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VERNON'S SAYLES'
ANNOTATED CIVIL STATUTES 1914
VOLUME 3

Annotated Civil Statutes (Articles 3640 to 5474)



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VERNON'S SAYLES'

ANNOTATED CIVIL STATUTES OF
THE STATE OF TEXAS

WITH HISTORICAL NOTES

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

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

IN FIVE VOLUMES

VOLUME 3

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VERNON'S SAYLES'
ANNOTATED CIVIL STATUTES
OF THE
STATE OF TEXAS

VOLUME 3

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(2290A)*

TITLE 53

EVIDENCE

Chap. 1. Personal Attendance of Witnesses. 2. Depositions of Witnesses.	Chap. 3. Depositions of Parties. 4. General Provisions.
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CHAPTER ONE

PERSONAL ATTENDANCE OF WITNESSES

Art. 3640. Witnesses subpoenaed. 3641. Form of subpoena. 3642. Service of. 3643. Witness shall attend, etc. 3644. Fees of witnesses.	Art. 3645. Witness refusing to testify. 3646. Privileged from arrest. 3647. Party may be examined as a witness. 3648. Interpreter may be summoned and appointed.
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Article 3640. [2264] [2209] **Witnesses subpoenaed.**—The clerk of the district or county court, or justice of the peace, as the case may be, shall, at the request of any party to a suit pending in his court, or of his agent or attorney, issue a subpoena for any witness or witnesses who may be represented to reside within the county or be found therein at the time of the trial. [Act March 13, 1846, p. 363, sec. 1. P. D. 3719.]

In general.—In criminal prosecution, held not error to refuse to issue a subpoena for a certain witness. *Godwin v. State*, 44 Cr. R. 599, 73 S. W. 804.

A deputy sheriff, in inserting of his own volition in the subpoena issued for witnesses the names of some 12 additional witnesses, acted without authority and in violation of law. *Manuel v. State*, 45 Cr. R. 96, 74 S. W. 30.

Diligence in procuring testimony.—The plaintiff, on filing suit, must use diligence to procure testimony to establish his case. *Osborne v. Scott*, 13 T. 59. It is the duty of the defendant to take steps to prepare for trial as soon as he is served with citation. *Connor v. Mackey*, 20 T. 747.

Diligence will date from the time when the subpoena is placed in the hands of an officer for service. *Williams v. Edwards*, 15 T. 41. See *Robinson v. Martel*, 11 T. 149.

When the witness does not reside in the county in which suit is brought, the issuance of a subpoena is not "due diligence." *Baker v. Kellogg*, 16 T. 117.

A rule for security for costs does not suspend the progress of a cause so far as the preparation of the parties for trial is concerned. *Anderson v. McKinney*, 22 T. 653.

Art. 3641. [2265-1448] [2210] **Form of subpoena.**—The style of the subpoena shall be, "The State of Texas." It shall state the names of the parties to the suit, the court in which the same is pending, the time and place at which the witness is required to appear, and the party at whose instance he is summoned. It shall be dated and tested by the clerk or justice, but need not be under the seal of the court, and the date of its issuance shall be noted thereon. It may be made returnable forthwith, or on any day for which the trial of the cause may be set. [Id.]

Subpoena duces tecum.—Production of books and papers in general, see notes under Art. 3687.

A witness may be compelled by a subpoena duces tecum to bring a paper into court. *Coons v. Renick*, 11 T. 134, 60 Am. Dec. 230.

The records of the United States cannot be obtained by a subpoena duces tecum in a suit to which the United States is not a party. *Id.*

Secondary evidence is inadmissible when a written instrument may be obtained by a subpoena duces tecum. *Hall v. York*, 16 T. 18.

A subpoena duces tecum should give a reasonably accurate description of the papers wanted. *Ex parte Gould*, 60 Cr. R. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

Art. 3642. [2266] [2211] **Service of.**—Subpoenas may be executed and returned at any time before the trial of the cause, and shall be served by being read to the witness; and service thereof may be accepted by any witness by a written memorandum, signed by him, attached to the subpoena. [Act May 13, 1846, p. 363, sec. 16. P. D. 1434.]

Service by party to suit.—The deputy of a sheriff who is a party to the suit may serve a subpoena. *Blum v. Bassett*, 67 T. 194, 3 S. W. 33.

Art. 3643. [2267] [2212] Witness shall attend, etc.—Every witness summoned in any suit shall attend the court from day to day, and from term to term, until discharged by the court or party summoning him; and, if any witness, after being duly summoned, shall fail to attend, he may be fined by the court as for a contempt of court, and an attachment may issue against the body of such witness to compel his attendance; but no such fine shall be imposed, nor shall such attachment issue in a civil suit until it shall be shown to the court, by affidavit of the party, his agent or attorney, that his lawful fees have been paid or tendered to such witness. [Id. P. D. 3720.]

Change of venue.—A witness is not required to follow a suit to another county to which the venue has been changed. *Dangerfield v. Paschal*, 20 T. 536.

Attachment to compel attendance.—Application for attachment to compel attendance of a female plaintiff as witness held insufficient. *City of Dallas v. Lentz* (Civ. App.) 81 S. W. 56.

Bond to secure appearance of witness.—A bond for appearance of a witness "at the next term of the court" does not sufficiently designate the time. *Mackey v. State*, 38 Cr. R. 24, 40 S. W. 982.

A bond taken in November, 1893, for appearance of a witness in April, 1893, is a nullity. *Id.*

In a criminal proceeding a bond to the sheriff to insure the appearance of a witness held defective in not setting forth any authority authorizing the sheriff to take it. *Gause v. State*, 60 Cr. R. 221, 131 S. W. 605.

Punishment of disobedience to subpoena as contempt.—The action of the court in refusing to find a juror for contempt for failure to obey a subpoena to testify held not error. *Johnson v. State*, 59 Cr. R. 11, 127 S. W. 559.

Art. 3644. [2268] [2213] Fees of witnesses.—Witnesses shall be allowed a fee of one dollar for each and every day they may be in attendance on the court, and six cents for every mile they may have to travel in going to and returning therefrom, which shall be paid on the certificate of the clerk, by the party summoning them; which certificate shall be given on the affidavit of the witness before the clerk; and such compensation and mileage of witnesses shall be taxed in the bill of costs as other costs. [Id. P. D. 3724.]

In general.—The parties to a judgment, pending appeal, may compromise it without the consent of the witnesses of the successful party, their fees being unpaid. *Hittson v. Burrow*, 28 C. A. 442, 67 S. W. 785.

The statute requiring the justice of the peace to transmit to the county court, in case of appeal, all the original papers, orders, etc., held to render a subpoena in the justice's court effective as process of the county court, so as to entitle the witness to fees for attending the county court. *International & G. N. R. Co. v. Richmond*, 28 C. A. 513, 67 S. W. 1029.

Different suits.—When a witness is subpoenaed in several suits, pending at the same time and place, at the instance of the same person, he is entitled to compensation in each case. *Flores v. Thorn*, 8 T. 377.

Where witnesses are subpoenaed in a number of cases at the same term of court and attend in obedience to subpoenas they are entitled to fees in each case, and the burden is on the party contesting the payment of fees to show that more than two were summoned to prove the same fact. *Cabell v. Orient Ins. Co.*, 22 C. A. 635, 55 S. W. 610.

Proof of attendance.—A witness may prove up his attendance at any time before the issue of execution, but not afterwards. *Hardy v. De Leon*, 7 T. 466. The affidavit should state the number of days he has attended and the number of miles for which he is entitled to charge. *Gause v. Edminston*, 35 T. 69.

The clerk is only entitled to 50 cents for taking the affidavit of a witness as to attendance and giving certificate thereof. He cannot make separate charge for each. *Texas M. Ry. Co. v. Parker*, 28 C. A. 116, 66 S. W. 583.

Persons entitled to fees.—The wife of a party to a suit is not entitled to pay for attendance as a witness. *Texas M. Ry. Co. v. Parker*, 28 C. A. 116, 66 S. W. 583.

A person whose vote is contested in an election contest held not entitled to fees for attending the trial. *Altgelt v. Callaghan* (Civ. App.) 144 S. W. 1166.

Parties.—A party litigant who testifies in his own behalf, or is called to the stand by the opposite party, is not entitled to witness fees. *Gause v. Edminston*, 35 T. 69.

Amount of fees.—Where witnesses for defendant railroad company from without the county testified that defendant furnished them free transportation, and in addition, paid their expenses and agreed to pay them for their time at a rate from \$1.50 to \$15 a day, it was not error for the court to refuse to charge the jury not to consider remarks of plaintiff's counsel that the statute prescribed \$1 a day as the fee for witnesses, and that defendant's witnesses in accepting more than that sum, received an amount not permitted by law. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

Additional compensation to experts.—Since a successful plaintiff in a personal injury suit is not entitled to recover for fees paid in obtaining expert testimony, it was improper to permit an expert to testify to the reasonableness of his charge. *Gulf, C. & S. F. Ry. Co. v. Dooley* (Civ. App.) 131 S. W. 831.

Mileage and expenses.—Witnesses in a criminal case are entitled to mileage for only one trip, going and coming, at any one term of court, and their per diem only for the

days on which they actually attend the court, including the time consumed in going and coming. *McArthur v. State*, 41 Cr. R. 635, 57 S. W. 847.

Suit dismissed.—When a suit is dismissed for failure to give security for costs, the defendant is entitled to a judgment for costs, and if witnesses have been subpoenaed by the defendant and attended court, and certificates of their attendance have been issued, the fees due them should be taxed in the bill of costs. *Anderson v. McKinney*, 22 T. 653.

Actions for fees.—A witness may sue the party summoning him for his fees. *Flores v. Thorn*, 8 T. 377; *Anderson v. McKinney*, 22 T. 653.

When a witness sues for his fees, the subpoena is evidence to prove that he was subpoenaed. *Flores v. Thorn*, 8 T. 377; *Crawford v. Crain*, 19 T. 145. And the subpoena must be produced or its absence accounted for. *Harris v. Coleman*, 8 T. 278.

The certificate of the clerk is prima facie evidence of the right of a witness to recover his fees for the time and mileage stated in the certificate. *Flores v. Thorn*, 8 T. 377; *Gause v. Edminton*, 35 T. 69.

Art. 3645. [2269] [2214] Witness refusing to testify.—Any witness refusing to give evidence may be committed to the county jail, there to remain without bail until he shall consent to give evidence. [Id. P. D. 3725.]

Refusal to answer.—Whether or not a witness, a party to the suit, willfully and contumaciously refuses to answer interrogatories propounded to him is a question for the court and not for the jury. *Houston & T. C. Ry. Co. v. Berling*, 14 C. A. 544, 37 S. W. 1083.

This article and Arts. 3680-3685 provide a ready means by which one party can procure the testimony of his adversary and the adversary can be compelled to testify as to any material fact except that he may decline to testify as any other witness can where the fact may have the tendency to charge or connect him with the commission of a crime. But if the evidence will have the effect only of subjecting him to civil action or pecuniary loss he will be compelled to testify. *Tillman v. Peoples*, 28 C. A. 233, 67 S. W. 205, 206.

Examination of witnesses.—See notes under Art. 3687.

Privilege of witness.—See notes under Art. 3687.

Art. 3646. [2270] [2215] Privileged from arrest.—Witnesses shall be privileged from arrest, except in cases of treason, felony and breach of the peace, during their attendance at court, and in going to and returning therefrom, allowing one day for each twenty-five miles from their place of abode. [Id. P. D. 3723.]

Art. 3647. [2271] [2216] Party may be examined as a witness.—Either party to a suit may examine the opposing party as a witness, and shall have the same process to compel his attendance as in the case of any other witness. His examination shall be conducted and his testimony shall be received under the same rules applicable to other witnesses. [Act Feb. 15, 1858, p. 110, sec. 3. P. D. 3754.]

Executors and administrators.—Executors and administrators may be examined as other parties. *Blackman v. Green*, 17 T. 322.

Beneficiary in assignment for creditors.—The beneficiary in an assignment for benefit of creditors can prove its execution. *Tittle v. Vanleer* (Civ. App.) 27 S. W. 736.

Discovery.—Right to take deposition of party as in nature of bill of discovery, see notes under Art. 3680.

A bill of discovery is not known in our practice as an independent remedy disconnected from a regular suit. *Love v. Keowne*, 58 T. 191.

Production of books and documents.—Production in general, see notes under Art. 3687.

A party has the right to compel the adverse party to produce in court books or documents in his possession to be used in evidence on the trial. *Cullers v. Birge* (Civ. App.) 34 S. W. 987.

Competency of party to testify.—See notes under Art. 3688.

Art. 3648. [2272] [2217] Interpreters may be summoned and appointed.—The court may, when necessary, appoint interpreters, who may be summoned in the same manner as witnesses, and shall be subject to the same penalties for disobedience, and shall be entitled to the same fees. [Act May 13, 1846, p. 363, sec. 98. P. D. 3761.]

Examination of witness through interpreter.—Where witnesses testify through an interpreter, a greater latitude may be allowed in their examination. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

CHAPTER TWO

DEPOSITIONS OF WITNESSES

<p>Art. 3649. Depositions of witness may be taken, when. 3650. Notice and service thereof. 3651. When notice may be given by publication. 3652. When process was served by publication. 3653. When suit has not been commenced. 3654. Cross-interrogatories. 3655. Commission to take deposition. 3656. Requisites of. 3657. Officers authorized to execute. 3658. Witness to be summoned. 3659. Refusing to answer, may be attached. 3660. Execution of the commission. 3661. Interpreter. 3662. Return of depositions. 3663. Depositions by oral examination and answer. 3664. Notice of taking deposition, requisites of. 3665. Any person may be compelled to appear and answer; proviso where deposition taken at distance over 100 miles.</p>	<p>Art. 3666. Service of notice, etc., noted on copy filed, etc., commission to issue after ten days. 3667. Commission, how styled, etc.; requisites of. 3668. Powers of officer taking deposition. 3669. Written cross interrogatories may be filed. 3670. Witness to be cautioned and sworn, etc. 3671. Examination, how conducted, reduced to writing, etc., and subscribed. 3672. Objections to testimony not to be sustained, etc.; but recorded and reserved for court, etc. 3673. Depositions certified and returned, how; rules as to use, etc. 3674. Depositions opened. 3675. Either party may use depositions, when. 3676. Objections to depositions. 3677. Depositions to be read in evidence, subject, etc. 3678. Matter not responsive stricken out.</p>
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Article 3649. [2273] [2218] Depositions of witnesses may be taken, when.—Depositions of witnesses may be taken when the party desires to perpetuate the testimony of a witness, and, in all civil suits heretofore or hereafter brought in this state, whether the witness resides in the county where the suit is brought or out of it; provided, the failure to secure the deposition of a male witness residing in the county in which the suit is pending shall not be regarded as want of diligence where diligence has been used to secure his personal attendance by the service of subpoena or attachment, under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless he is about to leave, or has left, the state or county in which the suit is pending and will not probably be present at the trial. [Act May 13, 1846, p. 363, sec. 67. P. D. 3726. Acts 1879, p. 126.]

In general.—Ex parte deposition held inadmissible. Ft. Worth Live Stock Commission Co. v. Hitson (Civ. App.) 46 S. W. 915.

Witness present at trial.—See notes under Art. 3677.

Diligence in taking.—The absence of a female witness who has been subpoenaed is no cause for continuance when proper diligence has not been used to take her deposition. Cotton Press Co. v. Bradley, 52 T. 587. And so where a witness resides in another county. Railway Co. v. Hardin, 62 T. 367.

Second deposition.—Should either party desire to obtain additional testimony from a witness already examined, the proper practice is to propound direct interrogatories, and give notice to the opposite party, as in other cases. Ector v. Wiggins, 30 T. 58.

The taking of the deposition of a witness a second time without leave of the court is an irregularity. Evansich v. G., C. & S. F. R. R. Co., 61 T. 24. See Schmick v. Noel, 64 T. 408.

Use against person not a party at time of taking.—See, also, notes under Art. 3677.

A deposition taken when a person was not a party to the suit is not admissible against him, but is admissible against those who were then parties. Flores v. Hovel (Civ. App.) 125 S. W. 606.

Admissions to prevent deposition.—A stipulation for the introduction of hearsay testimony concerning a passenger's injuries held sufficiently broad to authorize the introduction of the evidence offered. Thompson v. Ft. Worth & R. G. Ry. Co., 31 C. A. 583, 73 S. W. 29.

Art. 3650. [2274] [2219] Same subject; notice and service thereof.—The party wishing to take the deposition of a witness in a suit pending in court shall file with the clerk or justice of the peace, as the case may be, a notice of his intention to apply for a commission to take the answers of the witness to interrogatories attached to such notice. The notice shall state the name and residence of the witness, or the place where he is to be found, and the suit in which the deposition is to be used;

and a copy thereof, and of the attached interrogatories, shall be served upon the adverse party, or his attorney of record, five days before the issuance of a commission; and, whenever the adverse party is a corporation or a joint stock association, service may be made upon the president, secretary or treasurer of such corporation or association, or upon the local agent representing such corporation or association in the county in which the suit is pending, or by leaving a copy of the notice and attached interrogatories at the principal office of such corporation or association during office hours. [Acts 1879, p. 126. Acts 1887, p. 27.]

Necessity of notice.—Deposition held inadmissible in evidence for want of notice. *Gilbough v. Stahl Bldg. Co.*, 16 C. A. 448, 41 S. W. 535.

— **On retaking deposition.**—Where a deposition was suppressed because of irregularities, held improper to retake the deposition on the same direct and cross-interrogatories on file, without further notice. *First Nat. Bank v. Thomas* (Civ. App.) 118 S. W. 221.

Name and residence of witness.—Commission to take deposition of "Charles Emery;" returned with deposition of "Charles Emley." Held, the names were *idem sonans*. *Galveston, H. & S. A. Ry. Co. v. Daniels*, 1 C. A. 695, 20 S. W. 956.

The name and residence of the witness must be truly stated. *Garner v. Cutler*, 28 T. 175. A witness was named Lurance A. Atkinson in the notice and commission, and signed her answers as Nancy L. Atkinson. It was held that it was a legal presumption that she was known as well by one name as the other, and that it was error to exclude the deposition on the ground of the variance in the names, especially as an offer was made to prove the identity of the person characterized by two names, which was refused by the court. *Atkinson v. Wilson*, 31 T. 643; Art. 3676.

An indorsement of the residence of the witness on the back of the interrogatories served on attorneys of the opposite party is sufficient. *Fidelity Mut. Life Ass'n v. Harris* (Civ. App.) 40 S. W. 341.

The purpose in requiring the name and residence of the witness to be given is to identify the witness so that the opposing party may know who he is, but if as a matter of fact the opposing party does know who the witness is whose deposition is to be taken when the interrogatories are served on him to be crossed, a misnomer of the witness will not vitiate the deposition, and it should not be suppressed. *G., H. & S. A. Ry. Co. v. Morris*, 94 T. 505, 61 S. W. 710.

Service on agent.—Notice and interrogatories may be served upon the local agent of a railroad company. *M. P. Ry. Co. v. Collier*, 62 T. 318.

Service of notice of taking depositions on the local agent of a foreign corporation, upon whom a summons to the corporation could be legally served, was a valid service on the corporation. *Missouri, K. & T. Ry. Co. v. Goodrich* (Civ. App.) 149 S. W. 1176.

Sufficiency of copy.—A motion to quash a deposition because of the omission of certain words in a copy of the precept held properly overruled. *Missouri, K. & T. Ry. Co. of Texas v. Neaves* (Civ. App.) 127 S. W. 1090.

Loss of notice after service.—Where depositions were objected to "because it did not appear of record among the papers in the cause that there was service of notice and copies of the interrogatories" upon the opposite party, the trial court heard proofs of the service, return and loss of the notice and copies, and admitted the depositions. *Thompson v. Herring*, 27 T. 282.

Verification of notice.—The law does not require the copy of the notice of taking depositions to be served on the adverse party should be sworn to. Service of the copy is all that is required. *El Paso & S. W. Ry. Co. v. Wizard*, 39 C. A. 534, 88 S. W. 469.

Suppression for defects.—See notes under Art. 3676.

Art. 3651. [2275] [2220] When notice may be given by publication.—In all civil suits where it shall be shown to the court, by affidavit filed therein, that either party is beyond the jurisdiction of the court, or that he can not be found, or has deceased since the commencement of the suit, and such death has been suggested at a prior term of the court, so that the notice and copy of interrogatories can not be served upon him for the purpose of taking depositions, and such party has no attorney of record upon whom they can be served, or if he be deceased and all the persons entitled to claim by or through such deceased defendant have not made themselves parties to the suit, and are unknown, the party wishing to take depositions may file his interrogatories in the court where said suit is pending, and the clerk of such court or justice of the peace shall thereupon cause a notice to be published in some newspaper for thirty days, stating the number of the suit, the names of the original parties, in what court the suit is pending, the name and residence of the witness to whom interrogatories are propounded, and that a commission will issue on or after the thirtieth day after such publication to take the deposition of such witness; at the expiration of which time such clerk or justice shall, on the application of the party filing such interrogatories, his agent or attorney, issue a commission as in other cases. [Id. sec. 79. P. D. 3737.]

Art. 3652. [2276] [2221] When process was served by publication.—In suits where service of process has been made by publication, and the defendant has not answered within the time prescribed by law, service of notice of filing interrogatories may be made at any time after the day when the defendant is required to answer, by filing such notice among the papers of the suit at least twenty days before the issuance of a commission; service of notice may also be made in the manner prescribed in the preceding article. [Act April 1, 1861, p. 26, sec. 1. P. D. 3738.]

Art. 3653. [2277] [2222] When suit has not been commenced.—When any person may anticipate the institution of a suit in which he may be interested, and may desire to perpetuate the testimony of a witness to be used in such suit, he, his agent or attorney, may file a written statement in the proper court of the county where such suit could be instituted, representing the facts and the names and residences, if known, of the persons supposed to be interested adversely to said person; a copy of which statement and writ shall be served on the persons interested adversely; or, where such person, his agent or attorney, shall at the time of filing such statement, make affidavit that the names and residences of the heirs, successors or legal representative of any deceased person are unknown to the affiant, or reside beyond the jurisdiction of the state, the clerk of the court or justice shall issue a like writ, which shall be served on such unknown or non-resident persons by publication in some newspaper, in the mode and manner designated by law for the service of original process upon non-residents or unknown parties; after which the depositions of such witnesses may be taken and returned by the parties making the said statement in the form and under the rules prescribed for taking testimony by deposition; and such testimony may be used in any suit which may be thereafter instituted by or between any of the parties to the statement, or those claiming under them, in like manner as if such depositions had been taken after the institution of such suit or suits; and, when such suits have been instituted, all such depositions so taken and returned shall be subject to the like exceptions as other depositions. [Act April 15, 1874, p. 103, sec. 1. P. D. 6829b.]

Art. 3654. [2278] [2223] Cross-interrogatories.—Whenever one party may file interrogatories for the purpose of taking the deposition of a witness, the opposite party may file cross-interrogatories at any time before the commission issues, and a copy of the same shall accompany the direct interrogatories, and shall be answered and returned therewith. [Id. sec. 72. P. D. 3731.]

In general.—A cross-interrogatory should be fully answered. *Ball v. Hill*, 38 T. 237.

Quære: Can a defendant who has filed cross-interrogatories claim additional time to take answers where plaintiff has failed to have commission executed? *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

Time for filing.—When the commission was taken out after service of the notice was completed, and the cross-interrogatories filed on that day were not included, the presumption is that they were not filed until after the commission was issued, and an objection to the deposition on that ground was properly overruled. *McKinney v. O'Connor*, 26 T. 5.

Cross-interrogatories may be filed at any time before commission issues, but not afterwards. *Ector v. Wiggins*, 30 T. 55.

Scope of inquiry.—It is proper to ask a witness on a cross-examination any question that may be pertinent to the matter to be decided by the jury. This rule is not confined to such questions as will show bias of the witness. For the purpose of showing this or falsity in his main statement, a witness may be examined upon collateral matters; and the rule extends to an examination into all matters connected with the *res gestæ*. Inquiry may be made into the situation of the witness in respect to the parties and to the subject of litigation; his interest, his inclination and his prejudices; his means of obtaining a certain and correct knowledge of facts about which he testifies; the manner in which he uses those means; his power of discernment, memory and description, may be fully investigated and ascertained. *Evansich v. G., C. & S. F. R. R. Co.*, 61 T. 24.

Failure to file cross-interrogatories.—Under the statute a party who fails to file cross-interrogatories may not file direct interrogatories submitting leading questions. *St. Louis & S. F. R. Co. v. Matlock* (Civ. App.) 141 S. W. 1067.

Failure to answer ground for suppression.—See notes under Art. 3676.

Sufficiency of interrogatories.—In an action against a railroad company for injuries to a man at a public crossing, the admission of certain cross-interrogatories propounded to

defendant's witness, and answers thereto, held erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Melugin* (Civ. App.) 63 S. W. 333.

Withdrawal of answer.—A party may not withdraw answers given in direct response to cross-interrogatories propounded by him, on a technical ground that would not have been presented if the answers had been favorable to him, but the party asked the questions at his peril, and he must abide the consequences. *Fairbanks Co. v. Stites* (Civ. App.) 125 S. W. 636.

Art. 3655. [2279] [2224] Commission to take deposition.—After the service of the notice of filing the interrogatories has been completed, the clerk or justice shall issue a commission to take the deposition of the witness named in the notice. [Id. sec. 67. P. D. 3736.]

Time for issuance.—Where the defendant accepted service of the interrogatories and waived "the five days' notice," etc., the commission was properly issued on the same day. *Moore v. Gammel*, 13 T. 120.

Where the opposite party files cross-interrogatories and takes out a commission, the party initiating proceedings is entitled to a commission, though five days have not elapsed since notice to the opposite party. *St. Louis & S. F. Ry. Co. v. Skaggs*, 32 C. A. 363, 74 S. W. 733.

Right to commission.—Either party has the right to obtain the commission and take the deposition of a witness to whom direct and cross-interrogatories have been properly filed. *Burton v. G., H. & S. A. Ry. Co.*, 61 T. 526.

Amendment.—An error of the clerk giving in the commission a wrong name for the residence of the witness may be corrected by an amendment, the deposition having been properly taken. *Irvin v. Bevil*, 80 T. 332, 16 S. W. 21.

New commission.—When a deposition has been defectively returned, it is proper to take out a new commission immediately. *Boone v. Miller*, 73 T. 557, 11 S. W. 551.

Withdrawal of interrogatories.—Where by consent a deposition has been taken without a commission on the original interrogatories, it is irregular to withdraw the interrogatories to retake the deposition on account of irregularities in the return. *Boone v. Miller*, 73 T. 557, 11 S. W. 551.

Defects ground for suppression of deposition.—See notes under Art. 3676.

Art. 3656. [2280] [2225] Requisites of.—The style of the commission shall be, "The State of Texas," and it shall be dated and tested as other process; it shall be addressed to the several officers named in the succeeding article, and shall authorize and require them, or either of them, to summon the witness before him forthwith, and to take his answers under oath to the direct and cross-interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission and interrogatories, and the answers of the witness thereto, to the clerk or justice of the proper court, giving his official and postoffice address. [Id.]

Order of court.—After the service of a notice of the filing of interrogatories for the taking of a deposition has been completed, it is ordinarily the duty of the clerk to issue the commission without an order of court. *St. Louis Southwestern Ry. Co. of Texas v. Smith*, 38 C. A. 507, 86 S. W. 943.

Construction of words.—By the use of such vague and indefinite terms as "without delay" in the statute prescribing the form and requisites of the commission they are meant to be directory, and where the delay has not been prejudicial the deposition should not be suppressed. *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 938.

Consent to appointment of person not authorized by law.—As to the authority of the court by consent of parties to appoint a person, not an officer authorized by law, to take a deposition, see *State v. Cardinas*, 47 T. 250, 291.

Art. 3657. [2281] [2226] Officers authorized to execute.—The commission shall be addressed to the following officers, either of whom may execute and return the same:

1. If the witness be alleged to reside or be within the state, to any clerk of the district court, any judge or clerk of the county court, or any notary public of the proper county.

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

3. If the witness is alleged to reside or be without the United States, to any notary public or any minister, commissioner or charge d'affaires of the United States resident in, and accredited to, the country where the deposition may be taken, or any consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or consular agent of the United States resident in such country. [P. D. 3726, 3736.]

Consul—Commercial agent.—Defined. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484. See Art. 6012.

Disqualification of officer.—Ground for suppression of deposition, see notes under Art. 3676.

In support of exceptions to a deposition which purported to have been taken by a notary public, it was competent to show, by parol evidence, that the person taking it had previously ceased to be a notary by the acceptance of another office of profit; and that fact being thus established, the deposition was properly suppressed. A single act of this character could not constitute him a notary de facto, and so give validity to the deposition. *Biencourt v. Parker*, 27 T. 558.

A commissioner held not disqualified from taking depositions because a brother of plaintiff's attorney, who had contracted for a conditional fee. *Paris, M. & S. P. Ry. Co. v. Stokes* (Civ. App.) 41 S. W. 484.

An attorney is incompetent to act as a notary in taking the depositions of witnesses whom he had been employed to find. *Testard v. Butler*, 20 C. A. 106, 48 S. W. 753.

The person taking a deposition held disqualified. *Clegg v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 127 S. W. 1098.

Though the statute does not define the qualifications of the officer taking a deposition, a notary public who has been attorney for the witness whose deposition was taken in an action of the same nature against the same defendant was disqualified. *Clegg v. Gulf, C. & S. F. Ry. Co.*, 104 T. 280, 137 S. W. 109.

Art. 3658. [2282] [2227] Witness to be summoned.—Upon the receipt of such commission by any officer to whom it is addressed, residing in this state, if the witness does not voluntarily appear, he shall issue a subpoena, directed to the sheriff or any constable of the county, requiring him to summon the witness to appear and answer interrogatories at a time and place named in the subpoena. [Acts 1905, p. 107. Acts 1874, p. 103. Acts 1907, p. 186. P. D. 3727.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Attaching papers to deposition.—An officer taking a deposition cannot compel a witness to deliver or attach his private papers, and where a witness refuses to attach to the deposition an original paper in his possession, secondary evidence of the contents of the paper is admissible. *Sayles v. Bradley & Metcalf Co.*, 92 T. 406, 49 S. W. 209.

Art. 3659. [2283] [2228] Refusing to answer, may be attached.—If the witness, after being duly summoned, shall fail to appear, or, having appeared, shall refuse to answer the interrogatories, such officer shall have power to issue an attachment against such witness and to fine and imprison him in like manner as the district and county courts are empowered to do in like cases. [Act April 15, 1874, p. 103.]

Effect.—If plaintiff refuses to answer interrogatories and the court orders the answers to be taken as confessed, he cannot on the trial give testimony to disprove the answers as confessed. *G., C. & S. F. Ry. Co. v. Hamilton*, 17 C. A. 76, 42 S. W. 358.

Art. 3660. [2284] [2229] Execution of the commission.—Upon the appearance of the witness, the officer to whom the commission is directed shall proceed to take his answers to the interrogatories. The answers shall be reduced to writing, and shall be signed and sworn to by the witness. The officer shall certify that the answers of the witness were signed and sworn to by the witness before him, and shall seal them up in an envelope, together with the commission and interrogatories and cross-interrogatories, if any, and shall write his name across the seal, and indorse on the envelope the names of the parties to the suit and of the witnesses, and shall direct the package to the clerk of the court from which the commission issued; and, if the depositions be sent by mail, the officer taking the same shall certify on the envelope enclosing the depositions that he in person deposits the same in the mail for transmission, stating the date when and the postoffice in which the same are deposited for transmission. [Acts 1905, p. 107. Acts 1874, p. 103. Acts 1907, p. 187. P. D. 3728.]

Cited, *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

Suppression of deposition under provision of article as it formerly stood.—See, also, notes under Art. 3662.

Suppression of deposition for defects in manner and form of taking, see notes under Art. 3676.

The right to suppress a deposition at any time under this article exists only in reference to violations of its own provisions, and therefore a deposition cannot be suppressed at any time for failure to give five days' notice of time and place of taking, which is not a provision of this article, but of Art. 3658. *El Paso S. W. Ry. Co. v. Barrett*, 46 C. A. 14, 101 S. W. 1026.

Where objections which go to the form and manner of taking a deposition are not dealt with by this article, original Art. 3676 still applies, because it is unrepealed, and is still in force except where its provisions conflict with this article. *Id.*

Where the violation of the law in taking a deposition, is the act of the notary and apparent upon his certificate, and is not the act of a party to the suit, the suppression of

the deposition is not regulated by this article, so as to be enforced at any time, but is regulated by Art. 3676. Id.

Under this statute since its amendment by the act of 1907 (Supp. 1908, p. 167), the fact that a witness has been made acquainted with the interrogatories in advance is not a ground for suppression of the deposition. *M., K. & T. Ry. Co. v. Davis*, 53 C. A. 547, 116 S. W. 425.

Nor will a failure to answer a question be a ground of suppression, unless such failure tends to deprive a party of material evidence. Id.

Art. 3662, requiring the postmaster mailing a deposition to indorse thereon that he received it from the officer before whom the same was taken, is not repealed by Art. 3660, requiring the officer to certify on the envelope containing the deposition that he in person deposited the same in the mail, but the two sections are in force, and must be complied with. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

Sayles' Ann. Civ. St. 1897, art. 2286 (Art. 3662 of this compilation), required the postmaster at the post office where depositions are mailed to the clerk of court to indorse on the envelope containing them that he received them from the officer before whom they were taken. Held, in view of Arts. 3660 and 3673, that such provision is not restricted to depositions taken on oral examination, but is intended as a substitute for Art. 3662, and hence the indorsement of the postmaster is unnecessary. *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

Where the original precept, on which the notice to take the deposition of a witness was served, commanded service on the "M. Railway Company, defendant in this cause, said M. Railway Company being a corporation incorporated under the laws of Texas," and it did not appear that there was any other suit pending against defendant at the time, and it was shown that a copy of the precept with a copy of the interrogatories was served on defendant by delivery to its local agent, that the copy omitted the words "of Texas" did not render defendant's identity uncertain, and a motion to quash the deposition was properly overruled. *Missouri, K. & T. Ry. Co. v. Neaves* (Civ. App.) 127 S. W. 1090.

Officer to whom commission is directed.—Where the commission is directed to any notary public of a certain county, the taking of a deposition by a notary public of another is not a taking by the officer to whom the commission is addressed and is unauthorized. *German Ins. Co. v. Gibbs Wilson & Co.*, 42 C. A. 407, 92 S. W. 1070.

Manner of taking.—A party held not prejudiced by the manner in which a deposition was taken. *Gulf, C. & S. F. Ry. Co. v. Luther*, 40 C. A. 517, 90 S. W. 44.

Evidence held insufficient to show that depositions were not read to witness when they were taken, and that they were incorrectly written. *Rice v. Ragan* (Civ. App.) 129 S. W. 1148.

Certificate of officer taking.—Suppression for defects in general, see notes under Art. 3676.

The certificate should show that the answer was signed by the witness (*Thompson v. Halle*, 12 T. 139), and sworn to before the officer (*Chapman v. Allen*, 15 T. 278; *Patton v. King*, 26 T. 685, 84 Am. Dec. 596; *Trammell v. McDade*, 29 T. 360) by the witness (*Slaughter v. Rivenbark*, 35 T. 68; *Bacon v. Lloyd*, 1 App. C. C. § 234; *Railway Co. v. Brouard*, 69 T. 617, 7 S. W. 374). The certificate may be read in connection with the caption to the answers. *Railway Co. v. Gillum* (Civ. App.) 30 S. W. 697; Id. (Sup.) 31 S. W. 356.

Whether the court should permit an officer to amend his certificate is a question addressed to its discretion. If proposed before the trial commenced, it should be allowed, or if refused a continuance might be granted. If the application is made pending the trial it might be properly refused. *Chapman v. Allen*, 15 T. 278.

The caption of the deposition will be construed in connection with the final certificate to show the manner in which the deposition was taken. *Carroll v. Welch*, 26 T. 147. And it is sufficient if a substantial compliance with the statute is shown. *Neill v. Cody*, 26 T. 286; *H. & T. C. Ry. Co. v. Larkin*, 64 T. 454; *Railway Co. v. Brouard*, 69 T. 617, 7 S. W. 374.

An officer taking a deposition must identify the cause in which it is taken by stating its title in the caption or conclusion of his certificate. A mere recital that the deposition is taken "in compliance with the annexed commission" is not sufficient. *Slaughter v. Rivenbark*, 35 T. 68.

The certificate of the notary failed to state the name of the witness, and the official seal was not attached. Held, that the return could not be amended in the presence and under the direction of the court. *Railway Co. v. Matula*, 79 T. 577, 15 S. W. 573; *Millikin v. Smoot*, 71 T. 759, 12 S. W. 59, 10 Am. St. Rep. 813. See *Creager v. Douglass*, 77 T. 484, 14 S. W. 150.

The omission of the name of the county in the certificate is supplied by an impression of the seal containing his name, county and state. *Linskie v. Kerr* (Civ. App.) 34 S. W. 765.

The certificate to the depositions of several witnesses should state that each witness swore to and signed the answers made by him. *Missouri, K. & T. Ry. Co. of Texas v. Hennesey*, 20 C. A. 316, 49 S. W. 917.

A deposition held to identify the answers of a witness therein as those of the witness before the officer. *Missouri, K. & T. Ry. Co. of Texas v. Denton*, 29 C. A. 284, 68 S. W. 336.

Where the depositions of witnesses were taken under a single commission each signing at the conclusion of his answers, and the notary affixing a separate certificate, a motion to quash was properly overruled. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.) 96 S. W. 653.

A deposition held not subject to the objection that it did not sufficiently identify the cause in which it was taken. *McFaddin v. Sims*, 43 C. A. 598, 97 S. W. 335.

The caption of a deposition recited that, pursuant to the commission and interrogatories, a notary summoned the witness before him, and that he was "first duly sworn to testify the truth, the whole truth and nothing but the truth." Then followed the answers to the direct interrogatories, signed "W. C. G., Witness," with the following jurat: "Subscribed and sworn to before me," etc. Following answers to cross-interrogatories were likewise signed, followed by a jurat identical with the last quoted. The notary's certifi-

cate showed that defendant "was by me duly sworn to testify the truth, the whole truth and nothing but the truth in the case mentioned in the caption"; that the deposition was reduced to writing on a typewriter by the notary in the presence of defendant, who subscribed the same in the notary's presence, etc. Held, that the statutory requirement that the certificate, either alone or considered with the caption, must show that answers to the interrogatories and cross-interrogatories were signed and sworn to by the witness before the officer taking the deposition, was not complied with. *Missouri, K. & T. Ry. Co. v. Graves*, 57 C. A. 395, 122 S. W. 458.

The certificate of the officer taking depositions on written interrogatories propounded under the general statute need not show that the witnesses were first cautioned and sworn to testify to the truth, notwithstanding the statute. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

Under this article, requiring the officer before whom depositions are taken to certify on the envelope inclosing the depositions that he in person deposited the same in the mail for transmission, etc., and Art. 6006, providing that every notary public shall authenticate his official acts with his seal of office, the certificate of a notary on the envelope inclosing depositions must be authenticated by his official seal. *Id.*

Since the statute does not so require, it is not necessary for the officer taking depositions to designate in his certificate the office he holds. *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

A deposition cannot be quashed merely because the certificate was signed by the officer before whom the same was taken, without anywhere stating his official title. *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

The failure of the officer before whom a deposition was taken to seal his certificate on the envelope inclosing the same for return that he personally deposited it in the mail for transmission does not require a suppression of the deposition, as the officer's signature to such certificate may be verified by his sealed certificate to the deposition after opening. *Hartford Fire Ins. Co. v. Becton*, 103 T. 236, 125 S. W. 883.

Omission of a notary's seal from his certificate on an envelope enclosing a deposition is not ground for suppressing the depositions, where the seal was attached to his certificate that the answers were signed and sworn to before him. *Wisegarver v. Yinger* (Civ. App.) 128 S. W. 1190.

The caption of a deposition and the certificate of a notary thereto held not to comply with the statute. *Griffin v. Humphrey* (Civ. App.) 138 S. W. 1111.

Indorsement of envelope.—Depositions were objected to on the ground that the name of the officer was not written connectedly across the seal of the envelope, the two final letters being separated a quarter of an inch from the preceding ones. Held, that it being apparent that the last two letters were part of the name, and the name itself being intelligible, and there being no indication or pretense that the deposition had been tampered with, the objection was overruled. *Burleson v. Burleson*, 28 T. 383.

The address on the envelope, "To the District Court," etc., instead of "To the Clerk of the District Court," is an immaterial error. *Eakin v. Morris*, 1 App. C. C. 883. The requirement of the indorsement on the envelope is directory only. *Knoxville Fire Insurance Co. v. Hird*, 23 S. W. 393, 4 C. A. 82.

Where attorneys prepared the envelope for returning depositions, the indorsements on it are made the notary's act by his adoption thereof in using it. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

See this case for indorsements on envelope containing deposition held to be in substantial compliance with the law. *Barber v. Geer*, 26 C. A. 89, 63 S. W. 934.

The requirements of this article as to indorsements on the envelope are strictly statutory and are to be substantially complied with. *Barber v. Geer*, 94 T. 581, 63 S. W. 1008, 1009.

The indorsement on the envelope containing depositions held sufficient under Art. 3660. *Gulf, C. & S. F. Ry. Co. v. Lyman*, 27 C. A. 22, 65 S. W. 69.

Where the notary's name does not extend literally across the edge of the lap or cover forming the seal, yet does extend across and over that portion of the cover which contains the muclage forming the seal, it is literally "across the seal," as required by the statute. *Texas & P. Ry. Co. v. Felker*, 40 C. A. 604, 90 S. W. 531.

The return on a deposition envelope serves only to preserve the purity of the return and is properly for the court and not for the jury as evidence. *Ft. Worth & D. C. Ry. Co. v. Walker*, 48 C. A. 86, 106 S. W. 400.

Signature of witness.—The officer taking the deposition must certify that the witness signed and swore to the answers before him. Where the certificate recites that the witness was sworn by the officer before the interrogatories were propounded to him, and that his answers were reduced to writing, and subscribed and sworn to by him it is not sufficient. *McFaddin v. Sims*, 43 C. A. 598, 97 S. W. 336.

Use of previous answer to aid or influence witness.—It is the right of a party to ascertain from a witness what he knows about the case for his guidance in propounding interrogatories. But it is not proper for his answers to be first taken in writing, under oath or otherwise, and for them when so taken to be used to aid or influence him when he gives his deposition. *Greening v. Keel*, 84 T. 326, 19 S. W. 435.

Answer written by attorney.—It is gross irregularity for an attorney of a party to write the answers of a witness in his behalf; but where it is shown that there was no fraud or injury, the depositions will not be suppressed. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

Failure to take answers of all witnesses as ground for suppression.—See notes under Art. 3676.

General interrogatories.—An interrogatory propounded to a witness whose deposition was sought, after stating the case, requested him to "state any fact within his knowledge that will assist the court in arriving at a correct and just conclusion of the case, as fully as though specially here inquired about." Held, that the question was not proper by reason of its generality, which practically deprived the opposing party of the benefit of a cross-examination. *Railway Co. v. Whitaker*, 68 T. 630, 5 S. W. 448.

In an action on a note, objections to interrogatories in a deposition as too general

and practically depriving defendant of the right to cross-examine held properly overruled. *Cator v. Chamberlain* (Civ. App.) 68 S. W. 196.

Time of hearing.—That depositions were not in fact taken on the day specified in the notice, held no ground for quashing the same. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 43 C. A. 549, 96 S. W. 1087.

Signature to interrogatories.—Though answers to interrogatories propounded to "Gerald M." were signed "G. C. M.," the deposition held not objectionable. *Texas & P. Ry. Co. v. Walker*, 25 C. A. 216, 60 S. W. 796.

Answers of a witness in a deposition held signed by him. *Missouri, K. & T. Ry. Co. of Texas v. Denton*, 29 C. A. 284, 68 S. W. 336.

Leading interrogatories.—Interrogatory in servant's deposition in action against master for injuries held not objectionable as leading and suggestive. *Missouri, K. & T. Ry. Co. of Texas v. Baker*, 35 C. A. 542, 81 S. W. 67.

Answer to interrogatories in general.—Striking out irresponsive answers, see notes under Art. 3678.

An answer to an interrogatory, asking for an explanation of the witness of a matter he had before testified to, is properly stricken out—the previous testimony not being offered in evidence. *Pioneer Savings & Loan Co. v. Peck*, 20 C. A. 111, 49 S. W. 160.

Deposition held admissible, though answers are not attached to commission. *Texas & P. Ry. Co. v. Walker*, 25 C. A. 216, 60 S. W. 796.

Adoption of answer of other witnesses.—If, in taking the deposition of two witnesses at the same time, the same interrogatories and cross-interrogatories be put to both of them, and one of them simply adopts and swears to the answers made by the other, the answers so made are the answers of both and of each of them, and are admissible in evidence as such. *Howes' Heirs v. Rogers*, 32 T. 213.

Adoption of answers in former deposition.—The depositions of a witness written out by the officer taking them, and properly returned after being sworn to and subscribed by the witness, may be read in evidence, though the answers be literally the same used by the same witness in a former deposition, and which were in the handwriting of the party to the suit at whose instance they were taken. Notice of such objection must be given before trial. *Lundy v. Pierson*, 67 T. 233, 2 S. W. 737; *Bush v. Barron*, 78 T. 5, 14 S. W. 238.

Suppression for defects.—See notes under Art. 3676.

Art. 3661. [2285] [2230] Interpreter.—The officer executing such commission shall have authority, when he shall deem it expedient, to summon and swear an interpreter to facilitate the taking of the deposition. [R. S. 1879, 2230.]

See *Cavasos v. Gonzales*, 33 T. 133; *State v. Cardinas*, 47 T. 250.

Necessity of swearing.—Suppression for failure to swear, see notes under Art. 3676.

The fact that the attorney of the party propounding interrogatories acted as an interpreter without being sworn was held immaterial, it appearing that the answers were correctly taken. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

Art. 3662. [2286] [2231] Return of depositions.—Depositions may be returned to the court either by mail, by a party interested in taking the same, or by any other person; and the clerk or justice taking them from the postoffice shall indorse on them that he received them from the postoffice, and sign his name thereto. If sent otherwise than by mail, the person delivering them into court shall make affidavit before the clerk or justice that he received them from the hands of the officer before whom they were taken; that they have not been out of his possession since, and that they have undergone no alteration. [Act March 16, 1848, p. 106, sec. 16. P. D. 3729.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Construction of former provision as to certificate of postmaster.—Where a postmaster signed by a clerk, it is presumed that the clerk was a deputy. *Greenwood v. Woodward*, 18 T. 1.

The indorsement by the postmaster need not be dated. *Ballard v. Perry*, 28 T. 347-363.

An objection that the postmaster failed to indorse on the deposition the name of the person from whom he received it is fatal. *Laird v. Ivens*, 45 T. 621.

A receipt of the postmaster not stating the name of the postoffice where the deposition was mailed, this appearing from the postmark, is sufficient. *Anderson v. Rogge* (Civ. App.) 28 S. W. 106.

Art. 3662, requiring the postmaster mailing a deposition to indorse thereon that he received it from the officer before whom the same was taken, is not repealed by Art. 3660, requiring the officer to certify on the envelope containing the deposition that he in person deposited the same in the mail, but the two sections are in force, and must be complied with. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

In view of Arts. 3660 and 3673, this provision is not restricted to depositions taken on oral examination, but is intended as a substitute for Art. 3662, and hence the indorsement of the postmaster is unnecessary. *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

Under the statutes it is not now necessary that the envelope in which depositions are returned into court by mail should have indorsed thereon a certificate of the postmaster or his deputy that he received the same from the hands of the officer before whom they were taken. *Missouri, K. & T. Ry. Co. v. Neaves* (Civ. App.) 127 S. W. 1090.

Sufficiency of return.—Objection to depositions on the ground that they were not properly returned into court held not well taken. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

Art. 3663. Depositions by oral examination and answer.—The testimony of any witness by oral examination and answer may be taken in any civil cause in any of the district and county courts of this state, in any instance where depositions are now authorized by law to be taken. [Acts 1907, p. 187.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Art. 3664. Notice of taking depositions, requisites of.—Ten days' notice must be first given in writing by the party, or his attorney, proposing to take such deposition, to the opposite party, or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition; and, in all cases in rem, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party until a claim shall have been put in. [Id.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Art. 3665. Any person may be compelled to appear and answer; proviso where deposition taken at distance over 100 miles.—Any person may be compelled to appear and depose, as provided by this chapter, in the same manner as witnesses may be compelled to appear and testify in court; provided, that, when such depositions are to be taken at a point more than one hundred miles distant from the court where the suit is pending, the party to whom such notice is given may, by notice to the adverse party or his attorney, require the deposition to be taken upon commission and written interrogatories, unless the judge or court before whom said suit is pending shall, upon proper application, after notice, made either in term time or vacation, otherwise direct. [Id.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Art. 3666. Service of notice, etc., noted on copy filed, etc.; commission to issue after ten days.—After the notice of taking depositions by oral examination and answer, provided for in the last preceding article, shall have been served, the party serving the same shall note on a true copy thereof the date and hour of such service, and upon whom served, the manner of service, and sign the same; and the party desiring such deposition shall file such true copy with the clerk of the court in which such cause is pending, with request for the issuance of a commission to take such deposition, whereupon said clerk shall, after the expiration of ten days from the date of the service of such notice, as noted on said true copy, issue a commission to take such deposition. [Id.]

Art. 3667. Commission, how styled, etc.; requisites of.—Such commission shall be styled, addressed, dated and tested as provided by articles 3656 and 3657 of this chapter, and shall authorize and require the officer or officers to whom the same is addressed, or either of them, to examine said witness before him on the date named in the notice and commission and to take his answers under oath to such questions as may be propounded to him by the respective parties, or their attorneys, to the suit or proceeding; and such commission shall require such witness to remain in attendance from day to day until such deposition is begun and completed. [Id.]

Art. 3668. Powers of officer taking depositions.—Said officer shall have the power and authority conferred by article 3658 as amended by this act, and article 3659, to enforce the attendance of the witness, and to compel him to testify. [Id.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Art. 3669. Written cross-interrogatories may be filed.—If the party upon whom the notice is served shall desire to do so, he may file with the clerk of the court written interrogatories to the witness, a certified

copy of which interrogatories shall be attached to the commission and answers thereto taken at the time of taking the oral testimony. [Id.]

Art. 3670. Witness to be cautioned and sworn, etc.—Every person deposing, as provided in this act, shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth. [Id.]

Application of statute.—The certificate of the officer taking depositions on written interrogatories propounded under the general statute need not show that the witnesses were first cautioned and sworn to testify to the truth; the statute relating thereto applying only to depositions taken under oral examination. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

Art. 3671. Examination, how conducted, reduced to writing, etc., and subscribed.—The witness shall be carefully examined, his testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. [Id.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Art. 3672. Objections to testimony not to be sustained, etc., but recorded and reserved for court, etc.—The officer taking such deposition shall not sustain objections or exceptions to any of the testimony taken, nor exclude same; but any of the parties or attorneys engaged in taking the testimony may have such objections as they may make recorded with the testimony and reserved for the action of the court in which the cause is pending, and any such court shall not be confined to the objections made at the taking of the testimony. [Id.]

Cited, *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Art. 3673. Depositions certified and returned how; rules as to use, etc.—Such depositions shall be certified and returned by the officer taking the same, and opened as is provided in articles 3660, 3662 and 3674; and the same rules shall apply to the use of such deposition as are provided by articles 3675 to 3678, inclusive. [Acts 1907, p. 188.]

See *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90; *Id.* (Civ. App.) 124 S. W. 485.

Art. 3674. [2287] [2232] Depositions opened.—Depositions, after being filed, may be opened by the clerk or justice at the request of either party or his counsel; and the clerk or justice shall indorse on such depositions upon what day and at whose request they were opened, signing his name thereto, and they shall remain on file for the inspection of either party. [Act May 13, 1846, p. 363, sec. 77. P. D. 3741.]

Cited, *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

Art. 3675. [2288] [2233] Either party may use depositions, when.—When cross-interrogatories have been filed and answered, either party has the right to use the depositions on the trial. [Id. sec. 76. P. D. 3740.]

Cited, *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

In general.—A deposition taken in a case before intervention, subsequently admitted, but limited in its purpose to the original parties, cannot then be read in evidence by the intervener. *Shields v. Ord* (Civ. App.) 51 S. W. 298.

Where a deposition was regularly taken on behalf of plaintiff, defendant held entitled to offer an answer which was responsive to a part of an interrogatory as evidence in their behalf. *Everett v. Kemp* (Civ. App.) 80 S. W. 534.

Either party may use the deposition of a witness taken by the other. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Civ. App.) 107 S. W. 651.

In view of this article, a deposition, when used by a party who did not take it, is his evidence just as much as if he had taken it and is subject to all objections. *Galveston, H. & S. A. Ry. Co. v. Young* (Civ. App.) 148 S. W. 1113.

In absence of cross-interrogatories.—A party who has not filed cross-interrogatories has no right to read a deposition when the party at whose instance the commission was issued has declined to read it. *Norvell v. Oury*, 13 T. 31; *Harris v. Leavitt*, 16 T. 340; *Town of Refugio v. Byrne*, 25 T. 193. And this rule is not changed by the fact that the interrogatories were propounded to several witnesses, and the depositions were taken and returned together, and the depositions of the other witnesses had been read by the party taking the testimony. *Brandon v. McNelly*, 43 T. 76.

The plaintiff having read a portion of the deposition of a witness, the defendant was entitled to read the remainder, although he had not filed cross-interrogatories. *Ferguson v. Luce*, 1 App. C. C. § 537.

Use for impeaching witness.—A party should not be permitted to introduce a deposition taken by the adverse party solely as a predicate for impeaching the witness. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Civ. App.) 107 S. W. 651.

Incompetent evidence.—Either party can use a deposition when the interrogatories have been crossed; it seems that the declarations of a party can be introduced by himself when brought out by the other party in answer to his own interrogatories which he declines to read. *King v. Russell*, 40 T. 124.

The rule that, when interrogatories are crossed, either party may use the deposition, and defendant cannot object to answers to his questions, does not apply to incompetent evidence. *First Nat. Bank v. Edwards* (Civ. App.) 81 S. W. 541.

Where plaintiff took the deposition of a witness calling by broad interrogatories for a certain statement supposed to have been made by defendant, plaintiff could not object to defendant's introduction of the deposition containing answers, responsive to the interrogatories and unfavorable to plaintiff and corroborative of defendant's evidence, on the ground that they were self-serving declarations. *Evertson v. Warrach* (Civ. App.) 132 S. W. 514.

Art. 3676. [2289] [2235] Objections to depositions.—When a deposition shall have been filed in the court at least one entire day before the day on which the case is called for trial, no objection to the form thereof, or to the manner of taking the same, shall be heard, unless such objections are in writing and notice thereof is given to the opposite counsel before the trial commences; provided, however, that such objection shall be made and determined at the first term of the court after the deposition has been filed, and not thereafter. [Act May 13, 1846, p. 363, sec. 78. Amend. 1893, p. 5. P. D. 3742.]

Cited, *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90; *Harris Millinery Co. v. Melcher* (Civ. App.) 142 S. W. 100.

Application of article.—The above article applies also to depositions taken under Chapter 3, Title 40, of the Revised Statutes.

This article does not apply to depositions taken and filed before the amendment of 1893, nor to a motion to suppress which was also filed prior to such amendment. *Mayton v. Sonnefeld* (Civ. App.) 48 S. W. 608.

Right to object.—Objections to depositions are governed by statute. *Tewis v. Armstrong*, 71 T. 59, 9 S. W. 134.

A party cannot object to the admission in evidence of a deposition taken at his instance without order of the court after the adverse party had taken the deposition of the same witness and the latter deposition had been read in evidence. *Sexton Rice & Irrigation Co. v. Sexton*, 48 C. A. 190, 106 S. W. 728.

Time for objection.—An objection to the answer to an interrogatory is not waived because not called to the attention of the court before the trial at a previous term. *Clardy v. Callicoate*, 24 T. 170.

A question and answer eliciting merely the conclusion of the witness as to a matter of opinion or of law may be objected to on the trial. *Purnell v. Gandy*, 46 T. 190. Objections to the answer of a witness as hearsay, secondary or irrelevant evidence may be made when the testimony is offered. *Woosley v. McMahan*, 46 T. 62.

Exceptions to depositions should be presented to the court for decision before announcing ready for trial. *Allen v. Hoxey*, 37 T. 320; *Railway Co. v. Ivy*, 71 T. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758.

Objections to depositions for irrelevancy should be urged when the testimony is offered and not by motion to suppress. *Lott v. King*, 79 T. 292, 15 S. W. 231.

An objection to a deposition that the answer of the witness is not responsive to the question can only be raised by motion before announcement for trial. *International & G. N. R. Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210; *Railway Co. v. Shearer*, 1 C. A. 343, 21 S. W. 133.

A motion to suppress a deposition must be made before the announcement of "ready for trial" is made. *Hill v. Smith*, 25 S. W. 1079, 6 C. A. 312; *Railway Co. v. Burke*, 55 T. 323, 40 Am. Rep. 808; *Coleman v. Colgate*, 69 T. 88, 6 S. W. 553; *Neyland v. Bendy*, 69 T. 711, 7 S. W. 497.

Where depositions are taken and filed during a term of court, a motion to suppress may be made at the next term. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

Nonresponsive answers in a deposition can be suppressed only on motion made before the trial. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

This article does not preclude parties impleaded with the deponent from objecting orally at any time to the reading as against them. *Lumpkin v. Minor* (Civ. App.) 46 S. W. 66.

Objection that a statement in a deposition was not responsive to the interrogatory relates to the form, and must be made by motion to suppress, made before trial. *Clafin v. Harrington*, 23 C. A. 345, 56 S. W. 370.

Motion to suppress deposition must be made before trial. *McGrew v. Wilson* (Civ. App.) 57 S. W. 63.

If the deposition has been on file for more than one entire day before the case is called for trial, and no written motion has been filed to suppress it, and notice thereof given to opposite counsel, it is error to entertain objection to form of taking the deposition. *McMahon v. Veasey* (Civ. App.) 60 S. W. 333; *Taylor, B. & H. Ry. Co. v. Warner* (Civ. App.) 60 S. W. 443.

The statute seems to contemplate that a motion to suppress a deposition shall be filed and determined at the first term of the court after the filing of the deposition. *Waters-Pierce Oil Co. v. Davis*, 24 C. A. 508, 60 S. W. 458.

Objection of defendant to interrogatories in deposition as leading, made on the trial of the cause, held too late. *Gill v. First Nat. Bank* (Civ. App.) 61 S. W. 146.

Refusal to sustain objections to depositions made on trial will not be sustained on appeal, in the absence of a showing that the depositions were not filed more than a day before the trial. *Galveston, H. & S. A. Ry. Co. v. Williams*, 26 C. A. 163, 62 S. W. 808.

Motion to quash deposition on ground that it was not properly returned into court comes too late after announcement of ready for trial. *St. L. S. W. Ry. Co. v. Harkey*, 39 C. A. 523, 88 S. W. 507.

A motion to strike out answers in a deposition comes too late if not made at the first term after the deposition is filed. *Borden v. Le Tulle Mercantile Co.* (Civ. App.) 99 S. W. 128.

Objection to a deposition based on statutory requirements in filing interrogatories, issuance of commission taking and return of answers, or upon form of questions or failure of witness to answer, is to the manner of taking, and must be made before the trial of the case begins, and must be passed on at the first term of the court after the deposition is filed. *Ellis v. Lewis*, 45 C. A. 248, 100 S. W. 190, 191.

An objection that the answers of a witness testifying by deposition were not responsive to the questions, not made before trial on notice to the adverse party was not available on the trial. *Kaack v. Stanton*, 51 C. A. 495, 112 S. W. 702.

An objection to an answer to an interrogatory in a deposition held to go to the manner and form of taking the deposition, and the objection must be made before the trial commences. *Kirby v. Blake*, 53 C. A. 173, 115 S. W. 674.

Objections to the manner and form of taking deposition made when it is offered in evidence should be overruled. *St. L., S. F. & T. Ry. Co. v. Adams*, 55 C. A. 245, 118 S. W. 1157.

A party asking a question of a witness testifying by deposition is not estopped from objecting to the answer when the deposition is offered on the trial by the adverse party. *Reed v. Holloway* (Civ. App.) 127 S. W. 1189.

Objections to the manner and form of taking of depositions must be made in advance of the trial. *Houston & T. C. R. Co. v. Haberlin*, 104 T. 50, 133 S. W. 873.

Where the record fails to show that depositions were on file at least one day before trial, an assignment of error complaining of their exclusion on an objection to the manner and form of taking will be overruled. *Beaty v. Yell* (Civ. App.) 133 S. W. 911.

An objection to a deposition held not to justify its suppression. *Alamo Oil & Refining Co. v. Curvier* (Civ. App.) 136 S. W. 1132.

A motion to suppress a deposition, considered as an objection to its admission as evidence, was premature where made before trial. *Marshall & E. T. Ry. Co. v. Petty* (Civ. App.) 145 S. W. 1195.

A motion to suppress depositions for defects in form, made after the parties had announced ready for trial and after the jury was impaneled, but before trial, was too late. *Id.*

An objection to the answer of a witness, contained in a deposition, as not responsive is waived, where not urged by motion filed before announcing ready for trial. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 152 S. W. 1137.

In the absence of a showing to the contrary, it will be presumed that a deposition was filed before the case was called for trial, and hence that under this article an objection to the form and manner of taking it was properly overruled, because not presented by a motion to suppress. *Houston, E. & W. T. Ry. Co. v. Lacy* (Civ. App.) 153 S. W. 414.

Necessity of writing and notice.—The answer to a general written interrogatory to a witness to "state any other fact within his knowledge of interest to either party as fully and minutely as if specially interrogated thereto" is inadmissible if objected to in time, but if there be no written notice of objection before trial, the objection will be regarded as waived. *Wade v. Love*, 69 T. 522, 7 S. W. 225; *Railway Co. v. Whitaker*, 68 T. 330, 5 S. W. 448.

Objections to the form of interrogatories to a party must be in writing. *Allerkamp v. Gallagher* (Civ. App.) 24 S. W. 372.

Motion to suppress deposition taken without notice to all defendants sustained, where there was a subsequent deposition taken of the same witness with notice. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

Objections to depositions because the questions are leading go to manner and form of taking, and cannot be considered unless in writing. *Hugo & Schmeltzer Co. v. Hirsch* (Civ. App.) 63 S. W. 163.

Answers to interrogatories other than those attached to a witness' deposition held properly excluded, without a written objection, and notice given before trial. *Sparks v. Taylor* (Civ. App.) 87 S. W. 740.

An objection to answers in a deposition, is one that goes to the manner and form of taking, and can only be considered when presented in writing. *Borden v. Le Tulle Mercantile Co.* (Civ. App.) 99 S. W. 128, 129.

The objection that an answer of witness was voluntary and not responsive to the interrogatory goes to the form of the deposition and manner of taking it, within this article, requiring such an objection to be in writing and to be given to the opposite party before commencement of trial. *Henderson v. Louisiana & Texas Lumber Co.* (Civ. App.) 128 S. W. 671.

Objections to the manner and form of taking of depositions must be made in writing. *Houston & T. C. R. Co. v. Haberlin*, 104 T. 50, 133 S. W. 873.

Where the receiving teller of a bank testifying by deposition stated that he had credited on the bank's books an amount in favor of a customer on a certain date and attached the customer's bank book to his deposition as an exhibit which showed the credit, an objection to the admission in evidence by the opposite party of the condition of the account on a subsequent date was an objection to the form and manner of taking the deposition, and under this article it could only be made in writing on notice before trial. *W. T. Wilson Grain Co. v. Central Nat. Bank* (Civ. App.) 139 S. W. 996.

Objections that interrogatories were leading, or that the answers of the witnesses were not responsive, cannot be considered, unless written. *Ohio Pottery & Glass Co. v. Black* (Civ. App.) 149 S. W. 735.

An objection to a deposition, on the ground that it was not taken on notice to the adverse party, is an objection to the form and manner of taking the deposition, which

under this article must be presented by a motion to suppress before the commencement of the trial. *Houston, E. & W. T. Ry. Co. v. Lacy* (Civ. App.) 153 S. W. 414.

Enumeration of objections.—The following objections must be made under this article: That the commission was issued within less than five days after the interrogatories were filed. *Sheegog v. James*, 26 T. 501. That the name and residence of the witness are not truly stated in the notice. *Garner v. Cutler*, 28 T. 175. That notice of the filing of interrogatories was not served. *Grigsby v. May*, 57 T. 255; *Mann v. Mathews*, 82 T. 98, 17 S. W. 927. That the answer of a witness is not pertinent to the interrogatory. *Lee v. Stowe*, 57 T. 444. But see *Lindsay v. Jaffray*, 55 T. 626. That the answer is evasive. *Shelton v. Paul* (Civ. App.) 27 S. W. 172; *Railway Co. v. Crowder*, 70 T. 222, 7 S. W. 709. That the cross-interrogatories have not been fully answered. *Scott v. Delk*, 14 T. 341; *Hopkins v. Clark*, 20 T. 64; *Lee v. Stowe*, 57 T. 444; *Mills v. Herndon*, 60 T. 353; *Leaoh v. Dodson*, 64 T. 185. The question whether a deposition should be excluded because of the failure of a witness to answer a question is to a large extent left to the discretion of the court; it should not be excluded for any casual omission to answer an unimportant question. *H. & T. C. R. R. Co. v. Shirley*, 54 T. 125; *Coleman v. Colgate*, 69 T. 88, 6 S. W. 553. That an interrogatory is leading. *Buford v. Bostick*, 58 T. 63; *Mills v. Herndon*, 60 T. 353; *Marx & Kempner v. Heidenheimer*, 63 T. 304; *Leach v. Dodson*, 64 T. 185; *Purnell v. Gandy*, 46 T. 198; *Lee v. Stowe*, 57 T. 444; *Lott v. King*, 79 T. 292, 15 S. W. 231. An interrogatory that directs the witness to state anything that he may know beneficial to the party is objectionable. *Allen v. Hoxey*, 37 T. 322. An interrogatory requiring a witness to state "any other matter which would benefit either party to the suit" is too general and indefinite to admit the answer in evidence. *Chinn v. Taylor*, 64 T. 385. That the postmaster failed to indorse on the deposition the name of the person from whom he received the package. *Laird v. Ivens*, 45 T. 621. That the witness is described by a given name different from his true name. *Jones v. Ford*, 60 T. 127. The bill of exceptions to the exclusion of a deposition should state the grounds upon which the ruling is predicated. *Harris v. Leavitt*, 16 T. 340. Defects in the form of an interrogatory, or that the answer is irrelevant, is not a ground for the suppression of the deposition. *Howard v. Metcalf* (Civ. App.) 26 S. W. 449; *Lott v. King*, 79 T. 292, 15 S. W. 231; *Railway Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210; *Railway Co. v. Shearer*, 1 C. A. 343, 21 S. W. 133.

Grounds of objection.—That the officer did not take the depositions of one or more witnesses named in the commission, without giving a reason for such omission, is not a valid ground for suppressing the depositions of the witnesses taken by him. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

Where the several questions of an interrogatory cannot be separated and left as independent questions and answers without seriously affecting their import, and the form of the main questions is leading, the entire interrogatory is properly suppressed. *Mayton v. Sonnefeld* (Civ. App.) 48 S. W. 608.

Where a notary taking depositions refreshed the memory of the witness with a memorandum made by plaintiff's attorney, the deposition should be suppressed. *Rice v. Ward*, 93 T. 532, 56 S. W. 747.

Where interrogatories were propounded to "Selia," and plaintiff took the deposition of "Celia," the court properly refused to suppress the deposition. *Galveston, H. & S. A. Ry. Co. v. Sanchez* (Civ. App.) 65 S. W. 893.

That the answers in a deposition were reduced to writing by the witness held no ground for quashing the deposition. *Missouri, K. & T. Ry. Co. of Texas v. Denton*, 29 C. A. 284, 68 S. W. 336.

Depositions taken by a person before he has properly become a party to the suit are rightly suppressed, especially where there are nonresident defendants who have only been served by publication, and have not appeared. *Riviere v. Wilkens*, 31 C. A. 454, 72 S. W. 608.

The fact that a deposition was not marked "Filed" by the clerk did not furnish any reason for its exclusion; it having been duly taken and returned, and placed among the papers in the case. *Fire Ass'n of Philadelphia v. Masterson* (Civ. App.) 83 S. W. 49.

Where the style of a case appeared in the body of a commission to take a deposition, that it was not indorsed with the number and style of the case and marked issued by the officer, was not cause for quashing the deposition. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.) 96 S. W. 653.

Defects in commission.—The fact that, within five days of the filing of direct interrogatories by defendant, the commission issued at the instance of plaintiff, held no ground for suppression. *The Oriental v. Barclay*, 16 C. A. 193, 41 S. W. 117.

Failure to place the seal of court on commission held a mere irregularity. *Id.*

That interrogatories addressed to "H. W." and "Mrs. H. W." were signed and sworn to by "H. W." and "Mrs. N. E. W.," was not ground for suppressing the depositions; it being shown that the signers were the persons to whom the interrogatories were actually propounded. *Galveston, H. & S. A. Ry. Co. v. Morris* (Civ. App.) 60 S. W. 813.

Refusal to quash deposition held not ground for reversal. *St. Louis & S. F. Ry. Co. v. Skaggs*, 32 C. A. 363, 74 S. W. 783.

A motion to suppress a deposition held properly overruled. *Tarilton v. Orr*, 40 C. A. 410, 90 S. W. 534.

Notice.—An objection to a deposition on the ground that the notice of the filing of the interrogatories was served on attorneys who had not at the time become attorneys of record goes merely to the manner and form of taking the deposition, and under Art. 3676, it must be presented by motion to suppress. *Texas & P. Ry. Co. v. Sandy* (Civ. App.) 140 S. W. 498.

Disqualification of officer.—It is an objection to a deposition that the officer by whom it was taken was a surety on the bond for costs of the party offering the deposition in evidence. *Floyd v. Rice*, 28 T. 341. It is not an objection to a deposition that the officer by whom it was taken was interested with the party by whom the objection was made. *Ballard v. Perry*, 28 T. 347, 363.

The fact that a deposition was taken by a notary public who was subsequently employed as an attorney by the party in whose behalf it was taken does not authorize its suppression. *Welborne v. Downing*, 73 T. 527, 11 S. W. 501.

Deposition will not be suppressed because notary is attorney for plaintiff, where it does not appear that he sustained such relation when deposition was taken. *McGrew v. Wilson* (Civ. App.) 57 S. W. 63.

Refusal to quash deposition, on the ground that it did not appear that the officer had authority to take it, held proper. *Barber v. Geer*, 26 C. A. 89, 63 S. W. 934.

The person before whom a deposition is taken for plaintiff being the attorney of the witness in an action of the same nature against the same defendant is disqualified; so that it is proper to suppress the deposition. *Clegg v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 127 S. W. 1098.

— **Certificate of officer.**—A deposition cannot be quashed because the certificate was signed by the officer taking it without adding the name of his office. *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

Omission of a notary's seal from his certificate on an envelope inclosing depositions held not ground for suppressing the depositions. *Wisegarver v. Yinger* (Civ. App.) 128 S. W. 1190.

— **Failure to swear interpreter.**—Failure to swear interpreter at taking of deposition, where the officer did not understand the language of the witness, held fatal to deposition. *Davis v. Migliavaca*, 16 C. A. 42, 41 S. W. 91.

— **Failure of witness to answer, irresponsible answers, or failure to take answers of all witnesses.**—When a party to a suit, in testifying by deposition taken at his own instance, declines to produce, in response to a cross-interrogatory, letters or documents in his possession which are called for by his adversary, on the ground that they are too voluminous, and not that they are irrelevant to the issue, the deposition should on motion be suppressed. *Coleman v. Colgate*, 69 T. 88, 6 S. W. 553.

A failure to take the answers of all the witnesses is not a ground for suppressing the deposition. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

When a witness evades answering cross-interrogatories, his deposition should be suppressed. *Railway Co. v. Green*, 90 T. 257, 38 S. W. 31.

An answer held not so evasive or unresponsive as to justify suppressing the deposition. *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

Refusal to suppress a deposition for failure of the witness to fully answer an interrogatory held not an abuse of discretion. *Galveston, H. & S. A. Ry. Co. v. Baumgarten*, 31 C. A. 253, 72 S. W. 78.

A deposition should not be suppressed because an answer is irresponsible to an interrogatory, where it is responsive to a subsequent interrogatory. *Houston & T. C. R. Co. v. Bell* (Civ. App.) 73 S. W. 56.

Answer to cross-interrogatory held responsive to the question, so as to furnish no ground for suppressing the deposition. *Garner v. Risinger*, 35 C. A. 378, 81 S. W. 343.

Where the failure to answer cross-interrogatories is urged as a ground for the suppression of the entire deposition, the cross-interrogatories must be shown to be material. *Kirby Lumber Co. v. Chambers*, 41 C. A. 632, 95 S. W. 607.

Deposition containing incomplete answers held to be suppressed on motion. *W. R. Morris & Co. v. Southern Shoe Co.*, 44 C. A. 488, 99 S. W. 178.

Rule governing suppression of a deposition for the witness' failure to answer a question stated. *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 53 C. A. 547, 116 S. W. 423.

Refusal to suppress a deposition because witness did not answer a cross-interrogatory held not an abuse of discretion. *Id.*

— **Sufficiency, mode, and scope of objection.**—Objection to testimony held not insufficient, as covering too much of the testimony. *Wells-Fargo & Co.'s Express v. Waites* (Civ. App.) 60 S. W. 582.

It was not error to exclude testimony, impeaching a notary who had taken deposition used on the trial. *Chicago, R. I. & T. Ry. Co. v. Long*, 26 C. A. 601, 65 S. W. 882.

Where it was claimed that a deposition did not truthfully contain the evidence of the witness, the remedy of the opposite party was by motion to suppress, and not by introducing her as a witness and permitting her to change her testimony. *Hord v. Gulf, C. & S. F. Ry. Co.*, 33 C. A. 163, 76 S. W. 227.

Objection to testimony in deposition, not pointing out parts challenged, held properly overruled. *Ward v. Cameron*, 97 T. 466, 80 S. W. 69.

An objection to the admissibility of an answer in a deposition which has been suppressed held to raise no question on appeal. *Gulf, C. & S. F. Ry. Co. v. Luther*, 40 C. A. 517, 90 S. W. 44.

Certain objection held only to the manner and form of taking a deposition which should be made by a motion in writing to suppress. *Wabash R. Co. v. Newton, Weller & Wagner Co.* (Civ. App.) 110 S. W. 992.

An objection to depositions that they are not responsive to the interrogatories is an objection to the manner and form of taking. *Beaty v. Yell* (Civ. App.) 133 S. W. 911.

To pass on the admission of a deposition, there must be specific objection to something therein. *Freeman v. Cleary* (Civ. App.) 136 S. W. 521.

A general objection to questions propounded to a witness testifying by deposition held properly overruled. *Id.*

An objection to a deposition held properly overruled, in the absence of evidence of the facts on which the objection is predicated. *Texas & P. Ry. Co. v. Sandy* (Civ. App.) 140 S. W. 498.

Where a witness testified by deposition and a written objection to an entire interrogatory, and the answer thereto did not point out what part was objected to, and the greater part of the answer was admissible as a statement of facts within the personal knowledge of witness, the objection was properly overruled. *Pecos & N. T. Ry. Co. v. Brooks* (Civ. App.) 145 S. W. 619.

An objection to a deposition, because taken without notice to the adverse party, must be supported by competent evidence, unless the court judicially knows the facts. *Houston, E. & W. T. Ry. Co. v. Lacy* (Civ. App.) 153 S. W. 414.

— **Withdrawal of deposition for correction.**—The court may permit a deposition to be withdrawn and the certificate of the officer corrected. *Creager v. Douglass*, 77 T. 484, 14 S. W. 150; *Price v. Horton*, 4 C. A. 526, 23 S. W. 501.

Depositions may be withdrawn by leave of the court, to the end that formal defects may be amended. *Wallace v. Byers*, 14 C. A. 574, 38 S. W. 228.

Where depositions not properly returned by the officer taking them had not been tampered with, the court might permit their withdrawal for the correction of the irregularities, and then permit their use, on the officer making the required corrections. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

Where a deposition was taken by the answers being taken in shorthand and afterwards transcribed, and there was a clerical error in transcribing the notes, correction thereof may be made after the deposition is returned into court and filed. *Cleburne Electric & Gas Co. v. McCoy* (Civ. App.) 149 S. W. 534.

Trial of objections.—Questions of fact arising upon objections to a deposition will be tried by the court. *Garner v. Cutler*, 28 T. 175.

A deposition will not be excluded on account of interlineations and erasures, when it is apparent from the context and connection that they were made when the deposition was taken. *Ballard v. Perry*, 28 T. 347, 363.

Objection to the form or manner of taking a deposition may be heard and determined either before the trial commences or after. *Coleman v. Colgate*, 69 T. 89, 6 S. W. 553.

Evidence held to show collusion in taking of a deposition as a matter of law, and hence it was error for the court to submit such question to the jury. *Avocato v. Dell'Ara* (Civ. App.) 57 S. W. 296.

Motion to quash deposition held to raise question of fact, authorizing court to receive testimony outside of what was shown by deposition itself or indorsement on envelope. *St. Louis Southwestern Ry. Co. of Texas v. Harkey*, 39 C. A. 523, 88 S. W. 506.

Depositions could not be suppressed on the ground that a motion to strike out was not passed upon at the term it was filed; the statute expressly authorizing that it be passed upon at the next term. *Hartford Fire Ins. Co. v. Becton* (Civ. App.) 124 S. W. 474.

A party, believing that the answers of a witness testifying by deposition were not full enough, held required to procure a postponement of the case to enable him to procure a further deposition. *Western Union Telegraph Co. v. Douglass* (Civ. App.) 124 S. W. 488.

Waiver of objection.—Acceptance of notice to take depositions, to be used on a new trial, held a waiver of objections to its taking before a mandate of reversal of a former judgment was filed. *Caffey's Ex'rs v. Cooksey*, 19 C. A. 145, 47 S. W. 65.

Conduct of defendant in opening envelope containing depositions and obtaining benefit of some of them held a waiver of any objection to the indorsement on the envelope. *Gulf, C. & S. F. Ry. Co. v. Lyman*, 27 C. A. 22, 65 S. W. 69.

The refusal to exclude an answer of a witness to a direct interrogatory held not error under the facts. *Kirby Lumber Co. v. Chambers*, 41 C. A. 632, 95 S. W. 607.

Certain exceptions held insufficient to allow a witness' testimony in a deposition to be questioned. *Western Union Telegraph Co. v. Landry* (Civ. App.) 134 S. W. 848.

Where defendant in an action for personal injuries introduces a deposition of plaintiff taken before the trial, it thereby waives all objection to the testimony. *Freeman v. Grashel* (Civ. App.) 145 S. W. 695.

Reception of evidence by deposition will not be reviewed on appeal, where no objection, motion to strike, or exception was taken to its introduction at the trial. *Pecos & N. T. Ry. Co. v. Dinwiddie* (Civ. App.) 146 S. W. 280.

Art. 3677. [2290] [2236] Depositions to be read in evidence, subject, etc.—Depositions may be read in evidence upon the trial of any suit in which they are taken, subject to all legal exceptions which might be made to the interrogatories and answers, were the witness personally present before the court giving evidence. [Act March 16, 1848, p. 106, sec. 17. P. D. 3733.]

See *Hendricks v. Huffmeyer*, 15 C. A. 93, 38 S. W. 523; *Texas & P. Ry. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

In general.—A party in reading the depositions of a witness to the jury omitted to read certain accounts attached thereto as exhibits, and the court properly instructed the jury that they should consider such accounts in connection with the answer of the witness referring to them. *Pridgen v. Hill*, 12 T. 374.

Witness stated that there was no general reputation as to a boundary line. Following this answer are the words: [Witness did not understand the first part of interrogatory 10. N. P.] He now says that it was generally understood in the neighborhood that the west line of said surveys was where the line now runs. It was held not error to read the entire answer including that within brackets. *Kuechler v. Wilson*, 82 T. 638, 18 S. W. 317. Exhibits should be read in connection with the matters to which they relate. *Pridgen v. Hill*, 12 T. 374.

A person taking a deposition cannot read incompetent evidence on cross-examination where the evidence in chief in relation to the matter was excluded. *McCutchen v. Jackson* (Civ. App.) 40 S. W. 177.

An answer to an interrogatory asking for an explanation of what the witness had before testified to, the previous testimony not being offered in evidence, is properly stricken out. *Pioneer Savings & Loan Co. v. Peck*, 20 C. A. 111, 49 S. W. 160.

Introduction of depositions, after overruling of defendant's motion to suppress, to contradict defendant's testimony, held prejudicial error. *Avocato v. Dell'Ara* (Civ. App.) 57 S. W. 296.

Deposition for which proper predicate had not been laid held properly excluded. *Campos v. State*, 50 Cr. R. 102, 95 S. W. 1042.

Failure to show an abuse of discretion in the admission of one deposition of a witness rather than another held to require an overruling of an assignment of error based thereon. *Davis v. Davis*, 44 C. A. 238, 98 S. W. 198.

On an issue whether an insurance agent was authorized to receive payment of second premiums, testimony of insurer's bookkeeper on cross-interrogatories as to collections made and accounted for by the agent held properly admitted as against objection that

the testimony did not show that the collections made were not first premiums. *American Nat. Ins. Co. v. Collins* (Civ. App.) 149 S. W. 554.

Even though it were permissible, in offering the deposition of plaintiff's wife in evidence, to show that she was unable to attend court on account of sickness, such proof should not have gone into details by showing that she previously had two surgical operations performed and been in the hospital. *Missouri, K. & T. Ry. Co. of Texas v. Sullivan* (Civ. App.) 157 S. W. 193.

Witness present at trial.—The fact of the presence of a witness in court furnishes no grounds for the rejection of her deposition. *Schnick v. Noel*, 64 T. 406; *O'Connor v. Andrews*, 81 T. 28, 16 S. W. 628; *Railway Co. v. Renken*, 15 C. A. 229, 38 S. W. 829.

When a witness is in attendance upon court, and is held under the rule during the trial of the cause, his deposition formerly taken cannot be read. *McClure v. Sheek's Heirs*, 68 T. 426, 4 S. W. 552.

The deposition of a party may be read although he is present at the trial. *Cannon v. Sweet* (Civ. App.) 28 S. W. 719.

When witnesses have been examined orally by both parties, their depositions taken on ex parte interrogatories should be excluded, there being no material difference in the depositions from the testimony on the trial. *Willis v. Moore* (Civ. App.) 33 S. W. 691.

That the deposition of a witness present at the trial was read is an immaterial error, no prejudice being shown. *Railway Co. v. Gormley* (Civ. App.) 35 S. W. 488.

The fact that a party interested was present when the deposition was taken is not ground for excluding it. *Houston & T. C. R. Co. v. McKenzie* (Civ. App.) 41 S. W. 831.

The court may admit the deposition of a witness who is present at the trial. *Id.*

It is within the discretion of the court to allow a deposition of a witness who is present to be read. *Galveston, H. & S. A. Ry. Co. v. Burnett* (Civ. App.) 42 S. W. 314.

The practice of allowing witness' deposition to be read after he has testified is largely in the discretion of the trial court. *Wilson v. Wilson*, 35 C. A. 192, 79 S. W. 839.

The deposition of a witness was not rendered inadmissible by the fact that when it was offered the witness had been sworn and was present in court and under the rule, it being discretionary with the trial judge to admit the deposition. *Fire Ass'n of Philadelphia v. Masterson* (Civ. App.) 83 S. W. 49.

Persons as against whom deposition may be used.—A deposition cannot be used as evidence against those not parties to the suit when it was taken. *Dalsheimer v. Morris*, 28 S. W. 240, 8 C. A. 268.

The filing of a plea of intervention, and the raising of new issues thereby, does not render previously taken depositions incompetent. *Caffey's Ex'rs v. Cooksey*, 19 C. A. 145, 47 S. W. 65.

A grantor's depositions held admissible in an action for the recovery of land brought by him and revived by his heirs after his death. *Cummings v. Moore*, 27 C. A. 555, 65 S. W. 1113.

The adoption by plaintiffs of allegations in a petition filed in their names, but without their authority, held not to constitute a ratification by them of the unauthorized institution of the suit in their names so as to authorize the use of depositions previously taken by defendant. *Rogers v. Tompkins* (Civ. App.) 87 S. W. 379.

Depositions taken in a cause are not admissible in a subsequent cause as against one not a party to that in which they were taken. *Parlin & Orendorff Co. v. Vawter*, 39 C. A. 520, 88 S. W. 407.

A deposition taken, when a person was not a party to the suit, is not admissible against him, but is admissible against those who were then parties. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

A deposition held not admissible against one who was not a party at the time it was taken. *St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co.* (Civ. App.) 144 S. W. 1194.

Papers attached to deposition.—Documents attached to a deposition which are competent evidence themselves may be detached and taken by the jury in their retirement. *Davis v. M., K. & T. Ry. Co.*, 17 C. A. 199, 43 S. W. 44.

Exhibit, referred to by witness in his deposition as attached to deposition taken in another suit, held admissible in suit at bar. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

Former suit.—Deposition taken in one suit cannot be used in evidence in another, against objection. *People's Nat. Bank v. Mulkey*, 94 T. 395, 60 S. W. 754.

Deposition, taken in another case in which the parties and issues were substantially the same, cannot be used in evidence. *People's Nat. Bank v. Mulkey* (Civ. App.) 61 S. W. 528.

Where two suits, subsequently consolidated, were intimately connected in subject-matter, and the parties were the same, it was not error to permit a deposition, taken in one of the causes before consolidation, to be used in the consolidated cause. *Kothman v. Faseler* (Civ. App.) 84 S. W. 390.

Part of deposition.—When the court excludes part of an answer in a deposition, the party need not offer the rest, and hence he cannot complain of its admission. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

Where a party introduces a part of witness' answer to a question in a deposition, the opposite party is entitled to have the balance of it, relating to the same subject, go to the jury. *Birge-Forbes Co. v. St. Louis & S. F. R. Co.*, 53 C. A. 55, 115 S. W. 333.

Where a party introduced a portion of an answer to an interrogatory put to a witness testifying by deposition, the adverse party could introduce other portions of the answer explanatory of the part introduced. *Yates v. Billings* (Civ. App.) 148 S. W. 1130.

Cross-interrogatories.—In an action for injuries, answers to direct interrogatories in the deposition of a witness held a sufficient predicate for the introduction of answers to certain cross-interrogatories. *Galveston, H. & S. A. Ry. Co. v. Baumgarten*, 31 C. A. 253, 72 S. W. 78.

Irresponsive answers.—An irresponsive answer to a cross-interrogatory in a deposition held inadmissible. *Houston & T. C. R. Co. v. Ritter*, 16 C. A. 482, 41 S. W. 753.

Competency of witness.—Where plaintiff's incompetency when she conveyed the land

in question and at the time of trial were the controlling issues in a suit to set aside a deed, her ex parte deposition taken as a party to the suit was inadmissible. *Holland v. Riggs*, 53 C. A. 367, 116 S. W. 167.

Ex parte interrogatories.—The court held not to have erred in permitting defendant to introduce the answers to certain ex parte interrogatories propounded to defendant in a deposition. *Couturie v. Roensch* (Civ. App.) 134 S. W. 413.

Quashed deposition.—Where a deposition had been suppressed on formal motion before trial, it was error to admit it in evidence while the order suppressing it had not been set aside. *Long v. Fields*, 31 C. A. 241, 71 S. W. 774.

A deposition, quashed because wrongfully taken, was inadmissible to show that the party had resorted to improper means to procure and color testimony. *Joy v. Liverpool, London & Globe Ins. Co.*, 32 C. A. 433, 74 S. W. 822.

Time of taking as affecting admissibility.—Depositions of physicians as to injuries sustained by a plaintiff in a railway accident held admissible, though taken five years before the trial. *International & G. N. R. Co. v. Dalwigh* (Civ. App.) 48 S. W. 527.

Art. 3678. [2291] [2237] Matter not responsive stricken out.—If any deposition shall contain any testimony not pertinent to the direct and cross-interrogatories propounded, such matter shall be deemed surplusage, and may be stricken out by the court upon objection thereto. [Act May 13, 1846, p. 363, sec. 73. P. D. 3732.]

Responsiveness of interrogatories.—Reply of witness to interrogatory in a deposition held a sufficient answer thereto, and motion to quash, therefore, properly refused. *Waters-Pierce Oil Co. v. Davis*, 24 C. A. 508, 60 S. W. 453.

A question to an officer taking a deposition held such that it should be construed as referring to the manner of answering the interrogations. *Shannon v. Marchbanks*, 35 C. A. 615, 80 S. W. 860.

Where a witness examined by deposition attached certain letters as requested, a voluntary explanation thereof not in response to any interrogatory should have been excluded. *Central Texas Grocery Co. v. Globe Tobacco Co.*, 45 C. A. 199, 99 S. W. 1144.

The answer of a witness testifying by deposition held responsive to the interrogatories. *Ft. Worth & D. C. Ry. Co. v. Arthur* (Civ. App.) 124 S. W. 213.

Defendant may not have stricken from a deposition an answer because not fully answering the question asked by plaintiff. *Henderson v. Louisiana & Texas Lumber Co.* (Civ. App.) 128 S. W. 671.

In answer to an interrogatory in a deposition as to the effect on their salability as to keeping cattle confined in cars longer than necessary, that it caused extra shrinkage and damaged their appearance and selling value, and that this was especially true of calves, which could not stand as much as grown cattle, was not objectionable as not responsive. *Pecos & N. T. Ry. Co. v. Gray* (Civ. App.) 145 S. W. 728.

CHAPTER THREE

DEPOSITIONS OF PARTIES

Art. 3679. Party may take his own deposition.	Art. 3683. Taken and returned as other depositions.
3680. May take deposition of adverse party.	3684. Answer may embrace what—contradiction of.
3681. Where either party is a corporation no ex parte depositions.	3685. Refusal to answer, etc.
3682. Not necessary to give notice, etc.	3686. Objection to interrogatories, etc.

Article 3679. [2292] [2238] Party may take his own deposition.—The deposition of either party to a suit, who is a competent witness therein, may be taken in his own behalf in the same manner and with like effect with the depositions of other witnesses.

Against whom admissible.—Ex parte depositions of one of the members of a firm defendant held not admissible, as against a co-defendant who had no notice of the taking thereof, or opportunity to file cross-interrogatories. *Thomson v. Hubbard*, 22 C. A. 101, 53 S. W. 841.

An ex parte deposition of one defendant is not admissible against his codefendant, where the latter had no opportunity to file cross interrogatories. *Veck v. Culbertson* (Civ. App.) 57 S. W. 1114.

In what actions admissible.—Deposition of a decedent, taken while an action for injuries caused by defendant's negligence was pending in his name, held admissible on the trial of the action by his children, claiming damages for his death or for the injuries sought to be recovered by the decedent. *St. Louis Southwestern Ry. Co. of Texas v. Hengst*, 36 C. A. 217, 81 S. W. 832.

Examination.—In taking the ex parte deposition of a party to the suit, no answers of the witness can be taken by the officer, except those made to the questions which accompany (or are attached to) the commission. *Sparks v. Taylor* (Civ. App.) 87 S. W. 742.

Transactions with decedent.—The depositions of a defendant as to his transactions with a decedent cannot be taken by himself in a suit in which the widow of such decedent is the plaintiff suing as the representative of the community estate. *Gurley v. Clarkson* (Civ. App.) 30 S. W. 360; *Parks v. Caudle*, 58 T. 216; *Newton v. Newton*, 77 T. 510, 14 S. W. 157; *Harrill v. Houston*, 66 T. 280, 17 S. W. 731.

Art. 3680. [2293] [2239] May take deposition of adverse party.—Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness; and his examination shall be conducted and his testimony received in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter. [Act Feb. 15, 1858, p. 110, sec. 3. P. D. 3754.]

Cited, *Railway Co. v. Nelson*, 24 S. W. 588, 5 C. A. 387.

Bill of discovery.—These provisions of the statute take the place of the bill of discovery in equity practice. *Love v. Keowne*, 58 T. 191.

Since the enactment of Art. 3689, giving a party the right to examine opposite parties as witnesses to procure information for maintaining an action or defense, the equitable doctrine of discovery has no application. *Hamner v. Garrett* (Civ. App.) 133 S. W. 1058.

Executors and administrators.—Executors and administrators are within the meaning of the statute. *Blackman v. Green*, 17 T. 322; *Love v. Keowne*, 58 T. 191.

Sufficiency of interrogatories.—Interrogatories under this article must be framed so as to distinctly embody the fact desired to be proved. *Church v. Waggoner*, 78 T. 200, 14 S. W. 581.

The exclusion of the deposition of a party taken at the instance of the adverse party held erroneous, though the testimony in the deposition related to a transaction between the party and a deceased person under whom the adverse party claimed. *Ivy v. Ivy*, 51 C. A. 397, 112 S. W. 110.

Effect of objection of deponent to admission.—The deposition of a party, having been taken under the statute at the instance of his adversary, may be introduced in evidence over the latter's objection. *Kruger v. Spachek*, 22 C. A. 307, 54 S. W. 295.

Examination.—The examination of a party to a suit by written interrogatories is made as would be the examination of any other witness, except that a leading question may be put. A railway company was sued for damages for personal injuries alleged to have been inflicted through the negligence of the company's employes. The defendant, interrogating the plaintiff by written interrogatory, asked, "Describe minutely how the accident occurred; was it not your own fault and negligence?" Held, that the question was improper, and the party could properly refuse to answer it. *H. & T. C. Ry. Co. v. Reason*, 61 T. 613.

Diligence.—The same diligence should be used in obtaining the testimony of the adverse party as that of any other witness. *McMillan v. Croft*, 2 T. 397; *Hipp v. Robb*, 7 T. 67; *Frosh v. Holmes*, 8 T. 29.

Explanation of deposition at trial.—See notes under Art. 3686.

Art. 3681. Where either party is a corporation, no ex parte depositions.—Where either party to any suit is a corporation, neither party thereto shall be permitted to take ex parte depositions. [Acts 1897, p. 117.]

Constitutionality of act.—This act is not unconstitutional. It places parties on an equality in matters wherein before they had not been on equal footing. *Railroad Co. v. Stuart* (Civ. App.) 48 S. W. 799.

This act is constitutional. *Railroad Co. v. Stewart*, 92 T. 540, 50 S. W. 335.

Effect of ex parte deposition.—Ex parte depositions in a suit wherein a corporation is a party, though not taken according to law are admissible as admissions. *G., H. & S. A. Ry. Co. v. Thompson* (Civ. App.) 44 S. W. 8.

Art. 3682. [2294] [2240] Not necessary to give notice.—It shall not be necessary to give notice of the filing of the interrogatories or to serve a copy thereof on the adverse party before a commission shall issue to take the answer thereto, nor shall it be any objection to the interrogatories that they are leading in their character. [Acts Feb. 15, 1858, p. 110, sec. 3.]

Art. 3683. [2295] [2241] Taken and returned as other depositions.—A commission to take the answers of the party to the interrogatories filed shall be issued by the clerk or justice, and be executed and returned by any authorized officer as in other cases. [Id.]

Art. 3684. [2296] [2242] Answer may embrace, what; contradiction of.—The party interrogated may, in answer to questions propounded, state any matter connected with the cause and pertinent to the issue to be tried; and the adverse party may contradict the answers by any other competent testimony in the same manner as he might contradict the testimony of any other witness. [Id. sec. 4. P. D. 3755.]

In general.—A deposition taken without notice will not be suppressed on the ground that the party taking the testimony was present and aided the notary taking the answers by reading the interrogatories. *Parker v. Chancellor*, 73 T. 475, 11 S. W. 503.

Answers.—The plaintiff, in answer to an interrogatory whether he had not agreed

to receive a certain sum of money in full satisfaction of his demands, replied that he had done so upon certain conditions which had not been performed. Held, that having failed to state what the conditions were, or to prove them, his admission stood without qualification. *Hughes v. Prewitt*, 5 T. 264.

A party admitting the correctness of the account of the adverse party has a right to state such matters as are essential to his defense to prove that, though the account was just, yet that it had been paid or otherwise compensated. *McCorkle v. Lawrence*, 21 T. 731.

If a party admits a fact closely connected with another, concerning which he is not directly interrogated, but which tends to a defense against the fact admitted, he may state the latter in connection with the former. *Foster v. Spear*, 22 T. 226; *Sacra v. Stewart*, 32 T. 185; *Hammond v. Hough*, 52 T. 63.

The defendant, having admitted that he had discharged the plaintiff who was suing for the value of his services, was permitted to state the reasons for his having done so. *Herbert v. Butterworth*, 23 T. 250.

A statement in the defendant's answer, that his creditors pressed him because the plaintiff had closed his store by a writ of sequestration, is objectionable for irrelevancy, where the question sought to elicit facts entirely antecedent to the closing of the store. *Clardy v. Callicoate*, 24 T. 170.

Evidence tending to prove repair of track at the place where a wreck and injury occurred, after its occurrence, is admissible to rebut evidence that the track was used after the wreck without being repaired. *Fordyce v. Withers*, 1 C. A. 540, 20 S. W. 766.

A witness on cross-examination (testimony by depositions) was asked: "If in answer to any of the direct interrogatories you have stated anything as to the speed the train was running at the time of the wreck, state how you know, and state particularly what attention you paid to the speed of the train." On motion to suppress, the answer of the witness, "and all were nervous, apprehensive, and the effects and sensations were those of very great speed, and what seemed to me reckless speed," held responsive to the interrogatory, and proper. The witness had stated, in answer to direct interrogatories, that "the train was running at forty or fifty miles an hour." *G., H. & S. A. Ry. Co. v. Wesch*, 85 T. 594, 22 S. W. 957.

A party interrogated under the above article may state any facts connected with the cause and pertinent to the issue. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797. Answer to interrogatory held vague and indefinite and its exclusion sustained. *Jordan v. Young* (Civ. App.) 56 S. W. 762.

Where part of an answer to an interrogatory is impertinent, the court may exclude such part and admit the balance. *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Civ. App.) 77 S. W. 961.

The witness may, after he has answered the interrogatories propounded to him, state any matter connected with the cause and pertinent to the issues to be tried in answer to questions propounded to him by his attorney present at the taking of the deposition. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 488, 489, 6 L. R. A. (N. S.) 381.

Art. 3685. [2297] [2243] Refusal to answer, etc.—If the party interrogated refuses to answer, the officer executing the commission shall certify such refusal; and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed. [Id. sec. 5. P. D. 3756.]

Time for consultation with attorney.—A witness is not entitled to time for preparation or to get advice about his answers. *Parker v. Chancellor*, 73 T. 475, 11 S. W. 503.

A party interrogated is entitled to reasonable time to consult his attorney before answering. *Robertson v. Melasky*, 84 T. 559, 19 S. W. 776; *McLaughlin v. Carter*, 13 C. A. 694, 37 S. W. 666.

A party interrogated is entitled to reasonable time for consultation with his attorney. A certificate of refusal to answer, when such reasonable time was not allowed, should be suppressed. *Wofford v. Farmer*, 90 T. 651, 40 S. W. 788.

Taking interrogatories as confessed.—Where there are several defendants, and interrogatories pertinent to the issues have been propounded to one of them and have not been answered, they may be taken as confessed as to such defendant. *Teas v. McDonald*, 13 T. 349, 65 Am. Dec. 65.

When the answers to interrogatories propounded to a party have been stricken out as evasive and impertinent the court refused to permit him to make new answers. *Teas v. McDonald*, 13 T. 349, 65 Am. Dec. 65. When the answer is evasive the interrogatory will be taken as confessed. *Wells v. Groesbeck*, 22 T. 429.

When an interrogatory is taken as confessed by reason of the refusal of the party to answer, it will be construed in connection with the pleadings to determine the effect of the refusal in evidence. *Friend v. Miller*, 62 T. 177.

It is only in case of a deliberate refusal to answer by the party to whom interrogatories are propounded by the adverse party that the interrogatories will be taken as confessed. It is not intended that the certificate of the officer should be conclusive. *Bounds v. Little*, 75 T. 316, 12 S. W. 1109; *Railway Co. v. Winder* (Civ. App.) 31 S. W. 715.

An answer apparently evasive may be explained by the party and the order taking the question as confessed be set aside. *Norton v. Davis*, 83 T. 32, 18 S. W. 430.

The request of a party interrogated for time to consult his attorney, with an offer the next day to answer, followed by a willingness to answer on the trial, are reasons sufficient to require the certificate of the officer of refusal to be set aside as well as the order taking the interrogatories as confessed. *Robertson v. Melasky*, 84 T. 559, 19 S. W. 776; *Parker v. Chancellor*, 73 T. 475, 11 S. W. 503.

A party refusing to answer interrogatories cannot testify at the trial as to matters embraced in the interrogatories. *Railway Co. v. Nelson*, 24 S. W. 588, 5 C. A. 387.

Refusal of court to compel plaintiff to answer interrogatories filed by defendant held not an abuse of discretion. *Wofford v. Farmer*, 90 T. 651, 40 S. W. 788; *Id.* (Civ. App.) 40 S. W. 739.

Where plaintiff refused to answer interrogatories propounded before trial, and they were taken as confessed, he could not give testimony disproving the answers so confessed. *Gulf, C. & S. F. Ry. Co. v. Hamilton*, 17 C. A. 76, 42 S. W. 358.

One refusing to answer interrogatories before trial has the burden to show good reason therefor. *Id.*

Where motion to suppress notary's certificate of witness' refusal to testify is denied and on the trial an objection to the introduction of the certificate is overruled and witness is not allowed to testify, if on appeal none of the evidence heard on the motion to suppress is in the record, then in the absence of such evidence, the denial of the motion to suppress and refusal to allow witness to testify cannot be held error as it is presumed that there was evidence to justify court's ruling. *Weinert v. Simmang*, 29 C. A. 435, 68 S. W. 1011.

Defendants' refusal to answer interrogatories held not willful or contumacious, and the court properly vacated notary's certificate, and refused to allow plaintiff to read the interrogatories as confessed. *Donaldson v. Dobbs*, 35 C. A. 439, 80 S. W. 1084.

Evasive answers to interrogatories held not ground for taking the interrogatories as confessed, where there was no deliberate refusal to answer. *Baldwin v. Richardson*, 39 C. A. 406, 87 S. W. 746.

The overruling of plaintiff's motion to take as confessed *ex parte* interrogatories propounded to defendant held not error. *Sanborn v. Bush*, 41 C. A. 24, 91 S. W. 883.

Lower court's discretionary action in refusing to take as confessed certain interrogatories in a deposition held not to warrant reversal in the absence of a showing of prejudice. *Davis v. Davis*, 44 C. A. 238, 98 S. W. 198.

Where a witness refuses to answer an interrogatory and the notary formally certifies the refusal the question is to be taken as confessed, and the court has no right to refuse to take the refusal to answer as a confession on the ground of the ignorance of the witness, and that he did not know or realize the effect of his refusal to answer. *Locust v. Randle*, 46 C. A. 544, 102 S. W. 947.

Where a party fails or refuses to answer *ex parte* interrogatories without any excuse, the party propounding them is entitled to read to the jury such of them as are in form to be confessed. It is not necessary in such a case to file a motion before trial to have the interrogatories taken as confessed, and by filing such motion one does not waive his right to have them taken as confessed. *Lyon v. Files*, 50 C. A. 630, 110 S. W. 1000.

Evidence of defendant's failure to answer cross-interrogatories held admissible to contradict his general statements. *Levy v. Goldsoll* (Civ. App.) 131 S. W. 420.

Contempt.—Where the deposition of an opposing party is sought to be taken and he comes before the officer and refuses to answer the interrogatories the officer is without authority to fine and imprison the recusant witness as for contempt. *Ex parte Johnson*, 54 Cr. R. 113, 111 S. W. 743.

Art. 3686. [2298] [2244] Objections to interrogatories, etc.—The party interrogated may, upon the trial of the case, take exception to the interrogatories on the ground that they are not pertinent, and to the answers that they are not competent evidence.

Time for objection.—When a party gives a sufficient reason for refusal to answer an interrogatory he will be permitted to testify in relation thereto on the stand. *Jackson v. Munford*, 74 T. 104, 11 S. W. 1061; *Bounds v. Little*, 75 T. 316, 12 S. W. 1109; *Dunham v. Simon*, 1 U. C. 548.

A general interrogatory not indicating the subject-matter of the inquiry may be objectionable on that account, but such objection must be made before the trial. *G., C. & S. F. Ry. Co. v. Richards*, 83 T. 204, 18 S. W. 611.

Explanation of deposition.—A party, when a witness, may explain testimony in *ex parte* deposition taken by adverse party, though it was unambiguous. *Goodbar Shoe Co. v. Sims* (Civ. App.) 43 S. W. 1065.

The deposition of a party taken by the opposing party may be explained by the witness on the trial. *Smith v. Olsen*, 92 T. 181, 46 S. W. 631.

Reading part of deposition.—A party may read any admission of the adverse party contained in a deposition taken *ex parte*, without being compelled to read the whole. *Watson v. Winston* (Civ. App.) 43 S. W. 852.

CHAPTER FOUR

GENERAL PROVISIONS

Art. 3687. Common law rules of evidence.	Art. 3694. Copies of records of public officers and courts to be prima facie evidence.
3688. Color or interest does not disqualify.	3695. Record of surveys as evidence.
3689. Husband or wife not disqualified, except, etc.	3696. Copies and certificates from certain officers are evidence.
3690. In actions by or against executors, etc., certain testimony not allowed.	3697. Notarial acts and copies thereof are evidence.
3691. Religious opinions, etc., do not disqualify.	3698. In suits against delinquent officers, transcript from comptroller's office is evidence.
3692. Printed statutes evidence, when.	
3693. Certified copies of acts, etc., evidence.	

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| <p>Art. 3699. Copies of certain instruments prior to 1837 are evidence.</p> <p>3700. Recorded instruments admitted in evidence without proof, when.</p> <p>3701. Record books, certain, declared valid records, etc.; certified copies, effect of.</p> <p>3702. Certified copies of deeds, etc., to land in Archer county, recorded in Jack county, when, etc., evidence when.</p> <p>3703. Transcribed records, certified copies of, evidence, etc.</p> <p>3704. Transcribed records, effect of.</p> <p>3705. Certain abstracts of title evidence, when.</p> | <p>Art. 3706. Certified copy of instrument sued on is evidence, when.</p> <p>3707. Certified copies from heads of departments, evidence.</p> <p>3708. Assessment or payment of taxes may be proven, how.</p> <p>3709. Rate of interest in this state presumed, unless, etc.</p> <p>3710. Execution of notes and other instruments presumed, unless, etc.</p> <p>3711. Evidence of appointment and qualification of executor, etc.</p> <p>3712. Suit on sworn account.</p> <p>3713. Records of corporation are evidence.</p> |
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Article 3687. [2299] [2245] Common law rules of evidence.—
 The common law of England as now practiced and understood shall, in its application to evidence, be followed and practiced by the courts of this state, so far as the same may not be inconsistent with this title or any other law. [Act Dec. 20, 1836. P. D. 3706.]

COMMON LAW RULES OF EVIDENCE

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Rule 17. The existence of a deed may be presumed from possession under claim of title corroborated by other circumstances.

Rule 18. A grant may be presumed in support of a just and legal claim from long and uninterrupted possession.

Rule 19. A fact may be inferred from the proved existence of a relevant fact in the absence of opposing evidence.

Rule 20. Parol or extrinsic evidence is generally inadmissible to contradict, vary or add to the terms of a written instrument.

Rule 21. Contemporaneous written agreements relating to the same subject are to be construed together and several distinct stipulations are to be construed so as to give effect to all. A prior or contemporaneous parol agreement consistent with and forming a part of the contract is to be construed with the written part thereof.

Rule 22. Where the meaning of the words in a written instrument are doubtful, it may be read in the light of surrounding circumstances, and parol evidence of custom and usage is admissible to show its meaning.

- Rule 23. Blanks in written instruments left for names may be filled, and the true dates when incorrect may be shown.
- Rule 24. Parol evidence is admissible to contradict the recital of payment in a deed, receipt, or other instrument, and to show the amount actually paid or the real consideration.
- Rule 25. Parol evidence is admissible to show that a written instrument is void for illegality, want or failure of consideration, or on account of fraud or mistake.
- Rule 26. Parol evidence is admissible to establish a trust or to show that a written instrument was intended as a mortgage, trust or conditional sale.
- Rule 27. Parol evidence is admissible to show that a deed was made for the benefit of another not named in it, or solely for the benefit of one of the parties named therein.
- Rule 28. A written instrument falling through fraud, accident or mistake either of matter of law or of fact, to represent the true agreement, or containing terms contrary to the common intention will be corrected or reformed in equity.
- Rule 29. Parol evidence is admissible to establish a separate oral agreement constituting a condition precedent to an obligation claimed to arise on a written agreement.
- Rule 30. Parol evidence is admissible to show that a written agreement has been rescinded, modified, extended or waived by a subsequent valid agreement.
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I. *Competency of Evidence in General*

1. Nature and source of evidence in general.—In a suit in the county court for the rent of land, the plaintiff claimed under an execution sale against the lessor subsequent to the lease. The plaintiff offered in evidence, to prove his right to the rents, the judgment against the lessor, execution thereon and sale thereunder, and the sheriff's deed, which was rejected on the ground that it raised the question of title to the land. Held, that the evidence was material and competent for the purpose of establishing plaintiff's right to recover the rent. *Johnson v. Doss*, 1 App. C. C. § 1075.

A judgment substituting the record of a deed alleged to have been destroyed, in which neither the grantor nor his heirs were parties, held void and incompetent to show such conveyance. *Cook v. Roberson* (Civ. App.) 46 S. W. 866.

Declarations, made by defendant to witnesses relative to his cattle a few days before he sold them to plaintiff, and which witnesses at his direction communicated to plaintiff, held admissible against him in an action to rescind for his fraud. *Cabaness v. Holland*, 19 C. A. 383, 47 S. W. 379.

An insolvent buyer's testimony that a bank had tendered him assistance held inadmissible in an action to rescind a sale. *Willis v. Strickland* (Civ. App.) 50 S. W. 159.

In action for failure to deliver message, evidence of declaration of company's agent at receiving point, made several days after delivery, as to transaction at point of delivery, held incompetent. *Southwestern Telegraph & Telephone Co. v. Gotcher*, 93 T. 114, 53 S. W. 686.

Mandate of the supreme court entering judgment on reversal held competent evidence of the judgment in an action to revive. *Carothers v. Lange* (Civ. App.) 55 S. W. 580.

In an action for ejection of a passenger, evidence that he had no money with which to pay fare was competent. *Atchison, T. & S. F. Ry. Co. v. Cuniffe* (Civ. App.) 57 S. W. 692.

Testimony of a conductor that he did not station any one on the platform off which plaintiff fell and sustained injuries to notify passengers of the danger held competent. *Texas & P. Ry. Co. v. Taylor* (Civ. App.) 58 S. W. 166.

On a trial for forgery, held proper to permit evidence that defendant, subsequent to his alleged marriage to the woman whose name was forged, claimed to be illegal, introduced another woman as his wife. *Whittle v. State*, 43 Cr. R. 468, 66 S. W. 771.

In an action for delay in delivering a telegram, testimony of a former manager of the company at the receiving point as to what he would have done under the circumstances held incompetent. *Western Union Tel. Co. v. Pierce* (Civ. App.) 67 S. W. 920.

In an action for levying on exempt property, plaintiff's testimony that it would take \$100 to recompense him held incompetent. *Morris v. Williford* (Civ. App.) 70 S. W. 228.

In an action against a street railway company, an ordinance limiting the rate of speed of the car held competent to prove that its speed at the time of a collision was excessive. *San Antonio Traction Co. v. Upson*, 31 C. A. 50, 71 S. W. 565.

Certain evidence held competent to prove that certain tools were not on leased premises shortly after vacation thereof by lessee, in an action against the lessee to recover value of such tools. *Cammack v. Rogers*, 32 C. A. 125, 74 S. W. 945.

In action on policy, held competent to show company's knowledge of true state of title to property, after policy issued and before fire. *Continental Fire Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 378.

On an issue whether plaintiff was an actual settler on land involved on a certain date, certain testimony held competent. *March v. Shaw* (Civ. App.) 87 S. W. 360.

In an action against a railroad for failure to place cattle guards at the points where the road entered plaintiff's premises, held, that testimony as to expenses incurred on account of the hire of additional help by plaintiff for the purpose of driving his stock across defendant's right of way was competent and material. *Missouri, K. & T. Ry. Co. of Texas v. Wetz*, 38 C. A. 563, 87 S. W. 373.

In an action for damages for fraudulent representations as to the solvency and prosperity of a corporation whereby plaintiff was induced to purchase stock therein certain evidence held competent to show that the corporation was not solvent. *Collins v. Chipman*, 41 C. A. 563, 95 S. W. 666.

In an action for fraudulent representations whereby plaintiff was induced to purchase corporate stock, it was competent to prove by defendant, who was president of the corporation, how the business of the corporation was managed and the amount of salary paid to its officers. *Id.*

In an action for damages for false representations inducing plaintiff to purchase corporate stock, certain evidence relative to the earning power of the corporation held competent. *Id.*

Where, in an action for deceit of defendant's agent, there was evidence of ratification of the agent's fraudulent conduct, evidence of a conversation between plaintiff and defendant's general agent, concerning such transaction, held admissible as against defendant. *Western Cottage Piano & Organ Co. v. Anderson*, 45 C. A. 513, 101 S. W. 1061.

Evidence held relevant and competent in an action on a note under the plea of non est factum. *Scott v. Menly* (Civ. App.) 105 S. W. 55.

Evidence in an action for specific performance of a contract for the sale of land held incompetent. *Lipscomb v. Amend*, 49 C. A. 300, 103 S. W. 483.

In an action for the death of a child, struck by a train, certain evidence held admissible to show at what point the engineer, by ordinary care, could have discovered the child on the track. *Galveston, H. & N. Ry. Co. v. Olds* (Civ. App.) 112 S. W. 787.

Proceedings in a criminal case, in which a person was convicted of marrying a negro, held incompetent to show that she was a white woman in a civil action involving that question. *Stewart v. Profit* (Civ. App.) 146 S. W. 563.

In an action against a real estate broker for fraud inducing plaintiff to trade his land for a stock of merchandise, a question asked a witness as to whether he would describe the stock as a line of dry goods, clothing, boots, shoes and hats held inadmissible. *Biard & Scales v. Tyler Building & Loan Ass'n* (Civ. App.) 147 S. W. 1168.

Evidence of wife of false representations to her and her reliance thereon on exchange of property held competent in action against husband alone, which he defended on the ground of such false representations. *Martin v. Ince* (Civ. App.) 148 S. W. 1178.

The alleged wife's testimony on the question of a common-law marriage would not be exclusive thereon; other competent evidence being admissible to establish it. *Jordan v. Johnson* (Civ. App.) 155 S. W. 1194.

2. Results of tests, examinations and experiments.—In a suit to determine a boundary, a witness may detail conditions and distances disclosed by an experimental survey made by him, but cannot state that other surveys based on the corner as claimed by defendant would be affected by the change proposed by plaintiff. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

In a suit to determine a boundary, a witness may state that, in making a subdivision survey, the surveyor located a fallen tree, claimed to be the beginning corner, and, starting therefrom, they found the corner in controversy.—*Id.*

Admission of evidence in action for negligent killing of child on railroad track, as to experiments elsewhere to show engineer's field of vision, held not ground for reversal. *Olivaras v. San Antonio & A. P. Ry. Co.* (Civ. App.) 77 S. W. 981.

In an action for injuries to a servant, evidence of an experiment subsequently conducted by an expert held admissible, after proof, that the conditions under which it was conducted were practically the same as those existing at the time of the accident. *Krueger v. Brenham Furniture Mfg. Co.*, 38 C. A. 398, 85 S. W. 1156.

In an action for injuries to a licensee on a railroad track, evidence that no whistle was sounded, and that plaintiff had tested his hearing the week before and could hear a whistle for 290 steps, held admissible. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In an action for the death of a trespasser on a railroad track, certain evidence as to experiments made to determine at what distance the engineer could have seen decedent held admissible. *Houston & T. C. R. Co. v. Ramsey*, 43 C. A. 603, 97 S. W. 1067.

Testimony as to tests made by witnesses was properly excluded, where the conditions actually existing at the time of the accident and involved in the action were not shown to be similar. *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 49 C. A. 12, 108 S. W. 500.

In an action against a railroad company for death of a person on the track, a witness who got on a freight car similar to the one which struck decedent, and in a similar position and under similar circumstances as at the time of the accident, may testify as to how far in front of the car a person could be seen on the track in order to establish that the brakeman should have seen decedent. *Freeman v. Moreman* (Civ. App.) 146 S. W. 1045.

In an action to enjoin an infringement of water rights, measurements of the head-works and spillway of the defendant made after the case went to trial held properly admitted in evidence. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

In an action for the price of an engine, admission of evidence of a test of the engine after suit brought and by persons selected by the vendee was not erroneous, since such conditions only affected the weight of the evidence. *Texas Machinery & Supply Co. v. Ayers Ice Cream Co.* (Civ. App.) 150 S. W. 750.

Where railway brakeman charged with contributory negligence testified that he could not see a coal chute, testimony of witnesses as to experiments made by them under substantially similar circumstances was improperly excluded. *Kansas City, M. & O. Ry. Co. of Texas v. Hall* (Civ. App.) 152 S. W. 445.

3. Testimony by a witness as to his intent, motive or condition of mind.—The declarations of one claiming homestead rights when moving from the property are admissible in evidence to show whether the intention of abandonment exists or not. *Cline v. Upton*, 59 T. 27.

In a suit for damages it is competent to show the intention of plaintiff to continue in his occupation. *Howard Oil Co. v. Davis*, 76 T. 630, 13 S. W. 665.

Where the motive of a witness in the doing of an act involved a legal conclusion, his statement of that motive is incompetent evidence; but where the motive of a witness is not opinion or legal conclusion, but knowledge, it is admissible. *Hamburg v. Wood*, 66 T. 168, 18 S. W. 623.

On the question of abandonment the husband and wife may testify as to their intentions to return, etc. *Aultman v. Allen*, 12 C. A. 227, 33 S. W. 679.

It is error to compel a transferee of a warehouse receipt, suing one obtaining the property, to state whether he intends to hold the warehousemen liable. *Friedman v. Peters*, 18 C. A. 11, 44 S. W. 572.

Parties may testify as to their intentions where they affect validity of the transaction. *Wade v. Odle*, 21 C. A. 656, 54 S. W. 786.

Where it was claimed that the maker of a note alleged to be a forgery had paid other similar notes, the maker was entitled to testify as to his intent in paying them. *Kingsbury v. Waco State Bank*, 30 C. A. 387, 70 S. W. 551.

On issue whether a chattel mortgage lien had been waived by mortgagee, it was error not to permit him to testify as to his intention. *Mayers v. McNeese* (Civ. App.) 71 S. W. 68.

In an action for damages for erection and maintenance of a pool, constituting a nuisance, held, testimony of plaintiff was admissible to show the understanding and inducement that led plaintiff to agree to change of a highway from the proposed site of the pool. *Missouri, K. & T. Ry. Co. of Texas v. Dennis* (Civ. App.) 84 S. W. 860.

In an action for injuries, held error to sustain an objection to a question to plaintiff as to his willingness to be examined by a physician. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, 40 C. A. 565, 633, 90 S. W. 716.

In an action for a breach of contract for the sale and delivery of a buggy, testimony of defendant that he did not sell the identical buggy exhibited held admissible. *Schwartz v. Roberts*, 46 C. A. 458, 102 S. W. 924.

In an action to set aside a sale of land of an insane person by her guardian, made under an order of the county court, the county judge was properly not allowed to state the reasons which had induced his orders, nor that he made investigation as to the necessity of the sale and heard evidence upon that issue. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

The testimony of claimants of a homestead, from which they had removed, as to their intention to return thereto, is admissible. *Thigpen v. Russell*, 55 C. A. 211, 118 S. W. 1080.

In an action on a contract defended on the ground that it was procured by duress, certain evidence held admissible to prove the defense. *International Land Co. v. Parmer* (Civ. App.) 123 S. W. 196.

Where the intent of a person is material, he may testify directly as to his intention. *Browning v. Currie* (Civ. App.) 140 S. W. 479.

Testimony of a principal as to his knowledge of a fact held admissible on the question of the agent's authority to enter into an agreement for arbitration. *Heard v. Clegg* (Civ. App.) 144 S. W. 1145.

4. — Execution and delivery of contracts and conveyances.—When one attacks a written contract by sworn plea of non est factum, on the ground that the contract, though signed by him, did not express the real agreement, he being unable to read it, and that it was fraudulently written, it is not improper to permit him to testify that he

would not have signed the written contract if he had known its contents. *Chatham v. Jones*, 69 T. 744, 7 S. W. 600.

In an action by administrator, defendant cannot show that he and deceased intended a certain instrument to be a sale. *Anglin v. Barlow* (Civ. App.) 45 S. W. 827.

Where plaintiff claimed that defendant was estopped from asserting that certain contractors did not act as its agent in buying timber, plaintiff could testify as to his understanding as to whom he was selling his timber. *Missouri, K. & T. Ry. Co. of Texas v. Yale*, 27 C. A. 10, 65 S. W. 57.

Where, in an action on a note, authority to sign the defendant's name was claimed from defendant's acts in taking charge of the business, evidence of defendant's intent in so doing was admissible. *Kingsbury v. Waco State Bank*, 30 C. A. 387, 70 S. W. 551.

In trespass to try title, in which plaintiff claimed under a purchase of school lands, his testimony as to his intention in purchasing the land held admissible. *Goethal v. Read*, 35 C. A. 461, 81 S. W. 592.

5. — **Wrongful acts in general.**—Plaintiff suing for ejection from sleeping car may show by the train master that he intended to make plaintiff leave the car if he had not gone. *Pullman Palace Car Co. v. Cain*, 15 C. A. 503, 40 S. W. 220.

6. — **Negligence and contributory negligence.**—In an action by a servant for personal injuries, the admission of certain testimony by plaintiff as to the reason for his action held not error. *Rice v. Dewberry* (Civ. App.) 93 S. W. 715.

In an action against a carrier for failure to deliver goods in accordance with a bill of lading, the exclusion of testimony of the agent of the carrier as to what he would have done held not erroneous, in view of the testimony given. *Texas & G. Ry. Co. v. First Nat. Bank of Carthage*, 47 C. A. 283, 112 S. W. 589.

In an action for injuries to a servant, testimony of his superior, as to whether he expected that plaintiff would obey the direction which resulted in his injuries, held properly excluded. *Missouri, K. & T. Ry. Co. of Texas v. Gray*, 56 C. A. 61, 120 S. W. 527.

An injured servant held entitled to testify that he did not know of the danger of performing the work in which he was injured, in the way he did. *Texas & N. O. R. Co. v. Plummer*, 57 C. A. 563, 122 S. W. 942.

Where in an action for injuries to a patron on amusement grounds, caused by a tank falling on him, a witness testified that he saw third persons playing with the tank, refusing to permit him to testify why he gave them certain instructions was not error. *Wichita Falls Traction Co. v. Adams* (Civ. App.) 146 S. W. 271.

One who jumped from a train after it got 35 yards beyond the depot, and while it was going eight or ten miles an hour, it having started while he was assisting his family to seats thereon, may not, as regards the question of his contributory negligence, testify that, when he jumped, he thought he could do so in safety. *Gulf, C. & S. F. Ry. Co. v. Guess* (Civ. App.) 154 S. W. 1060.

7. — **Libel and slander.**—In libel, plaintiff may call witnesses to state that on reading the libel they concluded it was aimed at him. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

8. — **Usury.**—It is competent to permit the parties to a transaction to testify to their intentions when the question of usury is in issue. *Peightal v. Cotton States Bldg. Co.*, 25 C. A. 390, 61 S. W. 423.

9. — **Good faith in general.**—In an action for malicious prosecution, the defendant, testifying in his own behalf, was asked by his counsel to "state whether, in appearing before the grand jury and testifying as a witness against the plaintiff, he had any malice against him." Held, that the question was improper, not relating to any distinct, intelligible fact, but tending to elicit from the witness his inference or conclusion involving his correct understanding of the meaning of the word "malice" in such a connection. *Gabel v. Weinsensee*, 49 T. 131.

In an action for false imprisonment, the defendant, testifying in his own behalf, was asked by his counsel if he was actuated by malicious motives in making the affidavit upon which the warrant of arrest was based. Held, that the evidence was inadmissible. *Dunn v. Cole*, 2 App. C. C. § 823.

In an action by vendee to recover earnest money, vendee and his attorney held properly permitted to testify that they acted in good faith in rejecting the title. *Smith v. Lander* (Civ. App.) 106 S. W. 703.

Where plaintiff, having purchased certain property from a firm, sued to recover it against a purchaser from an individual member of the firm, evidence of plaintiff's belief that the property belonged to the firm, and the reasons thereof, was admissible. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

In an action for false imprisonment, evidence as to what was in plaintiff's mind when he claimed certain property held inadmissible. *Southwestern Portland Cement Co. v. Reitzer* (Civ. App.) 135 S. W. 237.

10. — **Fraud and misrepresentation.**—If the elements of fraud are shown to have existed in a sale, and it is afterwards attacked for fraud by creditors, it is immaterial what may have been the real intention of the parties. In such a case no good intention of the parties at the time ultimately to pay creditors, testified to by the parties themselves, can make that valid which the law pronounces void. *Miller v. Jannett*, 63 T. 82.

Fraud must be proven by legal and competent evidence. *Marsalis v. Oglesby*, 1 App. C. C. § 260; *T. & P. Ry. Co. v. Burke*, 1 App. C. C. § 946.

The issue being whether certain goods had been conveyed by defendant in fraud of his creditors, he was permitted to testify as to what was his intention or motive in making a sale of the goods. *Phillips v. Edelstein*, 2 App. C. C. § 451; *Numsen v. Ellis*, 3 App. C. C. § 134.

Where a sale is attacked as being in fraud of creditors, it is not error to permit the vendor, when called as a witness to support the sale, to be asked; "Did you sell for any other purpose than to pay your debts?" nor to allow his answer, "that he sold for no other purpose." *Sweeney v. Conley*, 71 T. 543, 9 S. W. 548.

The purchaser may testify that he would not have purchased if the false representation had not been made. *Pridham v. Weddington*, 74 T. 354, 12 S. W. 49.

Where a creditor purchases the goods of his insolvent debtor, and the transaction is attacked as in fraud of other creditors, he may testify that his motive in making the purchase was only to collect the debt due himself. *Blankenship v. Willis*, 1 C. A. 657, 20 S. W. 952.

A debtor may testify as to his intentions in the transfer of property. *Roberts v. Miller* (Civ. App.) 30 S. W. 381; *Brown v. Lessing*, 70 T. 544, 7 S. W. 783.

The grantor in the deed when attacked for fraud may testify as to his intentions. *Dittman v. Weiss* (Civ. App.) 31 S. W. 67.

Where, in an action on a note, the defense is fraud, defendant may be asked if he has not transferred his property to defeat collection. *Hynes v. Winston* (Civ. App.) 40 S. W. 1025.

Purpose and intent are matter of fact, and grantees may testify that they accepted the deed to secure claims, and without fraudulent intent. *Wright v. Solomon* (Civ. App.) 46 S. W. 58.

In an action for fraudulent representations whereby plaintiff was induced to purchase corporate stock, testimony by plaintiff that at the time he purchased the stock he believed that it would pay dividends of 20 per cent. per annum was admissible. *Collins v. Chipman*, 41 C. A. 563, 95 S. W. 666.

In an action by the buyer of a machine against the seller and his agents for fraudulent misrepresentations, it was error to refuse to permit an agent to testify that he believed the representations to be true. *Wimple v. Patterson* (Civ. App.) 117 S. W. 1034.

In a suit by a prior grantee under a deed of a married woman executed by herself alone, on her representation that she was single, against a subsequent purchaser under a deed executed by her and her husband, evidence of her reasons for not telling the prior grantee that she was a married woman held admissible on the issue of fraud. *Keller v. Lindow* (Civ. App.) 133 S. W. 304.

In an action against a real estate broker for fraud inducing plaintiff to trade his land for a stock of merchandise, the refusal to permit plaintiff to testify as to his reason for placing the deed executed by plaintiff in the hands of a third person held erroneous. *Biard & Scales v. Tyler Building & Loan Ass'n* (Civ. App.) 147 S. W. 1168.

Where, in trespass to try title, a witness had testified to the facts relied on to show that he and his cograntor were imposed on in executing a warranty instead of a quitclaim deed, as intended, it was not error to refuse to permit him to further testify as to his state of mind, or his reasons for believing he executed a quitclaim. *Hume v. Darsey* (Civ. App.) 154 S. W. 255.

11. Testimony as to character or reputation.—Evidence of character is not in general admissible. Where, however, the nature of the action involves the general character of a party, or goes directly to affect it, such evidence is admissible. *Britton v. Thrash*, 1 App. C. C. § 1238.

In an action for damages for malicious prosecution, evidence of the bad character of the plaintiff is admissible in mitigation of damages, but it must be confined to general reputation. *Dunn v. Cole*, 2 App. C. C. § 821.

In an action against a fraternal mutual life insurance company, evidence of defendant's reputation for admitting applicants irrespective of good health held competent. *Home Circle Soc. No. 2 v. Shelton* (Civ. App.) 85 S. W. 320.

12. Evidence admissible by reason of admission of similar evidence of adverse party.—Evidence, though not primarily admissible because not directly relevant to the matters in issue, may be rendered proper in rebuttal. See opinion for an illustration. *Wade v. Love*, 69 T. 522, 7 S. W. 225.

The admission of improper evidence in favor of one party to a suit will not authorize the adversary to introduce improper evidence in rebuttal if objection be made thereto. *Dolson v. De Ganahl*, 70 T. 620, 8 S. W. 321; *McCartney v. Martin*, 1 U. C. 143.

A party cannot complain of the admission of testimony of a fact whose existence is shown by evidence introduced by the party himself. *Davis v. Harper*, 17 C. A. 88, 42 S. W. 788.

Where, in an action of malicious prosecution and false imprisonment, defendant offered evidence to show that plaintiff embezzled its property, it was not error to permit plaintiff to prove his reputation for honesty. *San Antonio & A. P. Ry. Co. v. Griffin*, 20 C. A. 91, 48 S. W. 542.

Erroneous evidence is harmless when the same evidence was given by a witness of the objecting party. *Railroad Co. v. Grier*, 20 C. A. 138, 49 S. W. 148.

Improper evidence admitted over a party's objections is not made admissible by cross interrogatories touching the matters testified to. *Siebert v. Lott*, 20 C. A. 191, 49 S. W. 783.

A party cannot object to a ruling admitting evidence, where he had testified on cross-examination, without objection, to the same thing. *Berg v. San Antonio St. Ry. Co.* (Civ. App.) 49 S. W. 921.

Where a conspiracy was charged, and evidence introduced to prove same, the admission in rebuttal of an affidavit of the confederate held proper. *Fire Ass'n of Philadelphia v. McNerney* (Civ. App.) 54 S. W. 1053.

Where defendant introduced evidence that plaintiff had been indicted for perjury, evidence in rebuttal as to plaintiff's reputation for truth and veracity held not objectionable as irrelevant and immaterial. *St. Louis S. W. Ry. Co. v. Stonecypher*, 25 C. A. 569, 63 S. W. 946.

Where, in an action for injuries sustained by the breaking of a railroad drawbridge wrench, defendant's witness testifies that a similar wrench was used on another bridge of the same weight, plaintiff may show that the latter wrench was stronger and better. *Galveston, H. & N. Ry. Co. v. Newport*, 26 C. A. 583, 65 S. W. 657.

In action for purchase price of goods, testimony that they were worth more than the price asked held admissible. *Schuwirth v. Thumma* (Civ. App.) 66 S. W. 691.

The notary taking an acknowledgment may rebut the testimony of the grantor's wife that she did not understand the purport of the instrument. *Harrington v. Claffin*, 28 C. A. 100, 66 S. W. 898.

Where defendants introduce evidence relating to an irrelevant matter, the plaintiff has the right to further inquire of the witnesses concerning such matter. *Houston & T. C. R. Co. v. Hopson* (Civ. App.) 67 S. W. 458.

In view of the evidence as to whether an instrument procured by fraud, and, if so procured, whether it was subsequently ratified, held, that a witness was properly allowed to testify to grantor's mental condition down to the day of trial in determining whether his mind was impaired by liquor during the period in question. *Wells v. Houston*, 29 C. A. 619, 69 S. W. 183.

In an action for injuries, evidence of statements by plaintiff after the accident as to injury and suffering held admissible in rebuttal. *Missouri, K. & T. Ry. Co. of Texas v. Hawk*, 30 C. A. 142, 69 S. W. 1037.

Where carrier's witnesses testified to delays at different points than those specified in the complaint, it could not object to plaintiff's testimony as to such delays as not within the issues. *San Antonio & A. P. Ry. Co. v. Griffith* (Civ. App.) 70 S. W. 438.

In an action for injuries to a servant caused by a coal gate giving way, rebuttal testimony held properly admitted. *Gulf, C. & S. F. Ry. Co. v. Brooks* (Civ. App.) 73 S. W. 571.

In a suit to recover damages by the construction of a railroad in front of property, proof of a general improvement in business in the city held not admissible in rebuttal to plaintiff's cross-examination. *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.*, 97 T. 107, 76 S. W. 441.

Statement of insured's attorney in letter to defendant company held not objectionable, in action on policy for reference to compromise, made in reply to letter admitted without objection. *Aetna Ins. Co. v. Fitz*, 34 C. A. 214, 78 S. W. 370.

Plaintiff's evidence that charge against defendant published by plaintiff was true held admissible to rebut defendant's evidence that, in charging plaintiff with having falsely attacked defendant, defendant had not libeled plaintiff. *Cranfill v. Hayden*, 97 T. 544, 80 S. W. 609.

On an issue as to whether certain land was purchased with money belonging to the purchaser's wife, an acceptance of service of citation by the purchaser held admissible in rebuttal of testimony of a witness showing purchaser's location on a certain date. *Oakes v. Prather* (Civ. App.) 81 S. W. 557.

In an action for personal injuries, the admission in rebuttal of certain evidence relative to a different accident held proper. *Texas & P. Ry. Co. v. Malone* (Civ. App.) 88 S. W. 389.

Where a letter itself was excluded, evidence of its contents was inadmissible. *Gregory v. Webb*, 40 C. A. 360, 89 S. W. 1109.

In an action against a railroad for injuries to a passenger, certain evidence held admissible in rebuttal. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 40 C. A. 480, 90 S. W. 343.

In action for killing ponies on track, where train dispatcher testified, that train was late, testimony that when train was late the train crew sometimes ran faster than scheduled time held admissible. *Anson v. Gulf, C. & S. F. Ry. Co.*, 42 C. A. 437, 94 S. W. 94.

In an action of trespass to try title, after defendant had given testimony tending to show that he was an innocent purchaser, he could not complain of the testimony of plaintiff going to prove notice on the ground that such matter was not raised by the pleadings. *Cobb v. Bryan* (Civ. App.) 97 S. W. 513.

In an action where plaintiff claims an interest in land through a deed from his mother, certain evidence held not inadmissible as evidence of a conversation after the deed was written tending to modify the intention in the deed, especially where the same evidence was elicited by the other side. *Walker v. Erwin*, 47 C. A. 637, 106 S. W. 164.

In an action against a railroad for injuries to a person on a track, where defendant's claim agent had testified to statements made to him by plaintiff three or four days after the accident relating to the distance the train was from him when he fell down while attempting to get off the track, it was competent for plaintiff to testify that he told the agent that he did not know how far it was, but that, upon being urged to state some distance said it was at least 50 yards. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 50 C. A. 134, 109 S. W. 1126.

Objections to certain questions on cross-examination of a witness were properly overruled, where the same evidence had been previously introduced on direct examination without objection. *Missouri, Kansas & T. Ry. Co. of Texas v. Steele*, 50 C. A. 634, 110 S. W. 171.

Rule respecting one party's right to introduce a whole writing in evidence, where his adversary has introduced a part thereof, stated. *T. A. Robertson & Co. v. Russell*, 51 C. A. 257, 111 S. W. 205.

On an issue whether a deed was intended as a mortgage, held that, defendant having testified that such was the case, it was competent for plaintiff to contradict him by testifying that defendant told him that, if he would pay a certain debt, he could have the land. *Moore v. Kirby*, 52 C. A. 200, 115 S. W. 632.

Where evidence of what deceased had said about her health was admitted in support of the defense that she was not injured on defendant's train, but died of disease, similar evidence was properly admitted in rebuttal as against an objection that it was hearsay. *St. Louis & S. F. R. Co. v. Sizemore*, 53 C. A. 491, 116 S. W. 403.

In an action for personal injuries, evidence of injury to plaintiff's hearing held admissible to rebut defendant's evidence, though not alleged in the petition. *Southern Telegraph & Telephone Co. v. Evans*, 54 C. A. 63, 116 S. W. 418.

Irrelevant testimony held not rendered admissible by admission of other irrelevant testimony. *Hall v. Parry*, 55 C. A. 40, 113 S. W. 561.

In an action for injuries to a servant, evidence held admissible in rebuttal to contradict the testimony of defendant's foreman. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

Where defendant R., a co-maker of the note sued on by plaintiff bank, testified that it was given for the bank's accommodation, evidence of the other maker that the original note for which the note sued on was a renewal was not given by R. for plaintiff's accom-

modation was admissible in rebuttal. *First Nat. Bank v. Pearce* (Civ. App.) 126 S. W. 285.

Where, in an action on a note, defendant R. claimed and testified that the note was for plaintiff's accommodation, evidence that plaintiff paid the consideration for the note to R.'s codefendant, with R.'s knowledge and consent and at his direction, was admissible in rebuttal. *Id.*

Evidence held admissible by reason of the admission of other evidence. *Texas & P. Ry. Co. v. Wooldridge & Hamby* (Civ. App.) 126 S. W. 603.

That the court erroneously admitted evidence on a point over the objection of a party does not make it lawful for the court to admit similar evidence when offered by such party. *El Paso & S. W. R. Co. v. Eichel & Welkel* (Civ. App.) 130 S. W. 922.

In an action against a telegraph company for failure to transmit a message, certain evidence to contradict evidence of defendant held properly admitted. *Western Union Telegraph Co. v. Henderson* (Civ. App.) 131 S. W. 1153.

Where defendant has introduced portions of a statement made by plaintiff on a certain occasion, plaintiff was entitled to introduce other portions thereof essential to an explanation of that offered by defendant. *Hartford Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 465.

Evidence as to a subject brought out by the testimony of the adverse party held admissible. *Heard v. Clegg* (Civ. App.) 144 S. W. 1145.

Where defendant in quo warranto to oust him from office put in evidence parts of the former testimony of certain witnesses at the previous trial, relator was entitled to introduce the remainder of the testimony given upon the same occasion as well as statements made upon the examining trial regarding the same matter. *Pease v. State* (Civ. App.) 155 S. W. 657.

Where, in a suit to restrain the collection of taxes on bank stock assessed at a higher rate than other property, the tax officers showed rapid increase in the value of the stock since the bank was organized, they could not complain of evidence in rebuttal of the rapid increase in the value of land of the county. *Porter v. Langley* (Civ. App.) 155 S. W. 1042.

II. Competency of Witnesses

13. Capacity in general.—In a prosecution for violating the local option law, county surveyor was competent to testify that the field notes of the district alleged in the indictment closed. *Matkins v. State* (Cr. App.) 62 S. W. 911.

The testimony of a witness cannot be excluded merely because he made contradictory statements. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

14. Knowledge or means of knowledge of facts as affecting capacity.—A witness, ordinarily, cannot testify as to the motives of another person. *Numsen v. Ellis*, 3 App. C. C. § 134.

The custodian of records may testify that certain ones are missing. *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

When a witness testifies that he is familiar with the duties of foremen and switchmen in H., he is competent to testify to such duties. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204.

In order to be entitled to testify concerning a matter, the witness must not "guess" as to it. *Reichert v. International & G. N. Ry. Co.* (Civ. App.) 72 S. W. 1031.

In an action against a railroad for personal injuries, testimony of a witness who was not present when the accident occurred held admissible to show the location of the train. *International & G. N. R. Co. v. Quinones* (Civ. App.) 81 S. W. 757.

In an action against a carrier for damages to a shipment of cattle, a witness held properly allowed to state from his personal knowledge the freight rate between two points. *Texas Cent. R. Co. v. West* (Civ. App.) 88 S. W. 426.

It is not error to permit a witness to testify from his own knowledge as to what the freight rates between two points are. *Texas Cent. Ry. Co. v. Miller* (Civ. App.) 88 S. W. 499.

In an action for injuries to plaintiff's wife, plaintiff held properly permitted to testify as to the performance of certain work about his place by his wife. *Gulf, C. & S. F. Ry. Co. v. Booth* (Civ. App.) 97 S. W. 128.

A witness who saw cattle weighed, took a memorandum of the weights, knew that the same was correct, etc., held entitled to testify thereto, though he did not weigh the cattle. *St. Louis, I. M. & S. Ry. Co. v. Dodson* (Civ. App.) 97 S. W. 523.

A witness held competent to testify that defendant's state agent had full control of all defendant's agencies and business in Texas at the time of the transaction in controversy. *Western Cottage Piano & Organ Co. v. Anderson*, 45 C. A. 513, 101 S. W. 1061.

Witness held incompetent to prove contents of an abandoned pleading. *Smith v. Texas & N. O. R. Co.* (Civ. App.) 105 S. W. 523.

In an action for conversion of a crop delivered by tenant and subtenants to third persons made defendants, the testimony of a witness based on his recollection held competent as testimony of a fact. *Sexton Rice & Irrigation Co. v. Sexton*, 48 C. A. 190, 106 S. W. 728.

In an action for injuries to a brakeman by the breaking of a defective clevis on a brake chain, testimony of a former car inspector of defendant who had done that work for 25 years as to the usual and proper manner of inspecting cars on defendant's road held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Blachley*, 50 C. A. 141, 109 S. W. 995.

A city engineer was not incompetent to testify to the width of a city street because he was not present when the original lines were surveyed. *International & G. N. R. Co. v. Morin*, 53 C. A. 531, 116 S. W. 656.

In a prosecution for rape, an objection to the prosecutrix testifying as to penetration, on the ground that she did not know the meaning of the word, held properly overruled. *Leftrick v. State*, 55 Cr. R. 204, 116 S. W. 817.

A witness who had not seen the cattle of the seller for about two years before a sale of all the cattle was not competent to estimate the number of the cattle. *Gibbens & Roundtree v. Hart* (Civ. App.) 117 S. W. 163.

In an action for wrongful death, witnesses held authorized to testify as to the average amount received by decedent from his farm work. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

Testimony as to marks made on ground by the original surveyor held objectionable, where witness does not show how he knew they were so made. *Goldman v. Hadley* (Civ. App.) 122 S. W. 282.

In an action against a carrier for injury to bees shipped, testimony by plaintiff as to how the bees were loaded held admissible, while testimony of another as to whether they were properly loaded was properly excluded. *San Antonio & A. P. Ry. Co. v. Laws* (Civ. App.) 125 S. W. 973.

In an action against a telegraph company for delay in delivering a telegram, certain testimony of a witness as to the schedule of a certain train held admissible. *Western Union Telegraph Co. v. Gilliland* (Civ. App.) 130 S. W. 212.

Physicians of the allopathic school may testify to questions of anatomy for or against a member of any other school. *Berry v. State* (Civ. App.) 135 S. W. 631.

Certain evidence as to the age of a prosecutrix held admissible. *Vaughn v. State*, 62 Cr. R. 24, 136 S. W. 476.

In an action for the death of a trespasser struck by a train, a witness is not entitled to testify that no one had ever forbidden him to walk on the track. *Laeve v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 136 S. W. 1129.

That a witness had been at a certain town only twice held not to destroy the effect of his testimony as to the market value of cattle there. *San Antonio & A. P. Ry. Co. v. Miller* (Civ. App.) 137 S. W. 1194.

Evidence that witness who only knew deceased in a business way never heard him curse his wife was incompetent. *Streight v. State*, 62 Cr. R. 453, 138 S. W. 742.

Persons who derive a knowledge of prices in a certain market from publications of quotations in that market may testify to their knowledge so obtained. *Houston Packing Co. v. Griffith* (Civ. App.) 144 S. W. 1139.

A witness was qualified to testify to general reputation of person as to being a white woman or negro, although he lived in a country neighborhood several miles from that in which she lived. *Stewart v. Profit* (Civ. App.) 146 S. W. 563.

Witnesses testifying as to general reputation must show that they have knowledge of the facts and generally that their opportunity to acquire such knowledge was sufficient to enable them to do so. *Id.*

A witness who had made but two trips from a point in this state to St. Louis, and whose sources of knowledge were not set out or inquired into, was not incompetent to state the time of the ordinary run between the two points, where he stated generally that he knew the facts. *St. Louis & S. F. R. Co. v. Dean* (Civ. App.) 152 S. W. 1127.

15. Age and maturity of mind.—Witness eight or ten years old competent to testify, when. *Railway Co. v. Johnson* (Civ. App.) 37 S. W. 771.

It was not an abuse of discretion to allow a child to testify, where there was some evidence tending to show his appreciation of an oath. *Applebaum v. Bass* (Civ. App.) 113 S. W. 173.

16. Unsoundness of mind.—Where there is ground for doubting witness' mental incapacity to testify, and timely request is made therefor, court should examine into mental condition of witness before allowing her to testify. *Mills v. Cook* (Civ. App.) 57 S. W. 81.

17. Obligation of oath.—The court held not to have erred in holding a boy 10 years old competent to testify. *North Texas Const. Co. v. Bostick* (Civ. App.) 80 S. W. 109.

A child held erroneously permitted to testify, where his examination disclosed that he was ignorant as to the consequences of false swearing. *North Texas Const. Co. v. Bostick*, 98 T. 239, 83 S. W. 12.

18. Infamy or conviction of crime.—In civil action, a witness is not disqualified because he has been convicted and sent to the penitentiary for theft. *Missouri, K. & T. Ry. Co. of Texas v. De Bord*, 21 C. A. 691, 53 S. W. 587.

That the deposition of a witness incidentally showed that he was incarcerated could not supply the place of primary evidence of conviction as evidence to prove his incompetency. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 98 T. 76, 81 S. W. 4.

The exclusion of a deposition of one under sentence for a felony is not error. *Gulf, C. & S. F. Ry. Co. v. Johnson* (Civ. App.) 86 S. W. 34.

The defense of adultery of plaintiff in divorce may be proved by testimony of particeps criminis. *Oster v. Oster* (Civ. App.) 130 S. W. 265.

19. Examination of witness as to competency.—Where improper questions were allowed, eliciting proper testimony, held there was no error in allowing it to stand. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

20. Extrinsic evidence as to competency in general.—A witness, convicted and sentenced for a felony, held incompetent to testify, though the sentence of the court was not produced in support of the objection. *Gulf, C. & S. F. Ry. Co. v. Johnson* (Civ. App.) 77 S. W. 648.

21. Determination as to competency.—The burden of proving a witness incompetent is upon the objector. *Rogers v. Crain*, 30 T. 284; *Spann v. Glass*, 35 T. 761.

A bill of exceptions held not to show error in refusing to allow a juror to be sworn as a witness. *International & G. N. R. Co. v. Foster*, 45 C. A. 334, 100 S. W. 1017.

In a suit to set aside a conveyance by plaintiff, an incompetent, plaintiff held to have been properly excluded as a witness because of present incapacity, and not because of her allegation of prior insanity. *Holland v. Riggs*, 53 C. A. 367, 116 S. W. 167.

The competency of a witness to testify is primarily for the trial judge. *Lefkowitz v. Sherwood* (Civ. App.) 136 S. W. 850.

22. Questions calling for answer tending to disgrace witness or subject him to prosecution.—See Rule 1, post.

23. Fiduciary or contract relations in general.—Telegraphic messages in the possession of the officers of a telegraph company held not privileged communications. *Ex parte Gould*, 60 Cr. R. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

24. Communications to or advice by attorney or counsel.—A communication to an attorney to be privileged, so that it cannot be used in evidence, must be made for the purpose of obtaining professional advice or aid in respect to the particular matter to which it refers. Hence, a communication made to an attorney by one party for the purpose of having it made known to the adverse party is not a privileged communication. *Henderson v. Terry*, 62 T. 281.

It was error to require defendant to relate on cross-examination a confidential communication between him and his attorney. *Herring v. State* (Cr. App.) 42 S. W. 301.

A statement of a fact by a client to his attorney, to be incorporated in a pleading to be filed in court, is not a privileged communication. *San Antonio & A. P. Ry. Co. v. Brooking* (Civ. App.) 51 S. W. 537.

A witness should not be allowed to disclose statements by the contestant of a will, made to him as her attorney in a different cause. *McIntosh v. Moore*, 22 C. A. 22, 53 S. W. 611.

Cross-examination held properly excluded on the ground that it was as to a privileged communication between attorney and client. *Dyer v. McWhirter*, 51 C. A. 200, 111 S. W. 1053.

The rule making incompetent testimony as to communications by a client to his attorney held to be limited to cases strictly within the principle of the policy giving it birth. *Hyman v. Grant*, 102 T. 50, 112 S. W. 1042.

Certain testimony of an attorney held not inadmissible, as involving a confidential communication from his client. *Sarro v. Bell* (Civ. App.) 126 S. W. 24.

25. — Relation of attorney and client.—A conversation between an attorney and client held privileged. *Gulf, C. & S. F. Ry. Co. v. Gibson*, 42 C. A. 306, 93 S. W. 469.

In prosecution for perjury, testimony as to transaction between attorney and accused, acting on behalf of client, held inadmissible. *Rosebud v. State*, 50 Cr. R. 475, 98 S. W. 858.

A statement of facts, made to an attorney with the view of employing him, is privileged, though the suit was not brought by him. *International & G. N. R. Co. v. Duncan*, 55 C. A. 440, 121 S. W. 362.

26. — Professional character of employment or transaction.—Evidence held not inadmissible as of a transaction between attorney and client in a professional capacity. *Hyman v. Grant*, 102 T. 50, 112 S. W. 1042.

A witness consulted by the defendant as an attorney and who advised the defendant, understanding that the relation of attorney and client existed as to the matter, cannot be questioned about such matter. *Menefee v. State* (Cr. App.) 149 S. W. 138.

27. — Subject-matter of communications or advice in general.—In an action against a carrier for injuries to live stock, an instruction by plaintiff to his attorney as to the amount he should claim from the company held privileged. *Ft. Worth & D. C. Ry. Co. v. Lock*, 30 C. A. 426, 70 S. W. 456.

In a prosecution for theft, it was error to compel defendant's attorney to testify that defendant gave him two five-dollar bills as a fee. *Holden v. State*, 44 Cr. R. 332, 71 S. W. 600.

The act of a witness held, even if done in his professional character as an attorney, not to be privileged, because done to perpetrate a fraud. *Hyman v. Grant*, 102 T. 50, 112 S. W. 1042.

A qualified threat, made by defendant against deceased in the presence of defendant's attorney, held not a privileged communication. *Pearson v. State*, 56 Cr. R. 607, 120 S. W. 1004.

It was not error to permit a party to prove by the other party on cross-examination that his attorney had read to him a deposition made in prior proceedings in the case; such matter not being a privileged communication between attorney and client. *Danner v. Walker-Smith Co.* (Civ. App.) 154 S. W. 295.

28. — Instructions as to will or conveyance.—Evidence of an attorney that deeds executed by his clients were in fraud of creditors of the grantor held not privileged. *Stone v. Stitt*, 56 C. A. 465, 121 S. W. 187.

The rule that conversations between attorney and client are privileged held not to apply to conversations between a testator and his attorney as to the disposition of his property. *Pierce v. Farrar* (Civ. App.) 126 S. W. 932.

Communications to attorney acting merely as a scrivener in writing a deed, and giving no advice, held not privileged, so that the attorney could testify thereto. *Childress v. Tate* (Civ. App.) 148 S. W. 843.

29. — Mode or form of communications.—A statement written by defendant, which he intended to give his counsel, found on his person after arrest for homicide, held not a privileged communication. *Renfro v. State*, 42 Cr. R. 393, 56 S. W. 1013.

A letter written by a railroad's general counsel to its local attorney, relating to an issue arising at the trial of an action against the railroad company, held privileged. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 43 C. A. 549, 96 S. W. 1087.

Where defendant's attorney obtained certain notes, alleged to have been forged, from third persons, and not from his client, his professional relation did not render him incompetent to testify with reference to obtaining them. *Jordan v. State* (Cr. App.) 143 S. W. 623.

30. — Confidential character of communications or advice.—A statement of a fact made by a client to his attorney, to be alleged in a pleading, is not a confidential communication between attorney and client. *San Antonio & A. P. Ry. Co. v. Brooking* (Civ. App.) 51 S. W. 537.

31. — Communications through or in presence or hearing of others.—Statements of party to action to his attorney, heard by employé of such attorney, held not privileged. *Morton v. Smith* (Civ. App.) 44 S. W. 683.

It is not reversible error to permit the state in a criminal case to call the attorney of accused to prove what accused testified to on a former trial. *Yardley v. State*, 50 Cr. R. 644, 100 S. W. 399, 123 Am. St. Rep. 869.

32. Persons entitled to assert privilege.—Though testator by his will released plaintiff's debt, held, in an action to cancel his deed given to testator on the ground that it was merely security for the debt, that the attorney who drew the will could not testify

that testator told him the deed was given as a mortgage. *Emerson v. Scott*, 39 C. A. 65, 87 S. W. 369.

33. **Waiver of privilege.**—Plaintiff held to have waived bar of "privilege" to a communication testified to by defendant's counsel by failing to object to other testimony relative thereto. *Shelton v. Northern Texas Traction Co.*, 32 C. A. 507, 75 S. W. 338.

34. **Opinion and expert testimony.**—See Rule 36, post.

III. Demonstrative Evidence

35. **Identity.**—On a prosecution for assault with intent to rape, it was not permissible for the state to require accused to place a cap on his head for the purpose of identification by prosecutrix. *Turman v. State*, 50 Cr. R. 7, 95 S. W. 533.

36. **Age.**—In suit for illegally selling liquor to plaintiff's minor sons, putting witnesses on stand and proving by each his age, for purposes of comparison, held improper. *Poynor v. Holzgraf*, 35 C. A. 233, 79 S. W. 829.

37. **Wounds and other injuries.**—In an action for personal injuries, where evidence of the injury to plaintiff's foot is fully shown, there is no error in permitting him to exhibit it to the jury. *Texas Midland R. R. v. Brown* (Civ. App.) 58 S. W. 44.

In an action for injuries, it was proper for plaintiff, while testifying as a witness, to exhibit his person to the jury, showing the extent of his injuries. *Missouri, K. & T. Ry. Co. of Texas v. Moody*, 35 C. A. 46, 79 S. W. 856.

That plaintiff in action for personal injuries exhibited to jury his bared breast did not deprive him of the right to refuse to do so again. *Houston & T. C. R. Co. v. Anglin* (Civ. App.) 86 S. W. 785.

In an action for personal injuries, fragments of bones taken from plaintiff's head as a result of the injuries were admissible in evidence. *St. Louis & S. F. R. Co. v. Mathis*, 101 T. 342, 107 S. W. 530.

In a personal injury action it was not error to permit plaintiff to exhibit his injuries to the jury. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Civ. App.) 132 S. W. 845.

38. **Compelling person injured to submit to examination by physicians.**—As to the authority of the court to compel the plaintiff in a suit for personal injuries to submit to an examination by a physician, see *Railway Co. v. Underwood*, 64 T. 463; *Railway Co. v. Johnson*, 72 T. 95, 10 S. W. 325.

When an article to which testimony relates can be brought into court and exhibited to the jury it is proper that it should be done. *Hays v. Railway Co.*, 70 T. 602, 8 S. W. 491, 8 Am. St. Rep. 624; *Railway Co. v. Raspberry*, 13 C. A. 185, 34 S. W. 794.

The court will not appoint physicians to examine the body of a person injured. *Railway Co. v. Pendery*, 14 C. A. 60, 36 S. W. 793.

Refusal to require a physical examination in a personal injury case was not error, where plaintiff expressed a willingness to be examined, but his counsel opposed it. *Ft. Worth & R. G. Ry. Co. v. White* (Civ. App.) 51 S. W. 855.

The court has no power in a personal injury case to appoint surgical experts, and order an examination by them of plaintiff, for the purpose of obtaining the evidence of such experts as to the nature and extent of plaintiff's injuries. *Galveston, H. & S. A. Ry. Co. v. Sherwood* (Civ. App.) 67 S. W. 776.

In an action for injuries, the trial court has no authority to compel plaintiff to submit to an examination by physicians to be appointed by the court. *Austin & N. W. R. Co. v. Cluck* (Civ. App.) 73 S. W. 569.

The refusal to compel plaintiff in a personal injury action to submit to a physical examination by physicians held not erroneous. *Gulf, C. & S. F. Ry. Co. v. Brown* (Civ. App.) 75 S. W. 807.

In an action for injuries to a married woman, which depended entirely on subjective symptoms, it was not error to decline to compel her to submit to a physical examination. *Gulf, C. & S. F. Ry. Co. v. Gibbs*, 33 C. A. 214, 76 S. W. 71.

In an action for injuries, the court has no power to compel plaintiff to submit to a physical examination. *St. Louis & S. W. Ry. Co. of Texas v. Lindsey* (Civ. App.) 81 S. W. 87.

A court cannot compel a party against his consent to submit to a physical examination by physicians. *International & G. N. R. Co. v. Butcher* (Civ. App.) 81 S. W. 819.

Refusal of a court to require plaintiff to submit to a further physical examination held not error. *International & G. N. R. Co. v. Gready*, 36 C. A. 536, 82 S. W. 1061.

A plaintiff in an action for personal injuries who voluntarily exhibits them to jury held required to exhibit them to a physician at defendant's request. *Houston & T. C. R. Co. v. Anglin*, 99 T. 349, 89 S. W. 966, 2 L. R. A. (N. S.) 386.

It was not error to refuse to require one suing for personal injury to undergo examination by defendant's physicians. *Taylor v. White* (Civ. App.) 113 S. W. 554.

Defendant could not require the court to appoint physicians to examine plaintiff, or compel plaintiff to submit to such examination. *Missouri, K. & T. Ry. Co. of Texas v. Rogers*, 55 C. A. 93, 117 S. W. 939.

The consent of a plaintiff in an injury action to be examined by a physician appointed by the court, if his attorney advised it, held not such consent as to justify an examination by a physician appointed by the court, where the attorney only consented to an examination by a physician agreed upon by the parties. *San Antonio & A. P. Ry. Co. v. Spencer*, 55 C. A. 456, 119 S. W. 716.

39. **Autopsy.**—The court has inherent power to order the exhuming of a dead body on it appearing that justice and right will be defeated in case such order is not made. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

40. **Weapons, missiles and other instruments.**—Material things, such as scraps of leather, clothing, instruments of crime, are, within the discretion of the court, admissible in evidence. *Burris v. Endy*, 1 App. C. C. § 1307.

41. **Articles subject of or connected with controversy.**—The exhibition to the jury, by defendant, of selected articles from one class of goods only of the general stock converted, as evidence of the character of the stock in general, is error. *Garrity v. Rankin* (Civ. App.) 55 S. W. 367.

On the issue of negligence in permitting rotten ties to remain in a railroad track, pieces of wood, identified as parts of the ties, held admissible in evidence. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

Art. 3147, providing for a contest of a primary election, is not void as providing no adequate procedure for the trial; the act fixing the venue, and the time for commencing the proceedings, prescribing the essentials of contestant's pleading, and providing for service on contestee of notice of the filing of the contest, and a statement of the grounds of the contest, and of notice of the time set for the hearing, all to be prepared and issued by the clerk of the district court, and served five days before the hearing, also, providing that witnesses may be summoned, and by necessary implication sworn and examined, and that, if deemed necessary, the court may unlock the ballot boxes and examine their contents, the omission to prescribe rules of evidence being immaterial in view of this article requiring all courts to observe the common-law rules of evidence, where not otherwise provided, and no rights of contestees being invaded by the failure to expressly authorize him to file an answer and amend it, it being probable that he can do both, and a default judgment not being permissible, but contestant being required to show a disregard or violation of the law, but for which the result of the election would have been different. *Anderson v. Ashe* (Civ. App.) 130 S. W. 1044.

In an action for the wrongful seizure of household furniture, the refusal to allow defendant to exhibit the articles to plaintiff while testifying held not erroneous. *South-er v. Hunt* (Civ. App.) 141 S. W. 359.

It was not error not to require the jury to personally examine the machine on which an employé was injured, where because of a fire the machine was not in the same condition as at the time of the accident. *Gamer Co. v. Gamage* (Civ. App.) 147 S. W. 721.

42. **Duplicates, models and casts.**—There was a proper foundation laid for exhibiting in court a model of an appliance, where the only difference between the actual appliance used and the model was that one was made of metal and the other of leather. *Texas Machinery & Supply Co. v. Ayers Ice Cream Co.* (Civ. App.) 150 S. W. 750.

43. **Writings submitted for comparison.**—A paper not already in evidence and having no connection with the issue to be tried cannot be introduced to establish a signature in order that it may be compared with a signature the genuineness of which is controverted. *Smyth v. Caswell*, 67 T. 573, 4 S. W. 848; *Kennedy v. Upshaw*, 64 T. 411; *Cook v. First Nat. Bank* (Civ. App.) 33 S. W. 998.

Handwriting may be proved by comparison with admitted signatures. *Wagoner v. Rupy*, 69 T. 700, 7 S. W. 80.

Writing proven how. *Cannon v. Sweet* (Civ. App.) 28 S. W. 718; *Id.* 29 S. W. 947; *Mardes v. Myers*, 28 S. W. 693, 8 C. A. 542; *Millington v. Millington* (Civ. App.) 25 S. W. 320; *Steiner v. Lester* (Civ. App.) 23 S. W. 718.

The common-law rule which disallows the use of a writing, as a standard of comparison, which is not competent evidence upon some other issue in the case, does not apply when the instrument offered in evidence is admitted to be genuine. Some courts extend the exception to cases where the signature of the party was established by the most satisfactory evidence. *Cannon v. Sweet* (Civ. App.) 29 S. W. 947; *Id.* 28 S. W. 718. See *Adkins v. Galbraith*, 10 C. A. 175, 30 S. W. 291.

On an issue of the forgery of a certified copy of a deed having an alleged illegal seal the court held to have properly permitted the introduction of certain evidence for purposes of comparison. *Loring v. Jackson*, 43 C. A. 306, 95 S. W. 19.

A certain deed held properly admitted for the purpose of comparing the signature thereto with the signature to another document on an issue as to the identity of the one who executed the latter. *Woodward v. Keck* (Civ. App.) 97 S. W. 852.

A witness who denies his signature to an instrument may not, on direct examination, for the purpose of a comparison of his handwriting, write his name twice on a piece of paper in the presence of the jury, for the purpose of having the papers used to compare his handwriting. *Wade v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 110 S. W. 84.

A carbon copy of a writing, made by the pressure of a pencil on the original and the original, are each the writings of the party, and the carbon copy is not a copy of the original writing; and hence the carbon copy is admissible for the purpose of comparison of handwriting. *Id.*

Handwriting cannot be proven by comparison with other papers claimed to have been signed by the witness, which are not relevant to any issue in the case, where objection is seasonably made. *Id.*

Where a proper standard of comparison of handwriting is before the jury, comparison may be made by the jury itself, or with the assistance of expert testimony. *Id.*

A document containing the admitted signature of defendant, but irrelevant to the issues in the case, held inadmissible as a basis of comparison with alleged signature of defendant. *Brin v. Gale* (Civ. App.) 135 S. W. 1133.

The rule that handwriting may not be proved by comparison of hands obtains in Texas. *Id.*

44. **Experiments in court.**—In an action for personal injuries, it is not error to permit a physician to demonstrate to the jury the nature and extent of the injury by experimenting with plaintiff in their presence. *Missouri, K. & T. Ry. Co. of Texas v. Lynch*, 40 C. A. 543, 90 S. W. 511.

There being evidence that a machine was in the same condition as when converted by defendant, held that, though there was also evidence that it had been repaired after the conversion, it was not error to allow it to be exhibited to, and manipulated before, the jury. *St. Louis & S. F. Ry. Co. v. Ewing* (Civ. App.) 126 S. W. 625.

In action against manufacturer for injuries caused by soap, permitting test by pouring vinegar on the soap held not error. *Armstrong Packing Co. v. Clem* (Civ. App.) 151 S. W. 576.

IV. Documentary Evidence

45. **Particular statutory matters.**—See notes under Arts. 3688-3713, post.

46. **Admissibility of public or official records and certificates in general**—**Notice of view by jury.**—In trespass to try title to land condemned by a county for a public road,

published notice by the jury of view held admissible. *Asher v. Jones County*, 29 C. A. 353, 68 S. W. 551.

47. — **Maps.**—In trespass to try title the official map of the county, compiled after the institution of the suit, held properly received in evidence. *Sullivan v. Solis*, 52 C. A. 464, 114 S. W. 456.

A levy map held not admissible to limit a deed previously executed. *Morse's Heirs v. Williams* (Civ. App.) 142 S. W. 1186.

48. — **Laws.**—See notes under Arts. 3692, 3693.

Existence of domestic corporation, see notes under Art. 1132.

The corporate capacity of a foreign corporation was proven by the production of a copy of the general law of the state where organized providing for the formation of such corporations, certified by the secretary of state of such state, and of the certificate of organization. *W. E. M. Co. v. Curtis*, 1 App. C. C. § 729.

49. — **Ordinances.**—See notes under Art. 821.

50. — **Judicial acts and records in general.**—See, also, notes under Art. 3694.

A subpoena is evidence that a witness was subpoenaed. *Flores v. Thorn*, 8 T. 377; *Crawford v. Crain*, 19 T. 145.

The petition and judgment in a previous suit against a tenant are inadmissible as evidence to defend an action by the landlord. *Read v. Allen*, 56 T. 176.

A deed made by the officer to a purchaser at an execution sale is competent evidence to show that the adverse party claims under a common source, without introducing the judgment and execution. *Sellman v. Hardin*, 58 T. 86.

A record of a court showing a conviction of the husband, on his plea of guilty to a charge of having assaulted his wife, is not evidence. *Endick v. Endick*, 61 T. 559.

Judgments in suits by executors against various persons for purchase money of land sold held admissible to show executor's acquiescence in the sale. *Terrell v. McCown*, 91 T. 231, 43 S. W. 2.

In action to recover rent, where tenant relies on payment to a third person, judgment enjoining such third person from collecting the rent held admissible. *Thomas v. Judy* (Civ. App.) 44 S. W. 890.

A sheriff's deed held properly admitted in evidence to show privity of claim between defendant's predecessor in title and himself. *Collier v. Coutts* (Civ. App.) 45 S. W. 485.

A judgment vesting title to land in plaintiff's ancestors is admissible against one whose ancestors were not parties to the action as a link in plaintiff's chain of title. *Owens v. New York & T. Land Co.* (Civ. App.) 45 S. W. 601.

Where, by wrongful issuance of injunction, suit to enforce trust deed is restrained until debt has become barred, in subsequent proceeding to appoint another trustee, pleadings and judgment in the case are evidence to show that it was improperly issued. *Davis v. Converse* (Civ. App.) 46 S. W. 910.

The report of the master on a claim against a company in the hands of a receiver, stating that certain persons are primarily liable, held not evidence of said persons' liability in an action by claimant against them on the debt. *San Antonio & G. S. Ry. Co. v. Ryan* (Civ. App.) 47 S. W. 749.

Minutes of a commissioners' court regarding a county road, purporting to be laid out on a boundary line in dispute, held admissible to show acquiescence in the line. *Vogt v. Geyer* (Civ. App.) 48 S. W. 1100.

Where plaintiff claims under sheriff's deed, the judgment, execution, and return are admissible in evidence. *Kerr v. Oppenheimer*, 20 C. A. 140, 49 S. W. 149.

A decree awarding each party to a suit an undivided half interest in certain land, though recorded before the partition, held admissible to support a title thereunder. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

In trespass to try title, a bill of exceptions which had been filed by plaintiff in a case in the federal court between plaintiff and defendant's predecessor in title is inadmissible. *New York & T. Land Co. v. Votaw* (Civ. App.) 52 S. W. 125.

An objection by plaintiff to the introduction in evidence of the proceedings by a receiver, that plaintiff was not a party to the receivership suit, was not good, where it appeared that he became a party as an intervening creditor. *French v. McCready* (Civ. App.) 57 S. W. 894.

Abstract of a judgment on which execution was subsequently issued held admissible to show that one purchasing subsequent to the judgment did so in bad faith. *Loan & Deposit Co. of America v. Campbell*, 27 C. A. 52, 65 S. W. 65.

An objection that a judgment in another suit affecting the rights of the parties was improperly admitted as evidence, because an appeal had been taken therefrom, etc., was untenable, where such judgment had been in fact settled, and where the time for the appeal had elapsed. *Glaze v. Johnson*, 27 C. A. 116, 65 S. W. 662.

In trespass to try title, a judgment against several defendants, from one of whom plaintiff purchased and under which the land was sold, held admissible over objection that a stipulation in the transfer to plaintiff released the co-defendants. *Tinsley v. Corbett*, 27 C. A. 633, 66 S. W. 910.

In trespass to try title, a judgment under which plaintiff purchased held not subject to be excluded as evidence on the ground that it was not shown that the land therein ordered sold was not sold in accordance with the judgment. *Id.*

In trespass to try title, a judgment under which plaintiff purchased held admissible in evidence over objection that a payment by a person from whom plaintiff purchased the judgment to the judgment creditor discharged and satisfied it. *Id.*

Certain proceedings by administrator held admissible, with evidence of ratification, against plaintiffs in trespass to try title claiming under another estate. *Lane v. De Bode*, 29 C. A. 602, 69 S. W. 437.

Where, in trespass to try title, the plaintiff claimed through an administrator's sale, the orders of the probate court directing the sale held admissible in evidence. *Norwood v. Snell* (Civ. App.) 69 S. W. 642.

Rejection of an order of court turning over the residue of an estate held not error, the record not showing the question was part of the residue. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

Plaintiff cannot prove title to land by a judgment in a suit to which neither defendants nor their vendors were parties. *Id.*

Judgment by a grantee from a grantor in plaintiff's chain of title against defendant's predecessors in interest held admissible in evidence as an assertion of title. *Lochridge v. Corbett*, 31 C. A. 676, 73 S. W. 96.

Judgment vesting in plaintiff's title of third persons to land held admissible as muniment of title against defendant. *Ellis v. Le Bow*, 96 T. 532, 74 S. W. 528.

In an action by a railroad company to recover property sold under a judicial sale, a valid deed to the purchaser held admissible. *San Antonio & G. S. Ry. Co. v. San Antonio & G. R. Co.* (Civ. App.) 76 S. W. 782.

In trespass to try title, probate proceedings appointing plaintiff administratrix of the community estate of herself and her deceased husband held admissible in evidence. *Rogers v. Tompkins* (Civ. App.) 87 S. W. 379.

Certain judgment recitals held competent, though not conclusive, evidence in subsequent action between parties and privies of parties to the action in which judgment was rendered. *State v. Ortiz*, 99 T. 475, 90 S. W. 1084.

In trespass to try title, a judgment in an action between the parties' predecessors in interest held admissible. *Veatch v. Gray*, 41 C. A. 145, 91 S. W. 324.

In trespass to try title, a sheriff's deed under which plaintiff claimed held inadmissible. *Moore v. Kempner*, 41 C. A. 36, 91 S. W. 336.

In trespass to try title, a certain judgment in a partition suit held not admissible as against plaintiff. *Barrett v. McKinney* (Civ. App.) 93 S. W. 240.

In trespass to try title to land sold by a bankrupt's assignee, the assignee's report of sale held admissible to show that such assignee recognized the bankrupt as his vendee, and that the bankrupt's attorneys, to whom the land was also conveyed, paid no consideration. *Beall v. Chatham* (Civ. App.) 94 S. W. 1036.

Where plaintiff defended its failure to deliver rice stored with it by defendants on the ground that it had been taken under a writ of sequestration, the writ held admissible in evidence. *Borden v. Le Tulle Mercantile Co.* (Civ. App.) 99 S. W. 128.

Defects in a partition of land held not to affect its force as evidence of the discharge of a resulting trust. *Scranton v. Campbell*, 45 C. A. 388, 101 S. W. 285.

The failure of the order confirming a guardian's sale to describe the land fully held not to affect its admissibility in an action of trespass to try title. *Teague v. Swasey*, 46 C. A. 151, 102 S. W. 458.

In an action of scire facias to revive a judgment of the court of civil appeals entered of record in the district court, the judgment as entered of record in the district court is admissible in evidence. *Henry v. Red Water Lumber Co.*, 46 C. A. 179, 102 S. W. 749.

In an action involving the validity of a deed, a judgment in a former trial involving the same deed held inadmissible. *Walker v. Erwin*, 47 C. A. 637, 106 S. W. 164.

Probate court orders held to sufficiently identify land, and to be admissible as evidence in an action of trespass to try title. *Shirley v. Walker* (Civ. App.) 110 S. W. 995.

To show the execution of a lost deed, a statement in a statement of facts in a cause on file in the supreme court held admissible. *Rushing v. Lanier*, 51 C. A. 278, 111 S. W. 1089.

Evidence as to proceedings in administration of an estate will be admissible on the question of identity of the person whose estate was administered, although the allegations in the petition for administration do not show any right or authority for administration. *Baille v. Western Live Stock & Land Co.*, 55 C. A. 473, 119 S. W. 325.

A partition decree awarding land sued for to one of the heirs who had conveyed his interest by a deed of trust held admissible in trespass to try title by the purchaser to recover the land so set off. *Anderson v. Casey-Swasey Co.* (Civ. App.) 120 S. W. 918.

In an action for replevin, the replevin bond was admissible in evidence. *Lewter v. Lindley* (Civ. App.) 121 S. W. 178.

In trespass to try title, a judgment by agreement between heirs of a patentee and plaintiff's remote grantor in a suit for recovery of title and possession to the land, divesting the heirs' title and vesting it in the remote grantor, was admissible as a link in plaintiff's chain of title, vesting title in the grantor by estoppel and having the same prima facie effect in placing in him the title inherited by the heirs as their deed would have had. *Ingalls v. Orange Lumber Co.*, 56 C. A. 543, 122 S. W. 53.

In an action to recover title to property purchased, an application of defendant to be appointed temporary administrator held inadmissible. *Dooley v. Bolders* (Civ. App.) 128 S. W. 690.

Certain recitals held inadmissible to show marriage between decedent and plaintiff. *Berger v. Kirby* (Civ. App.) 135 S. W. 1122.

It was not error to exclude from evidence instructions refused in another suit, where they were not legitimate on any issue raised in this suit. *Smith v. Burgher* (Civ. App.) 136 S. W. 75.

A judgment, in a former action of trespass to try title between the same parties, held properly admitted in the present action despite an inaccuracy in defendant's name. *Hunt v. Wright* (Civ. App.) 139 S. W. 1007.

In trespass to try title, in which defendant claimed under a judgment foreclosing a tax lien, evidence of a decree reversing such judgment more than a year after defendant purchased at the sale pursuant thereto held not admissible. *Jameson v. O'Neill* (Civ. App.) 145 S. W. 680.

Where title apparently was in C., who was party to a partition suit in which a decree divested his right and vested it in T., the decree was admissible in trespass to try title though plaintiff therein was a stranger to the decree. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

Judgment held admissible in trespass to try title to show claim of title, and also as a link in the chain of title, though the parties to the present action were not parties to the judgment. *Blunt v. Houston Oil Co.* (Civ. App.) 146 S. W. 248.

In an action by the beneficiary of a life policy, where insured's wife claimed the proceeds under an agreement with her husband to insure in her favor in consideration of her agreeing to transfer their homestead, the admission of her application as guardian for her minor son, in which she listed another policy as his property, was proper to determine

the amount of insurance available for the wife and son. *Jones v. Jones* (Civ. App.) 146 S. W. 265.

In trespass to try title, where defendant claimed a part of the land by a chain of title from a patentee, the report of a commissioner in partition, who was the grantee of the patentee at some uncertain date and not shown to have ever been divested of title, allotting the land to defendant's predecessors, could not be considered a circumstance to prove a transfer from him without a showing that he had previously held title. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

In an action on a note in which defendant relied on coverture, a decree of divorce is admissible in evidence to show that she was a feme sole at the time of suit, and had ratified the contract made while she was a feme covert. *Peck v. Morgan* (Civ. App.) 156 S. W. 917.

Where the recitals in certified copies of the orders which authorized an administrator to sell land are in evidence, with the deed, in a suit to try title, held, that no other proof of decedent's death, nor of administrator's appointment or qualification, need be offered. *Barton v. Davidson* (Civ. App.) 45 S. W. 400.

51. — **Pleadings.**—Pleadings in a suit are not admissible in evidence against persons not parties thereto. *Howard v. Parks*, 21 S. W. 269, 1 C. A. 603.

The pleadings are admissible to show that an error in a judgment was due to clerical misprision. *Bailey v. Crittenden* (Civ. App.) 44 S. W. 404.

The pleadings in a foreclosure suit are competent to show when the proceedings were begun. *Oppermann v. McGown* (Civ. App.) 50 S. W. 1078.

Where a judgment in another action between the same parties is pleaded as *res judicata*, the petition and answer in such action held admissible to support such plea. *San Antonio & G. S. Ry. Co. v. San Antonio & G. R. Co.* (Civ. App.) 76 S. W. 782.

In action for right of way, answers showing defendants' title to the land held admissible in evidence. *Holman v. Patterson*, 34 C. A. 344, 78 S. W. 989.

In an action by a broker for commissions earned in procuring a purchaser, the answer of the purchaser in a suit by a third person held properly admitted in evidence. *Clark v. Wilson*, 41 C. A. 450, 91 S. W. 627.

There is no error in sustaining an objection to the admission of an original petition, which had been amended and did not appear to contain anything material. *Hudson v. Slate*, 53 C. A. 453, 117 S. W. 469.

In an action to subject land to a judgment lien, a pleading in an action in which the land was divided amongst the defendants held admissible to justify cancellation of a judgment refusing to subject it to the lien. *Davis v. Jones* (Civ. App.) 149 S. W. 727.

In an action to enforce a judgment lien, a pleading in another action held not inadmissible as affecting strangers to the present suit. *Id.*

52. — **Records of justices of the peace.**—A judgment by default in a justice court on service by publication held inadmissible to show want of notice or appearance in a suit filed against defendant about the same time in a county court. *East Texas Land & Improvement Co. v. Graham*, 24 C. A. 521, 60 S. W. 472.

53. — **Official records and reports in general.**—In trespass to try title to land condemned by a county as a public road, order establishing the road held not objectionable as evidence on the ground that no legal notice had been published, and that the order showed that the commissioners' court had refused to pay any compensation for the land taken. *Asher v. Jones County*, 29 C. A. 353, 58 S. W. 551.

In an action to recover school lands on a certificate, it is not error to admit in evidence the application made by plaintiff for the purchase of the land. *Simon v. Stearns*, 17 C. A. 13, 43 S. W. 50.

An order of the board of land commissioners, which showed that an unconditional certificate of purchase had been issued to the grantor of plaintiff's intestate, held admissible to show title. *Karnes v. Butler* (Civ. App.) 62 S. W. 950.

An order of the board of land commissioners that the unconditional certificate to public land was awarded to the purchaser of the conditional certificate at sheriff's sale held admissible to explain the conditional certificate. *Id.*

The fact that the amount remaining unpaid on public land was erroneously recited in the obligation of the purchaser held not to render the purchaser's application inadmissible in evidence in proof of the purchaser's title, where he had otherwise substantially complied with the law. *Joyce v. Sisk*, 26 C. A. 68, 62 S. W. 960.

In trespass to try title, application to purchase school lands, omitting the word "land," but showing appellant wished to purchase the "survey" for a home, held admissible. *Goethal v. Read*, 35 C. A. 461, 81 S. W. 592.

In an action on a tax collector's bond, certain schedules, signed by some of the sureties, attached to the bond and pleaded as an exhibit to the petition, held admissible to show the execution of the bond. *United States Fidelity & Guaranty Co. v. Fossati* (Civ. App.) 81 S. W. 1038.

In trespass to try title certain records held admissible in evidence as tending to show title. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

In trespass to try title to strip of land used by defendant county as road, report of jury of view attempting to lay off the road across plaintiff's land held admissible. *Wright & Vaughn v. Fanning* (Civ. App.) 86 S. W. 786.

In an action by a city against a county to recover a municipal square, orders of the commissioners' court through a series of years held admissible as showing authority and control over the property by the county. *City of Victoria v. Victoria County* (Civ. App.) 94 S. W. 368.

Original census roll held inadmissible to show that persons were alive at the time, what persons constituted their family, their ages, or other matters relating to pedigree or heirship. *Gorham v. Settegast*, 44 C. A. 254, 98 S. W. 665.

Proceedings of coroner's inquest held admissible to show cause of decedent's death in an action on a life insurance policy when expressly made evidence by the policy, though not included in the proof of death. *Metropolitan Life Ins. Co. v. Wagner*, 50 C. A. 233, 109 S. W. 1120.

In an action by a delinquent taxpayer to recover certain costs exacted upon pay-

ment of the taxes, certain evidence held admissible. *Tyler & Knudson v. Tom* (Civ. App.) 132 S. W. 850.

In an action on a dramshop keeper's bond, the original application for a license and the stub book showing the issuance of a license, held properly received in evidence. *McElroy v. Sparkman* (Civ. App.) 139 S. W. 529.

54. — **Tax deeds, records and receipts.**—Certificate of comptroller as to assessment or payment of taxes, see notes under Art. 3708.

A recitation in the tax deed that the collector offered the land at public auction at the time, place and in the manner required by law is not evidence of either fact. *Henderson v. White*, 69 T. 103, 5 S. W. 374.

Receipts for taxes on land which identify the land by the proper abstract number, the name of the grantee, the terminal letter of the grantee's name being omitted, are admissible in evidence, leaving the question of the payment of taxes to the jury. *Seemuller v. Thornton*, 77 T. 156, 13 S. W. 846.

A tax certificate is no evidence of title. *Hardy v. Brown* (Civ. App.) 46 S. W. 385.

In action to recover lands, a tax deed, without judgment for taxes, and to which plaintiffs are not parties, is not admissible. *De Garcia v. Lozano* (Civ. App.) 54 S. W. 280.

In trespass to try title which depended on the validity of a tax sale, tax receipts which were not for the taxes sued for were not admissible. *Eels v. Blair* (Civ. App.) 60 S. W. 462.

A tax deed, purporting to convey the land of an "unknown owner," held inadmissible on the issue raised by a claim of common source in trespass to try title. *Bonner v. Bonner*, 34 C. A. 348, 78 S. W. 535.

Under a city charter, held in a suit by the city to collect taxes, that the tax rolls were admissible in evidence to make out a prima facie case for plaintiff. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

A void tax deed is admissible to show a common source of title. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

55. — **Records and returns of surveyors.**—Records of surveys and certified copies thereof, see notes under Art. 3695.

Plaintiff read from the original field notes of the surveyor, made out in the English language, which contained the courses and distances in meandering a stream that bounded the survey, and were translated into the grant, which was in the Spanish language. The date of the survey, as shown by these field notes, was five months before the extending of the title, and before an order of survey issued. Held, that the commissioner for extending titles, having recognized and acted on the survey, the evidence was admissible if it tended to a more certain identification of the land embraced in the grant. *Cook v. Dennis*, 61 T. 246.

Field notes of a section not in controversy, unaccompanied by a patent of the section, or a certified copy, held inadmissible to show that part of the land in controversy is in such section. *Pardee v. Adamson*, 19 C. A. 263, 46 S. W. 43.

Certain field notes held admissible, in connection with parol evidence, to establish the starting point of a survey. *Stewart v. Crosby* (Civ. App.) 56 S. W. 433.

In an action to establish a boundary, the original field notes are admissible at the instance of either party. *Hamilton v. Saunders* (Civ. App.) 73 S. W. 1069.

Field notes are admissible to show a mistake in the patent in relation to the name of the grantee. *New York & Texas Land Co. v. Dooley*, 33 C. A. 636, 77 S. W. 1030.

Field notes of surveyor held admissible in evidence in action of trespass to try title. *Camp v. League* (Civ. App.) 92 S. W. 1062.

In trespass to try title to a tract, surveys of adjacent tracts are admissible to identify the tract in controversy. *Sullivan v. Solis*, 52 C. A. 464, 114 S. W. 456.

In a suit to establish a boundary, the lines of surveyors in attempting to locate the line are not binding on the parties, and the evidence of such surveys is only admitted to aid the jury in finding the location of the line as originally run. *Runkle v. Smith*, 52 C. A. 186, 114 S. W. 865.

56. — **Records kept by United States officers in general.**—In libel for charging that plaintiff imported goods without paying the custom duties thereon, the report of the government officers who investigated the case, not being commented on in the alleged libelous article, was irrelevant and inadmissible. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

A pay roll of a government vessel held admissible to show that a grantor was not present when the deed purported to have been executed. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 334.

57. — **Minutes and memoranda.**—One contracting with a city is not confined to the minutes of the proceedings of the council for proof of his contract. *City of Belton v. Sterling* (Civ. App.) 50 S. W. 1027.

Orders from the minutes of the county court are proper evidence in a suit to determine the area dedicated by a town to the county buildings. *City of Victoria v. Victoria County* (Civ. App.) 115 S. W. 67.

In an action against a city upon notes given in payment of fire hose, the minutes of the city council of its proceedings in reference to the purchase and the resolution authorizing the execution of the notes were properly admitted in evidence. *City of Cleburne v. Gutta Percha & Rubber Mfg. Co.* (Civ. App.) 127 S. W. 1072.

58. — **Official certificates.**—The certificate of the clerk is prima facie evidence of the right of a witness to fees and mileage as stated therein. *Flores v. Thorn*, 8 T. 377; *Gause v. Edminton*, 35 T. 69.

A certificate as to effect of ancient records is incompetent as evidence. *Howard v. Russell*, 75 T. 171, 12 S. W. 525.

Ex parte certificate of the clerk that no claims had been filed against an estate in course of administration is not evidence. *Myers v. Jones*, 23 S. W. 562, 4 C. A. 330.

The indefiniteness of the description of the property in an assessment certificate does not necessarily make it void or inadmissible. *Hutcheson v. Storrie* (Civ. App.) 48 S. W. 785.

In an action to recover land awarded to defendant as additional school land, the land commissioner's certificate of proof of defendant's settlement on his home section held not admissible as against plaintiff. *White v. Watson*, 34 C. A. 169, 78 S. W. 237.

A clerk's certificate on a will after probate held sufficient to show that it was duly recorded, as required by Acts 1848, p. 236, c. 157. *Hymmer v. Holyfield* (Civ. App.) 87 S. W. 722.

The certificate of the secretary of state, declaring that the right of a foreign corporation to do business in the state has been forfeited, is not admissible to prove a forfeiture. *St. Louis E. M. Fireproofing Co. v. Beilharz* (Civ. App.) 88 S. W. 512.

In an action to set aside deeds executed by a married woman, the certificate of the notary to her acknowledgment is not competent as testimony to show that she knew what land was covered by the deed. *Oar v. Davis*, 105 T. 479, 151 S. W. 794, affirming judgment (Civ. App.) 135 S. W. 710.

59. — Patents for land.—A recital in a patent held not evidence that a person was dead when the land certificate was conveyed to him. *Pfeuffer v. Bondies*, 42 C. A. 52, 93 S. W. 221.

60. — Record of conveyances and other private writings.—See notes under Art. 3700.

61. — Certificates of land commissioner.—See notes under Art. 3696.

62. Admissibility of transcripts and certified copies—Ancient instrument.—A certified copy of an ancient instrument not within the control of the court is admissible in evidence (*Holt v. Maverick* [Civ. App.] 24 S. W. 532) without proof of its execution, and, if it cannot be produced, proof of its contents may be made (*Walker v. Peterson* [Civ. App.] 23 S. W. 269).

63. — Judicial records and proceedings in general.—See, also, notes under Arts. 3694, 3706, 5614.

A certified copy of the execution docket is not better evidence than a certified copy of the execution. *Mitchusson v. Wadsworth*, 1 App. C. C. § 977.

A transcript of the proceedings of a court without jurisdiction is admissible to show the proceedings therein, when the fact that such proceedings were had is a material issue. *Ward v. Sutor*, 70 T. 343, 8 S. W. 51, 8 Am. St. Rep. 606.

An order of sale which refers to the judgment is not evidence of the purchaser's title at the sheriff's sale. *Bermea Land & Lumber Co. v. Agoue*, 20 C. A. 655, 50 S. W. 131.

A certified copy of the will, in which the testator devised to plaintiff's intestate a six-seventh interest in land which the testator claimed by virtue of an unconditional certificate of purchase issued by the board of land commissioners, held admissible to show plaintiff's title. *Karnes v. Butler* (Civ. App.) 62 S. W. 950.

In an action to recover the value of goods adjudged to be plaintiff's in garnishment proceedings in the court of civil appeals, the mandate of the court, signed by the chief justice and attested by the clerk and its seal, were properly received in evidence to prove the rendition of a judgment. *Hyde v. Baker*, 26 C. A. 287, 62 S. W. 962.

Where certified copies of the record in a proceeding in a foreign state were not admissible in evidence, because the court in which such proceedings were had was without jurisdiction, partial contents of such copies were not admissible for the purpose of proving statements therein contained. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

In an action of trespass to try title, a probate judge's decree in a guardianship matter held inadmissible. *Teague v. Swasey*, 46 C. A. 151, 102 S. W. 458.

In an action of trespass to try title, a certified copy of a report of sale in a guardianship matter held admissible. *Id.*

64. — Of federal courts in state courts.—The judgment rendered in a United States court upon which action is brought held sufficiently authenticated. *Whitley v. General Electric Co.*, 18 C. A. 674, 45 S. W. 959.

65. — Official documents, records and proceedings in general.—See, also, notes under Arts. 3693, 3696, 3708.

The admission of certified copies of parts of an assessment roll was proper when pertinent to matters in controversy. *Brummer v. City of Galveston* (Civ. App.) 77 S. W. 239.

On an issue as to whether the one under whom plaintiff claimed was the grantee named in a bounty warrant, certain documents held admissible. *Allen v. Halsted*, 39 C. A. 324, 87 S. W. 754.

A mere certified copy of the record of a foreign state is not admissible as evidence of the execution of a deed. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 128 S. W. 629.

An examined copy of a foreign record is admissible as evidence as to the execution of a deed the original of which has been lost. *Id.*

Examined copies of deeds as recorded in another state were admissible to show that the records contained purported copies of the deeds now lost. *William M. Rice Institute v. Freeman* (Civ. App.) 145 S. W. 688.

A certified copy of the findings, opinion, and judgment of the interstate commerce commission is, by Interstate Commerce Act, § 14, admissible in evidence in an action involving the question of the true rate for an interstate shipment. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 156 S. W. 267.

66. — Records and proceedings in land office.—See notes under Arts. 3694, 3696.

In an action between adverse claimants of school lands, certified copies of proofs of occupancy, filed in the general land office by one through whom plaintiff claims title, are not competent evidence. *Spence v. Dawson* (Civ. App.) 67 S. W. 180.

A certified sketch from a map held admissible as evidence of whatever appears thereon. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

67. — Records of conveyances and other private writings.—See, also, notes under Art. 3700.

A certified copy of a power of attorney, registered in another state, is not admissible to prove that the person executing it was in a certain place at the time it was executed. *Texas Tram & Lumber Co. v. Gwin* (Civ. App.) 52 S. W. 110.

Where a certified copy of a grant in a foreign language is also a correct translation thereof, it is admissible in evidence. *Hollifield v. Landrum*, 31 C. A. 187, 71 S. W. 979.

Mutilated records held admissible to show the existence of a deed. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

68. — Articles of Incorporation.—See notes under Art. 1132.

69-71. Requisites of exemplification or certificate in general.—Records in state comptroller's office, see notes under Art. 3696. See, also, notes under Art. 3694.

Erroneous certificates to copies of warrants in county comptroller's office held not to prevent their introduction in evidence. *Harper v. Marion County*, 33 C. A. 653, 77 S. W. 1044.

The federal courts do not require the certificate of a judge of a state court that the attestation of the clerk thereof is in due form. *Edwards v. Smith* (Civ. App.) 137 S. W. 1161.

Where a copy of a deed is certified to by the official custodian in one state, without any seal to his certificate, its admission in another state as evidence was error. *Paul v. Chenault* (Civ. App.) 44 S. W. 682.

A certificate to a copy of a foreign judgment held sufficient. *Varn v. Arnold Hat Co.* (Civ. App.) 124 S. W. 693.

72. Admissibility of private writings and documents in general.—A deed from a Masonic lodge executed by D., senior warden and acting worshipful master, was offered in evidence, and in support of the authority of D. to act the records of the lodge were offered in evidence, from which it appeared that the deed had been recorded in the minutes of the lodge, and the minutes adopted by the body. It was proven that there was no secretary, and the book was produced from the lodge room by the presiding officer, the acting secretary being sick. The book having been produced to show the action of the body itself, and not extraneous facts, it was held to be admissible. *Leach v. Dodson*, 64 T. 185.

Architect's certificates as to cost of completing building after breach of contract by contractor held admissible in evidence over objections stated. *Taub v. Woodruff* (Civ. App.) 134 S. W. 750.

73. — Corporate records and proceedings.—A church register evidence as to pedigree, etc. *Overall v. Armstrong* (Civ. App.) 25 S. W. 440.

A church record of marriage, death, etc., is admissible in evidence. *Howard v. Russell*, 75 T. 174, 12 S. W. 525; *Overall v. Armstrong* (Civ. App.) 25 S. W. 440.

In an action by a railroad company against another railroad company to recover plaintiff's property and franchise sold under a judicial sale, the introduction of defendant's charter in evidence held not error. *San Antonio & G. S. Ry. Co. v. San Antonio & G. R. Co.* (Civ. App.) 76 S. W. 782.

In an action against a building and loan association for the cancellation of a lien and to declare plaintiff's debt usurious, certificates of stock issued to plaintiff held admissible. *American Mut. Bldg. & Sav. Ass'n v. Cornibe*, 35 C. A. 335, 80 S. W. 1026.

Where, in a personal injury suit against a railroad receiver, the company's property was sold to a new corporation, subject to the receiver's liabilities, and the new corporation was made a party defendant, its charter and the receiver's deed held properly admitted in evidence. *Freeman v. McElroy* (Civ. App.) 149 S. W. 423.

74. — Rules.—In action by locomotive engineer for injuries, held proper to admit in evidence a rule making station agents responsible for the position of switches, where no yardmen were employed. *Missouri, K. & T. Ry. Co. of Texas v. Mayfield*, 29 C. A. 477, 68 S. W. 807.

In action against railroad for injuries to employé, rule of railroad forbidding backing of cars over a public crossing or highway, unless there is a man on them to see that the way is clear, held admissible. *Galveston, H. & S. A. Ry. Co. v. McAdams*, 37 C. A. 575, 84 S. W. 1076.

In an action for injuries to a railroad trackman by the explosion of a torpedo, a railroad rule held immaterial and irrelevant to the issues. *Murphy v. Galveston, H. & N. Ry. Co.* (Civ. App.) 96 S. W. 940.

Where a brakeman was injured by the sudden acceleration of the speed of a train a rule requiring a whistle to be sounded when rounding curves where the view is obstructed held irrelevant. *Gulf, B. & K. C. Ry. Co. v. Harrison* (Civ. App.) 104 S. W. 399.

In an action for injuries to a brakeman by the sudden acceleration of the speed of a log train, a rule that trains must not start, except on signal from the conductor, held irrelevant. *Id.*

A rule of a railroad company held admissible to prove the existence of facts recited therein. *Galveston, H. & S. A. Ry. Co. v. Harper*, 53 C. A. 614, 114 S. W. 1168, 1199.

In an action by an engine watcher for personal injuries, held, that the rejected rules of defendant included in his application for employment were relevant, and should have been admitted. *Southern Kansas Ry. Co. of Texas v. McSwain*, 55 C. A. 317, 113 S. W. 874.

Where the plaintiff's intestate was killed on a curve in the track, evidence of defendant's rule requiring whistles to be blown while rounding that curve held admissible. *Gulf, C. & S. F. Ry. Co. v. Brooks* (Civ. App.) 132 S. W. 95.

75. Admissibility of conveyances, contracts and other instruments.—See, also, notes under Art. 3700.

In a suit to try title between the grantees of the decedent's heirs and the grantees of her administrator, a deed held admissible and sufficient to pass title as against the collateral attack made on it by the grantees of decedent's heirs. *Flelds v. Burnett*, 49 C. A. 446, 108 S. W. 1048.

Plaintiff claimed title to six hundred and forty acres of land, part of a league granted to Solomon Bolin, as follows: 1. The grant to Bolin in 1835. 2. A sale by Bolin to John Little of one-half of the league. 3. A sale by Little to Lacy of that tract, reserving six hundred and forty acres in the northwest corner of the tract. 4. A sale of six hundred and forty acres by Little to plaintiff's intestate. The evidence of the title, so far as it is necessary to state, was as follows: Bolin, by his will, dated in 1835, duly probated in 1837, gave to his wife, Lucinda, "my half of the sitio of land which John Little was to clear out of the office on shares, supposed to be laid

between the rivers Trinidad and Neches." On the 28th of August, 1837, the widow of Bolin, joined by her second husband, describing themselves as testamentary administrators of Bolin, and reciting an order of court for that purpose, conveyed to John Little an undivided half of the Bolin league. No order of the court was shown. In 1850 S. W. Blount, husband of the widow of Lacy, filed a petition in the county court reciting that some time in 1837 or 1838 the executor of Solomon Bolin, deceased, by order of the probate court, executed to one John Little a title to one undivided half of said league; that afterwards Little conveyed the tract, less six hundred and forty acres, to Lacy, and prayed for partition. An order of partition was made, dividing the league by a line running east and west, giving the north half to Bolin and south half to the representative of Lacy. The defendants claimed the land in controversy under conveyances from the widow and children of Bolin, executed in 1850-51. It was held that the admission in the will of Bolin was evidence of title in Little to an undivided interest in the land against all claiming under Bolin; and the recitals in the deed by the administrators of Bolin were conclusive against all persons claiming under either of them. *Box v. Lawrence*, 14 T. 545.

A widow suing the administrator and legatees of her deceased husband shows common source of title as to all the legatees mentioned in the will by the introduction of it. *Mitchell v. Mitchell*, 80 T. 101, 15 S. W. 705.

A contract for a sale of land was made by an agent. A cash payment was made, and notes given for the balance, payable "on or before" a certain date. The vendor, on receipt of the cash and notes, returned the latter to his agent by mail for correction. The letter containing the notes was not delivered, but was returned by the post office department to the writer, stamped on the envelope "Return to Writer." The address on the envelope was not legibly written, and the envelope was not stamped with the stamp of the office to which it was directed. On receipt of the returned letter, the vendor, having learned that his agent was in collusion with the vendee, having sold the land for an inadequate price, sent the notes, together with a certified check for the cash payment, to the vendee, and repudiated the sale. In an action for a rescission of the deed, held, that the check was admissible in evidence to show that the contract of sale had never been completed; also that the returned envelope and letter were admissible. *Slator v. Trostel* (Civ. App.) 21 S. W. 285.

A carrier's bill of lading is evidence of shipper's ownership in an action against the carrier. *Parks v. Railway Co.* (Civ. App.) 50 S. W. 708; *Prendergast v. Williamson*, 6 C. A. 725, 26 S. W. 421.

In an action against maker and indorser of a note secured by vendor's lien, deed from the maker and indorser releasing part of the property secured by a lien held admissible. *Smith v. Ojerholm*, 18 C. A. 111, 44 S. W. 41.

Admissibility of trust deed under which defendant claimed, and abstract of title, determined. *Watkins v. Atwell* (Civ. App.) 45 S. W. 404.

Though will giving land to one was not probated, it is admissible to show that he did not take possession of land as tenant in common, but adversely. *Ilig v. Garcia*, 92 T. 251, 47 S. W. 717.

A deed of partition executed between heirs and executor is admissible to show a distribution of the estate. *Devine v. United States Mortg. Co. of Scotland* (Civ. App.) 48 S. W. 585.

A deed executed after commencement of suit is admissible to show a ratification by the grantor of the act of another in executing a deed prior to the suit as his attorney in fact. *McCulloch County Land & Cattle Co. v. Whitefort*, 21 C. A. 314, 50 S. W. 1042.

In an action for overflowing land, it was error to exclude a deed which showed that plaintiff did not own a part of the land damaged. *Texas & P. Ry. Co. v. O'Mahoney* (Civ. App.) 50 S. W. 1049.

In trespass to try title to school lands, it was proper to exclude a lease of the land to plaintiff's grantor, where the grantor had afterwards made an application to purchase. *Ablene Live Stock Co. v. Guinn* (Civ. App.) 51 S. W. 885.

A bond for title held admissible, though plaintiff was guilty of laches, and no decree for specific performance or occupation of the land by either party was shown. *Neyland v. Ward*, 22 C. A. 369, 54 S. W. 604.

A deed conveying the grantor's interest in the land in controversy by virtue of an unconditional certificate of purchase issued by the land commissioners held admissible to show title. *Karnes v. Butler* (Civ. App.) 62 S. W. 950.

Where in trespass to try title, the joint deed to plaintiff's husband and one of defendant's grantors was indorsed on the outside as a joint deed from the grantor therein to defendant's grantors, it was not error to exclude such indorsement from the evidence. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892, 68 S. W. 721.

In an action against a carrier for carrying a passenger out of his way, the unused portion of his ticket held admissible to show contract. *International & G. N. R. Co. v. Evans*, 30 C. A. 252, 70 S. W. 351.

In trespass to try title, where plaintiffs had shown a common source, a deed of the same land from a third party, executed prior to the deed from the common source to plaintiff's predecessors in interest, held not admissible to show an outstanding title. *Gann v. Roberts*, 32 C. A. 561, 74 S. W. 950.

In an action to rescind a contract for an exchange of lands, based on misrepresentation as to defendant's title, a lease to defendant of the lands in question held admissible, as conveying to him whatever title was then owned by the lessor. *Singleton v. Houston*, 35 C. A. 10, 79 S. W. 98.

An instrument reciting appointment of substituted trustee, who sold property under deed of trust, held admissible, on proof of refusal of original trustee to act. *Ward v. Forrester*, 35 C. A. 319, 80 S. W. 127.

In an action for materials furnished for a building pursuant to the order of sureties in the contractor's bond, the bond held admissible to support a consideration for the sureties' promise to pay. *Bartley v. Comer* (Civ. App.) 89 S. W. 82.

In an action by a broker for commissions in procuring a purchaser, an instrument executed by the purchaser procured by the broker held admissible for a specified purpose. *Clark v. Wilson*, 41 C. A. 450, 91 S. W. 627.

In trespass to try title, leases to the land in question executed by plaintiffs were admissible to show that plaintiffs were asserting ownership. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017.

In trespass to try title, lease held admissible to prove that defendants were tenants under plaintiff. *Camp v. League* (Civ. App.) 92 S. W. 1062.

In trespass to try title, plaintiffs held entitled to use in evidence a certain deed to them, executed prior to the filing of their first amended original petition. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

In trespass to try title, a deed under which plaintiffs were not claiming or attempting to deraign title held inadmissible as evidence of a common source of title or for any other purpose. *Id.*

In an action upon a note held proper to admit in evidence a certain contract between the payee and those executing the note. *Kempner v. Patrick*, 43 C. A. 216, 95 S. W. 51.

In an action of trespass to try title, the agreement of plaintiff's grantor to convey to plaintiff, and his deed to her, were properly admitted to show her title. *Cobb v. Bryan* (Civ. App.) 97 S. W. 513.

In an action on promissory notes, where the defense was payment, the fact that certain receipts covered payments shown by certain statements rendered did not make such receipts and statements inadmissible in evidence. *Stone v. Pettus*, 47 C. A. 14, 103 S. W. 413.

An accepted written proposal to maintain a waterworks system held admissible in evidence as the contract. *Bounds v. Hubbard City*, 47 C. A. 233, 105 S. W. 56.

In a suit to try title between the grantees of the decedent's heirs and the grantees of her administrator, a deed held properly admitted in evidence and sufficient to pass the title to the land described therein. *Fields v. Burnett*, 49 C. A. 446, 108 S. W. 1048.

In an action on an instrument acknowledging an indebtedness by defendant to plaintiff's intestate for a balance of money received from her, held error to exclude from evidence deeds showing that lands conveyed to the intestate were paid for by defendant out of funds belonging to intestate though the instrument did not cover such transactions; defendant having pleaded mutual mistake. *Watson v. Parker*, 50 C. A. 616, 111 S. W. 771.

In trespass to try title, where defendants claimed under a deed from T., executed under a power of attorney from the owner, and the deed recited a leasehold to T. and a subsequent conveyance to his principal, as well as the power of attorney, the lease to T. was properly admitted to explain the transaction between T. and his principal. *Neill v. Kleiber*, 51 C. A. 552, 112 S. W. 694.

In trespass to try title, deeds forming plaintiff's claim of title held properly received in evidence. *Milwee v. Phelps*, 53 C. A. 195, 115 S. W. 891; *Buckley v. Runge* (Civ. App.) 136 S. W. 533; *Guilmartin v. Padgett*, 138 S. W. 1143; *Rider v. Radford*, 151 S. W. 1181.

Admissibility of particular deeds in evidence stated. *Uvalde County v. Oppenheimer*, 53 C. A. 137, 115 S. W. 904.

In an action against a telephone company for failure to notify plaintiff of a sick call received over the line of another company, the exclusion of a certain contract between the two companies for the transmission of calls held not erroneous. *Southwestern Telegraph & Telephone Co. v. Owens* (Civ. App.) 116 S. W. 89.

Bills of lading in an action by a seller of coal for damages for breach of contract of purchase held admissible in evidence. *Maricle v. McAlister Fuel Co.*, 55 C. A. 178, 121 S. W. 221.

Evidence of the contents of a deed, in an action for divorce and to set aside a conveyance as in fraud of the wife, held admissible to show notice to the purchaser of the land of plaintiff's title and also on the issue of marriage. *Harlan v. Harlan* (Civ. App.) 125 S. W. 950.

In trespass to try title, a deed in plaintiff's chain of title held admissible against an intervener who made no demand for an abstract of title. *Coler v. Alexander* (Civ. App.) 128 S. W. 664.

In a suit to specifically perform a contract to convey, an abstract of title held not inadmissible. *Collier v. Robinson* (Civ. App.) 129 S. W. 389.

Where a contract was admitted in evidence, other writings which were part of it, and related to the same transaction, were also admissible. *Levy v. Goldsoll* (Civ. App.) 131 S. W. 420.

A power of attorney and a deed executed by a married woman alone, on her fraudulently representing to the grantee that she was single, is properly received in evidence, together with the evidence of her fraud to show a binding conveyance. *Keller v. Lindow* (Civ. App.) 133 S. W. 304.

Judgment in a former suit held not to make a trust deed inadmissible. *Smith v. Burgher* (Civ. App.) 136 S. W. 75.

It was no objection to the admission of a power of attorney to convey land that it was in German, or that it ran to the Imperial German consul for the state of Texas or his representative or successor in office. *Mitchell v. Robinson* (Civ. App.) 136 S. W. 501.

In suit to correct the description in deeds, deed of defendant's intestate to plaintiff held admissible. *Mounger v. Daugherty* (Civ. App.) 138 S. W. 1070.

An abstract held admissible in a suit for specific performance to show title in defendants, and hence their ability to perform. *Naylor v. Parker* (Civ. App.) 139 S. W. 93.

Certain deeds held admissible to show that the grantor had elected to accept the lands allotted to him in partition and to disclaim interest in a portion of the land certificate under which other heirs located other land. *Robertson v. Brothers* (Civ. App.) 139 S. W. 657.

Receipt held admissible in evidence in an action on a contract for the purpose of showing a partial payment under the contract. *Storrie v. Ft. Worth Stockyards Co.* (Civ. App.) 143 S. W. 286.

In trespass to try title, held, that a deed was admissible to show the limits of an adverse claim. *Dean v. Furrh* (Civ. App.) 143 S. W. 343.

In an action upon tuition notes given to a private school, a circular and catalogue of the school were admissible to show the terms of the contract between the parties, accepted by giving the notes. *Vidor v. Peacock* (Civ. App.) 145 S. W. 672.

Deeds and long possession under them held admissible to support a presumption of a prior verbal conveyance or conveyance by written deed. *Blunt v. Houston Oil Co.* (Civ. App.) 146 S. W. 248.

Where, in an action for conversion, the evidence showed that defendant and another had owned the property, and had sold it to a firm as evidenced by an unrecorded bill of sale retaining a lien for the price, and that a partner sold his interest in the firm by bill of sale, which recited that the copartner and third person purchasing the interest would pay defendant, and which retained a second lien for the unpaid price due to the partner, which instrument was filed for record, the instrument was admissible in evidence as against the objection of the bank. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 146 S. W. 1191.

In an attorney's action for compensation, contingent upon his establishing his client's right to land, deed from the client held admissible to show that the client's own act had made it impossible for him to procure the land. *Threadgill v. Shaw* (Civ. App.) 148 S. W. 825.

In a purchaser's action for equitable relief from a sale induced by fraud, a deed, executed and tendered by him to the party from whom he received title, was admissible in evidence to show his willingness to do equity, though the party to whom the tender was made was not the vendor with whom he had made the deal; plaintiff's deal having been with one who had merely a contract interest, and having received his deed from the holder of the legal title. *Hagelstein v. Blaschke* (Civ. App.) 149 S. W. 718.

In trespass to try title to a part of a railroad right of way, a deed from plaintiff to defendant, transferring another part of its right of way, was not admissible. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 151 S. W. 850.

Where plaintiff claimed title through a deed from a mercantile company to a grocery company in consideration of a credit on debt due the grantee, it was immaterial that the credit was not in fact entered on the grantee's books until after defendant ceased to be a member of the mercantile company. *Rider v. Radford* (Civ. App.) 151 S. W. 1181.

Where, in an action for specific performance, all of the parties interested were before the court, the original contract to convey to plaintiff, upon which the suit was based, was admissible in evidence. *Tolar v. South Texas Development Co.* (Civ. App.) 153 S. W. 911.

Deeds, showing title to the survey in which the land in controversy was located in the common source, held admissible to show that the original certificate had been transferred to such common source, though they were not in plaintiff's chain of title, nor embraced in the abstract. *Thompson & Tucker Lumber Co. v. Platt* (Civ. App.) 154 S. W. 268.

Where plaintiffs claimed title as heirs of an original patentee, a deed from the heir of a brother-in-law of the original patentee, made and recorded before the death of the patentee, is admissible on the question whether the original patentee held the grant in trust as to two-thirds thereof for the brother-in-law. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

76. — Relation to matters in controversy in general.—A deed of a portion of plaintiff's interest in land to her attorney was properly excluded in an action to enforce a parol gift of the land. *La Master v. Dickson*, 17 C. A. 473, 43 S. W. 911.

In action on vendor's lien note deposited as collateral, admission of deed to show lien was retained to secure the note held not error. *Bond v. National Exch. Bank* (Civ. App.) 53 S. W. 71.

Where defendant, sued on note, alleged it had been deposited as collateral, and set up note secured, claiming it was paid, admission of note shown to be renewal of note secured to show the amount due was not error. *Id.*

In an action by a city to recover a street claimed by adverse possession, a lease to a third party of a portion of the premises owned by him held not admissible in evidence. *Williams v. City of Galveston* (Civ. App.) 58 S. W. 551.

Where in trespass to try title there were neither allegations nor proof that an instrument in evidence referred to land in controversy, the trial court erred in considering the description of the land therein. *Turner v. Cochran* (Civ. App.) 63 S. W. 151.

In an action by the administratrix to recover double the amount of usurious interest paid on a note, as secured by a deed of trust, such deed of trust is admissible. *Cassidy v. Scottish-American Mortg. Co.*, 27 C. A. 211, 64 S. W. 1023.

In trespass to try title, it was improper to admit a deed, offered to show common source of title, when plaintiff failed to connect defendant's title with the deed. *Boston v. McMenamy*, 29 C. A. 272, 68 S. W. 201.

Deeds to adverse claimants of land held material, in connection with evidence of actual possession, on the question of their title. *Crawford v. Arnold* (Civ. App.) 78 S. W. 244.

In action for right of way over land deeds thereof to defendants, their execution being proven, held admissible in evidence. *Holman v. Patterson*, 34 C. A. 344, 78 S. W. 989.

In a suit by the grantee of land to set aside a mortgage executed thereon by the grantor, on the ground that the mortgage was obtained by duress, held not error to admit in evidence the deed from the grantor to the grantee. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1105.

In a suit by a vendor who had retained a lien to recover the land, the deed making the original conveyance held admissible in evidence. *Branch v. Taylor* (Civ. App.) 89 S. W. 813.

In action on building contract, written contract, pleaded by either party, held admissible in evidence. *Neblett v. McGraw & Brewer*, 41 C. A. 239, 91 S. W. 309.

A deed to plaintiff from her husband before marriage held admissible in support of plaintiff's plea of limitation. *Alford Bros. & Whiteside v. Williams*, 41 C. A. 436, 91 S. W. 636.

In an action to foreclose a chattel mortgage, the mortgage held admissible in evidence. *Roche v. Dale*, 43 C. A. 287, 95 S. W. 1100.

A note executed by a vendee to the vendor's administrator in renewal of two notes, one for the balance of the price of the land, and the other for rent, held admissible

in an action by such administrator to recover a part of the land for nonpayment of the balance of the price. *Smith v. Owen*, 43 C. A. 411, 97 S. W. 521.

On a question of dedication of a city street by filing a plat showing the street and selling lots with reference thereto, deeds and other instruments relating to a lot in the same part of the city held not admissible in evidence. *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

In an action on a note given for the price of land and foreclosure of vendor's lien, held proper to admit in evidence a certified copy of the deed and the note. *Bolden v. Hughes*, 48 C. A. 496, 107 S. W. 91, 93.

In a suit for the possession of real estate, a deed held properly received in evidence, as against the objection that the grantors therein were not shown to have been connected with the title. *Haney v. Gartin*, 51 C. A. 577, 113 S. W. 166.

In an action for attorney's services in endeavoring to obtain school lands for defendant, a quitclaim deed, executed by defendant to an occupant in settlement of a claim for damages, held inadmissible. *Shaw v. Threadgill*, 53 C. A. 254, 115 S. W. 671.

On an issue as to plaintiff's right to recover a proportional amount of the price of certain land for a deficiency in quantity, the contract of sale held admissible. *Yates v. Buttrell* (Civ. App.) 132 S. W. 831.

In an attorney's action for compensation contingent upon establishing his client's right to land, a deed from the client held admissible to show that the client's own act had made it impossible to recover the land. *Threadgill v. Shaw* (Civ. App.) 148 S. W. 325.

In a property owner's suit to enjoin a county from opening a second-class road through plaintiff's land, deeds from third persons to which plaintiff was not a party or privy, and not conveying land claimed by him, were irrelevant. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

Where a deed from a cotenant to his heir is introduced, it is admissible without showing the interest of the cotenant, where some of the cotenants are not parties. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

77. — Recitals of fact in general.—Recitals in deeds as estoppel, see post, Rule 32.

In an action of trespass to try title the defendants offered in evidence deeds which referred to and recited the fact of the grant of the land in controversy to plaintiff's ancestor under whom plaintiff claimed. Held, the validity of the grant was admitted. *Hardy v. De Leon*, 5 T. 211.

In a suit by a sheriff on a bond given by defendant to indemnify him for a levy made at the request of the defendant, a recital in the bond that the goods had been levied upon was evidence that the bond was executed after the levy, which was a material fact in the case. *Illies v. Fitzgerald*, 11 T. 417.

Recitals in a private instrument cannot be used in evidence to affect the title of one not connected therewith. Thus, in a suit for land a material issue was whether the title was issued before or after the 13th of November, 1835, the closing of the land office, and the plaintiff offered in evidence a deed executed by the original grantee to a person not connected with the plaintiff, reciting that the testimonio of the original title in his possession was dated November 15, 1835. Held inadmissible. *Houston v. Blythe*, 60 T. 506; *Williams v. Chandler*, 25 T. 4.

In an action of trespass to try title, both parties claimed from the T. & P. Ry. Co. The plaintiff claimed under a deed from the company to T. H. in consideration of \$1 paid by Elder T. H. of the African Baptist Church, South, and his successors in office, and then produced a chain of title through T. H. to himself. The defendant produced a deed signed by several persons as trustees of Mount Zion Baptist Church (colored) to I. B. H. and a deed from I. B. H. to himself. It was held that the recital in the deed was not evidence that the grantors were trustees, and that identity between the two churches did not appear. *Tapp v. Cory*, 64 T. 594.

Recitals in a contract executed by parties not personally acting in its execution, that the parties executing it acted in the representative capacity stated, will not prove the existence of such relation so as to bind others. *Fine v. Freeman*, 83 T. 529, 17 S. W. 783, 18 S. W. 963.

Recitals in a deed purporting to have been made by heirs are not evidence of the heirship as against strangers, and this, although the deed is an ancient document. *McCoy v. Pease*, 17 C. A. 303, 42 S. W. 659.

Recitals in deed held admissible on the question of the value of the property conveyed. *Richardson v. Overleese*, 17 C. A. 376, 44 S. W. 308.

Heirship cannot be proven by recitals in a deed. *Watkins v. Smith*, 91 T. 589, 45 S. W. 560.

Recital in a deed of a prior contract of sale, and payment of the price thereunder, made after the grantor had conveyed to a third person, is not admissible against the prior grantee. *Burroughs v. Farmer* (Civ. App.) 45 S. W. 846.

Application by husband and wife for loan, stating that the property was not their homestead, held admissible on foreclosure to show that, if it ever was, it had been abandoned. *Bowman v. Rutter* (Civ. App.) 47 S. W. 52.

Recital in a deed held admissible as evidence of bona fides of debt for which assignment had previously been executed. *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

Recitals of the will of a mother who died prior to the time a cause of action arose held competent evidence to prove coverture of a daughter, to avoid the bar of limitation. *Summerhill v. Darrow*, 94 T. 71, 57 S. W. 942.

In ejectment, probate proceedings and recitals in deeds of a grantor in plaintiff's chain of title held admissible. *Lochridge v. Corbett*, 31 C. A. 676, 73 S. W. 96.

Clause in deed of trust, empowering trustees to make recitals, held not to authorize substituted trustee to create evidence of his power to act, so as to make recital in his deed of refusal of original trustee to act evidence of that fact. *Ward v. Forrester*, 35 C. A. 319, 80 S. W. 127.

Where a deed is admissible in evidence, recitals therein are also admissible. *Sydnor v. Texas Savings & Real Estate Inv. Ass'n*, 42 C. A. 138, 94 S. W. 451.

In trespass to try title, a recital in a deed 30 years old held admissible. *Hirsch v. Patton*, 49 C. A. 499, 108 S. W. 1015.

A recital in a deed held admissible to prove the execution of another deed. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

Recital of a prior conveyance in a deed is not original evidence of the fact. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

Recitals in an ancient deed held evidence of marital relationship. *Ardoin v. Cobb* (Civ. App.) 136 S. W. 271.

A dray receipt for lumber sued for in an action on an open account held admissible in evidence, though it recited that the lumber was sold and delivered to another than defendant. *Browning v. El Paso Lumber Co.* (Civ. App.) 140 S. W. 386.

A recital in a power of attorney executed by the purported heir is not evidence of heirship as against third persons. *Stuart v. Harper* (Civ. App.) 143 S. W. 712.

A deed executed by one of the claimants to the land, recognizing in its recitals the title of the children of one from whom the opposite parties claimed title, is admissible as an admission against interest. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

A defective deed held admissible to show by a recital therein a claim of interest against the original patentee. *Id.*

78. — Death.—A recital in a writing that the makers are the heirs of a named person is not evidence of the death of such person or the heirship. *Davidson v. Senior*, 23 S. W. 24, 3 C. A. 547.

79. — Nature of Instruments In general.—On issue of ownership, a check in full for "stock of goods," admissible in evidence. *Kean v. Zundelowitz*, 29 S. W. 930, 9 C. A. 350.

An altered instrument may be rejected from evidence, until the alteration is explained in such manner as to show it is not nullified thereby. *Kansas Mut. Life Ins. Co. v. Coalson*, 22 C. A. 64, 54 S. W. 388.

Where a defendant in an action to foreclose a chattel mortgage and for conversion pleads payment in money and property, a bill of sale conveying property the proceeds of which were to be credited on the debt, and a sale by the mortgagee of certain property for a sum less than its value, held admissible. *Watts v. Dubois* (Civ. App.) 66 S. W. 698.

In an action against a railroad company by a brakeman for injury claimed to have resulted from defendant's negligence, his application for the position held properly admitted to show his acceptance of and agreement to the rules of defendant; violation of such rules having been pleaded. *Parks v. St. Louis S. W. Ry. Co. of Texas*, 29 C. A. 551, 69 S. W. 125.

In an action for salary for managing a skating rink, held not error to exclude a writing claimed by defendant to embody the terms of the contract of employment. *Gate City Roller Rink Co. v. McGuire* (Civ. App.) 112 S. W. 436.

In trespass to try title, a mortgage through which plaintiff claimed which had not been foreclosed did not constitute a muniment of title, and should not have been admitted for that purpose. *Moorhead v. Ellison*, 56 C. A. 444, 120 S. W. 1049.

A contract for separation and maintenance held valid, and properly admitted in evidence. *Levy v. Goldsoll* (Civ. App.) 131 S. W. 420.

To entitle one to claim in his grantor's right as an innocent purchaser, the grantee must show by other testimony than recitals in the deed to his grantor that such grantor paid a valuable consideration for the land. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

80. — Acknowledgment, signature and witnesses.—See notes under Art. 1109.

81. — Form and validity in general.—A deed to plaintiff, bearing date after the ouster alleged in the petition, is admissible in evidence. *Jenkins v. Adams*, 71 T. 1, 8 S. W. 603.

In an action by heirs of an alleged patentee, where the only issue was as to his identity, a deed purporting to have been executed and recorded after the death of such alleged patentee by one of the same name was admissible to show that some one of the patentee's name was claiming the land. *Schott v. Pellerim* (Civ. App.) 43 S. W. 944.

Description in deed held sufficiently definite to render it admissible in evidence. *Rector v. Erath Cattle Co.*, 18 C. A. 412, 45 S. W. 427.

A joint deed cannot be received in evidence as the deed of only a part of the grantors. *Story v. Birdwell* (Civ. App.) 45 S. W. 847.

Pen scratches through a writing purporting to convey real estate do not affect its admissibility if it remain intelligible. *Tutt's Heirs v. Morgan*, 18 C. A. 627, 42 S. W. 578, 46 S. W. 122.

A deed which, when read in connection with a map to which it refers, clearly shows the premises conveyed, is admissible. *Oppermann v. McGown* (Civ. App.) 50 S. W. 1078.

It is not error to refuse to receive in evidence a deed which on its face shows an alteration in a material particular, where such alteration is not explained by the party presenting it. *Bullock v. Sprowls* (Civ. App.) 54 S. W. 657.

In trespass to try title, a deed from the vendee at an execution sale held inadmissible for failure to sufficiently describe the property purported to be conveyed. *Stipe v. Shirley*, 27 C. A. 97, 64 S. W. 1012.

A headright land certificate was admissible in evidence, though some of the words and parts of words contained in it had been obliterated, where offered in connection with testimony of witnesses who had seen and examined it before it was defaced. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

A purported bill of sale, executed long after the property has been actually sold, held inadmissible in evidence. *Wooley v. Bell*, 33 C. A. 399, 76 S. W. 797.

A mistake in the name of a survey in the description of land does not constitute a variance between the petition and proof, or render the deed inadmissible, if the land is otherwise described. *Echols v. Jacobs Mercantile Co.*, 38 C. A. 65, 84 S. W. 1082.

The description of property in a deed of trust through which plaintiff claims held sufficient to identify the land and entitle the deed to admission in evidence.—*Id.*

That the guardians of certain minor grantors and the husband of another grantor had no authority to bind them to a deed by heirs held not to affect the admissibility of the deed in evidence in trespass to try title. *Arthur v. Ridge*, 40 C. A. 137, 89 S. W. 15.

A deed purporting to be executed by executors of an estate held inadmissible in evidence. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

In an action to try title to land, where the deed conveying the land was in form sufficient to convey it, even if a homestead, the question whether it was a homestead was immaterial. *Broom v. Herring*, 45 C. A. 653, 101 S. W. 1023.

In trespass to try title, a deed, the description in which is insufficient to identify the land, and on its face apparently inaccurate and incomplete, is inadmissible in evidence. *Thomas v. Tompkins*, 47 C. A. 592, 105 S. W. 1175.

The description of land in a deed held sufficient to entitle the deed to be admitted in evidence. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.

The description of land in a deed is sufficient where the land can be identified by other evidence in connection therewith. *Id.*

An administrator's deed and subsequent deeds thereunder held inadmissible in an action to quiet title, in view of irregularities in the probate proceedings. *Wilkin v. Geo. W. Owens & Bros.* (Civ. App.) 110 S. W. 552.

In trespass to try title, in which both parties claimed through deeds from N., a certified copy of the deed from N.'s grantee, through whom plaintiffs claimed, to another, held not inadmissible because it referred to a prior grant for a fuller description, and recited that it was acquired by the grantor by deed from N. *Houston Oil Co. of Texas v. Kimbail*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

A deed containing a defective description, but sufficient to identify the land intended to be conveyed, held admissible on the issue of the location of adjoining land patented to the common grantor and conveyed to defendant. *Snow v. Gallup*, 57 C. A. 572, 123 S. W. 222.

Where a deed was ambiguous only in applying the description contained therein on the ground, such ambiguity was not a valid objection to the admission of the deed in evidence. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

In trespass to try title, a deed held not inadmissible because part of the description did not fit the land involved. *Shelley v. Creighton-McShane Oil Co.* (Civ. App.) 130 S. W. 848.

In an action by the holder of a mortgage note against a purchaser of the land who assumes payment of the note, in which the defendant pleaded that the makers of the note had fraudulently represented to him that the land was incumbered only by the mortgage, when in fact it was covered by two vendors' lien notes, such lien notes were admissible in evidence, as against the objection that they did not describe the land included in the mortgage, where the two descriptions were substantially identical. *Britton v. J. W. Crowds Drug Co.* (Civ. App.) 148 S. W. 350.

82. — **Execution and proof.**—An unexecuted bill of lading held not admissible in an action for the price of the goods described therein. *Watson v. Winston* (Civ. App.) 43 S. W. 852.

In an action on an oral promise, an unsigned order containing a stipulation amounting to a contract held not admissible against defendant. *Id.*

Where a deed by the surviving owner of community property showed the authority of the grantor to act on its face, held, that it was admissible in evidence in trespass to try title to the land conveyed. *Green v. White*, 18 C. A. 509, 45 S. W. 389.

An unsigned memorandum of a contract held admissible, with other evidence, to show the terms of the contract agreed on. *Morgan v. Tims*, 44 C. A. 308, 97 S. W. 832.

A deed of trust executed by defendant ice company to the contractor for its plant, though not bearing the ice company's corporate seal, held admissible to show that the ice company had accepted the plant as completed. *Orient Consol. Pure Ice Co. v. Edmundson* (Civ. App.) 140 S. W. 124.

83. — **Record.**—In trespass to try title, held not error to admit an unrecorded deed to plaintiff's ancestor; a prior recorded deed to the ancestor from same grantor being in evidence. *Boston v. McMenamy*, 29 C. A. 272, 68 S. W. 201.

84. — **Void instruments.**—A deed void for uncertainty in description, but showing a claim of title, is admissible to show common source. *Burns v. Goff*, 79 T. 239, 14 S. W. 1009; *Culmore v. Genove* (Civ. App.) 24 S. W. 83.

A tax deed, not shown to be valid, is not admissible in evidence. *Wright v. United States Mortg. Co.* (Civ. App.) 54 S. W. 368.

In partition a deed held effectual to show common source of title, notwithstanding it was ineffectual to pass title. *Hughey v. Mosby* (Civ. App.) 71 S. W. 395.

In trespass to try title, a void deed under which defendants claim may be put in evidence by plaintiffs to show common source of title. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

Invalidity of deed held not to affect admissibility as corroborative evidence of existence of prior deed. *Williamson v. Work*, 33 C. A. 369, 77 S. W. 266.

To establish the existence of a lost trustees' deed, the record of which is void because the deed was improperly acknowledged, a curative deed subsequently executed and properly acknowledged is admissible, even though not a lawful exercise of the trustees' power. *Simmons v. Hewitt* (Civ. App.) 87 S. W. 188.

In trespass to try title a certain deed executed by a person not shown by the chain of deeds to have ever acquired title held admissible in evidence. *Sydnor v. Texas Savings & Real Estate Inv. Ass'n*, 42 C. A. 138, 94 S. W. 451.

A void tax deed is admissible to show a common source. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

An administrator's deed, made under a void decree of the probate court awarding specific performance, held not improperly admitted in trespass to try title, where a consent decree of the district court validated the conveyance. *Wm. Cameron & Co. v. Cuffie* (Civ. App.) 144 S. W. 1024.

Deeds are admissible to throw light upon the nature of grantees' possession, though ineffective as deeds. *Carr v. Alexander* (Civ. App.) 149 S. W. 218.

85. — **Documents insufficient or incomplete when standing alone.**—A written instrument referring to other writings for a description of land is admissible. *Catlett v. Starr*, 70 T. 485, 7 S. W. 844.

A deed executed by an administrator does not show title in absence of the decree of the proper court relating to the sale. *Riley v. Pool*, 24 S. W. 85, 5 C. A. 346.

A schedule of property, attached to an assignment to secure creditors, held properly admitted in evidence in trespass to try title, regardless of the sufficiency of description of land. *McMahon v. McDonald*, 51 C. A. 613, 113 S. W. 322.

86. — Instruments executed in other state or country.—As a general rule, a will which has not been probated in this state cannot be used as evidence of title or as a link in a chain of title to land situated in this state. *Paschal v. Acklin*, 27 T. 173; *Brundige v. Rutherford*, 57 T. 22; *Ochoa v. Miller*, 59 T. 460; *Mills v. Herndon*, 60 T. 353; *Ryan v. T. & P. R. R. Co.*, 64 T. 239.

87. Admissibility of books of account.—Sworn accounts and affidavit of denial, see notes under Art. 3712.

The rule which admits the books of the seller does not admit those of the buyer. *Dailey v. Sonnerborn*, 35 T. 60.

Books and memoranda of a party made by his clerks or agents are admissible in evidence if the entries were made in the regular course of business, and verified by the oaths of the persons who made them as correct, though such person has no exact recollection of the facts at the time of the trial. As a prerequisite to the admission of a party's book of account as evidence in his behalf, a supplementary oath of the party to the correctness, etc., of the books was formerly required. Since the decisions to that effect were rendered, our statute allowing a party to testify in his own behalf has become the law, and whether, in addition to his direct testimony to the fact, a suppletory oath would still be required under that statute, has never been decided in this state. There is no reason for requiring a suppletory oath, where the party is himself a witness and can testify to such facts as should have been stated in such oath. *Cahn v. Salinas*, 2 App. C. C. § 615.

A check book used by an officer in his private business, containing stubs showing that drafts had been drawn by him at certain times, was inadmissible for the purpose of showing when funds had been converted by him. *Barry v. Screwmen's Ass'n*, 67 T. 250, 3 S. W. 261.

An entry in the books of a bank in due course of business, in handwriting of a book-keeper of the bank shown to be dead, against the interest of the bank, is competent testimony in an action between other parties. *Heidenheimer v. Johnson*, 76 T. 200, 13 S. W. 46.

A mercantile firm borrowing money of the wife of one of its members executed a note therefor to her husband as trustee. In a suit by the wife against the firm, creditors of the firm intervened, seeking to defeat her attachment. It was held that the books of the firm were not admissible in evidence against the wife in behalf of the interveners. *Martin-Brown Co. v. Perrill*, 77 T. 199, 13 S. W. 975.

As to proof of accounts where alterations in the entries in an account book appear. *Maverick v. Maury*, 79 T. 435, 15 S. W. 686.

Books of account are admissible against a party seeking to recover a debt charged therein against another than the defendant. *Loomis v. Stuart* (Civ. App.) 24 S. W. 1078.

A bank book held inadmissible to show that the one in whose name the account stands is not a fictitious person. *Hirsch v. Jones* (Civ. App.) 42 S. W. 604.

Entries in an account book of money advanced on a person's account held not evidence that the money was advanced at the person's request. *Mings v. Griggsby Const. Co.* (Civ. App.) 106 S. W. 192.

A transcript of the books of a bank not a party to the action held admissible. *Barclay v. Deyerle*, 53 C. A. 236, 116 S. W. 123.

An entry of a memorandum in a book, by an employé, of a contract to make plans and specifications, not made in the presence of the person ordering the plans, as evidencing the intention of the parties to make such memorandum was not admissible in evidence against him. *Luttrell v. Parry* (Civ. App.) 129 S. W. 865.

The "shop book" rule is confined to entries of goods sold and delivered, or of work and labor performed. *Id.*

Telephone call tickets held admissible in evidence on proper preliminary proof, without the evidence of the operator who made the entries thereon. *Southwestern Telegraph & Telephone Co. v. Pearson* (Civ. App.) 137 S. W. 733.

Where book of depositor was introduced in evidence by defendant bank, plaintiff had a right to show the condition of account between the bank and the depositor, as exhibited by such bank book. *W. T. Wilson Grain Co. v. Central Nat. Bank* (Civ. App.) 139 S. W. 996.

Where, in liability insurance policies, the amount of premiums to be paid were to be reckoned upon the estimated pay roll of men employed on a building, statements from the books of the constructor, which showed the amount paid to each class of workmen referred to in the policies, was proper to prove the amount of premiums due in an action to recover balance thereof. *Ripley v. Ocean Accident & Guarantee Corporation* (Civ. App.) 146 S. W. 974.

Permanent entries made from a slate, card, or memorandum book by a person other than the one that made such temporary entries, and oral statements made by the salesman in the evening and entered by such other person, are admissible in evidence as original entries when supported by suppletory oath, and there need be no present recollection of the correctness of the items entered. *Weinberg v. Garren* (Civ. App.) 155 S. W. 1013.

88. — Character of books in general.—A coupon book sold by a merchant to a customer held an indebtedness evidenced by entry in books, within the rule admitting entries made in books of original entry. *Rogers v. O'Barr & Dinwiddie* (Civ. App.) 81 S. W. 750.

89. — Time books.—It is essential to the admission of shop book entries they be made and relate to matters in the regular course of business. *Bouldin v. Atlantic Rice Mills Co.* (Civ. App.) 86 S. W. 795.

90. — Matters proper for book entries.—Shopbook entries are inadmissible to prove items that do not relate to the business and are not properly the subject of book account. *Bouldin v. Atlantic Rice Mills Co.* (Civ. App.) 86 S. W. 795.

91. — By whom entries are made.—Rule as to admissibility of entries in books of account of a party to litigation stated. *Bouldin v. Atlantic Rice Mills Co.* (Civ. App.) 86 S. W. 795.

92. — **Entries made from memoranda or other information.**—In action against carriers for injury to cattle, an account sales taken from books of commission house selling the cattle held admissible to show the weights, under testimony of the bookkeeper as to correctness of the books. *Atchison, T. & S. F. Ry. Co. v. Williams*, 38 C. A. 405, 86 S. W. 38.

93. — **Purposes of proof in general.**—Where a policy provided that insured should keep books and make an inventory, both may be looked to, to determine the loss. *Phoenix Ins. Co. v. Padgett* (Civ. App.) 42 S. W. 800.

94. — **Persons bound in general.**—The books of a firm are not competent evidence against the wife of one of the partners, there being no evidence of conspiracy between the parties. *Martin-Brown Co. v. Perrill*, 77 T. 199, 13 S. W. 975.

95. — **Evidence for party in general.**—Books of account are evidence of the matters connected with the transaction in controversy. *Loomis v. Stuart* (Civ. App.) 24 S. W. 1078.

96. **Admissibility of private memoranda and statements in general.**—An undated and unsigned memorandum in regard to a family settlement of pecuniary matters is admissible in evidence. *Newton v. Newton* (Civ. App.) 25 S. W. 159.

In trespass to try title, ancient ex parte memorandum, showing that debt secured by deed and defeasance was not satisfied, held inadmissible. *Turner v. Cochran*, 30 C. A. 549, 70 S. W. 1024.

The admission as original evidence of a book memorandum fixing the date of a contract held error. *Tobler v. Austin* (Civ. App.) 71 S. W. 407.

In an action on a claim against decedent's estate for money loaned, a memorandum of the loan held admissible, though it also tended to show a partnership between plaintiff and deceased. *Altgelt v. Elmendorf* (Civ. App.) 86 S. W. 41.

The testimony of certain witnesses as to the weight of cattle and prices obtained, together with copies made from books of entry of the broker who sold the cattle, held properly admitted in evidence. *International & G. N. R. Co. v. Startz*, 42 C. A. 85, 94 S. W. 207.

In an action for commissions under an employment contract, a statement of plaintiff's commissions claimed to have been mailed to his employer, a corporation, or to its officers after dissolution, held admissible. *Houston Ice & Brewing Co. v. Nicolini* (Civ. App.) 96 S. W. 84.

Certificates of sale by commission merchants, attached to a deposition, held admissible, though not verified as correct, in view of other evidence as to the facts stated. *Missouri, K. & T. Ry. Co. v. Hopkins*, 52 C. A. 166, 113 S. W. 306.

A memorandum of the amount of timber scaled held not admissible as independent evidence of such amount. *Callen v. Collins* (Civ. App.) 135 S. W. 651.

In an action on a fire policy, it was error to admit in evidence a list of the insured property attached to the petition. *Mecca Fire Ins. Co. of Waco v. Stricker* (Civ. App.) 136 S. W. 599.

96½. — **Abstracts.**—An abstract which contains no mention of the acknowledgment to a deed is not sufficient. *Robins v. Ginacchio* (Civ. App.) 33 S. W. 747.

An abstract has the same force and effect as a certified copy of a recorded deed. No fact can be taken to be established which is not in the form of data or memoranda expressed upon the abstract. An abstract which contains no reference to or mention of an acknowledgment in connection with the deed is inadmissible in evidence. *Id.*

Admissibility of trust deed under which defendant claimed, and abstract of title, determined. *Watkins v. Atwell* (Civ. App.) 45 S. W. 404.

In trespass to try title, an abstract of title, with plaintiff's opinion as a lawyer approving it attached thereto, held material so as to be admissible in evidence. *Rudolph v. Tinsley* (Civ. App.) 143 S. W. 209.

97. — **Items of property and value thereof.**—Where a policy provided that insured should keep books and make an inventory, both may be looked to, to determine the loss. *Phoenix Ins. Co. v. Padgett* (Civ. App.) 42 S. W. 800.

In trial of a counterclaim for wrongful attachment of a stock of goods, defendant's inventory held admissible on the question of the identity and value of his property sold under a writ of attachment. *Michigan Stove Co. v. Waco Hardware Co.*, 24 C. A. 301, 58 S. W. 734.

An inventory taken several months after the issuance of a policy, but which was shown to be correct, held admissible. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

98. **Admissibility of letters, telegrams, and other correspondence.**—A contract for a sale of land was made by an agent. A cash payment was made, and notes given for the balance, payable "on or before" a certain date. The vendor, on receipt of the cash and notes, returned the latter to his agent by mail for correction. The letter containing the notes was not delivered, but was returned by the post office department to the writer, stamped on the envelope "Return to Writer." The address on the envelope was not legibly written, and the envelope was not stamped with the stamp of the office to which it was directed. On receipt of the returned letter, the vendor, having learned that his agent was in collusion with the vendee, having sold the land for an inadequate price, sent the notes, together with a certified check for the cash payment, to the vendee, and repudiated the sale. In an action for a rescission of the deed, held, that the check was admissible in evidence to show that the contract of sale had never been completed; also that the returned envelope and letter were admissible. *Slator v. Trostel* (Civ. App.) 21 S. W. 285.

Importance of a message may be shown by its terms. *Telegraph Co. v. Williford*, 2 C. A. 574, 22 S. W. 244; *Martin v. Telegraph Co.*, 1 C. A. 143, 20 S. W. 860.

Where a shipper and carrier have agreed on a rate admission of a letter from the carrier's general freight agent to the shipper, written in accordance with the agreement, and quoting such rate, is not error. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 29 C. A. 507, 69 S. W. 119.

In trespass to try title, a letter held admissible as tending to show an abandonment of a homestead. *White v. Epperson*, 32 C. A. 162, 73 S. W. 851.

In an action on a fire policy, defended on the ground that insured had procured

the burning of the property, letters written by insured to his co-conspirator held admissible. *Joy v. Liverpool, London & Globe Ins. Co.*, 32 C. A. 433, 74 S. W. 822.

In trespass to try title, transfer of a land certificate held to have been shown to have come from the proper custody and properly admitted. *Ward v. Cameron (Civ. App.)* 76 S. W. 240.

Fact that the transferor of land certificate could not write his name, and that transfer was signed with his name, held not conclusive evidence of forgery. *Id.*

A letter from defendant's manager, accepting plaintiff's offer of work, held properly admitted in evidence. *Orange Rice Mill Co. v. McIlhenney*, 33 C. A. 592, 77 S. W. 428.

In an action for breach of a broker's contract for the sale of oil, a letter written by the broker to the seller held admissible for the purpose of determining the capacity of tank cars in which the oil was to be delivered. *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. (Civ. App.)* 77 S. W. 961.

Statement of insured's attorney in letter to defendant company held not objectionable, in action on policy, as irrelevant and immaterial. *Ætna Ins. Co. v. Fitze*, 34 C. A. 214, 78 S. W. 370.

In an action on an insurance policy, an objection to a card notifying deceased of the maturity of a premium, as immaterial and irrelevant, was properly overruled. *Metro-politan Life Ins. Co. v. Gibbs*, 34 C. A. 131, 78 S. W. 398.

In an action for breach of contract to supply electric current to operate a motor, letters and telegrams received by defendant from the seller of the motor held admissible on the issue of the motor's warranted capacity. *Wofford & Rathbone v. Buchel Power & Irrigation Co.*, 35 C. A. 531, 80 S. W. 1078.

Letter of trustee in bankruptcy held inadmissible in evidence in absence of proof of adjudication in bankruptcy or appointment of trustee. *Keller v. Faickney*, 42 C. A. 483, 94 S. W. 103.

Love letters of the parties held admissible in an action for breach of promise to marry. *Cain v. Corley*, 44 C. A. 224, 99 S. W. 168.

In a suit to recover the balance of the price of certain land, certain letters written by plaintiff to his attorneys before the sale was consummated, and which were shown to defendant, held admissible to show that the agreement reached by the parties was expressed in the deed. *Latta v. Schuler*, 45 C. A. 237, 100 S. W. 166.

In an action for breach of marriage promise, letters written by plaintiff to defendant held admissible in evidence. *Hill v. Houser*, 51 C. A. 359, 115 S. W. 112.

A letter written by a bank the day after a draft was presented by an agent of the holder, acknowledging notice of the draft, and stating that it would be paid, is admissible, not as showing acceptance, but as corroborative of the agent's statements relating thereto. *Milmo Nat. Bank v. Cobbs*, 53 C. A. 1, 115 S. W. 345.

In an action against a bank for the nonpayment of an accepted draft, a telegram from a bank examiner after the drawer's failure, as well as the reply thereto, could not affect defendant's liability and was properly excluded. *Id.*

Certain letters sent by plaintiffs' agent to them with reference to the performance of their commission to procure defendant to sign a lease in controversy held inadmissible. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

In an action for false imprisonment, a telegram announcing plaintiff's arrest pursuant to another telegram held admissible in evidence. *Taylor Bros. v. Hearn (Civ. App.)* 133 S. W. 301.

Where letters offered in evidence were otherwise admissible, it was no valid objection that the writer stated he had no authority, except in an advisory capacity. *Pit-zer v. Decker (Civ. App.)* 135 S. W. 161.

In an action for breach of an express contract, a letter written by the defendant which did not evidence the contract held admissible as a part thereof to show the transaction between the parties. *Standard Paint Co. v. San Antonio Hardware Co. (Civ. App.)* 136 S. W. 1150.

In an action for damages for nondelivery of a telegram answering an inquiry as to the purchase of cows, the prospective purchaser's letter withdrawing his proposition held admissible in evidence. *Western Union Telegraph Co. v. Williams (Civ. App.)* 137 S. W. 148.

A letter from the drawer of an accepted draft to the holder, held inadmissible in an action by the holder against the drawer. *Seguin Milling & Power Co. v. Guinn (Civ. App.)* 137 S. W. 456.

Letters offered by plaintiff in an action on a note held admissible. *Schauer v. Von Schauer (Civ. App.)* 138 S. W. 145.

Letter written to a broker by owner of land held admissible in a broker's action for commission. *Riggins v. Sass (Civ. App.)* 143 S. W. 689.

In trespass to try title, held, that letters written by plaintiff's predecessor were not admissible on the issue of bona fide purchase. *Cartwright v. La Brie (Civ. App.)* 144 S. W. 725.

Memorandum on the margin of a letter, written by the son of an assignee of a head-right certificate to the land commissioner, held inadmissible. *Crosby v. Ardoin (Civ. App.)* 145 S. W. 709.

In an action for attorney's services, letters written to defendant, containing counsel and advice to her, were admissible. *Curtsinger v. McGown (Civ. App.)* 149 S. W. 303.

In an action for attorney's services, a letter written by plaintiff to defendant, containing a statement of disbursements and of the value of plaintiff's services, is inadmissible. *Id.*

A letter from a negro fraternal organization, written after the death of a member, notifying the beneficiary of her expulsion, held inadmissible on the issue as to whether insured was a member in good standing at his death. *International Order of Twelve Knights and Daughters of Tabor v. Wilson (Civ. App.)* 151 S. W. 320.

On partnership accounting between father and son, admission of letter of father showing property owned by him in another state held calculated to prejudice the jury. *Hengy v. Hengy (Civ. App.)* 151 S. W. 1127.

Letters passing between parties having no connection with a suit are inadmissible in evidence. *Home Inv. Co. v. Strange (Civ. App.)* 152 S. W. 510.

On an issue as to the forfeiture of a policy for nonpayment of the 1906 premium, correspondence relative to extension of time for the payment of the 1905 premium was admissible as tending to show the company's attitude toward the risk. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 147 S. W. 1152, 152 S. W. 625.

99. Maps, plats and diagrams.—A map of surveys, made by a competent person, from deeds found in the records, is competent evidence to prove the situation and boundaries of a certain tract in reference to others. *Haney v. Clark*, 65 T. 93.

Maps used by a surveyor in testifying may be used in evidence when representing work by him, without reference to their being of record or as of themselves evidencing acts of the parties or privies. *Devine v. Keller*, 73 T. 364, 11 S. W. 379.

Map and a photograph made by a witness, showing condition and surroundings at the place of accident, are admissible in evidence. *Railway Co. v. Moore*, 4 App. C. C. § 214, 15 S. W. 714.

Plat found on the back of deed admitted to show the manner and extent of a parol partition. *Linam v. Anderson*, 21 S. W. 768, 2 C. A. 631.

It is error to admit against a party a surveyor's report made in another suit to which he was not a party. *Jordan v. Young* (Civ. App.) 56 S. W. 762.

Where a city ordinance was adopted providing that a street be widened in accordance with a map referred to and made a part of the ordinance, in an action to recover an assessment paid, held not error to admit the map in evidence in connection with the ordinance. *City of San Antonio v. Walker* (Civ. App.) 56 S. W. 952.

Where the boundaries of land were in issue, it was not error to admit a plat of survey in connection with testimony of one who had surveyed the land, though it contained certain inaccuracies. *Besson v. Richards*, 24 C. A. 64, 58 S. W. 611.

Where a county claimed title to land on which the county buildings were located by adverse possession as against a city, a map on which the square was designated as "Court House Square" held admissible. *City of Victoria v. Victoria County* (Civ. App.) 94 S. W. 368.

On the issue whether a tract of land designated as a rural homestead had lost its character as such, a pencil sketch of the tract made by the owner held properly excluded. *Ayres v. Patton*, 51 C. A. 186, 111 S. W. 1079.

Where the field notes of the different sections of a block and the location of a section in controversy in trespass to try title is shown, maps subsequently made held admissible in evidence. *Flinberg v. Gilbert*, 104 T. 539, 141 S. W. 82.

In trespass to try title, a plat made by an experienced surveyor from field notes in deeds in partition held properly received in evidence; the deeds having been acted upon and ratified by the parties. *Unknown Heirs of Criswell v. Robbins* (Civ. App.) 152 S. W. 210.

100. Photographs.—Map and a photograph made by a witness, showing condition and surroundings at the place of accident, are admissible in evidence. *Railway Co. v. Moore*, 4 App. C. C. § 214, 15 S. W. 714.

In an action for personal injuries, photograph of plaintiff held admissible. *Galveston, H. & S. A. Ry. Co. v. Harper*, 53 C. A. 614, 114 S. W. 1168, 1199.

X-ray photographs properly taken held not objectionable on the ground that without cutting away the intervening tissue, it was impossible to tell whether the pictures correctly represented plaintiff's injured bones. *Houston & T. C. R. Co. v. Shapard*, 54 C. A. 596, 118 S. W. 596.

101. — Physical appearance and identity of persons.—In an action for injuries, the admission of photographs of plaintiff before and after injury held not error. *Houston & T. C. R. Co. v. Cluck* (Civ. App.) 84 S. W. 852.

102. — Condition of premises.—Photographs of defective sidewalk, taken two months after injury there, but before repair, held admissible in evidence. *City of San Antonio v. Talerico* (Civ. App.) 78 S. W. 28.

Photographs taken after repair of sidewalk, after an injury, showing cement patch, held admissible to show extent of hole which caused injury. *Id.*

Photographs of the place of the accident held admissible, though taken without notice to plaintiff. *Hawkins v. Missouri, K. & T. Ry. Co. of Texas*, 36 C. A. 633, 83 S. W. 52.

103. Books and other printed publications.—In an action for the death of a railroad engineer, rule book governing section foremen held admissible on the issue of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

In an action for injury from the handhold of a car coming off, held, that the rules of the master car builders' association were admissible for the purpose of showing the proper construction of the car. *Leas v. Continental Fruit Express*, 45 C. A. 162, 99 S. W. 859.

In an action against a carrier for delay in the transportation of live stock, certain evidence held admissible to show that a market existed at the point of destination. *St. Louis & S. F. Ry. Co. v. May*, 53 C. A. 257, 115 S. W. 900.

A book of railroad time-tables that is recognized by railroad men and people as being an authentic guide to the schedule of trains, held admissible, as evidence, to prove the schedule of a certain train contained therein. *Western Union Telegraph Co. v. Gilliland* (Civ. App.) 130 S. W. 212.

A publication giving daily reports of sales of live stock on a market held admissible and a witness may give his opinion on the market value of stock based on the daily reports. *Texas & P. Ry. Co. v. Isenhower* (Civ. App.) 131 S. W. 297.

In an action for damages for breach of a contract to buy cattle, held, that quotations as shown by certain daily papers were admissible. *Houston Packing Co. v. Griffith* (Civ. App.) 144 S. W. 1139.

104. — Law reports.—The opinion of an appellate court as contained in a printed volume of law reports held not admissible to establish facts stated therein. *Western Union Telegraph Co. v. Bradford*, 52 C. A. 392, 114 S. W. 686.

105. — Scientific and technical works.—The issue being whether a horse was unsound, the defendant offered in evidence a treatise on horses by Youatt, from which he proposed to read remarks on the disease in question; a witness having testified as an

expert that it was a work of high authority. Held, that the book would have been hearsay testimony about a matter upon which a competent witness had spoken very fully, and was properly excluded. *Fowler v. Lewis*, 25 T. Sup. 380. See *H. & T. Ry. Co. v. Reason*, 61 T. 613.

Works on medical science are not admissible in evidence. *Boehringer v. A. B. Richards Medicine Co.*, 29 S. W. 508, 9 C. A. 284.

Extracts from parliamentary authors held inadmissible to show that certain proceedings of a convention were regular and according to parliamentary usage. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

106. — **Mortality tables and tables of expectancy of life.**—Insurance experience life tables are admissible in evidence to show the probable duration of the life of a person. The fact that the person referred to was in poor health does not render the testimony incompetent, but simply attacks the force and weight to be attached to it. *Railway Co. v. Bennett*, 76 T. 151, 13 S. W. 319; *G., H. & S. A. Ry. Co. v. Leonard* (Civ. App.) 29 S. W. 955.

A life table shown to have been in general use by life insurance companies is admissible in evidence. *Railway Co. v. Smith* (Civ. App.) 26 S. W. 644.

Mortality tables generally used in insurance business are admissible as evidence. *Railway Co. v. Johnson*, 10 C. A. 254, 31 S. W. 255.

In an action for death of plaintiff's husband life tables are admissible, though they do not refer to a woman of plaintiff's age. *Missouri, K. & T. Ry. Co. of Texas v. Hines* (Civ. App.) 40 S. W. 152.

The *Flatchcraft Insurance Manual* with mortuary tables held admissible to prove life expectancy of deceased. *Missouri, K. & T. Ry. Co. of Texas v. Ransom*, 15 C. A. 689, 41 S. W. 326.

Mortuary tables, and other evidence of probable duration of decedent's life, are admissible. *Galveston, H. & S. A. Ry. Co. v. Burnett* (Civ. App.) 42 S. W. 314.

A mortality table generally used by life insurance companies may be introduced to show the probable duration of life. *S. A. & P. Ry. Co. v. Morgan* (Civ. App.) 46 S. W. 672.

In an action for negligence, causing the death of a husband and father, life expectancy tables of persons in ordinary occupations held admissible, notwithstanding decedent was engaged in the peculiarly hazardous business of a railroad engineer. *Galveston, H. & S. A. Ry. Co. v. Johnson*, 24 C. A. 180, 53 S. W. 622.

In action for death of railroad employé, the American tables of mortality are admissible to show the probable length of his life. *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561, 65 S. W. 63.

Where plaintiff's injuries were alleged to be permanent, mortality tables were admissible, though plaintiff's condition of health was not such as to render her an insurable subject. *Pecos & N. T. Ry. Co. v. Williams*, 34 C. A. 100, 78 S. W. 5.

In an action for injuries to a servant, it was not error to admit testimony as to life expectancy tables. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

In an action against a railroad company for personal injuries to a section hand, admission of evidence based on mortality tables held not erroneous. *International & G. N. R. Co. v. Tisdale*, 36 C. A. 174, 81 S. W. 347.

In an action for death by wrongful act, testimony from a mortality table is admissible to show deceased's expectancy in life. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

In an action for permanent injuries to a freight brakeman, average life tables held admissible to show his life expectancy. *International & G. N. R. Co. v. Brandon* (Civ. App.) 84 S. W. 272.

In an action for death, mortality tables showing decedent's life expectancy at the date he died, held admissible. *Huber v. Texas & P. Ry. Co.* (Civ. App.) 113 S. W. 984.

A mortality table held properly admitted, as bearing on the life expectancy of one suing for a personal injury. *St. Louis, S. F. & T. R. Co. v. Taylor* (Civ. App.) 134 S. W. 819.

107. **Compelling production of documents.**—In an action for breach of marriage promise, where letters and notes from plaintiff to defendant were in the possession of defendant's attorneys, and readily accessible, so that they could have been produced in a few minutes, it was not necessary for plaintiff to give notice before trial to produce them. *Hill v. Houser*, 51 C. A. 359, 115 S. W. 112.

108. — **Nature of document and relation to issue.**—In a suit upon an open account the plaintiff testified that he had receipts for some of the moneys claimed to have been paid out by him for the defendant and had the same then in his possession. Defendant demanded that he should produce the receipts for his inspection, which plaintiff offered to do upon condition that they should be read in evidence. The defendant declined to inspect them on this condition, and the court properly refused to require plaintiff to produce them. *Muse v. Burns*, 3 App. C. C. § 75.

109. — **Notice in general.**—Notice to produce a deed in controversy held unnecessary where the party who has it in possession is bound to know that the document will be required at the trial. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

110. — **Effect of failure to produce.**—The production of papers upon notice does not make them evidence in the case, unless the party giving the notice inspects them, so as to become acquainted with their contents. *Saunders v. Duval*, 19 T. 467.

The consequence of a failure to produce a deed at the trial upon proper notice is to make secondary evidence of its contents competent, but does not prove its contents. *Gayle v. Perryman*, 24 S. W. 850, 6 C. A. 20.

A party in possession of a document, who refuses to produce it after notice, cannot introduce evidence of indorsements thereon not called for by the adverse party. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

111. — **Introduction by party producing document.**—The fact that one party to a suit had notified the other party to produce certain letters at the trial, held not to authorize their introduction over the objection of the party who served the notice. *Ricker Nat. Bank v. Brown* (Civ. App.) 43 S. W. 909.

112. Authentication of documents—Public documents and records in general.—A part of a record is admissible. *Townsend v. Munger*, 9 T. 300; *Guilford v. Love*, 49 T. 715; *Frankel v. Heidenheimer*, 1 App. C. C. § 807.

The description of land conveyed by a sheriff's deed being ambiguous, a deed to the judgment defendant held properly admitted in evidence in aid of the description in the sheriff's deed. *Clark v. Wm. M. Rice Institute for Advancement of Literature, Science and Art (Civ. App.)* 103 S. W. 1110.

Where notice of appeal was given, the perfection of the appeal cannot be presumed so as to deprive the judgment of that finality necessary to make it admissible in evidence. *Slaughter v. Cooper (Civ. App.)* 107 S. W. 897.

113. — Ordinances.—See notes under Art. 821.

114. — Judicial acts and records.—The original papers in a suit in a court where the trial is had, or when they are brought into open court from the county court of the same county, in the custody of the clerk of that court, are admissible in evidence as original papers. *Wallis v. Beauchamp*, 15 T. 303; *Houze v. Houze*, 16 T. 598. But original papers from another county, in the hands of a person who is not their legal custodian, are not admissible. *Hardin v. Blackshear*, 60 T. 132.

In a suit by a county against a sheriff who was ex officio collector of the county to recover taxes alleged to have been collected by him and not paid over, reports of taxes collected, indorsed by his deputy in his name as sheriff and collector, when produced from the proper custody and attached as exhibits to the petition, are admissible in evidence, though not sworn to. *Webb County v. Gonzales*, 69 T. 455, 6 S. W. 781.

115. — Part of judicial proceedings.—A certified copy of an execution is admissible, without producing a transcript of the execution docket. *Mitchusson v. Wadsworth*, 1 App. C. C. § 977.

In a suit to try title to land sold by an assignee in bankruptcy, plaintiff held entitled to introduce such part of the bankruptcy proceedings as were material to her case. *Beall v. Chatham (Civ. App.)* 94 S. W. 1086.

116. — Examined copies of records.—Proof of a document of a public nature may be made by an examined copy, the genuineness of the original having been proved by the testimony of those who, from having had custody of the original, or from information derived from other sources, can testify as to that fact. *York v. Gregg*, 9 T. 85; *Coons v. Renick*, 11 T. 134, 60 Am. Dec. 230.

Upon an issue of pedigree tried in 1888 it was competent to show by any examined copy the record of proceedings of a Masonic lodge held in 1836 reciting a fact pertinent to the inquiry in the trial. *Howard v. Russell*, 75 T. 171, 12 S. W. 525.

An examined copy of an ancient instrument cannot be admitted without proof of execution. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

A judgment of a foreign state may be proved by a witness who has compared the copy offered in evidence with the original record entry thereof. *St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Civ. App.)* 88 S. W. 512.

117. — Preliminary evidence for authentication in general.—Where the original is an archive of a foreign government, and there are no means of testing its genuineness, or the verity of the proffered testimonio, by any record or other evidence within the limits of our own jurisdiction, extrinsic evidence of the genuineness of the instrument must be produced. *Word v. McKinney*, 25 T. 258.

An act of sale of land not authenticated by the signature of the officer before whom it was executed is not admissible in evidence without proof of its execution. *Andrews v. Marshall*, 26 T. 212.

The execution of a testimonio of a title to land must be proved before it is admissible in evidence. *Hatchett v. Conner*, 30 T. 108; *Paul v. Perez*, 7 T. 338; *Dé Leon v. White*, 9 T. 600; *Word v. McKinney*, 25 T. 258; *Wood v. Welder*, 42 T. 396.

Proof of an instrument executed under a power is not made necessary because the power is attacked. *Moses v. Dibrell*, 21 S. W. 414, 2 C. A. 457.

By-laws of an association, not shown to have been adopted, held erroneously admitted in an action against the association. *Cotton Jammers' & Longshoremen's Ass'n No. 2 v. Taylor*, 23 C. A. 367, 56 S. W. 553.

A time card of a railroad furnished by it to the public held admissible in evidence as against a certain objection. *Western Union Telegraph Co. v. O'Fiel*, 47 C. A. 40, 104 S. W. 406.

In an action against a telephone company for failure to notify plaintiff of a call, a copy of defendant's ticket record, reading, "Date, 10—10—04," held inadmissible to prove the date when the call was received. *Southwestern Telegraph & Telephone Co. v. Owens (Civ. App.)* 116 S. W. 89.

A certified copy of a chattel mortgage is admissible in evidence without proof of its execution when the fact is admitted. *Morris v. Moon (Civ. App.)* 120 S. W. 1063.

In a suit to partition lands in which plaintiffs claimed an undivided one-half interest, the fact that the suit was a partition suit did not authorize the admission of a deed under which plaintiffs claimed title without proof of its execution and without the three days' filing and notice to defendants required by statute. *Merrill v. Bradley*, 52 C. A. 527, 121 S. W. 561.

118. — Corporate acts, records and proceedings.—Constitution and by-laws of a beneficial society, purporting to be published by supreme council, and furnished the local order, and used by it, are admissible without further proof of their adoption. *Home Circle Soc. No. 1 v. Shelton (Civ. App.)* 81 S. W. 84.

119. — Conveyances, contracts and other writings in general.—A title executed by a commissioner without either instrumental or assisting witnesses is not admissible in evidence without proof of its execution by the commissioner. *Grimes v. Bastrop*, 26 T. 310.

As a general rule, a written document, in order to be proved, must be produced in court, together with the witness to identify it, and the proof of the identity should be first made, except in cases where the law has expressly dispensed with its identification. When a written instrument is to be proved by deposition, the usual method of identifying it is by the deponent attaching it to his answer, marking and describing it; or for the

officer taking the deposition to certify that the attached instrument is the identical one presented to the deponent and about which he testified. If no identification be so made, the instrument cannot be submitted to the jury. *Renn v. Samos*, 33 T. 760.

A private writing which does not constitute in whole or in part the basis of the pleadings (Art. 1906, subds. 8, 9) is not admissible in evidence without first proving its execution. *W. U. T. Co. v. Bertram*, 1 App. C. C. § 1153.

Admission of receipt without proof of execution or plea of payment held error. *Hander v. Baade*, 16 C. A. 119, 40 S. W. 422.

A receipt held inadmissible, in the absence of proof of execution. *Staples v. Word* (Civ. App.) 48 S. W. 751.

A lease was admissible in evidence to show an agent's authority to pay taxes on lands in question, though no proof was made of such agent's signature. *Cunningham v. Mathews* (Civ. App.) 57 S. W. 1114.

Where the identity of cattle alleged to have been wrongfully seized by a sheriff under a writ of sequestration was admitted, a bill of sale conveying the cattle to plaintiff was properly received in evidence, though there was no proof that the brands designated therein were recorded. *Campbell v. Ulch*, 24 C. A. 618, 60 S. W. 272.

In an action by an attorney against his client to recover an unascertained contingent fee for commencing an action against the client's guardians for misapplication of funds, receipts purporting to have been executed by the defendant's father as his guardian in a foreign state were properly excluded; there being no proof of their execution, or that the father was guardian at the time. *Lynch v. Munson* (Civ. App.) 61 S. W. 140.

The admission of a fire insurance policy in evidence without formal proof of its execution held no error, in an action seeking to hold defendant liable for the procuring of such policy. *Price v. Garvin* (Civ. App.) 69 S. W. 985.

Chattel mortgage held inadmissible in foreclosure against third party until execution is proved as at common law. *Peterson v. W. J. Martinez & Bros.*, 34 C. A. 212, 78 S. W. 401.

Plaintiff cannot introduce a chattel mortgage in evidence against one not a party to it, except on its execution being proved as at common law. *Becker v. Bowen* (Civ. App.) 79 S. W. 45.

A deed by a married woman, duly acknowledged, in which her husband joins, for the purpose of being admitted in evidence, may be proved as at common law. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 698.

Production of a deed by a party to the instrument claiming thereunder held to dispense with the necessity of proof of execution. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

In an action for deceit in representing an instrument to be a valid security for a loan, the instrument held admissible without proof of its execution. *Western Cottage Piano & Organ Co. v. Anderson*, 45 C. A. 513, 101 S. W. 1061.

120. — **Proof of authority to execute.**—A postal registry receipt, signed for a corporation by a private individual, without any proof of authority, held inadmissible to show receipt of letter by the corporation. *Underwriters' Fire Ass'n v. Henry* (Civ. App.) 79 S. W. 1072.

121. — **Unrecorded instruments.**—A deed never proven for record or recorded is admissible in evidence upon proof of its execution. *Stroud v. Springfield*, 28 T. 663.

122. — **Record as dispensing with proof of execution.**—A deed having but one subscribing witness, who proved it for record, is not admissible as a recorded instrument, but its execution must be proved in order to admit it. *Smith v. Kenney* (Civ. App.) 54 S. W. 801.

123. — **Instruments, and assignment, indorsement or guaranty thereof.**—Where a corporation pleaded non est factum to a suit on a note signed by its vice president and treasurer, the note was not admissible in evidence without proof of the officer's authority to sign the name of the corporation, and being admitted constituted no proof of the fact put in issue by the plea. *Henderson Mercantile Co. v. First Nat. Bank*, 100 T. 344, 99 S. W. 850.

124. — **Writings collateral to issues.**—A written contract cannot be admitted as evidence against one not a party thereto without proof of its execution. *Walker v. Texas & N. O. R. Co.*, 51 C. A. 391, 112 S. W. 430.

125. — **Ancient instruments.**—See Rule 16, post.

126. — **Form and sufficiency in general.**—Evidence that the witness had some business with the person whose signature was in question, that he believed the signature to be genuine, but that he had never seen the person write, and it did not appear that he was acquainted with the handwriting of such person or had seen a signature of his which he knew to be genuine, was held to be insufficient to prove the execution of the instrument. *Mapes v. Leal's Heirs*, 27 T. 345.

The grantor in a deed may testify to its execution in any case when it is offered in evidence. *Bohn v. Davis*, 75 T. 24, 12 S. W. 837.

In an action on a bond, the erasure of the name of one of the sureties held sufficiently explained. *United States Fidelity & Guaranty Co. v. Fossati* (Civ. App.) 81 S. W. 1038.

The genuineness of a writing may be proved by indirect or circumstantial evidence. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

An instrument shown to be genuine as a matter of law. *McAllen v. Raphael* (Civ. App.) 96 S. W. 760.

In an action against a carrier for injuries to a horse in transportation held error to admit in evidence a certain certificate purporting to give the pedigree of the horse, etc. *Texas & P. Ry. Co. v. Newsome & Williams*, 44 C. A. 513, 98 S. W. 646.

Evidence as to the execution of a chattel mortgage considered, and held sufficient to admit the mortgage in evidence. *Rogers v. Frazier Bros. & Co.* (Civ. App.) 108 S. W. 727.

In an action for damages to plaintiff's shipment of poultry, certain evidence held insufficient to prove the correctness of books kept by defendant railroad showing the icing of refrigerator cars. *A. B. Patterson & Co. v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 126 S. W. 336.

An unrecorded deed which had been filed for record held admissible in evidence where witness testified that he prepared it, delivered it to the grantee, saw the consideration pass from her to the grantor, and requested the notary public to take the acknowledgment which was taken in his presence. *Groesbeck v. Wiest* (Civ. App.) 157 S. W. 258.

127. — **Corporate acts, records and proceedings.**—Postal registry receipt held not inadmissible, because not signed with full name of the corporation. *Underwriters' Fire Ass'n v. Henry* (Civ. App.) 79 S. W. 1072.

128. — **Unwitnessed instruments and unauthorized attestation.**—See notes under Art. 1109.

129. — **Attesting witnesses.**—Necessity of attestation, see notes under Art. 1109. When the subscribing witnesses are beyond the jurisdiction of the court, it is not necessary to produce them, and it is sufficient to prove their signatures. *Frazier v. Moore*, 11 T. 755.

The execution of a deed may be proved by the grantor without calling the subscribing witnesses or accounting for their absence. *White v. Holliday*, 20 T. 679.

The affidavit must show that the subscribing witnesses are dead, or that they are absent from the state, or that they cannot be found after diligent inquiry. *Sample v. Irwin*, 45 T. 567; *Craddock v. Merrill*, 2 T. 494.

The grantee in a deed cannot testify to its execution without accounting for the absence of the subscribing witnesses. *Wiggins v. Fleishel*, 50 T. 57.

The grantee in a deed can prove an examined copy, the original being lost and the subscribing witnesses being dead or out of the state. *Texas Land Co. v. Williams*, 51 T. 51.

The death of the subscribing witnesses to an instrument which is over thirty-five years old will be presumed, so as to admit evidence of their signatures. *Hollis v. Dashiell*, 52 T. 187.

The admission of testimony to the signature of the maker by witnesses other than the subscribing witness was not erroneous where it appeared that such witness was without the jurisdiction of the court. *Chator v. Brunswick Co.*, 71 T. 588, 10 S. W. 250.

A writing attested by a witness must be proven by him. *Railway Co. v. McRae*, 82 T. 614, 18 S. W. 672, 27 Am. St. Rep. 926.

Execution of attested instrument must be proved by subscribing witnesses, unless failure to produce them is satisfactorily explained. *Lewis v. Bell* (Civ. App.) 40 S. W. 747.

Where a subscribing witness is dead, his signature may be proved by others. *Timmony v. Burns* (Civ. App.) 42 S. W. 133.

That subscribing witnesses to a deed reside out of the county, though in the state, held insufficient as a ground for the introduction of secondary evidence. *Johnson v. Franklin* (Civ. App.) 76 S. W. 611.

Written contract of sale held not admissible in evidence under proof offered as to its execution. *W. R. Morris & Co. v. Southern Shoe Co.*, 44 C. A. 488, 99 S. W. 178.

Where it is necessary to prove the execution of an instrument, subscribing witnesses must be called or their absence accounted for. *Hightower Bros. v. W. F. Taylor Co.* (Civ. App.) 126 S. W. 621.

130. — **Handwriting.**—In an action of trespass to try title, brought in 1858 and tried at the fall term, 1860, the plaintiff, for the purpose of showing the locus in quo of the land sued for, offered in evidence the field notes of a league of land dated May 17, 1835, found among the papers of P., who, it was proven, was the surveyor general of Robertson colony during this year, and had since died. The paper was excluded. The court held, in substance, that if the paper had been sufficiently proven it would have been admissible as the declaration of the party making it; but, in addition to the corroborating circumstances surrounding it, there should have been some evidence of the genuineness of the handwriting, as witnesses, who might have known, testified as to other facts on the trial. *Stroud v. Springfield*, 28 T. 649.

When a deed is offered in evidence, the effect of an affidavit of forgery is to put the party claiming under it upon proof of its due execution, which must be by the subscribing witnesses, or one of them, if living, or if dead, incompetent to testify, or cannot be procured, then by proof of their handwriting. Proof of handwriting may be made by one who has seen the party write, or, having received letters from him purporting to be in his handwriting, has afterwards communicated with him personally respecting them. Where one of the subscribing witnesses to a deed is incompetent to be a subscribing witness, and incompetent to testify, its execution may be established by proof of the handwriting of the other subscribing witness, he being dead. The requirements of the law concerning the proof of a deed for registration have no application or reference to the proof necessary upon offering it in evidence on the trial of a cause. *Cairrell v. Higgs*, 1 U. C. 56.

Affidavits as to the handwriting of the maker and subscribing witnesses of an instrument, offered in proving it up for record, held to sufficiently show that the parties referred to were dead. *Rountree v. Thompson*, 30 C. A. 595, 71 S. W. 574, 72 S. W. 69.

131. — **Books of account.**—Sworn account and affidavit of denial, see notes under Art. 3712.

Account books are admissible in evidence when it is shown: 1. That they were kept for that purpose. 2. That they contain the original entries, made by the proper person contemporaneously with the transaction. 3. That the party offering them was in the habit of keeping correct and just accounts. 4. This evidence must be supplemented by the oath of the party. *Underwood v. Parrott*, 2 T. 168; *Taylor v. Coleman*, 20 T. 772; *Werbiskie v. McManus*, 31 T. 116; *Burleson v. Goodman*, 32 T. 229; *Harrison v. State Central Bank*, 1 App. C. C. § 377.

The plaintiffs, in a suit on account for goods, etc., sold to defendant, proved by their clerk that their books were in the handwriting of one of the plaintiffs, and that the plaintiffs were in the habit of keeping correct books, but that witness was not clerk for plaintiffs when any of the articles were sold, and that another person, who was still living, was their clerk at that time. Held, that the books were not sufficiently proved; that the failure to obtain the evidence of the person who was clerk when the

articles were sold should have been accounted for, and there should have been added the suppletory oath of the party. *Townsend v. Coleman*, 18 T. 418.

In an action between partners the partnership books are not admissible in evidence on the suppletory oath of the party offering them, against the partner who at his request had not been permitted to inspect them. *Saunders v. Duval*, 19 T. 467.

An account book of a blacksmith, who without a clerk made his own entries in the regular routine of his business, is admissible under the above rule. *Burleson v. Goodman*, 32 T. 229; *Baldrige v. Penland*, 68 T. 441, 4 S. W. 565.

Bank books are not admissible in evidence in behalf of the bank when it was not shown that they had been properly kept. *Baldrige v. Penland*, 68 T. 441, 4 S. W. 565; *Arnold v. Penn.*, 11 C. A. 325, 32 S. W. 353.

Before books of account are admissible in evidence, it must be shown that they contain the daily record of the business of the person for whom they are kept, as it transpires from day to day between himself and customers, and that the entries therein are original entries, made contemporaneously with the transaction of the business which they are intended to evidence. *Bupp v. O'Connor*, 1 C. A. 328, 21 S. W. 619; *Moore v. Moore* (Civ. App.) 31 S. W. 532.

Proof of books of account kept by different persons, how made. *American Fire Ins. Co. v. First Nat. Bank* (Civ. App.) 30 S. W. 384.

It must be shown that the portion of an account book offered in evidence was made contemporaneously with the transaction in question. *Brown v. Williams* (Civ. App.) 31 S. W. 225; *Baldrige v. Penland*, 68 T. 441, 4 S. W. 565.

The predicate necessary for the introduction of books of account to prove an account determined. *Duty v. Storrs* (Civ. App.) 70 S. W. 357.

In an action for the value of ore shipped by plaintiff to defendant and converted by the latter, entries in the books of a railroad company held admissible to show the receipt of a certain car for transportation, the weight of the contents, and the names of the shipper and consignee. *Consolidated Kansas City Smelting & Refining Co. v. Gonzales*, 50 C. A. 79, 109 S. W. 946.

Facts necessary to be proved to authorize the introduction of account books in evidence, stated. *Stark v. Burkitt*, 103 T. 437, 129 S. W. 343.

In absence of person who had made the entries in a book offered in evidence, testimony of witness to having seen the entries made and to their correctness held a sufficient predicate for the admission of the book. *Haywood v. Grand Lodge of Texas*, K. P. (Civ. App.) 138 S. W. 1194.

132. — **Proof of handwriting in general.**—A book account held not sufficiently authenticated to render it admissible. *Missouri, K. & T. Ry. Co. of Texas v. Morrison*, 42 C. A. 598, 94 S. W. 173.

133. — **Memoranda and statements.**—In a suit for delay and improper handling of stock shipped to a commission house, an account of sales of stock at which plaintiff was present was admissible with his testimony, though not proved by any other witness. *Gulf, C. & S. F. Ry. Co. v. Lampkin*, 53 C. A. 524, 116 S. W. 128.

Certain document held inadmissible. *Jacobs v. Nussbaum & Scharff* (Civ. App.) 133 S. W. 484.

In an action against railroads for damage to cattle shipped, a proper foundation held to have been made for the admission of an account of sales. *Kansas City, M. & O. Ry. Co. of Texas v. Worsham* (Civ. App.) 149 S. W. 755.

Where, in an action for the conversion of a carload of freight, a witness identified and verified a list of the goods, the list was properly considered by the jury. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 156 S. W. 267.

134. — **Letters, telegrams and other correspondence.**—It is not error to admit a letter whose execution has been proven by an incompetent witness without objection. *Patrick v. Badger* (Civ. App.) 41 S. W. 538.

A letter offered in evidence held sufficiently identified. *Powell v. State* (Cr. App.) 44 S. W. 504.

A letter showing suspicious and material erasures held inadmissible in an action for breach of marriage promise, in the absence of evidence explaining same. *Barber v. Geer*, 23 C. A. 531, 57 S. W. 58.

Certain facts held to sufficiently establish the genuineness of a private writing. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

Proof of the execution of letters by the writer is a prerequisite to their admission in evidence as letters written by him. *Ex parte Denning* (Cr. App.) 100 S. W. 401.

Certain letters held not admissible in an action of trespass to try title. *Henry v. Vaughan*, 46 C. A. 531, 103 S. W. 192.

On an issue as to the execution and delivery of an alleged lost deed, letters showing plaintiff's endeavor to discover the deed held admissible without proof of the signatures of the writers. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

In action against an express company to recover on money orders paid on the plaintiff's forged indorsement, plaintiff's letters with his signature written by the alleged forger held admissible over objection that their custody was unexplained. *Wells Fargo & Co. Express v. Bilkiss* (Civ. App.) 136 S. W. 798.

A letter, appearing on its face to have been written by a third person, was not admissible in the absence of some testimony tending to show who executed it. *Newman v. Norris Implement Co.* (Civ. App.) 147 S. W. 725.

To render letters admissible in evidence, proof of their execution is necessary. *Quanah, A. & P. Ry. Co. v. Drummond* (Civ. App.) 147 S. W. 728.

135. — **Proof of handwriting.**—A letter held not objectionable, because not shown to have been in the handwriting of the person whose correspondence it purported to be. *Sun Mfg. Co. v. Egbert & Guthrie*, 37 C. A. 512, 84 S. W. 667.

136. — **Maps, plats and diagrams.**—In action by an abutting owner for closing a street, a map compiled by a land agent from sources not shown, and not otherwise proved to be correct, held properly excluded. *Smith v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 64 S. W. 943.

A plat of land held not admissible, as independent evidence, on mere testimony of one who was with the surveyor. *Smith v. Bunch*, 31 C. A. 541, 73 S. W. 559.

On the issue of dedication, lithograph copy of city map held properly admitted in evidence where the original was not recorded and could not be produced. *City of Houston v. Finnigan* (Civ. App.) 85 S. W. 470.

A plat of certain land in controversy in trespass to try title could not be considered without proof that it was correct. *R. W. Wier Lumber Co. v. Conn* (Civ. App.) 156 S. W. 276.

137. — **Photographs and other pictures.**—A witness need not make a photograph himself, nor see it made, to testify to its correctness. *Missouri, K. & T. Ry. Co. of Texas v. Magee* (Civ. App.) 49 S. W. 928.

Evidence that photographs of defective sidewalk taken two months after injury, were correct representations of locality at time of injury, held admissible. *City of San Antonio v. Talerico* (Civ. App.) 78 S. W. 28.

In an action for injuries, testimony of injured party that a photograph offered in evidence was a correct picture of the scene of the accident was sufficient to render it admissible. *Accousi v. G. A. Stowers Furniture Co.* (Civ. App.) 87 S. W. 861.

Photographs of a railroad curve where plaintiff's decedent was killed in a wreck held admissible on proof of any person who knew the fact that the photographs properly represented the scene. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

138. — **Books and other printed publications.**—A book containing city charter, which states on its title-page that it is published by the city, is admissible without further proof. *Galveston, H. & S. A. Ry. Co. v. Washington*, 25 C. A. 600, 63 S. W. 538.

In an action for injuries to cattle in transit, the admission of copies of a live stock reporter to show the market price held based on a sufficient predicate. *Kansas City, M. & O. Ry. Co. of Texas v. Worsham* (Civ. App.) 149 S. W. 755.

139. **Determination of question of admissibility.**—See notes under Art. 1971.

140. **Conclusiveness and effect.**—As to the effect in evidence of an account book kept by a clerk, etc., see *Maverick v. Maury*, 79 T. 435, 15 S. W. 686.

After assent of the parties to an account stated, an action lies for the balance as an original demand or an implied promise of payment, and cannot be re-opened and re-examined to ascertain the items unless for alleged fraud or mistake. *Henry v. Chapman*, 4 App. C. C. § 105, 16 S. W. 543.

An open account is not fixed and determined, and may be disputed. The matter is not closed, but is open for determination. *Langholz v. C. Z. Kroh Co.* (Civ. App.) 29 S. W. 831.

Though an instrument is admissible as an ancient document, held it may be found not genuine. *West v. Houston Oil Co. of Texas*, 56 C. A. 341, 120 S. W. 228.

A petition verified merely on information and belief was not evidence. *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

That a certificate of the seaworthiness of a vessel had been issued by the authorities held not conclusive evidence thereof in a shipper's action for injuries to a shipment due to a leak in the vessel. *Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co.* (Civ. App.) 154 S. W. 282.

140½. — **Use by adverse party.**—Where plaintiff based his right to recover on an invalid deed executed by the mayor of a town, and failed to introduce in evidence a tax deed previously executed to plaintiff's grantor by the sheriff of the county, the fact that defendant introduced such tax deed for the purpose of showing a common source did not authorize plaintiff to use such tax deed as a part of his chain of title. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

141. — **Judicial and other records.**—As between the state and the patentee, the patent is evidence of title in the latter. The decision of the commissioner is not conclusive of the genuineness of the assignment against the grantee, or any assignor of the certificate; but, as between the patentee and strangers, the patent is at least prima facie evidence that the title is in the patentee, and relieves him from the necessity of proving the assignment in an action of trespass to try title against a party who does not claim the certificate upon which the patent issued. *Mitchell v. Bass*, 26 T. 372; *Renick v. Dawson*, 55 T. 102; *League v. Rogan*, 59 T. 427; *Todd v. Fisher*, 26 T. 242.

As to value of decrees of Spanish governors as evidence of title to land, see *Von Rosenberg v. Haynes*, 20 S. W. 143, 85 T. 357.

After 30 years, a valid levy of an execution held shown by docket showing issuance and sheriff's deed reciting levy and sale. *West v. Loeb*, 16 C. A. 399, 42 S. W. 612.

Where, in an action of trespass to try title, the lands were located by virtue of a certificate to the administrators of a Texas volunteer killed in battle, which certificate bore an indorsement of transfer by such administrators to the one who located it, such indorsement is sufficient to justify a finding that such transfer was made. *Barrett v. Spence*, 28 C. A. 344, 67 S. W. 921.

Admissions contained in an abandoned pleading are not to be taken as conclusive, but may be explained or contradicted. *Houston, E. & W. T. Ry. Co. v. Dewalt* (Civ. App.) 71 S. W. 774.

In a suit to try title between grantees of a woman's heirs and grantees of her administrator, recitals of a certificate by the board of land commissioners made under section 10 of the general provisions of the Constitution of the Republic of Texas held to conclusively establish certain facts. *Fields v. Burnett*, 49 C. A. 446, 108 S. W. 1048.

Where a sheriff's deed to the property in controversy more than 30 years old recited a sale pursuant to an execution issued out of the office of the clerk of the district court of N. county and a levy and sale of the land thereunder, the deed conclusively established the issuance of the execution in accordance with its recitals. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

Recital in a judgment held to sufficiently show service of citation against defendant unknown heirs. *Houston Oil Co. of Texas v. Bayne* (Civ. App.) 141 S. W. 544.

A record sufficiently shows issuance of a writ of attachment, in an action in justice's court, where the judgment in that action shows foreclosure of an attachment lien, and directed issuance of an order of sale, and where it appears that the sheriff's return on the writ was introduced in evidence. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

142. — **Private contracts and other writings.**—In an action for breach of warranty of title to land, a recital in the deed is prima facie evidence that the amount stated was the true consideration. When two tracts are conveyed for an aggregate consideration, and the suit is for damages for breach of title to one only of the tracts, the recital of consideration in the deed is not evidence. *Hall v. Pierson*, 1 App. C. C. § 1211.

In trespass to try title it was held that the payment of purchase money, recited in the deed to plaintiff over 20 years old, should have been proved otherwise than by the recitals therein. *Bremer v. Case*, 60 T. 151.

In trespass to try title it was held that the recital in the deed to plaintiff over 20 years old that the purchase money had been paid was not sufficient evidence to establish that fact, so as to constitute him an innocent purchaser. *Id.*

A deed purporting to be executed under a power of attorney not produced, if thirty years old, which comes from the proper custody, and rights have been asserted under it and taxes paid by claimant, authorizes the presumption that the power existed. *O'Donnell v. Johns*, 76 T. 362, 13 S. W. 376; *Davis v. Pearson*, 26 S. W. 241, 6 C. A. 593; *Harrison v. McMurray*, 71 T. 129, 8 S. W. 612; *O'Donnell v. Johns*, 76 T. 362, 13 S. W. 376.

No more weight could be given to a deed, as matter of law, which was admissible and admitted as an ancient instrument, than ought to be to one proved by a subscribing witness. So far as admissibility is concerned this must be determined by the court; but the ultimate weight to be given to a deed admissible because proved in the one way or the other, so far as the question of genuineness goes, when there is a conflict of evidence as to this, must be determined by the jury. *Stooksbury v. Swan*, 85 T. 563, 22 S. W. 963.

As to effect of recital of consideration in deed, see *Womack v. Wamble*, 27 S. W. 154, 7 C. A. 273, citing *Weaver v. City of Gainesville*, 21 S. W. 317, 1 C. A. 286; *Willis v. Byars*, 21 S. W. 321, 2 C. A. 134; *Belcher v. Mulhall*, 57 T. 17; *Railway Co. v. Garrett*, 52 T. 133; *Railway Co. v. McKinney*, 55 T. 176; *Railway Co. v. Pfeuffer*, 56 T. 71; *Taylor v. Merrill*, 64 T. 494.

A deed of trust duly proven is prima facie evidence of the existence of the debts mentioned therein in a suit for conversion of the trust property. *Martin-Brown Co. v. Henderson*, 28 S. W. 695, 9 C. A. 130.

Mutilated deed held circumstantial, but not conclusive, evidence. *Bauman v. Chambers*, 91 T. 108, 41 S. W. 471.

A deed reciting that the grantor was the widow, sole legatee, and executrix of M. was not evidence of title, in the absence of proof of M.'s death, the existence and probate of the will, and that the grantee was executrix and sole legatee thereunder. *McCoy v. Pease*, 17 C. A. 303, 42 S. W. 659.

Recital in the instrument under which plaintiff claimed and the field notes of the survey introduced in evidence held to sufficiently show the acreage claimed by plaintiff. *Miller v. Gist*, 91 T. 335, 43 S. W. 263.

Where one testified unequivocally that he was a nonresident of the state, the fact that recitals in deeds mentioned him as a resident did not make the evidence conflicting. *Dodge v. Signor*, 18 C. A. 45, 44 S. W. 926.

Though a deed recites a consideration, it may be shown that the property conveyed was a gift. *Mahon v. Barnett* (Civ. App.) 45 S. W. 24.

A deed executed by city of San Antonio in 1852, and confirmed by legislative enactment, held to sufficiently show grantee's title from the sovereignty. *City of San Antonio v. Ostrom*, 18 C. A. 678, 45 S. W. 961.

Where the owner of land conveyed a part thereof, and the deed recited that there was reserved from its operation a certain number of acres previously conveyed or agreed to be conveyed to another, such recital was merely an admission, which might be rebutted. *Bartell v. Kelsey* (Civ. App.) 59 S. W. 631.

Recitals of consideration in a deed, held prima facie evidence of payment thereof by the grantee. *Williams v. Sapiha* (Civ. App.) 59 S. W. 947.

The will of a surviving wife, which recites the adoption of a daughter, held sufficient to establish the fact of her adoption, as against a devisee in the will, in an action to try title. *White v. Holman*, 25 C. A. 152, 60 S. W. 437.

A deed conveying the land in controversy to plaintiff's intestate held sufficient, under the evidence, to show an equitable interest, and hence to defeat a plea of stale demand filed by a naked trespasser. *Karnes v. Butler* (Civ. App.) 62 S. W. 950.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, that the waybill issued by defendant described the shipment as a through one held no proof of agency between defendant and the connecting line. *San Antonio & A. P. Ry. Co. v. Barnett*, 27 C. A. 498, 66 S. W. 474.

In an action for breach of warranty of title in a deed, the recital in the deed is prima facie evidence of the consideration paid. *Sachse v. Loeb* (Civ. App.) 69 S. W. 460.

The recitals of a consideration in a deed are insufficient to show that the grantee was a purchaser for value, as against the grantee in a prior unrecorded deed from the same grantor. *Moody v. Ogden*, 31 C. A. 395, 72 S. W. 253.

A deed reciting an intention to convey only whatever title the grantor may have acquired in the land by a purchase at tax sale is no evidence of title in the grantor by virtue of that sale. *McKee v. Ellis* (Civ. App.) 83 S. W. 880.

A deed executed by the assignee of certain bankrupts to their attorneys held not intended to pass title for their benefit. *Beall v. Chatham* (Civ. App.) 94 S. W. 1086.

A plat held to indicate that the surveyor making it made an actual survey and ran the lines on the ground as indicated by the plat. *Cochran v. Kapner*, 46 C. A. 342, 103 S. W. 469.

A recital in a deed held insufficient to show a chain of title from the patentee to the grantor. *Teagarden v. Patten*, 48 C. A. 571, 107 S. W. 909.

The recital in a deed of a consideration held not alone sufficient to prove payment thereof, so as to constitute grantee an innocent purchaser. *McAdoo v. Williams*, 54 C. A. 562, 118 S. W. 625.

A sheriff's deed more than 30 years old, reciting a sale under a certain execution, held conclusive evidence of the issuance of the execution as recited. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

The recital in a deed subsequent to an unregistered deed that the purchase money has been paid held not alone to prove payment. *Davidson v. Ryle* (Sup.) 124 S. W. 616.

To show a purchase in good faith as against an equitable title, a purchaser must prove, outside of recitals in his deed, that he paid value and purchased without actual or constructive notice of such title. *Low v. Gray* (Civ. App.) 130 S. W. 270.

Plaintiff's deed held to sufficiently comprehend the land sued for under her petition in trespass to try title. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

Recitals in a deed held to show that a wall was a party wall. *Fewell v. Kinsella* (Civ. App.) 144 S. W. 1174.

A bank to which land was transferred by a vendee held not entitled to rights of an innocent purchaser in an action by the original vendors to cancel the deed given by them, because procured by fraud, where there was no proof, aside from recitals of the deed to the bank, that the bank paid value or took without notice of plaintiffs' equities. *Morrison v. Cotton* (Civ. App.) 152 S. W. 866.

143. — **Books of account.**—An entry on the books of a bank of a certain amount as a credit on a depositor's account is not conclusive of the bank's liability to the depositor for that amount, but is open to explanation. *Anderson v. Walker*, 93 T. 119, 53 S. W. 821.

In a suit to recover money paid to defendant, but not credited, evidence of the drinking habits of defendant's bookkeeper held admissible. *Seiber v. Johnson Mercantile Co.*, 40 C. A. 600, 90 S. W. 516.

144. — **Books and other printed publications.**—The jury in determining the damages in an action for negligent death held not bound to take the mortuary tables as evidence of the probable duration of decedent's life. *Texas Mexican Ry. Co. v. Higgins*, 44 C. A. 523, 99 S. W. 200.

145. — **Effect of introducing part of document or record.**—When one party introduces a judgment or any part of a record, the other party may read the remaining part of the record in evidence. *Hughes v. Driver*, 50 T. 175.

Where a party offers only a part of an instrument, the adverse party held entitled to introduce the entire instrument only when a reading of the entire instrument is essential to a proper understanding of the part offered. *St. Louis & S. F. Ry. Co. v. May*, 53 C. A. 257, 115 S. W. 900.

Admission in evidence of a portion of a letter held not to require the admission of other portions. *Heard v. Clegg* (Civ. App.) 144 S. W. 1145.

146. **Estoppel by deed.**—See Rule 32, post.

V. Reception of Evidence at Trial

147. **Statutory matters as to conduct of trial.**—See Title 37, Chapter 12.

148. **Necessity and scope of proof.**—A witness suing for fees must produce the subpoena, or account for its absence. *Harris v. Coleman*, 8 T. 278.

When a suit is founded upon a bill of lading, the bill of lading must be produced in evidence, or its nonproduction be accounted for and its substance proved as alleged. When the bill of lading is declared on, it is admissible evidence without proof, unless its execution is denied under oath. *T. & P. Ry. Co. v. Logan*, 3 App. C. C. § 187.

In reconvention on a sequestration bond judgment cannot be rendered against the sureties without introduction of the bond and writ of sequestration with return thereon. *Wilkinson v. Stanley* (Civ. App.) 43 S. W. 606.

Tenant's introduction of distress warrant in support of plea of reconvention in action for rent held unnecessary in view of pleadings. *Hurst v. Benson* (Civ. App.) 71 S. W. 417.

Since state courts take judicial notice of the laws of the United States, the testimony of federal officers, such as revenue agents, is not admissible to prove such laws. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

149. — **Matters of record in cause.**—Where suit is brought against a railroad company for damages resulting from its delay and negligence in shipping stock under an implied contract, and the defendants plead a written contract with the shipper, but it is not introduced in evidence, the liability of the defendant is not limited thereby. *Missecuri, K. & T. Ry. Co. of Texas v. Wells*, 24 C. A. 304, 58 S. W. 842.

Exhibits attached to the pleadings are not evidence unless introduced at the trial. *Missouri, K. & T. Ry. Co. of Texas v. Lawson*, 55 C. A. 388, 119 S. W. 921.

150. — **Matters not controverted at trial.**—One may not complain of the foreclosure of a mortgage lien in a proceeding by his landlord because no mortgage was offered in evidence, where the existence of such lien was admitted by the answer. *Dunlap v. Thrasher*, 48 C. A. 324, 107 S. W. 83.

An admission by a defendant entered under district and county courts rule 31 (67 S. W. xxiii) held to relieve plaintiff of the obligation of proving his case and to allow a recovery to the extent of the claim pleaded. *Berry Bros. v. Fairbanks, Morse & Co.*, 51 C. A. 558, 112 S. W. 427.

151. **Introduction of documentary evidence.**—On the production of an instrument, if it appears to have been altered, it is incumbent upon the party offering it in evidence to explain this appearance. If nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. If ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when, the person by whom, and the intent with which, the alteration was made as matters of fact to be found by the jury upon the evidence. *Rodriguez v. Haynes*, 76 T. 225, 13 S. W. 296; *Warren v. Frederichs*, 76 T. 647, 13 S. W. 643; *Ammons v. Dwyer*, 78 T. 639, 15 S. W. 1049; *Pasture Co. v. Preston*, 65 T. 448; *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437; *Kennard v. Withrow* (Civ. App.) 28 S. W. 226.

Admissions in pleadings need not be read in evidence. *Bauman v. Chambers*, 91 T. 108, 41 S. W. 471.

In a suit on an official bond, where the issue is whether the bond was filed and approved, it may be introduced in evidence. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

It is not error to permit plaintiff to read part of a witness' statement where defendant was at liberty to read any other part claimed to be material. *Galveston, H. & S. A. Ry. Co. v. Eckles* (Civ. App.) 54 S. W. 651.

Defendants, claiming title in themselves, need not introduce deeds constituting links in their chain of title in the order of their execution. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

152. Placing witnesses under the rule.—Witnesses may, in the discretion of the court, be examined separately, and out of the hearing of each other. *Cavazos v. Gonzales*, 33 T. 133; *Watts v. Holland*, 56 T. 54.

The admissibility of witnesses who have not been placed under the rule, or have violated the rule, is within the sound discretion of the court. *Sherwood v. State*, 42 T. 498; *Texas Express Co. v. Dupree*, 2 App. C. C. § 321; *Phillips v. Edelstein*, 2 App. C. C. § 452.

Where witnesses have been placed under the rule, the court may permit a witness not under the rule to testify as to matters not anticipated. *Railway Co. v. Burleson* (Civ. App.) 26 S. W. 1107.

The permission of a witness, who has remained in the court room and heard some of the testimony, to testify after the rule was invoked, is within the sound discretion of the court, and will not be revised on appeal, unless an abuse of such discretion is apparent. *Garlington v. McIntosh* (Civ. App.) 33 S. W. 389.

Releasing a particular witness from the rule excluding witnesses held within the discretion of the court. *Galveston, H. & S. A. Ry. Co. v. Burnett* (Civ. App.) 42 S. W. 314.

The parties to a cause are not subject to the rule for the separation of witnesses. *Rotan Grocery Co. v. Martin* (Civ. App.) 57 S. W. 706.

Witness who has not been placed under rule for separation of witnesses may, in the discretion of the court, be permitted to testify. *Colbert v. Garrett* (Civ. App.) 57 S. W. 853.

Party to an action cannot be prevented from taking stand after he has heard testimony of two of his witnesses. *Id.*

Where the rule as to separation has been invoked as to witnesses, and a witness has been told what a witness for plaintiff had sworn, the court may in its discretion permit such witness to testify to matters tending to impeach plaintiff's witness. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 28 C. A. 260, 67 S. W. 140.

Court held to have abused its discretion in refusing to permit a witness to testify on account of a violation of the rule separating witnesses. *Johnson v. Cooley*, 30 C. A. 576, 71 S. W. 34.

Where witnesses have been placed under the rule, and the same is violated, the court should withdraw the case from the jury. *St. Louis & S. F. R. Co. v. Akers* (Civ. App.) 73 S. W. 848.

Failure to enforce rule excluding witnesses, as to certain witness, held not an abuse of discretion. *M. A. Cooper & Co. v. Sawyer*, 31 C. A. 620, 73 S. W. 992.

Permitting a witness to testify after he had violated a rule excluding witnesses held not an abuse of discretion. *International & G. N. R. Co. v. Hugen*, 45 C. A. 326, 100 S. W. 1000.

Allowing a witness to testify who had been in the courtroom after the rule had been demanded held no abuse of discretion by the court. *Houston & T. C. R. Co. v. Washington* (Civ. App.) 127 S. W. 1126.

The exercise of the sound discretion of the trial court in excluding the testimony of a witness who, having been placed under the rule, violated it, is reviewable only for abuse. *Galveston, H. & S. A. Ry. Co. v. Pingnot* (Civ. App.) 142 S. W. 93.

The matter of placing witnesses under the rule rests largely in the discretion of the trial court, and, in the absence of an abuse of discretion and prejudice to the party complaining, the ruling is not ground for reversal. *Beaumont & G. N. R. R. v. Elliott* (Civ. App.) 148 S. W. 1125.

It is within the court's discretion to permit particular witnesses to remain in the courtroom where the rule is invoked. *Armstrong Packing Co. v. Clem* (Civ. App.) 151 S. W. 576.

In a husband's action for injuries to his wife in which the rule was invoked, the court did not abuse its discretion in permitting both the husband and wife to remain in the courtroom. *Id.*

The propriety of placing any class of witnesses under the rule rests largely in the discretion of the trial judge, and his ruling will not be reversed, except where an abuse is shown. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

153. Offer of proof.—In making an offer to introduce testimony, it is not necessary for the offer to cover the entire issue; it is sufficient if the testimony conduces to prove a link in the chain of facts which make up the issue, or to lay a foundation for the introduction of other proper evidence. *Neill v. Keese*, 5 T. 23, 51 Am. Dec. 746. See *Gamage v. Alexander*, 14 T. 414.

Where evidence, offered in connection with an objection to a deed, was excluded because the deed was admissible on its face, defendant, in order to predicate error on the exclusion of such evidence, should have reoffered it as original testimony. *Houston Oil Co. of Texas v. Kimball* (Civ. App.) 114 S. W. 662.

154. — Showing grounds or purpose of admission.—Relevancy of evidence objected to must be shown by statement of counsel. *Harvey v. Edens*, 69 T. 420, 6 S. W. 306.

As a general rule to entitle a party to a revision of the rulings of the lower court as to questions to a witness, the expected answer must appear, but it is not applicable in the cross-examination of witnesses. *Cunningham v. Railway Co.*, 31 S. W. 629, 88 T. 534.

Where the purpose for which evidence was offered was revealed for the first time on appeal, it was not error to exclude it. *Lindsay v. State*, 39 Cr. R. 468, 46 S. W. 1045.

A bill of exceptions to the exclusion of evidence is insufficient to show injury, where it does not state what the witness would have answered in response to the question. *Shippers' Compress & Warehouse Co. v. Davidson*, 35 C. A. 558, 80 S. W. 1032.

A bill of exceptions to the exclusion of testimony should state what it was expected the witness would answer, and the objections to the testimony. *McMillion v. Cook* (Civ. App.) 118 S. W. 775.

155. — **Evidence admissible in part or for particular purpose.**—Where evidence is admissible against one party, another party, as to whom it is incompetent, cannot complain, in the absence of a request to the court to limit the effect of the evidence. *Shelburn v. McCrocklin* (Civ. App.) 42 S. W. 329.

It is not error to admit testimony, a part of which is inadmissible, when the objection is made to the whole. *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

When admissible evidence is intermingled with that which is inadmissible, it is not error to exclude the whole. *Cole v. Horton* (Civ. App.) 61 S. W. 503.

Evidence admissible against part of several defendants held properly admissible against all, in the absence of a request for an instruction limiting its effect. *Ft. Worth & D. C. Ry. Co. v. Harlan* (Civ. App.) 62 S. W. 971.

A duebill, given by a subcontractor of a railroad company in lieu of time checks, is admissible in an action thereon against the subcontractor and the railroad company to enforce the lien, though it contains admissions not binding on the company. *Texas & N. O. Ry. Co. v. Dorman* (Civ. App.) 62 S. W. 1086.

Where evidence is admissible on a certain issue, and there is no request for an instruction limiting its operation, an assignment of error in its admission will be overruled. *Brin v. McGregor* (Civ. App.) 64 S. W. 78.

In an action against a street railway company and a steam railway company for personal injuries, it was not error to admit evidence of negligence, competent under the pleadings of one of the defendants against the other, though not competent under the petition. *Gulf, C. & S. F. Ry. Co. v. Holt*, 30 C. A. 330, 70 S. W. 591.

Part of answer in a deposition showing personal observation held admissible after striking out hearsay. *Travelers' Ins. Co. v. Hunter*, 30 C. A. 489, 70 S. W. 798.

In an action against several defendants to recover property transferred by a bankrupt in fraud of his creditors, certain testimony, admitted by agreement between the plaintiff and certain of the defendants, held not harmful to other defendants. *Horstman v. Little* (Civ. App.) 88 S. W. 286.

Certain evidence as to ownership held admissible against both defendants in an action for conversion. *Trammell & Lane v. J. M. Guffey Petroleum Co.*, 42 C. A. 455, 94 S. W. 104.

A defendant held not entitled to complain of the exclusion of certain evidence offered on behalf of all the defendants, though it was only admissible in behalf of one. *Evans v. Scott* (Civ. App.) 97 S. W. 116.

Reference in plaintiff's evidence to a custom as to the making of a contract of employment held an immaterial matter, which did not affect the balance of plaintiff's testimony as to such contract. *San Antonio Light Pub. Co. v. Moore*, 46 C. A. 259, 101 S. W. 867.

It is a sufficient answer to an assignment of error as to the admission in evidence of a letter, based on the ground that it did not pass title to land in dispute between the parties, that it was not introduced for that purpose, but on a general issue of estoppel pleaded by the party introducing it. *Moore v. Kirby*, 52 C. A. 200, 115 S. W. 632.

In a suit to recover rents, part of the consideration for the conveyance of land, certain evidence held admissible only for the purpose of affecting the credibility of the witness, and not for the purpose of proving plaintiff's case. *Tipton v. Tipton*, 55 C. A. 192, 118 S. W. 842.

Evidence on the question whether defendant had abandoned his homestead held admissible, though tending to impeach the witness. *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

One offering testimony admissible against some, and inadmissible against other defendants, should invoke ruling as to its partial admissibility. *Berger v. Kirby* (Civ. App.) 135 S. W. 1122.

In an action to foreclose vendor's lien notes, releases of such liens were admissible though they contained recitals not of themselves admissible. *Adams v. Hill* (Civ. App.) 149 S. W. 349.

156. — **Rulings on offers.**—In an action against a railroad for damages resulting from delay, rough handling, etc., in transporting plaintiff's cattle, ruling excluding certain evidence held not relieved of error by explanation of trial judge. *Texas & P. Ry. Co. v. Coggin*, 40 C. A. 583, 90 S. W. 523.

156½. **Conclusiveness of evidence on party introducing it.**—The objection that a will is not the best evidence of the adoption of a daughter cannot be urged by a devisee, who has introduced the will in evidence, in an action to try title. *White v. Holman*, 25 C. A. 152, 60 S. W. 437.

Where a deposition is offered it should be considered as the evidence of the party who offered it, though it was taken at the instance of the opposite party. *Western Union Tel. Co. v. Lovely*, 29 C. A. 584, 69 S. W. 128.

157. **Presence of jury during offer or argument as to admission.**—Exercise of the trial court's discretion in permitting an offer of proof in the presence of the jury will not be reversed on appeal without an affirmative showing of abuse and substantial injury to plaintiff. *Moss v. Gulf, C. & S. F. Ry. Co.*, 46 C. A. 463, 103 S. W. 221.

In the absence of a request that the jury be retired during a legal argument, held, that it was no objection that during argument to the court counsel read from authorities. *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 49 C. A. 12, 108 S. W. 500.

158. **Provisional or conditional admission.**—The practice of admitting improper testimony with the promise or expectation of afterwards directing the jury not to consider it, or of controlling its effect by a charge, is condemned. *G., C. & S. F. Ry. Co. v. Levy*, 59 T. 542, 46 Am. Rep. 269; *Tucker v. Hamlin*, 60 T. 171.

159. **Presentation of evidence.**—A question as to what a witness had testified on a former trial of the cause, the witness not having testified on the trial in question, was improper. *Texas & P. Ry. Co. v. Prude*, 39 C. A. 144, 86 S. W. 1046.

160. **Application of personal knowledge of jurors.**—A defendant in an action for the reasonable value of services who offered no testimony as to the reasonable value thereof

could not complain if the jury made their own estimate from their own knowledge. *C. W. Hahl & Co. v. Southland Immigration Ass'n*, 53 C. A. 592, 116 S. W. 831.

161. Effect of admission of evidence.—The fact that defendant elicited incompetent testimony on cross-examination of plaintiff's witnesses did not render such evidence competent as against plaintiff. *Smith v. City of San Antonio* (Civ. App.) 57 S. W. 831.

One of two defendants in an action for conversion, both having denied plaintiff's title, held entitled to the benefit of evidence, however admitted, to show title in the other defendant. *Trammell & Lane v. J. M. Guffey Petroleum Co.*, 42 C. A. 455, 94 S. W. 104.

162. — Restriction to special purpose.—Evidence in an action to recover land held not erroneously admitted where it was restricted by instruction. *Clark v. Clark*, 21 C. A. 371, 51 S. W. 337.

Where testimony is before jury for certain purpose, court should limit its effect, but, where this is not requested, party cannot afterwards complain. *Galveston, H. & S. A. Ry. Co. v. Jackson* (Civ. App.) 53 S. W. 81.

Where tax deeds are introduced to support a plea of limitation, it is not necessary to object to their introduction to limit their effect to the purpose for which they were introduced. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 252.

In an action against an alleged partnership, the existence of which is denied, the refusal to limit the consideration of certain evidence to a particular issue held error. *Robinson v. First Nat. Bank*, 98 T. 184, 82 S. W. 505.

Where evidence otherwise inadmissible is admissible upon some one issue, the party against whom it is admitted is entitled upon request to have the scope of such evidence limited. *Bell v. Missouri, K. & T. Ry. Co. of Texas*, 36 C. A. 569, 82 S. W. 1073.

Where a witness is impeached by showing different statements out of court, it is error to fail to limit the impeaching testimony to the purpose for which it was admitted. *Texas Loan & Trust Co. v. Angel*, 39 C. A. 166, 86 S. W. 1056.

In trespass to try title, evidence of statements by defendant, who afterwards testified, held properly confined to question of good faith. *Camp v. League* (Civ. App.) 92 S. W. 1062.

In an action for commissions, certain testimony held admissible, and held, that it was not error to fail to restrict it to a certain purpose in the absence of a request by the defendant to do so. *Bluestein v. Collins* (Civ. App.) 103 S. W. 687.

In an action against a railroad company to enjoin construction of a fence between its right of way and plaintiff's lot, plaintiff's testimony that his property would be worth only half its value if the fence were erected, and that without a fence it would be worth from \$10,000 to \$12,000, should have been confined to the market value. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

163. Exclusion of improper evidence.—When evidence is excluded on grounds which are not tenable, the ruling will not be sustained on appeal on another ground which is good, but which might have been obviated if taken in the court below. *Butler v. Dunagan*, 19 T. 559.

The admissibility of evidence is determined by the judge. *Munzesheimer v. Allen*, 3 App. C. C. § 55.

Action of court in action for injuries, in sustaining objection to question put to plaintiff as to whether a proposition had been made to him to have the court appoint a committee of physicians to examine him, held erroneous. *Austin & N. W. R. Co. v. Cluck*, 97 T. 172, 77 S. W. 403, 64 L. R. A. 494, 104 Am. St. Rep. 863, 1 Ann. Cas. 261.

Sustaining an objection to a question whether plaintiff objected to an X-ray examination of his wife's injuries, for which he sued, held not error. *Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Civ. App.) 78 S. W. 558.

Testimony of the officer who took a deposition as to a question put to him, by defendant held such that it should have been excluded. *Shannon v. Marchbanks*, 35 C. A. 615, 80 S. W. 860.

Where, in an action for negligent death, a motion for an autopsy of the body of decedent for the purpose of establishing defendant's theory of self-defense was properly denied, the refusal to permit the motion to be read to the jury was proper. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

It is improper to admit inadmissible evidence and undertaking to control it by withdrawing it or excluding it by the charge. *Stephenson v. Jackson* (Civ. App.) 128 S. W. 1196.

164. Cumulative evidence in general.—Cumulative testimony is additional testimony of the same kind to the same point. It is not cumulative when it is of a different character, and merely tends to prove a former proposition, in issue by the testimony, by proof of a new and distinct fact. *Railway Co. v. Forsyth*, 49 T. 171.

It is not error to refuse to admit cumulative evidence unless it clearly appear that injury was caused. *Snow v. Starr*, 75 T. 411, 12 S. W. 673.

Exclusion of testimony on subject sufficiently covered by the witness held not error. *Gulf, C. & S. F. Ry. Co. v. Brown*, 16 C. A. 93, 40 S. W. 608.

In an action against a railroad for injuries, one of defendant's medical expert witnesses held properly excluded, under the rule excluding witnesses from attendance on the examination of other witnesses. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 31 C. A. 332, 72 S. W. 418.

The exclusion of the repetition of evidence admitted held not error. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

The refusal of the court to allow parties to introduce matters which were already in evidence was proper. *Camp v. League* (Civ. App.) 92 S. W. 1062.

Where the evidence of a witness at a former trial was substantially the same as that at a subsequent trial, it was not error to refuse to permit the introduction of his former testimony. *Missouri, K. & T. Ry. Co. v. Garrett* (Civ. App.) 96 S. W. 53.

The exclusion of the testimony of a witness to prove a fact established by a number of other witnesses is not erroneous. *Sherman Gas & Electric Co. v. Belden* (Civ. App.) 115 S. W. 897.

The exclusion of the report of the accident made by the witness then on the stand held not error; plaintiff's counsel, while having asked the witness if he made a report,

not having claimed that the report differed from his evidence. *Texas & P. Ry. Co. v. Tuck*, 103 T. 72, 123 S. W. 406.

Where one physician offered by defendant in an injury action was allowed to examine plaintiff's injured arm, held that defendant could not object because other physicians offered by it were not permitted also to examine the arm. *International & G. N. R. Co. v. Lane* (Civ. App.) 127 S. W. 1066.

The refusal of the court to allow a witness to make a second statement as to a matter previously testified to, held within the court's discretion. *Armstrong v. Burt* (Civ. App.) 138 S. W. 172.

The courts may properly refuse to permit the repetition of material evidence. *Young v. Watson* (Civ. App.) 140 S. W. 840.

165. Number of witnesses.—The matter of restricting the number of impeaching witnesses is entirely within the discretion of the trial judge, which will not be disturbed on appeal, unless abused. *Donaldson v. Dobbs*, 35 C. A. 439, 80 S. W. 1084.

166. Withdrawal of evidence.—When testimony has been admitted, and in the progress of the examination of the witness it is developed that his knowledge of facts is but hearsay, it is proper practice to withdraw from the jury that already admitted. *Bounds v. Little*, 75 T. 316, 12 S. W. 1109.

Withdrawing an agreement from evidence held not an abuse of discretion, where it was to be admitted only in case a certain witness should be absent, and he was present. *Robbins v. Ginnochio* (Civ. App.) 45 S. W. 34.

The court on appeal will not reverse a judgment because depositions read to the jury were withdrawn by the court. *Freeman v. Cleary* (Civ. App.) 136 S. W. 521.

167. Order of proof, rebuttal, and reopening case.—See notes under Art. 1951.

168. Right to object to evidence.—Where a question was asked about an entire conversation, part of which was irrelevant, but the witness confined himself to the relevant portion, overruling an objection to the answer was not error. *Paul v. Chenault* (Civ. App.) 44 S. W. 682.

A purchaser pendente lite does not become a party, and cannot object to or impeach evidence. *Smith v. Olsen* (Civ. App.) 44 S. W. 874.

Objections to evidence of a witness held unavailable where obviated by further testimony. *Halff v. Goldfrank* (Civ. App.) 49 S. W. 1095.

A party who offers a witness to prove an issue has a right to object to improper questions, the answers to which might affect his credibility. *Kruger v. Spachek*, 22 C. A. 307, 54 S. W. 295.

An insolvent debtor, who has conveyed his property to a trustee for distribution among his creditors, cannot object to the introduction of evidence in an action against his trustee in which he was joined as a party, which evidence did not in any manner tend to increase his liability to the creditor. *Wilson v. National Bank of Cleburne*, 27 C. A. 54, 63 S. W. 1067.

Any error in permitting witness to answer a leading question held to have been cured. *Hammond v. Decker*, 46 C. A. 232, 102 S. W. 453.

In the state's action for public free school land, defendants could not object that field notes and patent of grant, which they claimed included the land in controversy, were inadmissible in evidence because erroneous, locating the land out of the "jurisdiction" in which the grant by the Legislature called for it, where they did not connect themselves with any outstanding title, and the patentees had accepted the patent. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

169. — Estoppel or waiver.—A party cannot object to the introduction of a record after he has agreed that it might be used. *Kempner v. Beaumont Lumber Co.*, 20 C. A. 307, 49 S. W. 412.

When plaintiff gave in evidence, over objection, an administrator's deed, without proof of any order of sale or confirmation thereof, defendant's objections on this ground are waived when he subsequently offers the same deed as a part of his own title; and such deed being a common source of title, the action of the court in first admitting it, if an error at all, is immaterial. *Dohoney v. Womack*, 1 C. A. 354, 19 S. W. 883, 20 S. W. 950.

Where a party requires his opponent to produce certain letters for inspection, and then fails to introduce them in evidence, and the facts therein recited are shown by other evidence, the mere inspection does not make the letters admissible on behalf of their owner. *Ellis v. Randle*, 24 C. A. 475, 60 S. W. 462.

Right to complain that evidence was merely the opinion of the witness held waived, where testimony of the same character from others was not objected to. *Galveston, H. & S. A. Ry. Co. v. Eckles*, 25 C. A. 179, 60 S. W. 830.

An appellant cannot avail himself of an error in the admission of testimony, when he has permitted evidence of the same facts to be introduced in another form without objection. *Ft. Worth & D. C. Ry. Co. v. Harlan* (Civ. App.) 62 S. W. 971.

Where testimony in chief, objected to by defendant, was also brought out by it on cross-examination of the witness, it could not on appeal urge objections to its admissibility. *Gammel-Statesman Pub. Co. v. Monfort* (Civ. App.) 81 S. W. 1029.

An objection to evidence is waived by permitting other witnesses to testify without objection to the evidence complained of. *San Antonio & A. P. Ry. Co. v. Lester* (Civ. App.) 84 S. W. 401.

Error in permitting leading questions held not to have been waived. *Ft. Worth & R. G. Ry. Co. v. Jones*, 38 C. A. 129, 85 S. W. 37.

Where the court ruled that a written contract, and not an oral one, should control the action, plaintiff did not waive his right to complain of the ruling by proceeding with the trial. *McNeill v. Galveston, H. & N. Ry. Co.* (Civ. App.) 86 S. W. 32.

Where defendant cross-examined a witness, and the court sustained its motion withdrawing his evidence because it appeared that he was not competent to testify, defendant had no ground to complain of the court overruling its objection to the witness. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.) 96 S. W. 653.

A party who, after the admission of testimony over his objection, requires the witnesses on cross-examination to repeat the testimony, cannot claim that the testimony was in evidence over his objection. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

The admission of certain evidence by plaintiff in trover held not error, as her other testimony tended to show that the value given of the property converted was the cash market value. *Crouch Hardware Co. v. Walker*, 51 C. A. 571, 113 S. W. 163.

Defendant held not prejudiced by the court's refusal to permit plaintiff's ex parte deposition, taken before trial, to be read in evidence. *Holland v. Riggs*, 53 C. A. 367, 116 S. W. 167.

Error in refusing to permit the immediate cross-examination of an impeaching witness held waived by defendant's failure to cross-examine the witness when an opportunity was later afforded. *McMillion v. Cook* (Civ. App.) 118 S. W. 775.

Where improper evidence was admitted over objection, and on cross-examination the objecting party brings out the same evidence, he waived his objection. *Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 124 S. W. 217.

Objection to testimony held waived by the objecting party eliciting substantially the same testimony on cross-examination. *Trinity & B. V. Ry. Co. v. Johnson* (Civ. App.) 131 S. W. 1137.

A party who cross-examines the witness of the adverse party, giving incompetent testimony, held not to waive the objection because the witness on the cross-examination states the same facts. *Cathey v. Missouri, K. & T. Ry. Co. of Texas*, 104 T. 39, 133 S. W. 417, 33 L. R. A. (N. S.) 103.

Objection to testimony is waived by other witnesses being permitted without objection to testify to substantially the same effect. *Hendrix v. Brazzell* (Civ. App.) 157 S. W. 280.

170. Time for objection.—Objections to evidence on the ground that it is secondary must be taken when the evidence is offered. *Hunter v. Waite*, 11 T. 85.

Objection to the admissibility of evidence cannot be raised for the first time in a requested charge. *White v. Pyron* (Civ. App.) 62 S. W. 82.

Objections to testimony must be taken when it is offered, and if not made then are considered waived, and its admission is no ground for a new trial. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

On appeal only such objections to the admission of testimony as were urged on trial will be considered. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Civ. App.) 107 S. W. 651.

A party may not object to testimony for the first time by requesting special charges instructing the jury not to consider it. *Holland v. Riggs*, 53 C. A. 367, 116 S. W. 167.

A party must object to evidence, and state the reason at the time the evidence is offered. *Id.*

An objection to the testimony of a witness, not made until after plaintiff had finished his opening argument to the jury, was too late. *Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton*, 54 C. A. 593, 118 S. W. 628.

Statement as to time and mode for objection to evidence as not conforming to plaintiff's petition. *Galveston, H. & S. A. Ry. Co. v. Grant* (Civ. App.) 124 S. W. 145.

An objection to a question not made until after the answer is given may be properly overruled. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

Where evidence is admitted without objection, the question of variance cannot be raised on an instruction to the jury. *Western Union Telegraph Co. v. Robertson* (Civ. App.) 126 S. W. 629.

171. Sufficiency and scope of objection.—Only such objections as are urged to the admissibility of testimony will be considered on appeal. *Tevis v. Armstrong*, 71 T. 59, 9 S. W. 134.

An objection to the admission of evidence as not being permissible under the laws of evidence held sufficient. *Texas Brewing Co. v. Dickey* (Civ. App.) 43 S. W. 577.

An objection to certain testimony that it is irrelevant and immaterial is insufficient to present, on appeal, the question of the admissibility of the testimony. *Whittle v. State*, 43 Cr. R. 468, 66 S. W. 771.

The objection to evidence held sufficient. *Trammell & Lane v. J. M. Guffey Petroleum Co.*, 42 C. A. 455, 94 S. W. 104.

An objection, to a question as to whether witness had ever known a train to stop and let a street car pass, that the witness had not seen the car until it passed, held inapplicable and properly overruled. *Northern Texas Traction Co. v. Caldwell*, 44 C. A. 374, 99 S. W. 869.

It was not error to permit a witness to testify to the marriage of defendant, over an objection that "he was drunk" at the time. *Stevens v. State* (Cr. App.) 150 S. W. 944.

172. — General or specific.—A general exception that the damages claimed were not the proximate results of defendant's negligence held properly overruled. *International & G. N. R. Co. v. Evans*, 30 C. A. 252, 70 S. W. 351.

An objection to testimony that it was "immaterial and irrelevant" held too general. *Galveston, H. & S. A. Ry. Co. v. Powers* (Civ. App.) 101 S. W. 250.

Objection to the introduction of a life insurance table as evidence, on the ground that no predicate has been laid to authorize it, is too general to be considered. *Kansas City, M. & O. Ry. Co. of Texas v. Florence* (Civ. App.) 138 S. W. 430.

173. — Statement of grounds.—The ground of objection to testimony must be stated. *McDannell v. Horrell*, 1 U. C. 521.

An objection to the introduction of a written assignment of the cause of action, on the ground that no predicate had been laid to authorize its admission, was too indefinite to raise any question. *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 42 C. A. 60, 93 S. W. 1024.

An objection to testimony which states no grounds therefor should be disregarded. *Irvin v. Johnson*, 56 C. A. 492, 120 S. W. 1085.

Statement of when the objection to evidence, "incompetent, immaterial, and irrelevant," is sufficient. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 126 S. W. 672.

If evidence is relevant, an objection on the ground that it is immaterial and irrelevant is properly overruled, although the testimony be incompetent. *Knights of Macca-bees of the World v. Johnson* (Civ. App.) 143 S. W. 718.

Objection to hypothetical question held properly overruled, where only objection was that there was no evidence to support it, and there was such evidence. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

A deed may be inadmissible on the ground of immateriality in the absence of proof of the grantors' heirship, under which title is derived, but not on the ground of incompetency. *Villalva v. Brown* (Civ. App.) 148 S. W. 1124.

174. — **Scope and questions raised.**—A general objection to a physician's testifying to anything plaintiff said while being examined for the purpose of qualifying the physician as a witness, made before any testimony was given, was insufficient to raise any question as to the admissibility of the testimony. *Missouri, K. & T. Ry. Co. of Texas v. Johnson*, 95 T. 409, 67 S. W. 768.

Objection to evidence in personal injury case held insufficient to present question for review. *City of San Antonio v. Potter*, 31 C. A. 263, 71 S. W. 764.

An objection to the introduction of a statement in a deed as a whole is not sufficient to raise the question of the admissibility of a specific part of the statement. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

An objection to evidence of the declarations of agents of a corporation held to present the objection that declarations of mere agents of the defendants, made after the accident, were inadmissible against defendants. *City of Austin v. Forbis*, 99 T. 234, 89 S. W. 405.

An objection that certain testimony was an opinion did not raise a question as to the qualification and competency of a witness to testify as an expert. *Texas & P. Ry. Co. v. Warner*, 42 C. A. 280, 93 S. W. 489.

Objection to a discussion of evidence held not to relieve the objector of the failure to present proper objections to the evidence. *Western Union Telegraph Co. v. Simmons* (Civ. App.) 93 S. W. 686.

An objection to evidence of incompetency of plaintiff's fellow servant at the trial held insufficient to present the question on appeal that the evidence was inadmissible because irrelevant to the issue of negligence alleged. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 C. A. 605, 107 S. W. 889.

Where evidence, though not competent, was relevant, an objection to its relevancy only was properly overruled. *Postal Telegraph-Cable Co. v. Sunset Const. Co.* (Civ. App.) 109 S. W. 265.

In an action against carriers for injury to a live stock shipment, the admission of testimony held not error as against the objection made. *Missouri, K. & T. Ry. Co. of Texas v. Rich*, 51 C. A. 312, 112 S. W. 114.

An objection to evidence which goes rather to its sufficiency than to its admissibility does not raise a question of the admissibility thereof. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

A question, not being evidence, held it could not be objected to as hearsay. *Gulf, C. & S. F. Ry. Co. v. Farmer*, 102 T. 235, 115 S. W. 260.

The objection that certain evidence is hearsay is not the same as an objection that the testimony is not the best evidence. *Blair v. Boyd* (Civ. App.) 129 S. W. 870.

Where evidence is sought to be introduced on a specified ground, the court need not rule on its admissibility on another ground. *Runkle v. Smith* (Civ. App.) 133 S. W. 745.

Where one makes a single objection or particular objections to testimony, he waives other objections not made. *Houston & T. C. R. Co. v. Haberlin*, 104 T. 50, 133 S. W. 873.

Where the only objection to evidence in the trial court was that it was irrelevant and immaterial, no other objection can be considered on appeal. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

A party objecting that testimony in a stenographer's transcript duly certified and filed was not admissible without proof under oath of its correctness should object specifically; the objection that no proper predicate was laid being too general to require the court to swear the stenographer and prove his transcript. *Pease v. State* (Civ. App.) 155 S. W. 657.

175. — **Evidence admissible in part.**—Objections to a letter as irrelevant must point out the irrelevant parts, if any portion of it is admissible. *Railway Co. v. Gallaher*, 79 T. 685, 15 S. W. 694.

An objection to all of certain testimony collectively is properly overruled, where part of the testimony is admissible. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580; *Holt v. Hunt*, 18 C. A. 363, 44 S. W. 889; *Rhodes Haverty Furniture Co. v. Henry* (Civ. App.) 67 S. W. 340; *Texas & P. Ry. Co. v. Hall*, 31 C. A. 464, 72 S. W. 1052; *Jamison v. Dooley*, 98 T. 206, 82 S. W. 780; *Sun Mfg. Co. v. Egbert & Guthrie*, 37 C. A. 512, 84 S. W. 667; *Texas Cent. R. Co. v. Powell*, 38 C. A. 157, 86 S. W. 21; *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 39 C. A. 129, 86 S. W. 938; *St. Louis Southwestern Ry. Co. of Texas v. Frazier* (Civ. App.) 87 S. W. 400; *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 42 C. A. 60, 93 S. W. 1024; *Tuttle v. Robert Moody & Son*, 100 T. 240, 97 S. W. 1037; *Wandelohr v. Grayson County Nat. Bank* (Civ. App.) 106 S. W. 413; *Galveston, H. & S. A. Ry. Co. v. Janert*, 49 C. A. 17, 107 S. W. 963; *International & G. N. R. Co. v. Cuneo*, 47 C. A. 622, 108 S. W. 714; *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507; *Texas Cent. R. Co. v. Wheeler*, 52 C. A. 603, 116 S. W. 83; *Hudson v. Slate*, 53 C. A. 453, 117 S. W. 469; *Stubbs v. Marshall*, 54 C. A. 526, 117 S. W. 1030; *Southern Kansas Ry. Co. of Texas v. McSwain*, 55 C. A. 217, 118 S. W. 874; *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451; *Houston & T. C. R. Co. v. Lee* (Civ. App.) 123 S. W. 154; *Dudley v. Strain*, 130 S. W. 778; *Campbell v. San Antonio Machine & Supply Co.*, 133 S. W. 750; *Beaty v. Yell*, Id. 911; *Webster v. Frazier*, 139 S. W. 609; *Houston Packing Co. v. Griffith*, 144 S. W. 1139; *Martin v. Ince*, 148 S. W. 1178; *Williams v. Neill*, 152 S. W. 693; *Kell Milling Co. v. Bank of Miami*, 155 S. W. 325; *Rice v. Talliaferro*, 166 S. W. 242; *Houston Chronicle Pub. Co. v. McDavid*, 157 S. W. 224; *St. Louis Southwestern Ry. Co. of Texas v. Pruitt*, Id. 236.

It was not error to allow a witness to testify over an objection that his testimony was hearsay, when in fact only a part of it was open to that objection, and no specific objection was made to any particular portion. *Keating Implement & Machine Co. v. Erie City Iron Works* (Civ. App.) 63 S. W. 546.

An objection to an entire statement of a witness held properly overruled where a portion thereof was admissible as *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Tullis*, 41 C. A. 219, 91 S. W. 317.

Sustaining interrogatories containing admissible matter held not error when the objections fail to separate the proper from the objectionable portions. *Goodloe v. Goodloe*, 47 C. A. 493, 105 S. W. 533.

Where evidence was inadmissible for a part of the defendants, but admissible for another of them, a general objection to its admissibility was properly overruled. *Edwards v. White* (Civ. App.) 120 S. W. 914.

Assignment of error in admission of deeds over general objection of immateriality held to be overruled if any one of the deeds was admissible. *Davis v. Mills* (Civ. App.) 133 S. W. 1064.

A letter held properly received in evidence as against an objection that it contained self-serving declarations not pointed out. *Postal Telegraph Cable Co. of Texas v. Talerico* (Civ. App.) 136 S. W. 575.

A general objection to the admission of a writing held not sufficient where some of the statements therein were admissible. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 140 S. W. 368.

A party objecting to the exclusion of evidence inadmissible in part cannot complain of the exclusion of the whole. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 146 S. W. 600.

Where the testimony of a witness for appellee, who testified from a copy, as to the items of an account which he had kept in books, the books not being produced or accounted for, showed that he had an independent recollection as to certain items in the account, appellant should have cross-examined witness, so as to separate the items based upon his independent recollection from those based upon the books, and objected to the latter; an objection to all testimony being insufficient. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 155 S. W. 325.

Where at least part of a certificate of the land commissioner was admissible, and defendant's objection thereto did not specify what part of it was claimed to be objectionable as a conclusion, or what part he was not authorized to certify, the court was not bound to pick out any particular part of it as inadmissible. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

176. Motion to strike out—Grounds and purpose in general.—Where testimony has been admitted without objection, on an issue not raised by the pleadings, held, that the court should exclude it on motion after the evidence was closed. *Galveston, H. & S. A. Ry. Co. v. Scott*, 18 C. A. 321, 44 S. W. 589.

Where a witness admitted on cross-examination that he did not know the market value of the realty, it was error to refuse to strike out his testimony as to such value on direct examination. *Tyler S. E. Ry. Co. v. Hitchins*, 26 C. A. 400, 63 S. W. 1069.

Where witnesses to the amount of damage to the land based their estimates on improper elements, the refusal of the court to strike out such estimates was error. *Gulf, C. & S. F. Ry. Co. v. Ryon* (Civ. App.) 72 S. W. 72.

Testimony shown on cross-examination to be hearsay held required to be stricken out on motion. *Missouri, K. & T. Ry. Co. of Texas v. Renfro* (Civ. App.) 83 S. W. 21.

In an action to recover certain public school land, a motion to exclude all evidence concerning a certain lease held properly overruled. *Holt v. Cave*, 38 C. A. 62, 85 S. W. 309.

Evidence of false statements of vendor, admitted on a claim by the purchaser for damages, held to be excluded, where the case, when developed, shows the purchaser was not warranted in relying on them, or did not rely on them. *Oneal v. Weisman*, 39 C. A. 592, 88 S. W. 290.

Incompetency of parol evidence not appearing until after it had been admitted, a motion to exclude it should have been granted. *Wolf Cigar Stores Co. v. Kramer* (Civ. App.) 89 S. W. 995.

A refusal to strike out the testimony of a witness as hearsay held proper. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland*, 43 C. A. 322, 95 S. W. 747.

Where, in an action for injuries sustained by a conductor who testified over defendant's objection as to what a brakeman said to him after the accident, the court, on the plaintiff's statement that he would not insist upon the point, instructed the jury to disregard the same, held there was no error. *Galveston, H. & S. A. Ry. Co. v. Still*, 45 C. A. 169, 100 S. W. 176.

Testimony held subject to a motion to strike as hearsay where it was shown to have been such on a witness' cross-examination. *Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman* (Civ. App.) 134 S. W. 275.

In a personal injury action, held proper to strike testimony concerning a wound previously received by plaintiff in a difficulty; it not being claimed that such wound was received in the accident sued on. *Knox v. Robbins* (Civ. App.) 151 S. W. 1134.

177. — Necessity for motion.—Where counsel fails to object to the reading of part of a deposition, he should, in order to raise the question of error in reading the same, move to exclude it, and request that the jury be appropriately instructed. *Gulf, C. & S. F. Ry. Co. v. Matthews* (Civ. App.) 89 S. W. 983.

Where evidence is admissible as preliminary proof of a matter and no further evidence is offered, the adverse party cannot complain of its admission in the absence of a motion for its withdrawal from the jury. *Citizens' Telephone Co. v. Thomas*, 45 C. A. 20, 99 S. W. 879.

To obtain the benefit of an objection to evidence already admitted, there must be a motion to strike it out. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.

An unresponsive answer of a witness held not reversible error where there was no motion to strike it out. *Western Union Telegraph Co. v. Johnsey*, 49 C. A. 487, 109 S. W. 251.

178. — Necessity of previous objection.—Where no objection was made to testimony, and no motion made to strike it out, request for a charge excluding it from the jury is too late. *St. Louis & S. W. Ry. Co. of Texas v. Foster* (Civ. App.) 89 S. W. 450.

Failure to strike out certain testimony held not error in the absence of renewed objection and exception after a temporary ruling permitting the testimony to stand to give opportunity to supply preliminary other proof. *Galveston, H. & S. A. Ry. Co. v. Janert*, 49 C. A. 17, 107 S. W. 963.

Whether the evidence which is received without objection will be afterwards excluded on motion lies largely within the discretion of the trial court. *Hatzfeld v. Walsh*, 55 C. A. 573, 120 S. W. 525.

Where no tenable objection is presented to the introduction of testimony, a request to withdraw the same held addressed to the discretion of the trial court. *Postal Telegraph Cable Co. of Texas v. Harriss*, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

Where evidence is admitted without objection, it is not error to refuse a charge withdrawing the same from the jury. *Stark v. Coe* (Civ. App.) 134 S. W. 373.

Motion to strike out testimony after witnesses have been fully examined rests largely in the discretion of the trial judge. *Knights of Maccabees of the World v. Johnson* (Civ. App.) 143 S. W. 718.

Evidence held not to be stricken out on motion in absence of objection when admitted. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

179. — **Time for motion.**—Defendant, having introduced the answer of a witness to a cross interrogatory appearing in a deposition, held not entitled to an instruction withdrawing such answer from the jury after the trial and the arguments had closed. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 C. A. 605, 107 S. W. 889.

It is highly improper for the court, after judgment, to sustain a motion to strike evidence and enter it nunc pro tunc as of a date pending trial. *Reed v. Robertson* (Sup.) 156 S. W. 196.

180. — **Statement of grounds.**—A motion to withdraw testimony from jury held too general. *Travelers' Ins. Co. v. Hunter*, 30 C. A. 489, 70 S. W. 798.

181. — **Evidence admissible in part.**—The court may strike out part of witness' answer, subject to the objection, and allow the remainder to stand. *Texas Portland Cement & Lime Co. v. Ross*, 35 C. A. 597, 81 S. W. 94.

Refusal of the motion to strike out the answer of witness when only part of it as appeared from his subsequent answer was open to the objection that it was based on information given by plaintiff to witness held not error. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

182. — **Evidence elicited by party moving to strike out.**—Testimony unfavorable to defendant given by one of its witnesses on direct examination and reiterated on cross-examination will not be struck out on defendant's motion. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

The action of the court in failing to strike out an answer to a question asked a witness held not reversible error. *Western Union Telegraph Co. v. Johnsey*, 49 C. A. 487, 109 S. W. 251.

183. **Ruling or order.**—Evidence which was stricken because it was based on an hypothesis not established must be reintroduced after those facts are established. *Crary v. Port Arthur Channel & Dock Co.* (Civ. App.) 49 S. W. 703.

Where a leading question, objected to on that ground and that it was immaterial and irrelevant, was both material and relevant, it was improper for the court to sustain such objection generally. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

A trial judge should have heard courteous objections, whether he deemed them tenable or not, and after refusing to hear them should have signed the bill of exceptions showing that fact. *McLellan v. Brownsville Land & Irrigation Co.*, 46 C. A. 249, 103 S. W. 206.

The exclusion of competent evidence was erroneous, though the court thought it was introduced for another purpose for which it would have been immaterial. *Dunman v. J. C. Murphey & Co.*, 48 C. A. 539, 107 S. W. 70.

An objection to certain answers of a witness must be determined without reference to other answers. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 C. A. 605, 107 S. W. 889.

Defendant's request that evidence be excluded as incompetent was sufficiently complied with so as not to make its admission reversible error where the court charged that the jury should not consider such testimony for any purpose. *Mexican Cent. Ry. Co. v. Rodriguez* (Civ. App.) 133 S. W. 690.

184. **Effect of failure to object or except.**—One against whom a judgment by default has been rendered with writ of inquiry cannot on appeal object on account of error in admitting evidence not objected to on the trial. *Shornick v. Bennett*, 77 T. 244, 13 S. W. 982.

Improper evidence admitted without objection cannot be controlled by a special charge. *Missouri, K. & T. Ry. Co. v. Edling*, 18 C. A. 171, 45 S. W. 406.

Assignments of error in the admission of testimony cannot be considered where it does not appear that the testimony was objected to. *Texas Loan Agency v. Fleming*, 18 C. A. 668, 46 S. W. 63.

Plaintiff held not entitled to object to the introduction of minutes of a commissioners' court regarding a county road purporting to be laid out on a boundary line in dispute, where he did not object to the surveyor's testifying in regard thereto. *Vogt v. Geyer* (Civ. App.) 48 S. W. 1100.

A ruling excluding evidence offered to prove lost instrument cannot be maintained for insufficiency of proof of loss, where such objection was not made. *McCarty v. Johnson*, 20 C. A. 184, 49 S. W. 1098.

If no objection is made to parol evidence of agreement, its admissibility is acquiesced in and it may be considered to prove agreement. *Hunt v. Siemers*, 22 C. A. 94, 53 S. W. 387.

Expert testimony, admitted without objection, should not be subsequently set aside, though the witness failed to qualify. *Western Union Tel. Co. v. Gibson* (Civ. App.) 53 S. W. 712.

Evidence construed, on appeal, to show express warranty, though it would have been incompetent under such issue if objected to on trial. *Bryan Cotton Seed Oil Mill v. Fuller* (Civ. App.) 57 S. W. 924.

Incompetent evidence of damage, admitted without objection, held to warrant jury in accepting same as basis on which to figure out their verdict. *Texas & P. Ry. Co. v. Jones*, 23 C. A. 551, 58 S. W. 174.

Though a cause is tried to the court, error in admitting improper evidence will not be reviewed, unless an exception is taken thereto. *Dyer v. Pierce* (Civ. App.) 60 S. W. 441.

In trespass to try title, it was not error to admit evidence not objected to when given, and which did not affect any issue in the case. *Schneider v. Sanders*, 26 C. A. 169, 61 S. W. 727.

Testimony of an attorney, who obtained a judgment in justice court, that he issued execution thereon, is sufficient to support a finding that execution was issued, in the absence of an objection that it is not the best evidence. *Warren v. Kohr*, 26 C. A. 331, 64 S. W. 62.

A fact may be proved by hearsay evidence not objected to. *Western Union Tel. Co. v. Brown* (Civ. App.) 75 S. W. 359.

In an action against a railroad for personal injuries, any error in the admission of testimony of a witness as to the location of the train held waived by permitting the witness to make unchallenged previous statements to the same effect. *International & G. N. R. Co. v. Quinones* (Civ. App.) 81 S. W. 757.

Where hearsay evidence is admitted without objection it has all the probative force that it would have if it were not open to objection on the ground of hearsay. *Hatch v. Pullman Sleeping Car Co.* (Civ. App.) 84 S. W. 246.

Hearsay admitted without objection is not without probative force. *Western Union Tel. Co. v. Hirsch* (Civ. App.) 84 S. W. 394.

Where there was no objection on the trial to city ordinances regulating the movement and speed of trains within the city, it was not error for the court to submit the effect of such ordinances to the jury. *Trinity & B. V. Ry. Co. v. Simpson* (Civ. App.) 86 S. W. 1034.

In an action by a city for taxes, an objection to the manner in which the assessment rolls had been prepared should have been made to their introduction in evidence, and not to the testimony of the assessor, identifying the rolls. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

An instruction directing the jury to disregard evidence received without objection is properly refused. *El Paso & S. R. Co. v. Darr* (Civ. App.) 93 S. W. 166.

Hearsay evidence is subject to consideration, where admitted without objection. *Moore v. Supreme Assembly of Royal Soc. of Good Fellows*, 42 C. A. 366, 93 S. W. 1077.

In an action against carriers for damages to plaintiff's shipment of freight an objection to the introduction of the bill of lading, previously placed in evidence by another of defendants without objection held properly overruled. *Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co.* (Civ. App.) 95 S. W. 751.

The failure of plaintiff to object to certain evidence inadmissible under the general denial held not to warrant the submission of the issue raised by the evidence to the jury. *W. L. Moody & Co. v. Rowland*, 100 T. 363, 99 S. W. 1112.

A certificate of the county clerk of the county attached to an abstract of judgment admitted in evidence without objection, held required to be weighed as though it was the best evidence. *Abee v. Bargas*, 45 C. A. 243, 100 S. W. 191.

Objection to the admissibility of evidence, if not made in the trial court, will not be entertained on appeal from a judgment based upon it. *Mings v. Griggsby Const. Co.* (Civ. App.) 106 S. W. 192.

Defendant could disprove the execution of the deed under which plaintiffs claimed in trespass to try title, so as to overcome the prima facie case made by the introduction of a certified copy, though he did not object to the copy for want of proof of the execution of the original. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

The testimony of a witness in effect a legal conclusion is sufficient to raise an issue of fact, when admitted without objection. *McDonald v. Humphries* (Civ. App.) 146 S. W. 712.

Hearsay evidence, unobjected to, as to the depth of a well drilled for defendant held sufficient to sustain a judgment for the price of a well drilled that depth. *Lemons v. Biddy* (Civ. App.) 149 S. W. 1065.

Failure to object to the whole of an account, when it was actually introduced in evidence, waived an insufficient objection previously made to certain items of the account. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 155 S. W. 325.

An objection to evidence not made in the trial court cannot be raised on appeal. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 156 S. W. 267.

In an action for injuries received while plaintiff was being initiated, in which defendant pleaded a general denial, and that he was not being initiated, held, that conclusions of plaintiff's witnesses that he was being initiated were evidence, where they were admitted without objection. *Grand Temple and Tabernacle in State of Texas v. Knights and Daughters of Tabor of International Order of Twelve v. Johnson* (Civ. App.) 156 S. W. 532.

Where, in an action on a note, defendant permits secondary evidence of its contents without objection, and there is no issue as to the existence of the note, and the note is not introduced in evidence, defendant cannot complain that there is nothing on which to base the judgment against him. *Peck v. Morgan* (Civ. App.) 156 S. W. 917.

185. *Cure of error.*—The admission of illegal evidence of a fact proven by competent evidence is not cause for reversal. *Halcomb v. Stubblefield*, 76 T. 310, 13 S. W. 231; *Railway Co. v. Hume*, 87 T. 211, 27 S. W. 110; *White Sewing Mach. Co. v. Hicks* (Civ. App.) 33 S. W. 137.

186. *Harmless error.*—See notes under Arts. 1553, 1623.

VI. *Admissibility of Evidence at Former Trial or in Other Proceeding*

187. *Grounds for admission in general.*—In an action against a carrier for injuries to live stock, testimony offered by defendant as to the evidence of a witness in a

former suit against another railroad company for injury to the same stock was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Peacock* (Civ. App.) 128 S. W. 463.

Testimony given by absent witness on a former trial may be reproduced, if the witness is dead, beyond the jurisdiction, or is kept away by the adverse party. *Baker v. Sands* (Civ. App.) 140 S. W. 520.

In an action for death of plaintiff's wife, the testimony of his chauffeur, given at the inquest was admissible only as affecting his credibility and the weight to be given his testimony. *Texas Cent. R. Co. v. Dumas* (Civ. App.) 149 S. W. 543.

188. Death or disability of witness.—Evidence of a witness taken by deposition which was incorporated in a statement of facts on a former trial and signed by opposing counsel, the deposition having been lost afterwards, may be used on a subsequent trial between the same parties, it being shown that it pertained to facts depending on an inspection of a paper alleged to be forged, and that the witness, though still alive, had since his former examination become blind. *Houston v. Blythe*, 60 T. 506. See Art. 2157.

A. delivered to B., a common carrier, four bales of cotton. Two of the bales were destroyed by fire, and in a suit for their value A. testified in his own behalf. B. afterwards converted the other two bales to his own use, and the administrator of A. brought suit for their value. Held, that A. being dead, and the parties to the two suits being the same, his testimony on the former trial having been given under oath, and B. having had the opportunity of cross-examining him, it was admissible evidence in the last suit. *H. & T. C. Ry. Co. v. Perkins*, 2 App. C. C. § 520.

The rule allowing testimony of a deceased witness on a former trial to be reproduced on a subsequent trial does not allow it to be shown that on a former trial one since deceased offered to testify to certain facts. *Lane v. De Bode*, 29 C. A. 602, 69 S. W. 437.

Where the testimony of a witness at the first trial is admitted without objection, the court, on admitting the report of the testimony on the second trial, after the death of the witness, could not exclude answers as not responsive. *Sherman Gas & Electric Co. v. Belden*, 103 T. 59, 123 S. W. 119, 27 L. R. A. (N. S.) 237.

The stenographic report of the testimony of a party who testified at the first trial, and died before the second trial, held admissible. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

Decedent for injury to whom his administrator sues having testified on a former trial, it was proper to read his testimony from the official stenographer's notes. *Wagoner v. Sneed* (Civ. App.) 138 S. W. 219.

189. Absence of witness.—In action against railroad for injuries, evidence as to testimony of conductor on former trial held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit* (Civ. App.) 97 S. W. 825.

The testimony of a witness on the former trial of a cause held admissible on the subsequent trial, where his whereabouts is unknown and diligent search has been made to locate him. *Boyd v. St. Louis Southwestern Ry. Co. of Texas*, 101 T. 411, 108 S. W. 813.

Where it is shown that a witness has been absent nearly three years, and no person seems to know where he is, a sufficient predicate is laid for the admission in evidence of his testimony on a former trial. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 56 C. A. 282, 119 S. W. 1154.

190. Nature of former proceeding.—In an action under Art. 4694 complaining of the death of a person, evidence taken before the grand jury in connection with criminal proceedings, is inadmissible. *Croft v. Smith* (Civ. App.) 51 S. W. 1089.

The record of the coroner's inquest held inadmissible on the issue of the member's suicide, in an action by the beneficiary on his certificate. *Boehme v. Sovereign Camp of Woodmen of the World*, 36 C. A. 501, 85 S. W. 444.

191. Opportunity for cross-examination.—In a suit by a trustee in bankruptcy to set aside a conveyance by the bankrupt on the ground that it was fraudulent against his creditors, ex parte testimony of the bankrupt taken before a referee in bankruptcy was inadmissible as against the grantee. *Stone v. Stitt* (Civ. App.) 132 S. W. 862.

192. Identity of parties.—The evidence taken in one case is not admissible in another, the defendants in which were not parties to the first action, though the witnesses were dead. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

193. Preliminary evidence.—A mere statement of counsel that a witness is absent, and that his whereabouts could not be ascertained, is insufficient to justify proof of the witness' testimony at a former trial. *Houston & T. C. R. Co. v. Smith* (Civ. App.) 51 S. W. 506.

The sufficiency of the predicate for the admission in evidence of the testimony of a witness at a former trial is largely in the discretion of the trial court. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 56 C. A. 282, 119 S. W. 1154.

194. Mode of proof.—The evidence of a deceased witness may be reproduced by reading it from a statement of facts, agreed to and approved by the presiding judge, if the party offering it proves the death of the witness since the former trial of the case, and proves further that the testimony given by the witness upon the former trial was in substance the same as that found in the statement of facts. *Dwyer v. Bassett*, 1 C. A. 513, 21 S. W. 621.

A statement of facts, prepared in contemplation of an appeal after a former trial, and not containing the detailed testimony of the witnesses, is inadmissible to prove the testimony of an absent witness. *Houston & T. C. R. Co. v. Smith* (Civ. App.) 51 S. W. 506.

Where a witness who testified at a former trial of the action is dead, his testimony may be reproduced by reading a transcript of the notes of his testimony, verified by the stenographer to the effect that he took the notes, that they were correct, and that the transcript is a correct copy of the notes. *Cooper v. Ford*, 29 C. A. 253, 69 S. W. 487.

An unverified transcript of plaintiff's testimony, taken at a former trial by a stenographer appointed by the court, was inadmissible on a subsequent trial. *St. Louis Southwestern Ry. Co. of Texas v. Rea* (Civ. App.) 84 S. W. 428.

No error was disclosed in the exclusion of a transcript of the evidence of a witness who was beyond the jurisdiction of the court, where it was not shown that an offer was made to prove the correctness of the transcript by the stenographer who took the testimony. *El Paso Electric Ry. Co. v. Kitt* (Civ. App.) 99 S. W. 587.

Showing held not such that testimony at a former trial could be shown by reading a transcript. *Combest v. Wall* (Civ. App.) 115 S. W. 354.

Where the stenographic report of the testimony of a witness at a former trial, since deceased, was read in evidence, answers not responsive to the questions asked were properly excluded. *Sherman Gas & Electric Co. v. Belden* (Civ. App.) 115 S. W. 897.

RULE 1. WITNESS MAY BE SWORN AND EXAMINED, HOW

I. Examination of witnesses in general.

1. Oath or affirmation.
2. Mode of testifying in general.
3. Questions in general.
4. Questions assuming facts.
5. Leading questions.
6. — Preliminary or introductory questions.
7. — Suggestions in aid of recollection.
8. — Children and weak-minded or ignorant persons.
9. — Unwilling or hostile witnesses.
10. Repetition of questions.
11. Examination by court.
12. Answers in general.
13. Responsiveness of answer.
14. Remarks by witness.
15. Impressions of witness.
16. Reasons for knowledge or recollection of witness.
17. Use of documents to explain testimony.
18. Refreshing memory.
19. — Memoranda or other writings which may be used.
20. — Inspection of writing by adverse party.
21. — Admissibility of writing as evidence.
22. Testimony from memoranda or other writings.
23. Testimony of stenographer from notes.
24. Calling attention to and explanation of former statements or testimony.
25. Recalling witnesses.
26. Right to cross-examine and re-examine in general.
27. Control and discretion of court.
28. Scope and extent of cross-examination in general.
29. Limitation of cross-examination to subjects of direct examination.
30. Cross-examination as to irrelevant, collateral or immaterial matters.
31. Cross-examination as to writings.
32. Cross-examination of witness to character of party.
33. Cross-examination of party.
34. Questions on cross-examination.
35. — Questions assuming facts.
36. — Leading questions.
37. — Repetition of questions and questions calling for repetition of answers.
38. — Cross-examination by court.
39. Redirect examination.
40. — Explanation of testimony.
41. — New matter on cross-examination.
42. — Repetition of testimony on direct or cross-examination.
43. Recross-examination.
44. Privileged communications.

45. Answer tending to disgrace witness or render him infamous.
46. Answer tending to subject witness to criminal prosecution.
47. Privilege as to production of documents.
48. Caution to witness.
49. Waiver of privilege.
50. Persons entitled to claim privilege.
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II. Credibility of witnesses.

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| <p>80. — Laying foundation for impeaching evidence.</p> <p>81. — Competency of impeaching evidence in general.</p> <p>82. — Competency of impeaching witnesses as to character or reputation.</p> <p>83. — Examination of impeaching witnesses as to character or reputation.</p> <p>84. — Evidence of accusation or conviction of crime.</p> <p>85. — Rebuttal of evidence impeaching character.</p> <p>86. — Evidence to sustain character of witness impeached.</p> <p>87. — Effect of impeachment of character.</p> <p>88. Interest as ground of impeachment.</p> <p>89. — Interest of party of record.</p> <p>90. — Interest in event of witness not party to record.</p> <p>91. — Employment by or other contractual relation with party.</p> <p>92. — Friendly or unfriendly relations with or feeling toward party.</p> <p>93. — Cross-examination to show interest or bias.</p> <p>94. — Laying foundation for impeaching evidence as to interest or bias.</p> <p>95. — Competency of impeaching evidence as to interest or bias.</p> <p>96. — Rebuttal of evidence of interest or bias.</p> <p>97. — Evidence to show want of interest or freedom from bias.</p> <p>98. Inconsistency of statements as ground of impeachment.</p> <p>99. — Nature of former statement in general.</p> <p>100. — Former statement a mere opinion or conclusion.</p> <p>101. — Written statements or instruments.</p> <p>102. — Former testimony of witness.</p> <p>103. — Time of making statements and circumstances connected therewith.</p> <p>104. — Statements by others in presence or with the sanction of witness.</p> | <p>105. — Witnesses who may be impeached by inconsistent statements.</p> <p>106. — Irrelevant, collateral or immaterial matters.</p> <p>107. — Nature and extent of inconsistency.</p> <p>108. — Cross-examination as to inconsistent statements.</p> <p>109. — Laying foundation for proof of inconsistent statements.</p> <p>110. — Admission or denial by witness of making of inconsistent statements.</p> <p>111. — Competency of evidence of inconsistent statements in general.</p> <p>112. — Proof of oral statements, and examination of impeaching witnesses.</p> <p>113. — Proof of written statements or instruments.</p> <p>114. — Proof of former testimony of witness.</p> <p>115. — Rebuttal of evidence of inconsistent statements.</p> <p>116. — Evidence as to statements consistent with testimony.</p> <p>117. — Explanation of inconsistency.</p> <p>118. — Effect of impeachment by inconsistent statements.</p> <p>119. Contradiction of testimony of witness.</p> <p>120. — Right to contradict testimony of one's own witness.</p> <p>121. — Witness cross-examined as to matter not subject of direct examination.</p> <p>122. — Disproving facts testified to by witness.</p> <p>123. — Testimony subject to contradiction in general.</p> <p>124. — Irrelevant, collateral or immaterial matters.</p> <p>125. — Competency of contradictory evidence.</p> <p>126. — Rebuttal of contradictory evidence.</p> <p>127. Corroboration of impeached or contradicted witness.</p> <p>128. — Testimony subject to corroboration.</p> <p>129. — Competency of corroborative evidence in general.</p> <p>130. — Former statements corresponding with testimony.</p> |
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I. *Examination of Witnesses in General*

1. *Oath or affirmation*.—See, also, Title 2.

Where a deaf person was consciously sworn as a witness, it was sufficient, whether she actually heard the officer who administered the oath or not. *Texas & P. Ry. Co. v. Reid* (Civ. App.) 74 S. W. 99.

Defendant, allowing deaf witness, who could not hear oath when sworn, to testify without objection, held to have waived irregularity. *Id.*

2. *Mode of testifying in general*.—Complaining witness held properly permitted to testify by nods and shakes of the head and by writing, though defense was previously not notified of her condition. *Roberson v. State* (Civ. App.) 49 S. W. 398.

Where the complaining witness was unable to talk in testifying, an objection that the jury did not get her deponent so as to properly weigh her evidence was untenable. *Id.*

3. *Questions in general*.—The rule that only such evidence as is relevant to the matter in issue shall be introduced governs in the direct examination of a witness and also in the cross-examination. The rule is not applied with the same strictness in a cross-examination as it is in the examination in chief. It would seem that any fact which bears upon the credit of a witness is a relevant fact, and this whether it goes to his indisposition to tell the truth, his want of opportunity to know the truth, his bias, interest, want of memory, or other like fact. Upon cross-examination inquiry may be made into the situation of the witness with respect to parties and to the subject of the litigation, his interests, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in

which he uses those means, his power of discernment, memory, and description, may be fully investigated and ascertained. *Evansich v. G., C. & S. F. R. Co.*, 61 T. 24.

Where statement purporting to be that of accused on examining trial was excluded, it was not error to permit district attorney to read question to accused from the statement. *Wilborn v. State (Cr. App.)* 64 S. W. 1058.

Question asked of juror, when called as witness on submission of motive for new trial after conviction of homicide, as to expression of opinion of guilt, held not objectionable in form. *Cruise v. State (Cr. App.)* 77 S. W. 818.

A compound question, part of which calls for the conclusion of the witness, held objectionable. *Bell v. State*, 48 Cr. R. 256, 87 S. W. 1160.

A party is not precluded from eliciting the truth from a witness by asking him a second question which is unobjectionable in itself, because the previous question asked was objectionable, as leading. *Galveston, H. & H. R. Co. v. Alberti (Civ. App.)* 103 S. W. 699.

Question to witness inquiring if some person or persons interested had not tried to get witness to testify falsely against defendant held too general. *Sue v. State (Cr. App.)* 105 S. W. 804.

Where plaintiff in an action for injuries hesitated before answering questions on direct examination, his explanation that his mind was not as accurate as before he was hurt held not objectionable. *Houston & T. C. R. Co. v. Shapard*, 54 C. A. 596, 118 S. W. 596.

Certain question to witness in regard to paternity held not too general. *Wiess v. Hall (Civ. App.)* 135 S. W. 384.

A defendant, in an action for injuries to a child while crossing a railroad yard, held not entitled to complain of the plaintiff's counsel's failure to interrogate the plaintiff as to her appreciation of her danger at the time of the accident. *Ft. Worth & D. C. Ry. Co. v. Winger (Civ. App.)* 151 S. W. 586.

4. **Questions assuming facts.**—Assumption of a fact in an interrogatory held not error, it being merely to identify a person. *Travelers' Ins. Co. v. Hunter*, 30 C. A. 489, 70 S. W. 798.

A question held to call for a fact. *Uecker v. Zuercher*, 54 C. A. 289, 118 S. W. 149.

In an action by a mother for delay in the shipment of the corpse of her son, a question as to the effect on the mother of the news that the body would not be shipped by defendant held not objectionable as assuming that the news had some effect. *Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.)* 126 S. W. 678.

Question to witness assuming uncontroverted fact held not error. *Early & Clement Grain Co. v. City of Waco (Civ. App.)* 137 S. W. 431.

5. **Leading questions.**—Questions held leading. *Gordon v. McCall*, 20 C. A. 283, 48 S. W. 1111; *San Antonio & A. P. Ry. Co. v. Hammon*, 92 T. 509, 50 S. W. 123; *Lentz v. City of Dallas*, 96 T. 258, 72 S. W. 59; *Texas Southern Ry. Co. v. Hart*, 32 C. A. 212, 73 S. W. 833; *Dallas Electric Co. v. Mitchell*, 33 C. A. 424, 76 S. W. 935; *Ft. Worth & R. G. Ry. Co. v. Jones*, 38 C. A. 129, 85 S. W. 37; *St. Louis & S. F. Ry. Co. v. Conrad (Civ. App.)* 99 S. W. 209; *Seago v. White*, 45 C. A. 539, 100 S. W. 1015; *Garrett v. State*, 52 Cr. R. 255, 106 S. W. 389; *Goodsoe v. Same*, 52 Cr. R. 626, 108 S. W. 388; *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709; *Cleveland v. Taylor*, 49 C. A. 496, 108 S. W. 1037; *Bryan Press Co. v. Houston & T. C. Ry. Co. (Civ. App.)* 110 S. W. 99; *Gate City Roller Rink Co. v. McGuire*, 112 S. W. 436; *Roth v. Travelers' Protective Ass'n of America*, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97; *Houston & T. C. R. Co. v. Johnson (Civ. App.)* 118 S. W. 1150; *Williamson v. Chicago, R. I. & G. Ry. Co.*, 57 C. A. 502, 122 S. W. 897; *St. Louis Southwestern Ry. Co. of Texas v. Langston (Civ. App.)* 125 S. W. 334.

Discretion of court in permitting leading questions held properly exercised. *San Antonio & A. P. Ry. Co. v. Hammon*, 92 T. 509, 50 S. W. 123.

A question that does not suggest or indicate the answer held not leading. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

A question in the form, "Up to the time you saw [plaintiff], did you hear any whistle blown or bell rung by the approaching train?" is leading, as eliciting, by an answer of "Yes" or "No," more than one simple proposition. *International & G. N. R. Co. v. Dalwigh*, 92 T. 655, 51 S. W. 500.

The admission of an answer to a leading question is ground for a reversal of the judgment. *Id.*

Question held not objectionable as leading. *Harvey v. State (Cr. App.)* 53 S. W. 102; *Galveston, H. & S. A. Ry. Co. v. Williams*, 26 C. A. 153, 62 S. W. 808; *Same v. Puente*, 30 C. A. 246, 70 S. W. 362; *San Antonio Traction Co. v. Bryant*, 30 C. A. 437, 70 S. W. 1015; *Galveston, H. & S. A. Ry. Co. v. Walker (Civ. App.)* 76 S. W. 228; *Denison & S. Ry. Co. v. Powell*, 35 C. A. 454, 80 S. W. 1054; *Brock v. United Moderns*, 36 C. A. 12, 81 S. W. 340; *St. Louis Southwestern Ry. Co. of Texas v. Hall (Civ. App.)* 81 S. W. 571; *Fire Ass'n of Philadelphia v. Masterson*, 83 S. W. 49; *Gibson v. State*, 47 Cr. R. 489, 83 S. W. 1119; *Moore v. Same*, 49 Cr. R. 499, 96 S. W. 321; *Hickey v. State*, 51 Cr. R. 230, 102 S. W. 417; *United States Gypsum Co. v. Shields (Civ. App.)* 106 S. W. 724; *El Paso Electric Ry. Co. v. Ruckman*, 49 C. A. 25, 107 S. W. 1158; *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709; *Missouri, K. & T. Ry. Co. of Texas v. Steele*, 50 C. A. 634, 110 S. W. 171; *Same v. Malone (Civ. App.)* 110 S. W. 958; *Essary v. State*, 53 Cr. R. 596, 111 S. W. 927; *Jesse French Plano & Organ Co. v. Garza & Co.*, 53 C. A. 346, 116 S. W. 150; *International & G. N. R. Co. v. Morin*, 53 C. A. 531, 116 S. W. 656; *First Nat. Bank v. Pearce (Civ. App.)* 126 S. W. 285; *Freeman v. Vetter*, 130 S. W. 190; *Barrego v. State*, 61 Cr. R. 625, 136 S. W. 41; *Freeman v. Cleary (Civ. App.)* 136 S. W. 521; *Ripley v. Wenzel*, 139 S. W. 897; *McKinney v. State*, 63 Cr. R. 470, 140 S. W. 344; *Majors v. Same*, 63 Cr. R. 488, 140 S. W. 1095; *Olcott v. Squires (Civ. App.)* 144 S. W. 314.

A question, asked a witness, whether a certain statement in an affidavit for attachment "was true or false," is not leading. *Williams v. Kane (Civ. App.)* 55 S. W. 974.

In an action for personal injuries, questions as to the extent of plaintiff's injuries and his suffering therefrom, asked a witness, held not leading. *St. Louis S. W. Ry. Co. of Texas v. Ball*, 28 C. A. 287, 66 S. W. 879.

Where a witness states she was present and saw deceased pay the conductor his fare, it is not improper, as leading, to ask the conductor if witness, a man, or either of them,

paid him the fare and got permission to ride on the train on which deceased was killed. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 28 C. A. 260, 67 S. W. 140.

It is within the discretion of the trial court to permit leading questions. *Missouri, K. & T. Ry. Co. v. McCutcheon*, 33 C. A. 557, 77 S. W. 232; *Dudley v. Strain* (Civ. App.) 130 S. W. 778; *Early & Clement Grain Co. v. City of Waco*, 137 S. W. 431; *Pecos & N. T. Ry. Co. v. Gray*, 145 S. W. 728.

The court has a sound discretion to permit leading questions, when a witness shows disinclination to answer, or is inexperienced or timid. *Hill v. State* (Cr. App.) 77 S. W. 808.

A witness, giving estimates as to the value of property in a barn destroyed by fire, should not be asked leading questions. *St. Louis Southwestern Ry. Co. v. Crabb* (Civ. App.) 80 S. W. 408.

On a trial for theft, the error in allowing the state to ask a leading question held not reversible error. *Burch v. State*, 49 Cr. R. 13, 90 S. W. 168.

A question as to whether a locomotive blow-off pipe could burn or scald a person standing 15 or 18 feet away held not objectionable as leading. *Gulf, C. & S. F. Ry. Co. v. Tullis*, 41 C. A. 219, 91 S. W. 317.

A question as to whether a certain person had told witness what to testify was not objectionable as leading, suggestive, or calling for hearsay. *Coons v. State*, 49 Cr. R. 256, 91 S. W. 1085.

A question "whether or not" insured told an adjusting agent as to the destruction of an inventory by fire held leading. *Continental Ins. Co. v. Cummings* (Civ. App.) 95 S. W. 48.

On the issue of an insurance agent's knowledge as to the ownership of property, testimony as to the witness' impression as to its ownership held improperly admitted in response to a question calling for the general reputation as to such ownership. *Id.*

A question as to a statement of satisfaction by an agent examining certain books after a fire held leading. *Id.*

Questions held not leading merely because answerable by "yes" or "no." *St. Louis Southwestern Ry. Co. of Texas v. Lowe* (Civ. App.) 97 S. W. 1087.

The question, "Did you make any demand upon the defendant for the value of said damaged goods?" addressed to a witness, was not leading. *International & G. N. R. Co. v. H. P. Drought & Co.* (Civ. App.) 100 S. W. 1011.

A question not suggesting the desired answer is not leading. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.) 106 S. W. 194.

In an action for injuries by derailment of a train, it was not a leading question to ask a witness, "Did anybody direct your attention rather to the speed of the train?" *Ft. Worth & D. C. Ry. Co. v. Walker*, 48 C. A. 86, 106 S. W. 400.

A question "what idea did you entertain would be the result of your failure to catch your train, * * * whether you would be discharged for missing it or not?" was not leading, as its form did not indicate the answer desired. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

The allowing of leading questions lies in the discretion of the trial judge, and its exercise will not be reviewed unless the discretion is clearly shown to have been abused. *Id.*

Leading and suggestive questions referring to the identification of the assaulted party, whose name was not proved, should be excluded. *Brown v. State*, 53 Cr. R. 303, 109 S. W. 188.

A question, though susceptible of an answer of "yes" or "no," held not to suggest the answer, and not objectionable as leading. *Cunningham v. Neal*, 49 C. A. 613, 109 S. W. 455.

The use of the words, "whether or not," in propounding a question to a witness, does not in all cases relieve the question from the objection of being leading. *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Civ. App.) 110 S. W. 99.

A question is not necessarily leading because it admits of a direct negative or affirmative answer; but, to make it objectionable when only a single fact is sought to be elicited, it should suggest the answer. *Id.*

A question asked defendant held improperly allowed; the question being suggestive. *Darnell Lumber Co. v. City Loan & Trust Co.* (Civ. App.) 112 S. W. 128.

Answers to leading questions are objectionable as far as responsive to the same. *Gate City Roller Rink Co. v. McGuire* (Civ. App.) 112 S. W. 436.

A question as to a single fact, and not suggesting a particular answer, is not objectionable as leading. *St. Louis Southwestern Ry. Co. of Texas v. Allen* (Civ. App.) 117 S. W. 923.

Where it was apparent that a witness answered under a mistake as to the meaning of a question, it was not error to allow counsel for the party calling the witness to ascertain what he meant by the answer. *Missouri, K. & T. Ry. Co. of Texas v. Neiser*, 54 C. A. 460, 118 S. W. 166.

Questions which did not suggest the desired answer, nor indicate what answer was expected, were not leading. *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899.

It is error to allow leading questions to defendant as a witness in developing his defense. *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

A question which suggests to the witness the desired answer is leading. *El Paso & S. W. R. Co. v. Weiter* (Civ. App.) 125 S. W. 45.

It was not an abuse of discretion to permit the district attorney to ask a leading question of the state's witness. *Long v. State*, 58 Cr. R. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Leading questions are permissible to arrive at facts when modesty or delicacy of a witness prevents a full answer to a general interrogatory. *Carter v. State*, 59 Cr. R. 73, 127 S. W. 215.

Leading questions are not objectionable where the witness has given an ambiguous answer. *Id.*

In an action for breach of marriage promise, the exclusion of a leading question put to defendant held proper. *Fisher v. Barber* (Civ. App.) 130 S. W. 871.

In an action for injuries received while moving car wheels from a box car, a question referring to the floor of the car and telling the witness to go on, and tell what he saw in

regard to its condition, and to describe it, was not objectionable as leading. *Freeman v. Grashel* (Civ. App.) 145 S. W. 695.

Unless the discretion of the trial court in permitting leading questions is abused, it does not constitute reversible error. *Pecos & N. T. Ry. Co. v. Gray* (Civ. App.) 145 S. W. 728.

Questions to a witness "whether or not A. or B. attempted or did anything toward decedent," and "Did they have anything in their hands?" and "Did you have anything?" and "Did you attempt to do anything?" were not bad as misleading. *Wells v. State* (Cr. App.) 145 S. W. 950.

In a suit on a note against the maker and one who was alleged to have guaranteed the note, and had also misrepresented the maker's residence, and had advised plaintiff not to sue the maker because he was insolvent, and that he, the said guarantor, intended to pay the note and had collected moneys thereon, plaintiff, not having taken the stand in his own behalf, could not prove his case by leading questions propounded to him on cross-examination by his own counsel on his being called as a witness by one of the defendants other than the alleged guarantor. *Texas Baptist University v. Patton* (Civ. App.) 145 S. W. 1063.

Exclusion of a proper question asked a witness in chief was not justified because a similar question which was leading had just been excluded. *Dickerson v. Central Texas Grocery Co.* (Civ. App.) 147 S. W. 695.

Where it appeared that deceased wore a truss, a witness who examined deceased's trunk may state if he found a truss therein, and the prosecuting attorney by presenting a truss to him for identification did not thereby put the answer into the witness' mouth. *Harris v. State* (Cr. App.) 148 S. W. 1074.

Where a witness testified that he was present when a vest was taken out of accused's trunk and identified it as belonging to deceased, it was proper to show him the vest and ask whether it belonged to deceased. *Id.*

A question, whether witness recognized a vest as belonging to any one and whose property she recognized it to be, held not leading. *Harris v. State* (Cr. App.) 148 S. W. 1074.

A question asked a state's witness as to whether he authorized defendant to sign witness' name to a check held not leading. *Douglass v. State* (Cr. App.) 148 S. W. 1089.

In an action where the amount of wood left standing upon defendant's land was in issue, a question to a witness whether they were cutting it so as to take all of it, or leaving some of it, was not objectionable as calling for an opinion of the witness. *Sauer v. Veltmann* (Civ. App.) 149 S. W. 706.

A question, the purpose of which was to impeach plaintiff as a witness, held proper, even if leading. *Liquid Carbonic Co. v. Dilley* (Civ. App.) 150 S. W. 468.

A question, asked a state's witness whether or not accused told witness that there was no incumbrance against the mortgaged property when he sold it to witness, was not leading. *Coley v. State* (Cr. App.) 150 S. W. 789.

A question as to what was the impression of the witness as to whether the car was coming toward him or not, and as to whether the train was coming toward him or going from him, held not leading. *St. Louis Southwestern Ry. Co. of Texas v. Smith* (Civ. App.) 153 S. W. 391.

The question, "Was it or not necessary for the safety of car repairers to have a ladder with spikes in the bottom of it?" was not leading. *Missouri, K. & T. Ry. Co. of Texas v. Hedric* (Civ. App.) 154 S. W. 633.

6. — Preliminary or introductory questions.—In trespass to try title, testimony as to whether witness had surveyed the tract described in the petition held admissible. *Camp v. League* (Civ. App.) 93 S. W. 1062.

A question asked a witness to ascertain whether he is qualified to testify on an issue of fact may be leading. *El Paso & S. W. R. Co. v. Welter* (Civ. App.) 125 S. W. 45.

7. — Suggestions in aid of recollection.—Admission of leading questions directing witness' attention to his former statements held within the discretion of the court. *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 133.

Leading questions are permissible to refresh the memory of a witness when the purpose of justice requires it. *Carter v. State*, 59 Cr. R. 73, 127 S. W. 215.

In a prosecution for forgery, a witness held properly examined as to the time a conversation took place with officers of a bank to show the time the defendant's authority to draw checks ceased. *Howard v. State* (Cr. App.) 143 S. W. 178.

Leading questions may be asked for the purpose of refreshing a witness' recollection. *Wilson v. State* (Cr. App.) 154 S. W. 571.

8. — Children or weak-minded or ignorant persons.—Conviction of rape held not reversible for leading questions asked of prosecutrix. *Ham v. State* (Cr. App.) 78 S. W. 929.

Leading questions should not be permitted, where witness understands English sufficiently to answer questions intelligently. *Craddick v. State* (Cr. App.) 88 S. W. 347.

Leading questions may be put to children. *Carter v. State*, 59 Cr. R. 73, 127 S. W. 215. Leading questions are proper where the witness is confused or agitated, or is ignorant and slow to understand. *Id.*

Where a witness was unable to speak English and did not understand the interpreter well and was not well informed, it was not error to permit a leading question. *Diaz v. State*, 62 Cr. R. 317, 137 S. W. 377.

The court, on the examination of a witness of immature years and laboring under excitement, may permit leading questions. *Campbell v. State*, 62 Cr. R. 561, 138 S. W. 607.

9. — Unwilling or hostile witnesses.—Where a witness appears to be hostile, the court may, in its discretion, permit his examination by leading questions. *Nairn v. State* (Cr. App.) 45 S. W. 703; *Spars v. Same*, 50 S. W. 948; *Duncan v. Same*, 40 Cr. R. 591, 51 S. W. 372; *Burch v. Same*, 49 Cr. R. 13, 90 S. W. 168; *Roberson v. Same*, 53 Cr. R. 297, 109 S. W. 160; *Burk v. Same* (Cr. App.) 124 S. W. 658; *Carter v. Same*, 59 Cr. R. 73, 127 S. W. 215; *Mayo v. Same*, 62 Cr. R. 110, 136 S. W. 790; *Moore v. Same* (Cr. App.) 144 S. W. 598; *Clardy v. Same*, 147 S. W. 568; *Wilson v. Same*, 154 S. W. 571.

The court held to have properly permitted leading questions to be put to a witness. *Byrd v. State* (Cr. App.) 45 S. W. 804.

A party who places a reluctant witness on the stand may ask him leading questions, while apparently reading from a statement or memorandum. *Robinson v. State* (Cr. App.) 49 S. W. 386.

Allowing leading question where one answered slowly, and appeared not disposed to tell anything he could avoid, held not error. *Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Civ. App.) 51 S. W. 356.

If it reasonably appears that a witness is attempting to shield or favor defendant, it is not error to permit plaintiff to ask leading questions, though the witness states that he is friendly to plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. McAnaney*, 36 C. A. 76, 80 S. W. 1062.

Under the facts, leading questions held properly propounded to the party's own witness. *Little v. Dielmann*, 48 C. A. 392, 106 S. W. 1137.

After an evasive witness for the state had been on the stand for some time, it was not error to allow him to be questioned as to his testimony before the grand jury to refresh his recollection. *Matthews v. State*, 57 Cr. R. 337, 123 S. W. 127.

Defendant, being called as a witness for plaintiff, is necessarily hostile, and leading questions are proper. *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

It is within the discretion of the trial court to permit leading questions to a reluctant and unwilling witness who continually sought to evade questions asked him. *Sweeney v. State*, 59 Cr. R. 370, 128 S. W. 390.

It was proper to permit leading questions to be asked witnesses for the state, who gave testimony favorable to defendant at variance with their statements in the grand jury room. *Layton v. State*, 61 Cr. R. 507, 135 S. W. 557.

10. Repetition of questions.—Where a witness has fully answered, the court need not permit further examination as to the same matter. *Kugadt v. State*, 38 Cr. R. 681, 44 S. W. 989; *Williams v. Same*, 51 Cr. R. 361, 102 S. W. 1134, 123 Am. St. Rep. 884; *Benson v. Same*, 61 Cr. R. 367, 103 S. W. 911; *Watson v. Same* (Cr. App.) 105 S. W. 509; *Carter v. Same*, 59 Cr. R. 73, 127 S. W. 215; *Edwards v. Same*, 61 Cr. R. 307, 135 S. W. 540.

11. Examination by court.—It is reversible error for the court to ask a witness a leading question. *Biering v. Wegner*, 76 T. 506, 13 S. W. 537.

Where the court interrogates a witness, the same rules as to form of questions apply as when they are asked by counsel. *Hopperwood v. State*, 39 Cr. R. 15, 44 S. W. 841.

Where the prosecuting witness in a rape case was a young and inexperienced girl, it was proper for the court to examine her to make clear her testimony, where the court did not indicate his opinion of the case. *Wragg v. State* (Cr. App.) 145 S. W. 342.

A trial judge may not ask questions to emphasize to the jury testimony previously given by a witness or aid either party by attempting to supply omissions on the part of the litigant or his attorney, but he may ask a witness questions to get clear in his mind the testimony of such witness. *First State Bank of Teague v. Hare* (Civ. App.) 152 S. W. 501.

Where accused did not offer proof that deceased had a general reputation as a violent and dangerous man, it was improper for the court to seek to prove or disprove that fact by questions asked of a witness. *Hysaw v. State* (Cr. App.) 155 S. W. 941.

12. Answers in general.—In an action for injuries, refusal to strike the nonresponsive part of a witness' answer, intended to repel an insinuation implied by the question, held not error. *International & G. N. R. Co. v. Collins*, 33 C. A. 58, 75 S. W. 814.

In questioning witness on redirect examination, repetition of his answer to a question asked him on cross-examination held not error. *Id.*

Where evidence conclusively showed that a train stopped at a station only one or two minutes, and a witness stated that it did not take her 20 minutes to get from her seat to the car steps, held, that counsel could ask her what she meant by her answer. *Texas Midland R. R. v. Ritchey*, 49 C. A. 409, 108 S. W. 732.

The refusal to compel a young girl, suing for personal injuries, to answer "yes" or "no" to the question whether she would submit to an examination of her wounds before consulting her father, who was in the courtroom, held not error. *Texas Cent. R. Co. v. Wheeler*, 52 C. A. 603, 116 S. W. 83.

13. Responsiveness of answer.—Answer of witness held responsive to question asked. *Terrell v. McCown*, 91 T. 231, 43 S. W. 2; *Jordan v. Young* (Civ. App.) 56 S. W. 762; *Moore v. Woodson*, 44 C. A. 503, 99 S. W. 116; *Hoffman v. Lemm* (Civ. App.) 106 S. W. 712; *Taylor Bros. v. Hearn*, 133 S. W. 301.

Answer not responsive to question is properly excluded. *Griffis v. Payne*, 92 T. 293, 47 S. W. 973; *Minor v. Lumpkin* (Civ. App.) 53 S. W. 365; *Gate City Roller Rink Co. v. McGuire*, 112 S. W. 436.

Answer held objectionable as not responsive. *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Civ. App.) 77 S. W. 961; *Smith v. State* (Cr. App.) 99 S. W. 100; *Travelers' Protective Ass'n of America v. Roth* (Civ. App.) 108 S. W. 1039; *Gate City Roller Rink Co. v. McGuire*, 112 S. W. 436; *Roth v. Travelers' Protective Ass'n of America*, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97; *Houston & T. C. Ry. Co. v. Lee*, 104 T. 82, 133 S. W. 868; *Houston & T. C. R. Co. v. Gray* (Civ. App.) 137 S. W. 729.

Where a witness is questioned concerning an original contract, an answer referring only to a copy is not responsive. *Walker v. Dickey*, 44 C. A. 110, 98 S. W. 658.

Defendant held not entitled to predicate error on answers to questions because they were not categorical, where the questions were not susceptible of such answers. *Pullman Co. v. Vanderhoeven*, 48 C. A. 414, 107 S. W. 147.

The latter part of the answer to a question whether defendant's grantor claimed the ownership and possession of land that every one knew that he owned it; that it was his ranch and land there—was not responsive, and should have been stricken. *Merri-man v. Blalack*, 57 C. A. 270, 122 S. W. 403.

The answer of a witness designating acts of a conductor as ungentlemanly held responsive. *Houston & T. C. R. Co. v. Lee* (Civ. App.) 123 S. W. 154.

In an action against a railroad company for loss by fire, an answer of a witness that

"I was concerned in it, because I was the representative of the company, and they claimed our company set the place on fire," was responsive to the question, "How were you concerned in the fire?" *St. Louis Southwestern Ry. Co. of Texas v. Waco Cotton Pickery* (Civ. App.) 146 S. W. 201.

Where a witness was asked when he first learned that a note and deed of trust executed by him had been transferred by the payee to another, his answer that the first time he ever heard of it was when the cashier of the bank told him that the payee had transferred it was irresponsive and properly excluded. *Rudolph v. Price* (Civ. App.) 146 S. W. 1037.

In an action where the amount of wood left standing on defendant's land was in issue, a witness' answer to a question whether it was cut so as to take all of it, or to leave some, that he considered that it was cut clean, as clean as ever he had seen wood cut, was responsive. *Sauer v. Veltmann* (Civ. App.) 149 S. W. 706.

Where witness was asked if a shipment of cattle was not handled with reasonable care, an answer that witness accompanied the shipment part of the way, and with one exception never saw a train handled so roughly, held responsive. *Pecos & N. T. Ry. Co. v. Bishop* (Civ. App.) 154 S. W. 305.

14. Remarks by witness.—Comment of witness on statement made to him by deceased and to which he had testified held properly excluded. *Armstrong v. Burt* (Civ. App.) 138 S. W. 172.

15. Impressions of witness.—The general impression of a witness as to the date of a transaction is not admissible in evidence. *Railway Co. v. Douglass*, 69 T. 694, 7 S. W. 77.

Recollection and opinion of witness as to past transactions competent when. *Harris v. Nations*, 79 T. 409, 15 S. W. 262.

An "impression" of a witness is not evidence. *MacDonnell v. Fuentes*, 26 S. W. 792, 7 C. A. 136.

Servant permitted to testify to his recollection of what he told his foreman about his competency for the employment. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 40 S. W. 191.

16. Reasons for knowledge or recollection of witness.—It is not error to permit witness to testify in chief to facts approximately, where he is testifying from his own knowledge, but admits he does not know exactly. *Fields v. Haley* (Civ. App.) 52 S. W. 115.

A justice of the peace, after testifying that a witness did not give similar testimony at the examining trial that was given on the trial, held erroneously permitted to testify that the previous testimony of the witness was unreasonable. *Dyer v. State*, 47 Cr. R. 253, 83 S. W. 192.

In a prosecution for perjury, in falsely stating in an action against accused in justice court that he was an infant, testimony by a witness that he fled a suit for accused's mother for divorce is admissible, when limited only to fix the date of his first acquaintance with accused. *Poulter v. State* (Civ. App.) 157 S. W. 166.

17. Use of documents to explain testimony.—Permitting witnesses to illustrate their testimony by means of a paper rolled into a cylinder held not error. *Comer v. Thornton*, 38 C. A. 287, 86 S. W. 19.

18. Refreshing memory.—Permitting a witness to refresh his memory by reading over certain testimony given by him before the grand jury, held not error. *Magill v. State*, 51 Cr. R. 357, 103 S. W. 397.

Testimony of a conversation between accused's sister and a witness as to remarks made about decedent held properly excluded. *Long v. State*, 59 Cr. R. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

19. — Memoranda or other writings which may be used.—A witness may use memoranda to refresh his memory, and when so used it is not necessary that it should be produced in court, though its absence may afford matter of observation to the jury; for the witness, at last, testifies from his own recollection. *Hamilton v. Rice*, 15 T. 332; *H. & T. C. R. Co. v. Burke*, 55 T. 323, 40 Am. Rep. 308. Where a witness stated that his testimony was from books, papers, etc., without stating the kind of document, where or by whom kept, their accuracy, etc., the testimony was held to be inadmissible. The witness must be able to say, this was the paper made or at the time verified by me as a true record of the events. *T. & P. R. Co. v. Parrish*, 1 App. C. C. § 943; *Faver v. Bowers* (Civ. App.) 33 S. W. 131.

A memorandum book is primary and the best evidence. A copy of such book, unless the loss of the original is satisfactorily accounted for, is not admissible in evidence, nor can notes or memoranda to which the memory of the witness does not immediately attach be used to refresh his memory. He must be able to say, "This was the paper made or at the time verified by me as a true record of the events." It is not proper that a copy be appealed to, even for the purpose of refreshing the memory, while the original can be produced. *Byrnes v. Pacific Express Co.*, 4 App. C. C. § 188, 15 S. W. 46.

On trial for passing forged checks, witness can use a copy thereof to refresh his memory. *Riley v. State* (Cr. App.) 44 S. W. 498.

A list of stolen goods returned to the owner, made at the time by witness, is competent to refresh his memory. *Franks v. State* (Cr. App.) 45 S. W. 1013.

A witness may refresh his recollection by the testimony taken down by him in the grand jury room. *Luttrell v. State*, 40 Cr. R. 651, 51 S. W. 930.

It was error to allow a witness to refresh his memory and testify from a memorandum made by another, witness not having been present when the facts occurred, and having no personal knowledge thereof. *Missouri, K. & T. Ry. Co. of Texas v. Huggins* (Civ. App.) 53 S. W. 1029.

A memorandum made by plaintiff's attorney held not competent to refresh the memory of a witness on the taking of his deposition. *Rice v. Ward*, 93 T. 532, 56 S. W. 747.

In a prosecution for theft, it is permissible for a witness to refer to his pocket memorandum book in order to fix the date when he saw the animal alleged to have been stolen. *Parks v. State*, 46 Cr. R. 100, 79 S. W. 301.

It was not error to permit a witness for the state, in order to refresh his memory, to

read a statement made and signed by him before the grand jury. *Smith v. State*, 46 Cr. R. 267, 81 S. W. 936, 108 Am. St. Rep. 991.

On a prosecution for a violation of the local option law, it was proper to permit a witness to refer to his express books to refresh his memory as to what was done as to the package in question. *Cantwell v. State*, 47 Cr. R. 511, 85 S. W. 19.

It is not necessary that the memoranda used by a witness to refresh his memory should have been made by him. *Texas & P. Ry. Co. v. Birdwell* (Civ. App.) 86 S. W. 1067; *Same v. Henderson*, Id.

Where a record made by a witness did not refresh his recollection, and he testified that he could not swear to the facts except from the record, his evidence was properly excluded. *Ft. Worth & D. C. Ry. Co. v. Garlington*, 41 C. A. 340, 92 S. W. 270.

A witness held properly permitted to refresh his memory by reference to a certain memorandum. *San Antonio & A. P. Ry. Co. v. Turner*, 42 C. A. 532, 94 S. W. 214.

In a criminal prosecution, permitting a witness to testify after he had read his testimony given at a former trial was not error. *Watters v. State* (Cr. App.) 94 S. W. 1038.

In action to recover articles of personal property, held proper to have permitted plaintiff to refresh his memory as to the articles by reference to the petition. *Hammond v. Decker*, 46 C. A. 232, 102 S. W. 453.

In an action against a carrier of live stock, held proper to permit plaintiff to testify as to the weights of the stock using the account sales to refresh his memory. *St. Louis, I. M. & S. Ry. Co. v. Wills* (Civ. App.) 102 S. W. 733.

To show the number and nature of the packages in the possession of an express agent when robbed, it is error to allow witnesses who prepared the packages to refresh their memory by the use of copies of entries in their books. *Tabor v. State*, 52 Cr. R. 337, 107 S. W. 1116.

On a trial for violating the local option law, accused held not prejudiced by the court permitting a witness to refresh his memory by examining a statement made by him before the grand jury. *Wagner v. State*, 53 Cr. R. 306, 109 S. W. 169.

Where a witness on a second trial stated that he could not remember and that his memory was better at the first trial, the court properly permitted him to refresh his memory by reading his former testimony. *Proctor v. State*, 54 Cr. R. 254, 112 S. W. 770.

A witness was properly permitted to use a ledger for refreshing his memory, where all the other books in which any of the entries were made had been burned. *Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co.*, 52 C. A. 156, 114 S. W. 436.

Statement of right to use memorandum to refresh memory. *Galveston, H. & S. A. Ry. Co. v. Quilhot* (Civ. App.) 123 S. W. 200.

A sufficient foundation held to have been laid to permit witness to testify to a fact by refreshing his memory from book entries. *St. Louis Southwestern Ry. Co. of Texas v. Mitchell* (Civ. App.) 127 S. W. 876.

In an action against a railroad company for loss en route of eggs shipped, defendant's clerks held entitled to testify from records kept by them that only a certain number of cases were received. *Southern Pac. Co. v. C. H. Cox & Co.* (Civ. App.) 136 S. W. 103.

A witness may refresh his memory from notes made by him at the time of the occurrences. *Gould v. State* (Cr. App.) 146 S. W. 172, 179.

A witness may use, to refresh his recollection, an original memorandum or a copy thereof. *Washington v. State* (Cr. App.) 147 S. W. 276.

Where a witness for the state said that he did not remember, the district attorney might refresh his memory by showing him his testimony at a former trial. *Lee v. State* (Cr. App.) 148 S. W. 706.

In a prosecution for selling liquor, witnesses having testified to purchases, and that they had testified thereto before a justice of the peace, his examining and trial dockets, held admissible to refresh the memory of witnesses and of the justice as to the dates of purchases. *Misher v. State* (Cr. App.) 152 S. W. 1049.

In an action for damages, witnesses testifying to transactions covering several months and scores of shipments were properly permitted to refresh their memories by reference to written data made by them or under their direction and within their knowledge. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

Where a witness' statement was taken immediately after a killing, and he denied on the stand any independent recollection thereof, he was properly permitted to testify to the facts as recorded after reading the paper to refresh his recollection. *Smith v. Stat* (Cr. App.) 156 S. W. 214.

20. — **Inspection of writing by adverse party.**—Right of accused to inspect a statement used by prosecuting witness to refresh his memory stated. *Green v. State*, 53 Cr. R. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 706.

Where a witness testified concerning an alleged illegal sale of liquor after refreshing his memory from a memorandum book, the court properly refused to require production of the book or to permit cross-examination with reference to any other entries therein. *Morrow v. State*, 56 Cr. R. 519, 120 S. W. 491.

Where a witness for the state merely testified that he made a statement of the facts to the prosecuting attorney, but it is not used at the trial, held, refusal to compel the state to furnish it to defendant was not error. *Chandler v. State*, 60 Cr. R. 329, 131 S. W. 598.

21. — **Admissibility of writing as evidence.**—In an action against a telegraph company for delay in delivering a message, held error to admit in evidence the counter delivery sheet of defendant. *Western Union Tel. Co. v. Christensen* (Civ. App.) 78 S. W. 744.

Where a witness, after having read his written statement, had no independent recollection thereof, the writing was inadmissible for any purpose. *Galveston, H. & S. A. Ry. Co. v. Solcher* (Civ. App.) 110 S. W. 545.

A memorandum used to refresh a witness' recollection, but which contained matter which had no bearing on the issues, was inadmissible. *Little v. Rich*, 55 C. A. 326, 118 S. W. 1077.

22. Testimony from memoranda or other writings.—Application of funds from entries in an account book. *Railway Co. v. Warner* (Civ. App.) 29 S. W. 503. Use of map. *Clevenger v. Blount* (Civ. App.) 114 S. W. 868.

Objection to memorandum used by witness, that it was made without opposite party's knowledge or consent, held untenable on the evidence. *Crawford v. Abbey* (Civ. App.) 79 S. W. 346.

In a prosecution for violating the local option law, evidence of an express agent from whom the liquor was obtained that he had no recollection aside from his books held admissible. *Cantwell v. State*, 47 Cr. R. 521, 85 S. W. 18.

In an action by rice milling company to recover balance alleged to be due from defendant for advances on shipments of rice to be sold for account of defendant, testimony of inspector of the rice to show its quality, condition, and grade held inadmissible. *Bouldin v. Atlantic Rice Mills Co.* (Civ. App.) 86 S. W. 795.

A witness may testify as to the number of bales of cotton he sold a party, though he bases it on book entries made from cotton tickets. *Hubbard City Cotton Oil & Gin Co. v. Nichols* (Civ. App.) 89 S. W. 795.

A local railroad agent receiving waybills and entering them in books of original entry, could testify upon such books as to shipments. *Walker v. State*, 49 Cr. R. 345, 94 S. W. 230.

In a prosecution for theft of a level, it was proper to allow the witnesses who testified as to the value of the level to refer to and use in their testimony the catalog price lists of levels as a basis for fixing the value of the instrument. *Keipp v. State*, 51 Cr. R. 417, 103 S. W. 392.

23. Testimony of stenographer from notes.—A witness is properly allowed to refresh his memory by a copy transcribed from his stenographic notes, taken on a former hearing. *Connell v. State*, 45 Cr. R. 142, 75 S. W. 512.

24. Calling attention to and explanation of former statements or testimony.—State's attorney held properly permitted to read the former testimony of an unwilling witness to refresh his memory. *Carpenter v. State* (Cr. App.) 51 S. W. 227.

It is not error to permit a witness to testify as to which of two statements previously made by him he is the most positive is correct. *Dunn v. State*, 43 Cr. R. 25, 63 S. W. 571.

In a prosecution for theft, it was not error for the county attorney to read from the statement of facts in a former trial and ask the witness if she made certain statements. *Pool v. State*, 51 Cr. R. 596, 103 S. W. 892.

A witness is authorized to contradict a prior statement in his testimony, and explain the contradiction so as to permit the jury to accept the revised testimony. *Teutonia Ins. Co. v. Tobias* (Civ. App.) 145 S. W. 251.

In an action to enjoin an alleged infringement of water rights, a witness who answered a question, which was capable of being understood in different ways, without understanding the intent of his questioner, was properly permitted to explain the answer given. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

Where witnesses for the state were unfriendly or unwilling to testify, the county attorney could refresh their recollection by calling attention to prior statements alleged to have been made by them. *Liner v. State* (Cr. App.) 156 S. W. 211.

25. Recalling witnesses.—See notes under Art. 1952.

26. Right to cross-examine and re-examine in general.—In a prosecution for violating the local option law, proceeding relative to the explanation by witness of a portion of his testimony held not erroneous. *Owens v. State* (Cr. App.) 96 S. W. 31.

27. Control and discretion of court.—It was not an abuse of discretion for the court to refuse to require plaintiff, on cross-examination, to answer whether he did not feel unkindly toward defendant, and had not made a complaint against him for felony since he bought the land in controversy from the state. *Taylor v. McFatter* (Civ. App.) 109 S. W. 395.

The action of the court in permitting the state on a trial for assault with intent to rape to examine the prosecutrix with reference to a conversation with accused and permitting accused to cross-examine her held proper. *Warren v. State*, 54 Cr. R. 443, 114 S. W. 380.

28. Scope and extent of cross-examination in general.—Rulings on particular questions. *Herring v. Patten*, 18 C. A. 147, 44 S. W. 50; *Clark v. State*, 40 Cr. R. 127, 49 S. W. 85; *Berg v. San Antonio St. Ry. Co.* (Civ. App.) 49 S. W. 921; *Merritt v. State*, 40 Cr. R. 359, 50 S. W. 384; *Vogt v. Short* (Civ. App.) 50 S. W. 627; *Moore v. State*, 40 Cr. R. 439, 50 S. W. 942; *Nite v. Same*, 41 Cr. R. 340, 54 S. W. 763; *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561, 65 S. W. 68; *Borden v. State*, 42 Cr. R. 648, 62 S. W. 1064; *Galveston, H. & N. Ry. Co. v. Newport*, 26 C. A. 583, 65 S. W. 657; *Poole v. State*, 45 Cr. R. 348, 76 S. W. 565; *Washington v. Same*, 46 Cr. R. 184, 79 S. W. 811; *Shain Packing Co. v. Burrus* (Civ. App.) 75 S. W. 838; *Sexton v. State*, 48 Cr. R. 497, 88 S. W. 348; *Willis v. Same*, 49 Cr. R. 139, 90 S. W. 1100; *McLain v. Same*, 48 Cr. R. 549, 90 S. W. 1107; *Anson v. Gulf, C. & S. F. Ry. Co.*, 42 C. A. 437, 94 S. W. 94; *Welch v. State*, 50 Cr. R. 28, 95 S. W. 1035; *Owens v. Same* (Cr. App.) 96 S. W. 31; *Texas & P. Ry. Co. v. Newsome & Williams*, 44 C. A. 513, 98 S. W. 646; *Ft. Worth & D. C. Ry. Co. v. Travis*, 45 C. A. 117, 99 S. W. 1141; *Missouri, K. & T. Ry. Co. of Texas v. Lindsey* (Civ. App.) 101 S. W. 863; *Lahue v. State*, 51 Cr. R. 159, 101 S. W. 1008; *Hardin v. Same*, 51 Cr. R. 559, 103 S. W. 401; *Benson v. Same*, 51 Cr. R. 367, 103 S. W. 911; *Seiwert v. Same* (Cr. App.) 103 S. W. 932, 933; *Panhandle & G. Ry. Co. v. Kirby* (Civ. App.) 108 S. W. 495; *Dooley v. State*, 52 Cr. R. 491, 108 S. W. 676; *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 49 C. A. 304, 108 S. W. 1027; *Hobbs v. State*, 53 Cr. R. 71, 112 S. W. 308; *Marsh v. Same*, 54 Cr. R. 144, 112 S. W. 320; *Dobbs v. Same*, 54 Cr. R. 550, 113 S. W. 923; *Southwestern Telegraph & Telephone Co. v. Owens* (Civ. App.) 116 S. W. 89; *Gelber v. State*, 56 Cr. R. 460, 120 S. W. 863; *Barbee v. Same*, 58 Cr. R. 129, 124 S. W. 961; *Phillips v. Same*, 59 Cr. R. 534, 128 S. W. 1100; *Edwards v. Same*, 61 Cr. R. 307, 135 S. W. 540; *McLain v. Same*, 62 Cr. R. 118, 136 S. W. 1057; *A. Cohen & Co. v. Rittimann* (Civ. App.) 139 S. W. 59; *Grimes v. State*, 64 Cr. R. 64, 141 S. W. 261; *Hunt v. Johnson* (Civ. App.) 141 S. W. 1060; *Barber v. State*, 64 Cr. R. 96, 142 S. W. 577; *Maclin*

v. Same (Cr. App.) 144 S. W. 951; Swanney v. Same, 146 S. W. 548; Kirby v. Same, 150 S. W. 455; Davis v. Fain (Civ. App.) 152 S. W. 218; Mayhew v. State (Cr. App.) 155 S. W. 191; Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

Plaintiff may use an abandoned verified answer as evidence, and as a basis for cross-examination of the defendant filing it. Morgan v. E. Bement & Sons, 24 C. A. 564, 59 S. W. 907.

Great latitude should be allowed on cross-examination. O'Connell v. Storey (Civ. App.) 105 S. W. 1174.

The court properly refused to permit defendant to ask plaintiff on cross-examination whether, since he had lived in the neighborhood, he had not continually had trouble and lawsuits with his neighbors. Taylor v. McFatter (Civ. App.) 109 S. W. 395.

29. Limitation of cross-examination to subjects of direct examination.—The rule that the cross-examination of a witness must be confined to the questions propounded and answered on the examination in chief has not been recognized in this state, and any question pertinent to the matter in issue may be asked. Wentworth v. Crawford, 11 T. 127; Rhine v. Blake, 59 T. 240; Evansich v. G., C. & S. F. R. Co., 61 T. 24.

The adverse party has the right to cross-examine a witness upon any subject about which he has testified in his examination in chief (Grothaus v. Witte, 72 T. 124, 11 S. W. 1032), and is not limited to matters in rebuttal of questions propounded to the witness on the direct examination (Roberts v. Miller [Civ. App.] 30 S. W. 381).

Rulings in particular cases. Hull v. State (Cr. App.) 47 S. W. 472; Merritt v. Same, 40 Cr. R. 359, 50 S. W. 384; Wilkerson v. Same (Cr. App.) 57 S. W. 956; Woods v. Same, 60 S. W. 244; King v. Same, 64 S. W. 245; Bearden v. Same, 44 Cr. R. 578, 73 S. W. 17; Webb v. Same, 47 Cr. R. 305, 83 S. W. 394; Brittain v. Same, 47 Cr. R. 597, 85 S. W. 278; San Antonio Traction Co. v. Haines, 45 C. A. 289, 100 S. W. 788; Jones v. State (Cr. App.) 101 S. W. 993; Stewart v. Same, 52 Cr. R. 273, 106 S. W. 685; Ross v. Same, 53 Cr. R. 162, 295, 109 S. W. 152, 153; Yeiral v. Same, 56 Cr. R. 267, 119 S. W. 848; International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952; Johnson v. State, 63 Cr. R. 50, 138 S. W. 1021; Maclin v. Same (Cr. App.) 144 S. W. 951.

In an action for damages to a building caused by an explosion, where a witness testified to the total damage and that he had the contract to repair the woodwork, it was error for the court to refuse to require him to state on cross-examination what he was to receive for such repairs. Ft. Worth & D. C. Ry. Co. v. Cummins (Civ. App.) 69 S. W. 118.

Where one side examines a witness and the other side, after cross-examining, goes into new matter the witness as to the new matter becomes the witness of the party eliciting it. Stewart v. State, 52 Cr. R. 273, 106 S. W. 685.

New matter not covered by the examination in chief which may be used against her husband cannot be elicited from the wife on cross-examination. Pinckard v. State, 62 Cr. R. 602, 138 S. W. 601.

30. Cross-examination as to irrelevant, collateral or immaterial matters.—The rule that only such evidence as is relevant to the matter in issue shall be introduced governs in the direct examination of a witness and also in the cross-examination. The rule is not applied with the same strictness in a cross-examination as it is in the examination in chief. It would seem that any fact which bears upon the credit of a witness is a relevant fact, and this whether it goes to his indisposition to tell the truth, his want of opportunity to know the truth, his bias, interest, want of memory, or other like fact. Upon cross-examination inquiry may be made into the situation of the witness with respect to parties and to the subject of the litigation; his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he uses those means; his power of discernment, memory and description, may be fully investigated and ascertained. Evansich v. G., C. & S. F. R. Co., 61 T. 24.

Plaintiff cannot complain that his witnesses were cross-examined as to matters drawn out by his own counsel. Freedman v. Bonner (Civ. App.) 40 S. W. 47.

Irrelevant matters. Jones v. State, 38 Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; Richards v. Same, 53 Cr. R. 400, 110 S. W. 432; Drake v. Same (Cr. App.) 143 S. W. 1157.

In an action against a railway company for negligence, requiring defendant's engineer, on cross-examination, to testify to his negligence at other times, held error. Texas & P. Ry. Co. v. Meeks (Civ. App.) 74 S. W. 329.

Question on cross-examination as to whether it was a rule for the railroad company to keep a brakeman at the rear end of trains when switching under conditions not shown by the evidence held improper. Freeman v. Moreman (Civ. App.) 146 S. W. 1045.

31. Cross-examination as to writings.—In cross-examining, accused's counsel have the right to access to a book containing a written statement signed by the witness and used by the prosecuting attorney in his examination. Duke v. State, 61 Cr. R. 19, 133 S. W. 432.

32. Cross-examination of witness to character of party.—See Forrester v. State, 38 Cr. R. 245, 42 S. W. 400; Hopperwood v. Same, 39 Cr. R. 15, 44 S. W. 841; Holloway v. Same, 45 Cr. R. 303, 77 S. W. 14; Newell v. Same (Cr. App.) 145 S. W. 939.

33. Cross-examination of party.—Refusing to compel defendant's attorney to deliver to plaintiff a statement which he had used as a guide in examining defendant held not error. Timmons v. Casey, 19 C. A. 476, 47 S. W. 805.

A voluntary statement of accused may be used by prosecuting attorney on cross-examination. Ford v. State, 40 Cr. R. 280, 50 S. W. 350.

A party may state on cross-examination that the reason he remembers the testimony of his opponent on a former trial is because he saw it written down. McBane v. Angle, 29 C. A. 594, 69 S. W. 433.

In an action for injuries, it is proper not to allow defendant to show, on cross-examination of plaintiff, that he had refused to submit to an examination by physicians to be appointed by the court. Austin & N. W. R. Co. v. Cluck (Civ. App.) 73 S. W. 569.

In an action for servant's injuries, evidence that plaintiff refused to submit to examination by defendant's physician held properly excluded. Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 73 S. W. 571.

In an action for delay in delivery of telegram, certain cross-examination of plaintiff on the issue of mental anguish held improperly excluded. *Western Union Tel. Co. v. Simmons* (Civ. App.) 75 S. W. 322.

In an action for personal injuries, examination of plaintiff as witness as to advice of lawyer in relation to a prior injury of the same character held improper. *City of Dallas v. Muncton*, 37 C. A. 112, 83 S. W. 431.

Where a property owner testifies as to the value of his property, he may be asked on cross-examination what he will take for it. *Chicago, R. I. & T. Ry. Co. v. Carr* (Civ. App.) 89 S. W. 35.

Where in an action for injuries, plaintiff testified that prior to the accident he earned from \$5,000 to \$7,000 per annum, defendant on cross-examination was entitled to show that in fact plaintiff was poor. *Pecos & N. T. R. Co. v. Coffman*, 56 C. A. 472, 121 S. W. 218.

A party testifying in his own behalf should not be required to express on cross-examination his opinion of the truth of the testimony of a witness contradicting his testimony. *Temple v. Duran* (Civ. App.) 121 S. W. 253.

In an action by an owner of property abutting on a street for damages caused by operation of trains in the street, plaintiff may, on cross-examination, be asked as to what he would take for the property at the time of the trial. *Trinity & B. V. Ry. Co. v. Jobe* (Civ. App.) 126 S. W. 32.

In an action on a note, it was error to exclude questions asked on cross-examination of defendant R., to show that he knew the note was executed for the benefit of his co-maker, and not for the accommodation of plaintiff as claimed. *First Nat. Bank v. Pearce* (Civ. App.) 126 S. W. 285.

On an issue as to the depreciation of plaintiff's property, the court held not to have erred in refusing to require her to state how much she would take for the property as it stood. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

In an action on an account, held, that it was reversible error to permit counsel for plaintiff to ask defendant certain questions manifestly improper and prejudicial. *Stuart v. Calahan* (Civ. App.) 142 S. W. 60.

In a suit against the pastor of a church to enforce a resulting trust, cross-examination of defendant as to his prior relations with a woman and marriage to another held improper. *Gilmore v. Brown* (Civ. App.) 150 S. W. 964.

Where, in an action for libel, the issue was whether plaintiff and his wife could be identified by the defamatory article as the persons referred to, refusal to permit defendant to prove by plaintiff on cross-examination that he would not have known to whom it referred, except for information not possessed by the public was erroneous. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 157 S. W. 224.

34. **Questions on cross-examination.**—Question asked of defendant to impeach him should have been restricted to some definite time. *Stull v. State*, 47 Cr. R. 547, 84 S. W. 1059.

In an action for delay in delivering a death message, a question asked of defendant's witness on cross-examination, if he inquired by telephone as to the addressee, held not objectionable in that defendant could not discharge its obligation to deliver a message by telephone. *Western Union Telegraph Co. v. Craige*, 44 C. A. 214, 90 S. W. 681.

Where a question asked on cross-examination was objected to as calling for a conclusion, but it did not appear that it was answered, no error was committed. *Benson v. State*, 51 Cr. R. 367, 103 S. W. 911.

35. — **Questions assuming facts.**—On the cross-examination of a witness as to the identity of accused, held not permissible to ask him if he went to other places to identify other persons under arrest. *Moore v. State*, 40 Cr. R. 439, 50 S. W. 942.

In proceedings by a railroad to condemn land, certain evidence as to value held admissible. *Hengy v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 109 S. W. 402.

36. — **Leading questions.**—Leading questions held proper on cross-examination. *Bell v. State*, 48 Cr. R. 256, 87 S. W. 1160.

37. — **Repetition of questions and questions calling for repetition of answers.**—When a witness has on cross-examination more than once answered a question propounded by counsel, whether he shall again be required to make answer to the same question is within the discretion of the trial judge. *Railway Co. v. Pool*, 70 T. 713, 8 S. W. 535.

Exclusion of questions to state's witness on cross-examination as to whether he was positive as to testimony he had twice given positively, and whether he was as positive as to such matter as he was that defendant shot deceased, held not an abuse of discretion. *Blue v. State* (Cr. App.) 148 S. W. 730.

Exclusion of a question asked a witness on cross-examination whether he was not frequently drunk, held not erroneous, where he had previously repeatedly denied getting drunk; it being unlikely that he would have answered in the affirmative, as claimed. *Snyder Ice, Light & Power Co. v. Bowron* (Civ. App.) 156 S. W. 550.

38. — **Cross-examination by court.**—The action of the court, in asking witness if she understood the meaning of a certain word, while defendant was cross-examining witness, was not error. *Washington v. State*, 46 Cr. R. 184, 79 S. W. 811.

39. **Redirect examination.**—Where a witness on cross-examination by the prosecution, testified that he had been employed by third persons to investigate as to whether it would be safe for them to go on defendant's bond, he may be asked, on re-examination, whether he had advised that it would be safe so to do. *Fossett v. State*, 41 Cr. R. 400, 55 S. W. 497.

Where the witness stated on cross-examination the reason given by defendant for taking a machine sued for from plaintiff, it was not an abuse of the court's discretion to allow him to be asked, on re-examination, if defendant had not told him that he took the machine for another reason. *Mulliner v. Shumake* (Civ. App.) 55 S. W. 983.

Certain evidence held not to constitute impeachment by the state of one of its own witnesses. *Binyon v. State* (Cr. App.) 56 S. W. 339.

Certain re-examination of a witness held proper. *Lahue v. State*, 51 Cr. R. 159, 101 S. W. 1008; *Smith v. Same*, 52 Cr. R. 344, 106 S. W. 1161, 15 Ann. Cas. 357; *Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Civ. App.) 134 S. W. 736.

The overruling of a certain objection to cross-examination as to a witness' knowledge that a certain speed violated ordinances intended to protect human life, held not error. *Missouri, K. & T. Ry. Co. of Texas v. Wall* (Civ. App.) 110 S. W. 453.

Plaintiff having testified that he went on land previously conveyed to defendants, and took charge of it, and having testified on cross-examination that he went there at the request of defendants' grantor, held permissible, on redirect examination, to show that defendants' grantor surrendered possession to plaintiff, and turned over to him a deed through which grantor and her husband claimed. *Pardue v. Whitfield*, 53 C. A. 63, 115 S. W. 306.

Where a witness testified on cross-examination that he had been promised immunity, he could answer on re-examination that he had been directed not to testify against any one who was innocent. *Fruger v. State*, 56 Cr. R. 393, 120 S. W. 197.

In view of the cross-examination of a detective, the court properly permitted the state on re-examination to show that it made no financial difference to the witness whether defendant was convicted or acquitted. *Morrow v. State*, 56 Cr. R. 519, 120 S. W. 491.

Exclusion of testimony on redirect examination as to trouble between deceased and another person held error; he having stated on cross-examination the names of several with whom deceased had had trouble. *Maclin v. State* (Cr. App.) 144 S. W. 951.

Where character witnesses for defendant had on redirect explained in detail matters drawn out on their cross-examination, and defendant on cross-examination was not asked as to those matters, it was not error to refuse to allow him on his own redirect to go into such detailed explanation. *Stephens v. State* (Cr. App.) 145 S. W. 907.

Where accused brought out on cross-examination that the witness had been arrested for the crime, the state might properly, on redirect examination, elicit the fact that the grand jury had not indicted him. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Where the state showed the larceny of ribbon and a state's witness testified that a few days after the larceny she saw a young woman in accused's company wearing 20 yards of ribbon of the kind stolen, and the witness on cross-examination stated that she had bought ribbon for her daughters, it was not error to permit the state on redirect examination to ask whether she had ever bought as much as 20 yards at one time. *Holmes v. State* (Cr. App.) 157 S. W. 487.

40. — **Explanation of testimony.**—Redirect examination of witness. *James v. State*, 40 Cr. R. 190, 49 S. W. 401; *Turner v. Same* (Cr. App.) 51 S. W. 366; *Drye v. Same*, 55 S. W. 65; *Jackson v. Missouri, K. & T. Ry. Co. of Texas*, 23 C. A. 319, 55 S. W. 376; *Renfro v. State*, 42 Cr. R. 393, 56 S. W. 1013; *International & G. N. R. Co. v. Locke* (Civ. App.) 67 S. W. 1082; *Merrell v. State* (Cr. App.) 70 S. W. 979; *Smith v. Same*, 74 S. W. 556; *Kipper v. Same*, 45 Cr. R. 377, 77 S. W. 611; *Weaver v. Same*, 46 Cr. R. 607, 81 S. W. 39; *Brundige v. Same*, 49 Cr. R. 596, 95 S. W. 527; *Jeter v. Same*, 52 Cr. R. 212, 106 S. W. 371; *Biddy v. Same* (Cr. App.) 108 S. W. 689; *Green v. Same*, 62 Cr. R. 345, 137 S. W. 126; *James v. Same*, 63 Cr. R. 75, 138 S. W. 612; *Cotton v. Morrison* (Civ. App.) 140 S. W. 114; *Kinney v. State* (Cr. App.) 144 S. W. 257; *Moore v. Same*, 144 S. W. 598; *Lott v. Same* (Cr. App.) 146 S. W. 544; *Williams v. Same*, 148 S. W. 763; *Mason v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 151 S. W. 350; *Holmes v. State* (Cr. App.) 157 S. W. 487.

Explanation on redirect examination of testimony given on direct examination held properly excluded. *Whitehead v. State*, 61 Cr. R. 558, 137 S. W. 356.

41. — **New matter on cross-examination.**—See *Lax v. State*, 46 Cr. R. 628, 79 S. W. 578; *Millican v. Same*, 63 Cr. R. 440, 140 S. W. 1136.

42. — **Repetition of testimony on direct or cross examination.**—In an action for injuries, questions asked of an alleged expert held not objectionable as leading. *International & G. N. R. Co. v. Collins*, 33 C. A. 58, 75 S. W. 814; *Washington v. State*, 58 Cr. R. 345, 125 S. W. 917.

43. **Recross-examination.**—Permitting recross-examination is a matter within the discretion of the court, and will not ordinarily be reviewed on appeal. *Presidio County v. Clarke*, 38 C. A. 320, 85 S. W. 475.

44. **Privileged communications.**—See *Introductory*, II, ante.

45. **Answer tending to disgrace witness or render him infamous.**—In an action for breach of promise of marriage, questions asked plaintiff as to illicit relations with persons other than defendant before her engagement to marry him held properly excluded. *Clark v. Reese*, 26 C. A. 619, 64 S. W. 783.

46. **Answer tending to subject witness to criminal prosecution.**—Witness may refuse to answer a criminating question. The objection cannot be made by a party to the suit. *Railway Co. v. Muth*, 27 S. W. 752, 7 C. A. 443; *Ex parte Andrews*, 51 Cr. R. 79, 100 S. W. 376; *Pinckard v. State*, 62 Cr. R. 602, 138 S. W. 601; *Smith v. Same* (Cr. App.) 148 S. W. 722.

Exemption of witness from giving incriminating testimony applies to the giving of testimony before a grand jury. *Ex parte Wilson*, 39 Cr. R. 630, 47 S. W. 996.

Forged bill of sale need not be produced when witness shows it would tend to incriminate him. *Id.*

The manager of a saloon held protected by Const. art. 1, § 10, from being compelled to testify before a grand jury that certain of his bartenders kept a saloon open on Sunday for the ordinary sale of liquor. *Ex parte Merrell*, 50 Cr. R. 193, 95 S. W. 1047.

47. **Privilege as to production of documents.**—A statement of witness before the grand jury that an answer would not incriminate him is not a waiver of his right to show otherwise when brought before the court for contempt. *Ex parte Wilson*, 39 Cr. R. 630, 47 S. W. 996.

The constitutional right of the accused to refrain from giving evidence against himself applies to the giving of testimony before the grand jury. *Wilson v. State*, 41 Cr. R. 115, 51 S. W. 916.

48. **Caution to witness.**—Where a witness before the grand jury is not warned that the evidence given may be used against him, such evidence is not admissible on subsequent prosecution. *Bowen v. State*, 47 Cr. R. 137, 82 S. W. 520.

It is immaterial whether the court or counsel inform a witness that he may decline

to answer if his answers might tend to incriminate him. *Starr v. State* (Cr. App.) 86 S. W. 1023.

Where a witness does not know his rights in respect to declining to answer, if his answers might tend to incriminate him, the court should see that he is properly informed. *Id.*

49. **Waiver of privilege.**—The privilege of a witness of not answering in certain cases may be waived. *Ingersol v. McWillie*, 87 T. 647, 30 S. W. 869.

50. **Persons entitled to claim privilege.**—An accused cannot object to the testimony of a coprincipal on the ground that it would tend to incriminate him. *Duncan v. State*, 40 Cr. R. 591, 51 S. W. 372.

51. **Remedies for protection of witness against subsequent use of evidence.**—The action of the trial court in stating to a witness that she would be exempt from prosecution if she would testify to the truth held not erroneous under the evidence. *Stanford v. State*, 42 Cr. R. 343, 60 S. W. 253.

II. Credibility of Witnesses

52. **Credibility of witnesses in general.**—The jury need not accept as true positive evidence, where there is evidence of circumstances tending to show its falsity. *Mercantile & Banking Co. v. Landa* (Civ. App.) 40 S. W. 406.

Testimony of a witness held so contradictory in two depositions as to justify the jury in returning a verdict that deceased had no notice of a defective appliance. *Gulf, C. & S. F. Ry. Co. v. Royall*, 18 C. A. 86, 43 S. W. 815.

A jury may give credence to part of the testimony of a witness and reject the rest. *Galveston, H. & S. A. Ry. Co. v. Eckles*, 25 C. A. 179, 60 S. W. 830.

Evidence held sufficient to show that witness was competent to testify as to general reputation of a locomotive fireman. *Id.*

Mere conduct of officers and employes of defendant corporation, in testifying as unwilling witnesses, held insufficient to make out plaintiff's case. *Wells, Fargo & Co.'s Express v. Waites*, 29 C. A. 560, 69 S. W. 450.

In an action for personal injuries, contributory negligence need not be proven by a preponderance of the evidence to the satisfaction of the jury. *El Paso Electric Ry. Co. v. Kitt* (Civ. App.) 90 S. W. 678.

A jury may disregard evidence introduced by plaintiff and base a conclusion favorable to him upon testimony furnished by his adversary, or it may take part of the testimony of defendant as true and regard the balance as false (though it be the testimony of the same witness), and join what is taken as true to part of the testimony of plaintiff, and base his conclusion upon such portions of the testimony of each party. *Galveston, H. & S. A. Ry. Co. v. Murray* (Civ. App.) 99 S. W. 144.

A jury is not required to believe a witness, although he makes a plain statement of what is not impossible, and is neither impeached nor contradicted, but may discredit him on account of the manner of testifying and attendant circumstances; the jury being the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.*

Statement of weight and sufficiency of evidence in view of question of credibility of witnesses. *Missouri, K. & T. Ry. Co. of Texas v. Harris*, 45 C. A. 542, 101 S. W. 506.

The jury have no right to arbitrarily reject the evidence of an unimpeached witness against whom there is no discrediting fact or circumstance. *Grand Fraternity v. Melton*, 102 T. 399, 117 S. W. 788.

Though testimony of witnesses be uncontradicted, held, under conditions making it suspicious, that it could be disbelieved. *Sovereign Camp of Woodmen of the World v. Jackson* (Civ. App.) 138 S. W. 1137.

A jury can believe or disbelieve any witnesses giving contradictory testimony. *San Antonio Traction Co. v. Young* (Civ. App.) 141 S. W. 572.

Engineer of train, by which deceased person was killed, held to be interested witness, whose credibility is for the jury. *Knights of Maccabees of the World v. Johnson* (Civ. App.) 143 S. W. 718.

Testimony that one lying in a car was thrown in a westerly direction by the impact of an engine on the east end of the car held not so in conflict with physical facts as to destroy its force. *Missouri, K. & T. Ry. Co. of Texas v. Morin* (Civ. App.) 144 S. W. 1191.

In an action for slander where the testimony of a witness as to vile statements made by defendant concerning plaintiff was not corroborated, and was contradicted by defendant, the jury were justified in rejecting it as unworthy of credence. *Lehmann v. Medack* (Civ. App.) 152 S. W. 438.

53. **Testimony of party.**—Defendant's testimony, directly contrary to the fact as pleaded by him, is conclusive against him. *Daugherty v. Lady* (Civ. App.) 73 S. W. 837.

The fact that plaintiff in a personal injury action is the only witness testifying to the circumstances of the injury does not preclude a recovery. *International & G. N. R. Co. v. Mills* (Civ. App.) 78 S. W. 11.

A jury held warranted in basing its verdict on the direct testimony of a boy injured while stealing a ride on a freight car, notwithstanding the boy's contradictory statements on cross-examination. *Texas & N. O. R. Co. v. Buch* (Civ. App.) 102 S. W. 124.

Where the establishment of a fact depends solely on the evidence of a party having a material interest in the controversy, such interest may be considered by the jury in determining the credibility of the party and the weight to be given to his testimony. *Gulf, C. & S. F. Ry. Co. v. Batte* (Civ. App.) 107 S. W. 632.

Where a broker suing for a commission testified as to the customary rate of compensation, and defendant did not adduce any evidence on the subject, the court did not err in taking his testimony as undisputed. *Hansen v. Williams* (Civ. App.) 113 S. W. 312.

The court is not bound to believe a party's testimony on a particular issue as to which it may seem the evidence preponderates in his favor. *Steely v. Texas Improvement Co.*, 55 C. A. 463, 119 S. W. 319.

Where a witness is a party in interest, his credibility is largely a fact to be considered in determining what effect should be given to his testimony. *Bell County v. Felts* (Civ. App.) 122 S. W. 269.

The court may accept plaintiff's testimony, though it is contradicted by that of several witnesses. *Bailey v. Dillard* (Civ. App.) 147 S. W. 1165.

54. Testimony of interested persons.—When jury may infer from evidence that engineer saw a boy on the track, though he denied the fact. *Texas & P. Ry. Co. v. Phillips* (Civ. App.) 40 S. W. 344.

The testimony of witnesses interested in the issue is not necessarily overcome by the opposing testimony of a greater number of equally credible witnesses who are not interested. *Largent v. Beard* (Civ. App.) 53 S. W. 90.

In determining the fact and extent of an agency, the jury are not concluded by the testimony of the agent. *Majors v. Goodrich* (Civ. App.) 54 S. W. 919.

The jury, being judges of a witness' credibility, are not bound to accept as true uncontradicted testimony of an interested witness. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

The jury in an action on a life policy, in which the validity of a settlement made by the agent is in issue, may refuse to believe the testimony of the agent, in behalf of the company, though uncontradicted. *Franklin Life Ins. Co. v. Villeneuve*, 29 C. A. 128, 68 S. W. 203.

In action against a railroad for death of a bridge watchman, killed while riding a velocipede across the bridge, engineer's statement that he did not see deceased until within 100 feet of him, held not conclusive. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

The jury may infer that railroad employes saw a person dangerously near to the track in time to avoid injuring him, notwithstanding their denials, where there were no obstructions to their view. *Houston & T. C. R. Co. v. Flinn* (Civ. App.) 107 S. W. 94.

An interested party's uncontradicted testimony in support of his defense of fraud, in an action on notes, held not to be disregarded, where he had apprised the parties of his defense in his answer, filed months before the trial, in the absence of any showing that his testimony was untruthful. *Beene & Trotter v. Rotan Grocery Co.*, 50 C. A. 448, 110 S. W. 162.

A servant's denial in an injury action that he knew the risk is merely evidence of that fact and is not conclusive where there is circumstantial evidence to the contrary. *Western Union Telegraph Co. v. Burton*, 53 C. A. 378, 115 S. W. 364.

In an action for the death of a person killed by a train at a crossing, the jury in determining the question of discovered peril could disbelieve testimony of the fireman and engineer that the fireman was busy in firing the engine, and believe the testimony of decedent's sister, who saw the accident. *International & G. N. R. Co. v. Tinon* (Civ. App.) 117 S. W. 936.

The court or jury is not bound to believe an interested witness, especially where there are circumstances casting suspicion on his testimony. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 145 S. W. 707.

The jury is not bound to believe the testimony of an interested witness, though not directly contradicted. *Crane v. Western Union Tel. Co.* (Civ. App.) 152 S. W. 444.

The jury may discredit in part the testimony of an interested witness. *Wyatt v. Moore* (Civ. App.) 152 S. W. 1133.

III. Impeachment and Corroboration of Witnesses

55. Grounds of impeachment in general.—A liberal rule is allowed for the purpose of contradicting or impeaching witnesses. *Southworth v. State*, 52 Cr. R. 532, 109 S. W. 133.

Testimony that persons whose depositions had been admitted were negroes was an attempt at impeachment in an improper way. *Texas & P. Ry. Co. v. Good* (Civ. App.) 151 S. W. 617.

56. Corroboration of unimpeached and uncontradicted witness.—Corroboration of witness, see post.

A party cannot fortify the credit of his witness until his credibility is assailed. *Morrison v. State* (Cr. App.) 40 S. W. 591; *Murphy v. Same*, 40 S. W. 978; *Renfro v. Same*, 42 Cr. R. 393, 56 S. W. 1013; *Zysman v. Same*, 42 Cr. R. 432, 60 S. W. 669; *Reese v. Same*, 43 Cr. R. 539, 67 S. W. 325; *Fox v. Robbins* (Civ. App.) 70 S. W. 597; *Morton v. State* (Cr. App.) 71 S. W. 281; *McKensie v. Watson*, 36 C. A. 235, 81 S. W. 1017; *Bowen v. State*, 47 Cr. R. 137, 82 S. W. 520; *Dean v. Same*, 47 Cr. R. 243, 83 S. W. 816; *Green v. Same*, 49 Cr. R. 238, 90 S. W. 1115; *McKnight v. Same*, 50 Cr. R. 252, 95 S. W. 1056; *Casey v. Same*, 50 Cr. R. 392, 97 S. W. 496; *Jones v. Same*, 52 Cr. R. 206, 106 S. W. 126; *Holmes v. Same*, 52 Cr. R. 352, 353, 106 S. W. 1160; *Pratt v. Same*, 53 Cr. R. 281, 109 S. W. 138; *Texas & P. Ry. Co. v. Tuck* (Civ. App.) 116 S. W. 620; *Welch v. State*, 57 Cr. R. 111, 122 S. W. 880; *Graham v. Same*, 57 Cr. R. 104, 123 S. W. 691; *International & G. N. R. Co. v. Lane* (Civ. App.) 127 S. W. 1066; *Houston Electric Co. v. Jones*, 129 S. W. 863; *Downing v. State*, 61 Cr. R. 519, 136 S. W. 171; *Lacy v. Same*, 63 Cr. R. 189, 140 S. W. 461; *Allen v. Same*, 64 Cr. R. 225, 141 S. W. 983; *Oldham v. Same*, 63 Cr. R. 527, 142 S. W. 13; *Williams v. Same* (Cr. App.) 148 S. W. 763; *Weaver v. Same*, 150 S. W. 785.

Evidence as to the character of the prosecuting witness for honesty held not to justify the prosecution in introducing evidence as to his truth and veracity. *Zysman v. State*, 42 Cr. R. 432, 60 S. W. 669.

A witness who has not been impeached cannot be corroborated by showing that he has made the same statement testified to at other times to other parties. *Davis v. State*, 45 Cr. R. 292, 77 S. W. 451.

In habeas corpus, relator held not entitled to ask deceased's widow, on cross-examination, whether she had not been told that she would be charged with the murder if she testified that deceased had a knife when relator shot him, etc. *Ex parte McCoy*, 47 Cr. R. 237, 82 S. W. 1044.

Where predicate for impeachment of a state's witness has been laid, the state may introduce evidence as to his reputation before impeaching evidence has been introduced. *Harris v. State*, 49 Cr. R. 338, 94 S. W. 227.

A witness whose character has not been attacked except by questions which do not necessarily amount to an insinuation against his veracity cannot be corroborated by show-

ing that he has made the same statements on former occasions. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 49 C. A. 184, 108 S. W. 490.

It is improper to allow an unimpeached witness to corroborate himself by stating that he has testified to the same facts before. *Green v. State*, 53 Cr. R. 534, 110 S. W. 929.

An unimpeached witness cannot be corroborated by proof of similar statements out of court. *Pridemore v. State*, 53 Cr. R. 620, 111 S. W. 155.

The state can introduce evidence to sustain the reputation of a witness before witnesses for the defense have been introduced directly to impeach him. *Goode v. State*, 57 Cr. R. 220, 123 S. W. 597.

The rule as to when testimony is admissible to sustain the character of a witness for truth and veracity stated. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 133 S. W. 499.

Where an expert's capacity and credibility is not attacked, evidence is not admissible to support the same. *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155.

57. Right to impeach witness in general.—A witness making a statement about an immaterial matter cannot be impeached by showing that his testimony is false. *Croft v. Smith* (Civ. App.) 51 S. W. 1089; *Lankster v. State* (Cr. App.) 72 S. W. 388; *Texas & N. O. R. Co. v. Marshall*, 57 C. A. 538, 122 S. W. 946.

That witnesses testified in a case and their testimony was controverted did not put the credibility and general reputation of the witnesses in issue. *Hill v. State*, 52 Cr. R. 241, 106 S. W. 145.

The state, in a homicide case, held entitled, after laying a proper predicate, to impeach a witness for accused. *Marsh v. State*, 54 Cr. R. 144, 112 S. W. 320.

Plaintiff by successfully resisting the introduction of evidence to impeach the good faith of an attorney held to have vouched for the attorney's good faith in the entire transaction. *Cress v. Holloway* (Civ. App.) 135 S. W. 209.

58. Right to impeach one's own witness.—Defendant cannot impeach his own witness, who simply denies having stated facts that might have been beneficial to defendant. *Balley v. State*, 37 Cr. R. 579, 40 S. W. 281.

The state may impeach its own witness where he states an affirmative fact injurious, and in the nature of a surprise. *Ross v. State* (Cr. App.) 45 S. W. 808.

The mere failure of a witness to testify to facts expected to be proved by him will not authorize his impeachment. *Finley v. State* (Cr. App.) 47 S. W. 1015.

Defendant held entitled to show the arrangement he had with a witness for his compensation, where the witness stated, on cross-examination, that he was to receive an exorbitant sum for testifying. *Gulf, C. & S. F. Ry. Co. v. Mitchell*, 21 C. A. 463, 51 S. W. 662.

Where, on a second trial for murder, the state had changed its theory as to the motive of defendant, evidence of testimony given at the first trial, which does not tend to impeach any witness, or contradict or explain any evidence offered at the second trial was inadmissible. *Spangler v. State*, 42 Cr. R. 233, 61 S. W. 314.

Where the testimony of defendant's witness to prove the bad character of the state's witness proved his good character, defendant may not prove a particular transaction of the state's witness, collateral in its nature, to rebut or refute his own witness. *Lankster v. State* (Cr. App.) 72 S. W. 388.

A party offering a witness may not impeach his character. *Casey-Swasey Co. v. Virginia State Ins. Co.*, 33 C. A. 85, 75 S. W. 911.

Where defendant introduced a witness, who had given a deposition offered by plaintiff, and induced the witness to change her evidence, evidence of the notary that the witness' answers were properly transcribed held not objectionable as an attempt by plaintiff to contradict his own witness. *Hord v. Gulf, C. & S. F. Ry. Co.*, 33 C. A. 163, 76 S. W. 227.

A party cannot impeach his own witness on a point on which he fails to testify; but, to authorize impeachment, the witness must testify to something injurious to the party offering him. *Smith v. State*, 45 Cr. R. 520, 78 S. W. 519.

Defendant in a criminal case cannot, in the absence of a showing of surprise, impeach his own witness. *Steinke v. State* (Cr. App.) 86 S. W. 753.

The state cannot impeach its own witness, unless the witness has testified to something injurious to the state. *Reyes v. State*, 48 Cr. R. 346, 88 S. W. 245.

Where a defendant is not surprised by the testimony of his own witness, he cannot impeach him. *Franklin v. State* (Cr. App.) 88 S. W. 357.

The facts held not to have authorized the state to impeach one of its own witnesses. *Quinn v. State*, 51 Cr. R. 155, 101 S. W. 248.

That the testimony of a witness called by the state contradicted the testimony of another state's witness is not sufficient to entitle the state to impeach its own witness. *Goss v. State*, 57 Cr. R. 557, 124 S. W. 107.

59. — Witness hostile to party calling him.—Where a state's witness testified adversely to the state, impeaching testimony was held proper, though the prosecution had been told that the witness would testify adversely. *Young v. State* (Cr. App.) 44 S. W. 835.

Where a witness introduced to prove a fact, instead of proving such fact, gives damaging testimony against the party introducing him, he may be impeached. *Finley v. State* (Cr. App.) 47 S. W. 1015.

The allowance of testimony to impeach one's own witness, where he is reluctant, and the party calling him claims surprise at his testimony, is largely discretionary with the trial court. *Southworth v. State*, 52 Cr. R. 532, 109 S. W. 133.

In a trial for violating the local option law, the county attorney held properly allowed to ask a reluctant state's witness as to a statement made by him to the county attorney. *Id.*

60. — Party called as witness by adversary.—Where one party to a suit makes a witness of the other, he cannot impeach his testimony. *Goree v. Goree*, 22 C. A. 470, 54 S. W. 1036.

61. — **Witness cross-examined as to matter not subject of direct examination.**—Where, in a criminal case, the state asked a witness if defendant had not told him, after a former trial, that the testimony of a certain state's witness was exactly true, it made the witness its own, and could not afterwards impeach him. *Woodward v. State*, 42 Cr. R. 188, 58 S. W. 135.

One seeking to impeach a witness by showing that he has been guilty of a criminal offense is bound by the answer of the witness denying criminality. *Pinckard v. State*, 62 Cr. R. 602, 138 S. W. 601.

62. **Right to impeach impeaching witness.**—Where accused offered B. and L. as witnesses to impeach prosecutor's character covering six or eight months prior to the alleged offense, the state could introduce a petition signed about that time by B. and L. asking prosecutor's appointment as deputy sheriff. *Norris v. State*, 52 Cr. R. 166, 106 S. W. 136.

63. **Impeachment of capacity of witness.**—Cross-examination of a prosecuting witness as to whether he was intoxicated at the time concerning which he testified, held proper. *Green v. State*, 53 Cr. R. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 706.

64. **Impeachment of knowledge or recollection of witness.**—In trespass to try title, certain evidence to show that the mental capacity and faculties of recollection of a witness were impaired held admissible. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

In prosecution for violating local option law, certain testimony as to prosecuting witness' purchase of whisky from others than defendant held admissible. *Rutherford v. State*, 49 Cr. R. 21, 90 S. W. 172.

Where a witness in a burglary case positively identified a ring in accused's possession as one stolen from her at the time of the burglary, evidence by a jeweler as to whether he would undertake to identify it or a similar ring, which he had not seen for several months, and which had no peculiar mark upon it, was not admissible. *Moray v. State* (Cr. App.) 145 S. W. 592.

65. **Cross-examination to test reliability of witness.**—It was held that a witness might be cross-examined as to his eyesight, although his defective vision was not alleged in the petition as the ground of defendant's negligence in employing him. *Gulf, W. T. & P. Ry. Co. v. Holzheimer* (Civ. App.) 45 S. W. 188.

Defendants held entitled to show on cross-examination of plaintiff, as a test of memory, that he was inaccurate, was a man of large possessions, and an operator of many business affairs. *Waggoner v. Moore*, 45 C. A. 308, 101 S. W. 1058.

In an action against a carrier for injury to a live stock shipment, exclusion of cross-examination of a witness who testified as to the extent of plaintiff's damages held error. *Missouri, K. & T. Ry. Co. of Texas v. Rich*, 51 C. A. 312, 112 S. W. 114.

In a prosecution for attempt to commit rape, questions held proper on cross-examination to test the credibility of the witnesses. *Holloway v. State*, 54 Cr. R. 465, 113 S. W. 928.

66. **Cross-examination to discredit witness or disparage testimony in general.**—The rule that only such evidence as is relevant to the matter in issue shall be introduced governs in the direct examination of a witness and also in the cross-examination. The rule is not applied with the same strictness in a cross-examination as it is in the examination in chief. It would seem that any fact which bears upon the credit of a witness is a relevant fact, and this whether it goes to his indisposition to tell the truth, his want of opportunity to know the truth, his bias, interest, want of memory, or other like fact. Upon cross-examination inquiry may be made into the situation of the witness with respect to parties and to the subject of the litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he uses those means, his power of discernment, memory, and description, may be fully investigated and ascertained. *Evansich v. G., C. & S. F. R. Co.*, 61 T. 24.

Refusal to admit certain evidence offered to impeach a witness' credibility held not error. *De Lucenay v. State* (Cr. App.) 68 S. W. 796.

Certain cross-examination and evidence held permissible as affecting the credibility of a witness. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 100 T. 63, 93 S. W. 1068.

In a prosecution for violation of local option liquor law, certain testimony elicited on cross-examination held proper as impugning the credibility of the witness. *Henderson v. State*, 50 Cr. R. 604, 101 S. W. 208.

Certain cross-examination of a witness held proper. *Hood v. State* (Cr. App.) 101 S. W. 229.

A physician testifying for plaintiff in a personal injury action held properly cross-examined with respect to his having been habitually called by plaintiff's attorney, and that his fees had been contingent on the recovery of a judgment for damages. *Horton v. Houston & T. C. Ry. Co.*, 46 C. A. 639, 103 S. W. 467.

In an action for negligent death, the sustaining of an objection to a question on cross-examination held proper, as the testimony sought to be elicited did not contradict the witness. *International & G. N. R. Co. v. Howell* (Civ. App.) 105 S. W. 560.

In a criminal prosecution, where the accused testified, held that, on cross-examination, he might be required to answer as to whether a witness, now deceased, had not testified on similar prosecutions for other offenses that accused was the guilty party, and that he had failed to take the stand and deny the statements. *Sanders v. State*, 52 Cr. R. 156, 105 S. W. 803.

In a trial for violating the local option law, held, that the state could show certain facts on accused's cross-examination. *Southworth v. State*, 52 Cr. R. 532, 109 S. W. 133.

Cross-examination of accused's witnesses in a prosecution for violating the local option law held not admissible to affect their credibility nor to furnish a basis of impeachment, being on a collateral and irrelevant matter. *Ross v. State*, 53 Cr. R. 295, 109 S. W. 152.

On a trial for homicide, certain evidence held not admissible either for the purpose of impeaching a witness or as a circumstance adverse to accused. *Marsh v. State*, 54 Cr. R. 144, 112 S. W. 320.

On a trial for homicide, the state held properly allowed to impeach a witness for accused. *Id.*

Everything legitimate for the purpose of testing the knowledge of the fact testified to by a witness, his bias, prejudice, and any matter that legitimately goes to discredit him, is admissible on cross-examination. *Id.*

In a suit between a purchaser and vendors involving the terms of a verbal contract, held that there was no error in cross-examining vendors as to whether, in depositions taken before trial, they had omitted to mention a note, which they claimed the purchaser was to pay. *Hudson v. Slate*, 53 C. A. 453, 117 S. W. 469.

In a prosecution for wrongfully selling liquor, the state held properly allowed to ask defendant's wife on cross-examination if she did not know indictments were pending against her husband for illegal sales on days when she claimed he was confined to his bed by illness. *Morrow v. State*, 56 Cr. R. 519, 120 S. W. 491.

In a prosecution for assault, evidence as to the character of the prosecuting witness held admissible. *Simmons v. State*, 58 Cr. R. 574, 126 S. W. 1157.

Cross-examination of a witness for the state permitted by the court held all that was necessary to show his physical and mental condition at the time of a homicide, so that there was no error in refusing to permit him to be asked what places or houses he visited the preceding night. *Joseph v. State*, 59 Cr. R. 82, 127 S. W. 171.

In a prosecution for violating the local option law, held, that a state's witness could be asked on cross-examination if he knew the usual price of a half pint of whisky. *Walling v. State*, 59 Cr. R. 279, 128 S. W. 624.

A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of impeaching him. *Dooley v. Boiders* (Civ. App.) 128 S. W. 690.

In a prosecution for rape, defendant held entitled to cross-examine prosecutrix directly as to the time of defendant's last act of intercourse with her. *Foreman v. State*, 61 Cr. R. 56, 134 S. W. 229.

A person accused of crime who becomes a witness can have his credibility tested on cross-examination the same as any other witness, and the state may show by his cross-examination, if it can, that statements on direct examination were not true. *Weaver v. State* (Cr. App.) 150 S. W. 785.

Where a person accused of burglary testified that he was selling a medicine, and that he did not know he needed a license, cross-examination to show that he did not know that a license was required held competent. *Id.*

The wife of the defendant who testified that she witnessed the homicide, may be asked on cross-examination if, about that time, she was not telephoning to a certain woman. *Reagan v. State* (Cr. App.) 157 S. W. 483.

67. Competency of impeaching evidence in general.—Evidence that an accusation of crime was pending against a witness is not competent to impeach him where it was not drawn out on cross-examination. *Texas Brewing Co. v. Dickey* (Civ. App.) 43 S. W. 577.

Statements by sender of telegram that addressee had not been heard from for some time held inadmissible, in an action for nondelivery, to contradict testimony of addressee. *Western Union Tel. Co. v. Gahan*, 17 C. A. 657, 44 S. W. 933.

Evidence irrelevant and inadmissible for other purposes is inadmissible for the purpose of impeachment. *Hoy v. State*, 39 Cr. R. 340, 45 S. W. 916.

As affecting weight of evidence given by defendant's witnesses, plaintiff can show that they were discharged by defendant after the accident in which plaintiff was injured. *Missouri, K. & T. Ry. Co. v. Johnson* (Civ. App.) 49 S. W. 265.

After defendant takes the stand, and testifies, the state may recall him to lay a predicate for his impeachment, the same as other witnesses. *Clay v. State*, 40 Cr. R. 593, 51 S. W. 370.

Evidence tending to discredit testimony of witness held not subject to objection that it was immaterial, irrelevant and hearsay. *Galveston, H. & S. A. Ry. Co. v. Jackson* (Civ. App.) 53 S. W. 81.

It was not error to refuse instruction that witnesses may be impeached by proving their general reputation to be bad, or by proving contradictory statements. *Bruce v. State* (Cr. App.) 53 S. W. 867.

Hearsay testimony is admissible for impeaching purposes. *Galveston, H. & S. A. Ry. Co. v. Jackson*, 93 T. 262, 54 S. W. 1023.

A single witness may be introduced to impeach another witness. *Bradshaw v. State* (Cr. App.) 70 S. W. 215.

In a prosecution for assault with intent to rape, certain evidence as to defendant's witnesses not having formerly testified held admissible in impeachment. *Dina v. State*, 46 Cr. R. 402, 78 S. W. 229.

Evidence of accused's attempt to investigate the credibility of state's witness, elicited on accused's cross-examination, held admissible in proceedings for violating local option law. *Terry v. State* (Cr. App.) 79 S. W. 319.

Evidence to impeach defendant's testimony in a criminal prosecution held admissible. *Emerson v. State*, 54 Cr. R. 628, 114 S. W. 834.

Where no proper predicate was laid for impeaching testimony, it was properly excluded. *Swift & Co. v. Martine*, 53 C. A. 475, 117 S. W. 209.

In an action for wrongful attachment and execution, the report of a commercial agency held admissible to contradict plaintiff. *Rainey v. Kemp*, 54 C. A. 486, 118 S. W. 630.

A question asked to discredit plaintiff's testimony as to an occurrence at a certain place, his answer to which would have been that he was intoxicated while there, held properly excluded, the answer being too vague to discredit his testimony. *El Paso & N. E. Ry. Co. v. Lumbley*, 56 C. A. 413, 120 S. W. 1050.

In a homicide case, certain evidence held admissible to impeach a witness for accused. *Long v. State*, 59 Cr. R. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

In an action on an assigned claim for broker's commissions, a letter sent by defendant to the broker containing nothing relative to the issue held inadmissible to impeach defendant as a witness. *Riggins v. Sass* (Civ. App.) 127 S. W. 1064.

Where accused testified that he had not been drinking on the night of the killing, the state held entitled to show that 30 minutes after the killing his breath smelt strongly of whisky, to affect his credibility. *Payton v. State*, 60 Cr. R. 475, 132 S. W. 127.

Where witnesses testified that they had seen a pistol on accused's person, accused was entitled to show that they were under guard as county convicts, and that the officer having them in charge was present, as tending to impeach witnesses, on the theory that, if they had seen the pistol on accused's person, they would have informed the officer at the time. *Price v. State* (Cr. App.) 147 S. W. 243.

Where, in a prosecution for conversion of a borrowed horse, accused testified that he had purchased the horse and that V., an absent witness, was present at the time, V.'s testimony at the examining trial that he knew nothing about the case was inadmissible to impeach accused. *Gamboa v. State* (Cr. App.) 155 S. W. 249.

In a prosecution for aggravated assault, where there was no evidence that the prosecuting witness was drunk at the time of the assault, evidence that, when he was drunk, he knew nothing until he became sober, was properly excluded. *Caples v. State* (Cr. App.) 155 S. W. 267; *Click v. Same* (Cr. App.) 155 S. W. 270; *Russell v. Same, Id.*; *Thornton v. Same, Id.*

68. Recalling witness for purpose of impeachment.—A witness may be recalled and cross-examined on matters to be used as a basis for contradiction. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 28 C. A. 260, 67 S. W. 140.

It is not error for the court to permit a party to recall a witness of the adverse party for the purpose of laying a predicate for impeachment. *J. M. Guffy Petroleum Co. v. Hamill*, 42 C. A. 196, 94 S. W. 458.

Recalling a witness after he has been on the stand and fully examined and cross-examined by accused, for the purpose of getting him to contradict an alleged statement made by himself so as to impeach him by another witness, is a matter peculiarly within the trial court's discretion. *Bills v. State*, 55 Cr. R. 641, 117 S. W. 835.

69. Character as ground of impeachment.—Reputation of witness for honesty and fair dealing held inadmissible, when not in issue. *Roach v. Crume* (Civ. App.) 41 S. W. 86.

70. — Witnesses who may be impeached as to character.—Where a party testifies in his own behalf, the adverse party may to impeach his credibility assail his general reputation for truth and veracity. *Missouri, K. & T. Ry. Co. of Texas v. Hailey* (Civ. App.) 156 S. W. 1119.

71. — Character and reputation in general.—General reputation as to other qualities than truthfulness cannot be received to impeach a witness. *Houston, E. & W. T. Ry. Co. v. Runnels* (Civ. App.) 46 S. W. 394.

A witness cannot be impeached for proof of his general bad character, but the proof must be limited to his bad character for truth. *Belt v. State*, 47 Cr. R. 82, 78 S. W. 933.

Evidence of the husband's reputation for honesty and fair dealing held inadmissible in a prosecution for rape in which defendant contended that the charge was due to an attempt by the prosecuting witness and her husband to rob him. *Smith v. State*, 51 Cr. R. 137, 100 S. W. 924.

The mere fact that a witness has resided in a community but six months will not justify the exclusion of evidence as to his general reputation for truth and veracity, on the ground that he has not resided in the community long enough to establish a reputation. *Alderson v. State*, 53 Cr. R. 525, 111 S. W. 738.

While defendant's reputation for honesty and fair dealing could not be shown, it was error to exclude testimony of his general reputation for truth and veracity in the community by a witness who knew such reputation; defendant being an important witness upon the vital issues. *Irvin v. Johnson*, 56 C. A. 492, 120 S. W. 1085.

Evidence held inadmissible to affect the credibility of a state's witness. *Kirksey v. State*, 61 Cr. R. 641, 135 S. W. 577.

72. — Particular traits of character or habits.—Character as to honesty may be shown by general reputation and not by specific acts. *Landa v. Obert*, 25 S. W. 342, 5 C. A. 620; *Railway Co. v. Raney*, 25 S. W. 11, 86 T. 363.

Evidence held incompetent to impeach a witness. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

Testimony that prosecuting witness has reputation of being violent, quarrelsome, and a dangerous character held properly excluded. *Padron v. State* (Cr. App.) 55 S. W. 827.

Evidence that a witness was a "bum," and would not work, is not competent to impeach his veracity. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204.

Evidence of a witness' general reputation for chastity held not admissible for impeachment in a prosecution for murder. *Woodward v. State*, 42 Cr. R. 188, 58 S. W. 135.

A witness cannot be impeached for truth by showing her reputation for chastity is bad, except by asking her, on cross-examination, if she is a common prostitute. *Hall v. State*, 43 Cr. R. 479, 66 S. W. 783.

The character of the prosecutrix for chastity in a prosecution for incest being immaterial, she could not be impeached by admissions of intercourse with other men. *Richardson v. State*, 44 Cr. R. 211, 70 S. W. 320.

Witnesses cannot be impeached by showing that their reputations for morality and honesty are bad. *Locklin v. State* (Cr. App.) 75 S. W. 305.

Evidence that prosecutor stated that he did not believe there was any heaven, or hell, or God, held inadmissible. *Brundige v. State*, 49 Cr. R. 596, 95 S. W. 527.

Error to cross-examine a witness as to whether he had associated with prostitutes, when his moral character was not in issue and his general reputation for truth and veracity was not attacked. *Price v. Wakeham*, 48 C. A. 339, 107 S. W. 132.

In an action by a married woman for injuries on a city sidewalk, she could not be impeached by evidence that a child was born to her three months after her marriage. *City of San Antonio v. Wildenstein*, 49 C. A. 514, 109 S. W. 231.

Evidence that a defendant was a "sporting man" was inadmissible to impeach his testimony. *Kalteyer v. Mitchell* (Civ. App.) 110 S. W. 462.

Cross-examination of prosecutrix to show that she had had intercourse with other men held proper. *Shoemaker v. State*, 58 Cr. R. 518, 126 S. W. 887.

Defendant held not entitled to prove the reputation of certain persons for virtue and chastity. *Florence v. State*, 61 Cr. R. 238, 134 S. W. 689.

Exclusion of evidence to show that a witness of the state was a cocaine "fiend" held improper. *Anderson v. State* (Cr. App.) 144 S. W. 281.

Testimony that witness was addicted to drink habit held inadmissible to impeach her testimony. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

Evidence that a state's witness had been divorced from her first husband for her adultery was properly excluded. *Knight v. State* (Cr. App.) 147 S. W. 268.

A witness cannot be impeached by proof that he married a woman of questionable virtue. *Williams v. State* (Cr. App.) 148 S. W. 763.

In a prosecution for perjury for having testified in his wife's action for a divorce that he had not had intercourse with her before their marriage in which the former wife had testified as to such intercourse, evidence that at the time of the trial her general reputation for chastity was bad was inadmissible. *Spearman v. State* (Cr. App.) 44 L. R. A. (N. S.) 243, 152 S. W. 915.

73. — **Reputation as to veracity.**—Testimony to impeach a witness for want of veracity is not admissible when based on the personal knowledge of the witness. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204.

Rule respecting the impeachment of witnesses stated. *St. Louis Southwestern Ry. Co. of Texas v. Garber*, 51 C. A. 70, 111 S. W. 227.

That defendant's witnesses whose reputation was attacked lived in a distant state, and defendant was not notified before the trial that their credibility would be attacked, did not make the impeaching testimony inadmissible. *Id.*

Plaintiff held not required to develop his impeaching witnesses' means of knowledge of the general reputation of the witness sought to be impeached. *Id.*

Evidence of general reputation held admissible to rebut impeaching evidence. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

A witness may be impeached by evidence as to his general reputation for truth and veracity. *Id.*

74. — **Place and time of acquiring reputation.**—The evidence of witnesses properly qualified, relating to the reputation or truthfulness and veracity of a person of mature age in the community in which he formerly lived, is admissible to impeach his present character. Such evidence is not entitled to so much weight as that relating to present reputation, and is subject to rebuttal by proof of present good reputation. *Mynatt v. Hudson*, 66 T. 66, 17 S. W. 396.

A judgment of conviction of petty theft, rendered eight years before witness testified, held inadmissible for purpose of impeachment. *Herring v. Patten*, 18 C. A. 147, 44 S. W. 50.

Testimony to impeach the general reputation of a witness for truthfulness, to be competent, should refer to about the time when the testimony is given. *Robbins v. Ginnocchio* (Civ. App.) 45 S. W. 34.

A witness may be impeached by testimony as to his reputation for truth up to the time such witness testifies. *Fossett v. State*, 41 Cr. R. 400, 55 S. W. 497.

Evidence of crimes committed 15 or 17 years before held inadmissible to affect credibility. *Bowers v. State* (Cr. App.) 71 S. W. 234.

To impeach a witness by proof of his having been prosecuted for crime, the proof should be limited to prosecutions of recent date. *Casey v. State*, 50 Cr. R. 392, 97 S. W. 496.

Where accused became a witness in a prosecution for homicide in 1908, evidence of offenses alleged to have been committed by him in 1887 or 1888 and in 1894 held inadmissible to discredit him. *Winn v. State*, 54 Cr. R. 538, 113 S. W. 918.

Evidence of the conviction of a witness 18 or 20 years before held inadmissible for purposes of impeachment; the conviction being too remote. *Richards v. State*, 55 Cr. R. 278, 116 S. W. 587.

A witness for accused could not be impeached by evidence that about 30 years before he was convicted of horse theft, and was also indicted for murder, but not convicted. *Gardner v. State*, 55 Cr. R. 400, 117 S. W. 143.

Imprisonment 15 or 20 years ago is too remote to be shown to impeach a witness' credibility. *Spiller v. State*, 61 Cr. R. 555, 135 S. W. 549.

75. — **Particular acts or facts.**—A witness' reputation for truth cannot be impeached by testimony of one speaking only from personal knowledge. *Galveston, H. & S. A. Ry. Co. v. Burnett* (Civ. App.) 42 S. W. 314; *McMillion v. Cook*, 118 S. W. 775.

On an issue as to the credibility of a witness, who had been elected to public office, testimony that he had been elected by disreputable rascals is irrelevant and improper. *Kellogg v. McCabe*, 92 T. 199, 47 S. W. 520.

As bearing on the credibility of a witness for accused, the prosecution may show that such witness left the state at the time of the convening of the grand jury. *Gregory v. State* (Cr. App.) 48 S. W. 577.

A witness, on cross-examination, may be asked what business he is engaged in. *Missouri, K. & T. Ry. Co. of Texas v. Calnon*, 20 C. A. 697, 50 S. W. 422.

An accused cannot impeach a prosecuting witness by showing at what saloon he loafed, and the amount he paid for his whisky. *Drye v. State* (Cr. App.) 55 S. W. 65.

Certain evidence held inadmissible for purpose of impeachment. *Herod v. State* (Cr. App.) 56 S. W. 59.

On a trial for perjury, a witness cannot be asked if she had not declared in the presence of a third person that she intended to mix powdered glass with her husband's bread anterior to his death, to impeach her, as a witness cannot be impeached on collateral issues. *Flournoy v. State* (Cr. App.) 59 S. W. 902.

On trial for an aggravated assault, it was error to allow the prosecution to prove that a witness for defendant was in a wine room drinking with a woman when a certain murder occurred; the time and place of the two crimes being different. *Reed v. State*, 42 Cr. R. 572, 61 S. W. 925.

Question, asked witness for defendant, whether she had so testified to an alibi for defendant in other cases, held not admissible to destroy her credibility. *Mercer v. State* (Cr. App.) 66 S. W. 555.

Evidence of a single transaction not material to the issue is inadmissible to impeach a witness. *Harrington v. Clafin*, 28 C. A. 100, 66 S. W. 898.

In an action for conversion, a witness who invoiced the goods for defendant cannot be discredited by showing that he was financially embarrassed and unable to secure a favorable report from mercantile agencies. *Cooper Grocer Co. v. Britton* (Civ. App.) 74 S. W. 91.

The court did not err in permitting the prosecution to ask a witness for his defense, who was a gambler, what his occupation was. *McLeod v. State* (Cr. App.) 75 S. W. 522.

In an action on a fire policy, certain cross-examination of a witness for plaintiff and of plaintiff for himself held proper, as affecting their credibility. *McCarty v. Hartford Fire Ins. Co.*, 33 C. A. 122, 75 S. W. 934.

In a prosecution for rape, the exclusion of evidence on cross-examination as to the occupation of prosecutrix held not reversible error. *Carter v. State*, 45 Cr. R. 430, 76 S. W. 437.

In a prosecution for murder, it was proper for the court to permit an officer in the company to which defendant belonged to explain how he paid \$5 toward the prosecution. *Kipper v. State*, 45 Cr. R. 377, 77 S. W. 611.

Evidence of witness' remark, showing his opinion of an alleged murder, held inadmissible to impeach him. *Vann v. State*, 45 Cr. R. 434, 77 S. W. 813, 108 Am. St. Rep. 961.

It is proper, on cross-examination of a witness, to show her vocation, as that she keeps a dance house. *Flores v. State* (Cr. App.) 79 S. W. 808.

A witness cannot be impeached by showing that he had had difficulties and had made assaults. *Gray v. State* (Cr. App.) 86 S. W. 764.

Certain evidence held inadmissible to discredit defendant's testimony. *Lewter v. Lindley* (Civ. App.) 89 S. W. 784.

Testimony about an immaterial matter held not competent to impeach a witness. *Honeycutt v. State*, 49 Cr. R. 300, 92 S. W. 421.

A witness in a civil action cannot be impeached by requiring him to testify to discreditable acts on his part having no material bearing on the issues involved in the case. *W. L. Moody & Co. v. Rowland*, 46 C. A. 412, 102 S. W. 911.

The taking from the jury of the question whether defendant assaulted a witness for plaintiff in attempting to collect a debt or for the purpose of intimidating and driving him away held error. *Horsey v. C. E. Slayton & Co.*, 47 C. A. 212, 104 S. W. 503.

A witness may not be impeached by evidence of particular instance of untruthfulness. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

Impeaching evidence must be confined to witness' general reputation for truth, evidence as to specific criminal prosecution against him being inadmissible. *Hazard v. Western Commercial Travelers' Ass'n*, 54 C. A. 110, 116 S. W. 625.

Certain evidence to impeach a witness held inadmissible. *Ralley v. State*, 53 Cr. R. 1, 121 S. W. 1120, 125 S. W. 576.

To discredit a witness for the state, testifying that she had never been married and was the mother of a child, it was inadmissible to prove that her stepfather, who did not testify, was indicted for the crime of rape on her. *Pollard v. State*, 53 Cr. R. 299, 125 S. W. 390.

Under a rule stated, held, that a witness for accused could not be impeached by showing that an outsider had brought whisky to her house and that they had drunk it. *Holland v. State*, 60 Cr. R. 117, 131 S. W. 563.

A witness' fraudulent disposition of mortgaged property may be shown to impeach his testimony. *Dulin v. State*, 60 Cr. R. 376, 131 S. W. 1105.

Refusal to permit accused to inquire into the details of matters affecting a state witness' credibility held not error. *Kirksey v. State*, 61 Cr. R. 641, 135 S. W. 577.

That the husband of the prosecuting witness had obtained a divorce from her for adultery is inadmissible to impeach her. *Earles v. State*, 64 Cr. R. 537, 142 S. W. 1181.

A witness cannot be asked whether she has had improper intercourse with a certain man for the purpose of impeaching her credibility. *Foote v. State* (Cr. App.) 144 S. W. 275.

Though accused, on a trial for rape on a female under the age of 15 years, showed on her cross-examination that her act with him was the first act committed, he could not impeach her by showing her prior isolated acts of immorality. *Bigliben v. State* (Cr. App.) 151 S. W. 1044.

76. — **Accusation or conviction of crime.**—For the purpose of affecting his credibility a witness may be asked on cross-examination if he has been indicted for a felony. *Linz v. Skinner*, 11 C. A. 512, 32 S. W. 915.

A witness cannot be impeached by evidence that he has been prosecuted for forgery. *Freedman v. Bonner* (Civ. App.) 40 S. W. 47.

A witness may not be impeached by proof that he has been indicted for misdemeanors. *Lewis v. Bell* (Civ. App.) 40 S. W. 747; *Wright v. State*, 63 Cr. R. 429, 140 S. W. 1105; *Holmes v. Same* (Cr. App.) 150 S. W. 926; *Ablene & S. R. Co. v. Burlison* (Civ. App.) 157 S. W. 1177.

It was proper to permit the state to show that one of defendant's witnesses was under indictment for perjury, that he had then been brought from jail, and that the jury was then considering his case. *Bratt v. State* (Cr. App.) 41 S. W. 624.

Proof, on cross-examination, that witness had been acquitted of charge of carrying a pistol, held incompetent to affect his credibility. *Houston, E. & W. T. Ry. Co. v. Norris* (Civ. App.) 41 S. W. 708.

Prosecution may show on cross-examination that a witness had been previously convicted of a felony. *Stanley v. State* (Cr. App.) 44 S. W. 519.

Evidence of an offense that has never found its way into court held inadmissible for impeachment. *Fields v. State*, 39 Cr. R. 488, 46 S. W. 814; *Wade v. Same*, 48 Cr. R. 512, 90 S. W. 503.

A witness may be impeached by showing that he has been charged with crime. *Combs v. State* (Cr. App.) 49 S. W. 585.

A witness cannot be impeached by showing that he had made out and sworn to a false account against the estate as a witness on another trial. *Preston v. State*, 41 Cr. R. 300, 53 S. W. 127.

In civil actions proof that one a party and witness has been indicted, convicted, and sentenced to the penitentiary for theft, offered for purpose of discrediting his testimony, may be excluded. *Missouri, K. & T. Ry. Co. of Texas v. De Bord*, 21 C. A. 691, 53 S. W. 587.

In a criminal case, it is competent to ask accused, or witnesses for him, on cross-examination, whether they had ever been indicted for other offenses. *Sebastian v. State*, 41 Cr. R. 248, 53 S. W. 875.

A question, for the purpose of impeachment, as to whether witness had been indicted for theft, should be excluded. *Kruger v. Spachek*, 22 C. A. 307, 54 S. W. 295.

It is permissible to ask a witness on a criminal trial if he has been charged with offenses going to show moral turpitude. *Whitley v. State* (Cr. App.) 56 S. W. 69.

A witness may be asked, on cross-examination, by way of impeachment, if he has been indicted for a felony. *Cannon v. State*, 41 Cr. R. 467, 56 S. W. 351.

It may be shown, to impeach defendant, that he had been confined in penitentiary charged with other offenses. *Keaton v. State*, 41 Cr. R. 621, 57 S. W. 1125.

On trial of a prosecution for gaming, a question put to a witness for the state, asking if he had ever been prosecuted for crimes, and for what crimes, and if he had ever been convicted, and for what, or had ever been in jail or a convict on a county farm, held improper. *Young v. State* (Cr. App.) 60 S. W. 767.

Testimony as to whether a witness had previously been convicted of perjury is admissible to show such witness' credibility. *Chavarria v. State* (Cr. App.) 63 S. W. 312.

On trial for theft and for being an accomplice and accessory of S. who was a witness in the case, two judgments against S. for theft were admissible to impeach his credibility. *Chambers v. State* (Cr. App.) 65 S. W. 192.

Plaintiff in an action for the death of his son cannot be cross-examined as to his indictment for burglary. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 28 C. A. 260, 67 S. W. 140.

Defendant, in a prosecution for violating the local option law, cannot prove that a witness for the state has the reputation of violating the local option law. *Smith v. State* (Cr. App.) 77 S. W. 801.

A question to a witness as to whether or not he had not been indicted for perjury, and the offer of an indictment against him for purposes of impeachment, held inadmissible. *Houston & T. C. R. Co. v. Bulger*, 35 C. A. 478, 80 S. W. 557.

On a trial for perjury, held error to prevent defendant from showing that a witness testifying to the perjury had been convicted of an aggravated assault on his wife. *Curtis v. State*, 46 Cr. R. 480, 81 S. W. 29.

Where, after a trial of a criminal prosecution, one of defendant's witnesses was indicted for perjury committed thereon, the fact that he had been so indicted was inadmissible in a second trial of the case. *Bennett v. State* (Cr. App.) 81 S. W. 30.

On a criminal prosecution, it was error to admit evidence that one of defendant's witnesses had been indicted for playing cards. *Webb v. State*, 47 Cr. R. 305, 83 S. W. 394.

A conviction of simple assault in a justice's court does not impute moral turpitude, and cannot be shown to impeach a witness. *Gray v. State* (Cr. App.) 86 S. W. 764.

It was competent for the state to show that a witness for defendant had been charged with forgery as affecting his credibility. *Willis v. State*, 49 Cr. R. 139, 90 S. W. 1100.

It is error to permit defendant for the purpose of impeachment to prove on the cross-examination of plaintiff that he had been confined in jail for a misdemeanor, and that he had subsequently partially served a sentence therefor. *Missouri, K. & T. Ry. Co. of Texas v. Dumas* (Civ. App.) 93 S. W. 493.

The record of a court showing that a party had pleaded guilty to a misdemeanor held not admissible for the purpose of impeaching the party.—Id.

A witness may be impeached by showing that he has been charged with and prosecuted for felonies or misdemeanors involving moral turpitude. *Turman v. State*, 50 Cr. R. 7, 95 S. W. 533.

Questions inquiring of witness for the defense, if he had not been previously indicted for criminal assault upon a girl, and if he had not also been indicted for rape, held properly allowed, over objections based on the ground that the offenses did not show moral turpitude. *Sue v. State*, 52 Cr. R. 122, 105 S. W. 804.

Question inquiring of a witness if he had not previously been indicted for murder held proper, over an objection that it was not a crime carrying with it moral turpitude. Id.

For purpose of impeaching a witness, held it cannot be shown on his cross-examination that he had been indicted for a felony or other crime. *Missouri, K. & T. Ry. Co. of Texas v. Creason*, 101 T. 335, 107 S. W. 527.

A witness cannot be impeached by showing as a fact that he has committed larceny. *Goad v. State*, 52 Cr. R. 444, 108 S. W. 680.

Testimony of a witness that he had murdered a particular person held inadmissible to affect his credibility. *Choice v. State*, 54 Cr. R. 517, 114 S. W. 132, 135.

Evidence held admissible for impeachment purposes in a perjury trial. *Hardin v. State*, 55 Cr. R. 631, 117 S. W. 974.

A witness cannot be impeached by showing her conviction as a vagrant and prostitute and that her general reputation for chastity was bad. *Ellis v. State*, 56 Cr. R. 14, 117 S. W. 978, 133 Am. St. Rep. 953.

Where accused offered his codefendant, who had been acquitted, as witness, the state was properly allowed to prove on cross-examination that witness had been twice convicted before he had been finally acquitted. *Early v. State*, 56 Cr. R. 492, 120 S. W. 431.

A conviction of simple assault may not be used as impeaching testimony. *Hardin v. State*, 57 Cr. R. 401, 123 S. W. 613.

The pending of a criminal prosecution against a witness may be shown as affecting his credibility. *Majors v. State*, 58 Cr. R. 39, 124 S. W. 663.

A witness held not to be impeached by showing that he was indicted for gambling. *Goodwin v. State*, 58 Cr. R. 496, 126 S. W. 582.

Evidence that accused, on trial for burglary, had theretofore been indicted for burglary, held admissible to affect his credibility. *Diseren v. State*, 59 Cr. R. 149, 127 S. W. 1033.

An answer to a question held to involve moral turpitude on the part of a witness, and to be admissible. *Keeton v. State*, 59 Cr. R. 316, 123 S. W. 404.

A witness could be impeached by showing that he had recently been charged with arson. *Hunter v. State*, 59 Cr. R. 439, 129 S. W. 125.

Evidence of prior convictions on charges not involving moral turpitude are inadmissible to affect credibility. *Hightower v. State*, 60 Cr. R. 109, 131 S. W. 324.

It was proper to show that accused's witness had been imprisoned in a county jail and on the county farm. *Kemper v. State* (Cr. App.) 138 S. W. 1025.

The state could show upon cross-examination of an accused's witness that the witness had been indicted for swindling in selling sand packed cotton. *Id.*

That a witness has been charged with assault upon an outsider held inadmissible to impeach his testimony. *Id.*

It was improper to permit the state to show, on cross-examination of accused's witness, that witness as a saloon keeper had been indicted for violating the Sunday law. *Id.*

A witness may not be impeached by a mere showing that he has been indicted for a felony or misdemeanor involving moral turpitude. *Wright v. State*, 63 Cr. R. 429, 140 S. W. 1105.

Impeachment by showing criminal record of the plaintiff held improper. *Missouri, K. & T. Ry. Co. of Texas v. Roberts* (Civ. App.) 144 S. W. 691.

It is error to allow a question on cross-examination as to whether the witness was not under indictment for swindling. *McDonald v. Humphries* (Civ. App.) 146 S. W. 712.

Evidence of sales of liquor by a witness when such sale was only a misdemeanor, not involving moral turpitude held not competent to impeach his character. *Dickson v. State* (Cr. App.) 146 S. W. 914.

That a witness has been indicted or prosecuted for violation of the prohibition law, which is a misdemeanor only, cannot be proved to impeach his credibility. *O'Neal v. State* (Cr. App.) 146 S. W. 938.

Testimony in behalf of accused tending to impeach a witness for the state, by showing that he had been indicted for burglary, was admissible. *Price v. State* (Cr. App.) 147 S. W. 243.

That a criminal complaint had been filed against a witness, and no indictment found, could not be used against him for impeachment. *King v. State* (Cr. App.) 148 S. W. 324.

Proof that a witness was under indictment can affect his credibility only where the offense is a felony, or, if a misdemeanor, an offense involving moral turpitude. *Johnson v. State* (Cr. App.) 149 S. W. 165.

A defendant in a criminal action held not entitled to show guilt of a state's witness of a crime for which he had been indicted, but not yet tried, in impeachment of his testimony. *Hart v. State* (Cr. App.) 150 S. W. 188.

It was error to permit a witness called by accused to be asked on cross-examination whether he had been indicted for gambling; gambling not being a felony, or involving moral turpitude. *Miller v. State* (Cr. App.) 150 S. W. 635.

A witness may be impeached by showing that he has been indicted, or is then under indictment on a felony charge. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

The state may impeach accused's witness by showing, on cross-examination, that she had been convicted of running a disorderly house. *Bogue v. State* (Cr. App.) 155 S. W. 943.

A witness for the defense in a prosecution for murder may be asked to affect his credibility if he was not under indictment charged with seduction. *Asbeck v. State* (Cr. App.) 156 S. W. 925.

77. — **Conduct of witness with reference to cause.**—Evidence tending to impeach defendant's witness held admissible in a criminal case. *Webb v. State* (Cr. App.) 58 S. W. 82.

A witness' efforts to conceal the fact that he was a material witness may be shown on his cross-examination as a circumstance to indicate the improbability and lack of verity in his testimony. *Rice v. State*, 51 Cr. R. 255, 103 S. W. 1156.

A witness in a prosecution for murder held not to be impeached by showing that he did not report what he knew to the police. *Ripley v. State*, 58 Cr. R. 489, 126 S. W. 586.

In a suit to rescind an exchange of property, one of the defendants having testified adversely to plaintiff, he was entitled to show that such defendant had offered to furnish credible testimony for money or freedom from liability on the part of his brother. *Pickens v. Major* (Civ. App.) 139 S. W. 1040.

The credibility of a witness may be impeached by proof that he attempted to have a material witness evade the process of the court. *First Bank of Springtown v. Hill* (Civ. App.) 151 S. W. 652.

78. — **Conduct of witness inconsistent with testimony.**—Where a witness for defendant testified, among other things, that deceased had confessed to him that he had stolen a head of cattle, the state could properly prove that deceased was not indicted for the offense, and that the witness was a member of the grand jury that investigated the case and had not called the attention of the grand jury to the fact of such confession, since it affected his credit. *Kelly v. State* (Cr. App.) 151 S. W. 304.

79. — **Cross-examination for purpose of impeachment.**—On a trial for perjury, a witness who has been convicted of murder cannot be questioned as to the details of the killing, since the circumstances of the killing were inadmissible. *Flournoy v. State* (Cr. App.) 59 S. W. 902.

Certain cross-examination for impeachment held error. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

Where appeal from the conviction is pending, held, defendant, who has testified he never committed such an offense as he is charged with, may not, on cross-examination, be asked if he was not convicted of such an offense. *Jennings v. State*, 55 Cr. R. 147, 115 S. W. 587.

An objection to a question on cross-examination as to whether witness had not been arrested and convicted of various offenses during the past two years held properly sustained. *Ellis v. State*, 56 Cr. R. 14, 117 S. W. 973, 133 Am. St. Rep. 953.

Questions asked accused's witness on cross-examination held improper. *Kemper v. State* (Cr. App.) 138 S. W. 1025.

On cross-examination by accused of a state's witness, it was proper to refuse to permit witness to be asked as to statements while in jail as to burglaries committed by the witness, but he could be asked whether he had committed more than 20 burglaries in a stated time. *Holmes v. State* (Cr. App.) 157 S. W. 487.

80. — **Laying foundation for impeaching evidence.**—It cannot be shown, unless it be drawn out on cross-examination, that an indictment for embezzlement had been presented against a witness, in order to discredit him. *Texas Brewing Co. v. Dickey* (Civ. App.) 43 S. W. 577.

Evidence that witness had been guilty of an infamous crime is not competent to impeach his credibility, unless developed on cross-examination. *Texas & P. Ry. Co. v. Durrett*, 24 C. A. 103, 58 S. W. 187.

A witness cannot be impeached by showing indictments of perjury pending against him, except on cross-examination. *Casey-Swasey Co. v. Virginia State Ins. Co.*, 33 C. A. 85, 75 S. W. 911.

Where in a statutory rape case prosecutrix was not asked if she had had intercourse with another, evidence to show intercourse with her was inadmissible to impeach her. *Clardy v. State* (Cr. App.) 147 S. W. 568.

81. — **Competency of impeaching evidence in general.**—Evidence that a witness was secretly conducting a negro club, in the absence of an offer to prove that the club was vicious, held incompetent to discredit his testimony. *Atchison, T. & S. F. Ry. Co. v. Keller*, 33 C. A. 353, 78 S. W. 801.

An impeaching witness may testify as to whether the general reputation of another witness for truth and veracity is such that he could be believed upon oath. *Douglass v. State* (Cr. App.) 98 S. W. 840.

In an action for deceit, defendant held not entitled to show the grounds of separation between plaintiff and her first husband, nor that she had testified differently in a prior case concerning the number of children she had borne. *Western Cottage Piano & Organ Co. v. Anderson*, 45 C. A. 513, 101 S. W. 1061.

Certain evidence held inadmissible as merely impeaching a witness upon an immaterial issue. *Sue v. State*, 52 Cr. R. 122, 105 S. W. 804.

An impeaching witness having testified concerning another's reputation for truth, etc., at a time not too remote from the trial, other impeaching testimony relating to a more remote time was admissible. *St. Louis Southwestern Ry. Co. of Texas v. Garber*, 51 C. A. 70, 111 S. W. 227.

In a trial for assault with intent to kill, certain testimony held inadmissible to refute the claim of a witness that he entered into a conspiracy through fear. *Choice v. State*, 54 Cr. R. 517, 114 S. W. 132, 135.

An encyclopedia article cannot be used to attack the reputation for truth and veracity of a gypsy witness. *York v. State*, 57 Cr. R. 484, 123 S. W. 1112.

The exclusion of certain testimony on cross-examination of a witness for the state, to discredit another witness for the state, held not error. *Pollard v. State*, 53 Cr. R. 299, 125 S. W. 390.

Evidence of a complaint inadvertently made against an innocent person held not admissible to affect witness' credibility. *Kirksey v. State*, 61 Cr. R. 641, 135 S. W. 577.

After introduction of evidence to show that a witness for the state was a cocaine "fiend," it was error to exclude expert testimony as to the effect of habitual use of opiates. *Anderson v. State* (Cr. App.) 144 S. W. 281.

82. — **Competency of impeaching witnesses as to character or reputation.**—Impeaching questions must be predicated on knowledge of a witness' general reputation for truth and veracity in the community where he lives. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

A witness is not competent to testify to the bad reputation of another for truth and veracity, where he has never heard the reputation of the other called in question. *Tyler v. State* (Cr. App.) 79 S. W. 558.

Qualifying language used by an impeaching witness held not to show that his testimony was not based on his personal knowledge. *St. Louis Southwestern Ry. Co. of Texas v. Garber*, 51 C. A. 70, 111 S. W. 227.

83. — **Examination of impeaching witnesses as to character or reputation.**—Where defendant's witness states that one of plaintiff's witnesses was untruthful, he may be asked on cross-examination if the latter was not given recommendation by defendant when he quit his job. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.) 47 S. W. 1050.

A witness introduced to impeach the prosecutrix by showing her testimony on a former trial cannot be cross-examined by asking him if he believed the testimony of prosecutrix on the former trial. *Hamilton v. State* (Cr. App.) 51 S. W. 217.

Part of a question asked a witness to impeach defendant's credibility held improper. *Stull v. State*, 47 Cr. R. 547, 84 S. W. 1059.

No particular form of question is required in eliciting from an impeaching witness his knowledge of the general reputation of one sought to be impeached for truth and veracity. *St. Louis Southwestern Ry. Co. of Texas v. Garber*, 51 C. A. 70, 111 S. W. 227.

A question asked an impeaching witness as to the "reputation" of a witness sought to be impeached held not objectionable for omitting the word "general." *Id.*

Effort made to impeach prosecuting witness by contradictory statements held a sufficient attack to authorize the admission of evidence of his general reputation for truth and veracity. *Alderson v. State*, 53 Cr. R. 525, 111 S. W. 738.

Defendant held entitled to cross-examine an impeaching witness concerning the basis of his opinion before he was permitted to testify that defendant's general reputation was bad. *McMillion v. Cook* (Civ. App.) 118 S. W. 775.

A witness having testified against defendant's reputation, defendant was not entitled to ask on cross-examination what it was about which witness claimed defendant had lied concerning witness' son. *Id.*

A question, calling for a witness' knowledge concerning defendant's general reputation for truth and veracity, held proper. *Id.*

A question asked of an impeaching witness held not objectionable as not limited to reputation concerning truth and veracity. *Id.*

Question whether, basing an opinion on the reputation of prosecuting witness, he was worthy of belief on oath, held properly excluded. *Edgar v. State*, 59 Cr. R. 491, 129 S. W. 141.

Evidence held incompetent to impeach a witness. *Chandler v. State*, 60 Cr. R. 329, 131 S. W. 598.

The manner of asking the questions in order to ascertain the general reputation of a witness in a community for truth and veracity stated. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 133 S. W. 499.

84. — Evidence of accusation or conviction of crime.—Indictment against state's witness held admissible for purpose of attacking his credibility. *Lee v. State*, 45 Cr. R. 51, 73 S. W. 407.

In impeaching a witness by showing, after his denial thereof, his former conviction of a larceny, it is not necessary to produce the jail book. *Wilson v. State* (Cr. App.) 78 S. W. 232.

Where a witness on cross-examination denies that he has been previously convicted of a larceny, he may be impeached by the record of conviction. *Id.*

A copy of a judgment of conviction, showing the conviction of a witness of a felony, is admissible for the purpose of impeachment. *Gulf, C. & S. F. Ry. Co. v. Gibson*, 42 C. A. 306, 93 S. W. 469.

Certain record evidence showing plaintiff's conviction held properly excluded. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

Mere rumor of accusation of crime is not a basis for impeachment of a witness. *Shepard v. State*, 56 Cr. R. 604, 120 S. W. 446.

A judgment of conviction of a witness for a felony is the best evidence to prove his disqualification to testify, and not the admission of the witness himself. *King v. State*, 57 Cr. R. 363, 123 S. W. 135.

The record of a judgment of conviction of a felony held admissible to discredit a witness. *Huff v. McMichael* (Civ. App.) 127 S. W. 574.

Another witness could not testify that he had heard that a particular witness had been indicted for rape; a copy of the indictment being the best evidence of that fact, unless the witness himself was questioned thereon. *Ward v. State* (Cr. App.) 146 S. W. 931.

In a prosecution for rape, the court's charge in a previous homicide case against the principal witness for the state, which submitted the issue of his insanity, and the verdict of not guilty in that case, were inadmissible, in connection with other evidence tending to discredit the witness. *Caton v. State* (Cr. App.) 147 S. W. 590.

Disqualification of a witness by having served a prison sentence held insufficiently proven by the testimony of the witness upon objection that the record was the best evidence. *Harris v. State* (Cr. App.) 148 S. W. 1071.

In the absence of proper objection, the fact that a witness has been convicted of felony may be shown by parol. *Chambers v. Wyatt* (Civ. App.) 151 S. W. 864.

The original indictment against a witness for a felony, returned within two years, was not too remote to be admissible as impeaching evidence. *Robinson v. State* (Cr. App.) 156 S. W. 212.

85. — Rebuttal of evidence impeaching character.—Where defendant, to impeach a state's witness, shows that he has been indicted, the state may show by the witness himself, without producing the record, that he has been acquitted. *Burks v. State* (Cr. App.) 49 S. W. 389.

Evidence that a witness was acquainted in the neighborhood, and had formerly resided at a place which he registered as his residence, held admissible in rebuttal. *Gay v. State*, 40 Cr. R. 242, 49 S. W. 612.

Testimony offered in embezzlement prosecution held properly rejected. *Trace v. State*, 43 Cr. R. 48, 62 S. W. 1067.

Certain evidence corroborative of witness held competent; his veracity having been impeached on cross-examination. *Kipper v. State*, 45 Cr. R. 377, 77 S. W. 611.

It was not error to permit a witness to be asked if he was a stranger in the county, and did not have an uncle living there. *Archibald v. State*, 47 Cr. R. 153, 83 S. W. 189.

Defendant held entitled to give evidence of his general reputation for truth and veracity after the introduction of the state's evidence in rebuttal. *Neill v. State*, 49 Cr. R. 219, 91 S. W. 791.

Certain evidence held admissible in rebuttal to impeach a witness. *Beeson v. State*, 60 Cr. R. 39, 130 S. W. 1006.

Exclusion of testimony controverting a showing that a witness assaulted another held error. *Kemper v. State* (Cr. App.) 138 S. W. 1025.

Where, in a prosecution for unlawfully carrying a pistol, defendant attempted to reflect upon a witness' testimony by showing that she met him at night, she was properly permitted to testify that defendant had before then told her he was a single man, but that she later learned he was married. *Valigura v. State* (Cr. App.) 153 S. W. 856.

Where the defendant on cross-examination of a witness for the state elicited that he had been indicted for running a gambling place, and that he was an officer at the time, the state could show that the case had been dismissed, and that he was at the time only a special man detailed to keep order at the place. *Johnson v. State* (Cr. App.) 153 S. W. 875.

Where defendant, to lessen the force of testimony of witnesses for the state, proved that on the night of the burglary they had and drank intoxicating liquor, the state was properly permitted to prove that they did not become intoxicated. *Holmes v. State* (Cr. App.) 156 S. W. 1172.

86. — Evidence to sustain character of witness impeached.—Self-serving declarations held inadmissible in contradiction of impeaching testimony. *Henry v. Bounds* (Civ. App.) 46 S. W. 120.

Where irrelevant evidence that witness has been convicted of a misdemeanor was introduced to impeach his testimony, the witness can be allowed to explain. *Houston E. & W. T. Ry. Co. v. Runnels* (Civ. App.) 46 S. W. 394.

Impeachment of a witness by proof of his conviction of a felony held not to authorize introduction of record of the examining trial to support his testimony by showing that it was the same as that then given. *Scott v. State* (Cr. App.) 47 S. W. 531.

Evidence of a witness' general reputation for veracity is admissible where testimony has been offered to show that he had been charged with criminal offenses. *Luttrell v. State*, 40 Cr. R. 651, 51 S. W. 930.

A witness who knows the reputation of another witness may testify to the fact of such reputation, even though he has never heard it discussed by others. *Reid v. State* (Cr. App.) 57 S. W. 662.

Where a witness' reputation for truth had been attacked, testimony supporting his character is admissible. *Sheppard v. Love* (Civ. App.) 71 S. W. 67.

Evidence that plaintiff's reputation for truth and veracity was good held admissible in view of the evidence offered by defendant showing his conviction of crime. *Missouri, K. & T. Ry. Co. of Texas v. Dumas* (Civ. App.) 93 S. W. 493.

To permit plaintiff to show on redirect examination that he was not guilty of a crime held not error in view of defendant proving plaintiff's conviction on his cross-examination. *Id.*

Where a state's witness had been rigidly cross-examined in a manner bringing him into disrepute, introduction by state of evidence showing his good reputation for truth held not error. *Harris v. State*, 49 Cr. R. 338, 94 S. W. 227.

When it is sought to support the reputation of a witness, it must be shown that the supporting witnesses are acquainted with his general reputation for truth and veracity. *Wolff v. Western Union Telegraph Co.*, 42 C. A. 30, 94 S. W. 1062.

Where an attorney who had been counsel for a witness, who had theretofore been indicted for theft, testified that he had investigated the facts in the cases against the witness, and that they had been dismissed, his further testimony that there were no facts to substantiate the charges was properly excluded as without the scope of the investigation. *Howard v. State*, 53 Cr. R. 378, 111 S. W. 1038.

In a prosecution for theft of a mower, testimony by the officer who recovered it from accused's house as to statements by the owner as to how he identified the mower held not admissible; accused not being present when such statements were made. *White v. State*, 57 Cr. R. 196, 122 S. W. 391.

Where the veracity of the prosecutrix has been attacked, the state may show that her reputation for truth and veracity is good. *Helton v. State* (Cr. App.) 125 S. W. 21.

Exclusion of testimony explaining why accused's witness killed two men and was himself shot held error. *Kemper v. State* (Cr. App.) 138 S. W. 1025.

A question and answer on cross-examination held not an attack on the character of a witness, so as to justify evidence of his reputation for truth. *San Antonio & A. P. Ry. Co. v. Nappier* (Civ. App.) 141 S. W. 564.

The state could introduce evidence to support a state's witness sought to be impeached by proving his reputation for truth and veracity. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

A person who has lived for a great many years in the same community as a witness, and has never heard any one talk about the witness' reputation, is competent to prove his good reputation for truth and veracity. *Dickson v. State* (Cr. App.) 146 S. W. 914.

In a burglary trial, evidence as to the trial and acquittal of another who was jointly indicted with accused was not admissible to relieve such other person from any inference affecting his credibility. *Payne v. State* (Cr. App.) 148 S. W. 694.

Where one of the defendants in her testimony several times referred to the testimony of plaintiff as untrue, evidence supporting plaintiff's reputation for truth and veracity was admissible. *Hearn v. Harless* (Civ. App.) 154 S. W. 613.

87. — **Effect of Impeachment of character.**—Conviction of witness not shown by record goes to his credibility, but not to his qualification. *McNeal v. State* (Cr. App.) 43 S. W. 792.

That a witness is sought to be impeached or contradicted does not necessarily require the jury to disbelieve his testimony. *Franks v. State*, 48 Cr. R. 211, 87 S. W. 148.

88. **Interest as ground of Impeachment.**—It is competent to ask questions for the purpose of showing a bias upon the part of the witness. *Wentworth v. Crawford*, 11 T. 127; *Rhine v. Blake*, 59 T. 240; *Evansich v. G., C. & S. F. R. R. Co.*, 61 T. 24.

On a trial for murder, held competent for the state to ask a witness if she was influenced to falsify her testimony because of fear of her uncles, and had not so stated, and on her denial to impeach her by a third party. *Smith v. State* (Cr. App.) 68 S. W. 267.

Impeachment of a prosecuting witness on facts tending to show bias or interest held proper, notwithstanding a witness may not be impeached on collateral and immaterial matters. *Green v. State*, 54 Cr. R. 3, 111 S. W. 933.

On cross-examination of a witness in a criminal prosecution, motives which influence his testimony may be shown. *Pope v. State* (Cr. App.) 143 S. W. 611.

Even where a witness in a criminal prosecution admits bias its extent may be shown on cross-examination. *Id.*

The state may show, on the cross-examination of H., a witness for accused on trial for violation of the local option law, that H. has been indicted for selling liquor in violation of the local option law, and that a third person who has testified for accused is also a witness for H., to show the status and interest of the witness and the third person. *O'Neal v. State* (Cr. App.) 146 S. W. 938.

The interest, feeling, and animus of a witness is always material to enable the jury to properly weigh his testimony. *O'Neal* (Cr. App.) 146 S. W. 938; *Freeman v. Moreman* (Civ. App.) 146 S. W. 1045; *Lee v. State* (Cr. App.) 148 S. W. 706.

89. — **Interest of party of record.**—In an action against a carrier for injuries to plaintiff's horses, cross-examination of plaintiff to show that he had had a great number of suits against defendant company, etc., held inadmissible. *Texas & P. Ry. Co. v. Dishman*, 41 C. A. 250, 91 S. W. 828.

In a suit for a balance due on a sale, as affecting plaintiff's credibility, it was proper to prove that he had stated to his partner, who was interested, that there would be a lawsuit, or trouble about it, and he would give him one-half of what he could beat defendant out of. *Hamilton v. Dismukes*, 53 C. A. 129, 115 S. W. 1181.

Where a contestant of a will testified in support of the contest, it was proper to show an agreement with other contestants as to benefits to be received in case of a defeat of probate. *Allday v. Cage* (Civ. App.) 148 S. W. 838.

90. — **Interest in event of witness not party to record.**—Evidence of conversations of witnesses held admissible as going to his credit. *Sims v. State* (Cr. App.) 44 S. W. 522. Evidence held competent to show the interest of one of defendant's witnesses. *Sims v. State* (Cr. App.) 45 S. W. 705.

Evidence of a witness' general character held incompetent to show that he had no means, and did nothing to obtain the money which it was claimed he was given for testifying. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

Cross-examination in prosecution for aggravated assault held proper, as affecting witness' credibility. *Pace v. State* (Cr. App.) 79 S. W. 531.

On a prosecution for murder held error not to permit defendant to show statements, made by a witness for the state, tending to show his animosity for defendant. *Brownlee v. State*, 48 Cr. R. 408, 87 S. W. 1153.

Evidence that a witness had agreed for a money consideration to testify for a party held admissible. *Routledge v. Rambler Automobile Co.* (Civ. App.) 95 S. W. 749.

In a prosecution for violating the local option law it was competent for the state to prove on cross-examination of a witness that he asked the prosecuting witness what he swore in the grand jury room and that he answered: "Yes, sir." *Owens v. State* (Cr. App.) 96 S. W. 31.

Exclusion of evidence that a witness who had testified for a party was an attorney in the case for the party under an employment for a contingent fee held prejudicial error. *Pecos River R. Co. v. Harrington*, 48 C. A. 346, 99 S. W. 1050.

Sustaining objection to a question as to the amount of a witness' commission in a prosecution for keeping a disorderly house held not error. *Tacchini v. State*, 59 Cr. R. 55, 126 S. W. 1139.

The state may show, on the cross-examination of a witness for accused, his prejudice in favor of accused. *Cain v. State* (Cr. App.) 153 S. W. 147.

91. — **Employment by or other contractual relation with party.**—A witness cannot be impeached by showing that he was employed and discharged at an indefinite time by the party against whom he testified. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

A section foreman held to be an interested witness in an action against a railroad company in whose behalf he testified. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

Where an attorney states that he has an interest contingent on recovery for his fee, it is proper to show, on cross-examination, the extent of such interest. *City of San Antonio v. Porter*, 24 C. A. 444, 59 S. W. 922.

In action by brakeman against railroad company, proof that company's physician had examined brakeman, looking to a settlement, held admissible. *Texas & N. O. R. Co. v. Scott*, 30 C. A. 496, 71 S. W. 26.

In an action against a railroad for injuries, held proper for plaintiff to show on cross-examination of some of defendant's witnesses that they were not subpoenaed, but were in its employ, and attended at its request and in expectation that it would pay them. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 31 C. A. 332, 72 S. W. 418.

In an action against a railroad for injuries, plaintiff was properly allowed to ask one of defendant's witnesses whether or not, under a general rule of defendant, negligent employes were discharged, and had to do their best as witnesses for the company, or get out. *Id.*

On the issue of the incompetency of a brakeman, held not error to permit a witness testifying to his good reputation to state specific acts of negligence. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

It is proper, on cross-examination, to ask a witness if he is in the employ of the party calling him, and if he was paid to come to court and testify. *Id.*

In a prosecution for pursuing the business of selling intoxicating liquors, it is proper cross-examination to ask the prosecuting witness if he was not engaged by officers to help catch persons violating the liquor law; such question tending to show his interest or bias. *Whitehead v. State* (Cr. App.) 147 S. W. 583.

Where interested witnesses testified as to the value of land, it was within the discretion of the court to permit questions on cross-examination as to what they would give for it to test their credibility. *Martin v. Ince* (Civ. App.) 148 S. W. 1178.

92. — **Friendly or unfriendly relations with or feeling toward party.**—Evidence held inadmissible to show bias of prosecuting witness against defendant. *Forrester v. State*, 38 Cr. R. 245, 42 S. W. 400.

Testimony that a witness expressed a belief of the guilt of one charged with murder, and desire to see him hung, held admissible to prove bias. *Reddick v. State* (Cr. App.) 47 S. W. 993.

A witness can be cross-questioned as to his friendliness or other feelings towards the parties. *Cox v. Missouri, K. & T. Ry. Co. of Texas*, 20 C. A. 250, 48 S. W. 745.

Credibility of witness cannot be attacked by proof of grounds for prejudice of which he had no knowledge. *Houston & T. C. R. Co. v. Patterson* (Civ. App.) 57 S. W. 675.

The refusal to admit evidence that the prosecuting witness in a prosecution for a violation of the local option law was in a similar line of business with defendant, and had entered into a conspiracy to break him up, held error. *Lyon v. State* (Cr. App.) 61 S. W. 125.

In a prosecution for assault with intent to murder, the state was properly permitted to show by the prosecutrix, who was hostile toward it, the state of feeling existing between her and accused. *Baines v. State*, 43 Cr. R. 490, 66 S. W. 847.

Evidence of the relations existing between deceased and witnesses for the state and defendant and his associates held admissible to discredit the witnesses in a prosecution for homicide. *Jackson v. State* (Cr. App.) 67 S. W. 497.

In a prosecution for embezzlement, question intended to show ill feeling of witness toward accused held properly excluded. *Jackson v. State*, 44 Cr. R. 259, 70 S. W. 760.

Testimony of a witness as to whether he would have voluntarily come a long distance at defendant's request to testify in the case, as he had done for plaintiff, held admissible. *Wooley v. Bell*, 33 C. A. 399, 76 S. W. 797.

Certain evidence held admissible to show the prejudice of a witness for the state. *Sapp v. State* (Cr. App.) 77 S. W. 456.

In an action against a railroad for killing plaintiff's stock, certain questions asked plaintiff on cross-examination held improperly excluded. *Houston, E. & W. T. Ry. Co. v. Wilson*, 37 C. A. 405, 84 S. W. 274.

In a criminal case, held proper to admit certain testimony of a witness, on cross-examination, as tending to show her interest in the case. *Sexton v. State*, 48 Cr. R. 497, 88 S. W. 348.

Unfriendly feelings entertained by a material witness toward the party against whom he testifies are material, as affecting the weight to be given to his testimony. *Houston, E. & W. T. Ry. Co. v. McCarty*, 40 C. A. 364, 89 S. W. 805.

Evidence of conspiracy to prosecute, and that the prosecution was a part thereof, held admissible. *Baughman v. State*, 49 Cr. R. 33, 90 S. W. 166.

In a prosecution for homicide, certain evidence held admissible as showing animus on the part of a witness for the defense and favoritism to defendant. *Sue v. State*, 52 Cr. R. 122, 105 S. W. 804.

It is always competent to prove by proper evidence the hostile attitude of a witness either to a party or to the cause to affect the witness' credibility. *Burnett v. State*, 53 Cr. R. 515, 112 S. W. 74.

In a prosecution for selling liquor to a minor, certain testimony held admissible to show animus of a witness. *Gelber v. State*, 56 Cr. R. 460, 120 S. W. 863.

The state was properly permitted to ask a witness for accused whether he was not the man who went to defendant's daughter just after the killing and told her not to tell anything on him, to affect the witness' credibility. *Pearson v. State*, 56 Cr. R. 607, 120 S. W. 1004.

Accused can show that a state's witness had requested accused to furnish money to pay witness' fines, and became angered when he refused to do so. *O'Neal v. State*, 57 Cr. R. 249, 122 S. W. 386.

The testimony as to the friendship between a state's witness and decedent is immaterial, especially where the witness states that he was friendly with decedent. *Welch v. State*, 57 Cr. R. 111, 122 S. W. 880.

The refusal of a party to submit the controversy to arbitration held not to justify an inference of bias on his part. *Mortimore v. Affleck* (Civ. App.) 125 S. W. 51.

It will be competent, as showing bias or prejudice, to prove threats against accused by a witness for the state, if limited to such end. *Pollard v. State*, 58 Cr. R. 299, 125 S. W. 390.

It was not error to ask accused's witness on cross-examination if he had not testified, on an application for habeas corpus, to facts beneficial to accused. *Kemper v. State* (Cr. App.) 138 S. W. 1025.

The animus towards decedent of a witness testifying for accused held a material inquiry. *Hickey v. State*, 62 Cr. R. 568, 138 S. W. 1051.

In an action for the wrongful seizure by defendant of plaintiffs' goods, testimony of the relations of a witness to defendant held admissible to show prejudice. *Souther v. Hunt* (Civ. App.) 141 S. W. 359.

In a prosecution for forgery, certain evidence impeaching one of the state's witnesses held inadmissible. *Barber v. State*, 64 Cr. R. 89, 142 S. W. 582.

The animus of the prosecuting witness toward accused held material as affecting his credibility. *Earles v. State*, 64 Cr. R. 537, 142 S. W. 1181.

The state held properly permitted to ask a witness if he and accused were good friends. *Moore v. State* (Cr. App.) 144 S. W. 598.

In an action for personal injuries, questions on cross-examination of plaintiff's witness, who had contradicted all of defendant's witnesses as to whether witness and his relatives had not sued defendant and other railroads for personal injuries, held admissible as bearing on his bias or hostility. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 146 S. W. 600.

In a trial for homicide, the father of deceased testifying for the state should, in absence of plea of privilege, be permitted to answer whether since the homicide he had attempted to shoot defendant, as tending to show his animosity or ill will against defendant. *Smith v. State* (Cr. App.) 148 S. W. 722.

In a murder trial, evidence that accused's uncle gave one of the accused's witnesses a pair of shoes was admissible for the state to show the relation existing between witness and accused's family. *Burnam v. State* (Cr. App.) 148 S. W. 757.

Testimony as to the friendship between a witness and the defendant was admissible as bearing on his credit. *Foster v. State* (Cr. App.) 150 S. W. 936.

93. — Cross-examination to show interest or bias.—Cross-examination of witness to show bias held proper. *Lowry v. State*, 53 Cr. R. 562, 110 S. W. 911; *Green v. Same*, 54 Cr. R. 3, 111 S. W. 933; *Combest v. Wall* (Civ. App.) 115 S. W. 354; *Gelber v. State*, 56 Cr. R. 460, 120 S. W. 863; *Miller v. Freeman* (Civ. App.) 127 S. W. 302; *Clegg v. Gulf, C. & S. F. R. Co.*, Id. 1098; *Millican v. State*, 63 Cr. R. 440, 140 S. W. 1136; *Pope v. Same* (Cr. App.) 143 S. W. 611.

In an action against a railroad for personal injuries, plaintiff held entitled on cross-examination to ask certain questions of witnesses in order to test their credibility. *Missouri, K. & T. Ry. Co. of Texas v. Malone* (Civ. App.) 110 S. W. 958.

Accused in a prosecution for carrying knucks held entitled to cross-examine a witness as to a conversation occurring just before the fight in which the knucks were seen. *Pope v. State* (Cr. App.) 143 S. W. 611.

The adverse side may cross-examine a witness fully to show his bias, interest, and prejudice, or any other mental state or status, which if fairly construed might tend to affect his credibility. *Irvin v. State* (Cr. App.) 148 S. W. 589.

The court properly refused to permit a witness for defendant, sought to be impeached by the state on cross-examination, to go into details as to matters inquired about, solely to lay a predicate for impeachment. *Id.*

Prosecuting witness having testified on cross-examination that he felt unkindly toward accused and wanted him convicted, it was not error to refuse to permit further cross-examination with reference to the witness' bias. *Clark v. State* (Cr. App.) 148 S. W. 801.

The exclusion of testimony on the cross-examination of a physician testifying for plaintiff suing for a personal injury, tending to show interest and bias, held within the discretion of the trial court. *St. Louis & S. F. Ry. Co. v. Clifford* (Civ. App.) 148 S. W. 1163.

94. — **Laying foundation for impeaching evidence as to interest or bias.**—Testimony impeaching a state's witness was properly excluded where no proper foundation was laid for it. *Nite v. State*, 41 Cr. R. 340, 54 S. W. 763; *Galveston, H. & S. A. Ry. Co. v. La Prelle*, 22 C. A. 593, 55 S. W. 125.

The admission of evidence of a collateral fact, on cross-examination of a witness, to prove his friendship to one of the plaintiffs, which he had already admitted, held prejudicial error. *Hooks & Hines v. Pafford*, 34 C. A. 516, 78 S. W. 991.

In a criminal case, the feelings of prosecutrix toward accused may be shown on her examination as a witness, but not as an independent matter pursuant to an offer so to do without designating any particular witness. *Coffman v. State*, 51 Cr. R. 478, 103 S. W. 1128.

In a prosecution for rape, evidence of disclosures of accused to witness concerning the alleged familiarity of M. with prosecutrix held inadmissible, in the absence of proof that the disclosures were brought to the knowledge of the prosecutrix, or that they procured or induced the prosecution. *Bader v. State*, 57 Cr. R. 293, 122 S. W. 555.

Statements antedating a transaction, and showing motive or feelings, are original testimony. *Cockrell v. State*, 60 Cr. R. 124, 131 S. W. 221.

95. — **Competency of impeaching evidence as to interest or bias.**—Refusal to permit answers to irrelevant question is not error, where witness was asked no other questions making it relevant. *Owens v. Missouri, K. & T. Ry. Co.* (Civ. App.) 45 S. W. 399.

Evidence that money was furnished a witness to induce him to testify held competent. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

Evidence to contradict a witness' denial that he was paid to testify, and that he displayed money to show it, and to show he had no means, and did nothing to obtain money, held competent. *Id.*

Evidence of the possession of a pistol by a witness for the defense, in a prosecution for assault with intent to murder, held inadmissible to show that the witness was acting with defendant. *Collins v. State* (Cr. App.) 66 S. W. 840.

In an action against a railroad for the destruction of plaintiff's crop by diverting water through a ditch onto plaintiff's land, certain evidence held competent to show that a witness was interested with plaintiff in another suit. *Chicago, R. I. & G. Ry. Co. v. Longbottom* (Civ. App.) 80 S. W. 542.

On a criminal prosecution, certain evidence tending to discredit a witness for defendant held erroneously admitted. *Swain v. State*, 48 Cr. R. 98, 86 S. W. 335.

Details of difficulty between prosecutor and accused held inadmissible, unless illustrating some phase of the evidence. *Henderson v. State*, 49 Cr. R. 269, 91 S. W. 569.

Admission of testimony as to statement made by witness in absence of accused for purpose of impeachment held error. *Woodward v. State*, 50 Cr. R. 294, 97 S. W. 499.

Defendant in an action against a railway company for false imprisonment was entitled to show that one of plaintiff's witnesses had a suit against defendant similar to the suit of plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Cherry*, 44 C. A. 232, 97 S. W. 712.

Declarations of witnesses made out of court are admissible to show their bias, prejudice, or favoritism though made in defendant's absence. *Porch v. State*, 51 Cr. R. 7, 99 S. W. 1122.

In an action against a railroad for personal injuries received by plaintiff, a United States railway postal clerk, through the derailment of the car in which he was working, the exclusion of certain evidence held error. *St. Louis & S. F. Ry. Co. v. Sproule*, 45 C. A. 615, 101 S. W. 268.

A witness should not be permitted to testify that certain other witnesses who testified against accused were hostile to him, unless the witness' knowledge as to such feeling, attitude, and disposition of such other witnesses is shown. *Burnett v. State*, 53 Cr. R. 515, 112 S. W. 74.

On a trial for assault with intent to rape, certain evidence held competent as affecting the credibility of a witness for accused. *Warren v. State*, 54 Cr. R. 443, 114 S. W. 380.

In an action by a husband for personal injuries to his wife, certain evidence held inadmissible to show an attempt of the husband to defraud defendant. *Citizens' Ry. & Light Co. v. Johns*, 52 C. A. 489, 116 S. W. 62.

In an action by a husband for personal injuries to his wife, certain evidence held not admissible to show his prejudice. *Id.*

Evidence of the acts of a mob of which certain witnesses were a part held admissible to show prejudice and ill will toward accused. *Streight v. State*, 62 Cr. R. 453, 138 S. W. 742.

Statements of a witness called for the accused, in a prosecution for murder, showing bias on behalf of such accused, held admissible to affect the weight of his testimony. *Renn v. State*, 64 Cr. R. 639, 143 S. W. 167.

Where the issue was whether a third person was the agent of plaintiff or defendant, declarations of the third person held admissible to affect his credibility as a witness, but not to show agency. *Sackville v. Storey* (Civ. App.) 149 S. W. 239.

In a personal injury action by a passenger, proof that the defendant's doctor advised a compromise in settlement is admissible to show his bias and interest. *Ft. Worth & D. C. Ry. Co. v. Matchett* (Civ. App.) 152 S. W. 1113.

96. — Rebuttal of evidence of interest or bias.—The answers of a witness having been read by one party to discredit another witness, the adversary may introduce in evidence the further answers of the witness tending to show his own temper and feeling toward the witness he thus seeks to discredit. *Railway Co. v. Coon*, 69 T. 730, 7 S. W. 492.

Where the prosecutrix, on a prosecution for an attempt to procure an abortion, testified on cross-examination that the attorneys for the state had consented to dismiss the adultery case against her if she would testify against defendant, held not error to permit the state to show that its attorneys had told her to swear to the truth. *Fretwell v. State*, 43 Cr. R. 501, 67 S. W. 1021.

Where, on trial for homicide, the state has attempted to impeach a witness on her denial that she had stated that she was influenced to testify falsely by fear of relatives, accused may show by such relatives that they had not threatened witness. *Smith v. State* (Cr. App.) 68 S. W. 267.

Where defendant, on trial for theft, proved that a witness had expended \$50 in coming to court to testify, it was proper for the state to prove that such amount had been reimbursed to witness by citizens. *Mercer v. State*, 45 Cr. R. 460, 76 S. W. 469.

Where defendant, in an action for injuries, attempted, on cross-examination of physicians, to show a conspiracy to testify for plaintiff, it was proper to allow one of them to testify that, when he was called on by the other to wait on plaintiff, it was not the first time he had been called on by physicians. *Denison & S. Ry. Co. v. Powell*, 35 C. A. 454, 80 S. W. 1054.

Where accused attempted to show that a witness for the state was prejudiced against him, the state was properly permitted to show by the witness that he had no ill will against accused. *Cain v. State* (Cr. App.) 153 S. W. 147.

Where defendant elicited from a witness on cross-examination that he had aided in an attempt to cause defendant's certificate as a teacher to be canceled, the witness was properly permitted on re-examination to state that he did so because defendant was charged with certain offenses. *Manley v. State* (Cr. App.) 153 S. W. 1138.

Where, on a trial for assault, accused, for the purpose of showing animus and prejudice, questioned the prosecuting witness relative to his calling accused a vile name, it was not error to permit the prosecuting witness to explain that he did so because he believed accused was implicated in the separation of himself and his wife. *Comegys v. State* (Cr. App.) 156 S. W. 642.

97. — Evidence to show want of interest or freedom from bias.—As bearing on the credibility of a witness, he may show that he is not interested in the suit. *Tomson v. Heidenheimer*, 16 C. A. 114, 40 S. W. 425.

Where the state was permitted to prove that the witness had become responsible for defendant's attorney's fee, the witness should have been allowed to state on cross-examination why he became so responsible. *Oxsheer v. State*, 38 Cr. R. 499, 43 S. W. 335.

In prosecution for murder, certain evidence held competent for impeachment. *Kipper v. State*, 45 Cr. R. 377, 77 S. W. 611.

A witness for accused may not be supported by proof that on a former trial she had been summoned as a witness and had testified for the state. *Welch v. State*, 57 Cr. R. 111, 122 S. W. 880.

98. Inconsistency of statements as ground of impeachment.—A witness may be impeached by his own contradictory statement to which his attention has been called. *Smith v. Bank*, 74 T. 457, 12 S. W. 113; *Railway Co. v. Dyer*, 76 T. 156, 13 S. W. 377; *Easton v. Dudley*, 78 T. 236, 14 S. W. 583; *Cross v. McKinley*, 81 T. 332, 16 S. W. 1023; *Cherry v. Butler*, 4 App. C. C. § 271, 17 S. W. 1090; *Bonner v. Mayfield*, 82 T. 234, 13 S. W. 305; *Dooley v. Miller*, 21 S. W. 157, 2 C. A. 132; *Ryan v. State* (Cr. App.) 49 S. W. 599; *Patterson v. Same*, 60 S. W. 557; *Galveston, H. & S. A. Ry. Co. v. Washington*, 94 T. 510, 63 S. W. 534; *Guinn v. State* (Cr. App.) 65 S. W. 376; *Shaffer v. Same*, *id.* 1072; *Long v. Long*, 30 C. A. 368, 70 S. W. 587; *Lewandowski v. State* (Cr. App.) 72 S. W. 594; *Dawson v. Same*, 74 S. W. 912; *Locklin v. Same*, 75 S. W. 305; *Jenkins v. Same*, 45 Cr. R. 173, 75 S. W. 312; *Thompson v. Same*, 48 Cr. R. 16, 85 S. W. 1059; *Randell v. Same*, 49 Cr. R. 261, 90 S. W. 1012; *McIntyre v. Same*, 50 Cr. R. 83, 94 S. W. 1048; *Maxcy & Anderson v. Fairbanks Co.*, 42 C. A. 254, 95 S. W. 632; *Adams v. State*, 52 Cr. R. 13, 105 S. W. 197; *Hoskins v. Velasco Nat. Bank*, 48 C. A. 246, 107 S. W. 598; *Green v. State*, 53 Cr. R. 473, 110 S. W. 925; *Sanders v. Same*, 54 Cr. R. 101, 112 S. W. 68, 22 L. R. A. (N. S.) 243; *High v. Same*, 54 Cr. R. 333, 112 S. W. 939; *Hardin v. Same*, 55 Cr. R. 631, 117 S. W. 974; *Deneaner v. Same*, 58 Cr. R. 624, 127 S. W. 201; *Long v. Same*, 59 Cr. R. 103, 127 S. W. 551, *Ann. Cas.* 1912A, 1244; *Lane v. Same*, 59 Cr. R. 595, 129 S. W. 353; *Pratt v. Same*, 59 Cr. R. 635, 129 S. W. 364; *Lone Star Lignite Mining Co. v. Caddell* (Civ. App.) 134 S. W. 841; *Gross v. State*, 61 Cr. R. 176, 33 L. R. A. (N. S.) 477, 135 S. W. 373; *Treadway v. Same* (Cr. App.) 144 S. W. 655.

A witness may be impeached by evidence of contradictory statements. *Donahoo v. Scott* (Civ. App.) 30 S. W. 385.

Evidence held incompetent for purpose of impeachment. *Halsell v. Neal*, 23 C. A. 26, 56 S. W. 137; *Oldham v. State*, 63 Cr. R. 527, 142 S. W. 13.

Where defendant's wife testifies, the state cannot go beyond impeaching her by contradictory statements and give statements of hers on other matters. *Messer v. State*, 43 Cr. R. 97, 63 S. W. 643.

In an election contest, certain declarations of a voter who appeared as a witness held properly admitted for purposes of impeachment. *Bailey v. Fly*, 35 C. A. 410, 80 S. W. 675.

Certain method of contradiction of one of defendant's witnesses held improper. *Parker v. State*, 46 Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021, 3 Ann. Cas. 893.

Where a witness denied making a statement to a certain person, held competent to call such person to contradict him. *Myers v. State* (Cr. App.) 101 S. W. 1000.

Certain evidence offered for the purpose of impeachment held not admissible. *Van-houser v. State*, 52 Cr. R. 572, 108 S. W. 386.

Statements made out of court by witness contradictory of statements in court held to form a basis for impeachment. *Sanders v. State*, 54 Cr. R. 101, 112 S. W. 68, 22 L. R. A. (N. S.) 243.

The refusal to permit accused by way of impeachment of a state's witness to show a certain fact held erroneous. *Id.*

Evidence of a conversation held with defendant's foreman held admissible to discredit the evidence of the foreman. *Galveston, H. & S. A. Ry. Co. v. Norton*, 55 C. A. 478, 119 S. W. 702.

In an action on a note, evidence of an inconsistent statement made by defendant R. held admissible to contradict R. on a material issue. *First Nat. Bank v. Pearce* (Civ. App.) 126 S. W. 285.

It is proper to ask a witness, for the purpose of impeachment, if he has not made other and different statements about the matter in question, than those he made during the trial. *Freeman v. Vetter* (Civ. App.) 130 S. W. 190.

The state held not entitled to show on the cross-examination of a witness statements of the witness indicating the guilt of accused. *Hickey v. State*, 62 Cr. R. 568, 138 S. W. 1051.

99. — Nature of former statement in general.—A judgment debtor was introduced as a witness by his vendees in a suit by them against his creditors for wrongfully seizing the stock of goods conveyed by him for his debt, for the purpose of showing that the sale had been made in good faith. The sale was attacked for fraud, and it was shown that the witness remained in apparent possession after the sale. On cross-examination the defendant asked the witness if he did not, a few days after he made the bill of sale of the goods to plaintiff, say, in the store, that if his creditors would not levy on the goods he would have them all back in a few days. Held, that the question was proper, and within the rule which allows the credibility of a witness to be impeached by showing that he has made statements out of court, of facts relative to the issue, contrary to what he has testified to at the trial. *Miller v. Jannett*, 63 T. 82.

A witness giving evidence tending to prove an alibi by showing defendant was at home all night can be impeached by evidence that she had stated that defendant was away from home on the night of the theft. *Smith v. State* (Cr. App.) 44 S. W. 520.

Where plaintiff had attached goods which defendant had sold to a third person after buying from plaintiff on credit, statements made by defendant in the absence of the purchaser held admissible to contradict defendant, and affecting his credibility. *D'Arrigo v. Texas Produce Co.*, 18 C. A. 41, 44 S. W. 531.

A witness for the state testified that defendant's wife had stated two years ago that deceased had insulted her. Held, that she could be asked if she had not that morning told the state's counsel that defendant's wife had never told her of such insults, and she answered that she had not. *Merritt v. State*, 40 Cr. R. 359, 50 S. W. 384.

When defendant, charged with robbery, claimed that the money was won in a card game, and a witness testified that he had seen the robbed party play cards, testimony that such witness had stated, on the day before the trial, that he had never seen him play cards, is admissible. *Webb v. State* (Cr. App.) 55 S. W. 493.

Statements of a witness as to plaintiff's condition at the time of the injury complained of, inconsistent with her testimony on the stand, held admissible. *Luke v. City of El Paso* (Civ. App.) 60 S. W. 363.

On a prosecution for fornication, a witness having denied making a statement involving the fact that he had seen defendant and the particeps criminis fornicating, held error to permit him to be contradicted by one to whom it was claimed the statement was made. *Boatwright v. State*, 42 Cr. R. 442, 60 S. W. 760.

Conversations of a prosecuting witness, stating that the stolen calf was the calf of a different cow than the one referred to in his testimony, held admissible to impeach him. *Landers v. State* (Cr. App.) 63 S. W. 557.

Where, in a proceeding in garnishment to reach a certain bank deposit, the judgment debtor has testified that he had assigned all his interest in the money to the intervener at a certain time, testimony that after such time the debtor said the money was his is admissible to impeach such testimony. *Norton v. Maddox* (Civ. App.) 66 S. W. 319.

In a prosecution for rape of a female under 15, refusal to permit her to be asked on cross-examination whether she had not stated to others she was 16 at about the same time held error. *Miller v. State* (Cr. App.) 72 S. W. 996.

In a prosecution for homicide, where accused's witness testified to an alibi in favor of an accomplice, the state may show on cross-examination that the witness had made contradictory statements. *Jenkins v. State*, 45 Cr. R. 173, 75 S. W. 312.

In an action for death on a railroad bridge, held proper to permit witnesses to state that the day after the accident the engineer stated to them he saw deceased on the bridge, but thought he would get off, as contradicting his testimony. *Gulf, C. & S. F. Ry. Co. v. Brown*, 33 C. A. 269, 76 S. W. 794.

In a prosecution for seduction, the limitation to contradiction alone of evidence that prior to the trial prosecutrix stated that defendant raped her held error. *Nolen v. State*, 43 Cr. R. 436, 88 S. W. 242.

A witness, testifying in behalf of defendant on trial for murder, and denying that he stated that the murder was a cold-blooded one, cannot be impeached by proof that he made such statement. *Scott v. State*, 49 Cr. R. 386, 93 S. W. 112.

Where a witness gave testimony tending to show that act of accused was in self-defense, evidence of his statements that accused shot deceased for nothing held inadmissible. *Watson v. State*, 50 Cr. R. 171, 95 S. W. 115.

In a prosecution for homicide, privileged communications between a witness and his attorney are inadmissible to controvert his testimony. *Hardin v. State*, 51 Cr. R. 559, 103 S. W. 401.

In a seduction trial held defendant could show, on cross-examining a state's witness who testified that prosecutrix's reputation for chastity was good, that witness had stated to another that prosecutrix's sister's reputation was bad. *Jeter v. State*, 52 Cr. R. 212, 106 S. W. 371.

The state held entitled to ask a witness in impeachment whether he did not remark soon after leaving the room in which the killing occurred that accused had killed decedent. *Keeton v. State*, 59 Cr. R. 316, 128 S. W. 404.

In a prosecution for rape, evidence of prosecutrix's statements to others that she had had intercourse with other men mentioned, held admissible to impeach her. *Foreman v. State*, 61 Cr. R. 56, 134 S. W. 229.

Remarks of a witness on hearing shots on the night of the homicide held admissible in impeachment. *Renn v. State*, 64 Cr. R. 639, 143 S. W. 167.

Where the master claimed that plaintiff had been injured wrestling with another, who testified that the servant was injured while wrestling with him, questions on cross-examination as to statements made by the third person in relation to the wrestle to the master's agents, and as to statements made in a former trial in relation thereto, were properly received in evidence. *Texas Tracton Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

Where, in a prosecution for murder of accused's wife's father, accused's wife testified for him that she told accused for the first time on the morning of the killing that decedent, her father, was the father of her child, the state could ask her on cross-examination whether she had not told accused that fact before the day of the killing, and told others that she told accused thereof a month before the killing. *Swanney v. State* (Cr. App.) 146 S. W. 548.

In an action by a wife to recover a note constituting her separate property actually transferred by her husband, the husband, testifying that she consented to the transfer, could be impeached by proof of his confession that he had wrongfully transferred the note. *First Bank of Springtown v. Hill* (Civ. App.) 151 S. W. 652.

Where, in an action for commissions for procuring the sale of realty, the purchaser testified that plaintiff put him in touch with the property and was instrumental in closing the deal, evidence was admissible by defendant's agent that the purchaser told him that plaintiff had nothing to do with the sale. *Carl v. Wolcott* (Civ. App.) 156 S. W. 334.

What witnesses might have said to a state's witness, not admissible as original evidence, would not tend to impeach him. *Pullen v. State* (Cr. App.) 156 S. W. 935.

100. — Former statement a mere opinion or conclusion.—A witness testifying to criminating facts cannot be impeached by her declaration that she believed defendant not guilty. *Taylor v. State*, 38 Cr. R. 552, 43 S. W. 1019.

Affidavit of witness that he believed a fire was caused by a passing engine held inadmissible to impeach his evidence that he did not know the cause. *Houston & T. C. R. Co. v. Bath*, 17 C. A. 697, 44 S. W. 595.

A witness cannot be impeached as to his statement of his belief as to who committed the crime. *Jenkins v. State*, 45 Cr. R. 173, 75 S. W. 312.

A witness' statement of opinion may not be used to impeach him. *Kirk v. State*, 48 Cr. R. 624, 89 S. W. 1067.

General statements of plaintiff's right in an action held not admissible to impeach a witness for defendant. *Houston, E. & W. T. Ry. Co. v. Adams*, 44 C. A. 288, 98 S. W. 222.

Where an alleged statement of a witness concerning which the witness was cross-examined was matter of opinion, she could not be contradicted on her denying that she made the statement. *Streight v. State*, 62 Cr. R. 453, 138 S. W. 742.

In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was not admissible to impeach the testimony of the agent. *S. W. Slayden & Co. v. Palmo* (Civ. App.) 151 S. W. 649.

101. — Written statements or instruments.—Recital in a deed that grantor sold as the agent of the heirs of his father is admissible to contradict testimony of grantor that he had previously disposed of his interest therein. *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

A certain letter, dictated by accused to a fellow prisoner, held admissible for the purpose of impeaching accused. *Carmona v. State* (Cr. App.) 65 S. W. 928.

A witness cannot be impeached by the allegations in his petition in an action, where it is not shown that he had knowledge of the contents of the petition or that he authorized the same. *Denison & P. S. Ry. Co. v. Foster*, 28 C. A. 578, 68 S. W. 299.

In garnishment, on the issue as to whether the garnishee was indebted, an instrument purporting to extend a note due by the debtor to the garnishee held properly admitted as tending to contradict the debtor. *Faseler v. Kothman* (Civ. App.) 70 S. W. 321.

In trespass to try title, a letter held admissible as tending to contradict a statement made by plaintiff. *White v. Epperson*, 32 C. A. 162, 73 S. W. 851.

Defendant by cross-interrogatory may show that plaintiff's witness had made a written statement contrary to what he had testified for plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Patterson* (Civ. App.) 73 S. W. 987.

In an action by the purchaser of a machine against the seller for failure to deliver, certain letters held admissible to discredit a witness. *Fred W. Wolf Co. v. Galbraith*, 39 C. A. 351, 87 S. W. 390.

In an action for personal injuries, plaintiff held entitled to show the questions and answers on application by him for life insurance as tending to discredit the testimony of the examining physician as a witness for defendant. *San Antonio Tracton Co. v. Parks* (Civ. App.) 93 S. W. 130.

Witnesses held properly impeached by allegations of a petition filed in a proceeding in which they were parties plaintiff. *Texas & N. O. Ry. Co. v. Moers* (Civ. App.) 97 S. W. 1064.

In an action for injuries to a brakeman, evidence that, in order to obtain his employment, he had falsely sworn that he had never had any litigation with any railway company, held admissible to impeach his testimony. *Galveston, H. & S. A. Ry. Co. v. Harris*, 43 C. A. 434, 107 S. W. 108.

A pleading of a party held admissible to contradict his testimony in another case. *Michel v. Michel* (Civ. App.) 115 S. W. 358.

A sworn statement made by prosecutrix to the assistant county attorney of another county held admissible to impeach her. *Bader v. State*, 57 Cr. R. 293, 122 S. W. 555.

In trespass to try title a document which tended to show that the occupants of

the land had not become defendants' tenants, thereby contradicting his testimony on that issue, was relevant and material. *Blair v. Boyd* (Civ. App.) 129 S. W. 870.

Where a witness testified contrary to a statement made by him in a prior affidavit, the affidavit was admissible to impeach him. *Morgan v. Fleming* (Civ. App.) 133 S. W. 736.

Exclusion of a written statement tending to discredit a witness' testimony held improper. *Beaty v. Yell* (Civ. App.) 133 S. W. 911.

A statement held admissible to contradict accused's witness. *Butler v. State*, 61 Cr. R. 133, 134 S. W. 230.

A witness testifying that cattle were diseased on the day they were tendered by the seller may be impeached by proof that he had executed and delivered a certificate that the cattle were free from disease on that date. *O'Brien v. Von Lienen* (Civ. App.) 149 S. W. 723.

Where accused introduced a witness who testified that he was one of the three indicted for the attempted robbery, and that neither he nor accused were at the place of the robbery, the written confession of such witness at the time of his arrest was properly admitted to impeach his evidence. *Wingate v. State* (Cr. App.) 152 S. W. 1078.

An affidavit by a witness containing statements in conflict with material evidence given by her on the stand was properly admitted for purposes of impeachment. *Jordan v. Johnson* (Civ. App.) 155 S. W. 1194.

102. — Former testimony of witness.—Voluntary testimony of accused on examining trial after warning held admissible for impeachment. *Copeland v. State* (Cr. App.) 40 S. W. 589.

Ex parte depositions of plaintiff taken by defendant held admissible to attack testimony by plaintiff at the trial. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.) 44 S. W. 8.

Where the truth of a witness' statement made on trial was in issue, it was competent to impeach him by his testimony taken before the grand jury. *Wooley v. State* (Cr. App.) 64 S. W. 1054.

In a prosecution for murder, testimony of a witness that he stated before the grand jury that he believed defendant killed deceased held inadmissible as impeaching evidence. *Morton v. State*, 43 Cr. R. 533, 67 S. W. 115.

It was competent for defendant to show that a witness, who had testified that defendant did the killing, had stated on the examining trial that he did not know who did the killing. *Cecil v. State*, 44 Cr. R. 450, 72 S. W. 197.

The state may show, by testimony of grand jury, statements made by prosecuting witness before them, where she had denied making the same. *Gibson v. State*, 45 Cr. R. 312, 77 S. W. 812.

Evidence of statements made by witness before the grand jury, which she denied having made, held admissible. *Gallegos v. State*, 48 Cr. R. 53, 85 S. W. 1150.

A deposition of a witness for plaintiff taken in another suit to which he was not a party held inadmissible against plaintiff to show contradictory statements. *Clark v. Gurley*, 48 C. A. 274, 106 S. W. 394.

To impeach a witness, held, it could be shown he made statements in justice court contrary to his testimony. *Vanhooser v. State*, 55 Cr. R. 114, 113 S. W. 285.

On a trial for perjury certain testimony held admissible to impeach accused. *Anderson v. State*, 56 Cr. R. 360, 120 S. W. 462.

Where witnesses for the state proved on the trial to be witnesses favorable to defendant, it was proper to permit the state to prove by them what they had formerly testified before the grand jury. *Layton v. State*, 61 Cr. R. 507, 135 S. W. 557.

A state's witness may be impeached by proof of inconsistent statements at the preliminary examination. *Earles v. State*, 64 Cr. R. 537, 142 S. W. 1181.

Evidence given in habeas corpus proceedings, held admissible for impeachment of a witness. *Renn v. State*, 64 Cr. R. 639, 143 S. W. 167.

A witness becoming a state witness upon cross-examination in a criminal case may be impeached by contradictory statements made in the examining trial. *Harris v. State* (Cr. App.) 148 S. W. 1071.

Where defendant's wife testified in his behalf that the deceased was armed, testimony of witnesses for the state that at the inquest she had made a written statement to the effect that deceased was unarmed was admissible as impeaching testimony. *Perry v. State* (Cr. App.) 153 S. W. 138.

Where a witness for accused testified to a different state of facts on the examining trial, it was not error to admit so much of such testimony as showed the contradicted statements. *Cloud v. State* (Cr. App.) 133 S. W. 892.

103. — Time of making statements and circumstances connected therewith.—Acts and statements of accused while under arrest held inadmissible for the purpose of impeaching him. *Parker v. State* (Cr. App.) 57 S. W. 668.

Under the statute requiring warning before any statement made by one under arrest can be introduced in evidence, such a statement cannot be shown to dispute defendant's answer to a question on cross-examination, though he answered without objection. *Johnson v. State*, 43 Cr. R. 476, 66 S. W. 845.

Where a witness testified that a statement made to the county attorney and grand jury was made under threat of being sent to jail, and is not true, evidence of such statement is inadmissible. *Skeen v. State*, 51 Cr. R. 39, 100 S. W. 770.

It was not error for the purpose of impeaching a witness, to admit evidence of statements made by such witness, though not made in defendant's presence, and not binding upon him. *Tucker v. State* (Cr. App.) 150 S. W. 190.

The state may not impeach a witness in a homicide case by proving that he had told a third person, on the night after the burial of decedent, that decedent was a poor, inoffensive man and was murdered for nothing. *Davis v. State* (Cr. App.) 155 S. W. 546.

104. — Statements by others in presence or with the sanction of witness.—In an action against the drawee for the nonpayment of a draft, a statement of an agent of the holder, who presented the draft, which statement was indorsed by defendant's

cashier, except in one particular, was admissible to impeach the cashier's evidence. *Milmo Nat. Bank v. Cobbs*, 53 C. A. 1, 115 S. W. 345.

Where the prosecuting witness had testified at the examining trial that defendant confessed his guilt, it was error to exclude defendant's impeaching evidence to the effect that the prosecuting witness was present when the officers were trying to get a confession from defendant, and heard his positive denial of guilt, and remained silent. *Donahue v. State* (Cr. App.) 155 S. W. 250.

105. — **Witnesses who may be impeached by inconsistent statements.**—A party may contradict a witness produced by him who contradicts his own testimony given in a former trial. *Blake v. State*, 38 Cr. R. 377, 43 S. W. 107.

Where defendants were not misled by their witness nor surprised by his testimony, they cannot read from his deposition in a different proceeding and ask him to reconcile his testimony therewith. *Parlin & Orendorff Co. v. Miller*, 25 C. A. 190, 60 S. W. 881.

Where defendant's witness denied making a certain statement to defendant's counsel, the witness could not be impeached by showing that he made such statement to another person. *Hall v. Cloutz*, 26 C. A. 348, 63 S. W. 941.

Where a witness gives testimony different from his statements made before going on the stand, the party calling him may, to refresh his memory, ask him if he did not make such prior statements, and, if he denies, may prove such statements. *Dallas Consol. Electric St. Ry. Co. v. McAllister*, 41 C. A. 131, 90 S. W. 933.

Where a party has introduced in evidence a deposition taken by the adverse party, thereby making the witness his own, testimony by another witness for such party to statements by the deponent, which, in his deposition, he had denied making, offered for the purpose of impeaching him, if objected to on that ground, should be excluded. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Civ. App.) 107 S. W. 651.

On the trial for homicide, the state held entitled to develop facts on the cross-examination of a witness for accused without making the witness its own. *Pratt v. State*, 59 Cr. R. 635, 129 S. W. 364.

A statement by a prosecutrix having been denied defendant had a right to contradict her. *Gross v. State*, 61 Cr. R. 176, 33 L. R. A. (N. S.) 477, 135 S. W. 373.

A party, not misled as to what his witness will testify to, cannot impeach his testimony by introducing a deposition taken in a different proceeding. *St. Louis Southwestern Ry. Co. of Texas v. Waco Cotton Pickery* (Civ. App.) 146 S. W. 201.

106. — **Irrelevant, collateral or immaterial matters.**—A witness cannot be impeached by contradictory statements on an immaterial and irrelevant issue. *Noel v. Denman*, 76 T. 306, 13 S. W. 318; *Missouri, K. & T. R. Co. of Texas v. Moore* (Civ. App.) 59 S. W. 282; *Cogdell v. State*, 43 Cr. R. 178, 63 S. W. 645; *Denison & P. S. Ry. Co. v. Foster*, 28 C. A. 578, 68 S. W. 299; *Connell v. State*, 45 Cr. R. 142, 75 S. W. 512; *Fox v. Same* (Cr. App.) 87 S. W. 157; *Cooper v. Same*, 48 Cr. R. 608, 89 S. W. 816; *Barbee v. Same*, 50 Cr. R. 426, 97 S. W. 1058; *Prewitt v. Southwestern Telegraph & Telephone Co.*, 46 C. A. 123, 101 S. W. 812; *El Paso & N. E. Ry. Co. v. Landon* (Civ. App.) 124 S. W. 744; *Texarkana Gas & Electric Co. v. Lanier*, 126 S. W. 67; *Lemons v. State*, 59 Cr. R. 299, 128 S. W. 416; *Dooley v. Bolders* (Civ. App.) 128 S. W. 690; *Jennings v. State*, 60 Cr. R. 421, 132 S. W. 473; *Burnam v. Same*, 61 Cr. R. 51, 133 S. W. 1045; *Stevens v. Same* (Cr. App.) 150 S. W. 944.

Where a witness in a homicide case had been asleep and was aroused by the shooting, in which four shots were fired, whether he heard only two shots or more than two was not material, so that the exclusion of evidence as to his testimony on a former trial was without injury. *Oates v. State* (Cr. App.) 149 S. W. 1194.

Testimony, in an action for personal injury, as to an agent of defendant telling plaintiff after the accident not to worry about his job, that it was not his fault, and that defendant would take care of him, is as to a collateral issue, and therefore not subject to impeachment. *Texas Co. v. Strange* (Civ. App.) 154 S. W. 327.

107. — **Nature and extent of inconsistency.**—In an action by a husband for the death of his wife, testimony held admissible as original evidence to show that a witness for defendant was unacquainted with plaintiff, whom she had testified to having seen on a particular occasion on the day deceased was injured. *International & G. N. Ry. Co. v. Boykin* (Civ. App.) 85 S. W. 1163.

Defendant could not introduce the evidence of one of his witnesses upon the examining trial to impeach him, where it was substantially the same as the verbal evidence of the witness. *Franklin v. State* (Cr. App.) 88 S. W. 357.

A statement held not inconsistent with witness' testimony, so as to be admissible to impeach her. *International & G. N. R. Co. v. Boykin*, 99 T. 259, 89 S. W. 639.

In a trial for homicide, held, that exclusion of evidence as to testimony of a witness on a former trial, which was practically the same as on the present trial, was not error. *Oates v. State* (Cr. App.) 149 S. W. 1194.

A witness may not be impeached by proof of testimony given by him in another case, having no connection with the issue on trial or any testimony of the witness in the case at bar. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

In an action for the value of a mortgaged building which defendants agreed to hold in trust for plaintiffs, purchasers of the equity from plaintiff's father, who was defendant's debtor, evidence by a defendant in a former action by plaintiff's father against defendants, in which judgment went against them, that the person who is claimed to have sold the property for defendants was not his agent was not admissible, not contradicting defendants' evidence herein. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

In a prosecution for homicide, a witness who testified that he communicated to accused threats made by deceased cannot be impeached by mere proof that in conversation with the prosecutor and others he did not tell them of such threats. *Roberts v. State* (Cr. App.) 156 S. W. 651.

108. — **Cross-examination as to inconsistent statements.**—Where a witness for the defense testified to an isolated statement a witness for the state had made contrary to his testimony, it was held error to permit the state to draw from him further details of the conversation in which the statement was made, otherwise corroborating the state's witness. *Red v. State*, 39 Cr. R. 414, 46 S. W. 408.

Exclusion of answer to question, whether if stenographer's report of testimony at former trial showed a certain statement of witness he would not stand corrected, held not error. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 44 C. A. 480, 99 S. W. 152.

Where a witness admitted he had changed his testimony from that on a former trial, he could be asked whether he had not done so because the plaintiff was beaten on the first trial. *Knights of Modern Maccabees v. Gillis* (Civ. App.) 125 S. W. 338.

In a prosecution for perjury in an action for divorce, where the former wife was a state's witness, and where defendant introduced her depositions in a former divorce action containing false answers favorable to defendant, the state can cross-examine her to explain why she had given such answers in the depositions. *Spearman v. State* (Cr. App.) 44 L. R. A. (N. S.) 243, 152 S. W. 915.

109. — **Laying foundation for proof of inconsistent statements.**—Basis for impeachment must be laid by statement of time, place and to whom made. *Railway Co. v. Dyer*, 76 T. 156, 13 S. W. 377.

To impeach a witness by proof of contradictory statements, it is necessary to lay a predicate by asking the witness questions relating to such statements and eliciting his answers. *Wallace v. State* (Cr. App.) 49 S. W. 395; *Martinez v. Same*, 53 S. W. 634; *Cauthern v. Same*, 65 S. W. 96; *International & G. N. R. Co. v. Boykin*, 99 T. 259, 89 S. W. 639; *Opet v. Denzer, Goodhart & Schener* (Civ. App.) 93 S. W. 527; *Kyle v. State*, 55 Cr. R. 360, 116 S. W. 598; *Galveston Electric Co. v. Dickey* (Civ. App.) 126 S. W. 332.

It is sufficient predicate for the impeachment of a witness to ask her if she "had not testified before the grand jury on a former occasion" to certain facts. *Turner v. State* (Cr. App.) 51 S. W. 366.

No predicate was necessary for the introduction of evidence that, during the searching of defendant's room for stolen property, his roommate said that he did not know that defendant possessed a diamond, and defendant's reply that it was one he had owned for some time. *McBroom v. State* (Cr. App.) 61 S. W. 481.

A quashed deposition held inadmissible in evidence to impeach other depositions of same witness, where no proper foundation was laid for such impeachment. *Joy v. Liverpool, London & Globe Ins. Co.*, 32 C. A. 433, 74 S. W. 822.

In murder prosecution, predicate for impeachment of witness, testifying to friendly relations between accused and decedent, held sufficiently laid. *Connell v. State*, 45 Cr. R. 142, 75 S. W. 512.

Testimony of medical witness, in action against railroad for injuries received by person in alighting from a train, held insufficient as predicate for impeachment. *Missouri, K. & T. Ry. Co. of Texas v. Criswell*, 34 C. A. 278, 78 S. W. 388.

Where the theory of the defense was that a crime was committed by a witness for the state who testified that he was present when defendant committed the crime, evidence of conflicting statements made by the witness out of court are admissible as original evidence in defendant's behalf. *Smith v. State*, 52 Cr. R. 27, 105 S. W. 182.

Where there have been two trials in a prosecution, it is proper to ask a witness testifying on the second what he testified to on the first to lay a predicate to contradict him. *Barbee v. State*, 58 Cr. R. 129, 124 S. W. 961.

A prior affidavit of a witness is not admissible to impeach him until a proper predicate has been laid therefor. *Morgan v. Fleming* (Civ. App.) 133 S. W. 736.

Where on a subsequent trial the testimony of a former witness is reproduced, he being beyond the jurisdiction, an affidavit executed by him contradicting such testimony, was inadmissible without a proper foundation laid. *Baker v. Sands* (Civ. App.) 140 S. W. 520.

A witness held properly questioned, as to his statements on the night of the crime, as a predicate for impeachment. *Renn v. State*, 64 Cr. R. 639, 143 S. W. 167.

A witness could not be impeached by evidence of a conversation between him and another where he did not testify as to the details of a conversation covered by the purporting impeaching evidence. *Holmes v. State* (Cr. App.) 150 S. W. 926.

The admission of evidence of inconsistent statements against a witness for plaintiff, who was not a party to or interested in the suit, without any foundation first laid therefor, was error. *Gutzman v. City of Ft. Worth* (Civ. App.) 155 S. W. 1182.

110. — **Admission or denial by witness of making of inconsistent statements.**—Evidence held admissible for purpose of impeachment, where witness, in answer to question whether or not he had made a prior statement, stated that he probably did. *Wyatt v. State*, 38 Cr. R. 256, 42 S. W. 598.

That a witness stated he did not remember making a statement did not preclude impeaching testimony that he made it. *Newman v. State* (Cr. App.) 70 S. W. 951; *Pitman v. Holmes*, 34 C. A. 485, 78 S. W. 961; *Campos v. State*, 50 Cr. R. 289, 97 S. W. 100.

Where a witness sought to be impeached admits the prior antagonistic statements, it is not error for the court to exclude evidence of the witnesses who heard such statements. *Bice v. State*, 51 Cr. R. 123, 100 S. W. 949.

It is only where a witness denies having written a letter that the letter itself can be introduced as impeaching evidence. *J. B. Lloyd & Son v. Kerley* (Civ. App.) 106 S. W. 696.

In an action against a street railroad company and a motorman, for death of plaintiff's decedent from being run over by a car, the written statement of the motorman's testimony at the inquest held not admissible to impeach him as a witness. *Texarkana Gas & Electric Co. v. Lanier* (Civ. App.) 126 S. W. 67.

In order to impeach a witness by statements at another time different from those made upon the trial, a predicate must first be laid by calling his attention to the former statements, and if he then admits having made them, the party attacking him has no occasion to offer in evidence the testimony by which he expects to prove the inconsistent statements. *Id.*

A question to a witness who had already stated that he told others that he did not see the killing whether he did not know what he was telling such others was a story held properly excluded. *Spencer v. State*, 59 Cr. R. 217, 128 S. W. 118.

111. — **Competency of evidence of inconsistent statements in general.**—Evidence of what a witness recollected of a charge on a former trial, relating to his evidence on

such trial, held inadmissible to show a motive for change in his testimony. *Burkitt v. McDonald*, 26 C. A. 426, 64 S. W. 694.

In an action for the death of a person killed by a train, certain evidence held admissible to impeach testimony of engineer that he had not suspected the peril of deceased. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442.

Certain evidence held admissible to impeach a witness for accused. *Proctor v. State*, 54 Cr. R. 254, 112 S. W. 770.

112. — **Proof of oral statements, and examination of impeaching witnesses.**—Testimony of a notary as to statements made by witness when he took her deposition held hearsay. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 28 C. A. 395, 67 S. W. 182.

Examination of an impeaching witness held error for eliciting matters beyond the scope of the predicate laid for impeachment. *St. Clair v. State*, 49 Cr. R. 479, 92 S. W. 1095.

Certain cross-examination of a witness offered by the defense to impeach a witness held competent. *Liles v. State*, 62 Cr. R. 32, 135 S. W. 1177.

A witness called to testify to a conversation denied by accused as a witness should be examined in the language of the predicate laid for accused's impeachment; the witness being improperly permitted to state the conversation between himself and accused. *Kempner v. State* (Cr. App.) 138 S. W. 1025.

113. — **Proof of written statements or instruments.**—Statements may be shown by letters of witness. *Dooley v. Miller*, 21 S. W. 157, 2 C. A. 132. See *Howard v. Galbraith* (Civ. App.) 30 S. W. 689.

To impeach a witness, he may be asked whether he made certain statements, though they be in writing. *Missouri, K. & T. Ry. Co. of Texas v. Calnon*, 20 C. A. 697, 50 S. W. 422.

It having been shown that certain statements by a witness before the grand jury were taken down in writing, and the writing having been introduced to impeach such witness, held not error to allow the one identifying the statements to testify that it was customary to take down such statements in writing. *Parker v. State* (Cr. App.) 65 S. W. 1066.

Where a witness denied making statements in an alleged affidavit sworn to by him, the affidavit was not admissible, without further proof that he made the statements. *Terry v. State* (Cr. App.) 72 S. W. 332.

The state cannot read in evidence defendant's application for a continuance for the purpose of impeaching one of defendant's witnesses. *Wilburn v. State* (Cr. App.) 77 S. W. 3.

Where defendant's witness on cross-examination was asked if he had not made an affidavit to secure a change of venue for defendant, and he admitted doing so, but denied he knew what was in the application, it was proper to show that in his affidavit he had stated he had "been fully informed of and had read the contents of the application, and that the facts stated therein were true." *Kelly v. State* (Cr. App.) 151 S. W. 304.

114. — **Proof of former testimony of witness.**—A witness may be impeached by showing that he testified differently on a former trial, when a proper predicate is laid. A statement of facts is not competent for that purpose. *McCamant v. Roberts*, 80 T. 316, 15 S. W. 580, 1054.

A paper containing the testimony of a witness before the grand jury in the same case cannot be used on the trial by the state to impeach its own witness, nor to intimidate the witness, nor as the basis of cross-examination of its own witness, where it refused the use of the paper to defendant and his counsel. *Brown v. State*, 42 Cr. R. 176, 58 S. W. 131.

In a prosecution for murder, held error to exclude stenographer's notes on a former trial for the purpose of contradicting witnesses. *Stringfellow v. State*, 42 Cr. R. 588, 61 S. W. 719.

Where witness denied that his statements before the grand jury were contradictory to his testimony, the district attorney having shown the statements to have been taken down in writing, held proper to allow the writing to be introduced in evidence. *Parker v. State* (Cr. App.) 65 S. W. 1066.

Evidence of a notary taking a witness' deposition, which she gave evidence intended to impeach, held admissible for the purpose of showing that the witness made prior contradictory statements, without regard to whether the witness was introduced by plaintiff or defendant. *Hord v. Gulf, C. & S. F. Ry. Co.*, 33 C. A. 163, 76 S. W. 227.

On prosecution for homicide, original testimony of witness given on inquest trial held inadmissible to contradict witness. *Dean v. State*, 47 Cr. R. 243, 83 S. W. 816.

Testimony held admissible to show that the person referred to as J. L. in depositions to impeach witness, and said to have made a certain statement, was M. C. L., the witness attempted to be impeached. *Spencer Shoe Co. v. Jaramillo*, 37 C. A. 497, 84 S. W. 241.

Where the stenographer who took the testimony of a witness at a former trial testified to the accuracy of his notes, the court properly permitted him to read from his notes for the purpose of impeaching the witness. *Casey v. State*, 50 Cr. R. 392, 97 S. W. 496.

For the purpose of showing testimony of witness at a former trial, held improper to admit official stenographer's notes not signed by witness or otherwise certified by him to be correct. *Prewitt v. Southwestern Telegraph & Telephone Co.*, 46 C. A. 123, 101 S. W. 812.

Testimony by the secretary of the grand jury that found the indictment for murder held not admissible to impeach a witness. *McGill v. State*, 60 Cr. R. 614, 132 S. W. 941.

115. — **Rebuttal of evidence of inconsistent statements.**—Offer to prove contradictory statements of witness held not to authorize them to be supported by evidence of reputation for veracity. *Gulf, C. & S. F. Ry. Co. v. Younger* (Civ. App.) 40 S. W. 423.

Where a witness' credibility has been impeached by cross-examination and proof of contradictory statements, proof of the witness' reputation for truth and veracity is proper in rebuttal. *Fox v. Robbins* (Civ. App.) 70 S. W. 597; *Runnels v. State*, 45 Cr. R. 446, 77 S. W. 458; *Conretras v. San Antonio Traction Co.* (Civ. App.) 83 S. W. 870; *Swain v. State*, 48 Cr. R. 98, 86 S. W. 335; *Missouri, K. & T. Ry. Co. of Texas v. Dumas* (Civ. App.) 93 S. W. 493; *Harris v. State*, 49 Cr. R. 338, 94 S. W. 227; *Brown v. State*, 52 Cr. R. 267, 106 S. W. 368; *Kansas City Southern Ry. Co. v. Williams* (Civ. App.) 111 S. W. 196; *Gra-*

ham v. State, 57 Cr. R. 104, 123 S. W. 691; *Houston Electric Co. v. Faroux* (Civ. App.) 125 S. W. 922; *Dickson v. State* (Cr. App.) 146 S. W. 914.

In a prosecution for homicide, the defendant, in order to contradict a witness, having introduced a portion of his testimony at the inquest, the state held entitled to offer only so much of the balance as was germane and explanatory of that offered by the state. *Corpus v. State*, 51 Cr. R. 315, 102 S. W. 1152.

Where defendant, his wife, and son, were charged with homicide and jointly applied for bail and were subsequently separately tried, the erroneous admission of the son's testimony on his own trial as original evidence in behalf of his father did not authorize the state to offer the son's evidence in the habeas corpus bail proceedings. *Smith v. State*, 52 Cr. R. 27, 105 S. W. 182.

Defendant having laid predicates to impeach a witness by contradictory statements, the court did not err in permitting the state to cause the witness to identify an alleged written statement made and signed by the witness immediately after the killing. *Edwards v. State*, 61 Cr. R. 307, 135 S. W. 540.

A witness impeached by proof of a contradictory statement is properly permitted to testify, when recalled, as to what he actually said to the impeaching witness. *Cain v. State* (Cr. App.) 153 S. W. 147.

The exclusion of evidence as to the good reputation of a witness for defendant for truth and veracity was proper where the state did not attack his general reputation, although it had impeached him by proving contradictory statements. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

The exclusion of statements as to what impeaching witnesses had said to a state's witness, offered to contradict the state's witness, was not error, where there was no necessity of explaining the statements of the state's witness. *Pullen v. State* (Cr. App.) 156 S. W. 935.

116. — Evidence as to statements consistent with testimony.—Contradicted witness, see post.

Where a statement made by a witness out of court was introduced in evidence to discredit the witness, other statements by the witness in support of his testimony were admissible. *Keith v. State* (Cr. App.) 44 S. W. 849; *Johnson v. Same*, 42 Cr. R. 377, 60 S. W. 48; *Louder v. Same*, 46 Cr. R. 121, 79 S. W. 552; *Simpson v. Same*, 46 Cr. R. 551, 81 S. W. 320; *Wallace v. Same*, 46 Cr. R. 341, 81 S. W. 966; *Franklin v. Same* (Cr. App.) 88 S. W. 357; *St. Louis Southwestern Ry. Co. of Texas v. Irvine* (Civ. App.) 89 S. W. 428; *Craven v. State*, 49 Cr. R. 78, 90 S. W. 311, 122 Am. St. Rep. 799; *Casey v. Same*, 50 Cr. R. 392, 97 S. W. 496; *Rice v. Same*, 50 Cr. R. 648, 100 S. W. 771; *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507; *Cabrera v. State*, 56 Cr. R. 141, 118 S. W. 1054; *Missouri, K. & T. Ry. Co. of Texas v. Sharp* (Civ. App.) 120 S. W. 263; *Hardin v. State*, 57 Cr. R. 401, 123 S. W. 613; *Pitts v. Same*, 60 Cr. R. 524, 132 S. W. 801; *Streight v. Same*, 62 Cr. R. 453, 138 S. W. 742; *Lewis v. Same*, 64 Cr. R. 490, 142 S. W. 875; *Mitchell v. Same* (Cr. App.) 144 S. W. 1006; *Dickson v. Same*, 146 S. W. 914; *Green v. Same*, 147 S. W. 593; *Collins v. Same*, 148 S. W. 1065; *Foster v. Same*, 150 S. W. 936; *Mason v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 151 S. W. 350; *Bosley v. State* (Cr. App.) 153 S. W. 878; *Gradington v. Same*, 155 S. W. 210; *Gulf, C. & S. F. Ry. Co. v. Franklin* (Civ. App.) 155 S. W. 553.

A charge on the effect of impeaching a witness held erroneous. *Poyner v. State*, 40 Cr. R. 640, 51 S. W. 376.

A party could not show statements by him out of court, consistent with his testimony, to rebut evidence of contradictory statements. *White v. State*, 42 Cr. R. 567, 62 S. W. 575; *Welch v. Same*, 50 Cr. R. 28, 95 S. W. 1035; *Williams v. Kirby Lumber Co.* (Civ. App.) 136 S. W. 1182.

Evidence of a witness concerning a conversation, contradictory to the evidence of other witnesses, held admissible, though the witness did not hear all of the conversation. *Kelly v. State* (Cr. App.) 71 S. W. 756.

Testimony of county attorney as to what certain witnesses had testified to before the grand jury, held proper. *Lee v. State*, 44 Cr. R. 460, 72 S. W. 195.

In an action against a railroad for injuries, statements made by plaintiff to a witness several hours after the accident held inadmissible to support plaintiff's testimony. *McCowen v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 73 S. W. 46.

In an action by a servant for injuries, certain evidence of plaintiff's counsel held admissible, as showing that evidence introduced by plaintiff of master's promise to repair the appliance causing the injury was not fabricated. *Gulf, C. & S. F. Ry. Co. v. Garren*, 96 T. 605, 74 S. W. 897, 97 Am. St. Rep. 939.

Action of the court, in permitting portions of plaintiff's deposition to be read after she had testified, held, under the circumstances, proper. *Wilson v. Wilson*, 35 C. A. 192, 79 S. W. 839.

Evidence of statement of subscribing witness to will alleged to be a forgery, when delivering instrument to justice of the peace, held admissible to corroborate such witness' testimony. *Dolan v. Meehan* (Civ. App.) 80 S. W. 99.

Evidence of what a witness has said out of court cannot be received to sustain his testimony, except where an effort has been made to impeach his credibility. *Glover v. Coit*, 36 C. A. 104, 81 S. W. 136.

The state, on the impeachment of a witness by proof of contradictory statements, may prove that the witness gave testimony before the grand jury in accord with his testimony on the trial. *Burch v. State*, 49 Cr. R. 13, 90 S. W. 168.

An accused whose testimony is impeached by contradictory statements is entitled to prove that he had made the same statements out of court that he made at the trial. *Hudson v. State*, 49 Cr. R. 24, 90 S. W. 177.

Accused having induced an accomplice to admit that he had made false declarations prior to the trial, denying his complicity, the state held not thereby entitled to show that, after inducements had been made to him, he made declarations similar to his testimony. *Anderson v. State*, 50 Cr. R. 134, 95 S. W. 1037.

An accomplice stands with respect to credibility like other witnesses, and his testimony may be corroborated by proof of statements out of court in line with his testimony. *Rice v. State*, 50 Cr. R. 648, 100 S. W. 771.

Where a witness admitted that he had told counsel for accused a different story than that testified to, the state held properly permitted to ask him if he had not told other persons in effect the same as he had testified. *Romero v. State*, 56 Cr. R. 435, 120 S. W. 859.

Certain evidence, tending to corroborate testimony of plaintiff on a material issue, held erroneously excluded. *Phillips v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 136 S. W. 542.

Testimony corroborating a witness sought to be impeached by accused held admissible. *Campbell v. State*, 62 Cr. R. 561, 138 S. W. 607.

Self-serving declarations, made by a shipper of horses, as to damage during transportation, held not admissible in corroboration of his testimony to remove the effect of impeachment by showing statements to a prospective purchaser of the horses that they were all right. *Galveston, H. & S. A. Ry. Co. v. Young & Webb* (Civ. App.) 148 S. W. 1113.

In an action by a passenger for personal injuries, a section foreman, who was impeached by proof of inconsistent declarations, cannot be corroborated by proof of exculpatory declarations made when in jail charged with an offense in connection with the accident. *Ft. Worth & D. C. Ry. Co. v. Matchett* (Civ. App.) 152 S. W. 1113.

117. — **Explanation of inconsistency.**—Where a deposition of plaintiff was introduced to impeach her, it was proper to let her explain that portions of her answers were left out by the notary. *Missouri, K. & T. Ry. Co. v. Walden* (Civ. App.) 46 S. W. 87.

Where defendant introduced part of the previous testimony of one of plaintiff's witnesses to impeach him, the balance was properly admitted. *Thornton v. State* (Cr. App.) 65 S. W. 1105.

Redirect examination of a witness as to statements inquired about on cross-examination held proper. *Barber v. State* (Cr. App.) 69 S. W. 515.

Where a witness is impeached by showing his contradictory testimony at a former trial, held competent to show the mental condition of the witness at the former trial. *Weaver v. State*, 46 Cr. R. 607, 81 S. W. 39.

In an action for injuries to a servant, refusal to permit the servant to explain on redirect examination a matter brought out on cross-examination held, in view of the previous explanation made by him, not error. *Reynolds v. International & G. N. Ry. Co.*, 38 C. A. 273, 85 S. W. 323.

Where facts tending to impeach the integrity of a witness or motive of a party are brought out on cross-examination, he will be permitted, on redirect examination, to explain such facts. *Comer v. Thornton*, 38 C. A. 287, 86 S. W. 19.

Where, in a criminal case, the state offered in evidence for the purpose of impeaching a witness for accused, parts of his testimony on a former trial, accused was entitled to offer in evidence any part of the former testimony of the witness, explaining, modifying, or contradicting the portion introduced by the state. *Casey v. State*, 50 Cr. R. 392, 97 S. W. 496.

Where, in a prosecution for homicide, defendant introduced part of the evidence of a witness at the inquest, to contradict her testimony, the balance of the witness' evidence given at the inquest, then offered by the state, held properly admitted as explanatory. *Corpus v. State*, 51 Cr. R. 315, 102 S. W. 1152.

On cross-examination of a witness, held proper to bring out the entire conversation, part of which he had testified to. *Hood v. State*, 52 Cr. R. 524, 107 S. W. 848.

In a prosecution for seduction, evidence as to prosecutrix's physical condition at the time of writing a letter at variance with her testimony on the trial of the case held material. *Faulkner v. State*, 53 Cr. R. 258, 109 S. W. 199.

Witness for accused having given conflicting evidence, accused could prove that his first statement was made because of threats of personal injury. *Cornett v. State*, 54 Cr. R. 372, 112 S. W. 1071.

Evidence by the state as to what prosecuting witness had told another as to the transaction held admissible, where accused had shown his statements out of court contradicting his testimony. *Harville v. State*, 54 Cr. R. 426, 113 S. W. 253.

A witness whose evidence has been impeached held entitled to an opportunity to explain the impeaching evidence. *Texarkana Gas & Electric Co. v. Lanier* (Civ. App.) 126 S. W. 67; *Spencer v. State*, 59 Cr. R. 217, 123 S. W. 118; *Dooley v. Boiders* (Civ. App.) 128 S. W. 690.

In a prosecution for assault with intent to rape, certain testimony held admissible to explain prosecutrix's silence after the assault and contradictory statements made by her with reference thereto; accused having attempted to show such conduct by her to discredit her as a witness. *Ross v. State*, 60 Cr. R. 547, 132 S. W. 793.

The state having introduced in rebuttal for purposes of impeachment parts of testimony given by witnesses on another hearing, defendant was entitled to introduce the balance of the testimony. *Streight v. State*, 62 Cr. R. 453, 138 S. W. 742.

A witness, after being contradicted as to statements made, should have been permitted to state exactly what she said. *Id.*

On an attempt to impeach accused's witness, testimony held improperly excluded. *Kemper v. State* (Cr. App.) 138 S. W. 1025.

Where accused sought to impeach a state's witness by introducing a portion of his testimony at the examining trial, the state was entitled to support the witness by introducing the whole of such evidence. *Allen v. State*, 64 Cr. R. 225, 141 S. W. 983.

It is not improper to permit an injured employé, after being cross-examined relative to misrepresentations made by him as to his age at the time he secured employment, to explain such misrepresentations on redirect examination. *Missouri, K. & T. Ry. Co. v. Goodrich* (Civ. App.) 149 S. W. 1176.

118. — **Effect of impeachment by inconsistent statements.**—It is not necessary that impeaching testimony should absolutely falsify the evidence of the impeached witness. *Schwartz v. State*, 55 Cr. R. 36, 114 S. W. 809.

That a witness is shown to have testified differently at a former trial goes to the credibility of his testimony, but not its competency. *Anderson v. Houston Motor Car Co.* (Civ. App.) 131 S. W. 419.

The only office of impeaching testimony being to break the effect of damaging evidence, the state cannot make out a case by impeaching its own witnesses. *Antu v. State* (Cr. App.) 147 S. W. 234.

119. **Contradiction of testimony of witness.**—Witness cannot be impeached by proof of his commission of a theft, which he denies, and which is not a question at issue. *Winn v. Winn*, 23 C. A. 617, 57 S. W. 80.

The state held not bound by answers on cross-examination. *Fuller v. State*, 50 Cr. R. 14, 95 S. W. 541.

Evidence held inadmissible to contradict witness' statement on cross-examination respecting his own conduct. *Gonzales v. State*, 54 Cr. R. 230, 112 S. W. 941.

Testimony by a state's witness held admissible as to the appearance of a man seen by witness at prosecutrix's house. *Lemons v. State*, 59 Cr. R. 299, 128 S. W. 416.

Denial of an impeaching fact by a witness consisting of conviction of a misdemeanor, not involving moral turpitude, cannot be contradicted. *Wright v. State*, 63 Cr. R. 429, 140 S. W. 1105.

The state bringing out a matter on the cross-examination of a witness held not entitled to contradict the witness. *Baggett v. State* (Cr. App.) 144 S. W. 1136.

Where a witness had testified that he was not drunk at the time of the killing, and had drunk nothing thereafter, a justice who conducted the inquest the next day was entitled to testify that the witness was drunk at the inquest. *Wallace v. State* (Cr. App.) 145 S. W. 925.

Where the prosecuting witness had testified that she did not know whether she had been indicted for a felony within the last two or three years, an indictment against her for a felony, returned within two years, was admissible to impeach such statement. *Robinson v. State* (Cr. App.) 156 S. W. 212.

120. — **Right to contradict testimony of one's own witness.**—It was not competent for defendant to contradict his own witness, who made no damaging statements against him, and who appeared to have testified as was expected. *Cooksey v. State* (Cr. App.) 58 S. W. 103.

A party cannot contradict his own witness, unless he was surprised by some injurious statement made by the witness. *Texas & P. Ry. Co. v. Crump* (Civ. App.) 110 S. W. 1013.

A party cannot claim surprise at the testimony of a witness called by him, where the witness told counsel before being placed on the stand what the effect of his testimony would be. *Id.*

In an action against a railroad for injuries to a passenger, permitting plaintiff to state her remembrance as to an alleged conversation with her physician, testified to by him, held not error. *Gulf, C. & S. F. Ry. Co. v. Williams* (Civ. App.) 136 S. W. 527.

121. — **Witness cross-examined as to matter not subject of direct examination.**—New evidence, different from that given in the examining trial, being brought out in the cross-examination of a witness in a criminal prosecution, it was not error for the state, after having abandoned the witness, to cross-examine him as to his statement made on the examining trial. *Hodge v. State* (Cr. App.) 64 S. W. 242.

Action of prosecuting attorney in questioning defendant's witness as to matters not brought out by defendant held to make him as to such matters the state's witness. *Casey v. State* (Cr. App.) 90 S. W. 1018.

122. — **Disproving facts testified to by witness.**—Though a party may not impeach his witness, he may prove the truth of a fact by testimony in direct contradiction to that of the witness. *Pitman v. Holmes* (Civ. App.) 78 S. W. 961.

In an action on a note, defendant having called plaintiff as a witness, and he having denied a certain agreement, defendant was not thereby precluded from testifying that plaintiff made such agreement and failed to comply therewith. *Hedges v. Slaughter* (Civ. App.) 130 S. W. 592.

123. — **Testimony subject to contradiction in general.**—A witness' declaration that deceased was the aggressor is not admissible to impeach her, where she did not testify that she was present at the fight. *Taylor v. State* (Cr. App.) 43 S. W. 1019.

Evidence for defendant, contradicting what plaintiff's witness had said on cross-examination, held admissible. *Glasgow v. Hembree* (Civ. App.) 44 S. W. 679.

An attempt to prove what the father of defendant may have said to the witness as to the guilt of defendant, in order to impeach the witness on such hearsay testimony, is not permissible. *Poyner v. State* (Cr. App.) 48 S. W. 516.

In an action to recover for injuries to plaintiff's wife, where a witness testified that he did not remark to her "Are you hurt? you look like you are," held proper for the wife to testify in rebuttal that he did so remark. *Houston & T. C. R. Co. v. Harris* (Civ. App.) 70 S. W. 335.

In an action by landlord for rent, surveyor's testimony as to amount of tillable land, held not conclusive, so as to exclude contradicting evidence. *Turner v. Meier* (Civ. App.) 70 S. W. 984.

Certain cross-examination by the state held proper for purposes of impeachment. *Cogdell v. State* (Cr. App.) 74 S. W. 311.

Where a witness is asked, for the purpose of impeaching him, if he had ever been in the penitentiary, his answer cannot be contradicted. *Gulf, C. & S. F. Ry. Co. v. Johnson* (Sup.) 78 S. W. 224.

Cross-examination of witness as to a threat made against defendant held not competent for impeachment purposes. *Simpson v. State* (Cr. App.) 87 S. W. 826.

In an action for commissions, certain contradictory testimony held admissible. *Bluestein v. Collins* (Civ. App.) 103 S. W. 687.

In an action against a railroad for negligent death, the exclusion of evidence that a witness called by defendant had stated that decedent came to his death while attempting to board a moving train held proper. *Texas & P. Ry. Co. v. Crump* (Civ. App.) 110 S. W. 1013.

Certain evidence held admissible to contradict the sister of accused, claiming that a few days before the killing she had told him that decedent had been the cause of her removal as a teacher from one school to another. *Long v. State* (Cr. App.) 127 S. W. 551.

Where a witness for defendant testified as to statements made to him about the alleged robbery by the brother of the prosecuting witness, the state had the right to introduce the brother of prosecuting witness to contradict defendant's witness. *Green v. State* (Cr. App.) 147 S. W. 593.

124. — **Irrelevant, collateral or immaterial matters.**—It was error to admit testimony contradicting immaterial evidence of a witness. *Railway Co. v. Coon*, 69 T. 730, 7 S. W. 492; *Texas & P. Ry. Co. v. Phillips*, 91 T. 278, 42 S. W. 852; *Smye v. Groesbeck* (Civ. App.) 73 S. W. 972; *Baldridge v. State* (Cr. App.) 74 S. W. 916; *Drumm-Flato Commission Co. v. Union Meat Co.*, 33 C. A. 587, 77 S. W. 634; *Gulf, C. & S. F. Ry. Co. v. Matthews* (Civ. App.) 89 S. W. 983; *Keith v. State*, 50 Cr. R. 63, 94 S. W. 1044; *W. L. Moody & Co. v. Rowland*, 46 C. A. 412, 102 S. W. 911; *St. Louis & S. F. R. Co. v. McAnella* (Civ. App.) 110 S. W. 936; *Citizens' Ry. & Light Co. v. Johns*, 52 C. A. 489, 116 S. W. 62.

It is error to allow interrogation of defendant's witness on cross-examination as to matters not germane to a direct examination, and then impeach her as to such matters. *Welch v. State* (Cr. App.) 46 S. W. 812.

Generally a witness cannot be contradicted on a collateral matter. *Batcheller v. Besancon*, 19 C. A. 137, 47 S. W. 296; *Brundige v. State*, 49 Cr. R. 596, 95 S. W. 527; *Jones v. Same*, 51 Cr. R. 472, 101 S. W. 993; *Payne v. Same* (Cr. App.) 148 S. W. 694.

Where witnesses base their recollection on certain other facts happening in connection therewith, it is competent to show that they are mistaken as to the collateral facts. *Jefferson v. State* (Cr. App.) 49 S. W. 88.

Evidence held not incompetent, as impeaching on immaterial and irrelevant matters. *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 20 C. A. 688, 50 S. W. 417.

Cross-examination of defendant's witness held relevant, justifying his impeachment by the testimony of an opposing witness. *Bean v. State* (Cr. App.) 51 S. W. 946.

Where defendant's accomplice admitted hiding himself on the second day after the murder, the exclusion of the evidence that it was the first day thereafter held not prejudicial to defendant. *Rupe v. State*, 42 Cr. R. 477, 61 S. W. 929.

Held error to admit evidence of an attempted settlement by defendant's father for the purpose of impeachment. *Garcia v. State* (Cr. App.) 74 S. W. 916.

In an action for injuries, evidence tending to contradict a statement by a witness that he had been informed that plaintiff's general reputation was that of a shiftless man held not objectionable as an attempt to impeach the witness on an immaterial issue. *St. Louis Southwestern Ry. Co. of Texas v. Bryson*, 41 C. A. 245, 91 S. W. 829.

In a homicide case, the whereabouts of a person not called as a witness held material, rendering evidence thereof admissible as impeachment of the evidence of witnesses for accused. *Green v. State*, 49 Cr. R. 645, 98 S. W. 1059.

Testimony offered in a criminal prosecution to contradict the testimony of a witness brought out on cross-examination and to show that witness was an accomplice of defendant held properly rejected. *Keener v. State*, 51 Cr. R. 590, 103 S. W. 904.

Defendant not having been connected with the procuring of a witness to testify falsely, the examination of another witness as to the offering of money to such witness to testify falsely held to be on a matter collateral to the issue, and hence evidence to contradict witness on that subject was inadmissible. *Rice v. State*, 51 Cr. R. 255, 103 S. W. 1156.

In an action against a railway company by an engineer for injury caused in running into a preceding train, held proper to exclude questions whether on certain other occasions he had disobeyed rules. *Galveston, H. & S. A. Ry. Co. v. Quinn* (Civ. App.) 104 S. W. 397.

In a suit against a sleeping car company for loss of a ring, refusal of the court to permit defendant to delay the trial for the purpose of examining evidence taken at a former trial, and introducing it to impeach plaintiff's wife on a collateral matter, held not error. *Pullman Co. v. Vanderhoeven*, 48 C. A. 414, 107 S. W. 147.

The rule that a witness may be impeached by showing him to have made an erroneous statement in his testimony is subject to the limitation that resort may not be had to collateral matters. *Id.*

Illegal testimony cannot be contradicted. *Pryse v. State*, 54 Cr. R. 523, 113 S. W. 938.

A husband, suing for personal injuries to his wife, cannot, with a view of discrediting his testimony, be contradicted with respect to a prior claim made by him against a defendant. *Citizens' Ry. & Light Co. v. Johns*, 52 C. A. 489, 116 S. W. 62.

The testimony of defendant's wife, relied on to reduce the killing to manslaughter, that deceased raped her, and she told defendant thereof, was as to a material matter, within the rule as to impeachment. *Cameron v. State* (Cr. App.) 153 S. W. 867.

A witness cannot be impeached upon immaterial matters, such as whether he had in his possession a pistol at a given time. *Bogue v. State* (Cr. App.) 155 S. W. 943.

125. — **Competency of contradictory evidence.**—Where defendant sought to justify a killing on the ground that deceased had made insulting remarks concerning the former's wife, evidence that deceased had made complimentary remarks about her, at a time long prior to the remarks complained of, is inadmissible to impeach the witnesses testifying as to the insulting remarks. *Fossett v. State*, 41 Cr. R. 400, 55 S. W. 497.

A witness having denied jumping his horse on the street about the time of the crime, the prosecution may show, as impeaching him, that he was seen with accused jumping their horses on the street. *Blanco v. State* (Cr. App.) 57 S. W. 828.

Evidence is admissible to show that at a former trial a witness did not mention a fact to which he now testifies. *Pennybacker v. Hazlewood*, 26 C. A. 183, 61 S. W. 153.

Evidence held admissible in murder prosecution on cross-examination for purpose of impeachment. *McAnear v. State*, 43 Cr. R. 518, 67 S. W. 117.

In a suit against a hotel proprietor for appropriating money left by a lodger in his room, where defendant claimed that a third party appropriated the money, testimony as to the latter's reputation for honesty and fair dealing was admissible. *Salvini v. Legumazabel* (Civ. App.) 63 S. W. 183.

Fact that witness was contradicted held not sufficient to authorize proof of his veracity. *Kipper v. State*, 45 Cr. R. 377, 77 S. W. 611.

In an action for death of plaintiff's husband, plaintiff held entitled to introduce evidence of statements made by deceased just before his death, in rebuttal of other alleged statements testified to by defendant's witnesses. *Houston & T. C. R. Co. v. Turner*, 34 C. A. 397, 78 S. W. 712.

In an action on notes given for tuition in a commercial college, entries on the back of a receipt given defendant by plaintiff held admissible to contradict plaintiff's testimony that she was absent without leave. *Draughon v. Sterling* (Civ. App.) 103 S. W. 639.

On an issue as to the warranty of title of land, held that certain deeds were admissible to contradict the statement of a witness that he had never warranted title to such land. *Larkin v. Trammel*, 47 C. A. 548, 105 S. W. 552.

Evidence that an adopting parent intended to adopt the child and thought he had done so held admissible to contradict the testimony of a witness that when the parent filed the deed of adoption he instructed the clerk not to record it. *J. M. Guffey Petroleum Co. v. Hooks*, 47 C. A. 560, 106 S. W. 690.

In an action for personal injuries, certain evidence held admissible to impeach a doctor's testimony, but not to prove plaintiff's injury. *Galveston, H. & S. A. Ry. Co. v. Janert*, 49 C. A. 17, 107 S. W. 963.

In action by locomotive engineer for injuries caused by derailment of his train, evidence as to rule of company requiring preservation of broken ties held admissible to discredit witness for the defense. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365.

In a proceeding to condemn land, evidence that defendant four months before the proceedings had entered his land for taxation at less than \$30 per acre held admissible to contradict his testimony as to value. *Crystal City & U. R. Co. v. Isbell* (Civ. App.) 126 S. W. 47.

In an action against shippers for breach of contract to furnish cars for shipment of live stock, the exclusion of certain evidence held not error. *Missouri, K. & T. Ry. Co. of Texas v. Golson* (Civ. App.) 133 S. W. 456.

Certain evidence held admissible in a prosecution for incest to impeach prosecutrix. *Gross v. State*, 61 Cr. R. 176, 33 L. R. A. (N. S.) 477, 135 S. W. 373.

It is proper to ask questions of a contradicting witness in the same form as the predicates laid therefor. *Edwards v. State*, 61 Cr. R. 307, 135 S. W. 540.

To impeach a witness in a prosecution for murder, who stated that another person and himself heard the deceased threaten the accused, evidence that the other person, who had since died, was in a distant community at the time of the alleged threat held admissible. *Renn v. State*, 64 Cr. R. 639, 143 S. W. 167.

A witness, testifying to threats made by deceased in a prosecution for murder, may be impeached by testimony of another, who heard the threats, that they were uttered by the accused. *Id.*

Testimony which in no way contradicts the testimony of a witness sought to be impeached is not admissible. *Irvin v. State* (Cr. App.) 148 S. W. 589.

The state held properly permitted to identify a tool with which accused assaulted prosecuting witness, and to show that a witness for accused with whom he lived identified the tool as belonging to her, to dispute accused's witness' testimony that she did not identify the tool, and that accused was home the night of the offense, held admissible to impeach an alibi witness. *Payne v. State* (Cr. App.) 148 S. W. 694.

Evidence as to the trial and acquittal of another who was jointly indicted with accused was not admissible to affect the accuracy of the identification of accused by prosecuting witness. *Id.*

Where accused's mother testified that she did not know what caused the death, a few days subsequent to the homicide, of her daughter, whom, it was claimed, deceased expected to marry, testimony of a physician, tending to show that she died from the effects of poison, was not admissible to impeach the mother. *De Leon v. State* (Cr. App.) 155 S. W. 247.

In an action for commissions for procuring the sale of realty, a copy of an earnest money receipt given by defendant's agent to the purchaser was admissible to contradict the purchaser's evidence that he bought the property through plaintiff. *Carl v. Wolcott* (Civ. App.) 156 S. W. 334.

Accused's witness who testified as to the statement of a Mexican who saw the killing cannot be contradicted by statements of what the interpreter said the Mexican stated. *Garcia v. State* (Cr. App.) 156 S. W. 939.

126. — **Rebuttal of contradictory evidence.**—That plaintiffs, in trespass to try title, had been contradicted on material issues, did not authorize introduction of evidence in support of their reputation for truth and veracity. *White v. Epperson*, 32 C. A. 162, 73 S. W. 851.

The mere fact that a witness is contradicted does not authorize the admission of supporting evidence as to his reputation for truth. *Simmonds v. Simmonds*, 35 C. A. 151, 79 S. W. 630.

Where a state's witness was contradicted held competent for state to show his reputation for truth and veracity to be good. *Myers v. State* (Cr. App.) 101 S. W. 1000.

A witness may, in rebuttal, testify to a telephone conversation with defendant's wife, which was denied by the wife on cross-examination. *Reagan v. State* (Cr. App.) 157 S. W. 483.

127. **Corroboration of impeached or contradicted witness.**—Corroboration of unimpeached witness, see ante.

Proof of the reputation of a witness for truth is not admissible because his testimony is contradicted. *Tomson v. Heidenheimer*, 16 C. A. 114, 40 S. W. 425.

The question, "Did your message * * * involve any threats?" etc., is improper, as being leading. *Perkins v. Adams*, 17 C. A. 331, 43 S. W. 529.

Conflict between testimony of two witnesses held not to admit evidence as to reputation of one for truth and veracity. *Harris v. State* (Cr. App.) 45 S. W. 714.

The fact that the cross-examination was of a character tending to impeach a witness does not authorize evidence in rebuttal to show his reputation for truth and veracity. *Payne v. State*, 40 Cr. R. 290, 50 S. W. 363.

A conflict in evidence between a witness for the state and the defendant held not to authorize the state to introduce evidence of the witness' reputation for truth and veracity. *Jacobs v. State*, 42 Cr. R. 353, 59 S. W. 1111.

Where plaintiff testified as to his injuries, and defendant introduced evidence that plaintiff was feigning testimony as to plaintiff's truth and veracity held admissible in rebuttal. *Texas Cent. & N. W. Ry. Co. v. Weldeman* (Civ. App.) 62 S. W. 810.

Only where witness is a stranger will cross-examination authorize testimony to sustain witness. *Warren v. State*, 51 Cr. R. 593, 103 S. W. 883.

Where the defense was that the killing was provoked by disclosures made to accused by his wife of insults offered her by decedent, and the state attempted to show that the testimony of accused's wife as to such insults and of her disclosure thereof to accused was false, testimony that accused's wife made the same disclosures to her sister before the killing was admissible. *Akin v. State*, 56 Cr. R. 324, 119 S. W. 863.

A mere contradiction of a witness does not justify proof of good character for truth and veracity. *Adams v. International & G. N. R. Co.* (Civ. App.) 122 S. W. 895.

Where a person was a party defendant and also a witness, he as a party defendant had the same right to complain of an assault upon his credibility as witness as his codefendant. *Texarkana Gas & Electric Co. v. Lanier* (Civ. App.) 126 S. W. 67.

Where accused attempted to impeach a state's witness by proof that the witness was mad at accused and had stated that he would testify to enough to break accused's neck, it was competent for the state to corroborate the witness by his testimony at the examining trial shortly after the homicide, and before there was any trouble between accused and the witness. *Williams v. State* (Cr. App.) 148 S. W. 763.

A showing that a case against an accomplice, testifying for the state, had been dismissed is an attempt to impeach the witness by showing a corrupt motive, so that the state may introduce corroborative evidence. *Gusemano v. State* (Cr. App.) 155 S. W. 217.

Where defendant sought to impeach plaintiff, evidence as to statements made by him held admissible to corroborate his testimony. *Gulf, C. & S. F. Ry. Co. v. Franklin* (Civ. App.) 155 S. W. 553.

128. — **Testimony subject to corroboration.**—Witness held not authorized to testify to certain things on redirect examination to corroborate certain testimony given by him, because of contradictory statements on cross-examination, or because contradicted as to other matters. *Parker v. State*, 43 Cr. R. 526, 67 S. W. 121.

The existence of a conflict between the testimony of a witness for defendant and plaintiff does not authorize corroborating proof on plaintiff's part of an otherwise immaterial circumstance. *Reynolds v. International & G. N. Ry. Co.*, 38 C. A. 273, 85 S. W. 323.

129. — **Competency of corroborative evidence in general.**—A subscribing witness to a deed, having proven the execution of the instrument, was impeached as to his truth and veracity. Facts and circumstances independent of the deed, and contemporaneous with its execution, coupled with evidence of possession of the title papers by the grantee, and his acts and declarations in regard to the land conveyed by the deed, repeated through a series of years, were admissible in corroboration of the evidence of the impeached witness. *Newby v. Haltaman*, 43 T. 314; *Cox v. Cock*, 59 T. 521; *Belcher v. Fox*, 60 T. 527.

A witness may testify that he saw defendant at a crap game, though he did not see him play. *Washington v. State* (Cr. App.) 50 S. W. 341.

Where the defendant testifies that he paid a certain sum to W. for the plaintiff as a part consideration of the note sued on, an answer filed by plaintiff, in an action by W. against him, held admissible as tending to corroborate defendant. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

Certain evidence held not brought out by defendant, so as to render admissible certain other testimony as corroborative thereof. *Owens v. State* (Cr. App.) 63 S. W. 634.

Where persons stated to district attorney that defendant had stolen a horse and sent it to a certain place, evidence that sheriff went there and found it held inadmissible. *Id.*

Certain evidence held admissible on trial for homicide, as corroborating testimony of defendant's wife as to insults offered by deceased. *Messer v. State*, 43 Cr. R. 97, 63 S. W. 643.

In a prosecution for theft of a buggy and harness, testimony by a witness for the state, who claimed that he acted as a detective in the transaction, that a third person reported to him that he had bought a buggy and harness from defendant and had sold it to another party, etc., held not admissible. *Mercer v. State* (Cr. App.) 66 S. W. 555.

Question asked a witness, whether he knew a third party's reputation for honesty and fair dealing, was not objectionable as not so framed as to find out first whether witness knew the party's reputation. *Salvini v. Legumazabel* (Civ. App.) 68 S. W. 183.

Where a doctor testified that he prescribed for insured, held not error to allow a druggist to testify that he filled the prescriptions. *Flippen v. State Life Ins. Co.*, 30 C. A. 362, 70 S. W. 787.

In a prosecution for violating a local option law, evidence of persons to whom it was claimed prosecutor gave beer alleged to have been purchased from defendant held inadmissible to corroborate prosecutor. *Seiwert v. State*, 51 Cr. R. 404, 103 S. W. 932, 933.

In an action for a broker's commission, certain evidence held not admissible to corroborate defendant's testimony. *Hansen v. Williams* (Civ. App.) 113 S. W. 312.

Evidence of a declaration of deceased after being stabbed held admissible as confirmatory of the witness' statement concerning the details and her presence and familiarity with the tragedy. *Fleming v. State*, 54 Cr. R. 339, 114 S. W. 383.

Where accused on trial for assault with intent to rape impeached prosecutrix, testimony of complaints by prosecutrix and of her condition immediately after she had escaped from accused was admissible. *Rogers v. State* (Cr. App.) 143 S. W. 631.

In a prosecution for assault to murder, evidence of the finding of prosecutor's hat and certain tracks near where the difficulty was claimed to have occurred held admissible to support the prosecutor's testimony that he had been jerked into a buggy, held down, and shot, at which time he lost his hat. *Wilson v. State* (Cr. App.) 155 S. W. 242.

130. — **Former statements corresponding with testimony.**—Witness impeached by showing inconsistent statements, see ante.

Where design to misrepresent, from some motive of interest, has been imputed to a witness, a former statement, made by him at a time when the supposed motive did not exist, is admissible in confirmation of his evidence. *Lewy v. Fischl*, 65 T. 311.

It is not competent to show that a witness had made the same statement on a former trial, no attack having been made upon the witness as testifying differently. *Hunter v. Lanius*, 82 T. 677, 18 S. W. 201; *Taliaferro v. Gondelock*, 82 T. 521, 17 S. W. 792.

A witness whose testimony is attacked as a fabrication may support the same by proof of statements made when no motive for fabrication existed. *Jones v. State* (Cr. App.) 41 S. W. 638, 70 Am. St. Rep. 719.

Hearsay evidence is not admissible to corroborate witnesses. *Newton v. Alexander* (Civ. App.) 44 S. W. 416.

A witness cannot be corroborated by proof of his own statements, where it is not claimed that he had made contrary statements, or that his testimony has been fabricated. *Doucette v. State* (Cr. App.) 45 S. W. 800.

Evidence that the defendant had made the same statements before he could have had any motive to fabricate testimony is admissible to show that his testimony is not a recent fabrication, when it is attacked as such. *Ballow v. State*, 42 Cr. R. 263, 58 S. W. 1023.

Statements by a party held admissible as corroborative after attempted impeachment, though favorable to herself. *Davis v. Davis*, 44 C. A. 238, 98 S. W. 198.

Mere attempt to break down the evidence of a state's witness by cross-examination did not authorize the introduction of testimony of the witness given at other times, unless connected with, and explanatory of, the testimony introduced to contradict the witness. *Corpus v. State*, 51 Cr. R. 315, 102 S. W. 1152.

In a suit to enforce a parol trust alleged to have been made by an agent of defendant and plaintiff, exclusion of statements made by the agent after the termination of the agency in corroboration of his testimony held proper. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

Where it is sought to impeach a witness, proof that the witness at other times made statements similar to his testimony held admissible to corroborate him. *Stephenson v. Jackson* (Civ. App.) 128 S. W. 1196.

Defendant having laid a foundation to impeach a state's witness by contradictory statements, the state was authorized to introduce the witness' testimony at an inquest, which was the same as the testimony at the trial, to support him. *Edwards v. State*, 61 Cr. R. 307, 135 S. W. 540.

The state held not entitled to support the testimony of its witness by proving a similar statement at another time and place. *Dorman v. State*, 64 Cr. R. 104, 141 S. W. 526.

Defendant prosecuted for sale of whisky, which he claimed was taken, could not after testifying that it belonged to him and D., and had been ordered for their own use, corroborate his testimony by that of D. that he reported to D. that some one had taken their whisky, and run off with it. *Carver v. State* (Cr. App.) 150 S. W. 914.

In an action on a bond, evidence of a conversation between the obligor and the surety as to the obligee held inadmissible as hearsay when offered to corroborate the testimony of the surety as to what transpired between him and an agent of the obligee. *White Sewing Mach. Co. v. Wingo* (Civ. App.) 152 S. W. 187.

Where, in an action on notes, the evidence as to whether they were indorsed to plaintiff bank before maturity conflicted, and its president testified they purchased before maturity, a letter, dated before maturity, signed by the president addressed to another bank, stating that they purchased the notes on such bank's recommendation dated before the notes' maturity was admissible to support the president's testimony at trial. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 152 S. W. 646.

Where it is sought to show that an accomplice testifying for the state was testifying from corrupt motives, he can be corroborated by showing that before the motive existed he had made the same statement. *Gusemano v. State* (Cr. App.) 155 S. W. 217.

Where defendant, in attacking the credibility of a witness who was an admitted accomplice, proved that he had been promised immunity, held, that there was no error in permitting the witness to show that he had made the same statement to the county attorney before he had been promised immunity as he had made on the stand. *Holmes v. State* (Cr. App.) 156 S. W. 1172.

RULE 2. EVIDENCE IS THE MEANS BY WHICH THE ISSUE IS DETERMINED

Statement of the rule.—Evidence is the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. *Johnson v. Brown*, 25 T. 120. As to who are competent witnesses, see Introductory, ante, and Arts. 3688-3691, post.

RULE 3. ADMISSIBILITY OF EVIDENCE A QUESTION FOR THE JUDGE

See notes under Art. 1971.

RULE 4. THE EFFECT OF EVIDENCE IS A QUESTION FOR THE JURY

See notes under Art. 1971.

RULE 5. EVIDENCE MUST RELATE TO FACTS IN ISSUE AND TO RELEVANT FACTS

1. Relevancy and importance in general.
2. Certainty.
3. Remoteness.
4. Tendency to mislead or confuse.
5. Negative evidence.
6. Circumstantial evidence of facts in issue.
7. Matters showing relevancy of other facts.
8. Matters explanatory of facts in evidence or of inferences therefrom.
9. Evidence irrelevant unless preceded or followed by other evidence.
10. Identity.
11. Personal relations.
12. Nature and condition of property or other subject-matter.
13. Character or reputation.
14. — Honesty and integrity.
15. — Chastity and temperance.
16. — Right to prove specific facts.
17. Pecuniary condition.
18. Motive, intent and good faith.
19. Knowledge or notice.
20. — Diligent inquiry.
21. — Waiver of notice.
22. Statements and conduct of parties.
23. Customs and course of business.
24. Value of services.
25. Value or market price of property.
26. — Time and place of valuation.
27. — Appraisal of property.
28. — Corporate stock.
29. — Comparison with other property.
30. — Crops.
31. — Cost of property and amount received in general.
32. — Cost of production.
33. — Rental value.
34. — Insurance.
35. — Judicial sale.
36. — Amount for which property can be purchased.
37. — Amount for which property will sell.
38. — Tax assessment.
39. — Circumstances adding to or deducting from value in general.
40. — Animals.
41. Laws of other state or country.
42. Date of organization of county.
43. Time of election of officer.
44. Violation of anti-trust law.
45. Discrimination in taxation.
46. Dedication.
47. Public character of road.
48. Validity of purchase of school land.
49. Illegitimacy of child.
50. Marriage.
51. Separation of husband and wife.
52. Residence.
53. Wills, matters affecting validity of.
54. — Allowance under will.
55. Gift.
56. Partnership and partnership transactions.
57. Collusive appointment of receiver.
58. Injunction.
59. Partition.
60. Boundaries.
61. Indebtedness.
62. — Assumption.
63. Money lent.
64. Loan or sale.
65. Payment.
66. — By mistake.
67. Usury.
68. — Parol evidence.
69. Lien and waiver thereof.
70. Liabilities on bonds.
71. Release of mortgage.
72. Execution of notes.
73. Validity of notes.
74. Execution of lease.
75. Eviction of tenant.
76. Liability for rent.
77. Alteration of instruments.
78. Forgery.
79. Employment in general.
80. Authority of agent.
81. Contract in general.
82. Execution of contract.
83. Mistake in contract.
84. Modification of contract.
85. Construction of terms of contract.
86. Performance or breach of contract.
87. — Contract of employment.
88. — Contract of insurance.
89. — Contract of sale.
90. — Contract of carrier.
91. — Marriage promise.
92. Conveyance.
93. Establishment and execution of lost deeds.
94. Breach of covenant.
95. Ratification of void deed.
96. Trust.
97. Construction of trust deed.
98. Specific performance.
99. Stockholder's liability.
100. Contribution.
101. Title and possession.
102. — Documentary evidence.
103. Conversion.
104. Trespass.
105. — By cattle.
106. Negligence.
107. Place of accident.
108. Independent contractor.
109. Delay of carrier.
110. Delay in delivering message.
111. Failure to send or deliver message.
112. Ejectment of passengers and others from trains.
113. Unlawful arrest and false imprisonment.
114. Malicious prosecution.
115. Waters and water courses—Obstruction.
116. — Diversion.
117. Libel and slander.
118. Wrongful release of judgment.
119. Wrongful attachment, execution or sequestration.
120. Fraud and fraudulent conveyances.
121. Undue influence and mental incapacity.
122. Nuisance.
123. Damages.
124. — Personal injuries.

1. Relevancy and importance in general.—The fact that evidence may be weak and have but slight bearing on the issue to be tried affords no reason for its exclusion. *Armendal v. Stillman*, 67 T. 458, 3 S. W. 678.

It is not necessary that the fact sought to be proved should have immediate reference to the issue; it is sufficient if the evidence refer to a fact relevant to a fact in issue. *Hunter v. Lanus*, 82 T. 677, 18 S. W. 201.

In a suit by a wife for divorce, on an issue as to whether the husband gave her a venereal disease, it may be shown that he sent her a package of medicine with instructions how to use it. *Hanna v. Hanna*, 3 C. A. 51, 21 S. W. 720.

The fact that a grantee sought to hold his grantor liable on a covenant of warranty did not tend to show that the grantee did not regard the grantor as a nominal party to the deed. *Edinburgh American Land Mortg. Co. v. Briggs* (Civ. App.) 41 S. W. 1036.

Evidence offered by plaintiff's counsel for the benefit of a purchaser pendente lite from plaintiff is not admissible. *Smith v. Olsen* (Civ. App.) 44 S. W. 874.

In an action for death (by collision) of an alleged passenger, that a witness has been taken by the defendant to testify before the railroad commission as to "double headers" is properly excluded, as impertinent. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 28 C. A. 260, 67 S. W. 140.

In an action to rescind the purchase of a judgment, a proposition which contained no specific offer to rescind held properly excluded. *Hume v. John B. Hood Camp Confederate Veterans* (Civ. App.) 69 S. W. 643.

Evidence, in action to cancel lease of land for gas and oil development, to show amount of oil land under lease by defendant and efforts to acquire other land, held admissible. *J. M. Guffey Petroleum Co. v. Oliver* (Civ. App.) 79 S. W. 884.

Where, pending a suit by a mortgagor to set aside the mortgage, he died, and a purchaser from him intervened on the same grounds, held not error to admit in evidence the date of the filing of the original petition in the action. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1105.

In an action for grass and water consumed by defendant's cattle, certain evidence held admissible. *Lyons v. Slaughter* (Civ. App.) 87 S. W. 182.

Evidence material only on a question, issue as to which is not raised, held improperly admitted. *Oneal v. Weisman*, 39 C. A. 592, 88 S. W. 290.

In a suit by a foreign corporation on a foreign judgment, defendant may show that the judgment arose out of a transaction entered into by the corporation in the state of the forum, without having had a permit to do business there. *St. Louis Expanded Metal Fireproofing Co. v. Bellharz* (Civ. App.) 88 S. W. 512.

Evidence that witness had been appointed by plaintiff to arbitrate the differences between plaintiff and defendant railroad company held immaterial. *Eastern Texas R. Co. v. Moore* (Civ. App.) 94 S. W. 394.

In an action on a promissory note against the maker and another, who had agreed to assume payment thereof, a certain question held to have been erroneously permitted to be asked the maker by his codefendant. *Jockusch, Davison & Co. v. O. T. Lyon & Son*, 100 T. 594, 102 S. W. 396.

Where the objections urged against the admission of testimony only went to its weight and not to its admissibility, the court erred in excluding it. *International & G. N. R. Co. v. Jackson*, 47 C. A. 26, 103 S. W. 709.

The exclusion of certain evidence held not ground for the reversal of a judgment. *Punchard v. Masterson* (Civ. App.) 103 S. W. 826.

In an action to recover from vendor money paid for land, contract for the sale of which was forfeited by the state, certain evidence held admissible. *Slaughter v. Cooper* (Civ. App.) 107 S. W. 897.

In a suit for personal injuries, evidence that plaintiff was prosecuting the suit on a pauper's affidavit, and that his son-in-law had refused to become surety on the bond for costs, is irrelevant. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 49 C. A. 184, 108 S. W. 490.

The function of the judge in determining the relevancy of evidence is not that of a final arbiter, and, if the fact offered presents a reasonable inference in support of a material issue, it is his duty to admit it, leaving the weight thereof to the jury. *Kansas City, M. & O. Ry. Co. of Texas v. Young*, 50 C. A. 610, 111 S. W. 764.

Evidence which tends to raise collateral issues should be rejected. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

In an action against a city by grantees of a franchise to build a street railway for damages resulting from a forfeiture of the franchise, certain evidence held inadmissible. *Spencer v. City of Palestine*, 54 C. A. 392, 116 S. W. 857.

In an action on a lease, evidence of subsequent conversations and negotiations between witness and defendant and with the landlord's agents held irrelevant. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

In an action to recover loss sustained by failure to fully insure rice left with defendant to be milled and sold, certain evidence held admissible. *Broussard v. South Texas Rice Co.* (Civ. App.) 120 S. W. 587.

Evidence that an attorney, consulted with a view of employing him to bring the suit in question, did not bring it is irrelevant and immaterial. *International & G. N. R. Co. v. Duncan*, 55 C. A. 440, 121 S. W. 362.

In condemnation proceedings, the admission of certain evidence held prejudicial. *Stephenville North & South Texas Ry. Co. v. Moore*, 56 C. A. 553, 121 S. W. 882.

The pleadings must first be considered in determining whether evidence is relevant; the test of relevancy not being whether the issues raised will be submitted to the jury. *San Antonio Traction Co. v. Higdon* (Civ. App.) 123 S. W. 732.

"Relevant," as applied to testimony, means that the testimony bears upon the issues so as to tend to prove or disprove them, but testimony may be relevant if it is only a link in the chain of evidence tending to prove the issues by reasonable inference, though not directly bearing upon them. *Id.*

In an action for injuries to a passenger, evidence that plaintiff had a half-fare permit which purported to exempt defendant from liability held properly excluded. *Houston & T. C. R. Co. v. Swancey* (Civ. App.) 128 S. W. 677.

It is permissible to prove any fact that is relevant to the main fact, and relevancy is determined by the fact that men will ordinarily infer the existence of the main fact from proof of the existence of the other fact. *Dudley v. Strain* (Civ. App.) 130 S. W. 778.

An objection to certain evidence held without merit. *Lone Star Lignite Mining Co. v. Caddell* (Civ. App.) 134 S. W. 841.

Where defendant was not called upon to account for his absence at the trial, the fact that he was paralyzed was properly excluded. *Fritter v. Pendleton* (Civ. App.) 134 S. W. 1186.

In an action by an assignee of an account, certain testimony of the assignor held irrelevant. *Stuart v. Calahan* (Civ. App.) 142 S. W. 60.

In an action by the owner against a railroad company for destruction of property by fire, the admission in evidence of an agreement between the company insuring the property and the owner by which the owner was to sue at his own expense, and giving the insurance company half the recovery, did not affect the judgment against the railroad company. *Missouri, K. & T. Ry. Co. of Texas v. Murray* (Civ. App.) 150 S. W. 217.

The meaning of the word "relevant," as applied to evidence, is that which directly relates to the issue made by the pleadings. *Wells Fargo & Co. Express v. Gentry* (Civ. App.) 154 S. W. 363.

2. Certainty.—The fact that a witness can only give his recollection of a conversation, about the correctness of which he is not certain, or that he is able to detail only a part of a conversation, will not exclude his testimony; it becomes a matter for the jury in considering his credibility. *Simpson v. Brotherton*, 62 T. 170. A witness who has no positive recollection of a fact testified about, and who is yet satisfied, from the circumstances which he does remember, that a fact existed, should be allowed to detail those circumstances. If his deduction from the circumstances detailed seems unreasonable, the evidence may be excluded; otherwise it should go to the jury, who are to weigh and judge. *Davie v. Terrill*, 63 T. 105.

Testimony that plaintiff appeared to have a fine practice held sufficiently definite on question of damages by injury disabling him. *Gulf, C. & S. F. Ry. Co. v. Brown*, 16 C. A. 93, 40 S. W. 608.

Testimony as to amount spent for medicine held not too vague and uncertain to be admissible. *Texas Portland Cement & Lime Co. v. Ross*, 35 C. A. 597, 81 S. W. 94.

In an action for injuries at a crossing, testimony by one who was at a distance from the place of the accident that he heard a whistle blow in that neighborhood, but could not tell on what road the engine was, was immaterial. *Garber v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 118 S. W. 857.

The testimony of a witness as to the number of bales that could have been ginned, if there had been no delay in installing a press in a gin, held inadmissible because uncertain. *Reagan Round Bale Co. v. Dickson Car Wheel Co.*, 55 C. A. 509, 121 S. W. 526.

As it is the province of the jury to reconcile the inconsistencies in testimony, the court should not reject testimony on account of contradictions therein. *Atchison, T. & S. F. Ry. Co. v. Seeger* (Civ. App.) 126 S. W. 1170.

Admission of testimony that the rental value of land was 25 cents for every head of cattle it would pasture held not error, where others had testified how many it would pasture. *Buchanan v. Wilburn* (Civ. App.) 127 S. W. 1198.

Uncertainty of witness as to the date of an event held not to go to admissibility of his testimony, but to its weight. *Southern Kansas Ry. Co. of Texas v. Butler* (Civ. App.) 131 S. W. 240.

On an issue in an election contest as to the residence of a voter whose right to vote was denied, testimony held properly excluded as being indefinite and vague. *Linger v. Balfour* (Civ. App.) 149 S. W. 795.

3. Remoteness.—Probate and contest of wills, see Arts. 3271, 3272.

In an action for the value of a slave injured while employed by the defendants in a dangerous business without the knowledge of the owner, evidence that it was customary for slaves to assist one another in jobs undertaken by them was held to be too remote. *Phillips v. Wheeler*, 10 T. 536. A temporary custom cannot affect the rights of parties under a contract. To accomplish such a result it must be established, and so general in its application that all are presumed to know it. *Wootters v. Kauffman*, 67 T. 488, 3 S. W. 465.

Evidence of injury entailed by a ship channel held inadmissible, because the injury was primarily to the United States, and too remote. *Crary v. Port Arthur Channel & Dock Co.* (Civ. App.) 49 S. W. 703.

Evidence held too remote to show setting of fire by sparks from locomotive. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 23 C. A. 395, 67 S. W. 182.

That the time to which certain testimony offered in an action for injuries to a servant, related was nine months prior to the date of the accident only affected the weight of the testimony, and not its competency. *Missouri, K. & T. Ry. Co. of Texas v. Parrott*, 43 C. A. 325, 94 S. W. 1135, 96 S. W. 950.

Certain evidence held to be too remote on an issue of damages for injuries to the person. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

Evidence in an action to restrain the maintenance of a nuisance held properly excluded, as being too remote and speculative. *Boyd v. Schreiner* (Civ. App.) 116 S. W. 100.

On the issue whether a man and woman were married in January, 1840, certain evidence held inadmissible because too remote. *Phillips v. Palmer*, 56 C. A. 91, 120 S. W. 911.

In an action for injuries to cattle by delay in shipment during the year 1907, evidence that during the year 1902 similar shipments were usually made in from 30 to 36 hours was not inadmissible for remoteness. *Atchison, T. & S. F. Ry. Co. v. Davidson* (Civ. App.) 127 S. W. 895.

In an action for fraud circumstances, though remote, and entitled to but little weight in themselves, are admissible in evidence where they tend to aid the inquiry as to the truth of the matter. *Reed v. Holloway* (Civ. App.) 127 S. W. 1189.

In an action for brokers' commissions, evidence that plaintiffs had paid another broker commissions as the procuring cause of the sale held inadmissible. *Stephenson v. Jackson* (Civ. App.) 128 S. W. 1196.

Testimony which is too remote should be excluded. *Barnett v. Ward* (Civ. App.) 144 S. W. 697.

In an action for delay in the transportation of stock, evidence as to the time of the usual run from C. to Kansas City from 1898 to within the last two or three years held not

objectionable for remoteness. *Pecos & N. T. Ry. Co. v. Dinwiddie* (Civ. App.) 146 S. W. 280.

In an action for the price of a pump purchased March 14, 1910, a letter of warranty written November 11, 1909, was not objectionable for remoteness. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 147 S. W. 717.

4. **Tendency to mislead or confuse.**—Testimony that a master kept a certain sum from the servant's wages for a hospital fund held not to prejudice the jury in an action against the master for injuries. *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 20 C. A. 688, 50 S. W. 417.

5. **Negative evidence.**—For the purpose of showing that he had purchased the land in controversy without notice of a prior deed, the defendant offered to prove by a witness that at the time of the purchase of the land by his vendor he, as the vendor's attorney, examined the record of deeds in the county in which the land was situated, and found no conveyance of the land to any person. This evidence was properly excluded. *Edwards v. Barwise*, 69 T. 84, 6 S. W. 677.

One living and well acquainted in a community may testify that a certain person does not live there. *Dawson v. State*, 38 Cr. R. 50, 41 S. W. 599.

Officer having charge of deed records may testify as to deeds found of record from grantor, to aid description in deed to all of grantor's unsold lands in league named. *Smith v. Clay* (Civ. App.) 57 S. W. 74.

In an action on a policy, where defendant claimed that plaintiff had hired a person to burn the insured house, evidence that no one had been indicted for burning the house was not admissible. *Liverpool & L. & G. Ins. Co. v. Joy*, 26 C. A. 613, 62 S. W. 546, 64 S. W. 786.

In an action for injuries sustained by plaintiff on jumping from a moving train, which he had boarded to seat his wife, held proper to admit evidence that others had jumped off the train just before and in the presence of plaintiff without injury. *Texas & P. Ry. Co. v. Crockett*, 27 C. A. 463, 66 S. W. 114.

Evidence that no one had offered to stop the train, or warned plaintiff not to alight, held admissible. *Gulf, C. & S. F. Ry. Co. v. Shelton*, 30 C. A. 72, 69 S. W. 653.

In an action for injuries, testimony of a witness, who had had but a short acquaintance with plaintiff and her next friend, as to absence of complaint by the latter concerning plaintiff's health, held properly excluded. *City of Dallas v. Lentz* (Civ. App.) 81 S. W. 55.

In an action for the purchase price of a machine, where the defense was breach of warranty, it was error to permit a witness to testify that he had set up other machines of the same make and character, and had never had any complaint from the purchasers. *Haynes v. Piano Mfg. Co.*, 36 C. A. 567, 82 S. W. 532.

That a witness had examined the files in the office of the Secretary of State, and had failed to find any record of a charter of a corporation by a particular name, held inadmissible. *Cobb v. Bryan*, 37 C. A. 339, 83 S. W. 887.

On an issue as to the existence of a certain corporation, evidence that a witness had never heard of such an organization, in the place where it was alleged to have had its domicile or elsewhere, held admissible. *Id.*

Suppression of testimony by defendant cannot be proved by showing that plaintiff made an unsuccessful effort to procure the testimony claimed to have been suppressed. *Reynolds v. International & G. N. Ry. Co.*, 38 C. A. 273, 85 S. W. 323.

In an action for material furnished for a building under order of two of the sureties in the contractor's bond, held error to exclude the testimony of another surety, that he had no part in the assumption of the contractor's contract. *Bartley v. Comer* (Civ. App.) 89 S. W. 82.

In an action for injuries to a locomotive fireman, certain testimony held competent as tending to sustain plaintiff's evidence that he did not notice the dangerous condition of the apron causing the injury. *Galveston, H. & S. A. Ry. Co. v. Udalle* (Civ. App.) 91 S. W. 330.

In an action for injury to an employé by a ladder breaking while he was descending it into a tank car, another employé could not testify that no ladder ever broke with him, and that he was never injured by one in a tank car. *Adams v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 105 S. W. 526.

In an action for injuries to saloon fixtures, certain evidence as to another's ownership of the fixtures held inadmissible. *Temple v. Duran* (Civ. App.) 121 S. W. 253.

In an action against a railroad for damages to plaintiff's shipment of poultry by delay in transportation and failure to properly ice the car, the admission of evidence that certain other poultry was rejected by the consignee thereof and thereafter purchased by plaintiff and included in his shipment was error, the cause of the rejection not being stated, and the evidence being calculated to cause the jury to believe that the poultry was rejected because it was tainted or otherwise defective. *A. B. Patterson & Co. v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 126 S. W. 336.

That there was no record in the county clerk's office of a marriage license about the date of an alleged marriage does not show that no such license had been issued. *Wiess v. Hall* (Civ. App.) 135 S. W. 384.

Admission of testimony of persons not the legal custodians of records of deeds to show that there was no record of an alleged deed held error. *Mounger v. Daugherty* (Civ. App.) 138 S. W. 1070.

In an action by one partner to recover money claimed due after a settlement with other partners, evidence held admissible that one of the other partners never claimed that more money was due than was paid under the contract. *Storrie v. Ft. Worth Stockyards Co.* (Civ. App.) 143 S. W. 286.

In an action for damage to plaintiff's house by blasting rock near it in the year of 1909 and thereafter, evidence was not admissible as to the effect of blasting in the year of 1906, and that witness felt no shocks therefrom, unless it was shown that the operations in that year were the same in force and character as in 1909. *Mt. Franklin Lime & Stone Co. v. May* (Civ. App.) 150 S. W. 756.

Where a witness who testifies that he did not see or hear a particular incident is in such circumstances that his failure to hear may be inconsistent with the happening of

the event, his negative testimony is admissible as against affirmative statements as to seeing or hearing the event. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 153 S. W. 355.

6. **Circumstantial evidence of facts in issue.**—Payment of taxes may be shown by direct or circumstantial evidence. *Watson v. Hopkins*, 27 T. 637; *Ochoa v. Miller*, 59 T. 460; *Allen v. Woodson*, 60 T. 651.

When a publication is privileged and believed to be true, the prima facie case of libel from the false and defamatory publication is deemed to have been fully met, and malice in fact must be established by other evidence, as by the style or manner of the writing or by extraneous facts. Malice may be proved by circumstantial evidence, and in such cases malice is inferred from the evidentiary facts. *Behnee v. Railway Co.*, 71 T. 424, 9 S. W. 449.

In order to establish a locative interest in a tract of land, it is necessary that a contract for such interest between the owner and locator be proved. This may be shown by circumstantial evidence. *Boone v. Hulseley*, 71 T. 176, 9 S. W. 531.

In an action for wrongful attachment circumstantial evidence as to fraud on the part of the plaintiff is admissible. *Cox v. Trent*, 1 C. A. 639, 20 S. W. 1118; *Hunter v. Lanius*, 82 T. 677, 18 S. W. 201; *Day v. Stone*, 59 T. 612; *Cook v. Greenberg* (Civ. App.) 34 S. W. 687.

Circumstances to explain an accident admissible. *Railway Co. v. Richart* (Civ. App.) 27 S. W. 918.

Identity may be shown by circumstantial evidence. *French v. Koenig*, 27 S. W. 1079, 8 C. A. 341; *Minor v. Lumpkin* (Civ. App.) 29 S. W. 799; *Frieberg v. Isbell* (Civ. App.) 25 S. W. 938.

On the issue of good faith in a contract, evidence of surrounding circumstances, etc., admissible. *Fairbanks v. Simpson* (Civ. App.) 28 S. W. 128.

Trivial circumstances indicating fraud are admissible in evidence. *Stelnam v. Gahwiler* (Civ. App.) 30 S. W. 472.

The existence of lost deeds may be shown by direct and circumstantial evidence. *Patrick v. Badger* (Civ. App.) 41 S. W. 538; *Baylor v. Tillebach*, 20 C. A. 490, 49 S. W. 720.

Evidence that there were no obstructions between an approaching engine and plaintiff was admissible to show that the engineer and fireman saw him before steam was emitted from the engine. *Texas & N. O. R. Co. v. Syfan* (Civ. App.) 43 S. W. 551.

Records of lost deeds, though not regular because the deeds were not sufficiently proved to be recorded, are admissible as circumstantial evidence to prove the deeds. *McCarty v. Johnson*, 20 C. A. 184, 49 S. W. 1038.

Where it is sought to prove a conveyance by circumstantial evidence, any act which is consistent or inconsistent with the probability of a conveyance having been made as claimed is admissible. *Texas Tram & Lumber Co. v. Gwin* (Civ. App.) 52 S. W. 110.

Acts done by one or his agent, showing open claim to land, held admissible, as circumstances establishing a lost deed. *Grayson v. Lofland*, 21 C. A. 503, 52 S. W. 121.

Where husband makes deed to his wife and retains possession thereof, whether it is a delivery to the wife in law depends on the intention of the husband, which intention is to be shown by circumstances, and is an issue for the jury. *McCartney v. McCartney*, 93 T. 359, 55 S. W. 310.

Negligence of a master may be established by circumstances, without direct proof. *Missouri, K. & T. Ry. Co. of Texas v. Crowder* (Civ. App.) 55 S. W. 380.

A contract of marriage may be established by facts and circumstances; it not being necessary that it should in every case be dependent on an express promise. *Edge v. Griffin* (Civ. App.) 63 S. W. 148.

Delivery of a life insurance policy as a gift may be proved by circumstantial evidence. *Lord v. New York Life Ins. Co.*, 27 C. A. 139, 65 S. W. 699.

On issue of arson in action on fire policy, all circumstances tending to prove the guilt of the party charged with the offense are admissible in evidence. *Joy v. Liverpool, London & Globe Ins. Co.*, 32 C. A. 433, 74 S. W. 822.

In determining intention of a surveyor in a boundary suit, held, that the jury should consider his purpose, as gathered from what he did in making the surveys, the description of the land he gave, and all the circumstances attending the transaction. *Masterson v. Ribble*, 34 C. A. 270, 78 S. W. 358.

Under the statute requiring the Commissioner of the General Land Office to cause school lands to be classified and appraised before offering them for sale, plaintiff in trespass to try title to lands which he claimed by purchase from the state, held not required to show by direct evidence that they were classified and appraised. *Corrigan v. Fitzsimmons*, 97 T. 595, 80 S. W. 989.

Payment of taxes may be proven by either direct or circumstantial evidence. *Jordan v. Brown* (Civ. App.) 94 S. W. 398.

The origin of a fire may be proved by circumstantial evidence. *D. H. Fleming & Son v. Pullen* (Civ. App.) 97 S. W. 109.

The right of the public to go directly across a track at a particular place, and the assent of the company thereto rendering it a public crossing, may be established by circumstantial evidence. *Houston, E. & W. T. Ry. Co. v. Adams*, 44 C. A. 288, 98 S. W. 222.

Held error to direct a verdict for defendant where there was circumstantial evidence to sustain plaintiffs' claim. *Jante v. Culbreth* (Civ. App.) 101 S. W. 279.

That sparks from an engine ignited property along a railroad track may be shown by circumstances. *Gulf, C. & S. F. Ry. Co. v. Meentzen Bros.*, 52 C. A. 416, 113 S. W. 1000.

One seeking to postpone a prior unregistered deed must show that he paid the purchase price of the land without actual notice of the existence of the prior deed, which may be shown by circumstances. *Holland v. Nance*, 102 T. 177, 114 S. W. 346.

Forgery of a deed may be proved by circumstantial evidence. (Civ. App.) 114 S. W. 662, affirmed *Houston Oil Co. v. Kimball*, 103 T. 94, 122 S. W. 533, rehearing denied 103 T. 94, 134 S. W. 85.

Circumstantial evidence held admissible to show that a boundary between adjoining landowners had been agreed on between them. *Roberts v. Blount* (Civ. App.) 120 S. W. 933.

A ratification by a party to a written instrument of an alteration made therein may be shown by circumstances as well as by direct evidence. *Matson v. Jarvis* (Civ. App.) 133 S. W. 941.

An actual delivery of a gift may be implied from circumstances. *Schauer v. Von Schauer* (Civ. App.) 138 S. W. 145.

Plaintiff, who claims title from the holder of a headright certificate, may show by circumstances a conveyance of the certificate by the holder. *Baldwin v. McCullough* (Civ. App.) 146 S. W. 203.

The telegraph company's abandonment of its free delivery limit rule, through its knowledge and acquiescence in free deliveries made in violation of such rule, may be shown by either direct or circumstantial evidence. *Western Union Telegraph Co. v. White* (Civ. App.) 149 S. W. 790.

In a suit by the executor to set aside a deed executed by testatrix to her daughter on the ground of fraud and undue influence, evidence that testatrix's son did not object to the placing of the land in the inventory of her estate was not error, as it might be pertinent in a chain of circumstantial evidence. *Rankin v. Rankin*, 105 T. 451, 151 S. W. 527, reversing judgment (Civ. App.) 134 S. W. 392.

Great latitude in making proof of fraud is admissible, and every circumstance tending at all to show fraud is admissible in evidence. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

In an action by a car checker, who claimed he was required to ride trains and was hurt in boarding one, held, that the question for determination was whether he acted within the line of his duties as he saw them, and so his age and the conduct of the railroad company might be considered. *Houston Belt & Terminal Ry. Co. v. Stephens* (Civ. App.) 155 S. W. 703.

The actual malice essential to authorize a recovery for a defamatory publication which is privileged may be proved by circumstances showing wanton malevolence and reckless disregard of the rights of others, including the party injured. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 157 S. W. 224.

7. Matters showing relevancy of other facts.—In an action against carriers for damages for injury to stock, testimony as to how many of the cattle were so badly injured at destination as to cause their death was admissible in connection with evidence that a great many of them died, as tending to show that their death resulted from the carriers' failure to discharge their contractual duty as carriers in transporting. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737, judgment reversed, 104 T. 92, 134 S. W. 328.

8. Matters explanatory of facts in evidence or of inferences therefrom.—Where a supplemental report explaining a prior report was admitted without objection, the first report was admissible. *Watson v. Dewitt County*, 19 C. A. 150, 46 S. W. 1061.

Where a witness testified, in an action for an injury alleged to be due to leaving a car standing improperly, that, after the accident, no cars were standing there, evidence that the car had been removed was admissible. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

After evidence by plaintiff to show that at time of alleged embezzlement defendant lived beyond his means, defendant may show his income and expenses at such time. *Largent v. Beard* (Civ. App.) 53 S. W. 90.

Failure to plead truth of defamatory charges as a justification held not to authorize the exclusion of defendants' testimony in a libel suit as to basis of their good faith, where they had been permitted to testify that in making the charges they acted in good faith. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

It was not error to admit evidence which was part of, intimately connected with, and necessary to the understanding of a conversation introduced by the party objecting thereto. *International & G. N. R. Co. v. True*, 23 C. A. 523, 57 S. W. 977.

In a switchman's action for injuries, evidence that plaintiff, though warned to look out for certain ground switches, was not warned of the one over which he fell, was admissible to explain why he did not discover it. *Galveston, H. & S. A. Ry. Co. v. English* (Civ. App.) 59 S. W. 912.

Permitting stenographer to read over testimony, and allowing witness to explain it, held within discretion of trial court. *Equitable Life Assur. Soc. v. Maverick* (Civ. App.) 78 S. W. 560.

It being negligence to erect a gangway obstructing travel across a street without permission of the city council, it was proper, in an action for wrongful death resulting from the obstruction, to permit proof of want of permission to build the gangway. *Shippers' Compress & Warehouse Co. v. Davidson*, 35 C. A. 553, 80 S. W. 1032.

In an action for personal injuries, held proper to exclude evidence of statements of plaintiff as to how he received the injuries. *Vicars v. Gulf, C. & S. F. Ry. Co.*, 37 C. A. 500, 84 S. W. 286.

In action for injuries to fireman caused by leakage in throttle of engine, books showing report of engineer as to defects, making no reference to the throttle, held admissible in view of evidence previously admitted. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 44 C. A. 534, 98 S. W. 392.

In an action for injuries to a traveler on a public highway in consequence of her horse becoming frightened by an approaching train, certain evidence held admissible as corroborative evidence. *Johnson v. Texas & G. Ry. Co.*, 45 C. A. 146, 100 S. W. 206.

In an action for injuries to one run over by a street car, certain testimony as to the maximum speed of defendant's cars held properly admitted. *San Antonio Traction Co. v. Haines*, 45 C. A. 289, 100 S. W. 788.

On an issue as to whether the property sold brought its market value, it was proper to allow evidence tending to show the reason for the depreciated value. *Robertson v. Warren*, 45 C. A. 584, 100 S. W. 805.

In an action for the value of a shipment made by defendant to a third person on plaintiff's order, on the ground that it should have been made so that the third person

could not have obtained the shipment without first making payment, the exclusion of certain testimony held proper. *Smith v. Landa*, 45 C. A. 446, 101 S. W. 470.

Where a servant was injured from a projecting set screw on a shaft, the exclusion of evidence to show whether the screw could be produced in court held not error. *Wagoner v. Porterfield*, 55 C. A. 169, 118 S. W. 1094.

Evidence explanatory of purpose of witness in calling on defendant, a conversation with whom he gives, held admissible. *Henderson v. Louisiana & Texas Lumber Co.* (Civ. App.) 128 S. W. 671.

In an action for the price of goods, where defendant claimed that plaintiff had agreed that another dealer should take part of the goods, and to release defendant from liability, and offered evidence of a conversation between plaintiff and its agent in support of such claim, plaintiff was entitled to show that it had sold other goods to such third person, and that the conversation had reference thereto. *Holt & Smith v. Texas Moline Plow Co.* (Civ. App.) 150 S. W. 215.

Where defendant in an action to cancel a conveyance attacked the credibility of witnesses who had joined in it, and drew out the husband's statement that the grantor's attorney threatened to have the wife sign it or to send the grantor back to the asylum, the wife's statement to the same effect, though objectionable standing alone, was admissible as a part of what was done and said at the time. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

9. Evidence irrelevant unless preceded or followed by other evidence.—When the relevancy of evidence to sustain an issue depends on the existence of other facts not in evidence, and no statement is made that counsel expect to establish such facts, it is not error to exclude the evidence. *Harvey v. Edens*, 69 T. 420, 6 S. W. 306.

Objections to evidence must pertain to its competency, not its sufficiency; and evidence which is competent cannot be excluded merely because other evidence that would seem to render it sufficient had not already been introduced. Evidence when offered to show a conveyance of land is competent, though it may not describe the land, if it refers to other writings for specific description. *Catlett v. Starr*, 70 T. 485, 7 S. W. 844.

A witness stated that he had found a corner of a survey "that appeared to be an original corner. It corresponded with other corners on the ground that were called for." The testimony was admissible before the papers showing the callings were put in evidence. *Boydston v. Sumpter*, 78 T. 402, 14 S. W. 996.

Evidence of false representations in themselves insufficient held admissible in connection with notary's failure to comply with statute in taking wife's acknowledgment. *Phelps & Bigelow Windmill Co. v. Creager* (Civ. App.) 40 S. W. 206.

A refusal to admit books in evidence held proper where there was no showing that they contained anything material. *Willis v. Sanger*, 15 C. A. 655, 40 S. W. 229.

In an action against a carrier for selling a passenger a ticket over the wrong route, evidence of discomforts is inadmissible where it falls to show that he would not have suffered as great discomforts on the proper train. *Texas & P. Ry. Co. v. Armstrong* (Civ. App.) 41 S. W. 833.

An offer to prove that an engineer is a member of the B. L. E., for the purpose of showing him competent, is properly refused when unaccompanied by an offer to show the extent of the membership of that order. *Terrell v. Russell*, 16 C. A. 573, 42 S. W. 129.

In an action for personal injuries sustained while uncoupling cars on track rendered unsafe by stones left between the rails when ballasting with gravel, evidence that track was ballasted throughout with gravel, as was known by employé, held inadmissible, without a showing that the same condition as to stones obtained at other places along the track, as well as at point of accident. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.) 42 S. W. 255.

Where code of defendant's printed rules had been already introduced, testimony as to a certain rule held inadmissible, without showing that there were oral rules, and plaintiff knew them. *Id.*

Evidence concerning sale of lands by the owner to a third person held inadmissible for failure to show the lands were the same intrusted to plaintiff to sell. *Burnett v. Edling*, 19 C. A. 711, 48 S. W. 775.

Statements of a buyer's financial condition, furnished a seller by a commercial agency, held inadmissible, in an action to rescind for fraud, without proof that they were made by the buyer. *Meyers v. Bloon*, 20 C. A. 554, 50 S. W. 217.

The objection to the admission in evidence of a record that it did not show that the timber sought to be recovered had been inventoried or described, so as to inform plaintiff that the receiver was claiming it as the property of defendant, was not good, where the property was described with sufficient particularity in other parts of the record, so that it could be identified without difficulty. *French v. McCready* (Civ. App.) 57 S. W. 894.

In a suit on judgments recovered in another state by an assignee thereof, the transfer of such judgments must be proved to render them admissible in evidence. *Baggs v. Hale*, 25 C. A. 309, 61 S. W. 525.

Where there was no evidence that the sale of school land to plaintiff was forfeited, an assignment of error in rejecting evidence of a sale to defendant after sale to plaintiff had been "legally forfeited and canceled," cannot be sustained. *Renfro v. Harris*, 28 C. A. 58, 66 S. W. 460.

On an issue whether a railway company was negligent in the construction of an embankment, evidence that certain bridges were washed away held properly excluded, in the absence of evidence that they were properly constructed. *Missouri, K. & T. Ry. Co. of Texas v. McGregor* (Civ. App.) 68 S. W. 711.

In an action against a telegraph company for delay in sending a message, evidence as to a storm which prostrated its lines, or of the posting of notices that delay would occur, held inadmissible, in the absence of evidence that plaintiff had actual notice of such facts or notices. *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 C. A. 526, 69 S. W. 181.

The bare fact that the records of a county were burned held not admissible, there being no offer to show any of their contents. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

In an action of trespass to try title, evidence of the transfer of a lease by one of

the three owners thereof on behalf of himself and the others held not admissible, in the absence of proof of the authority of the person making the transfer to act for the other two owners. *Jones v. Wright* (Civ. App.) 81 S. W. 569.

Where, in trespass to try title, defendant's application to purchase the land as school land was properly excluded as invalid, it was not error to exclude evidence of his obligation to pay and of payment and settlement. *Goethal v. Read*, 35 C. A. 461, 81 S. W. 592.

Admission of evidence as to the receipt and collection of a check by one of the defendants held error, in the absence of any evidence that it was paid on the note sued on. *Eastham v. Patty & Brockinton*, 37 C. A. 336, 83 S. W. 885.

Evidence held not such as to warrant proof of custom. *San Antonio Machine & Supply Co. v. Josey* (Civ. App.) 91 S. W. 598.

Admission of note in evidence held proper, if evidence taken as a whole sufficiently establishes its execution. *Dreeben v. First Nat. Bank* (Civ. App.) 93 S. W. 510.

In trespass to try title, held proper to admit a chain of title, though no deeds connecting it with the original grantees were shown. *McMahon v. McDonald*, 51 C. A. 613, 113 S. W. 322.

A defendant in trespass to try title under a third person who recovered judgment for the land in a suit between himself and the patentee of the state must show that the third person recovered by reason of the title of the patentee, or the judgment cannot be received in evidence. *Hamman v. Presswood* (Civ. App.) 120 S. W. 1052.

Where, in an action on a fire policy, there was no proof of a custom by the company's adjuster to notify insured before examining the property after the fire, and the policy did not require such notice, it was error to admit evidence that the adjuster did not notify plaintiff's attorney before investigating the loss. *Hartford Fire Ins. Co. v. Becton* (Civ. App.) 124 S. W. 474.

An expert who had examined plaintiff's eyes only after the accident could testify that one was impaired more than the other. *Roscoe, S. & P. Ry. Co. v. Jackson* (Civ. App.) 127 S. W. 872.

On the issue whether the payee of a note purporting to be signed by a firm knew of the withdrawal of a partner, evidence that the continuing partner had dictated a circular letter notifying the correspondents of the firm of the withdrawal, and had instructed a third person to mail copies to all persons who had done business with the firm, including the payee, was inadmissible in the absence of evidence that a copy of the letter had been received by or mailed to the payee. *Trezevant & Cochran v. R. H. Powell & Co.* (Civ. App.) 130 S. W. 234.

Testimony in an action for damages against carriers of live stock alleged to have been caused by delay in transportation held inadmissible for failure to verify records referred to, and to indicate the sources of separate parts of testimony. *Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson* (Civ. App.) 133 S. W. 725.

A question to witnesses held proper, though not followed up by other proof. *Mis-souri, K. & T. Ry. Co. of Texas v. Moss* (Civ. App.) 135 S. W. 626.

A judgment foreclosing a tax lien, reciting that the law had been complied with, and that service was had, is prima facie valid and admissible in evidence without proof of the court's jurisdiction. *Mangum v. Kenley* (Civ. App.) 145 S. W. 316.

In a passenger's action for injuries, defendant's evidence of rumors connecting plaintiff with a certain social scandal introduced to show mental anxiety aggravating a previous ailment was properly excluded, where there was no proof of notice to him of such rumors. *Ft. Worth & R. G. Ry. Co. v. Crannell* (Civ. App.) 149 S. W. 351.

In proceedings to probate a will contested by testator's widow on the ground of mental incapacity, testimony that two of the beneficiaries under the will were in good financial circumstances was inadmissible, in the absence of evidence that testator knew that fact. *McDonald's Estate v. McDonald* (Civ. App.) 150 S. W. 593.

Where the evidence did not show that sickness in plaintiff's family was caused by the impounding of water on his premises by the erection of a viaduct approach, evidence of such sickness was not admissible in an action for resulting damages. *Messer v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 153 S. W. 928.

Ordinarily the market value of the property destroyed by fire is the correct measure of the liability of insurer thereof, and it is not permissible to prove extrinsic value without first showing that the property had no market value. *State Mut. Fire Ins. Co. v. Cathey* (Civ. App.) 153 S. W. 935.

10. Identity.—Circumstantial evidence, see ante.

On an issue of identity between parties claiming under different persons of the same name, evidence of the claim by each is admissible. *Hickman v. Gillum*, 66 T. 314, 1 S. W. 339; *McCament v. Roberts*, 80 T. 325, 15 S. W. 580, 1054; *Hill v. Smith*, 6 C. A. 316, 25 S. W. 1079; *Byers v. Wallace*, 87 T. 503, 28 S. W. 1056, 29 S. W. 760; *Nix v. Cole* (Civ. App.) 29 S. W. 561.

Hearsay evidence is admissible to prove pedigree, age and death. Evidence of time, or place of residence, or death, is admissible for the purpose of identification. *De Leon v. McMurray*, 23 S. W. 1038, 5 C. A. 280; *Brown v. Lazarus*, 25 S. W. 71, 5 C. A. 81; *Insurance Co. v. Blodgett*, 27 S. W. 236, 3 C. A. 45; *Byers v. Wallace*, 28 S. W. 1056, 29 S. W. 760, 87 T. 503; *Wallace v. Howard* (Civ. App.) 30 S. W. 711; *French v. McGinnis*, 21 S. W. 941, 3 C. A. 86; *Nixon v. Wichita L. & L. Co.*, 84 T. 408, 19 S. W. 560; *Louder v. Schluter*, 78 T. 103, 14 S. W. 205, 207; *Paden v. Briscoe*, 81 T. 563, 17 S. W. 42.

Evidence held admissible to identify the land claimed to have been conveyed, and to prove a conveyance. *Vasquez v. Texas Loan Agency* (Civ. App.) 45 S. W. 942.

Evidence held incompetent to identify a witness. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

For the purpose of identifying a car seen by witness, after plaintiff had fallen from one owing to the breaking of a handhold, as the car from which he had fallen, evidence that a new handhold had recently been put on is admissible. *Railroad Co. v. Rose*, 19 C. A. 470, 49 S. W. 133.

Testimony as to contents of lost deed held competent in identifying land. *Bayne v. Denny*, 21 C. A. 435, 52 S. W. 983.

To identify certain person as one to whom bounty warrant was issued for land in controversy on account of his participation in certain battle, held, certain evidence was competent. *Minor v. Lumpkin* (Civ. App.) 53 S. W. 365.

A transfer of a certificate issued in lieu of a headright held to sufficiently identify the certificate. *Simmonds v. Simmonds*, 35 C. A. 151, 79 S. W. 630.

Certain testimony of witness held competent to identify the claimant of land at the time it was conveyed. *Allen v. Halsted*, 39 C. A. 324, 87 S. W. 754.

On an issue as to the identity of a person who received a donation under a bounty warrant, certain evidence held relevant. *Id.*

In an action to foreclose a trust deed, certain testimony held admissible to identify a plat referred to in the deed. *Pinckney v. Young* (Civ. App.) 107 S. W. 622.

A concordance in names is always some evidence of identity. *Western Union Telegraph Co. v. Hankins*, 50 C. A. 513, 110 S. W. 539.

In trespass to try title, certain evidence held relevant on the issue of the identity of F. S., to whom the patent was granted. *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 75.

In an action to recover certain stolen diamonds from a purchaser, evidence held admissible to show that the diamonds had been stolen and to identify them. *Morris v. Shuttles Bros. & Lewis* (Civ. App.) 139 S. W. 1053.

11. Personal relations.—In an action for personal injuries, plaintiff cannot show that he had a wife and two children. *Gulf, C. & S. F. Ry. Co. v. Hamilton*, 17 C. A. 76, 42 S. W. 358.

Evidence in action for personal injuries that plaintiff's mother was living held not error, it being competent to show his expectancy of life. *Missouri, K. & T. Ry. Co. of Texas v. Rose*, 19 C. A. 470, 49 S. W. 133.

Where a father sues for damages caused by the death of his son, testimony of the father that the deceased knew the father's business, knew who owed him and whom he owed, is admissible, because it shows the disposition of deceased toward his father, which is a factor for consideration in cases like this. *Railroad Co. v. Davis*, 22 C. A. 335, 54 S. W. 909.

In suit by child for wrongful death of father as bearing on damages, the fact that there was a mother and other children may be shown. *Galveston, H. & S. A. Ry. Co. v. Contreras*, 31 C. A. 489, 72 S. W. 1051.

In an action for injuries to a father, evidence that he had three children, which was not relevant to any issue in the case, was inadmissible. *Ft. Worth Iron Works v. Stokes*, 33 C. A. 218, 76 S. W. 231.

In an action by a husband for the death of his wife, evidence that he had married again is inadmissible. *International & G. N. Ry. Co. v. Boykin* (Civ. App.) 85 S. W. 1163.

In an action for injuries to plaintiff's minor son, it was proper to exclude evidence that she had another son who contributed to her support. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 99 T. 337, 90 S. W. 164.

In an action by children for negligence causing the death of their father, evidence that deceased had abandoned plaintiffs some time prior to his death was admissible on the question of damages. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

12. Nature and condition of property or other subject-matter.—Negligence and damages, see post.

On the issue of the grade and quality of hay, a witness purchasing other hay coming out of the same racks may testify as to the grade and quality of the hay in question. *Dixon v. Watson*, 52 C. A. 412, 115 S. W. 100.

In an action against a carrier for damages to goods and for misrouting, declarations of third persons to plaintiff concerning the condition of the goods and the manner in which they were routed held irrelevant and immaterial. *Gulf, C. & S. F. Ry. Co. v. Coulter* (Civ. App.) 139 S. W. 16.

13. Character or reputation.—Probate of wills, see Arts. 3271, 3272.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

Where the action is brought to recover for the pecuniary loss suffered by the family of the deceased, proof that deceased was kind and affectionate in his family, an indulgent father and husband, is admissible. *Missouri Pac. Ry. Co. v. Bond*, 20 S. W. 930, 2 C. A. 104.

The general reputation of a person for care and skill in his employment is admissible in evidence. *Mex. Nat. R. Co. v. Musette*, 24 S. W. 520, 7 C. A. 169.

General reputation is inadmissible to establish agency. *McGregor v. Hudson* (Civ. App.) 30 S. W. 489; *Bartley v. Rhodes* (Civ. App.) 33 S. W. 604; *Brady v. Nagle* (Civ. App.) 29 S. W. 943.

Evidence that employé in charge of hand car had violated rules, and was untrustworthy, held admissible in action for injury by negligent use of the hand car. *Branch v. International & G. N. R. Co.* (Civ. App.) 40 S. W. 208.

In an action for the trial of a land title, evidence of reputation or character of one of the parties is not relevant, though he is a stranger in the county. *Timmony v. Burns* (Civ. App.) 42 S. W. 133.

In an action for a libel that plaintiff ran a "blind tiger" in his building, the general repute to that effect is admissible in mitigation of damages. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 530.

It is not competent to show contributory negligence by proof that plaintiff was a reckless, careless man, or that he had been careless on some other occasion. *Mayton v. Sonnefeld* (Civ. App.) 48 S. W. 608.

In determining whether an employé was negligent, his inexperience at the work may be considered. *Hillsboro Oil Co. v. White* (Civ. App.) 54 S. W. 432.

To prove general reputation that woman is married, addresses of letters written her are admissible. *Cuneo v. De Cuneo*, 24 C. A. 436, 59 S. W. 284.

In an action for negligence causing death, evidence tending to show that deceased was a worthless character was relevant on the question of pecuniary loss. *Standlee v. St. Louis & S. W. Ry. Co. of Texas*, 25 C. A. 340, 60 S. W. 781.

In an action for injuries caused by a coemployé's negligence, evidence that his reputation for competency was bad held admissible on an issue as to whether defendant

exercised ordinary care to discover his incompetency. *International & G. N. R. Co. v. Jackson*, 25 C. A. 619, 62 S. W. 91.

In action for wrongful death, evidence that decedent was a church member and did not use profane language was too remote on the measure of damages. *Lipscomb v. Houston & T. C. Ry. Co.*, 95 T. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

Agency held not established by proof of general reputation. *Dyer v. Winston*, 33 C. A. 412, 77 S. W. 227.

In an action for injuries to a minor, evidence as to his personal habits and characteristics held admissible. *Cameron Mill & Elevator Co. v. Anderson*, 34 C. A. 105, 78 S. W. 8.

In an action by a parent for injuries sustained to a minor child, evidence of the good morals of the child was inadmissible. *Cameron Mill & Elevator Co. v. Anderson*, 34 C. A. 229, 78 S. W. 971.

In an action for injuries to a minor, evidence that he was obedient, industrious, sober, and economical was admissible. *Cameron Mill & Elevator Co. v. Anderson*, 98 T. 156, 81 S. W. 282, 1 L. R. A. (N. S.) 198.

In an action for damages sustained by a passenger by reason of having been illegally arrested by an agent of the company, evidence showing the bad character of the passenger held inadmissible. *Texas Midland R. R. v. Dean* (Civ. App.) 82 S. W. 524.

In prosecution for slander of female, defendant may avail himself of the female's bad reputation in the place from whence she came. *Ballew v. State*, 48 Cr. R. 46, 85 S. W. 1063.

In an action against a railroad company for damages caused by a fire alleged to have been communicated by one of defendant's engines, evidence that the engineer in charge of the locomotive alleged to have caused the fire was careful held irrelevant. *McFarland v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 88 S. W. 450.

On the issue of the incompetency of a brakeman, evidence of his reputation held admissible. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

In an action for negligence causing death, it is admissible to prove that deceased was healthy, sober, and industrious, and worked regularly. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

In trespass to try title, evidence as to general reputation of the grantee in a deed in plaintiff's chain of title as a forger of land titles held admissible. *Loring v. Jackson*, 43 C. A. 306, 95 S. W. 19.

In an action for policeman's salary, evidence that he was unfit to serve on the police force, in the absence of proof that he had been discharged, held irrelevant. *City of San Antonio v. Serna*, 45 C. A. 341, 99 S. W. 875.

Evidence that plaintiff's fellow servant had a reputation among the persons who worked in the shop where he was employed as an incompetent, careless person, held not objectionable as failing to show his general reputation. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 C. A. 605, 107 S. W. 889.

When recovery of a railroad company was sought for injury to an employé from a violent coupling with a caboose, on the ground merely that the engineer was negligent in making the coupling, held, that evidence of his reputation for care was inadmissible. *Ft. Worth & R. G. Ry. Co. v. Finley*, 50 C. A. 291, 110 S. W. 531.

In an action for the negligent death of a child, struck by a train, the exclusion of evidence of the competency of the engineer operating the train held not erroneous. *Galveston, H. & N. Ry. Co. v. Olds* (Civ. App.) 112 S. W. 787.

On an issue as to whether a son exercised undue influence over his mother to procure an assignment of notes and mortgages, testimony held improperly received. *McKay v. Peterson*, 52 C. A. 195, 113 S. W. 981.

In trespass to try title, in which defendants claimed that the deed to plaintiff's remote grantor was forged, but the evidence did not justify a finding of forgery, evidence that such grantor was reputed to be a forger of land titles was not admissible. Judgment (Civ. App.) 114 S. W. 662, affirmed. *Houston Oil Co. v. Kimball*, 103 T. 94, 122 S. W. 533, rehearing denied 103 T. 94, 124 S. W. 85.

Where an engineer was charged with negligently operating a train, proof of his reputation as being a careful and prudent engineer held inadmissible. *Adams v. International & G. N. R. Co.* (Civ. App.) 122 S. W. 895.

In a railroad passenger's action for injuries in a collision, where it appeared that the conductor handling the freight train colliding with the train whereon plaintiff was riding, was negligent, the exclusion of evidence respecting such conductor's reputation for ability, prudence, etc., was not error, such evidence being immaterial. *Missouri, K. & T. Ry. Co. of Texas v. Farris* (Civ. App.) 126 S. W. 1174.

In an action for the death of an employé, wherein plaintiff did not charge that defendant was negligent in selecting, as its servant, a co-employé who accidentally inflicted the injury claimed to have caused death, the court erred in admitting testimony that the latter was a good and careful man and did his work well. *Dye v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 127 S. W. 893.

In an action for injuries to a passenger, evidence as to the passenger's character held properly rejected. *Houston & T. C. R. Co. v. Swancey* (Civ. App.) 128 S. W. 877.

In civil actions, the character of the parties is irrelevant. *Houston Electric Co. v. Jones* (Civ. App.) 129 S. W. 863.

Evidence that a passenger injured in alighting is habitually very careful to avoid injury held inadmissible on the issue as to whether the passenger waited until the car stopped before alighting. *Small v. San Antonio Traction Co.* (Civ. App.) 148 S. W. 833.

In an action for deceit in recommending defendant W. for credit, evidence that he had long been in the habit of becoming intoxicated and had a reputation of being a bad paymaster held admissible to show he was irresponsible at the time credit was given. *Wells v. Driskell* (Civ. App.) 149 S. W. 205.

The exclusion of testimony, that a railway engineer who did not obey the signals of the brakeman was unsafe to work with in spotting cars, was not error; it being so obviously true that no proof of the fact was necessary. *Kansas City, M. & O. Ry. Co. of Texas v. Hall* (Civ. App.) 152 S. W. 445.

In an action to establish a claim to property of a decedent, on the ground of an

oral contract with the decedent to be husband and wife, and a living together as such, evidence as to the character of cohabitation and of the community and as to plaintiff's character for virtue were admissible. *Berger v. Kirby*, 105 T. 611, 153 S. W. 1130.

In an action to compel the execution of a deed, where defendant claimed that plaintiff was only a tenant from month to month, and had been given notice to vacate, and that she was behind in her rent, there being no issue as to this, evidence to contradict it that she was very close and thrifty was properly excluded. *Boiders v. Dooley* (Civ. App.) 154 S. W. 614.

Where an administrator was charged with conspiracy with plaintiff and another to fraudulently obtain land of the estate by fraudulent execution sale, evidence of a decree removing him and rendering judgment against him was admissible as tending to show his character, and that he would probably enter into a conspiracy as alleged. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

14. — **Honesty and Integrity.**—Where plaintiff's character as to integrity is directly assailed by the defense, he may prove that his general reputation in such respect is good. *Fire Ass'n of Philadelphia v. Jones* (Civ. App.) 40 S. W. 44.

The fact that neighborhood rumors as to defendant's intentions were allowed to creep into the record without objection did not make evidence as to character for honesty and fair dealing proper. *Jackson v. Martin* (Civ. App.) 41 S. W. 837.

Evidence of the character of defendant for honesty is not admissible in an action by a vendor against the purchaser for breach of the contract to purchase. *Id.*

Where the defendant's character for honesty is in issue, he may show that his reputation was good, but not that he was considered one of the best boys in the country. *Largent v. Beard* (Civ. App.) 53 S. W. 90.

Defendant, in support of plea of truth of article charging plaintiff with being a liar, cannot testify to statements of plaintiff's neighbors that his reputation was bad. *Mitchell v. Spradley*, 23 C. A. 43, 56 S. W. 134.

In action for rent, tenant's evidence of landlord's bad reputation for honesty held improperly admitted. *Hurst v. Benson* (Civ. App.) 71 S. W. 417.

Where reputation for truth of party to an action had not been attacked on trial, evidence to show it was good held inadmissible. *McCowen v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 73 S. W. 46.

In an action for injuries to minor from being struck by a railroad train, held error to permit defendant to introduce testimony as to minor's connection with the theft of certain property. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

Evidence that a party's reputation for truth and veracity was good 30 years ago where he then lived, and ever since has lived, is not admissible. *Daugherty v. Lady* (Civ. App.) 73 S. W. 837.

In an action for an alleged wrongful levy on goods claimed to have been sold in fraud of creditors, evidence that the seller's reputation for payment of debts was good held admissible. *Hooks & Hines v. Pafford*, 34 C. A. 516, 78 S. W. 991.

In suit for illegally selling liquor to plaintiff's minor sons, evidence that one of them was a gambler held inadmissible. *Poynor v. Holzgraf*, 35 C. A. 233, 79 S. W. 829.

In an action on a contract of hiring, the compelling of defendant to state when and how often in his business career he had been sued held error. *Seago v. White*, 45 C. A. 539, 100 S. W. 1015.

The answer charging embezzlement by plaintiff held to bring in the issue of plaintiff's reputation for honesty, making evidence of his good reputation admissible. *Mullinax v. Pyron* (Civ. App.) 123 S. W. 1139.

Evidence of defendant's reputation for dishonesty held not made admissible by the answer charging embezzlement by plaintiff, thus bringing in the issue of the latter's reputation for honesty. *Id.*

Defendant in an action for death by negligence held not entitled to a trial of the question of deceased having been an embezzler. *Galveston, H. & S. A. Ry. Co. v. Pingenot* (Civ. App.) 142 S. W. 93.

Plaintiff having pleaded fraud by log scalers and testified that they had stolen his logs, evidence of their general reputation for honesty was admissible. *Cudlipp v. C. R. Cummings Export Co.* (Civ. App.) 149 S. W. 444.

A carrier sued for the loss of baggage consisting of wearing apparel of a passenger may not show that the passenger was a gambler and had in his trunk in addition to the wearing apparel a complete gambler's outfit. *Missouri, K. & T. Ry. Co. of Texas v. Halley* (Civ. App.) 156 S. W. 1119.

15. — **Chastity and temperance.**—In a suit for personal injuries to a wife, where damages were sought for humiliation from exposure of her person, held competent to prove that she was reputed a prostitute. *Houston & T. C. R. Co. v. Ritter*, 16 C. A. 482, 41 S. W. 753.

Where a master justified the discharge of a servant on the ground of his drinking habits, held, that the servant could prove his reputation as a drinking man before and after the discharge. *Allgeyer v. Rutherford* (Civ. App.) 45 S. W. 628.

In an action for breach of contract of marriage, evidence of plaintiff's illicit relations with men other than defendant, prior to and during her engagement, held admissible in mitigation of damages. *Clark v. Reese*, 26 C. A. 619, 64 S. W. 783.

In an action for slander, based on statements imputing a want of chastity to plaintiff, evidence of her good reputation for chastity is admissible. *King v. Sassaman* (Civ. App.) 64 S. W. 937.

In an action for injuries by falling into an unprotected ditch in a city street, evidence that plaintiff was addicted to intoxication held inadmissible. *Browne v. Bachman*, 31 C. A. 430, 72 S. W. 622.

In an action for damages for an unlawful arrest, held error to refuse to permit defendant to show that at the time of the arrest plaintiff was keeping a house of prostitution. *Texas Midland R. R. v. Dean*, 98 T. 517, 85 S. W. 1135, 70 L. R. A. 943.

In an action for personal injuries, evidence that plaintiff had been seen in houses of ill fame was not admissible to prove that he had not been rendered impotent by the injury. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 91 S. W. 355.

In an action on a liquor dealer's bond for damages through the sale of liquor to plaintiff's husband, certain evidence held admissible on the issue of the husband being an habitual drunkard. *Birkman v. Fahrenthold*, 52 C. A. 335, 114 S. W. 428.

Evidence concerning reputation for chastity held admissible to rebut a claim of common-law marriage. *Berger v. Kirby* (Civ. App.) 135 S. W. 1122.

A woman's general reputation for chastity and general reputation of the house in which she and her alleged husband lived held admissible on the question of a marriage through which she claimed property. *Grigsby v. Reib* (Civ. App.) 139 S. W. 1027.

16. — **Right to prove specific facts.**—When it is sought to charge the employer by reason of his having knowingly employed an incompetent servant, such incompetency must be shown by general reputation, and not by specific acts. *Railway Co. v. Scott*, 68 T. 694, 5 S. W. 501.

Where the negligence of a green hand employed by defendant railroad company as engineer, and placed on a run requiring special skill, was alleged to have been the cause of a fellow servant's death, held, that evidence of specific acts of his negligence was admissible. *Galveston, H. & S. A. Ry. Co. v. Davis* (Civ. App.) 45 S. W. 956.

Evidence of specific acts of negligence by a fellow servant, known to the master, held admissible in connection with other evidence that said servant was habitually intemperate. *Id.*

In a civil case, testimony as to defendant's previous history and charges made against him at various times and places is inadmissible. *Donaldson v. Dobbs*, 35 C. A. 439, 80 S. W. 1084.

On the issue of the incompetency of a brakeman, specific acts of negligence held admissible. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

Evidence of a person's character, when admissible, must be confined to general reputation. *McCormick v. Schtrenck* (Civ. App.) 130 S. W. 720.

17. **Pecuniary condition.**—Evidence irrelevant unless preceded or followed by other evidence, see ante.

In a proceeding against a sheriff for failing to levy execution, the fact that the tax roll shows that the defendant rendered no property is not admissible in evidence. *Batte v. Chandler*, 53 T. 613.

When the issue is whether an apparent purchaser bought for himself or another, evidence of his means, etc., is admissible. *Stone v. Day*, 69 T. 13, 5 S. W. 642, 5 Am. St. Rep. 17.

In an action for libel the wealth of the defendant is not a fact in issue. *Young v. Kuhn*, 71 T. 645, 9 S. W. 860.

In an action for personal injuries it is error to allow the plaintiff to testify that his wife had no means of support except her own labor. *Missouri, K. & T. Ry. Co. of Texas v. Hannig*, 91 T. 347, 43 S. W. 508.

In action for personal injuries, evidence that plaintiff is poor held irrelevant on the issue of damages. *Trinity & S. Ry. Co. v. O'Brien*, 18 C. A. 690, 46 S. W. 389.

In an action for damages for the death of decedent, evidence that plaintiffs' means of support were deceased's earnings held admissible. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

In an action by a father for his son's death, the father's pecuniary condition is admissible on the measure of damages. *International & G. N. R. Co. v. Knight* (Civ. App.) 52 S. W. 640.

Proof of a father's financial condition and age held competent in an action by him for the wrongful killing of his son. *Galveston, H. & S. A. Ry. Co. v. Davis*, 22 C. A. 335, 54 S. W. 908.

Proof of the pecuniary condition of the parents is admissible in an action by them to recover for the death of an adult son. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204.

In an action by a husband's creditors to subject property fraudulently conveyed to the wife, evidence that the wife had a bank balance subsequent to the purchase of the property was properly excluded. *Gonzales v. Adoue* (Civ. App.) 56 S. W. 543.

In action for damages, held error to allow plaintiff to testify as to her financial condition in order to arouse sympathy. *City of Belton v. Lockett* (Civ. App.) 57 S. W. 687.

In an action by member of a firm for a final settlement on the ground of misrepresentations when he entered the firm, evidence is not admissible to show the insolvency of persons who were not indebted to the firm when plaintiff became a member. *Veck v. Culbertson* (Civ. App.) 57 S. W. 1114.

Evidence as to plaintiff's pecuniary condition held properly admitted in an action for the negligent killing of a child. *Citizens' Ry. Co. v. Washington*, 24 C. A. 422, 58 S. W. 1042.

On the question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence as to A.'s financial condition, and statements made by him in relation thereto, held competent. *Jones v. Meyer Bros. Drug Co.*, 25 C. A. 234, 61 S. W. 553.

On the question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence as to B.'s failure in business and insolvency is admissible. *Id.*

On question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence that B., though insolvent, had some money, was admissible. *Id.*

In an action for slander, evidence of the financial condition of defendant is inadmissible. *King v. Sassaman* (Civ. App.) 64 S. W. 937.

Testimony as to dependency of daughters held admissible in action for death of their father. *St. Louis S. W. Ry. Co. of Texas v. Bowles*, 32 C. A. 118, 72 S. W. 451.

Plaintiff, in an action for injury to his wife, may not testify to his impoverished condition. *City of Dallas v. Moore*, 32 C. A. 230, 74 S. W. 95.

In an action for injuries to a passenger, evidence that plaintiff and her father were too poor to employ a physician held competent to explain why a physician had not been employed. *Pecos & N. T. Ry. Co. v. Williams*, 34 C. A. 100, 78 S. W. 5.

The fact of plaintiff's drawing a federal pension for physical debility held pertinent on question of his condition prior to the injuries sued for. *Hawkins v. Missouri*, K. & T. Ry. Co. of Texas, 36 C. A. 633, 83 S. W. 52.

In an action for injuries, evidence as to the value of plaintiff's property, as rendered for taxation, held irrelevant. *International & G. N. R. Co. v. Goswick*, 98 T. 477, 85 S. W. 785.

In action for death of plaintiff's son, claimed to be her only support, offer of evidence as to contributions from another son held properly excluded. *Gulf, C. & S. F. Ry. Co. v. Johnson* (Civ. App.) 86 S. W. 34.

Evidence as to inability of defendant to pay house rent held admissible on issue as to whether a certain payment was made by her. *Walker v. Dickey*, 44 C. A. 110, 98 S. W. 658.

In an action for broker's commissions, evidence of the financial ability of the concern from which the purchaser was to obtain funds with which to make the purchase and his arrangements therefor held admissible. *Leuschner v. Patrick* (Civ. App.) 103 S. W. 664.

In an action for personal injuries held reversible error to permit plaintiff to prove that she was in destitute circumstances. *Dallas Consol. Electric St. Ry. Co. v. Summers*, 48 C. A. 474, 106 S. W. 891.

In an action on a contract, evidence of defendant's financial condition held inadmissible. *Hall v. Parry*, 55 C. A. 40, 118 S. W. 561.

On the issue whether there was a delivery of a deed, executed by P. to H. and K., for a recited consideration of \$25 paid by them to him and his love and affection for them as his stepdaughters, such deed having been delivered by him to the cashier of a bank, who deposited it in the bank's vaults, where it remained till P.'s death, evidence that when he married the mother of H. and K. he had run through with all his property, through dissipation, and when his wife died, four years before he executed the deed, he was worth \$12,000 or \$15,000, was inadmissible; it not appearing that P. was under any obligation to H. or K. on account of an interest owned by them in the community estate between their mother and P., or otherwise. *Phillips v. Henry* (Civ. App.) 124 S. W. 184.

The only tendency of evidence that when one signed and acknowledged a deed to his stepdaughters, and delivered it to a bank, he was indebted, being that he made and delivered it to the bank with intent to defraud his creditors, it is not admissible in favor of his administrator, on the issue whether the delivery to the bank was intended and operated as a delivery to the grantees. *Id.*

In an action for breach of marriage promise, evidence of the financial condition of defendant held admissible on the issue of actual damages. *Fisher v. Barber* (Civ. App.) 130 S. W. 871.

In an action by a physician for the reasonable value of professional services rendered, evidence of the financial condition of defendant and of the custom among physicians to graduate their charges according to the financial condition of the patient held inadmissible. *Swift v. Kelly* (Civ. App.) 133 S. W. 901.

In an action to enjoin a sale to enforce a deed of trust, securing a note, on the ground that the note was without consideration and was accommodation paper, evidence of the financial condition of the payee and the fact that the note was given to enable him to avoid prosecution was properly excluded; but plaintiff was properly allowed to introduce evidence of a lack of consideration. *Rudolph v. Price* (Civ. App.) 146 S. W. 1037.

Where it was agreed that a note executed by plaintiff and a third person would not be collectible, unless an authorized statement showed that it was necessary for defendant to pay the note to reimburse the payees for payments made to secure the location of a railroad and depot, the exclusion of evidence in an action on the note that citizens other than plaintiff and a third person were able to guarantee the bonus required by the company was proper. *Key v. Hickman* (Civ. App.) 149 S. W. 275.

On a partnership accounting, where partner claimed land as his individual property, and claimed that he paid for it out of a bank deposit, exclusion of bank account offered to show that he had no such deposit held error. *Hengy v. Hengy* (Civ. App.) 151 S. W. 1127.

In a suit to restrain the enforcement of an execution, evidence that complainant had long had property out of which the judgment could have been collected with due diligence, as tending to show payment, held inadmissible. *Morrison v. Hammack* (Civ. App.) 152 S. W. 494.

As parading plaintiff's financial condition, evidence, in an action for personal injuries, that he has to work is improper. *Texas Co. v. Strange* (Civ. App.) 154 S. W. 327.

18. Motive, intent and good faith.—Facts happening just before and after the principal transaction, and tending to show the intent of the party, are relevant. *Horton v. Reynolds*, 8 T. 284.

The intent of a party in making a deed charged to be fraudulent may be shown by the surrounding circumstances, such as the indebtedness of the party, the amount and character of his property, the secret reservation of an interest therein, etc. *Baldwin v. Peet*, 22 T. 708, 75 Am. Dec. 806; *Belt v. Raguet*, 27 T. 471; *Cox v. Miller*, 54 T. 16; *King v. Russell*, 40 T. 124; *Green v. Banks*, 24 T. 508; *Day v. Stone*, 59 T. 612.

In a suit to recover on a policy of insurance for loss by fire, where the defendant charged that the fire was caused by the consent or procurement of the insured, every circumstance which throws light on the motives of the insured is admissible in evidence; such as over-insurance, proof of loss in excess of the value of the property destroyed, the assignment of the policy after the loss out of the usual course of business or for an improper purpose, the disposition of the goods, just before the burning, out of the usual course of business, and other like facts. *Dwyer v. Continental Ins. Co.*, 63 T. 354.

Since the rule in *Shelley's Case* is one of law, and not of intention, evidence of the express intention of the testator to devise only a life estate is inadmissible. *Brown v. Bryant*, 17 C. A. 454, 44 S. W. 399.

In an action assailing a mortgage for fraud, evidence of the mortgagee held admissible to show his good faith. *Wright v. Solomon* (Civ. App.) 46 S. W. 58.

In an action assailing a mortgage for fraud, evidence held admissible to show mortgagor's motives, and as a part of the *res gestæ*. *Id.*

Evidence that a purchaser at a sale under a trust deed took for the trustee, and that the property came back to the trustee under voluntary conveyances, held evidence of a fraudulent intent in the making of the deed. *Wade v. Odle* (Civ. App.) 46 S. W. 887.

In an action by parents to recover for the wrongful killing of their son, testimony that they may have brought the action simply to investigate the circumstances of the homicide is irrelevant and prejudicial. *Croft v. Smith* (Civ. App.) 51 S. W. 1089.

On an issue as to the bona fides of a legatee in bringing suit to construe the will, a written contract made by such legatee with his attorneys as to their fees is admissible. *Thornton v. Zea*, 22 C. A. 509, 55 S. W. 798.

Evidence held admissible to show intention in procuring sequestration, alleged to have been wrongful, where exemplary damages were claimed. *Endel v. Norris* (Civ. App.) 57 S. W. 687.

Evidence showing that a purchaser of school lands from patentee did not pay value, it was not error to exclude evidence of his good faith. *State v. Burnett* (Civ. App.) 59 S. W. 599.

In an action against a city for injury to land from the pollution of a stream with sewage, a contract between defendant and a third party for the removal of the sewage held admissible to show defendant's intention to discontinue such use of the stream. *Umscheid v. City of San Antonio* (Civ. App.) 69 S. W. 496.

In false imprisonment, evidence of good faith on the part of those making the arrest is admissible on the issue of vindictive damages. *Pincham v. Dick*, 30 C. A. 230, 70 S. W. 333.

In an action to recover land claimed by defendant, a deserted wife, as her homestead, evidence that it was the intention of plaintiff and her husband to occupy the property as a home held admissible. *Long v. Long*, 30 C. A. 368, 70 S. W. 587.

Where defendant claimed property under a parol partition, and plaintiff claimed that the partition was a partition of rents only, evidence as to his intention in partitioning the rents was immaterial. *Id.*

In an action for wrongful attachment, certain evidence held admissible to show defendant's good faith. *Cline v. Hackbarth*, 30 C. A. 591, 71 S. W. 48.

Where a car inspector was killed by being struck by a switch target, evidence that it was defendant's intention, when the switch was established, to replace it with another as soon as possible, held competent. *International & G. N. R. Co. v. Bearden*, 31 C. A. 58, 71 S. W. 558.

On an issue as to whether a purchaser of school lands was an actual bona fide settler thereon, certain testimony showing his intent held erroneously excluded. *Lewis v. Scharbauer*, 33 C. A. 220, 76 S. W. 225.

In an action for the death of a son, his parents may testify that deceased stated to them it was his intention to remain with them while they lived, as bearing on the issue of damages. *Gulf, C. & S. F. Ry. Co. v. Brown*, 33 C. A. 269, 76 S. W. 794.

Evidence that plaintiff in a transitory action for injuries occurring in New Mexico, brought the suit in Texas, held inadmissible for the purpose of affecting the good faith of his action or to discredit his testimony. *Atchison, T. & S. F. Ry. Co. v. Keller*, 33 C. A. 358, 76 S. W. 801.

On an issue as to whether defendant, who placed plaintiffs in possession of land, had given them the land, certain evidence held admissible as bearing on defendant's intention. *Shannon v. Marchbanks*, 35 C. A. 615, 80 S. W. 860.

In an action for injuries to plaintiff while walking along defendant's railroad track, evidence as to the reason plaintiff chose the course he did held admissible in support of his allegation that he was lawfully on the track at the time of the accident. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In trespass to try title to certain school land, evidence held admissible on the issue of the good faith of defendant's alleged prior settlement. *Jones v. Wright* (Civ. App.) 92 S. W. 1010.

In an action by a servant for wrongful discharge held proper to admit evidence showing the master's motive. *Pacific Express Co. v. Walters*, 42 C. A. 355, 93 S. W. 496.

Where a purchaser of brick failed to pay installments therefor as agreed, and claimed damages for delay in delivery, purchaser held entitled to show why he had not made payments according to terms of contract. *Shurter v. Butler*, 43 C. A. 353, 94 S. W. 1084.

In an action to cancel a deed as to one of two lots conveyed, certain evidence held inadmissible to show plaintiff's intent not to convey both lots. *Horwitz v. La Roche* (Civ. App.) 107 S. W. 1148.

In an action for wrongful attachment, the intentions of the officer making the levy held immaterial. *Rainey v. Kemp*, 54 C. A. 486, 118 S. W. 630.

An instrument acknowledging receipt of a sum of money for an alley between certain streets, as well as parol testimony to locate and identify the strip, was admissible to show an intention to dedicate the strip as a public alley. *Menczer v. Poage*, 55 C. A. 415, 118 S. W. 863.

On the issue whether the delivery to a bank of a deed by P., the grantor, operated to pass the title to the grantees, H. or K., depending on whether, when he delivered the deed to the bank's cashier, he intended to finally part with possession and control of it, he having delivered it in an envelope indorsed by him, "P. or H. or K.," and the cashier having placed it in the bank's vault, where it remained till P.'s death, evidence that P., after so delivering the deed, listed the land with his agent for sale, and never withdrew it, was admissible. *Phillips v. Henry* (Civ. App.) 124 S. W. 184.

The only tendency of evidence that when one signed and acknowledged a deed to his stepdaughters, and delivered it to a bank, he was indebted, being that he made and delivered it to the bank with intent to defraud his creditors, it is not admissible

in favor of his administrator, on the issue whether the delivery to the bank was intended and operated as a delivery to the grantees. *Id.*

On the issue whether a subsequent purchaser was a bona fide purchaser without notice of a prior unregistered conveyance, evidence of what he did after the purchase was inadmissible. *Davidson v. Ryle*, 103 T. 209, 124 S. W. 616, 125 S. W. 881.

Certain evidence held admissible to show that a controversy as to one's liability was a bona fide. *Hunt v. Ogden* (Civ. App.) 125 S. W. 386.

On an issue of defendant's good faith and honest mistake in taking up her residence near but not on school land which she had applied to purchase, all information on which she acted, and every circumstance to show the care exercised by her, held admissible. *Morgan v. Fleming* (Civ. App.) 133 S. W. 736.

Defendants' signatures of a petition held no evidence of a threat or intention to trespass upon plaintiff's lands. *Fleming & Davidson v. Rohleder* (Civ. App.) 135 S. W. 735.

On an issue between a subsequent purchaser and the holder of a prior unrecorded deed from the same grantor, the latter held entitled to testify why he kept his deed off the record and as to the consideration paid therefor as bearing on his good faith. *Miller v. Linguist* (Civ. App.) 141 S. W. 170.

Certain evidence held admissible in an action by a partner to recover balance due under a contract claiming fraud in settling in full with the other partners, to show good faith by defendant in settling with the other partners. *Storrie v. Ft. Worth Stockyards Co.* (Civ. App.) 143 S. W. 286.

Evidence tending to show fraud and failure of consideration for note is admissible, where bona fides of holder was disputed. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 145 S. W. 707.

In an action against a real estate broker for fraud inducing plaintiff to trade his land for a stock of merchandise, the testimony of a witness as to the character and value of the stock held admissible to show the good faith of the broker. *Blard & Scales v. Tyler Building & Loan Ass'n* (Civ. App.) 147 S. W. 1168.

Where the evidence tended to show that loss under a fire policy was occasioned by incendiarism, evidence as to the existence of a mortgage on the property was admissible as tending to show a motive. *Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown* (Civ. App.) 151 S. W. 899.

Where plaintiff testified to the value of the property, including the house on which he sought to recover insurance, evidence of the value of the lot alone was properly admitted as tending to show that plaintiff considered the house of little value, and thus show a motive for burning it. *Mott v. Spring Garden Ins. Co.* (Civ. App.) 154 S. W. 658.

On a cross-action in trespass to try title to have a constable's sale under which plaintiff was claiming set aside on the ground of fraud and inadequacy of price, evidence that the plaintiff, who purchased at the sale, subsequently refused to accept the debt, interest, and costs was admissible to show bad faith. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

In a personal injury action, evidence that the plaintiff's attorney refused to permit a physical examination by a physician representing the defendant is immaterial on the question of plaintiff's good faith. *Artesian Belt Ry. Co. v. Young* (Civ. App.) 155 S. W. 672.

Proof that a husband caused a conveyance to be taken in his wife's name tends to show that it was the intention of the parties that the property should be her separate property, and this is true whether the consideration was paid from her separate property or from the community. *Emery v. Barfield* (Civ. App.) 156 S. W. 311.

The knowledge of the person making calls in field notes of a survey as to the facts in connection with the survey is admissible in determining the meaning of the language used in the field notes; such evidence not constituting a statement of his intentions. *Gilbert v. Finberg* (Civ. App.) 156 S. W. 507.

19. Knowledge or notice.—Evidence irrelevant unless preceded or followed by other evidence, see ante.

Negative evidence, see ante.

Facts happening just before and after the principal transaction, and tending to show the knowledge of the party, are relevant. *Horton v. Reynolds*, 8 T. 284.

The evidence as to the notoriety of the defendant's claim and ownership of land in the neighborhood where it was situated was properly admitted to show knowledge of the facts by others. *Berry v. House*, 1 C. A. 562, 21 S. W. 711.

Evidence of notice, before purchase, that a note was procured by fraud, held admissible. *Hynes v. Winston* (Civ. App.) 40 S. W. 1025.

Where a brakeman was killed by a water spout overhanging the track, evidence that a witness had seen the spout out of repair, and had reported it, was admissible. *Galveston, H. & S. A. Ry. Co. v. Burnett* (Civ. App.) 42 S. W. 314.

That persons were passing between cars of a train standing at a crossing, to the knowledge of defendant, held admissible on the question of negligence in moving the train. *San Antonio & A. P. Ry. Co. v. Green*, 20 C. A. 5, 49 S. W. 670.

Evidence held material, as tending to show whether defendant should have known at whom he was shooting. *Croft v. Smith* (Civ. App.) 51 S. W. 1089.

Evidence that a sidewalk was repaired some time after an accident is not admissible to show knowledge of the defect before the accident. *City of Dallas v. Meyers* (Civ. App.) 55 S. W. 742.

Evidence of a dog's reputation for being vicious is competent on the question of scienter, in an action for injuries sustained from an attack by the dog. *Triolo v. Foster* (Civ. App.) 57 S. W. 698.

Evidence that owner of premises did not know that the lien contract contained a recital that the material had not yet been furnished held competent. *Kribs v. Craig* (Civ. App.) 60 S. W. 62.

Evidence that answers of assured to agent of fraternal insurance association were truthful, though misstated in the application, held admissible to show notice to the order of the existing facts. *Order of Columbus of Baltimore City, Md., v. Fuqua* (Civ. App.) 60 S. W. 1020.

On an issue as to whether a price quoted in a letter of plaintiff to defendant referred to a secondhand or a new machine, a prior letter in which plaintiff quoted new machines at a higher price held admissible to show defendant's knowledge of the price of a new machine. *Dorsey Printing Co. v. Gainesville Cotton-Seed Oil Mill & Gin Co.*, 25 C. A. 456, 61 S. W. 556.

In an action for injuries received by an engineer in a collision caused by a brakeman going to sleep and leaving a switch open, evidence that the train dispatcher was requested to allow the latter to lay off and rest held admissible to charge the railroad company with knowledge of the brakeman's condition. *St. Louis S. W. Ry. Co. v. Kelton*, 28 C. A. 137, 66 S. W. 887.

In a suit to cancel a contract and deeds made in pursuance thereof on the ground of false representations as to the character of the round cotton bale process, the objection to a question, on cross-examination, if plaintiff knew how many round bale processes there were in the country, held properly sustained. *American Cotton Co. v. Collier*, 30 C. A. 105, 69 S. W. 1021.

In trespass to try title, certain evidence as to want of knowledge by plaintiff's grantor of defendant's equities held erroneously excluded. *Long v. Fields*, 31 C. A. 241, 71 S. W. 774.

Evidence held admissible to show notoriety of the existence of a defect in a street as indicating the city had, or should have had, notice. *City of Dallas v. Moore*, 32 C. A. 230, 74 S. W. 95.

Evidence in action on policy held admissible on issue of agent's knowledge of true ownership of property. *Continental Fire Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 378.

Evidence of knowledge of condition of railway truck by an employé, injured from defects therein, held admissible. *International & G. N. R. Co. v. Penn* (Civ. App.) 79 S. W. 624.

In an action for damages for laying out road over land, evidence that adjoining owner received no notice of proceedings held inadmissible. *Morgan v. Oliver* (Civ. App.) 80 S. W. 111.

In action for injuries to servant, testimony that the foreman who employed plaintiff had been informed of his lack of experience, etc., held admissible. *Gammel-Statesman Pub. Co. v. Monfort* (Civ. App.) 81 S. W. 1029.

In action against railroad for loss of property by fire communicated by defendant's engine to goods in building under lease from railroad, evidence that plaintiff had notice of stipulations of lease held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Keahy*, 37 C. A. 330, 83 S. W. 1102.

On the issue of the incompetency of a servant, certain evidence held admissible as showing that the master had received such notice that inquiry would show incompetency. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

On the issue of negligence of a railroad in inspecting a tender which was subsequently wrecked, thereby injuring a trainman, evidence that the inspector knew that his son was to go in the engine to which the tender was attached held relevant. *Hover v. Chicago, R. I. & G. Ry. Co.*, 40 C. A. 280, 89 S. W. 1084.

In an action for injuries from an alleged nuisance on a railroad right of way, evidence of statements made to defendant's servants prior to suit brought held admissible to show notice. *McFadden v. Missouri, K. & T. Ry. Co. of Texas*, 41 C. A. 350, 92 S. W. 989.

In an action for slander held proper to admit testimony of plaintiff that a person told her that defendant had uttered the words alleged. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

In an action for death of a servant, certain evidence held admissible to show that defendant had knowledge of the defects in the car in which deceased was riding when killed. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

In an action against a city for injuries to a traveler in consequence of a defective street, certain evidence held admissible as showing notice of the defect. *City of Dallas v. McCullough* (Civ. App.) 95 S. W. 1121.

In a suit for the negligent delay of a telegraph company in delivering a message where the amount of recovery was not affected by the fact that others claimed loss besides the one to whom the message was sent, the fact that the defendant had no notice that others were interested at the time the message was sent was immaterial. *Western Union Telegraph Co. v. True* (Civ. App.) 103 S. W. 1180.

A servant's general reputation of incompetency is admissible to charge his master with knowledge. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

Evidence that a grantor's agent who had placed the grantee in possession knew that the grantee had inclosed and improved the land was admissible, on the issue whether the grantee was excused from investigating whether the lots held by him were those described in the deed. *Isaacks v. Wright*, 50 C. A. 312, 110 S. W. 970.

In determining whether an owner of land knew of the sale of the land by another as his attorney in fact and acquiesced in it, so as to make it a valid sale, lapse of over 20 years from the execution of the sale until the owner's heirs brought suit to recover the land should be considered. *Eastham v. Hunter*, 102 T. 145, 114 S. W. 97, 132 Am. St. Rep. 854.

Evidence of a servant's knowledge, or means of knowledge, of the presence of a set screw by which he was injured held admissible. *Waggoner v. Porterfield*, 55 C. A. 169, 118 S. W. 1094.

In a suit against a railroad for negligence in providing an injured employé with medical attention, the testimony of a witness that at plaintiff's request he notified defendant's local agent of the injury was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Graves*, 57 C. A. 395, 122 S. W. 458.

On an issue whether an attaching creditor had notice of a deed, executed, but not recorded, at the time of his levy, evidence that an agent of the grantee in the deed, before the levy, told the creditor of the terms of the exchange of property between the debtor and grantee in the deed, is admissible. *Folkes v. Wyatt* (Civ. App.) 126 S. W. 958.

In an action for injuries from an obstruction in a city street, evidence of city officers that they knew of the obstruction, and had issued orders that it be removed held

admissible not only to show the condition of the street, but also notice to the city. *City of Ft. Worth v. Lopp* (Civ. App.) 134 S. W. 824.

Evidence as to notice of lien held admissible in a suit to establish a mechanic's lien against a married woman's separate property. *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683.

The fact that the insured filed a waiver of service in foreclosure proceedings was not proof that he knew of the commencement of such proceedings. *Philadelphia Underwriters' Agency of the Fire Ass'n of Philadelphia v. Neurenberg* (Civ. App.) 144 S. W. 357.

In trespass to try title, held, that certain evidence bearing upon notice to a purchaser under whom plaintiff claimed was inadmissible. *Cartwright v. La Brie* (Civ. App.) 144 S. W. 725.

In an action against a railroad company for injury caused by its baggagemaster frightening plaintiff's horses in raising a metallic door, evidence that plaintiff asked the baggageman to wait until he could get to his wagon before raising the door held properly admitted. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

Evidence as to plaintiff's knowledge of defendant's financial condition held admissible to show the unreasonableness of defendant's claim that the mules had been bought for him by plaintiff. *McKay v. Wishert* (Civ. App.) 152 S. W. 508.

On the issue of the priority between a purchase-money chattel mortgage and a mortgage by the buyer to a third person for money for the cash payment demanded by the seller, it appeared that the third person's mortgage was first filed for record, and the seller testified that he did not know that the buyer would give a mortgage to obtain the money, and that the sale was not to take effect until the cash and notes and securities were in his possession. Evidence that the buyer, while negotiating with the seller, informed him that he would borrow the amount of the cash payment from the third person, and would execute a chattel mortgage on the property, and that the seller did not object, and that personal security was demanded of the mortgagor by the seller and furnished, was admissible to support the defense that the seller, with knowledge that the buyer would borrow the money from the third person and secure the same by a mortgage acquired therein. *Pace v. J. M. Radford Grocery Co.* (Civ. App.) 152 S. W. 1130.

In an action for death of employe, evidence that he had worked for defendant for more than two years where the apparatus and conditions were the same as in the building where he was killed should have been admitted to show his knowledge of the conditions and dangers. *William Miller & Sons Co. v. Wayman* (Civ. App.) 157 S. W. 197.

20. — **Diligent inquiry.**—In an action on a note and to foreclose a vendor's lien on land for which it was given, brought by an indorsee, evidence that the payee's attorney assured plaintiff that the transaction was a bona fide sale held admissible. *Cochran v. Siegfried* (Civ. App.) 75 S. W. 542.

As bearing on the question of diligence in seeking information as to title, a party claiming land as an innocent purchaser was properly permitted to testify that, before he bought, he was told by his immediate grantor that he had not sold it. *Downs v. Stevenson*, 56 C. A. 211, 119 S. W. 315.

21. — **Waiver of notice.**—A water consumer suing an irrigation canal company held not entitled to show certain facts as establishing waiver of a requirement for written notice of demand for service. *Lone Star Canal Co. v. Cannon* (Civ. App.) 141 S. W. 799.

22. **Statements and conduct of parties.**—Statement of a father suing for death of his minor son while in defendant's employ held relevant on the issue whether he acquiesced in the employment. *Missouri, K. & T. Ry. Co. of Texas v. Evans*, 16 C. A. 63, 41 S. W. 80.

Evidence of drunkenness of insured after the fire held inadmissible as evidence of misrepresentations as to the amount of property saved. *Phoenix Ins. Co. v. Padgitt* (Civ. App.) 42 S. W. 800.

In an action against a railroad company for causing the death of an employe, evidence that the employes of the road failed to go to the place where the deceased lay dead is inadmissible. *Gulf, C. & S. F. Ry. Co. v. Beall* (Civ. App.) 43 S. W. 605.

Where plaintiff claims his contract with a building company is usurious, evidence of statements made by its officers, which were not known to plaintiff and did not influence his contract, is inadmissible. *Cotton States Bldg. Co. v. Rawlins* (Civ. App.) 62 S. W. 805.

Where defense was that insured had set the fire, testimony that the insurer had employed detectives and prosecuted the insured for arson held admissible. *Phoenix Assur. Co. of London v. Stenson* (Civ. App.) 63 S. W. 542.

Evidence of conduct provoking an assault held admissible in mitigation of exemplary damages. *Galveston, H. & S. A. Ry. Co. v. La Prelle*, 27 C. A. 496, 65 S. W. 488.

In an action by a railroad brakeman for personal injuries, testimony that within a week after the injury plaintiff was consulting attorneys about bringing suit was immaterial. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 28 C. A. 609, 68 S. W. 803.

In an action by a railway brakeman for personal injuries, testimony that at the time plaintiff commenced suit his counsel gave him certain money, etc., held immaterial. *Id.*

In an action by a locomotive fireman for injuries caused by defective engine step, evidence that engineer said he would have the step repaired held admissible. *Gulf, C. & S. F. Ry. Co. v. Garren*, 96 T. 605, 74 S. W. 897, 97 Am. St. Rep. 939.

Where damages for medical bills incurred are claimed in an action for injuries, testimony as to a request by plaintiff to telephone for a doctor is admissible. *Texas Cent. R. Co. v. Powell*, 38 C. A. 157, 86 S. W. 21.

In an action for damages for burning grass, testimony that plaintiff warned defendant of the danger from fire held inadmissible. *Dunn v. Newberry* (Civ. App.) 86 S. W. 626.

The question whether an agent of an insurer assented to the insurance of property while in a particular building must be determined from what he said and did in the negotiations. *Ætna Ins. Co. v. Brannon*, 99 T. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020.

In an action for injuries to a servant, correspondence between plaintiff and defendant in which the former gave the reasons of his unwillingness to submit to an examination by defendant's physicians held inadmissible. *Galveston, H. & S. A. Ry. Co. v. Hughes* (Civ. App.) 91 S. W. 643.

Evidence of the acts of a grantor and grantee with reference to certain crops which were not harvested at the time the deed was made held admissible to rebut the grantee's claim to the crops under the deed. *Carter & Donaldson v. Childress* (Civ. App.) 99 S. W. 714.

In an action for the death of an employé engaged in putting fuel oil in an engine tender, by slipping on a greasy fuel box lid in descending from the tender, testimony that decedent was slow and awkward in filling the tender, and the engineer told him to hurry, was admissible on the question of contributory negligence. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

In an action by the addressee against a telegraph company for delay in delivering a telegram, the statements of the sender and her agent in sending the message that neither of them had anything to do with bringing the suit held immaterial. *Western Union Telegraph Co. v. Guinn* (Civ. App.) 130 S. W. 616.

In a suit to restrain the enforcement of a default judgment on the ground of fraud in procuring the same, it is proper to permit plaintiff to testify to conversations between himself and his attorney relative to the former suit and to certain acts on the part of both, to prove that he was not negligent in failing to appear and answer in the former suit. *Dalhart Real Estate Agency v. Le Master* (Civ. App.) 132 S. W. 860.

On an issue as to defendant's employment as gin manager for the off season of 1908-1909, evidence of a quarrel between plaintiff's superintendent and another employé held irrelevant. *Guitar v. McGee* (Civ. App.) 139 S. W. 622.

In an action for personal injuries by a person who, while a minor, executed a release which he disaffirmed after reaching his majority, evidence that he never requested secrecy as to his minority was incompetent. *Kansas City, M. & O. Ry. Co., of Texas v. Meakin* (Civ. App.) 146 S. W. 1057.

Testimony of plaintiff that before suing defendant he had consulted lawyers and had been advised by them to sue defendant is inadmissible. *Merchants' Nat. Bank of Houston v. Townsend* (Civ. App.) 147 S. W. 617.

In an action on a fire policy, evidence that plaintiff objected to the local authorities investigating the fire was admissible on the issue whether the fire had been started by him. *Mott v. Spring Garden Ins. Co.* (Civ. App.) 154 S. W. 658.

23. Customs and course of business.—See, also, notes under Rules 6, 20.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

Remoteness, see ante.

In an action by a property owner against the adjoining owner for damages to his property by the explosion of dynamite on the latter's premises, used as a hardware store, evidence of how particular persons conducted their hardware business in a particular place was properly excluded, as not showing the general custom. *Barnes v. Zettlemoyer*, 25 C. A. 468, 62 S. W. 111.

Where defendant pleaded the illegality of contracts for the sale of cotton, evidence as to business methods of the other party to the contracts held admissible. *Smith v. Bowen*, 45 C. A. 222, 100 S. W. 796.

In an action for the value of a shipment made by defendant to a third person on plaintiff's order, on the ground that it should have been made so that the third person could not have obtained the shipment without first making payment, certain testimony held properly admitted. *Smith v. Landa*, 45 C. A. 446, 101 S. W. 470.

A custom or usage of trade may be proved by proof of specific instances. *Broussard v. South Texas Rice Co.* (Civ. App.) 120 S. W. 587.

On the issue of adverse possession by uninclosed land, evidence that stock was not permitted to run at large where the land was situated, and that it was not customary for farmers to fence, held admissible. *Stevens v. Pedregon* (Civ. App.) 140 S. W. 236.

24. Value of services.—Earnings and earning capacity, to show damages for personal injury, see post.

In order to determine the value of the services of an attorney rendered in a law suit, it is proper to show the nature of the litigation, the amount involved, the interests at stake, the capacity and fitness of the plaintiffs for the required work, the services and labor rendered, the length of time occupied, and the benefit, if any, derived by defendant from the litigation. *I. & G. N. Ry. Co. v. Clark*, 81 T. 43, 16 S. W. 631.

Evidence held admissible on the issue of the amount of fees which attorneys were entitled to for making a collection. *Britt v. Burghart*, 16 C. A. 78, 41 S. W. 389.

Where a distress warrant was levied upon mules, held proper to exclude testimony offered by the tenant to show the value of the services of the mules. *Dunlap v. Thrasher*, 43 C. A. 324, 107 S. W. 33.

In a broker's action for commissions under an express contract fixing the compensation plaintiff was to receive, evidence of the value of his services was inadmissible. *Fordtran v. Stowers*, 52 C. A. 226, 113 S. W. 631.

In an action by real estate brokers for commissions for selling land, evidence held admissible on the question of the reasonable value of the services that when more than one agent assisted in selling it was the custom of the agent procuring the buyer to charge only 2½ per cent. commissions. *Toland v. Williams & Wiley* (Civ. App.) 129 S. W. 392.

Where, in an action on a note executed by a client to her attorney for services rendered, the issue was whether the charge made by the attorney was excessive, evidence that the maker's estimate of the value of the attorney's services was based on a false estimate of the value of the estate which she obtained by him was admissible. *Barnes v. McCarthy* (Civ. App.) 132 S. W. 85.

25. Value or market price of property.—Certainty, see ante.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

In an action for the value of goods sold, evidence of the agreement of the parties as to the amount to be paid therefor is admissible. *Ballew v. Casey*, 60 T. 573. But when the suit is to recover an agreed sum, evidence of the value is inadmissible. *McGreal v. Wilson*, 9 T. 426; *Gammage v. Alexander*, 14 T. 414; *Jones v. Brazile*, 1 App. C. C. § 299.

Market value is shown by price when there has been an actual sale, by cost, etc. *Galveston Wharf Co. v. McYoung*, 2 App. C. C. § 643. When there is no market value of a commodity, such as hay, evidence of a single sale in the neighborhood, the opinion of

witness, the general understanding of the community as to its value, is admissible. *G. C. & S. F. Ry. Co. v. Lowe*, 2 App. C. C. § 648.

Certain evidence in an action for wrongful attachment as to value of the property held admissible. *Armstrong v. Ames & Frost Co.*, 17 C. A. 46, 43 S. W. 302.

Estimated value of book accounts was held admissible against a fraudulent purchaser thereof. *Moore v. Temple Grocer Co.* (Civ. App.) 43 S. W. 843.

Evidence as to value of land cut into lots, and the value of lots in the neighborhood, held admissible in an action for injuries by railroad. *Denison & P. S. Ry. Co. v. Scholz* (Civ. App.) 44 S. W. 560.

Evidence as to what plaintiff was offered for his land before defendant maintained a nuisance held inadmissible to show impairment in value. *Brennan v. Corsicana Cotton-Oil Co.* (Civ. App.) 44 S. W. 588.

Where appraisal is waived, evidence of value of goods destroyed held admissible in action on policy. *Springfield Fire & Marine Ins. Co. v. Cannon* (Civ. App.) 46 S. W. 375.

The exclusion of evidence offered by a railroad company to show the value of property destroyed by fire held error. *Houston & T. C. R. Co. v. Smith* (Civ. App.) 46 S. W. 1046.

In action on fire policy, evidence that arbitrators did not estimate the value of part of the building that was totally destroyed held not error. *Phoenix Ins. Co. v. Moore* (Civ. App.) 46 S. W. 1131.

On an issue whether an instrument was intended as a mortgage or a conditional deed, evidence is admissible that the property was worth nearly double the consideration named in the deed. *Temple Nat. Bank v. Warner*, 92 T. 226, 47 S. W. 515.

Evidence of the value of the abutting property assessed, held inadmissible where a personal judgment was not asked for. *Hutcheson v. Storrie* (Civ. App.) 48 S. W. 785.

Evidence of the value of lands taken, based on an assumed deep-water frontage, was properly stricken, where no such frontage was shown to exist. *Crary v. Port Arthur Channel & Dock Co.* (Civ. App.) 49 S. W. 703.

Evidence that plaintiff could get only \$150 for the land immediately after the railroad was built held admissible. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Civ. App.) 51 S. W. 511.

Plaintiff's damages for a fraudulent sale by defendant being the value of the land at the time of second sale, evidence showing a particular value of the land to him or amount of taxes paid is inadmissible. *Mitchell v. Simons* (Civ. App.) 53 S. W. 76.

Evidence of value of property in controversy held admissible. *Huff v. Maroney*, 23 C. A. 465, 56 S. W. 754.

In action to cancel deed and rescind sale by devisee of property not yet distributed, as having been procured for an inadequate consideration, question of whether executors properly administered estate held not material on question of value of estate conveyed. *Wells v. Houston*, 23 C. A. 629, 57 S. W. 584.

Where defendant city discharged sewage along the border of plaintiff's land, it was error to allow testimony to show that sewage enhanced the value of land for agricultural purposes, where the sewage did not flow on plaintiff's land, and it was not possible for him to use it. *Smith v. City of San Antonio* (Civ. App.) 57 S. W. 881.

In an action to recover for household goods destroyed in transportation, evidence of their intrinsic value held properly admitted. *Missouri, K. & T. Ry. Co. of Texas v. Davidson*, 25 C. A. 134, 60 S. W. 278.

Evidence that real estate sold under a vendor's lien was of greater value than at the time the lien was reserved held inadmissible in an action by a purchaser under the vendor's lien foreclosure sale to recover machinery removed from property. *Mundine v. Pauls*, 28 C. A. 46, 66 S. W. 254.

Evidence of general increase in value held not admissible on the question of damages from construction in a railroad. *Eastern Texas R. Co. v. Eddings*, 30 C. A. 170, 70 S. W. 98.

In proceeding to condemn land, evidence that it is an old homestead, and, as such, possesses peculiar value to the owner, held inadmissible. *Cane Belt Ry. Co. v. Hughes*, 31 C. A. 565, 72 S. W. 1020.

Evidence in condemnation proceedings of probable character of lands as suburban property held admissible. *St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Civ. App.) 73 S. W. 976.

In suit for cancellation of conveyance on ground of fraud, certain evidence held admissible on question as to value of lands, in return for an interest in which, the conveyance was made. *Cooper v. Maggard* (Civ. App.) 79 S. W. 607.

Where, pending suit for trespass in the erection of a telephone pole on plaintiff's premises, the pole was removed, whereupon plaintiff filed an amended petition alleging such fact, evidence of the difference in value of the land with and without the pole held irrelevant. *Southwestern Telegraph & Telephone Co. v. Whiteman*, 36 C. A. 163, 81 S. W. 76.

In action for breach of contract of sale of real estate, plaintiff held not limited to proof of market value to establish the true value of the property. *J. P. Watkins Land Mortg. Co. v. Campbell*, 98 T. 372, 84 S. W. 424.

In an action for injuries to a horse, evidence that plaintiff had tried to sell it and had not found a purchaser for a specified price was inadmissible. *Howard v. Fabj*, 42 C. A. 42, 93 S. W. 225.

In action for cancellation of deed on issue of force and threats of violence, value of respective interests of parties and consideration paid for the property conveyed held immaterial. *Bartek v. Kolacek* (Civ. App.) 99 S. W. 114.

In an action for injuries to abutting property by a construction in the street, defendant under the pleadings held entitled to show the enhancement in value of the abutting property, in offset to damages done to it by the construction. *Burton Lumber Corp. v. City of Houston*, 45 C. A. 363, 101 S. W. 822.

In proceedings by a railroad to condemn land, certain evidence as to value held admissible. *Hengy v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 109 S. W. 402.

Where it is sought to prevent an owner of property from using it because of injury to an adjoining proprietor, evidence as to the value of defendant's property is admissible. *Gose v. Coryell* (Civ. App.) 126 S. W. 1164.

In a suit to enjoin the collection of taxes on the ground of discrimination in assessing plaintiff's tracts, testimony held admissible as to the value of timber on the several

tracts belonging to plaintiff taken as a whole. *Lufkin Land & Lumber Co. v. Noble* (Civ. App.) 127 S. W. 1093.

In an action to recover the purchase price of a machine, evidence as to its value held immaterial. *Carroll v. Mitchell-Parks Mfg. Co.* (Civ. App.) 128 S. W. 446.

In an action to recover money paid for an option to purchase land by reason of the false representation that defendant had such an option, evidence of the increased value of the land at the time of the trial over its value at the time of its purchase, held inadmissible. *Magill v. Coffman* (Civ. App.) 129 S. W. 1146.

Where, in an action by an indorsee of a note against the executor of the deceased maker, the executor made the payee a party and alleged that the payee exercised undue influence over the maker while occupying the relation of attorney to her, evidence that the payee, after the action was brought, had stated that, while he had taken the note, he did not expect to collect the full amount thereof, but that he expected the court to pass on the reasonableness of his fees as evidenced by the note, but that since the suit had been filed he would insist on the full amount, was admissible on the issue between the executor and the payee that his charge for his services was excessive. *Barnes v. McCarthy* (Civ. App.) 132 S. W. 85.

On a dispute as to the price agreed upon, evidence of the value of the goods is admissible. *Paine v. Argyle Mercantile Co.* (Civ. App.) 133 S. W. 895.

Where it is an uncontroverted issue as to whether an article has a market value, evidence is admissible to show intrinsic or actual value, but not otherwise. *Felker v. Hyman* (Civ. App.) 135 S. W. 1128.

In an action to recover money paid under a contract, held, that inadequacy of price was material on the issue as to whether there was a meeting of minds. *Dewitt v. Bowers* (Civ. App.) 138 S. W. 1147.

In an action for damages for breach of a contract for the sale of land, evidence showing its market value held admissible. *Naylor v. Parker* (Civ. App.) 139 S. W. 93.

In a suit to rescind an exchange of property or for damages in the alternative, the court held to properly permit testimony as to the value of the land exchanged by plaintiff. *Pickens v. Major* (Civ. App.) 139 S. W. 1040.

In an action for injuries to property from the construction of a railroad in a street, testimony as to whether the lot was of greater or less value after the laying of the tracks was properly excluded. *Dallas Terminal Ry. & Union Co. v. Ardrey* (Civ. App.) 146 S. W. 616.

Exclusion of evidence as to value of land lying in one certain direction held not error, where the shortage for which the purchaser sued did not lie in any particular direction. *Yates v. Buttrill* (Civ. App.) 149 S. W. 347.

In an action for the value of a house destroyed by fire, it was proper to show the value of the land separate from the house as bearing on the value of the house. *Missouri, K. & T. Ry. Co. of Texas v. Murray* (Civ. App.) 150 S. W. 217.

A carrier sued for loss of baggage consisting of wearing apparel of a passenger may not prove that the articles had a market value as secondhand articles and prove secondhand value. *Missouri, K. & T. Ry. Co. of Texas v. Hailey* (Civ. App.) 156 S. W. 1119.

26. — Time and place of valuation.—Under a claim for use and occupancy of premises from December 1, 1879, evidence of its value from January 1, 1879, is inadmissible. *Walker v. Simkins*, 2 App. C. C. § 70.

The value of lands taken by railroads for right of way is to be estimated at the time payment is made or tendered. *G., C. & S. F. Ry. Co. v. Lyons*, 2 App. C. C. § 139.

In an action for conversion of a stock of goods taken in bulk in payment of a debt, the inquiry as to value should be restricted to the value in bulk as at the time of the sale. *Reynolds v. Weinman* (Civ. App.) 40 S. W. 560.

In an action for damages to a house by operation of railroad, defendant cannot show price of the property 12 years before. *Denison & P. S. Ry. Co. v. Cummins* (Civ. App.) 42 S. W. 588.

Where petition in a suit to set aside a deed for fraud charged certain interveners in possession with rents, the value of the property at the time of the trial was properly shown. *Temple Nat. Bank v. Warner* (Civ. App.) 44 S. W. 1025.

Evidence of the value of homestead property after its designation held admissible to show its valuation at the time. *Gonzales v. Adoue* (Civ. App.) 56 S. W. 543.

Where plaintiff sued for failure to deliver goods purchased, testimony as to the market value of the goods at the place to which they were to be shipped was improperly admitted; it appearing that plaintiff could not buy such goods at such place. *Specialty Furniture Co. v. Kingsbury* (Civ. App.) 60 S. W. 1030.

In an action against a railroad company for an overflow from construction of a trestle, held error to admit evidence as to the value of the land before the construction of the trestle. *San Antonio & A. P. Ry. Co. v. Kiersey*, 98 T. 590, 86 S. W. 744.

In an action against a railroad company for the destruction of property by fire, the sustaining of an objection to a question asked a witness testifying as to the market value of the land before and after the fire held not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Nelser*, 54 C. A. 460, 118 S. W. 166.

In an action for injury to land by overflow in May, 1905, testimony as to its value on March 14, 1906, held properly excluded on question of damages. *Missouri, K. & T. Ry. Co. of Texas v. Chilton*, 52 C. A. 516, 118 S. W. 779.

In condemnation proceedings for a right of way, the admission of evidence as to the market value of the land when the road was constructed, rather than at the time of trial, held not error. *Stephenville North & South Texas Ry. Co. v. Moore*, 56 C. A. 553, 121 S. W. 882.

Trade publications held inadmissible to show market price of a delayed shipment of sheep at the place of destination on a certain date. *Galveston, H. & S. A. Ry. Co. v. Word* (Civ. App.) 124 S. W. 478.

Where cattle shipped would not have arrived, in the usual course of transit, until the 14th day of the month, evidence of the condition of the market on the 13th is immaterial. *Galveston, H. & S. A. Ry. Co. v. Noelke* (Civ. App.) 125 S. W. 969.

In an action on a policy, evidence of the value of the property when insured as well

as before the fire, held admissible. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

In an action for damages for breach of a contract to buy cattle, evidence as to the market value at the place and at about the time fixed for delivery held admissible. *Houston Packing Co. v. Griffith* (Civ. App.) 144 S. W. 1139.

Where a pump was sold under warranty f. o. b. New York, evidence as to its value at Lubbock, Tex., where it was set up, held immaterial. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 147 S. W. 717.

In an action against a railroad company for damages caused by an overflow of a stream, the admission in evidence of the value of the land overflowed just before and just after the overflow was not erroneous. *Stephenville, N. & S. T. Ry. Co. of Texas v. Yates* (Civ. App.) 148 S. W. 836.

In an action involving the falsity of representations as to the value of land, where there was evidence that its value at the time of the trial was the same as at the time the representations were made, the admission of depositions giving the witnesses' opinions of its value when the depositions were taken was proper. *Martin v. Ince* (Civ. App.) 148 S. W. 1178.

In a condemnation proceeding, the testimony of the owner as to the consideration paid by him for the property, and the consideration realized from a sale of a part of the property more than a year prior to the trial, where part cash and part promissory notes and other property were given, was improperly admitted. *Ft. Worth Improvement Dist. No. 1 of Tarrant County v. Weatherred* (Civ. App.) 149 S. W. 550.

27. — **Appraisal of property.**—Testimony of sheriff that he valued goods at what bookkeeper acquainted with cost marks on same said they cost coupled with testimony of bookkeeper that he gave cost price to sheriff, is admissible to show cost of goods. *Parlin & Orendorff Co. v. Hanson*, 21 C. A. 401, 53 S. W. 62.

In an action on a fire policy, the adjustment held evidence of the value of the goods destroyed, and prima facie proof of the amount due under the policy. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068, 96 S. W. 760.

28. — **Corporate stock.**—To show the value of the stock of a corporation held as collateral, it is competent to prove that at Boston, where its headquarters are kept, only about one-fifth of their face value could be raised on the shares. *Smith v. Traders' Nat. Bank*, 82 T. 368, 17 S. W. 779.

A statement of a building and loan association's business two years prior to a sale of its assets held admissible to show the value of plaintiff's stock. *North Texas Sav. & Bldg. Ass'n v. Jackson* (Civ. App.) 63 S. W. 344.

On an issue as to the value of certain corporate stock, evidence that, when the corporation was organized, part of its stock was watered and issued to promoters, was irrelevant. *Campbell v. Rushing* (Civ. App.) 141 S. W. 133.

29. — **Comparison with other property.**—Where the land sought to be condemned included all of the timber land on defendant's farm, evidence that plaintiff had been offered timber land within a half mile of that in question at a certain price was properly excluded. *Gulf, C. & S. F. Ry. Co. v. Brugger*, 24 C. A. 367, 59 S. W. 556.

On an issue as to whether the value of plaintiff's property had depreciated by construction of railway lines, etc., in the vicinity, certain evidence as to other lots held erroneously admitted. *Dennis v. Dallas, C. & S. W. Ry. Co.* (Civ. App.) 94 S. W. 1092.

30. — **Crops.**—Evidence of the cash market value of cotton and its classification is admissible. *Railway Co. v. Gernan*, 84 T. 141, 19 S. W. 461.

Where plaintiff's interest in a cotton crop had been converted, evidence of the market value of cotton at the time was admissible. *Ellis v. Stine* (Civ. App.) 55 S. W. 758.

Where there was no evidence of market value of grass destroyed by fire, its value to plaintiff for the purposes for which he used it should be considered. *San Antonio & A. P. Ry. Co. v. Stone* (Civ. App.) 60 S. W. 461.

In an action against a railroad for the destruction of plaintiff's crops, owing to the diversion of waters onto his land through a ditch constructed by defendant along the line of its road, evidence as to the value of lint cotton during the season that the lands were overflowed, was admissible. *Chicago, R. I. & G. Ry. Co. v. Longbottom* (Civ. App.) 80 S. W. 542.

In an action for damages to plaintiff's rice crop owing to an overflow of water from defendant's canal, certain testimony as to what plaintiff received a sack for some of the uninjured rice subsequently sold held not controlling on the issue of damages. *Colorado Canal Co. v. Sims*, 42 C. A. 442, 94 S. W. 365.

In an action for the burning of plaintiff's grass, evidence of its value held inadmissible as not showing market value. *Texas & P. Ry. Co. v. Pemberton*, 43 C. A. 291, 95 S. W. 1089.

In an action against a railroad for flooding lands, all the evidence, when taken together, held not to violate the correct criterion of the value of a growing crop. *Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Civ. App.) 112 S. W. 783.

In an action against the landlord for failure to give the tenant possession of all the land leased, evidence as to the value of the crop raised on the land furnished held admissible. *Pressler v. Warren*, 57 C. A. 635, 122 S. W. 909.

Where the judgment record does not show certain proceedings, it will be presumed, especially after a long lapse of time, that that was done which should have been done. *Maes v. Thomas* (Civ. App.) 140 S. W. 846.

31. — **Cost of property and amount received in general.**—The price a fraudulent purchaser received for the property was not admissible to show its value. *Moore v. Temple Grocer Co.* (Civ. App.) 43 S. W. 843.

In an action for failure to deliver goods, evidence of their cost held admissible where there was no market value at the place of delivery. *New York & T. S. S. Co. v. Weiss* (Civ. App.) 47 S. W. 674.

Evidence as to the cost of improvements held admissible in an action to recover on defendant's obligation to pay the cost of such improvements on discontinuing plaintiff's right to use land. *Ackermann v. Ackermann Schuetzen Verein* (Civ. App.) 60 S. W. 366.

In an action for conversion of furniture, it was error to permit the owner to testify as to what he paid for the piano converted. *Lincoln v. Packard*, 25 C. A. 22, 60 S. W. 682.

Where the value of improvements on land was in issue, testimony of witness as to what he estimated the improvements to have cost, and that he did not think they had deteriorated much, held proper. *Smith v. Frio County (Civ. App.)* 66 S. W. 711.

In a proceeding to condemn land for a railroad right of way, evidence as to the price paid therefor by the owner 10 years before was incompetent, though there was evidence that its market value had remained unchangd. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 429, 68 S. W. 745.

Rule stated for ascertaining the value of household goods in use, for the purpose of determining the damages from injury thereto. *Wells, Fargo Exp. Co. v. Williams (Civ. App.)* 71 S. W. 314.

In action for partnership accounting, contract whereby defendant sold third person half interest in the property held not admissible on question of the value of the property when sale was made. *Gresham v. Harcourt*, 33 C. A. 196, 75 S. W. 808.

Evidence of the cost of personal property destroyed by fire set by a railroad company, though admissible, held insufficient proof of value to sustain a recovery. *St. Louis Southwestern Ry. Co. v. Moss*, 37 C. A. 461, 84 S. W. 231.

In an action for injury to personal property, the original cost may be considered in arriving at its value only in the absence of evidence showing that the property had no market value at the time it was destroyed. *Galveston, H. & S. A. Ry. Co. v. Levy*, 45 C. A. 373, 100 S. W. 195.

In an action for damages to grazing lands from herding sheep thereon, tramping down grass, consuming and polluting water, and injuring the tanks, where there was no market value of the grass, water, or tanks, the price plaintiff was paying the state for the pasturage was immaterial on the question of his damages. *Tippett v. Corder (Civ. App.)* 117 S. W. 186.

Evidence of the price paid for property is not evidence of its market value. *Texarkana & Ft. S. Ry. Co. v. Neches Iron Works*, 57 C. A. 249, 122 S. W. 64.

In an action for the price of a secondhand, well-drilling outfit, the value thereof may not be shown by proof of the price at which the seller obtained the outfit at a sheriff's sale. *Edwards v. Mayes (Civ. App.)* 136 S. W. 610.

Testimony of price paid by plaintiffs for the timber, for destruction of which they sue, held inadmissible to prove market value. *St. Louis & S. F. R. Co. v. Blocker (Civ. App.)* 138 S. W. 156.

The price paid for land was not evidence of its market value. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick (Civ. App.)* 147 S. W. 730.

In an action on a party wall contract, stipulating that defendant on using the wall should pay one-half of the then value of the part used, evidence of the original cost of the wall was relevant on the question of its value at the time defendant made use of it, a year or more after its construction. *Wyatt v. Moore (Civ. App.)* 152 S. W. 1133.

32. — **Cost of production.**—Proof of market value of crops, without evidence of cost of harvesting, held improper in an action for destruction of standing crops. *D. H. Fleming & Son v. Pullen (Civ. App.)* 97 S. W. 109.

33. — **Rental value.**—If there is no market, the rental value of property delayed may be ascertained by proof of facts affecting the question and by opinions of witnesses properly informed. *G., C. & S. F. Ry. Co. v. Maetze*, 2 App. C. C. § 631.

In assessing damages on an unimproved lot, evidence of rental value of saloon across the street held incompetent. *Gulf, C. & S. F. Ry. Co. v. Burger (Civ. App.)* 45 S. W. 613.

Evidence of the value of the property conveyed at the time of the trial held inadmissible, standing by itself, to show its rental value. *Temple Nat. Bank v. Warner*, 92 T. 226, 47 S. W. 515.

Evidence of the value of rents before and after permanent injury to the realty held admissible to show depreciation. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Civ. App.)* 51 S. W. 511.

In an action for injury to land from the pollution of a stream, evidence of the annual value and net income of the land prior to its injury held admissible as to rental value, though the land had never been rented. *Umscheid v. City of San Antonio (Civ. App.)* 69 S. W. 496.

In an action against a railroad company for damages to property abutting on the street in which the tracks were laid, evidence of the rental value of the property after the construction of the road was admissible on the question of damages. *Texas Short Line Ry. Co. v. Clifford (Civ. App.)* 94 S. W. 168.

In an action for the detention of personal property alleged to have been purchased by plaintiff of defendant, evidence of the rental value or hire thereof per day held inadmissible. *Parlin & Orendorff Co. v. Kittrell (Civ. App.)* 95 S. W. 703.

In an action against a railroad company for damages caused by the building of a depot, tracks, etc., near plaintiff's property, evidence of a reduction in the rental value of the property held admissible to show damages. *Magee v. Oklahoma City & T. R. Co. (Civ. App.)* 95 S. W. 1092.

In an action for the rental value of the building during the time the contractor delayed its construction, any testimony bearing on the question of rental value is admissible. *Smith v. Gunn*, 57 C. A. 339, 122 S. W. 919.

Evidence of price at which public free school land was rented by defendants to a third party held admissible as a circumstance tending to show the reasonable rental value recoverable by the state. *Hamilton v. State (Civ. App.)* 152 S. W. 1117.

34. — **Insurance.**—In a suit to recover damages for the wrongful seizure of goods, evidence as to the amount for which they were insured at the time of the seizure is inadmissible when offered for the purpose of proving their value. *Blum v. Stein*, 68 T. 608, 5 S. W. 454.

35. — **Judicial sale.**—The sheriff's return on a sale of attached property, made several months after its seizure, is not admissible evidence as to its value at the time of the seizure. *McCown v. Kitchen (Civ. App.)* 52 S. W. 801.

Amount for which land sold on execution held, under the circumstances, not evidence of its value. *W. T. Rickards & Co. v. J. H. Bemis & Co. (Civ. App.)* 78 S. W. 239.

36. — **Amount for which property can be purchased.**—In an action of trespass for burning an old house, it was error to admit on the question of damages evidence as to the price of new lumber; the true measure of damages being, as the court charged, the difference between the value of the premises just before and just after its destruction. *Wetzel v. Satterwhite* (Civ. App.) 125 S. W. 93.

37. — **Amount for which property will sell.**—Where an assignment of a debtor's stock is assailed for fraud, proof that the goods could not have been sold for more than 65 per cent. of their value held inadmissible. *Half v. Goldfrank* (Civ. App.) 49 S. W. 1095.

In condemnation proceedings for a road, the reception of evidence that the entire tract out of which the road was taken would sell for more if cut up into small tracts held error. *Watkins v. Hopkins County* (Civ. App.) 72 S. W. 872.

In an action against a carrier for unreasonable delay in delivering potatoes, evidence of price for which potatoes actually sold held admissible on issue of damages. *Garlington v. Ft. Worth & D. C. Ry. Co.*, 34 C. A. 274, 78 S. W. 368.

38. — **Tax assessment.**—In an action for injuries to plaintiff for pollution of a water course by sewage, assessments of plaintiff's property for taxation are properly excluded on the issue of value. *City of San Antonio v. Diaz* (Civ. App.) 62 S. W. 549.

On a dispute between the buyer and seller as to the price, the buyer held entitled to show that a third person offered to sell at the price claimed by him. *Paine v. Argyle Mercantile Co.* (Civ. App.) 133 S. W. 895.

The amount at which plaintiff gave in his property for taxes during certain years held relevant on the question of its value. *Gulf, C. & S. F. Ry. Co. v. Koch* (Civ. App.) 144 S. W. 1035.

39. — **Circumstances adding to or detracting from value in general.**—Where the market value of an article cannot be shown, the intrinsic qualities of the thing, its uses, and any facts which would naturally affect the minds of parties buying and selling, in determining the price to be asked or given, are relevant to the question of value. *Railway Co. v. Dunham*, 4 App. C. C. § 99, 16 S. W. 421.

To show depreciation of property, evidence of noise, smoke, and dirt is admissible. *Denison & P. S. Ry. Co. v. Cummins* (Civ. App.) 42 S. W. 538.

Testimony that adjacent property had depreciated 30 per cent. by reason of a nuisance held admissible. *Brennan v. Corsicana Cotton-Oil Co.* (Civ. App.) 44 S. W. 538.

In an action against a railroad company for damages to property abutting on the street in which the tracks were laid, certain evidence held admissible to show diminution in the value of the property. *Texas Short Line Ry. Co. v. Clifford* (Civ. App.) 94 S. W. 168.

In an action on a street paving contract, evidence that the value of defendant's property had been enhanced by the construction of the pavement held inadmissible. *Barber v. Asphalt Pav. Co. v. Loughlin*, 44 C. A. 580, 98 S. W. 948.

In an action for damages to real estate, in consequence of the construction of railroad pens near thereto, evidence of the depreciation of the value of the property for specified purposes held admissible. *Gulf, C. & S. F. Ry. Co. v. Blue*, 46 C. A. 239, 102 S. W. 128.

In an action against a railway company to enjoin construction of a fence between its right of way and an adjoining lot, testimony as to the value of the lot on account of its proximity to the company's station and as to what uses the lot could be subjected was properly admitted on the question of market value. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

40. — **Animals.**—It being shown that the agents of the railway company were informed at the time of receiving the cattle that they were for immediate sale at their destination, it was relevant to show the state of the market at the destination when the cattle should have been delivered, and the lower price when actually delivered. *Railway Co. v. Greathouse*, 82 T. 104, 17 S. W. 834.

Proof of intrinsic value of cattle shipped held proper, where there was no market value. *Missouri, K. & T. Ry. Co. v. Chittim* (Civ. App.) 40 S. W. 23.

In action for injuries to mare in transit, evidence of unaccepted offer held inadmissible on the question of value. *Texas & P. Ry. Co. v. Randle*, 18 C. A. 348, 44 S. W. 603.

Where an action is brought against railroad for damages to cattle resulting from its negligence and delay in executing a contract of carriage, evidence of the market value of the cattle is admissible. *Missouri, K. & T. Ry. Co. of Texas v. Wells*, 24 C. A. 304, 58 S. W. 842.

On an issue as to the damages for a carrier's failure to seasonably unload cattle at their destination, evidence of the market value of the cattle there, if delivered in as good condition as when turned over to the carrier, held inadmissible. *Galveston, H. & S. A. Ry. Co. v. Botts* (Civ. App.) 70 S. W. 113.

In action against carrier, evidence by seller as to price brought at National Stockyards held sufficient evidence that cattle sold at market value. *St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co.* (Civ. App.) 76 S. W. 947.

In action against a carrier for damages to cattle, evidence showing the condition, history, and shortage of the cattle on their arrival at destination is admissible. *Chicago, R. I. & T. Ry. Co. v. Carroll*, 36 C. A. 359, 81 S. W. 1020.

In an action against a railroad company for killing certain ponies, evidence of what plaintiff paid for the ponies was inadmissible to show the value of the animals. *Gulf, C. & S. F. Ry. Co. v. Anson* (Civ. App.) 82 S. W. 785.

In an action for damages to a shipment of cattle, it was not error to refuse evidence of market value, based on conditions not existing on the arrival of the shipment. *St. Louis Southwestern Ry. Co. of Texas v. Dolan* (Civ. App.) 84 S. W. 393.

In an action for damages to a shipment of cattle, testimony as to what the shipment ought to have been worth held properly excluded.—Id.

On the question of damages to cattle shipped, evidence as to what plaintiff paid for the cattle is inadmissible. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards* (Civ. App.) 86 S. W. 47.

In an action for injuries to horses shipped, the market value of the horses at points other than their destination was inadmissible. *Texas & P. Ry. Co. v. Stephens* (Civ. App.) 86 S. W. 933.

In an action involving the value of live stock certain evidence held inadmissible. *Bullard v. Stewart*, 46 C. A. 49, 102 S. W. 174.

Where sheep could not have arrived at their destination in time for the market of the day on which the shipment would have been made had cars been furnished in a reasonable time, evidence of the state of the market on that day was irrelevant. *Galveston, H. & S. A. Ry. Co. v. Word* (Civ. App.) 124 S. W. 478.

In an action against a carrier for injury to a shipment of cattle, plaintiff testified there was no market for the cattle in the condition they were in when they reached their destination, that there was no place for their sale there, that there were no stock-yards except the railroad pens, and no barns where cattle were sold, and no commission merchants, and if there had been any people there buying and selling at that time he would have known of it. Another testified it was a place about 1,500, that he had been in and around there for some time preceding the shipment, and there were no yards, commission merchants, or sales of cattle there that he ever heard of. Held, that such testimony was admissible on the question of damages to show that there was no market value at that place. *Missouri, K. & T. Ry. Co. of Texas v. Wasson Bros.* (Civ. App.) 126 S. W. 664.

In an action against a railroad company for damage to cattle en route, evidence as to what the cattle would have sold for some time after they should have reached destination if promptly transported, and at another market, was not admissible. *Houston & T. C. R. Co. v. Roberts* (Civ. App.) 126 S. W. 890.

Evidence as to price paid for horses injured in transportation held inadmissible in an action against the carrier, where there is evidence of their market value at their destination. *Chicago, R. I. & G. Ry. Co. v. Rogers* (Civ. App.) 129 S. W. 1155.

What cattle sold for on the day of their arrival and on the market to which they were shipped held admissible to show their market value, in an action for injury to them through the carrier's rough handling and delay in transit. *Ft. Worth & R. G. Ry. Co. v. Montgomery* (Civ. App.) 141 S. W. 813.

Evidence of what plaintiff paid for a horse eight months before its injury and the price he offered to sell him for held inadmissible on the issue of market value. *Municipal Paving Co. v. Donovan Co.* (Civ. App.) 142 S. W. 644.

In an action for breach of a contract to buy cattle, evidence of the range of prices during a period covering the date in question, and showing minimum price during the period, held admissible to show value. *Houston Packing Co. v. Griffith* (Civ. App.) 144 S. W. 1139; *Houston & T. C. R. Co. v. Crowder*, 152 S. W. 183.

In a statutory action against a railroad for killing a jack, testimony by a witness, who sold the animal to plaintiff, that he was cheap at the selling price to a man who needed him, was inadmissible because not based on the proper measure of damages, which was the market value. *Ft. Worth & R. G. Ry. Co. v. Chisholm* (Civ. App.) 146 S. W. 988.

Where, by reason of a carrier's delay in transporting cattle, plaintiff was unable to sell them on the morning market, and the evening market was lower, the difference between the morning and evening price was admissible. *Gulf, C. & S. F. Ry. Co. v. Ideus* (Civ. App.) 157 S. W. 173.

41. **Laws of other state or country.**—The existence of a statute of another state cannot be proved by producing the opinion of the supreme court of that state construing it. *Seiders v. Merchants' Life Ass'n of the United States*, 93 T. 194, 54 S. W. 753.

Where, under the Mexican law, field notes of surveys could only be obtained from the general land office, testimony of witnesses to the same effect was irrelevant. *Clawson v. Wilkins* (Civ. App.) 93 S. W. 1086.

Since the ultimate determination of cases arising in the Indian Territory may be made by the federal supreme court, its rulings as to what are the rules of the common law must be accepted as the highest evidence of the common law of the territory. *Missouri, K. & T. Ry. Co. of Texas v. Wise*, 101 T. 459, 109 S. W. 112.

42. **Date of organization of county.**—On the issue as to the date of the organization of a county, evidence that the commissioners' court provided in a certain year that the transcript of the surveyor's records of a land district be placed in the custody of the county surveyor was immaterial. *McCaleb v. Rector* (Civ. App.) 78 S. W. 956.

43. **Time of election of officer.**—The fact that the first entry in a surveyor's record book was made in 1882 is not evidence on an issue as to when the surveyor was elected. *McCaleb v. Rector* (Civ. App.) 78 S. W. 956.

44. **Violation of anti-trust law.**—It may be shown, to prove combination of corporations in violation of the anti-trust law, that an ordinance extending their franchises was accepted in furtherance of an unlawful design to restrain trade. *San Antonio Gas Co. v. State*, 22 C. A. 118, 54 S. W. 289.

45. **Discrimination in taxation.**—In a suit to enjoin the collection of taxes on the ground of discrimination against plaintiff's lands for the years 1906 and 1907, testimony as to an agreement by the commissioners' court in 1904 to abide by the valuation of property assessed, regardless of evidence, held properly excluded as irrelevant. *Lufkin Land & Lumber Co. v. Noble* (Civ. App.) 127 S. W. 1093.

46. **Dedication.**—Intent, see ante.

In determining whether a dedication of property to a city as a street was revoked before its acceptance, evidence that land has been sold by the dedicator and described by him in the deed by the plat upon which the blocks, lots, and streets were delineated, is admissible. *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

Whether an alley was dedicated to public use depends on the action or nonaction of the owners of the land, and so it was erroneous to admit evidence showing that without the alley the public would be greatly inconvenienced in getting through the large block in which the alley was situated. *Davis v. Young* (Civ. App.) 148 S. W. 1116.

47. **Public character of road.**—The long-continued use of a road is a pertinent fact to establish its public character. *Markham v. H. & T. C. R. R. Co.*, 1 App. C. C. § 81.

And so is the assignment of hands by the county court to work it. *McWhorter v. State*, 43 T. 666.

48. **Validity of purchase of school land.**—On issue as to validity of purchase of school lands, evidence that commissioner of general land office canceled the award of land to the purchaser held inadmissible. *Smithers v. Lowrance*, 100 T. 77, 93 S. W. 1064.

On issue as to validity of purchase of school lands, evidence that purchaser paid interest and resided on land as required by law, held admissible. *Id.*

49. **Illegitimacy of child.**—Evidence showing illicit intercourse of married woman with a man not her husband held inadmissible to prove illegitimacy of her child. *Foote v. State* (Cr. App.) 144 S. W. 275.

Evidence of difference in color between child and her mother's husband held inadmissible to prove illegitimacy. *Id.*

50. **Marriage.**—Negative evidence, see ante.

Remoteness, see ante.

Evidence, in an action by a wife for the death of her husband, that deceased's mother corresponded with her as a daughter held admissible on question of marriage. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

51. **Separation of husband and wife.**—Testimony upon point of actual separation before time of agreement to separate held material and relevant. *Levy v. Goldsoll* (Civ. App.) 131 S. W. 420.

52. **Residence.**—Certainty, see ante.

On the issues involving plaintiff's residence and his disposition to earn money, certain evidence held properly received. *Pecos & N. T. Ry. Co. v. Thompson* (Civ. App.) 140 S. W. 1148.

On an issue as to whether a particular voter resided in the state on January 1st, so as to make him liable for poll tax, it was error to exclude his testimony that he and his wife did nothing toward establishing a home in the state until about the middle of January. *Linger v. Balfour* (Civ. App.) 149 S. W. 795.

On an issue as to the residence of a voter, testimony as to where he had lived since a specified time, where his headquarters were during that time, and as to where he considered his home to be since that time was properly excluded as irrelevant. *Id.*

On an issue as to the residence of a voter whose right to vote was denied, testimony that he did not go on a claim which he had filed on in another state to live was properly excluded, since, he being a single man, his right to vote was fixed by statute at the place where he usually slept. *Id.*

Testimony offered on an issue as to the residence of a voter, whose right to vote was denied, as to whether he resided with a certain family, held properly rejected. *Id.*

53. **Wills, matters affecting validity of.**—See notes under Arts. 3271, 3272.

54. — **Allowance under will.**—Evidence as to the value of services of a superintendant of property devised by testator, in order to arrive at the net profits, held admissible in an action for an allowance under the will. *McCreary v. Robinson*, 94 T. 221, 59 S. W. 536.

55. **Gift.**—Circumstantial evidence, see ante.

Certain evidence held admissible on an issue as to whether the owner of land had made a parol gift thereof. *Hammond v. Hammond*, 43 C. A. 284, 94 S. W. 1067.

56. **Partnership and partnership transactions.**—Admissibility of evidence to show partnership determined. *Davis v. Bingham* (Civ. App.) 46 S. W. 840.

It was not error, in an action growing out of the dissolution of a partnership, to refuse to require plaintiff to answer questions relating to transactions prior to the existence of the partnership. *Mansfield v. Neese*, 21 C. A. 584, 54 S. W. 370.

In action on note, seeking to charge defendants as partners, question asked to elicit evidence of assumption of indebtedness held properly excluded; the evidence being irrelevant. *Moore v. Williams*, 31 C. A. 287, 72 S. W. 222.

Evidence of a transfer of his property by an alleged partner, prior to starting the business in which he was alleged to be a partner, held admissible as a circumstance showing that he was a partner. *Robinson v. First Nat. Bank* (Civ. App.) 79 S. W. 103.

57. **Collusive appointment of receiver.**—Proceedings with reference to the removal of a receiver, had long after the appointment, are inadmissible on the question of collusion in the appointment. *Adams v. San Antonio & A. P. Ry. Co.*, 34 C. A. 413, 79 S. W. 79.

58. **Injunction.**—Remoteness, see ante.

In proceedings to enjoin the construction of a highway, evidence that the jury of view promised plaintiff that its claim for damages would be allowed is admissible. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

In a suit to restrain the erection of a building of combustible material within established fire limits, certain evidence held properly excluded. *Chimine v. Baker*, 32 C. A. 520, 75 S. W. 330.

In an action to enjoin continued violation of a contract not to engage in a certain line of business, certain evidence held inadmissible. *Walker v. Brosius* (Civ. App.) 90 S. W. 655.

In an action to enjoin a railway company from constructing a fence along the line of a lot adjoining its right of way, evidence that the fence would affect the use of the lot is immaterial and irrelevant. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

59. **Partition.**—In a suit where there is a question as to an alleged ancient partition of land, evidence of the payment of taxes by those claiming under the partition is admissible. *Glasscock v. Hughes*, 55 T. 461.

60. **Boundaries.**—Evidence irrelevant unless preceded or followed by other evidence, see ante.

Hearsay evidence, see notes under Rule 35.

Circumstantial evidence, see ante.

When a disputed boundary line was coincident with an established line of another survey, made at the same time, a question which sought to elicit the action of a

surveyor in running the line of such established survey was pertinent to the issue. *Tucker v. Smith*, 68 T. 473, 3 S. W. 671.

A boundary line cannot be proven by showing that an adjoining land owner claiming under the grant, but who is not a party to the suit, does not claim beyond the line in controversy. *Bailey v. Baker* (Civ. App.) 42 S. W. 124.

A judgment deciding the boundaries of a section of land held inadmissible in another action between different parties, to show such boundaries. *Colonial & U. S. Mortg. Co. v. Tubbs* (Civ. App.) 45 S. W. 623.

On an issue as to boundary line, though deeds of both parties referred to plat recorded in county clerk's office, evidence showing the survey as marked on the ground held properly admitted. *McLane v. Grice* (Civ. App.) 66 S. W. 709.

Evidence as to certain survey in an action to determine a boundary line examined, and held admissible. *Dillingham v. Smith*, 30 C. A. 525, 70 S. W. 791.

In trespass to try title, deed of adjoining land held admissible in evidence in connection with other evidence on issue as to location of boundary. *Camp v. League* (Civ. App.) 92 S. W. 1062.

In trespass to try title, deeds of adjoining property held admissible in evidence to define location of land in question. *McCullum v. Buckner's Orphans' Home*, 54 C. A. 348, 117 S. W. 886.

In action for death at railroad crossing, evidence tending to show ordinance including territory within city limits and exercise of municipal functions over the territory held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Bratcher*, 54 C. A. 10, 118 S. W. 1091.

Admissibility of certain evidence in an action to determine a boundary discussed. *Gull v. O'Bryan* (Civ. App.) 121 S. W. 593.

A witness held properly allowed to testify that a surveyor was with him when he found a marked boundary line concerning which he testified. *Myers v. Moody* (Civ. App.) 122 S. W. 920.

In a boundary line dispute, a witness could state the fact of having run a line at a certain place and time, whether he knew where the original line was run or not. *Id.*

Where the land was originally located by office work without actual survey, a judgment in another action finding corners of adjacent land by which the land in suit could be identified is admissible in evidence though defendant was not a party thereto. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

Certain evidence held admissible in trespass to try title to show that the boundary line was not as claimed by plaintiffs. *Cochran v. Casey* (Civ. App.) 128 S. W. 1145.

In trespass to try title, in which the boundary line of a certain survey was the disputed question, certain testimony by a surveyor held admissible to identify the marked tree found by him with the one called for in the field notes of the survey. *Id.*

In trespass to try title, in which the line of a certain survey was in controversy, a deed from plaintiffs to another which called for certain trees identified by a witness held admissible to show that fact, and that plaintiffs had acquiesced in the line as located by such parties. *Id.*

In trespass to try title in which defendants claimed under an agreement of defendants' grantors fixing the boundary line, certain evidence held admissible to identify on the ground the agreed line shown on the plat attached to the agreement. *Hermann v. Fenn* (Civ. App.) 129 S. W. 1139.

Where the field notes of an original survey made in 1857 did not call for a rock pile, the testimony of a witness that he subsequently saw a rock pile at the end of a line, as run by a surveyor making a subsequent survey, held inadmissible. *Runkle v. Smith* (Civ. App.) 133 S. W. 745.

In a suit to establish a boundary, certain evidence held admissible to show the true location of the line. *Id.*

In action to recover land deed to defendant of adjoining survey held admissible to locate common corner. *Davis v. Mills* (Civ. App.) 133 S. W. 1064.

Certain evidence in a boundary case held admissible. *Collins v. Warfield* (Civ. App.) 140 S. W. 107.

61. **Indebtedness.**—In an action for an accounting between partners, and to determine the liability of third persons to the firm, evidence of payment made by such third person to defendant after suit brought held inadmissible. *Storrie v. Hamilton* (Civ. App.) 42 S. W. 235.

Evidence as to creation of original debt held irrelevant in contest between execution creditor and claimant. *Stephens v. Johnson* (Civ. App.) 45 S. W. 328.

62. — **Assumption.**—On an issue whether one could have obtained money for a certain purpose, evidence that a person owed him held competent. *Western Union Tel. Co. v. Waller* (Civ. App.) 47 S. W. 396.

In an action on a note against a corporation as maker, testimony by a person who subsequently purchased the corporation as to how the former owner thereof treated the indebtedness was irrelevant, and its admission prejudicial error. *Wilson v. Tyler Coffin Co.*, 28 C. A. 172, 66 S. W. 865.

In an action by a railway brakeman for personal injuries, testimony that plaintiff was indebted to a third party, who was pressing him, held immaterial. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 28 C. A. 609, 68 S. W. 803.

In an action on a note against the maker and another, alleged to have assumed payment thereof, where there was conflict of evidence as to which of a number of notes the third person had assumed to pay as part of the purchase price of property, testimony as to the value and kind of property purchased was admissible. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 145 S. W. 722.

63. **Money lent.**—In an action to recover money loaned to defendant and his wife, evidence that defendant's wife ill-treated him and evidence as to facts brought out in a divorce suit between them are inadmissible. *Meredith v. Miller* (Civ. App.) 99 S. W. 430.

64. **Loan or sale.**—The fact that an alleged buyer received a note from the alleged seller at the time of the alleged sale held admissible to show that the transaction was a loan. *Land v. Klein*, 21 C. A. 3, 50 S. W. 638.

65. Payment.—Pecuniary condition, see ante.

When the issue was as to payment of the debt sued on, evidence that the parties had had a settlement, and that a certain indebtedness was agreed upon, is pertinent. *Wells v. Fairbanks*, 5 T. 582.

Certain evidence held admissible to show payment of purchase money. *Terrell v. McCown*, 91 T. 231, 43 S. W. 2.

On an issue as to whether capital stock had been fully paid up, held, that the value of contracts secured before the company's incorporation, and turned into the corporation, and the net earnings invested between the date of incorporation and the issue of such stock, should be considered. *Cole v. Adams*, 92 T. 171, 46 S. W. 790.

In an action to cancel a deed of trust on the ground of payment, circumstances tending to strengthen a presumption of payment may be proved, though plaintiff produce the note. *Johnson v. Lockhart*, 20 C. A. 596, 50 S. W. 955.

Evidence to rebut proof of payment held admissible in action by city for taxes paid by property owner to defaulting collector. *City of Georgetown v. Jones*, 31 C. A. 623, 73 S. W. 22.

In a suit to set aside a judgment as a cloud on title, evidence of demand on judgment defendants and succeeding owners of the land and on complainant, and that none of them paid, was admissible to show that the judgment had not been paid. *James v. Midland Grocery & Dry Goods Co.* (Civ. App.) 146 S. W. 1073.

66. — By mistake.—In an action to recover money paid by mistake on a draft, held competent to ask a witness if his bank paid defendant on an incorrect advice slip from its New York correspondent. *First Nat. Bank v. Edwards* (Civ. App.) 81 S. W. 541.

67. Usury.—In an action against a building and loan association for the cancellation of a lien and to declare plaintiff's debt usurious, evidence as to conduct of defendant's agent in the matter held admissible. *American Mut. Bldg. & Sav. Ass'n v. Cornibe*, 35 C. A. 385, 80 S. W. 1026.

68. — Parol evidence.—See notes under Rule 25.

69. Lien and waiver thereof.—Certain matters held inadmissible, against assignee of claim for pay for paving street, to show liens, and consequent right of city to retain money as security. *City of San Antonio v. Stevens* (Civ. App.) 126 S. W. 666.

In an action by a landlord against a buyer from the tenant of a part of the crop, certain evidence held admissible to show a waiver of the lien on the entire crop. *Melasky v. Jarrell* (Civ. App.) 131 S. W. 856.

70. Liabilities on bonds.—In an action on a tax collector's bond, evidence for the defendant that the money paid as taxes was received by the collector from nonresidents of a county attached for judicial purposes to the county of that officer is not admissible. The presumption would obtain that money so collected was paid on legal assessments on personal property. *Webb County v. Gonzales*, 69 T. 455, 6 S. W. 781.

Evidence that a wife, suing for damages, sought to obtain liquor for her husband from the dealer and others, is admissible to show consent to sell. *Tipton v. Thompson*, 21 C. A. 143, 50 S. W. 641.

Evidence that a father had drunk intoxicating liquors with his minor son held admissible, in an action by him for a penalty for selling liquors to the son. *Kruger v. Spachek*, 22 C. A. 307, 54 S. W. 295; *Wakeham v. Price* (Civ. App.) 89 S. W. 1093.

In an action on the bond of a liquor dealer, rejection of evidence to show that an intervenor willfully instigated and prosecuted the suit held error. *Cox v. Watelsky*, 27 C. A. 478, 66 S. W. 327.

In an action on a retail liquor dealer's bond, certain evidence held not pertinent. *Farenthold v. Tell*, 52 C. A. 110, 113 S. W. 635.

In an action on a liquor dealer's bond for damages through the sale of liquor to plaintiff's husband, certain evidence held admissible. *Birkman v. Farenthold*, 52 C. A. 335, 114 S. W. 428.

In an action against a guardian and his sureties, evidence tending to show disqualification of the judge appointing defendant held properly excluded. *Minchew v. Case* (Civ. App.) 143 S. W. 366.

71. Release of mortgage.—In an action on a note and to foreclose a mortgage securing it, certain evidence held admissible as tending to show a release of the mortgage. *Bledsoe v. Palmer* (Civ. App.) 81 S. W. 97.

72. Execution of notes.—Where the makers of a note sued on by a pledgee thereof had given a second note in renewal, they were properly permitted to testify as to the circumstances inducing them to execute the renewal note. *National Bank of Commerce v. Kenney*, 98 T. 293, 83 S. W. 368.

Evidence held relevant and competent in an action on a note under the plea of non est factum. *Scott v. Menly* (Civ. App.) 105 S. W. 55.

Where one of the makers of a note sued on claimed that it was executed for the accommodation of plaintiff bank, evidence that the other maker had neither permission, power nor authority from the bank, when the note was executed, to borrow money for it, was irrelevant and immaterial. *First Nat. Bank v. Pearce* (Civ. App.) 126 S. W. 285.

In an action on a note, proper proof of defendant's signature to a note for which the note sued on was later substituted, held admissible as a circumstance relevant to the issue of whether defendant signed the note in controversy. *Miller v. Burgess* (Civ. App.) 136 S. W. 1174.

73. Validity of notes.—In an action against a city on notes given in payment of fire hose, certain evidence held inadmissible to affect the validity of the notes. *City of Cleburne v. Gutta Percha & Rubber Mfg. Co.* (Civ. App.) 127 S. W. 1072.

74. Execution of lease.—In an action for breach of a lease which defendant denied was executed for it by its general manager, held proper to show on the cross-examination of such manager that another, for whom he had testified the lease was executed, was a stockholder and director of defendant company. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

In an action for the breach of a lease of land, certain evidence held admissible to show that the lease was executed for defendant. *Id.*

75. Eviction of tenant.—Certain evidence held admissible on the issue whether a landlord evicted his tenant, or the tenant abandoned the premises. *Crews v. Cortez*, 52 C. A. 644, 115 S. W. 609.

76. Liability for rent.—In a suit in the county court for the rent of land, the plaintiff claimed under an execution sale against the lessor subsequent to the lease. The plaintiff offered in evidence, to prove his right to the rents, the judgment against the lessor, execution thereon, and sale thereunder, and the sheriff's deed, which was rejected on the ground that it raised the question of title to the land. Held, that the evidence was material and competent for the purpose of establishing plaintiff's right to recover the rent. *Johnson v. Doss*, 1 App. C. C. § 1075.

In an action for rent, evidence of the landlord's agent of a sublessee's promise to pay the balance soon held admissible to prove the latter's consent that payments should be made on rent due by the tenant. *Darling v. City of Temple*, 22 C. A. 478, 55 S. W. 40.

Evidence held admissible as tending to establish the fact that leased premises became "unfit for occupancy" by reason of a fire, which, by the terms of the lease, terminated it. *Meyer Bros. Drug Co. v. Madden, Graham & Co.*, 45 C. A. 74, 99 S. W. 723.

In an action for rent for the year during which defendant held over under a life tenant, evidence that he married the remainderman's widow and became the stepfather of his children held immaterial. *Brooks v. Wynn* (Civ. App.) 139 S. W. 1055.

In an action for rent, evidence of the unsanitary condition of the landlord's adjoining premises, not shown to have caused defendant's subtenants to vacate held inadmissible. *Pressler v. Barreda* (Civ. App.) 157 S. W. 435.

77. Alteration of instruments.—Circumstantial evidence, see ante.

In a suit when the question was whether a Mexican grant for eleven leagues to Rafael de Aguirre had been altered, the following facts were held pertinent to the issue: The name of "Rafael de Aguirre" is written over some other name, apparently that of "Perfecto Valdez." The date of the concession, "14th June, 1830," had been written over another date, apparently "13th July, 1830." The words, "and the 2d of May of the past year," had been interlined. The locative call had been changed. The words interlined were noted at the foot of the instrument, but there was a conflict in the opinions of the witnesses as to whether the corrections and the body of the instrument were in the same handwriting. A translated copy of the last page of the Aguirre grant, made in 1855, and a certified copy of the same in Spanish, made in 1833, did not show the emendation clause. It was shown that a concession was made to Perfecto Valdez and a survey made embracing the land described in the first-named grant, but no final title was ever issued. Another grant of eleven leagues was made to Aguirre in 1833. *Hanrick v. Cavanaugh*, 60 T. 1.

Testimony of printer as to time of printing billheads to show that date of bill had been changed held admissible. *Walker v. Dickey*, 44 C. A. 110, 98 S. W. 658.

78. Forgery.—Character and reputation, see ante.

Circumstantial evidence, see ante.

On the issue of forgery of a deed, proof that the grantee and the alleged forger were often seen together at the land office held competent. *Stone v. Moore* (Civ. App.) 48 S. W. 1097.

Where it was alleged that a note sued on was a forgery, evidence that the forger was expert in forging maker's name held admissible. *Kingsbury v. Waco State Bank*, 30 C. A. 387, 70 S. W. 551.

In an action against an express company to recover on money orders paid on forged indorsement, evidence held immaterial. *Wells Fargo & Co. Express v. Bilkiss* (Civ. App.) 136 S. W. 798.

Certain evidence held admissible on the issue as to whether a deed was a forgery. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 334.

79. Employment in general.—Evidence that the secretary of a company, having power to employ servants, told an injured person to have nothing to do with lawyers, held inadmissible to prove the party an employé. *San Antonio Waterworks Co. v. White* (Civ. App.) 44 S. W. 181.

Where, in an action against a railroad for injuries sustained by one acting as express messenger and as baggageman for defendant, it was in issue whether plaintiff was employed by the railroad, certain evidence held proper to show such employment. *Missouri, K. & T. Ry. Co. of Texas v. Reasor*, 28 C. A. 302, 68 S. W. 332.

80. Authority of agent.—Undisclosed instructions of a carrier to its live-stock agent, with whom a contract to furnish cars to ship stock was made, held not admissible to limit the apparent authority of the agent to make the contract. *International & G. N. R. Co. v. True*, 23 C. A. 523, 57 S. W. 977.

In an action for breach of a lease of land with water and seed to be furnished, in which the issue was whether one who was defendant's general manager when the lease was executed, acted for defendant in making it, certain evidence held admissible. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

Making of a contract by the general freight agent of an initial carrier on the part of a connecting carrier held not to show his authority to do so. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Civ. App.) 139 S. W. 81.

81. Contract in general.—The terms "express contract" and "contracts implied in fact" do not indicate a distinction in the principles of contract, but a difference in the character of the evidence by which it is proved. *Fordtran v. Stowers*, 52 C. A. 226, 113 S. W. 631.

82. Execution of contract.—Testimony of witness that date of bill for lumber presented by him had been changed held admissible, in view of previous testimony, on issue as to execution of contract. *Walker v. Dickey*, 44 C. A. 110, 98 S. W. 658.

83. Mistake in contract.—In action to enforce materialman's lien, defendant's evidence, offered on issue of mistake in building contract, held improperly excluded. *Murphy v. Fleetford*, 30 C. A. 487, 70 S. W. 989.

84. Modification of contract.—Evidence that a member of defendant's committee had agreed to set certain grade stakes for plaintiff in performing a contract for the construction of a road held inadmissible. *Palo Duro Club v. McAllister*, 57 C. A. 393, 122 S. W. 971.

85. Construction of terms of contract.—The issue being whether a sale contemplated actual delivery, the exclusion of evidence to show arrangements by the vendor to secure money to make necessary payments held erroneous. *Dunman v. J. C. Murphey & Co.*, 48 C. A. 539, 107 S. W. 70.

In an action by an architect for preparing plans for remodelling a church building, the fact that the plans as drawn were of no value to the church held admissible on the issue of the terms of the contract. *Dudley v. Strain* (Civ. App.) 130 S. W. 778.

Certain evidence held admissible in an action on a written contract in support of defendant's plea that the contract provided for arbitration. *Storrie v. Ft. Worth Stockyards Co.* (Civ. App.) 143 S. W. 286.

Evidence of a party to a building contract as to how he construed the written instrument held improper. *Baldwin v. G. M. Davidson & Co.* (Civ. App.) 143 S. W. 716.

86. Performance or breach of contract.—A report of the contractor's superintendent as to the condition of the building, held admissible in an action for a breach of a building contract. *Watson v. Dewitt County*, 19 C. A. 150, 46 S. W. 1061.

Where executrix of attorney sued an attorney, on ground he had contracted with deceased to divide fee in a certain case, whether the client knew deceased as counsel in the case, or not, held immaterial. *Aycock v. Baker* (Civ. App.) 60 S. W. 273.

In an action against a city for breach of a contract for the construction of a sewer, evidence that the city wrongfully obstructed the work, causing the contractors to incur greater expense than they otherwise would have incurred, held admissible as showing damages against the city. *Marshall v. City of San Antonio* (Civ. App.) 63 S. W. 138.

In an action for breach of defendant's pasturage contract, evidence that the pasturage was insufficient by reason of drought held admissible. *Hines v. Shafer* (Civ. App.) 74 S. W. 562.

In action for balance due on building contract, evidence that contractors were delayed by failure of brick company to furnish brick fast enough held inadmissible. *Neblett v. McGraw & Brewer*, 41 C. A. 239, 91 S. W. 309.

In an action against corporation for breach of contract, evidence that its general manager, who executed the contract, had no authority to do so, held improperly excluded. *Tres Palacios Rice & Irrigation Co. v. Eidman*, 41 C. A. 542, 93 S. W. 698.

In an action for damages for failure to properly supply plaintiff's cattle with water under a contract for pasturage held, that there was no prejudicial error as against plaintiff in permitting defendant to testify as to the dishonoring of a draft given him by plaintiff. *Tuttle v. Robert Moody & Son* (Civ. App.) 94 S. W. 134.

In a cross-action for breach of a contract to furnish water to irrigate certain rice fields, evidence as to the amount of depletion of the water in the rice fields by evaporation held admissible. *Colorado Canal Co. v. McFarland & Southwell* (Civ. App.) 94 S. W. 400.

In an action for breach of contract, certain evidence held admissible. *Kettler Brass Mfg. Co. v. O'Neil*, 57 C. A. 568, 122 S. W. 900.

An owner, suing the contractor for the rental value of a building because of the failure of the contractor to complete the building within the time agreed, held improperly required to testify to a certain fact. *Smith v. Gunn*, 57 C. A. 339, 122 S. W. 919.

87. — Contract of employment.—Remoteness, see ante.

Value of services, see ante.

Where one was appointed agent to sell lands, the owner reserving the right to sell them himself, evidence of a sale by the owner held inadmissible. *Burnett v. Edling*, 19 C. A. 711, 48 S. W. 775.

In an action by a broker to recover commissions, evidence of acts of owner's agent held irrelevant. *Id.*

In an action for a certain sum under an express contract for professional services, evidence that the sum was demanded of the client, and that the services were rendered with the client's acquiescence, held inadmissible. *Boyd v. Boyce* (Civ. App.) 53 S. W. 720.

In a suit by promoter to recover for services in promoting a sale, evidence as to representations made by promoter to vendee held properly excluded. *Alexander v. Wakefield* (Civ. App.) 69 S. W. 77.

In a suit on a contract providing for payment for services on the conclusion of "any trade," evidence that the trade finally consummated was not the one pending held properly excluded. *Id.*

In an action by broker for commissions, where principal had stated that her title was perfect, evidence of what the purchaser would have done, had there been an incumbrance, was properly excluded. *Smye v. Groesbeck* (Civ. App.) 73 S. W. 972.

Whether the suspension of a policeman after the expiration of his term of office was in accordance with the city charter held immaterial. *City of Houston v. Albers*, 32 C. A. 70, 73 S. W. 1084.

In an action for a breach of a contract of employment, in which plaintiff alleged that he had been unable to secure other employment, certain evidence held admissible. *Lone Star Salt Co. v. Wilderspin* (Civ. App.) 81 S. W. 327.

In action by agent for commission for sale of land, evidence that the tract contained a greater acreage than stated in the contract held inadmissible. *Denton v. Howell* (Civ. App.) 87 S. W. 221.

In an action for services, certain testimony held admissible to show plaintiff's employment by defendant's agent. *St. Louis Southwestern Ry. Co. of Texas v. Irvine* (Civ. App.) 89 S. W. 428.

In an action for services rendered by plaintiff in purchasing certain property for defendant, certain testimony held irrelevant. *Id.*

In an action on a contract of employment made by a corporation's secretary without authority, evidence of the making of such contract and plaintiff's services thereunder held admissible as a basis of plaintiff's claim of subsequent ratification. *Peach River Lumber Co. v. Ayers*, 41 C. A. 334, 91 S. W. 387.

In an action by a broker for commissions earned in procuring a purchaser, evidence of the ability of a third person to take the land and pay for it held admissible. *Clark v. Wilson*, 41 C. A. 450, 91 S. W. 627.

In an action for broker's commissions, evidence of a conversation between the broker and his principal after the sale held inadmissible as showing estoppel to claim commissions. *Ross v. Moskowitz* (Civ. App.) 95 S. W. 86.

In an action for broker's commissions, evidence that when the seller accounted to witness for a portion of the proceeds he did not deduct anything for commissions held inadmissible. *Id.*

In an action for breach of contract of employment, certain evidence held inadmissible, on the issue of the existence of the contract. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

In an action for policeman's salary, a pamphlet consisting of the rules and committees of the city council of the city held irrelevant. *City of San Antonio v. Serna*, 45 C. A. 341, 99 S. W. 875.

In an action for policeman's salary, evidence that plaintiff understood his allowance for clothing to be \$22.50 for every six months held inadmissible. *Id.*

In an action for a broker's commission for securing a purchaser for bank stock, testimony held inadmissible to show the broker's authority to act for the seller, but admissible on the issue whether his efforts procured the sale. *Ross v. Moskowitz*, 100 T. 434, 100 S. W. 768.

In an action on a contract of hiring certain evidence held material. *Seago v. White*, 45 C. A. 539, 100 S. W. 1015.

In an action against a city to recover for services rendered by chief of fire department, former and subsequent ordinances fixing the salary of such officer held admissible on the question of salary. *City of San Antonio v. Tobin* (Civ. App.) 101 S. W. 269.

In an action for broker's commissions, evidence concerning defendant's application to witness for advice as to the proposed purchaser's proposition to purchase on installments, and the advice given, held inadmissible. *Leuschner v. Patrick* (Civ. App.) 103 S. W. 664.

In a suit for broker's commissions, evidence concerning what occurred between plaintiff and another with reference to drawing a deed to the purchaser secured held admissible. *Id.*

Evidence held admissible in a suit for a real estate broker's commission. *Sterling v. De Laune*, 47 C. A. 470, 105 S. W. 1169.

In an action for wrongful discharge of employé, evidence as to details of business in which plaintiff entered after his discharge held admissible. *Wolf Cigar Stores Co. v. Kramer*, 50 C. A. 411, 109 S. W. 990.

In an action for a real estate broker's commission, the defendant could show on plaintiff's cross-examination that defendant had become a surety on plaintiff's note to a bank. *Yates v. Bratton* (Civ. App.) 111 S. W. 416.

In an action by a broker employed to procure a purchaser of real estate for his commissions, it is not error to allow defendant to prove by plaintiff's testimony that no sale of the premises had in fact been made. *Runck v. Dimmick*, 51 C. A. 214, 111 S. W. 779.

In an action by a broker for commissions in selling defendant's land, evidence of a conversation between plaintiff and the prospective purchaser regarding the sale, defendant not being present, held admissible only to show what efforts, if any, plaintiff made to sell the land. *Fordtran v. Stowers*, 52 C. A. 226, 113 S. W. 631.

In an action for commissions for the sale of real estate, certain evidence held not improperly admitted. *Luhn v. Fordtran*, 53 C. A. 148, 115 S. W. 667.

In an action by a broker for commissions for procuring a purchaser, certain evidence held admissible to disprove the claim of the broker that he had procured a purchaser ready, willing, and able to purchase on the terms prescribed by the owner. *Johnson & Moran v. Buchanan*, 54 C. A. 328, 116 S. W. 875.

In an action for breach of a contract of employment, evidence that plaintiff had, or could in the exercise of proper diligence have obtained, other remunerative employment held admissible to reduce damages. *Texas Life Ins. Co. v. Roberts*, 55 C. A. 217, 119 S. W. 926.

In an action for breach of contract of employment, a waiver by defendant held not to render inadmissible certain evidence to reduce damages. *Id.*

In an action for breach of a contract of employment, held error to exclude plaintiff's expense accounts as evidence. *Id.*

In an action to recover commissions on the sale of property, certain evidence held admissible. *Weil v. Schwartz* (Civ. App.) 120 S. W. 1039.

In a broker's action for commissions, evidence that, to enable the purchasers to make the cash payment required plaintiff agreed to lend them the amount of the commission claimed by him, held admissible on the issue whether plaintiff was a joint purchaser. *Smith v. Fears* (Civ. App.) 122 S. W. 433.

In an employé's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by giving notice to employés of a general reduction in wages, testimony by defendant's manager of a notice of reduction of wages given at a meeting of employés held admissible. *Pennington v. Thompson Bros. Lumber Co.* (Civ. App.) 122 S. W. 923.

In a real estate broker's action for commissions for procuring a purchaser for land, a contract tending to show the agreement between the owner and the purchaser was admissible in evidence. *Dockery v. Maple* (Civ. App.) 125 S. W. 631.

In an action for wrongful discharge of an employé, certain evidence held material. *G. A. Kelly Plow Co. v. London* (Civ. App.) 125 S. W. 974.

In an action for broker's commissions, evidence that the purchasers' representatives, before engaging with defendants, decided to purchase the land on the terms quoted by plaintiffs, held admissible. *Pope v. Ansley Realty Co.* (Civ. App.) 135 S. W. 1103.

In an action for damages for breach of a contract for services, certain evidence offered by plaintiff held immaterial. *Young v. Watson* (Civ. App.) 140 S. W. 840.

In an action for damages for breach of a contract for plaintiff's services as a chemist, evidence on the part of the employer that it was an inconvenience to him to discharge plaintiff held properly excluded. *Id.*

In an action by a broker for commissions, certain evidence held admissible to show that a sale could not be made on a designated date. *Longworth v. Stevens* (Civ. App.) 145 S. W. 257.

In an action by a broker for commissions, evidence of the money spent by the owner in selling the property held properly excluded. *Id.*

A broker basing an action for commissions on the cancellation of the contract of employment held entitled to show certain facts. *Id.*

In a broker's action for commission, defendant's testimony that he made the sale because in need of money was properly excluded. *Parks v. Sullivan* (Civ. App.) 152 S. W. 704.

Testimony of plaintiff that he was present when a contract was made by his wife, joined in the conversation, and "adopted" the contract held properly admitted. *Lilly v. Yeary* (Civ. App.) 152 S. W. 823.

In action on oral contract of employment for life in consideration of a release of claim for personal injuries, evidence as to the circumstances surrounding the accident and the extent of the injuries held admissible. *Texas Cent. R. Co. v. Eldredge* (Civ. App.) 155 S. W. 1010.

88. — Contract of Insurance.—Negative evidence, see ante.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

Statements and conduct of parties, see ante.

Evidence that insured had the equitable title to the premises insured when the policy issued was not rendered inadmissible by his having acquired the legal title before trial. *Fire Ass'n of Philadelphia v. Jones* (Civ. App.) 40 S. W. 44.

Evidence held relevant to show what was included in the policy. *Phoenix Ins. Co. v. Dunn* (Civ. App.) 41 S. W. 109.

Proofs of loss held admissible in action on policy, though defective, where no injury to the company is shown, and no objection was made to them, and the objection to their admission is general. *London & L. Fire Ins. Co. v. Schwulst* (Civ. App.) 46 S. W. 89.

In action on policy, an answer filed in another action by one not a party to the action on trial, and not filed by him, or one shown to be acting as his agent, or answering on information by such a party, held inadmissible to show transfer of property by insured. *Id.*

Where one of the plaintiffs had no interest in the insurance policy sued on, except as mortgagee, evidence of payments on the mortgage, made after the loss and before the trial, was admissible. *Alamo Fire Ins. Co. v. Davis*, 25 C. A. 342, 60 S. W. 802.

In an action on a life insurance policy which had been returned by the insured, evidence held admissible to show an understanding that when the policy arrived it might be accepted, at the option of the insured, as explaining the subsequent acts. *Atkins v. New York Life Ins. Co.* (Civ. App.) 62 S. W. 563.

Where defense was that insured had set the fire, fact that insurance company had had the insured discharged from various positions of employment held irrelevant. *Phoenix Assur. Co. of London v. Stenson* (Civ. App.) 63 S. W. 542.

Testimony in action on life policy held admissible, as tending to show authority in local agents to extend premium. *Washington Life Ins. Co. v. Berwald* (Civ. App.) 72 S. W. 436.

Evidence which would be admissible against the assured in an action by him on his fire policy is admissible in an action by his assignee. *Joy v. Liverpool, London & Globe Ins. Co.*, 32 C. A. 433, 74 S. W. 822.

In an action on a policy, evidence held admissible to show waiver of proofs of death. *Metropolitan Life Ins. Co. v. Gibbs*, 34 C. A. 131, 78 S. W. 398.

In an action on a benefit certificate, witnesses may state that applicant was unable to speak above a whisper, was emaciated, and that her father stated she had consumption. *Home Circle Soc. No. 1 v. Shelton* (Civ. App.) 81 S. W. 84.

In an action on a fire policy, held not error to refuse to admit evidence tending to show a limitation on the authority of the agent, who wrote the policy and by agreement with insurer waived a requirement thereof. *Fire Ass'n of Philadelphia v. Master-son* (Civ. App.) 83 S. W. 49.

The finding at a coroner's inquest that insured came to his death by suicide is not admissible in evidence in an action for life insurance. *Boehme v. Sovereign Camp, Woodmen of the World*, 98 T. 376, 84 S. W. 422, 4 Ann. Cas. 1019.

In action on mutual benefit certificate, evidence held admissible to show that one assessment was sufficient to raise amount called for by the certificate. *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 C. A. 29, 90 S. W. 921.

In an action on a fire policy, certain evidence held admissible as tending to prove an oral assignment of the policy after the loss. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

In an action on an insurance policy, certain evidence held admissible to show that defendant's agent went through the building containing the property and knew the amount of insurance wanted on all of it. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

In an action on a policy, whether the insured answered truthfully all questions asked him when the policy was issued held irrelevant. *Mecca Fire Ins. Co. of Waco v. Moore* (Civ. App.) 128 S. W. 441.

In an action on a life policy, certain evidence held admissible to show a waiver by insurer of a forfeiture of the policy for nonpayment of a premium. *Equitable Life Assur. Society of United States v. Ellis* (Civ. App.) 137 S. W. 184.

Evidence that an applicant for a fire policy had not received, prior to a loss, any notice of the cancellation of his policy held inadmissible. *Jefferson Fire Ins. Co. of Philadelphia v. Greenwood* (Civ. App.) 141 S. W. 319.

In an action on a mutual benefit certificate, evidence of insured's husband that up to the time of her last illness insured did all her household work held admissible as bearing on the health of deceased at the time she was reinstated as a member, and before she was taken sick. *Modern Brotherhood of America v. Chandler* (Civ. App.) 146 S. W. 626.

89. — Contract of sale.—On an issue whether defendant or his contractor purchased goods used in defendant's house, evidence that defendant was using the goods daily held inadmissible. *Watson v. Winston* (Civ. App.) 43 S. W. 852.

On an issue whether defendant or his contractor purchased the goods, evidence that plaintiffs had never given the contractor credit was inadmissible. *Id.*

Evidence held irrelevant on a question whether property delivered under the contract came up to the required quality. *Florida Athletic Club v. Hope Lumber Co.*, 18 C. A. 161, 44 S. W. 10.

In an action to recover damages for nondelivery of possession of premises sold, it is not error to permit defendant's former tenant to testify that an agreement to vacate was procured by fraud, where the defense is that plaintiff knew the premises were leased, and also of the agreement to vacate. *Jaeger v. Biering* (Civ. App.) 51 S. W. 50.

Where, under a contract to deliver oil in buyer's tanks at defendant's mill, the tanks were delivered before the time limited by the contract expired, but defendant claimed there was not time to fill them within such limit, evidence of the length of time it would take defendant to fill a tank was properly excluded. *Palestine Cotton-Seed Oil Co. v. Corsicana Cotton-Oil Co.*, 25 C. A. 614, 61 S. W. 433.

In an action to recover back purchase price of land paid by purchaser, vendor having defaulted, certain testimony held immaterial. *Lewis v. Williams*, 41 C. A. 644, 91 S. W. 247.

In an action to recover earnest money paid on a contract for sale of land, the admission of certain evidence held not error. *Davis v. Fant* (Civ. App.) 93 S. W. 193.

In an action for price of an engine and other machinery, evidence held admissible to show that failure of the engine to pump water was due to lack of water in the well. *Maxcy & Anderson v. Fairbanks Co.*, 42 C. A. 254, 95 S. W. 632.

In an action to recover the price paid for whisky sold under a warehouse receipt, defendant was entitled to prove that the signature to the receipt was that of defendant, etc. *Julius Kessler & Co. v. Burckell* (Civ. App.) 99 S. W. 173.

In an action to recover the price of whisky, defendant held entitled to prove the warehouse receipt under which the whisky was sold, and also that such receipt was afterwards received from plaintiff and acted on by defendant. *Id.*

In an action by a seller for price of materials, certain evidence held admissible. *Gorham v. Dallas, C. & S. W. Ry. Co.* (Civ. App.) 106 S. W. 930.

In an action for the contract price of an electric sign, certain evidence held not admissible on plaintiff's part. *Ellison Furniture & Carpet Co. v. Langever*, 52 C. A. 50, 113 S. W. 178.

In an action for the price of goods bought, certain evidence held admissible. *Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Civ. App.) 122 S. W. 443.

In an action for shrinkage of cattle, evidence that the sellers brought only one dry feed with them to the place of delivery, and that the grass and peas in the pasture scoured the cattle, held admissible. *Cox v. Steed* (Civ. App.) 131 S. W. 246.

In an action for the price of goods, held, that proof of what the seller was paying for them was admissible. *Richardson v. Herbert* (Civ. App.) 135 S. W. 628.

In an action for the price of a well-drilling outfit, evidence held inadmissible to prove a warranty. *Edwards v. Mayes* (Civ. App.) 136 S. W. 510.

Where a pump was alleged to have been warranted to give satisfaction and to be first class, evidence that the design of the pump was poor held admissible. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Company* (Civ. App.) 147 S. W. 717.

Evidence that the pump and engine took too much steam held admissible. *Id.*

Where a pump was warranted to be satisfactory, evidence that it required a certain amount of horse power to run it held admissible. *Id.*

In an action for the price of coal to be delivered f. o. b. mines, evidence of the buyer that he did not receive the coal was inadmissible; the question being whether the seller had delivered at the mine. *Richard Cocke & Co. v. Big Muddy Coal & Iron Co.* (Civ. App.) 155 S. W. 1019.

90. — Contract of carrier.—Where a contract to furnish cars was made with a carrier's live stock agent, testimony of inability to furnish cars of a particular kind held inadmissible. *International & G. N. R. Co. v. True*, 23 C. A. 523, 57 S. W. 977.

In an action against a railway company for refusing an excursion ticket presented by a passenger, on the ground that it had expired, testimony as to the difference between the excursion rate and the regular fare should be excluded as immaterial. *Rutherford v. St. Louis S. W. Ry. Co.*, 28 C. A. 625, 67 S. W. 161.

In an action for breach of a carrier's contract to furnish cars for the shipment of cattle, evidence held admissible to show that the contract made by the agent of one of the carriers to furnish cars at a particular point was within the scope of his authority. *Pecos River R. Co. v. Latham*, 40 C. A. 78, 88 S. W. 392.

In an action against carriers for damages for injury to stock, testimony as to how many of the cattle were so badly injured at destination as to cause their death was admissible in connection with evidence that a great many of them died, as tending to show that their death resulted from the carriers' failure to discharge their contractual duty as carriers in transporting. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737.

A carrier's liability for damages for breach of contract for carriage of a passenger is subject to the same rules, and may be established by like testimony and presumptions, as in cases of torts based on the same facts. *El Paso & N. E. Ry. Co. v. Landon* (Civ. App.) 124 S. W. 744.

In an action for loss of goods, evidence that the carrier did not receive the goods held material and relevant. *Southern Pac. Co. v. C. H. Cox & Co.* (Civ. App.) 136 S. W. 103.

91. — Marriage promise.—Circumstantial evidence, see ante.

Pecuniary condition, see ante.

Evidence of what occurred between the parties more than a year before suit for breach of promise to marry held admissible, though the one-year statute is pleaded. *Cain v. Corley*, 44 C. A. 224, 99 S. W. 168.

In an action for breach of marriage promise, certain evidence held inadmissible, where actual damages only were claimed. *Fisher v. Barber* (Civ. App.) 130 S. W. 871.

92. Conveyance.—Circumstantial evidence, see ante.

Evidence held admissible to identify the land claimed to have been conveyed, and to prove a conveyance. *Vasquez v. Texas Loan Agency* (Civ. App.) 45 S. W. 942.

93. Establishment and execution of lost deeds.—Circumstantial evidence, see ante.

Admissibility of evidence in petition alleging a conveyance and loss of the deed determined. *Grayson v. Lofland*, 21 C. A. 503, 52 S. W. 121.

Certain evidence held admissible on the issue of due execution of a lost deed. *Garrett v. Spradling*, 39 C. A. 60, 88 S. W. 293.

Where it is sought to establish a lost deed, evidence of sales and resales of land under the claim of ownership by the vendees, general reputation of ownership, and nonclaim by persons who would otherwise have been the owners, is admissible. *J. M. Guffey Petroleum Co. v. Hooks*, 47 C. A. 560, 106 S. W. 690.

Certain evidence held admissible to show the execution of a lost deed. *Rushing v. Lanier*, 51 C. A. 278, 111 S. W. 1089.

94. Breach of covenant.—Evidence that a purchaser of land demanded a reduction in the price on the ground of a deficiency in the quantity is inadmissible to establish a breach of covenant in a prior deed. *Davis v. Fain* (Civ. App.) 152 S. W. 218.

95. Ratification of void deed.—Where defendants claim under void deeds of executor's attorney in fact, evidence of the receipt of purchase money by persons not parties held inadmissible to show ratification. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

96. Trust.—Evidence held admissible to show that the grantor in a deed was acting as a trustee. *Whately v. Oglesby* (Civ. App.) 44 S. W. 44.

Admissibility of evidence to establish spendthrift trust determined. *Herring v. Pat-ten*, 18 C. A. 147, 44 S. W. 50.

The management and control by a husband of land which he had conveyed to his wife by a warranty deed is not evidence against her that the conveyance was in trust for his benefit. *O'Neal v. Clymer* (Civ. App.) 61 S. W. 545.

97. Construction of trust deed.—In an action involving the construction of a trust deed, certain evidence held admissible. *Farrish v. Mills* (Civ. App.) 102 S. W. 184.

98. Specific performance.—In an action for specific performance, evidence of plaintiff's possession and improvements held admissible on the issue of his abandonment of the contract. *Durham v. Breathwit*, 57 C. A. 38, 121 S. W. 890.

Evidence, in a suit to specifically perform a contract to convey, held admissible on an issue whether the purchasers negligently delayed performance of their obligations. *Collier v. Robinson* (Civ. App.) 129 S. W. 389.

99. Stockholder's liability.—On the issue of stockholder's liability on subscription to stock, certain evidence held properly excluded. *Sheldon Canal Co. v. Miller*, 40 C. A. 460, 90 S. W. 206.

100. Contribution.—Certain evidence, in an action against defendants to recover their proportional liability on notes paid by the plaintiff as to the payment of stipulated attorney's fees, held admissible. *Webster v. Frazier* (Civ. App.) 139 S. W. 609.

101. Title and possession.—Pecuniary condition, see ante.

Knowledge or notice, see ante.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

When defendant pleaded that the real interest in the note sued on was in a person who was a joint maker with himself, and that he had a set-off against such person, setting it out fully in his answer, evidence that the joint maker had paid and taken up the notes sued on after they were due was admissible. *Holliman v. Rogers*, 6 T. 91.

In trespass to try title against a defendant in possession, the plaintiff proved a judgment of the federal court against a third party, and that he at a marshal's sale became the purchaser of the interest of such third party in the property sued for. After this he offered to prove that such third party was in possession of the property at the date when the judgment of the federal court was rendered. Held, that the evidence should have been admitted. *Caplen v. Drew*, 54 T. 493.

Suit was brought to recover back money paid on a note given for personal property, on the ground that the defendant had no title to the property sold, etc. The defendant reconvened claiming a balance due on the note, and the plaintiff pleaded the same matter as a bar to defendant's recovery. Evidence that these parties, with others, had an arbitration in regard to the property for which the note was given, and that the same had been allotted to a third party, and was not in fact delivered to plaintiff, was relevant. *Bowden v. Kelley*, 1 App. C. C. § 480.

The mere possession of a muniment of title is not evidence of title in the possessor. *Shifflet v. Morelle*, 68 T. 382, 4 S. W. 843.

Possession of land is evidence of title against a trespasser. *Express Co. v. Dunn*, 81 T. 85, 16 S. W. 792; *Edrington v. Butler* (Civ. App.) 33 S. W. 143.

Possession of real estate is shown by occupation and exercise of exclusive ownership. *Pacific Exp. Co. v. Dunn*, 81 T. 85, 16 S. W. 792.

Absence from the residence in this state, and the claim of home and residence in another state, is evidence of abandonment. *Moerlein v. M. & L. Inv. Co.*, 29 S. W. 162, 9 C. A. 415.

An adverse possession, how shown. *Durst v. Mann* (Civ. App.) 35 S. W. 949.

In trespass to try title by a divorced wife against her former husband to recover her community interest in land, evidence that she had lost her homestead right was not admissible. *House v. Williams*, 16 C. A. 122, 40 S. W. 414.

Evidence of a conveyance by one claiming by adverse possession held admissible on the issue whether his possession was adverse. *Id.*

Evidence of administrator that at sale of decedent's land it was purchased by another for administrator's benefit held admissible in behalf of the heirs. *Baumann v. Chambers*, 17 C. A. 242, 42 S. W. 564.

Certain evidence held inadmissible to disprove common source of title. *West v. Keeton*, 17 C. A. 139, 42 S. W. 1034.

Admissibility of evidence to show title in defendant, under sale by executor under power in will, determined. *Terrell v. McCown*, 91 T. 231, 43 S. W. 2.

What the grantees under whom defendants claim understood as to what land was conveyed by an indefinite deed is admissible in trespass to try title. *Pope v. Riggs* (Civ. App.) 43 S. W. 306.

In trespass to try title, evidence of plaintiff's dealings with the land, which defendant may have known of from the records, is admissible. *Id.*

In trespass to try title, evidence of particular instances where plaintiff has sold the same parcel of land to different persons is not relevant, when the parcels so sold were not connected with the land in controversy.

Where defendant claimed by adverse possession, a transfer of the headright certificate under which the land was located held admissible to show extent of claim. *Collier v. Coutts* (Civ. App.) 45 S. W. 485.

Testimony that decedent was not an Odd Fellow held inadmissible in trespass to try title against an Odd Fellows lodge, claiming as devisee of land in which it was alleged that testator had only a life estate. *Caffey's Ex'rs v. Cooksey*, 19 C. A. 145, 47 S. W. 65.

Under issue alleging that plaintiffs are joint owners of equal interests it cannot be shown that one owns more than half the land. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Civ. App.) 51 S. W. 511.

Evidence held admissible to support a claim of title under a plea of limitations. *Laughter v. Laughter*, 21 C. A. 414, 52 S. W. 987.

Evidence as to length of time defendant had owned and lived on his land, the improvements made, and taxes paid thereon, held proper in determining whether he was bona fide owner thereof, within Rev. St. 1895, art. 4218ff. *Smith v. Rothe* (Civ. App.) 55 S. W. 754.

Where defendant asserted title by adverse possession, his testimony that he claimed the property as a part of a certain survey held admissible to show the nature of his possession. *Daughtrey v. New York & T. Land Co.* (Civ. App.) 61 S. W. 947.

Evidence in trespass to try title held material. *Barrett v. Eastham*, 28 C. A. 189, 67 S. W. 198; *Stith v. Moore*, 42 C. A. 528, 95 S. W. 587.

In trespass to try title, evidence that plaintiffs had not paid taxes on the land since the commencement of the suit held immaterial. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892, 68 S. W. 721.

On an issue whether defendant had abandoned a business homestead, evidence as to the salary he was receiving as a traveling salesman was inadmissible. *Alexander v. Lovitt* (Civ. App.) 67 S. W. 927.

On an issue whether realty was purchased by the community funds of a husband and his first wife, or his second wife, or separate funds, held that evidence of the acquisition of property after the transaction in question was not of a character calculated to influence the jury. *Blackwell v. Mayfield* (Civ. App.) 69 S. W. 659.

Where defendant claimed to hold property under a parol partition awarding the land to her husband, evidence as to advice given to plaintiff by attorneys prior to the partition held inadmissible. *Long v. Long*, 30 C. A. 368, 70 S. W. 587.

In an action against an abandoned wife to recover land claimed as her homestead, evidence to show no cause for the abandonment held admissible. *Id.*

That one claimed to be, and asserted that she was, the guardian of her children, is not admissible to affect their interest. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

Evidence of a parol gift of land held admissible to show that the donee had an honest belief in his title in the land at a later occasion when he contracted to sell it. *Hollifield v. Landrum*, 31 C. A. 187, 71 S. W. 979.

On the issue whether a title offered a vendee was good and marketable, evidence of a flaw in the title 35 years old might properly be considered. *Id.*

In an action to recover possession of certain cattle, certain testimony held irrelevant. *Word v. Kennon* (Civ. App.) 75 S. W. 365.

In trespass to try title, where plaintiff claims under a deed from a married woman certain testimony held admissible to show that the land was her separate property. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

In trespass to try title, held proper to admit in evidence an agreement between the grantee in the transfer of a land certificate and certain other persons as to the location and survey of the land. *Ward v. Cameron* (Civ. App.) 76 S. W. 240.

In trespass to try title, certain testimony as to filing of power of attorney in general land office held immaterial, as not affecting validity of plaintiffs' title. *Houston & T. C. R. Co. v. De Berry*, 34 C. A. 180, 78 S. W. 736.

In trespass to try title, evidence that one of plaintiff's predecessors in title owned other land, which might have been the subject of one transfer in plaintiff's chain of title, held inadmissible. *Simmonds v. Simmonds*, 35 C. A. 151, 79 S. W. 630.

In a suit to enforce a vendor's lien on land in which defendant claimed a community interest, certain evidence held admissible to show that the land belonged to plaintiff at the time it was sold, and that a dispute as to the boundary line had been settled by an agreement recognizing plaintiff's title to the land. *Cavin v. Wichita Valley Townsite Co.*, 36 C. A. 336, 82 S. W. 342.

In an action against the minority of a church to obtain possession of the church property, a list of members belonging to one of the factions held immaterial on the issue as to how the persons present at a church meeting voted. *Gipson v. Morris*, 36 C. A. 593, 83 S. W. 226.

In trespass to try title, evidence that defendant was picking cotton on the land in suit when the citation therein was served on her held competent on issue of possession and ownership. *Field v. Field*, 39 C. A. 1, 87 S. W. 726.

Where plaintiff did not plead title by limitation, evidence that he had paid the taxes on the land for over 30 years was not material. *Moore v. Kempner*, 41 C. A. 86, 91 S. W. 336.

Where plaintiff claimed title to land under a purchase from the state, evidence of three years' occupancy by him held properly excluded. *Smithers v. Lowrance* (Civ. App.) 91 S. W. 606.

Evidence, in an action of trespass to try title, held inadmissible. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017; *Mars v. Morris*, 48 C. A. 216, 106 S. W. 430; *Beall v. Chatham* (Civ. App.) 117 S. W. 492.

Evidence of payment of taxes held inadmissible in an action of trespass to try title. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017; *Beall v. Chatham* (Civ. App.) 117 S. W. 492.

In trespass to try title, certain evidence held immaterial as to defendant's rights, and inadmissible. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017.

In trespass to try title, the exclusion of certain evidence held not erroneous. *Davis v. Ragland*, 42 C. A. 400, 93 S. W. 1099.

In trespass to try title, whether a survey of public lands was made by virtue of a bounty warrant or a land warrant held immaterial. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

In trespass to try title by a county to recover school lands, proof that the county abandoned and floated its original location might be made by showing a different survey and location subsequently made by the county. *Lamar County v. Talley* (Civ. App.) 94 S. W. 1069.

In trespass to try title, evidence concerning a deed prior to an alleged forged deed under which plaintiff, who was an innocent purchaser, claimed, held irrelevant. *Loring v. Jackson*, 43 C. A. 306, 95 S. W. 19.

In trespass to try title, certain evidence held inadmissible on the issue as to whether the land, the legal title to which was in M., was not the property of R. *Carlisle v. Gibbs*, 44 C. A. 189, 98 S. W. 192.

In an action to recover damages for the unlawful withholding of the possession of land, certain evidence held admissible. *Broussard v. Hinds* (Civ. App.) 101 S. W. 855.

In an action to recover land, where a party claims the whole tract by adverse possession, evidence that he paid taxes on only 40 acres was admissible on the issue of the extent of his claim. *White v. Eavenson*, 46 C. A. 158, 101 S. W. 1029.

In an action for the possession of land claimed by defendant under a lease, certain evidence held immaterial and irrelevant. *Duncan v. Jouett* (Civ. App.) 111 S. W. 981.

In trespass to try title, certain evidence held admissible on the issue arising from plaintiff's claim that defendant held as tenant of himself or his grantor, and defendant's claim by limitation. *Hyman v. Grant*, 50 C. A. 37, 114 S. W. 853.

In a suit to quiet title as against a vendee in default, certain evidence held immaterial. *McCullough v. Rucker*, 53 C. A. 89, 115 S. W. 323.

Evidence held inadmissible in an action by decedent's son to charge the widow with proceeds of fraternal life insurance. *Wooden v. Wooden* (Civ. App.) 116 S. W. 627.

In trespass to try title, certain evidence held inadmissible as a collateral attack on a lease of public lands not involved in the case. *McGill v. Sites*, 54 C. A. 262, 118 S. W. 220.

In trespass to try title, certain evidence held admissible. *Ingalls v. Orange Lumber Co.*, 56 C. A. 543, 122 S. W. 53; *Bender v. Brooks* (Civ. App.) 130 S. W. 653.

On the question of whether defendant abandoned his homestead or not, by his absence from the county, the facts that he had not paid for the land, or received a deed therefor, until he returned, are proper for consideration by the jury. *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

In trespass to try title in which defendant claimed a quarter section by adverse possession but only showed actual possession of a small part, plaintiff having constructive possession of the remainder, testimony that the occupants upon the other quarter sections respected defendant's claim to the whole quarter was immaterial. *Thompson v. Texas & N. O. R. Co.* (Civ. App.) 123 S. W. 616.

In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, certain evidence held immaterial. *Beavers v. Baker* (Civ. App.) 124 S. W. 450.

In trespass to try title, certain evidence held admissible to show title by adverse possession. *Ross v. Martin* (Civ. App.) 128 S. W. 718.

Evidence of an entering on, and continued possession of, land, under claim of parol gift, held admissible to show possession was adverse. *Smith v. Guinn* (Civ. App.) 131 S. W. 635.

In trespass to try title to school land, evidence that plaintiff paid taxes on the land and poll taxes in the county where the land is situated is not relevant on the issue whether he resided on the land at the time. *Beaty v. Yell* (Civ. App.) 133 S. W. 911.

In an action to recover land, testimony as to title acquired by a witness from heirs of former owner held admissible. *Davis v. Mills* (Civ. App.) 133 S. W. 1064.

On the issue as to whether there had been a settlement on the lands by a substitute purchaser of public school lands, held certain evidence was admissible. *Erickson v. McWhorter* (Civ. App.) 143 S. W. 245.

In an action against a county for title and possession of school lands originally sold by it to plaintiff's remote grantor, evidence as to proceedings by which the county subsequently recovered judgment in trespass to try title and leased the lands held admissible. *Fullerton v. Scurry County* (Civ. App.) 143 S. W. 971.

In trespass to try title, where defendants claim under a judgment foreclosing a tax lien, and plaintiffs had already proved a patent from the state to their ancestor, proof of possession by the ancestor before the foreclosure of the tax lien was immaterial. *Mangum v. Kenley* (Civ. App.) 145 S. W. 316.

In trespass to try title to recover the east third of a survey under a headright certificate, evidence of conveyances of the west two-thirds of a survey after a partition and of possession under the deed and payment of taxes held admissible. *Baldwin v. McCullough* (Civ. App.) 146 S. W. 203.

In trespass to try title to school lands awarded to plaintiff, and then canceled, and awarded to defendant, evidence that a conveyance by plaintiff to another was not absolute was admissible on the question of abandonment. *Anthony v. Ball* (Civ. App.) 146 S. W. 612.

Upon the issue of abandonment of a homestead vel non, the question of whether a new homestead has been acquired is relevant and material. *Gilley v. Troop* (Civ. App.) 146 S. W. 954.

Evidence relating to an interlocking agreement between plaintiff and defendant railroad companies as to a crossing, not touching the land in controversy, was not admissible in trespass to try title. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 151 S. W. 850.

In trespass to try title to a strip granted to plaintiff as a railroad right of way, evidence as to the necessity of using the land for switches was admissible on the issue of abandonment. *Id.*

In an action to recover a pair of mules, or damages, and for attorney's fees and expenses, notes signed by defendant and the plaintiff's brother, and the testimony of a bank employé that plaintiff's brother had paid the bank a certain sum on notes of himself and defendant, were irrelevant. *McKay v. Wishert* (Civ. App.) 152 S. W. 508.

In a suit by a child to recover from his father an undivided half interest in land on the theory that it was community property, evidence of rents received held admissible. *Miller v. Odum* (Civ. App.) 152 S. W. 1185.

In an action against a telephone company for injuries to a horse caused by a wire left in the highway, where there was a conflict in the evidence as to the ownership of the wire, evidence that the defendant's district chief shortly after the accident ordered linemen to remove the wire was admissible as tending to show ownership. *Southwestern Telegraph & Telephone Co. v. Thompson* (Civ. App.) 157 S. W. 1185.

102. — **Documentary evidence.**—See *Introductory*, ante.

103. **Conversion.**—Where plaintiff obtained possession of property under foreclosure of a landlord's lien against defendant and others as codefendants, evidence that one of the codefendants was not served with process held properly excluded as immaterial in a suit by defendant against plaintiff for converting the property. *Irion v. Bexar County*, 26 C. A. 527, 63 S. W. 550.

Where a defendant in an action for conversion justified his taking possession of the property under the foreclosure of a landlord's lien in a justice court, the statement of facts filed with the justice held properly excluded as immaterial. *Id.*

Where plaintiff alleged that he had sold defendant only a half interest in goods, while defendant claimed the entire stock, evidence of price plaintiff asked for the entire stock before the sale to the defendant held admissible. *Puckett v. Irick*, 27 C. A. 466, 66 S. W. 62.

Where plaintiff in conversion alleged a sale to defendant of half interest in a stock of goods, while defendant claimed the entire stock, evidence of the value of plaintiff's services was inadmissible under the issues. *Id.*

In an action for conversion of mules, statement that a certain person had run off with the mules and sold them to one of the defendants held relevant. *Huey v. Hammett* (Civ. App.) 93 S. W. 531.

In an action for the value of ore shipped by plaintiff to defendant and converted by the latter, certain evidence held admissible. *Consolidated Kansas City Smelting & Refining Co. v. Gonzales*, 50 C. A. 79, 109 S. W. 946.

In an action for conversion, evidence held inadmissible. *Crawford v. Thomason*, 53 C. A. 561, 117 S. W. 181.

In action for conversion of goods taken under attachment from third person, certain evidence held admissible to show that the goods were sold to the attachment debtor, though nominally to the plaintiff. *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

In an action against a carrier for conversion of freight, based on a refusal to deliver without payment of excessive charges, evidence that the carrier claimed a specified sum to be the true rate per hundred pounds on the shipment was admissible to show what rate had been demanded. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 156 S. W. 267.

Evidence of the necessity for a subsequent retaking from a buyer of mortgaged property at mortgagee's sale, in order to protect the property, is not admissible in an action for conversion based upon the original taking by the mortgagee. *Dobbs v. Whitfield* (Civ. App.) 156 S. W. 1160.

104. **Trespass.**—Plaintiff brought suit for trespass on his land in cutting and carrying away timber. Evidence that plaintiff had sold a part of the land described in his petition is irrelevant, there being no offer to prove that the alleged trespass was committed on the land so sold. *Leach v. Millard*, 9 T. 551.

105. — **By cattle.**—Evidence held admissible in an action for damage to crops by trespassing cattle that defendant's cattle had run at large adjacent to witnesses' fences without breaking through them. *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

106. **Negligence.**—Character and reputation, see ante.

Circumstantial evidence, see ante.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

Explanatory evidence, see ante.

Intent, see ante.

Knowledge or notice, see ante.

Matters showing relevancy of other facts, see ante.

Negative evidence, see ante.

Remoteness, see ante.

Statements and conduct of parties, see ante.

Tendency of evidence to mislead or confuse, see ante.

In an action for damages for injuries received from being struck by a locomotive, evidence that the plaintiff was thrown by the blow into a ditch, the water in which was deep enough to drown a man, is admissible, as immediately connected with the manner of the infliction of the injury charged, and no specific averment in regard either to the ditch or water was necessary to authorize its introduction. *International & G. N. Ry. Co. v. Brett*, 61 T. 483.

In a suit against a railroad company for the value of property destroyed by fire, on the issue, "was the burning caused by fire emitted from the defendant's engine," it was competent, for the purpose of showing the cause of injury and negligence, to prove the following facts: The property, situated about fifty yards from the track, was destroyed by fire at 12 o'clock at night; a passenger train passed at 10 o'clock that night, when a strong wind was blowing in the direction of the property. No other train passed that night. Some nights after the fire, other passing engines threw sparks of fire to a distance sufficient to reach the place where the property had been. No other cause of fire existed. In rebuttal it was competent to prove that on that night it was misting rain, and damp, that the engine was burning coal, and was supplied with

the most approved appliances for preventing the escape of fire, and that it was carefully and skilfully managed, and that no fire escaped from it. *Gulf, C. & S. F. Ry. Co. v. Holt*, 1 App. C. C. §§ 836-838; *East Line & R. R. Co. v. Hart*, 2 App. C. C. §§ 419, 420; *Ft. Worth & D. C. Ry. Co. v. Ratliffe*, 2 App. C. C. § 681.

The replies to a messenger with a telegram made at the office of the party to whom the telegram is directed, touching his whereabouts, are admissible upon issue of negligence in delivering the message. *Telegraph Co. v. Cooper*, 71 T. 508. 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

Evidence that defects in machinery from which an injury to an employé resulted were open and patent to common observation is relevant to show contributory negligence. *Railway Co. v. Johnson*, 83 T. 628, 19 S. W. 151.

Contributory negligence, how shown. *Railway Co. v. Traweck*, 84 T. 65, 19 S. W. 370. Evidence of violation of rule forbidding passengers to ride on freight trains held admissible. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.) 40 S. W. 631.

Declarations of conductor that brakes would not work, made immediately after collision, held material on issue whether collision was caused by interference of third person. *Missouri, K. & T. Ry. Co. v. Vance* (Civ. App.) 41 S. W. 167.

In action for damages to cattle on a train, evidence as to the usual loss incident to such travel held admissible. *Mexican Nat. R. Co. v. Savage* (Civ. App.) 41 S. W. 663.

Where evidence fails to show that defects in fence or crossing had any bearing on the question as to negligence in killing stock, admission of evidence as to such defects held error. *Galveston, H. & S. A. Ry. Co. v. Dyer* (Civ. App.) 46 S. W. 841.

Admissibility of evidence on the question of negligence of the crew of a freight train in not flagging passenger train, whereby employé was injured, determined. *Missouri, K. & T. Ry. Co. v. Johnson* (Civ. App.) 49 S. W. 265.

Evidence of persons who were crossing a track to the knowledge of defendant, who moved its train, held admissible on question of negligence. *San Antonio & A. P. Ry. Co. v. Green* (Civ. App.) 49 S. W. 672.

Evidence that a car was going as fast as a horse could trot on a good road held admissible in an action for injuries, as tending to show the speed of the car. *City Railway Co. v. Wiggins* (Civ. App.) 52 S. W. 577.

In action against railroad company for injuries sustained by one of its employes, held, certain evidence was admissible. *Galveston, H. & S. A. Ry. Co. v. Jackson* (Civ. App.) 53 S. W. 81.

Evidence of use made of a track by a railroad company held admissible, where plaintiff received personal injuries from an engine on such track. *International & G. N. R. Co. v. Brooks* (Civ. App.) 54 S. W. 1056.

Evidence held admissible on issue of master's care in selection of proper machinery. *Missouri, K. & T. Ry. Co. of Texas v. Crowder* (Civ. App.) 55 S. W. 380.

Where plaintiff, who was employed to work under defendant's agent, was injured while on a car on the main track, evidence that the conductor had sole control of cars on that track was admissible on question of his negligence. *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

Where plaintiff's only right to be on the car where he was injured was that of an employé, evidence that it was the engineer's duty to ring the bell at the point where the car was standing, because it was near a highway, was inadmissible. *Id.*

Certain evidence held admissible to show city's implied consent to digging of a ditch in its street in violation of city ordinance. *City of Corsicana v. Tobin*, 23 C. A. 492, 57 S. W. 319.

The fact that a manufacturing company carried accident insurance, as against loss by injuries to employes, was not admissible as bearing upon the question of the company's negligence. *Barrett v. Bonham Oil & Cotton Co.* (Civ. App.) 57 S. W. 602.

Evidence held inadmissible to show incapacity of deceased to understand danger of his position on track. *St. Louis S. W. Ry. Co. v. Shiflet*, 94 T. 131, 58 S. W. 945.

In an action by a passenger to recover for injuries sustained in attempting to board a moving train, equipped with gates on the platform, evidence that he had seen the gateman close the gates before leaving stations held admissible, with evidence that the gates were open when he attempted to get on. *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 94 T. 242, 59 S. W. 874, 55 L. R. A. 497.

Where the question of the portion of the train in which a passenger was in, or whether he was attempting to leave the train at the time when he was injured, is in issue, evidence of plaintiff's reason for being in a particular part of the train, or leaving it, is admissible. *Gulf, C. & S. F. Ry. Co. v. Cleveland* (Civ. App.) 61 S. W. 951.

Evidence in an action against a railroad company for personal injuries held relevant as to the amount of care required. *International & G. N. R. Co. v. Foster*, 26 C. A. 497, 63 S. W. 952.

Certain evidence held admissible to prove that cars were obstructing the view of the railroad crossing at the time of an accident. *Missouri, K. & T. Ry. Co. of Texas v. Oslin*, 26 C. A. 370, 63 S. W. 1039.

Evidence of the duties of a car porter held admissible in an action by a passenger against a railroad company for setting her down at the wrong station. *Texas Midland R. Co. v. Terry*, 27 C. A. 341, 65 S. W. 697.

In an action for injuries sustained by plaintiff on jumping from a moving train, he having been aboard the train to seat his wife, held proper to permit witness to testify that the train did not stop long enough to enable one who had bought a ticket for it to get on. *Texas & P. Ry. Co. v. Crockett*, 27 C. A. 463, 66 S. W. 114.

In action against receiver of electric light company for personal injuries, evidence of mode of ascending poles several years before held admissible. *Dupree v. Tamborilla*, 27 C. A. 603, 66 S. W. 595.

In an action for death (by collision) of a person to whom defendant owed no duty, a question as to whether a witness would undertake to say that it was not negligence to run two trains together in the daytime is irrelevant. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 28 C. A. 260, 67 S. W. 140.

In an action for injuries sustained by falling from an overcrowded excursion train, evidence that defendant had advertised the excursion and expected large crowds was admissible. *Williams v. International & G. N. R. Co.*, 28 C. A. 503, 67 S. W. 1085.

In an action for injuries by a traveler against a railroad company due to a defective bridge, the exclusion of evidence to the effect that the bridge was constructed of good material and that it appeared to be safe held erroneous. *Denison & P. S. Ry. Co. v. Foster*, 28 C. A. 578, 68 S. W. 299.

In an action by an employé for personal injuries, evidence tending to show assumption of risk held properly excluded. *Missouri, K. & T. Ry. Co. of Texas v. Follin*, 29 C. A. 512, 68 S. W. 810.

In an action for damages resulting from the death of a lineman, killed by an un-insulated wire, it was error to reject evidence that persons frequently went where he did, to show negligence of defendant. *Rucker v. Sherman Oil & Cotton Co.*, 29 C. A. 418, 68 S. W. 818.

Evidence to rebut contributory negligence, in action by railroad telegrapher for injuries, held properly admitted under restriction in instructions. *Galveston, H. & S. A. Ry. Co. v. Jenkins*, 29 C. A. 440, 69 S. W. 233.

In an action against a railway company for injuries to a servant, evidence that injured employé of defendant would have to execute a release of his claim for damages before returning to work held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Hawk*, 30 C. A. 142, 69 S. W. 1037.

On an issue as to the contributory negligence of a brakeman in uncoupling cars held proper to allow evidence that the automatic levers were on the wrong side of the car to go to the jury. *Galveston, H. & S. A. Ry. Co. v. Courtney*, 30 C. A. 544, 71 S. W. 307.

In an action for injuries to a passenger while disembarking, owing to the distance from the step of the car to the ground below, a witness could testify as to the existence of a fill at the place of the accident. *International & G. N. R. Co. v. Clark* (Civ. App.) 71 S. W. 587.

In an action for injuries at a crossing, evidence that plaintiff looked in the direction from which he understood there was danger of a train approaching held admissible. *International & G. N. R. Co. v. Ives*, 31 C. A. 272, 71 S. W. 772.

In an action for injuries sustained by a failure to guard an excavation in a street, as required by a city ordinance, such ordinance held admissible as against the city on the issue of negligence vel non. *Browne v. Bachman*, 31 C. A. 430, 72 S. W. 622.

In an action for injuries to a minor, the fact that the father was absent from home, and left the government of the children to the mother, was not evidence of negligence on his part. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

In an action by servant against railroad for injuries, held, that testimony of plaintiff as to whether the rules of the company had required him to put out a fusee at the place where his train stopped was properly admitted. *Missouri, K. & T. R. Co. of Texas v. Bodie*, 32 C. A. 168, 74 S. W. 100.

In an action against railroad for damages to employé by reason of incompetence of surgeon employed by the company in its hospital, evidence that such surgeon had not been properly examined by the board of medical examiners held incompetent. *Poling v. San Antonio & A. P. Ry. Co.*, 32 C. A. 487, 75 S. W. 69.

In an action for injuries sustained by plaintiff at a crossing by reason of defendant's negligently running a hand car in front of his team, thereby frightening them, etc., certain evidence held to have been improperly excluded. *Henze v. International & G. N. R. Co.* (Civ. App.) 75 S. W. 822.

Evidence in action for injuries from frightening of plaintiff's horse by railroad car held admissible. *International & G. N. R. Co. v. Mercer* (Civ. App.) 78 S. W. 562.

In an action for injuries to plaintiff while going into a railroad pumping station, evidence that defendant's servant in charge of the same had been given instructions not to permit any person to come on such premises held immaterial. *Houston & T. C. R. Co. v. Bulger*, 35 C. A. 478, 80 S. W. 557.

In an action for injuries occasioned by a horse frightening at a street car, held proper to show that the street was much traveled by the public. *Denison & S. Ry. Co. v. Powell*, 35 C. A. 454, 80 S. W. 1054.

In an action against a railroad for injuries to a servant, certain evidence held properly admissible on the issue of contributory negligence. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

In an action against a railroad company for negligence, causing the death of a section foreman, certain evidence held admissible as bearing on the care exercised by deceased in going upon the track. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

In action against railroad company for burning a building, evidence is admissible that only a few minutes before the fire a person interested in the contents of the building was seen running from the premises. *Missouri, K. & T. Ry. Co. of Texas v. Jordan* (Civ. App.) 82 S. W. 791.

In an action for injuries to a servant, evidence that he was ordered to do the work, and would have been discharged summarily had he refused, held inadmissible. *Bonn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 82 S. W. 808.

In an action by an engineer against a railroad company for injuries received at a washout, evidence is admissible that plaintiff had requested the train dispatcher to allow him to sidetrack his train because of the storm and the condition of the track, but the request was refused. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 83 S. W. 406.

In action for injuries to hack driver while crossing street railroad track, certain evidence held admissible. *El Paso Electric Ry. Co. v. Davis* (Civ. App.) 83 S. W. 718.

In an action against a city for personal injuries to an electric lineman, certain evidence held relevant on the questions of negligence and contributory negligence. *City of Austin v. Forbis* (Civ. App.) 86 S. W. 29.

The question whether plaintiff drank whisky on the day of the accident held objectionable, in not limiting it to a time before the accident. *Crowder v. St. Louis Southwestern Ry. Co. of Texas*, 39 C. A. 314, 87 S. W. 166.

In an action for the death of a pedestrian while walking on a railroad track, evidence that defendant had never consented to the use of its track by the public at the

place in question held inadmissible. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 99 T. 160, 88 S. W. 192.

In an action against a building and loan association for damages caused by the negligence of a contractor in constructing a building, certain evidence held irrelevant. *Henry v. Stuart* (Civ. App.) 88 S. W. 248.

In an action against a railway company for injuries to a servant, certain evidence, showing the rules of the company regulating the movement of trains, held admissible. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

In an action against a railway company for injuries received by an employé on a work train, certain evidence held inadmissible. *Id.*

In an action for injuries to a licensee on a railroad track, evidence as to the point on which he entered the right of way, and how far and in what direction he traveled before he was struck, held admissible. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In an action for injuries to a licensee while walking along a railroad track, evidence held admissible to rebut defendant's allegation of contributory negligence. *Id.*

In an action for injuries to plaintiff while walking along defendant's railroad track, evidence concerning obstructions to the view at a crossing, and the speed at which the train was run, in the absence of signals, held admissible. *Id.*

In an action for injuries to plaintiff while walking on defendant's right of way, evidence held admissible as describing the locality and surroundings of the accident. *Id.*

In action for injuries while walking on a railroad right of way, evidence as to obstructions of the view of the right of way from a highway held erroneously admitted. *Houston & T. C. Ry. Co. v. O'Donnell*, 99 T. 636, 92 S. W. 409.

In an action for injuries received by an employé, certain evidence held admissible on the issue whether the employer was chargeable with a want of ordinary care in the construction of appliances. *Kirby Lumber Co. v. Dickerson*, 42 C. A. 504, 94 S. W. 153.

In an action against a railroad for injuries to a brakeman while coupling cars, the exclusion of the answer of a witness held not error. *St. Louis & S. F. R. Co. v. Ames* (Civ. App.) 94 S. W. 1112.

In an action for injuries from being thrown from defendant's automobile, certain evidence held properly excluded. *Routledge v. Rambler Automobile Co.* (Civ. App.) 95 S. W. 749.

In an action for personal injuries caused by the explosion of dynamite, certain evidence held admissible as showing that the concussion produced was not sufficient to cause the injury complained of. *Hickey v. Texas & P. Ry. Co.* (Civ. App.) 95 S. W. 763.

In an action against a city for injuries to a traveler in consequence of a defective street, the testimony of a witness as to the condition of the street where the accident occurred held admissible. *City of Dallas v. McCullough* (Civ. App.) 95 S. W. 1121.

In action for injuries to child on track, evidence that emergency brakes of train were not applied till child was struck held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 43 C. A. 630, 97 S. W. 825.

In an action by creditors against the receiver of the debtor and the sureties on his bond for negligence of the receiver, certain evidence held properly excluded. *Groesbeck Cotton Oil Gin & Compress Co. v. Oliver*, 44 C. A. 303, 97 S. W. 1092.

In action for injuries at railroad crossing, testimony that railroad was not prosecuted for obstructing road, that city council had closed up street, and testimony as to acts showing abandonment after accident, held inadmissible. *Gulf, C. & S. F. Ry. Co. v. Garrett* (Civ. App.) 99 S. W. 162.

In action for injuries at railroad crossing, testimony that road or street had been abandoned held admissible. *Id.*

In an action against a railway company for injuries to a passenger on a street car received in a collision between the car and a train at a crossing, certain evidence held admissible to prove negligence on the part of the employés in charge of the train. *St. Louis, S. F. & T. Ry. Co. v. Andrews*, 44 C. A. 426, 99 S. W. 871.

In an action for the death of a servant, the admission of evidence that an inexperienced man would not realize the danger held not erroneous. *Yellow Pine Oil Co. v. Noble* (Civ. App.) 101 S. W. 276.

In an action against a railroad for killing a cow, witnesses were properly allowed to testify to facts tending to show a failure to ring the bell. *Texarkana & Ft. S. Ry. Co. v. Bell* (Civ. App.) 101 S. W. 1167.

In an action against a railroad for death of an employé while removing a push car from the track, certain evidence held admissible. *International & G. N. R. Co. v. McVey*, 46 C. A. 181, 102 S. W. 172.

In an action for the death of a person killed by a train certain evidence held admissible to show when the engineer applied the air brake. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442.

In an action against a steam railroad for injuries to a street car passenger in a threatened collision between the car and a switch engine, certain proof held required to be considered in determining the right of the engineer to act on the assumption that the servants in charge of the car would yield to him the right of way. *Horton v. Houston & T. Cent. Ry. Co.*, 46 C. A. 639, 103 S. W. 467.

In an action for injuries to plaintiff by collision with a vehicle driven by defendant at a speed in violation of a city ordinance, the ordinance was relevant and material evidence. *Foley v. Northrup*, 47 C. A. 277, 105 S. W. 229.

In an action against a railway company for the death of an engineer in a derailment, his watch held proper evidence to show time of accident as proving rate of speed. *Galveston, H. & S. A. Ry. Co. v. Gillespie*, 48 C. A. 56, 106 S. W. 707.

Evidence that, while defendant's employés were working on a curve in its railroad track at which decedent was killed, other parts of the track would become defective, held immaterial. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

Where a pedestrian was injured by a defect in a city sidewalk, a question whether it would not have been safer for her to walk on the paved street around the defect, was properly excluded as immaterial. *City of San Antonio v. Wildenstein*, 49 C. A. 514, 109 S. W. 231.

In an action for personal injuries sustained while obtaining water from a tank car placed by defendant on a side track, evidence held admissible on the issue of defendant's obligation to exercise care. *Louisiana & T. Lumber Co. v. Brown*, 50 C. A. 432, 109 S. W. 950.

In a death action, certain evidence, held admissible on the issue whether defendant railroad was negligent in not having its switch lamps lighted as required by statute. *Missouri, K. & T. Ry. Co. of Texas v. McDuffey*, 50 C. A. 202, 109 S. W. 1104.

In an action against a railroad for injuries to a pedestrian using the track, evidence of witnesses and photographs relating to the use of the track as a roadbed by the public as pedestrians, and to defendant's knowledge and means of knowledge of such use, was admissible to show use of the track by the public as bearing on the question whether plaintiff was a mere trespasser or a licensee. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 50 C. A. 134, 109 S. W. 1126.

In an action against a railroad for destruction of property by fire from defendant's locomotive, certain testimony held admissible. *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Civ. App.) 110 S. W. 99.

In an action against a railway company for injury to a brakeman run over by cars, plaintiff held entitled to show a rule of the company requiring employes to protect the company's property. *St. Louis Southwestern Ry. Co. of Texas v. Cleland*, 50 C. A. 499, 110 S. W. 122.

In an action for injuries received in jumping from a trestle on discovering the proximity of a train, evidence that the trestle and track in question were frequently used as a footpath in going between certain places held admissible on the issue of plaintiff's being a licensee. *Texas Midland R. R. v. Byrd* (Civ. App.) 110 S. W. 199.

In an action against a railroad for injuries to one struck by a train while walking on defendant's track certain evidence held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Malone* (Civ. App.) 110 S. W. 958.

In an action against a railroad company for the destruction of cotton while in possession of compress company, certain evidence held inadmissible on the issue of contributory negligence. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 420, 110 S. W. 978.

In an action for injury to a pedestrian while passing between cars, certain evidence held admissible on the issue of contributory negligence. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 111 S. W. 758.

In an action against a railroad company for injuries caused by the shying of plaintiff's horse at a box car placed at a crossing, evidence that the car had been moved shortly after the accident held admissible. *Texas Cent. R. Co. v. Randall*, 51 C. A. 249, 113 S. W. 180.

Evidence held admissible in an action against carriers for discharging a passenger at a wrong point. *Pullman Co. v. Hoyle*, 52 C. A. 534, 115 S. W. 315.

On the question of whether a railroad company was negligent in placing a mail crane so near its track as it had, it is proper to allow a witness to testify as to what he observed when the engine passed the crane. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 117 S. W. 1043.

One using a railroad track as a footway may show the proximity of crossings, stations, and the like, and the custom of the company to give signals for such places on the issue of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Longino*, 54 C. A. 87, 118 S. W. 198.

In an action for injuries at a crossing caused by the violation of an ordinance limiting the speed of trains to six miles an hour, testimony that the city had never prosecuted violations of the ordinance held irrelevant and harmful. *Garber v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 118 S. W. 857.

In an action for injuries to a pedestrian stumbling over a guy wire, evidence of the effect of the wire becoming charged with electricity held properly excluded. *City of Ft. Worth v. Williams*, 55 C. A. 289, 119 S. W. 137.

In an action for injuries caused by the sudden starting of a train without warning while plaintiff was climbing between it at a crossing, an ordinance requiring the engineer to continuously ring the bell held admissible. *Texas & N. O. R. Co. v. Bean*, 55 C. A. 341, 119 S. W. 328.

In an action for injuries caused by the sudden starting of a train while plaintiff was climbing between the cars at a public crossing, after waiting for more than five minutes for the train to clear the crossing, an ordinance, forbidding trains to block a crossing for more than five minutes held admissible. *Id.*

Certain evidence held admissible, in an action for injuries received at a railroad crossing. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 56 C. A. 282, 119 S. W. 1154.

Evidence held admissible in an action for fire set by a locomotive to rebut evidence that defendant's engines were properly equipped with spark arresters. *Texas Cent. R. Co. v. Qualls* (Civ. App.) 124 S. W. 140.

In an action for the death of an employe in a logging train caused by the derailment of the train, a fact held properly considered in determining the issue of negligence. *Rice & Lyon v. Lewis* (Civ. App.) 125 S. W. 961.

In an action against a railroad for damages to poultry shipped by plaintiff, evidence that the consignees, plaintiff's agents, on receiving the poultry made no complaint as to its condition, and that they signed a receipt reciting that it was in good condition, was admissible. *A. B. Patterson & Co. v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 126 S. W. 336.

In an action for injuries to an engineer in a rear-end collision with a train at a station, certain evidence held admissible on the issue whether the forward train could stop for any length of time at the station without giving signals. *International & G. N. R. Co. v. Brice* (Civ. App.) 126 S. W. 613.

Evidence held admissible in a personal injury case as tending to show plaintiff's injury. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 126 S. W. 672.

In a railroad passenger's action for injuries in a collision, allegations of the complaint that a state fair was being held, that the collision was with great force, the engine of the passenger train being torn up, and certain cars telescoped, and that defendant's em-

ployés operating the engine colliding with the passenger train knew that it probably contained several hundred passengers, etc., merely set forth existing conditions, and were proper to be detailed as evidence before the jury that they might determine the degree of negligence exercised on the occasion. *Missouri, K. & T. Ry. Co. of Texas v. Farris* (Civ. App.) 126 S. W. 1174.

That the engineer prior to the time he said he struck animals on the track failed to blow the whistle and ring the bell was relevant on the issue of negligence, but it was for the jury, and not the court, to determine whether such failure under the circumstances constituted negligence, and, if so, whether it was the proximate cause of injury. *Texas Cent. R. Co. v. Mallard* (Civ. App.) 127 S. W. 1117.

In an action for injuries to a servant by the collapse of a trestle, evidence that prior thereto defendant took out some of the supports held admissible. *Fraser-Johnson Brick Co. v. Baird* (Civ. App.) 128 S. W. 460.

In an action against a carrier for injuries to live stock, evidence of a former suit by the plaintiff against another railroad for injury to the same stock was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Peacock* (Civ. App.) 128 S. W. 463.

In an action against a telegraph company for delay in delivering a telegram, certain evidence was held admissible on the issue of the addressee's agent's contributory negligence in not selecting another method of sending the message, because of the strike. *Western Union Telegraph Co. v. Guinn* (Civ. App.) 130 S. W. 616.

Where, in an action for negligent death, a physician testified that decedent died from pneumonia, evidence that pneumonia resulted from injuries negligently inflicted was admissible. *San Antonio Gas & Electric Co. v. Ocon* (Civ. App.) 130 S. W. 846.

On the issue of contributory negligence in an action by a passenger for negligent failure of the carrier to properly warm the car in which she was traveling, testimony of the conductor of the train that on her complaining he told her that she could go into, and that he would assist her to, another car that was warm, and that she refused to go, was material on the issue of contributory negligence. *Southern Kansas Ry. Co. of Texas v. Butler* (Civ. App.) 131 S. W. 240.

In an injury action against a city under the petition alleging negligence of the city in general, certain matters of proof held admissible. *City of San Antonio v. Ashton* (Civ. App.) 135 S. W. 757.

In an injury action by a passenger against a street railway company, a certain provision of the city ordinances held properly admitted in evidence. *Rapid Transit Ry. Co. v. Williams* (Civ. App.) 136 S. W. 267.

Evidence as to conditions of an electric light wire the next morning after the accident held admissible. *Temple Electric Light Co. v. Halliburton* (Civ. App.) 136 S. W. 584.

Evidence held inadmissible on an issue whether a locomotive set a fire. *St. Louis Southwestern Ry. Co. of Texas v. Gilbert* (Civ. App.) 136 S. W. 836.

In an action for the death of a person struck by a train, certain evidence held admissible on the issue of contributory negligence. *Laeve v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 136 S. W. 1129.

In an action by adult children for damages for the death of their mother, certain evidence held admissible. *Rader v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 137 S. W. 718.

Where plaintiff's horse was frightened by the cable spool of a telephone company, evidence as to the disposition of the horse and his qualities was admissible. *Southwestern Telegraph & Telephone Co. v. Doolittle* (Civ. App.) 138 S. W. 415.

In an action against a railway company for injury to a passenger compelled to alight while the train was in motion, testimony held admissible to show proximate cause of the injury. *Kansas City, M. & O. Ry. Co. of Texas v. Florence* (Civ. App.) 138 S. W. 430.

In an action against a carrier for the death of chickens during transportation, evidence held inadmissible. *Wells Fargo & Co. Express v. Mitchell* (Civ. App.) 139 S. W. 926.

In an action against a railroad company for the death of a servant killed while repairing a car, certain evidence held admissible. *Gulf, C. & S. F. Ry. Co. v. Kennedy* (Civ. App.) 139 S. W. 1009.

In an action for death of a pedestrian, evidence of a signal that the train would stop held admissible on the question of his contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Muske* (Civ. App.) 141 S. W. 565.

In an action against a carrier, evidence held irrelevant. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 141 S. W. 1011.

Though the place at which one crossing a railroad was not a highway crossing, but one customarily used by persons going to the depot, held, evidence of the opening between cars being closed without signal by whistle was admissible on the question of negligence. *Galveston, H. & S. A. Ry. Co. v. Pingenot* (Civ. App.) 142 S. W. 93.

Evidence as to the rapid speed of a train held admissible in an action for damages by fire. *Missouri, K. & T. Ry. Co. of Texas v. McCall* (Civ. App.) 143 S. W. 188.

In an action by a passenger for personal injuries from derailment at a switch, evidence as to the danger if the plug were out of the switch held properly admitted. *Texas Traction Co. v. Hanson* (Civ. App.) 143 S. W. 214.

In an action by a passenger for personal injuries, evidence of the defendant's rules as to rate of speed held admissible.—*Id.*

Bills of lading held inadmissible in action against railway for fire as they did not show that the company was responsible for placing the property destroyed near the tracks. *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.* (Civ. App.) 146 S. W. 336.

Exclusion of evidence that it was dangerous to back a train without taking precautions against injuring people held proper, where company was under no obligation to guard against such injuries at the place of the accident. *Freeman v. Moreman* (Civ. App.) 146 S. W. 1045.

In an action for injuries to a passenger from exposure in a cold waiting room, testimony of defendant's station agent that he would have conducted plaintiff to a hotel or built a fire if she had requested it was inadmissible. *Texas Cent. R. Co. v. Perry* (Civ. App.) 147 S. W. 305.

In a street car passenger's action for injuries to his arm by being struck by another car going around a curve, the company's rule prohibiting cars from passing on curves was admissible as tending to show negligence, irrespective of whether plaintiff knew of the rule. *Boldt v. San Antonio Traction Co.* (Civ. App.) 148 S. W. 831.

Testimony of a medical expert that a woman in a pregnant condition is more careful to avoid injury held inadmissible on the issue of whether the street car was moving when she attempted to alight. *Small v. San Antonio Traction Co.* (Civ. App.) 148 S. W. 833.

In an action for injuries from unguarded machinery, on an issue as to whether it could have been guarded, evidence that a guard was placed over part of it, and that it did not interfere with its operation, was competent. *Armour & Co. v. Morgan* (Civ. App.) 151 S. W. 861.

In an action for injuries caused by the sudden jerk of the car, evidence of the failure to stop on a prior signal by the passenger held admissible as a part of the history of the transaction and as relevant on the issue of contributory negligence, though not alleged in the petition. *Barnes v. Hewitt* (Civ. App.) 152 S. W. 236.

In a personal injury action by a servant who worked in a gin house, testimony by a witness that the master's gin house was the best constructed building of the kind he had ever seen was irrelevant. *Van Geem v. Cisco Oil Mill* (Civ. App.) 152 S. W. 1108.

Evidence, in a mine employé's action for injuries due to a defective stairway, that defendant's "mines were some of the best lignite mines in the state, as regards safety and efficiency of management," was properly excluded. *Consumers' Lignite Co. v. Hubner* (Civ. App.) 154 S. W. 249.

In an action for the death of a brakeman from falling under a car of a train which he had flagged, evidence that the train was not equipped with apparatus by which signals could be conveyed from the engine back to the rear brakeman or conductor was admissible to show the necessity of deceased to communicate his instructions to the brakeman and the conductor. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

On the issues of whether a railroad used ordinary care in furnishing a brakeman with a safe place to work, evidence that it was putting ballast on the track, which was then in course of construction, was admissible. *Id.*

107. **Place of accident.**—In action against railroad for injuries to employé, certain testimony relating to place of accident held admissible. *Galveston, H. & S. A. Ry. Co. v. McAdams*, 37 C. A. 575, 84 S. W. 1076.

In an action for the death of one killed by a railroad train within city limits, certain evidence held not admissible as tending to show that the place of the accident was not within the city. *Texarkana & Ft. S. Ry. Co. v. Frugia*, 43 C. A. 48, 95 S. W. 563.

108. **Independent contractor.**—Evidence of what was done towards control of contractor held material to the question of independent contractor. *Smith v. Humphreyville*, 47 C. A. 140, 104 S. W. 495.

109. **Delay of carrier.**—Evidence irrelevant unless preceded or followed by other evidence, see ante.

Negative evidence, see ante.

Remoteness, see ante.

Where defendant railroad company negligently failed to transport promptly a merry-go-round which plaintiff was shipping to a town to set up at a picnic, and a further delay in setting it up after it arrived was caused by the refusal of the drayman, whom plaintiff had engaged for that purpose, to haul it from the depot because he was then doing other work, defendant's negligent delay was not the proximate cause of damages caused by the drayman's failure to perform his contract with plaintiff, even if, except for defendant's negligence, the machine would have arrived at a time when other engagements would not have prevented the drayman from immediately removing it, and hence in an action against defendant for damages for such delay, evidence of the drayman's breach of contract was not admissible. *Texas Cent. R. Co. v. Shropshire & Shepperd* (Civ. App.) 125 S. W. 369.

In an action for injuries to cattle by delay in transportation, evidence that the cattle, if they "got a good run," would have been worth in the market at destination five cents a pound, and that the cattle arrived in a greatly damaged condition, was not inadmissible as indirectly proving that the cattle did not "get a good run." *Atchison, T. & S. F. Ry. Co. v. Davidson* (Civ. App.) 127 S. W. 895.

In an action against carriers for delaying carriage of construction material used under a government contract, the contractor could show that the government engineer refused to extend time for doing the work. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Civ. App.) 139 S. W. 81.

In an action for delay in the transportation of live stock, evidence as to what was required to constitute a complete delivery to a connecting carrier held inadmissible. *Eastern Ry. Co. of New Mexico v. Montgomery* (Civ. App.) 139 S. W. 885.

Evidence of time required for prior shipments held admissible to show delay of carriers in transporting shipment of cattle. *Pecos & N. T. Ry. Co. v. Gray* (Civ. App.) 145 S. W. 728.

Evidence as to the effect of holding plaintiffs' cattle and hogs an additional 24 hours in transit was not inadmissible, because it did not appear that they were actually confined 24 hours longer than the usual time. *Pecos & N. T. Ry. Co. v. Dinwiddie* (Civ. App.) 146 S. W. 280.

110. **Delay in delivering message.**—Evidence irrelevant unless preceded or followed by other evidence, see ante.

Statements of parties, see ante.

Evidence, in action against telegraph company for delay in delivering telegram, of recipient's understanding of message, held admissible. *Western Union Tel. Co. v. Cooper*, 29 C. A. 591, 69 S. W. 427.

In an action for delay in delivering a telegram, the testimony of a person, to whom the messenger boy was directed, that he would have told where the addressee could be found, held admissible. *Western Union Tel. Co. v. Waller* (Civ. App.) 72 S. W. 264.

In an action against a telegraph company for delay in the delivery of message, whereby plaintiff failed to reach the bedside of dying mother, evidence that she called for him

held inadmissible. *Western Union Tel. Co. v. Waller*, 96 T. 589, 74 S. W. 751, 97 Am. St. Rep. 936.

In an action against telegraph companies for negligent delay in delivery of telegram consisting of a bid by plaintiff for the erection of a building, certain testimony of persons with whom plaintiff intended to make the contract held admissible. *Texas & W. Telegraph & Telephone Co. v. Mackenzie*, 36 C. A. 178, 81 S. W. 581.

In an action against a telegraph company for delay in delivering a message, evidence tending to show that, if the messenger had inquired for plaintiff of the person to whom he was directed, he would have been informed of plaintiff's whereabouts, was admissible. *Western Union Tel. Co. v. Waller*, 37 C. A. 515, 84 S. W. 695.

In an action for delay in delivering a death message, evidence as to whether certain witnesses were acquainted with the addressee held immaterial. *Western Union Telegraph Co. v. Craig*, 44 C. A. 214, 90 S. W. 681.

In an action for mental anguish in consequence of delay in transmitting a telegram, certain evidence held admissible. *Western Union Telegraph Co. v. Campbell*, 41 C. A. 204, 91 S. W. 312.

In an action against a telegraph company for delay in delivering a message, held, that, in anticipation of defendant's introduction of evidence showing proper zeal in locating the sendee, plaintiff could prove that defendant, though informed of the sendee's whereabouts, failed to use ordinary care in locating her. *Western Union Telegraph Co. v. Bell*, 48 C. A. 359, 107 S. W. 570.

In an action against a telegraph company for delay in the delivery of messages, certain evidence held admissible on the issue of the diligence used by plaintiff after receiving the messages. *Western Union Telegraph Co. v. Johnsey*, 49 C. A. 487, 109 S. W. 251.

Evidence held admissible in an action for delay in delivering a death message based on the addressee being prevented from delaying the burial by a reply telegram. *Western Union Telegraph Co. v. Moran*, 52 C. A. 117, 113 S. W. 625.

In an action against a telegraph company for delay in delivering a telegram, evidence that the addressee had requested the sender to keep him informed as to his son's condition was admissible, on the issue of the agency for the addressee of the party who delivered the message to defendant. *Western Union Telegraph Co. v. Guinn* (Civ. App.) 130 S. W. 616.

In an action against a telegraph company for delay in delivering a telegram, evidence that the addressee had received in Memphis a letter from his son five days before his death held admissible on the issue made, as to his presence in that city, and also for its tendency to show the addressee's distress in being deprived of seeing his son before his death. *Id.*

In an action against a telegraph company for delay in delivering a telegram, evidence that the addressee's agent was told the day after the defendant received the message that it had "gone through" held admissible, on the issue of such agent's contributory negligence in not selecting another method of sending the message, because of the strike. *Id.*

Certain evidence in action for delay in sending telegram held inadmissible. *Western Union Telegraph Co. v. Woods* (Civ. App.) 133 S. W. 440.

In an action for delay in the transmission of a telegraph message, certain evidence held admissible. *Western Union Telegraph Co. v. Landry* (Civ. App.) 134 S. W. 848.

Admission of evidence, in action for damages for failure to promptly deliver a message reading, "Your husband killed by team in 'T.' to-day," that plaintiff was unable to bury her husband at any other point than that at which the delayed telegram stated him to have been killed held error. *Western Union Telegraph Co. v. White* (Civ. App.) 149 S. W. 790.

111. Failure to send or deliver message.—It is permissible for one to testify that, if a telegram to her husband had been delivered to her, she would have sent it to her husband. *Western Union Tel. Co. v. Mitchell*, 91 T. 454, 44 S. W. 274, 40 L. R. A. 209, 66 Am. St. Rep. 906.

Admissibility of evidence in action for nondelivery of message determined. *Western Union Tel. Co. v. Gahan*, 17 C. A. 657, 44 S. W. 933.

Evidence of the manager of the company that time was saved by not holding a telegram for extra pay held inadmissible in an action for delivering it at the wrong place. *Western Union Tel. Co. v. Sweetman*, 19 C. A. 435, 47 S. W. 676.

In action for failure to deliver telegram, admission of evidence, as that addressee could have been found, held, under the facts, reversible error. *Western Union Tel. Co. v. Redinger*, 22 C. A. 362, 54 S. W. 417.

Evidence showing accessibility of plaintiff held admissible in an action against a telegraph company for failure to deliver a message. *Western Union Tel. Co. v. Davis*, 24 C. A. 427, 59 S. W. 46.

Where a telegraph company claims exemption from liability for failure to deliver a telegram outside of free delivery limits, evidence that the company's sending agent made no inquiry as to where addressee lived held properly admitted. *Id.*

In an action for the failure to deliver a telegram, evidence as to the actions of the parties, had the message been delivered, held to have been properly admitted. *Western Union Tel. Co. v. Norris*, 25 C. A. 43, 60 S. W. 982.

Evidence as to the addressee of a telegram being well known held admissible on the issue of negligence in failing to deliver it. *Western Union Tel. Co. v. James*, 31 C. A. 503, 73 S. W. 79.

Rejection of evidence as to how an error in transmitting a telegram could occur held error, notwithstanding an admission of counsel. *Western Union Tel. Co. v. Brown* (Civ. App.) 75 S. W. 359.

In an action against a telegraph company for failure to properly deliver a death message, certain evidence held admissible to show that, had it been promptly delivered, the addressee could have given it to the plaintiff in time. *Western Union Tel. Co. v. Crawford* (Civ. App.) 75 S. W. 843.

In an action against a telegraph company for failure to deliver a message, certain evidence held admissible as to the whereabouts of the sendee in aid of the delivery of the message. *Western Union Telegraph Co. v. O'Fiel*, 47 C. A. 40, 104 S. W. 406.

In an action against a telegraph company for failing to deliver a message to a physician, evidence of the whereabouts of the physician the day following the sending of the telegram held immaterial in view of other evidence. *Slaughter v. Western Union Tel. Co.* (Civ. App.) 112 S. W. 688.

In an action against a telegraph company for failure to deliver a message, thereby depriving the sender of the privilege of buying bank stock, certain evidence held admissible. *Postal Telegraph Cable Co. of Texas v. Harriss*, 56 C. A. 105, 121 S. W. 358.

In an action against a telegraph company for failure to deliver a message, certain evidence held material. *Western Union Telegraph Co. v. Henderson* (Civ. App.) 131 S. W. 1153.

In an action for failure to deliver a telegram, evidence that the messenger who went for the message was informed where the addressee could be found was admissible. *Western Union Telegraph Co. v. Reynolds* (Civ. App.) 140 S. W. 121.

In an action against a telegraph company for the failure to deliver a death telegram, where the company claimed that plaintiff should have taken an earlier train than she did, evidence of the reasons for her delay are admissible. *Western Union Telegraph Co. v. Daniels* (Civ. App.) 152 S. W. 1116.

112. Ejection of passengers and others from trains.—In an action against a railroad company to recover for injuries caused by putting a person off a train, evidence that the mistake in taking it was caused by failure of defendant to give proper signals was irrelevant. *Gary v. Gulf, C. & S. F. Ry. Co.*, 17 C. A. 129, 42 S. W. 576.

A passenger's testimony as to whether she preferred to get off or stay on a train from which she has been wrongfully ejected held immaterial, if she was in fact ejected. *Texas & P. Ry. Co. v. Wharton* (Civ. App.) 145 S. W. 282.

Evidence that the conductor did not ask the ejected person whether she had money or ask her for any was admissible, where there was evidence that the conductor told her she could do nothing but get off, to show that the conductor was hasty. *Southern Kansas Ry. Co. of Texas v. Wallace* (Civ. App.) 152 S. W. 873.

113. Unlawful arrest and false imprisonment.—Good faith, see ante.

Evidence as to plaintiff's treatment while confined in jail held admissible. *San Antonio & A. P. Ry. Co. v. Griffin*, 20 C. A. 91, 48 S. W. 542.

Evidence of defendant's unfulfilled promise to inform plaintiff's wife of his arrest, and of its efforts to have plaintiff's bondsmen surrender him into custody, held admissible. *Id.*

In an action against a sheriff for false imprisonment, held error to exclude from evidence an executive warrant under which he acted, and testimony explanatory of his connection with the detention. *Regan v. Jessup*, 34 C. A. 74, 77 S. W. 972.

In an action for damages sustained by a passenger by reason of having been illegally arrested by an agent of the railroad company, the exclusion of evidence showing that the agent was a special policeman of the city where the arrest occurred held proper. *Texas Midland R. R. v. Dean* (Civ. App.) 82 S. W. 524.

In action for false imprisonment, information and warrant of arrest filed after false imprisonment held inadmissible to justify or mitigate the unlawful act. *Gold v. Campbell*, 54 C. A. 269, 117 S. W. 463.

Certain evidence held admissible on the issue of malice, in an action for false imprisonment. *Taylor Bros. v. Hearn* (Civ. App.) 133 S. W. 301.

114. Malicious prosecution.—The fact that the prosecutor acted, after a full statement of all the facts, on the advice of counsel that an offense had been committed, though admissible in evidence for the defendant, is not conclusive of the question of malice. *Glasgow v. Owen*, 69 T. 167, 6 S. W. 527.

Advice of counsel may be considered with other facts upon the questions of malice and probable cause. *Hurlbut v. Boaz*, 23 S. W. 446, 4 C. A. 371.

In an action for malicious prosecution, the defense of advice of private counsel is not complete, but is a fact to be considered by the jury on the issue of malice and probable cause. *Missouri, K. & T. Ry. Co. of Texas v. Groseclose*, 50 C. A. 525, 110 S. W. 477.

Purpose for which the fact that no indictment was found against plaintiff may be considered in an action for malicious prosecution, stated. *Equitable Life Assur. Soc. of United States v. Lester* (Civ. App.) 110 S. W. 499.

Certain evidence held admissible in an action for malicious prosecution to show that defendant had not communicated all of the facts to the county attorney, on whose advice plaintiff was arrested. *Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Civ. App.) 134 S. W. 736.

115. Waters and water courses—Obstruction.—Evidence irrelevant unless preceded or followed by other evidence, see ante.

In a suit for the overflow of land caused by the obstruction of a ditch, evidence that on the removal of the obstruction the water receded held admissible. *Texas & N. O. R. Co. v. Anderson* (Civ. App.) 61 S. W. 424.

Evidence that plaintiff's land was low and had overflowed before defendant company closed a culvert through its embankment and constructed a drain along its right of way held admissible as tending to show a complete defense for overflow from such closing. *Gulf, C. & S. F. Ry. Co. v. Wishart*, 28 C. A. 162, 66 S. W. 860.

In an action for the drowning of plaintiff's stock by failure to leave openings in defendant's right of way fence, where the deed required defendant to construct all necessary road crossings, evidence that an open crossing was necessary was admissible. *Gulf, C. & S. F. Ry. Co. v. Clay*, 28 C. A. 176, 66 S. W. 1115.

Evidence in an action for damages to land by construction of a railway obstructing flow of surface water held irrelevant. *Texarkana & Ft. S. Ry. Co. v. Spencer*, 28 C. A. 251, 67 S. W. 196.

In an action for damages to crops alleged to be due to interference with the natural flow of water, evidence tending to show that they were damaged by reason of excessive rainfall held admissible. *Gulf, C. & S. F. Ry. Co. v. Huffman* (Civ. App.) 81 S. W. 536.

Evidence as to the land being flooded only after construction of a railroad held admissible in an action against the railroad company for flooding the land. *International & G. N. R. Co. v. Foster*, 45 C. A. 334, 100 S. W. 1017.

In an action against a railroad company for damages resulting from the backing up of surface water, owing to the improper construction of an embankment, evidence held improperly admitted. *San Antonio & A. P. Ry. Co. v. Kiersey*, 101 T. 513, 109 S. W. 862.

In an action against a railroad company for so constructing its tracks that water from a river ran over plaintiff's land, certain evidence held admissible. *International & G. N. R. Co. v. Davison* (Civ. App.) 138 S. W. 1162.

In a timber owner's action for obstructing a stream so as to interfere with the rafting of logs, evidence that rafting had not proved profitable to some parties engaged in the business was properly excluded. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 149 S. W. 358.

116. — **Diversion.**—In an action for damages for the overflow of a portion of plaintiff's farm, plaintiff's reasons for abandoning the balance of the farm held immaterial. *Eastern Texas R. Co. v. Moore* (Civ. App.) 94 S. W. 394.

Defendants in a riparian owner's suit to enjoin the diversion of water held to have the right to prove that the plaintiff's loss was due to the diversion by an intermediate appropriator and to prove the amount of that diversion. *Biggs v. Lee* (Civ. App.) 147 S. W. 709.

117. **Libel and slander.**—Circumstantial evidence, see ante.

Pecuniary condition, see ante.

Statements of fact in publication held libelous, so that the contention that conclusions based thereon were not libelous when taken in connection with facts was immaterial. *Cranfill v. Hayden*, 97 T. 544, 80 S. W. 609.

In libel for charging plaintiff with smuggling, testimony as to the authority of custom officers in searching and seizing goods held irrelevant. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

In slander the exclusion of evidence of the appearance of defendant at the time of the uttering of the slanderous words held proper as not proving malice, which must be implied from the charge itself. *Day v. Becker* (Civ. App.) 145 S. W. 1197.

118. **Wrongful release of judgment.**—In an action for the wrongful release of a judgment after its sale by defendant to plaintiff, certain proof held inadmissible on the issue of whether defendant sold the judgment. *W. L. Moody & Co. v. Rowland*, 46 C. A. 412, 102 S. W. 911.

119. **Wrongful attachment, execution or sequestration.**—Circumstantial evidence, see ante.

Motive, intent and good faith, see ante.

In a suit for damages resulting from an illegal seizure of property exempt from forced sale, evidence offered showing cause for the issuance of the attachment is irrelevant. *Brown v. Bridges*, 70 T. 661, 8 S. W. 502.

In order to show want of probable cause, evidence of an offer to compromise or arbitrate is competent. *Lewis v. Taylor* (Civ. App.) 24 S. W. 92.

That an attaching creditor was angry is not admissible in evidence in an action for a wrongful attachment. *Yarborough v. Weaver*, 25 S. W. 468, 6 C. A. 215.

To prove that one was actuated by malice in seizing the property of another it is competent to show his language and conduct in making the seizure. *Land v. Klein*, 21 C. A. 3, 50 S. W. 638.

In an action for wrongful attachment, a judgment for defendant against plaintiff for the amount of the debt for which the attachment was levied, which was suspended by appeal, was not admissible to show that plaintiff was indebted to defendant. *Cline v. Hackbrath*, 30 C. A. 591, 71 S. W. 48.

In an action for wrongful attachment, certain evidence held admissible as tending to show that the attachment defendant had been fraudulently disposing of his property. *Id.*

In an action for wrongful attachment, certain evidence held properly admitted, when expressly limited to the issue of probable cause. *Id.*

In an attachment suit held error to refuse to admit certain evidence showing that before commencement of suit defendant had claimed that he was entitled to damages as against plaintiff. *Kleinsmith v. Kempner*, 37 C. A. 246, 83 S. W. 409.

In a sequestration suit, evidence that plaintiff had a mortgage lien on the property sued for was admissible on the issue of malice in suing out the writ on which defendant predicated a right to recover exemplary damages. *Rea v. P. E. Schow & Bros.*, 42 C. A. 600, 93 S. W. 706.

In an action for damages for alleged wrongful levy of execution, the admission of certain evidence held not error. *First Bank of Mertens v. Steffens*, 51 C. A. 211, 111 S. W. 782.

In an action for wrongful attachment, plaintiff held entitled to show the falsity of the grounds stated in the affidavit of attachment. *Rainey v. Kemp*, 54 C. A. 486, 118 S. W. 630.

In proceeding on motion to quash attachment certain evidence held properly excluded. *Awalt v. Schooler* (Civ. App.) 128 S. W. 453.

120. **Fraud and fraudulent conveyances.**—Circumstantial evidence, see ante.

Evidence irrelevant unless preceded or followed by other evidence, see ante.

Knowledge or notice, see ante.

Motive, intent and good faith, see ante.

Pecuniary condition, see ante.

Remoteness, see ante.

Statements and conduct of parties, see ante.

The issue being whether S. had transferred his goods to H. for the purpose of defrauding his creditors, it was inadmissible to introduce evidence that S., prior to the loan of money to H. with which the goods had been bought of him by H., offered to invest money in a certain business, and to put H. in as a clerk to look after his interest, it not having been shown that H. knew of the proposition. *Hinson v. Walker*, 65 T. 103.

Fraud may be proven as any other fact. *Wylie v. Posey*, 71 T. 34, 9 S. W. 87.

On the issue of fraud charged to avoid a sale by a failing debtor to a creditor, it is competent to prove that the debtor offered the complaining creditor property at the

price for which it was afterwards sold to another creditor. *Traders' Bank v. Clare*, 76 T. 47, 13 S. W. 183.

Where a failing debtor sells out to his own employé, and fraud is alleged, the fullest latitude of proof should be allowed other creditors in showing the fraud. Every relevant circumstance should go to the jury for what it is worth. *Cox v. Trent*, 1 C. A. 639, 20 S. W. 1118.

In an action assailing a conveyance for fraud, evidence held admissible on the issue of fabricated indebtedness. *Wright v. Solomon* (Civ. App.) 46 S. W. 58.

Evidence that, after a conveyance, mortgagee offered to turn over to plaintiff all of the mortgaged property if he would pay his claim, which he refused, held admissible. *City Nat. Bank v. Martin-Brown Co.*, 20 C. A. 52, 43 S. W. 617, 49 S. W. 523.

The theory of a witness as to what induced the buyer of an insolvent's goods to pay an exorbitant price held inadmissible in an action attacking the transfer as fraudulent. *Half v. Goldfrank* (Civ. App.) 49 S. W. 1095.

Evidence that the property was worth more than the price, and that the buyer would have taken it had he known its condition, is admissible on the issue of the materiality of the false representations. *Carson v. Houssels* (Civ. App.) 51 S. W. 290.

Evidence of acceptance by creditors of chattel mortgage executed for their benefit is admissible, when such mortgage is attacked as fraudulent on its face, because acceptance of all creditors does not appear. *Parlin & Orendorff Co. v. Hanson*, 21 C. A. 401, 53 S. W. 62.

Under pleadings raising issue as to fraud on creditors, held, that wife of grantor of deed under which plaintiff claimed was properly allowed to testify that, of money her husband received from sale of farm bought with proceeds of her separate property, certain amount was invested in property conveyed. *Barnes v. Krause* (Civ. App.) 53 S. W. 92.

In an action by a creditor to set aside a voluntary conveyance by a husband to his wife, evidence of transactions occurring after the conveyance held incompetent to prove an indebtedness against the husband. *Gonzales v. Adoue*, 94 T. 120, 58 S. W. 951.

In an action against the grantee of a patentee to set aside a patent to school lands for fraud, a judgment in an action by a third person against the patentee held not admissible. *State v. Burnett* (Civ. App.) 59 S. W. 599.

In a suit to cancel a contract and deeds made in pursuance thereof on the ground of false representations as to the character of the round cotton bale process, evidence as to the saving to the farmers in handling cotton in the round bale held inadmissible. *American Cotton Co. v. Collier*, 30 C. A. 105, 69 S. W. 1021.

In a suit to cancel a contract and deeds made in pursuance thereof on the ground of false representations as to the character of the round cotton bale process, evidence as to the claims made for it at the time of the trial, more than four years afterwards, held inadmissible. *Id.*

On the issue whether a debt included in a deed of trust was fictitious and fraudulent as to other creditors, certain testimony held relevant. *M. A. Cooper & Co. v. Sawyer*, 31 C. A. 620, 73 S. W. 992.

On the issue whether a debtor had transferred his property with the intent to defraud his creditors, evidence as to what his grantee said and did with reference to his property was inadmissible. *Searcy v. Gwaltney Bros.*, 36 C. A. 153, 81 S. W. 576.

In an action on a note given for part of the purchase price of land, evidence that the payee falsely represented that he had good title, etc., was admissible. *Morris v. Brown*, 38 C. A. 266, 85 S. W. 1015.

In a suit to set aside a conveyance as fraudulent, recitals in a former judgment held not admissible as against the grantee. *Parlin & Orendorff Co. v. Vawter*, 39 C. A. 520, 88 S. W. 407.

In an action for damages for false representations as to the value of corporate stock, evidence of a certain representation held not objectionable as relating to mere opinion. *Collins v. Chipman*, 41 C. A. 563, 95 S. W. 666.

In an action for fraudulent misrepresentations inducing plaintiff to buy corporate stock, certain evidence held admissible to show that the representations were not true when made. *Id.*

On issue of fraud, evidence of subsequent ownership of property by person charged held inadmissible. *Guthrie v. O. T. Lyon & Sons* (Civ. App.) 98 S. W. 432.

Where, in an action for deceit of defendant's agent, there was evidence of ratification of the agent's fraudulent conduct, evidence of a conversation between plaintiff and defendant's general agent, concerning such transaction, held admissible as against defendant. *Western Cottage Plano & Organ Co. v. Anderson*, 45 C. A. 513, 101 S. W. 1061.

In an action for fraud, certain testimony held inadmissible. *First Nat. Bank v. Baldwin*, 46 C. A. 244, 102 S. W. 786.

In an action against a building and loan association for fraud in inducing plaintiff to subscribe for stock, held unessential to plaintiff's recovery that he show that he applied for a loan, etc. *Trollinger v. Amarillo Savings & Loan Co.*, 46 C. A. 592, 103 S. W. 199.

Evidence held material on the defense that one was induced by fraudulent representations to sign a contract for purchase of materials. *United States Gypsum Co. v. Shields* (Civ. App.) 106 S. W. 724.

Evidence held admissible on the question whether one was deceived by false representations. *Goldman v. Hadley* (Civ. App.) 122 S. W. 282.

In an action for damages by false representations inducing plaintiff to purchase his partner's interest in the firm, certain evidence held irrelevant. *Pitman v. Self* (Civ. App.) 127 S. W. 907.

A buyer of corporate stock seeking to recover damages for fraud inducing the purchase held not entitled to prove a specified fact. *Reed v. Holloway* (Civ. App.) 127 S. W. 1189.

Evidence held relevant to show nonexistence of fraud. *Crockett & Sons v. Anselin* (Civ. App.) 132 S. W. 99.

In an action to set aside a deed as having been procured through fraudulent representations, under the issues as to whether a certain hotel that was given in con-

sideration of the deed was misrepresented as being rentable, and whether defendant relied upon plaintiff's false representations as to the character of the land covered by the deed, it was no error to exclude evidence by defendant that he became acquainted with plaintiff through his agent; such evidence being wholly immaterial. *Peters v. Strauss* (Civ. App.) 132 S. W. 956.

In an action for fraud inducing an exchange of property for a mule, evidence of the price paid by defendant for the mule about two months prior to the exchange held admissible. *McCullough Hardware Co. v. Burdett* (Civ. App.) 142 S. W. 612.

In an action on a note wherein plaintiff garnished insurance proceeds claimed by defendant's brother, held improper to refuse to permit the brother to testify what caused him to procure an assignment of the proceeds. *Dickerson v. Central Texas Grocery Co.* (Civ. App.) 147 S. W. 695.

In an action against a real estate broker for fraud inducing plaintiff to trade his land for a stock of merchandise, testimony for plaintiff that plaintiff had not authorized the broker to enter into a contract, by which plaintiff should accept the stock without inspection, held erroneous in view of the terms of the contract of exchange which did not provide that plaintiff should not have the right to inspect before receiving the merchandise. *Blard & Scales v. Tyler Building & Loan Ass'n* (Civ. App.) 147 S. W. 1168.

In an action against a real estate broker for fraud inducing plaintiff to trade his land for a stock of merchandise, a question asked a witness as to whether he would describe the stock as a line of dry goods, clothing, boots, shoes and hats held inadmissible. *Id.*

In an action on a note executed by defendant, in which land standing in the name of B. was attached which plaintiff claimed was purchased by a town-site corporation for defendant and transferred to B. to defraud defendant's creditors, evidence that defendant had the same rights in the land as the town-site company, as defendant stockholders owned the town-site company, was admissible. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.* (Civ. App.) 153 S. W. 680.

The affidavit of the publisher of a newspaper, taken before the administrator of an estate, half of which was the property of the party cited by publication, was admissible in evidence as tending to show fraud; the purchaser having been alleged to have been in conspiracy with such administrator. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

121. Undue influence and mental incapacity.—Circumstantial evidence, see ante.

The issue being merely whether the person giving a note was insane, and not whether the bank taking it had notice thereof, admission of evidence that the cashier of the bank to which it was payable thought at the time the person executed the note that he was insane is error. *First Nat. Bank v. McGinty*, 29 C. A. 539, 69 S. W. 495.

The state of one's health may be considered in determining the question of mental capacity to transact business. *Johnson v. Gulf, C. & S. F. Ry. Co.*, 36 C. A. 487, 81 S. W. 1197.

On an issue as to whether a son exercised undue influence over his mother to procure an assignment of notes and mortgages, testimony held improperly received. *McHay v. Peterson*, 52 C. A. 195, 113 S. W. 981.

In a suit by the executor to set aside a deed executed by testatrix to her daughter-in-law on the ground of fraud and undue influence, evidence that defendant's attorney had offered to give an heir his share if he would have nothing to do with the case was inadmissible. *Rankin v. Rankin*, 105 T. 451, 151 S. W. 527, reversing judgment (Civ. App.) 134 S. W. 392.

In an action by an executor to set aside a deed made by his deceased on the ground of deceased's insanity, the exclusion of evidence tending to show a change in the handwriting of deceased is proper since the evidence was irrelevant. *Armstrong v. Burt* (Civ. App.) 138 S. W. 172.

In an action by an executor to set aside a deed of his deceased on the ground of insanity, evidence as to the feeling of the grantor towards defendant's family held admissible. *Id.*

Where a son procured his mother to make a deed of her land to his wife that he might have the control over it as his own, all evidence which would be admissible if the deed had been made to the son was admissible in a suit by the mother's executrix to set aside the deed. *Rankin v. Rankin*, 105 T. 451, 151 S. W. 527, reversing judgment (Civ. App.) 134 S. W. 392.

In an action to cancel a deed on the grounds of the grantor's insanity and undue influence, evidence, that one not shown to have had any authority to act for defendants or to stand in a confidential relation toward the grantor had told the grantor that the land was not worth more than the amount offered, was a mere expression of opinion and inadmissible on the issue of undue influence. *Stratton v. Riley* (Civ. App.) 154 S. W. 606.

In an action to cancel a deed for mental incapacity of the grantor and undue influence, a question as to what connection B. had with the transaction was properly excluded, where neither by pleading nor proof was B. connected with the transaction. *Id.*

In a suit to set aside a deed, executed by testatrix and her husband, conveying all their property to the exclusion of a son, on the ground of undue influence and mental incapacity, evidence that about five years before the making of the deed the husband gave directions for the disposition of the property showing that he did not wish to disinherit the son was admissible. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581.

122. Nuisance.—Remoteness, see ante.

In a suit to enjoin the maintenance of a nuisance consisting of a cotton gin, evidence as to the cost of moving to another place was properly excluded. *Faulkenbury v. Wells*, 28 C. A. 621, 68 S. W. 327.

In an action for a nuisance in polluting a stream and causing a stench on plaintiff's premises, defendant held entitled to show that the stench arose from other causes. *Shain Packing Co. v. Burrus* (Civ. App.) 75 S. W. 838.

In a suit to enjoin the construction and operation of a cotton gin, on the ground that the same would be a nuisance, certain evidence held inadmissible. *Robinson v. Dale* (Civ. App.) 131 S. W. 308.

In a suit to restrain the maintenance of a livery stable as a nuisance, and for damages, evidence offered by plaintiff that defendant had contracted not to engage

in the livery business in the town for five years, and that a suit was pending to enjoin him from doing so, was immaterial. *Kennedy v. Garrard* (Civ. App.) 156 S. W. 570.

123. **Damages.**—Certainty, see ante.

Character and reputation, see ante.

Pecuniary condition and value, see ante.

Statements and conduct of parties, see ante.

As evidence of damage from the attachment and sale of goods, the plaintiff may show that his business was broken up, that he was thrown out of employment, and his services were worth a stated sum. *Mayo v. Savoni*, 1 App. C. C. § 217.

It is irrelevant upon the question of damages to show that the plaintiff had contracted for the sale of the cattle at their destination, and that they were refused because not such as had been represented, and not for or on account of their condition. Such testimony did not tend to show the amount or limit of damages suffered. *Wade v. Love*, 69 T. 522, 7 S. W. 225.

Evidence that the publisher of a libel, who charged a violation of the local option laws, was informed thereof by his agent in his line of duty, is admissible to mitigate the damages. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580.

Under Art. 6521, it was held that evidence of benefits derived from the construction of a telegraph line in common with the community in general cannot be excluded by the court. *Houston & T. C. R. Co. v. Postal Tel. Cable Co.*, 18 C. A. 502, 45 S. W. 179.

Certain evidence in an action to cancel a conveyance of land held admissible to show a waiver of defendant's claim for damages because of plaintiff's failure to comply with a contract in relation to repair of other property. *Lancaster v. Richardson* (Civ. App.) 45 S. W. 409.

An insurer who has not required an appraisal on a disputed loss cannot complain of the admission of evidence other than an award to establish the amount of the loss. *Virginia Fire & Marine Ins. Co. v. Cannon*, 18 C. A. 588, 45 S. W. 945.

In an action for breach of a contract to deliver gravel, certain evidence held admissible on an issue as to the amount of damages. *Downey v. Hatter* (Civ. App.) 48 S. W. 32.

Evidence of the nature of injuries to a consignment of stock is no evidence on which to estimate damages. *Gulf, W. T. & P. Ry. Co. v. Staton* (Civ. App.) 49 S. W. 277.

Evidence of injury to navigation in certain waters by the construction of a ship channel held immaterial to the question of damages, because the land not taken was not shown to extend to those waters, and no special damage was shown. *Crary v. Port Arthur Channel & Dock Co.* (Civ. App.) 49 S. W. 703.

On issue of damages from construction of railroad, evidence that city had not graded street in front of it on account of the railroad held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Civ. App.) 51 S. W. 511.

Evidence of loss of profits held proper in action against a railroad for cutting off plaintiff's access to market by closing a crossing. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 21 C. A. 236, 51 S. W. 541.

In an action to condemn land, the exclusion of evidence that, unless it was condemned, plaintiff would not be able to complete a roundhouse which it had previously located near the land, was proper. *Gulf, C. & S. F. Ry. Co. v. Brugger*, 24 C. A. 367, 59 S. W. 556.

In action for injuries by fire to grass of lessee, evidence of injury to turf was properly received. *San Antonio & A. P. Ry. Co. v. Stone* (Civ. App.) 60 S. W. 461.

Evidence of loss of time by a tenant and his family as the result of an illegal distress is admissible on the question of exemplary damages. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

In a suit to recover half the profits of a certain sale, evidence as to the expenses incurred in affecting same was improperly excluded. *Branch v. De Blanc* (Civ. App.) 62 S. W. 134.

In an action for breach of marriage promise, evidence as to previous engagements of plaintiff held not admissible on the question of the measure of damages. *Edge v. Griffin* (Civ. App.) 63 S. W. 148.

In an action for the negligent destruction of pear trees, evidence that such trees add nothing to the value of the soil in that locality was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Burroughs*, 27 C. A. 422, 66 S. W. 83.

In an action for delay in delivering a telegram notifying a son of the serious sickness of his mother, evidence that they were more than ordinarily affectionate held admissible. *Western Union Tel. Co. v. Waller* (Civ. App.) 72 S. W. 264.

On the issue of damages for killing a mule, certain evidence held admissible. *Southern Kansas Ry. Co. of Texas v. Cooper*, 32 C. A. 592, 75 S. W. 328.

In an action for damages by defendant's constructing tracks along the street in front of plaintiff's property, testimony as to what plaintiff would take for his property held properly excluded. *Eastern Texas R. Co. v. Scurlock* (Civ. App.) 75 S. W. 366.

In an action against a railroad for damages because of the construction of an embankment on plaintiff's land, evidence that the embankment obstructed plaintiff's view and impaired the use of a windmill held admissible. *Choctaw, O. & T. R. Co. v. True*, 35 C. A. 309, 80 S. W. 120.

In an action against telephone companies for negligent delay in delivery of message, consisting of bid by plaintiff for the erection of a building, plaintiff is entitled to show what his profits would have been, had the contract been awarded him. *Texas & W. Telegraph & Telephone Co. v. Mackenzie*, 36 C. A. 178, 81 S. W. 581.

In an action against a railroad company for the burning of a building, evidence as to whether the building was insured is inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Jordan* (Civ. App.) 82 S. W. 791.

In action for loss by fire communicated by defendant's engine, rejection of evidence that plaintiff had transferred his cause of action to insurers held not cause for reversal. *Missouri, K. & T. Ry. Co. of Texas v. Keahey*, 37 C. A. 330, 83 S. W. 1102.

In an action for breach of contract not to engage in business, evidence showing plaintiff's loss of profits held admissible. *Crump v. Ligon*, 37 C. A. 172, 84 S. W. 250.

In an action against a railway company for temporary damages to land, due to

the negligent construction of the track, evidence of depreciation in the market value of the land is inadmissible. *Gulf, B. & G. N. Ry. Co. v. Roberts* (Civ. App.) 86 S. W. 1052.

In an action against a railroad for failure to place cattle guards at the points where the road entered plaintiff's premises, held, that testimony as to expenses incurred on account of the hire of additional help by plaintiff for the purpose of driving his stock across defendant's right of way was competent and material. *Missouri, K. & T. R. Co. of Texas v. Wetz*, 38 C. A. 563, 87 S. W. 373.

In an action for the diversion of water, certain evidence held admissible on the issue of permanent damages. *St. Louis Southwestern Ry. Co. v. Terhune* (Civ. App.) 94 S. W. 381.

In an action against a telegraph company for damages owing to failure to deliver message informing plaintiff that his wife was ill in childbirth, it was proper to permit plaintiff to show who lived with his wife at the time, the age of such parties, and their ability or capacity to assist her. *Western Union Telegraph Co. v. Craven* (Civ. App.) 95 S. W. 633.

Where plaintiff sued for a telegraph company's delay in delivering a message resulting in his being prevented from attending a brother's funeral, evidence as to his grief held improperly excluded. *Buchanan v. Western Union Telegraph Co.* (Civ. App.) 100 S. W. 974.

In an action for failure to deliver a telephone call, it was error to allow evidence of damage of which there was nothing in the call to put the companies upon notice that this element of damage would arise or be likely to arise from a failure to deliver. *Sabine Valley Telephone Co. v. Oliver*, 46 C. A. 428, 102 S. W. 925.

In an action for breach of contract to sell a specified number of bales of cotton, evidence that cotton advanced steadily in price, held admissible. *Pierce v. Waller* (Civ. App.) 102 S. W. 1173.

In an action for breach of contract to sell a specified number of bales of cotton certain testimony held inadmissible on the issue of damages.—Id.

In an action against a railroad company for overflowing a farm, certain evidence held admissible on the issue of damages. *Houston & T. C. R. Co. v. Darwin*, 47 C. A. 219, 105 S. W. 825.

In an action for damages for wrongful expulsion from a fraternal association, held that a policy of insurance forfeited by such expulsion and the forfeiture of a membership card, which enabled the holder to travel by rail without paying fare, were properly considered on the question of damages. *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 108 S. W. 453.

In an action for mental anguish suffered by plaintiff's wife because of his absence from a failure to deliver a telegram, evidence as to the possible effect of the worry due to plaintiff's absence on the wife's health held improperly admitted. *Western Union Telegraph Co. v. Olivarri* (Civ. App.) 110 S. W. 930.

Where the evidence raised an issue of exemplary damages, in an action for conspiracy resulting in the expulsion of a member of a beneficial association, evidence that plaintiff at the time of defendant's illegal acts had a home, a wife and children was admissible. *St. Louis & S. W. Ry. Co. of Texas v. Thompson*, 102 T. 89, 113 S. W. 144, 19 Ann. Cas. 1250.

Certain evidence held admissible in reduction of damages from eviction of a tenant on shares. *Crews v. Cortez*, 52 C. A. 644, 115 S. W. 609.

In an action for conversion, evidence as to damages held inadmissible. *Crawford v. Thomason*, 53 C. A. 561, 117 S. W. 181.

In an action for damage to an onion crop, mode of proving damages stated. *Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm*, 53 C. A. 643, 117 S. W. 1049.

In an action for breach of a contract to make and deliver staves, certain evidence held inadmissible on the issue of damages. *Gibson & Cunningham v. Purifoy*, 56 C. A. 379, 120 S. W. 1047.

In an action for injuries to personal property, certain evidence held admissible on the issue of exemplary damages. *Temple v. Duran* (Civ. App.) 121 S. W. 253.

In an action for mental anguish caused by delay in not carrying plaintiff's wife's body on the same train that he was on, and in not delivering it at his destination by the time that he arrived there, testimony that while in transit the conductor told him that the body of his wife was on the same train was inadmissible; as plaintiff could not have suffered mental anguish until he ascertained that the body was not being carried on the train; and the conductor's statement to the contrary, if untrue, could have caused no distress. *Missouri, K. & T. Ry. Co. of Texas v. Vandiver*, 57 C. A. 470, 122 S. W. 955.

In an action against a carrier for loss of goods, evidence of the amount of freight unpaid was admissible on the issue of damages, though not pleaded as a counterclaim. *Texas & P. Ry. Co. v. Hoffecker* (Civ. App.) 123 S. W. 617.

Testimony in an action for burning of grass and sod as to the number of cattle it would pasture and the price for pasturing held admissible. *Texas Cent. R. Co. v. Qualls* (Civ. App.) 124 S. W. 140.

On the issue of damages, evidence that the owners intended to divide a portion of the land into lots for immediate use was admissible. *Crystal City & U. R. Co. v. Isbell* (Civ. App.) 126 S. W. 47.

In a suit by an abutting owner for damages from construction of an additional railroad track in a street, evidence that a house of ill fame was established and conducted near plaintiff's lot before the acts complained of was inadmissible for defendant on the issue of damages. *Connor v. International & G. N. R. Co.* (Civ. App.) 129 S. W. 196.

In an action by a contractor for breach of contract, daily time checks of payments for work done and the pay roll held admissible as bearing on the loss of profits. *El Paso & S. W. R. Co. v. Eichel & Weikel* (Civ. App.) 130 S. W. 922.

In an action for breach of contract, certain evidence held admissible to show what profits were in contemplation of the parties at the making of the contract. *El Paso & S. W. R. Co. v. Eichel & Weikel* (Civ. App.) 130 S. W. 922.

Evidence of pleading and recovery of damages in a condemnation suit for a railroad right of way held not admissible in an action for damages for failure of the railroad to

construct a farm crossing. *Chicago, R. I. & G. Ry. Co. v. Nicholson* (Civ. App.) 135 S. W. 235.

Certain evidence held admissible in an action for the conversion of timber because of plaintiff's claim of exemplary damages. *Cookville Coal & Lumber Co. v. Evans* (Civ. App.) 135 S. W. 750.

In an action against a railway company for breach of contract to carry a dead body, testimony held admissible to show plaintiff's mental suffering, etc. *Missouri, K. & T. Ry. Co. of Texas v. Linton* (Civ. App.) 141 S. W. 123.

In an action for wrongful seizure of secondhand furniture, held competent for plaintiff to prove that the goods were valuable to him. *Souther v. Hunt* (Civ. App.) 141 S. W. 359.

In an action for damages to business, amount of business done by complainant in a corresponding period not too remote and business done during the time of such obstruction held admissible. *American Const. Co. v. Davis* (Civ. App.) 141 S. W. 1019.

In an action for injuries to cattle in transit, evidence that the damage to the shipment was increased as the result of the cattle being fed and watered at E., instead of W., held admissible. *Pecos & N. T. Ry. Co. v. Dinwiddie* (Civ. App.) 146 S. W. 280.

In an action against a railroad's receiver for burning plaintiff's property, evidence as to the manner and cost of repairing the injury done was admissible. *Freeman v. Nathan* (Civ. App.) 149 S. W. 243; *Same v. Peacock*, Id. 259.

In an action for damage to plaintiff's house by blasting operations, evidence that brick used in the house were not as substantial as those called for in the specifications and as to the relative cost of the two classes of brick held immaterial. *Mt. Franklin Lime & Stone Co. v. May* (Civ. App.) 150 S. W. 756.

In an action for injuries to a horse where plaintiff had to use another horse, testimony of plaintiff as to the amount he paid for feed for the injured horse while he had to hire and feed another was admissible. *Powell v. Hill* (Civ. App.) 152 S. W. 1125.

In an action for damages for the destruction of crops, it was not error to permit a witness to testify on the question of damages that of the products raised some were sold at the nearest shipping point and others were shipped to market, but that all were sold on a basis of f. o. b. at the nearest shipping point. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

124. — **Personal Injuries.**—Evidence irrelevant unless preceded or followed by other evidence, see ante.

Personal relations as affecting damages, see ante.

Remoteness, see ante.

In a suit for damages for the negligent killing of plaintiff's husband, evidence of the monthly wages of the decedent was admissible. *Railway Co. v. Johnston*, 73 T. 536, 15 S. W. 104.

Evidence that plaintiff did not practice his profession after receiving injuries held admissible. *Gulf, C. & S. F. Ry. Co. v. Brown*, 16 C. A. 93, 40 S. W. 608.

In an action for wrongfully ejecting a passenger, evidence that his acquaintances joked him about the matter is inadmissible. *Gulf, C. & S. F. Ry. Co. v. Copeland*, 17 C. A. 55, 42 S. W. 239.

Evidence that a negro was not inconvenienced by the absence of a water-closet from a railway car held admissible. *Henderson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 42 S. W. 1030.

Evidence that deceased had declared his purpose to take care of his father held admissible with proof of age and expectancy of life of the father. *International & G. N. Ry. Co. v. Knight* (Civ. App.) 45 S. W. 167.

A physician's statement to plaintiff, bitten by a dog, that she was in danger of hydrophobia, lockjaw, and blood poisoning, held incompetent to show mental suffering. *Trinity & S. Ry. Co. v. O'Brien*, 18 C. A. 690, 46 S. W. 389.

Evidence of necessary assistance rendered to plaintiff since the injury to enable him to perform his work held admissible on question of damages. *International & G. N. R. Co. v. Zapp* (Civ. App.) 49 S. W. 673.

Proof of life expectancy of plaintiff held inadmissible in an action for loss of an arm. *St. Louis & S. F. R. Co. v. Nelson*, 20 C. A. 536, 49 S. W. 710.

In an action for an injury to plaintiff's hand which only partially affected his ability to prosecute his business, his life expectancy is inadmissible. *City of Honey Grove v. Lamaster* (Civ. App.) 50 S. W. 1053.

The scope of evidence admissible to prove the earning capacity of one suing for a personal injury to determine his loss where totally disabled, set forth. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

In an action for personal injury, evidence that plaintiff was totally disabled warranted the admission of evidence of his life expectancy. *Id.*

Evidence as to effect of injury to wife, held admissible, in action by husband; the evidence showing it was the natural result of the injury. *City of Dallas v. Jones* (Civ. App.) 54 S. W. 606.

Evidence of plaintiff's loss of weight was competent to show the physical condition produced by injuries. *San Antonio & A. P. Ry. Co. v. Weigers*, 22 C. A. 344, 54 S. W. 910.

In an action by parents to recover for the death of their son, due to negligence of defendant, evidence of assistance they received and expected from him was properly admitted. *Brush Electric Light & Power Co. v. Lefevre* (Civ. App.) 55 S. W. 396.

Where, in an action for the ejection of a passenger, the court limited recovery to damages arising from mental suffering, it was not error to allow the jury to consider all the circumstances in estimating the damages. *Atchison, T. & S. F. Ry. Co. v. Cunniffe* (Civ. App.) 57 S. W. 692.

Evidence of price paid by plaintiff for nursing injured son is admissible in action for injuries. *Texas & P. Ry. Co. v. Short* (Civ. App.) 58 S. W. 56.

In an action by a passenger for injuries, held not error to admit evidence of sums paid by him to physicians for treatment, where the jury were instructed that they were not to find for medical attention or services, unless the evidence showed that the same were reasonable in amount. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

Evidence of plaintiff's brooding over his crippled condition and his future prospects held admissible as evidence of mental anguish in an action for injuries. *Missouri, K. & T. Ry. Co. of Texas v. Miller*, 25 C. A. 460, 61 S. W. 978.

The exclusion of evidence of a passenger that the defendant's cars were cold and filthy, and that the passengers indulged in swearing and drinking, held erroneous. *Duck v. St. Louis & S. W. Ry. Co. (Civ. App.)* 63 S. W. 891.

Evidence in action for personal injuries as to plaintiff's nervous condition held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Oslin*, 26 C. A. 370, 63 S. W. 1039.

In an action for wrongful death, evidence that plaintiffs had received money on insurance on decedent's life was inadmissible. *Lipscomb v. Houston & T. C. Ry. Co.*, 95 T. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

Evidence in an action for personal injuries held inadmissible on the question of earning capacity. *Houston & T. C. R. Co. v. Gee*, 27 C. A. 414, 66 S. W. 78.

Where, in an action for personal injury, plaintiff's capacity for earning money was permanently impaired, testimony as to the probable duration of his life according to life tables held admissible. *Gulf, C. & S. F. Ry. Co. v. Mangham*, 95 T. 413, 67 S. W. 765.

In an action for injuries, plaintiff's testimony that, after the accident, he could not do as much work in a specific line as formerly, was admissible on the question of damages. *International & G. N. R. Co. v. Locke (Civ. App.)* 67 S. W. 1082.

In an action for personal injury, plaintiff's earning capacity being permanently impaired, though not wholly destroyed, testimony as to the probable duration of his life according to mortality tables held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Scarborough*, 29 C. A. 194, 68 S. W. 196.

In an action for negligently compelling a first-class passenger to ride in a second-class car, testimony that passengers therein used profane language held admissible. *Texas & P. Ry. Co. v. Kingston*, 30 C. A. 24, 68 S. W. 518.

In an action for personal injuries, evidence as to the disposition of the party before and after the injury held admissible to show that the injured party had suffered physical pain and mental anguish. *Gulf, C. & S. F. Ry. Co. v. Moore*, 28 C. A. 603, 68 S. W. 559.

In action by servant against master for injuries, the trial court did not err in admitting as evidence mortuary tables of life expectancy, it being shown that plaintiff's earning capacity had been permanently affected. *Gulf, C. & S. F. Ry. Co. v. Mangham*, 29 C. A. 486, 69 S. W. 80.

Evidence as to the present condition of plaintiff with reference to his injuries and capacity to work held admissible on the question of permanent injury. *Hildenbrand v. Marshall*, 30 C. A. 135, 69 S. W. 492.

In a personal injury action, evidence of increased susceptibility to disease held admissible. *Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.)* 73 S. W. 555.

Testimony by the husband and others that prior to injury his wife was able to perform all of her ordinary household duties, but not thereafter, was admissible. *Chicago, R. I. & T. Ry. Co. v. Armes*, 32 C. A. 32, 74 S. W. 77.

A husband, in an action for injury to his wife, may testify to the value of his services rendered her, but not the general trouble he was put to. *City of Dallas v. Moore*, 32 C. A. 230, 74 S. W. 95.

In an action for injuries, a witness was entitled to testify as to plaintiff's disposition prior and subsequent to the injuries. *McGrew v. St. Louis, S. F. & T. Ry. Co.*, 32 C. A. 265, 74 S. W. 816.

In an action by a servant for injuries, proof of his life expectancy is admissible, though the injury, while permanent, did not result in entire disability. *Gulf, C. & S. F. Ry. Co. v. Cooper*, 33 C. A. 319, 77 S. W. 263.

In an action for the death of a son 10 or 11 years old, evidence of decedent's expressed purpose to contribute to the aid of his parents is admissible on the issue of damages. *Freeman v. Carter (Civ. App.)* 81 S. W. 81.

In an action for injuries to a servant, evidence as to what plaintiff had earned at other times and places than at or about the time and place of the injury was admissible. *San Antonio Foundry Co. v. Drish*, 38 C. A. 214, 85 S. W. 440.

In an action for injuries to a woman, a second miscarriage occurring some time after the injury held a proper subject of consideration to determine the extent of the injury, but not for the purpose of allowing specific damages for that miscarriage itself. *Rapid Transit Ry. Co. v. Smith*, 98 T. 553, 86 S. W. 322.

In action for injuries, evidence of plaintiff's expectancy of life held admissible. *Northern Texas Const. Co. v. Crawford*, 39 C. A. 56, 87 S. W. 223.

In an action for injuries to plaintiff's minor son, evidence tending to show that plaintiff depended upon her work for a living was incompetent. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 99 T. 337, 90 S. W. 164.

In an action for injuries to a servant, evidence of deductions made from his gross earnings for hospital fees, insurance, etc., held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Dickson*, 40 C. A. 550, 90 S. W. 507.

In an action for injuries on defendant's railroad track, evidence that some time prior thereto plaintiff had been seriously ill and that a priest had been sent for held inadmissible. *Houston & T. C. R. Co. v. O'Donnell (Civ. App.)* 90 S. W. 886.

In an action for personal injuries held proper to admit certain evidence as showing that the injuries claimed to have been caused by the accident did not exist prior thereto. *San Antonio Traction Co. v. Parks (Civ. App.)* 93 S. W. 130.

In an action tried in 1905 for personal injuries received in 1902, certain evidence held inadmissible on the issue of his earning capacity. *Missouri, K. & T. Ry. Co. of Texas v. Dumas (Civ. App.)* 93 S. W. 493.

In an action by children for negligence causing the death of their father, certain evidence held not admissible on the question of damages. *Beaumont Traction Co. v. Dilworth (Civ. App.)* 94 S. W. 352.

In an action for physical and mental suffering sustained by a woman incident to her expulsion from a passenger train, evidence as to her being a Christian Scientist held admissible. *Ft. Worth & D. C. Ry. Co. v. Travis*, 45 C. A. 117, 99 S. W. 1141.

In an action for injuries to a person employed part of the time as conductor and

part of the time as brakeman, evidence as to how much time he was called upon to act as conductor and what he received as such held competent. *Galveston, H. & S. A. Ry. Co. v. Still*, 45 C. A. 169, 100 S. W. 176.

Evidence that an injured woman had before marriage taught in a literary school and an art school and clerked in a dry goods store is competent, as showing her previous health and her ability to discharge the duties of housewife. *Missouri, K. & T. Ry. Co. of Texas v. Corse*, 46 C. A. 60, 101 S. W. 522.

In action for personal injuries, testimony as to plaintiff's ability to handle himself as an ordinarily active strong man would do held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Lindsey* (Civ. App.) 101 S. W. 863.

In an action for personal injury to a four year old child, evidence tending to show her prospective musical talent held competent. *Gulf, C. & S. F. Ry. Co. v. Sauter*, 46 C. A. 309, 103 S. W. 201.

In an action for personal injuries, evidence as to what plaintiff earned 20 years before the accident, where it is shown that he still possessed the same business capacity when injured, is admissible to prove his earning capacity at the time of the injuries. *El Paso Electric Ry. Co. v. Murphy*, 49 C. A. 586, 109 S. W. 489.

In an action for personal injuries, evidence of profits from investments of business, while not admissible to prove earnings, is admissible as tending to show possession of business qualities. *Id.*

In an action for personal injuries, certain testimony held admissible to show diminished capacity to labor by reason of the injuries. *St. Louis Southwestern Ry. Co. of Texas v. Norvell* (Civ. App.) 115 S. W. 861.

The jury, in an action by parents for the negligent death of a minor son, held entitled in determining the damages sustained to consider certain facts. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

Evidence held relevant as tending to show the nature, character, and extent of plaintiff's injury. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 126 S. W. 672.

In an action for personal suffering from a doctor not coming, certain evidence held admissible to show extent of damages. *Texas Central Telephone Co. v. Owens* (Civ. App.) 128 S. W. 926.

In an action by parents for the death of their adult son, certain evidence held admissible on the issue as to plaintiffs' expectation of financial aid from deceased. *St. Louis Southwestern Ry. Co. of Texas v. Huey* (Civ. App.) 130 S. W. 1017.

In an action for injuries, certain testimony of plaintiff was admissible in determining her earning capacity in considering the question of damages. *St. Louis Southwestern Ry. Co. of Texas v. Horne* (Civ. App.) 130 S. W. 1025.

Evidence that plaintiff had suffered from the time of the accident to the time of the trial as a result of the injury held admissible. *Blackshear v. Trinity & B. V. Ry. Co.* (Civ. App.) 131 S. W. 854.

Certain evidence held admissible in mitigation of exemplary damages in an action for false imprisonment. *Taylor Bros. v. Hearn* (Civ. App.) 133 S. W. 301.

Evidence as to plaintiff's weight at different times since the accident held admissible. *Rapid Transit Ry. Co. v. Williams* (Civ. App.) 136 S. W. 267.

In an action against a railroad for personal injuries, question to plaintiff's medical witness held inadmissible as being irrelevant and immaterial. *Ft. Worth & R. G. Ry. Co. v. Neal* (Civ. App.) 140 S. W. 398.

The extent of one's physical and mental suffering can be shown by testimony to any facts manifesting the same, and coming under witness' observation. *Missouri, K. & T. Ry. Co. of Texas v. Linton* (Civ. App.) 141 S. W. 129.

In an action by a wife for herself and child for the unlawful killing of her husband, evidence as to deceased having been taken to another state on criminal process, and the circumstances under which he was married to plaintiff, and as to what he said to witness as to his conduct prior to his marriage, was inadmissible either on the issue of plaintiff's right to recover or on the issue of exemplary damages. *Holland v. Closs* (Civ. App.) 146 S. W. 671.

In an action for negligence causing death, evidence of deceased's life expectancy held competent, although plaintiffs were minor children who would have no legal right to aid from their father after majority. *Freeman v. Moreman* (Civ. App.) 146 S. W. 1045.

In an action against a railroad company for injuries to a female plaintiff, evidence that the injury might have continued latent for a long time held admissible. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922.

RULE 6. FACTS ARE RELEVANT WHEN SO CONNECTED WITH A FACT IN ISSUE AS TO FORM PART OF THE SAME TRANSACTION OR SUBJECT-MATTER

Relation to issues in general.—A fact that other business men, under the same circumstances, acted as did the defendant, is not competent evidence. *Rand v. Johns*, 4 App. C. C. § 203, 15 S. W. 200; *Railway Co. v. Burnett*, 3 App. C. C. § 236.

The question of the liability of a railway company for damages is confined to the condition of the road at the time and place of the occurrence, and evidence as to the condition of the road elsewhere as well as of previous wrecks is inadmissible. *Railway Co. v. Mitchell*, 75 T. 77, 12 S. W. 810; *Railway Co. v. Johnson*, 72 T. 95, 10 S. W. 325; *Railway Co. v. Shuford*, 72 T. 165, 10 S. W. 408; *Railway Co. v. Turner*, 1 C. A. 625, 20 S. W. 1008.

In an action against a railway company for injuries resulting from the negligence of its employés, evidence of other similar and distinct acts of negligence is not admissible. Negligence must be proven by the circumstances of the particular case. *Railway Co. v. Rowland*, 82 T. 166, 18 S. W. 96.

In action to enjoin defendants from diverting water, evidence of obstructions above property of defendants was admissible. *Anderson v. Stratton* (Civ. App.) 42 S. W. 645.

In an action for injuries by defects in a railroad track, evidence of its condition at

such point and points immediately connected therewith held admissible. *Houston City St. Ry. Co. v. Medlenka*, 17 C. A. 621, 43 S. W. 1028.

In an action against a railroad company for failing to leave an opening in its fence, evidence that openings had been made in the fence for plaintiff's neighbors held admissible. *San Antonio & A. P. Ry. Co. v. Grier*, 20 C. A. 138, 49 S. W. 148.

In a suit against a railroad for causing death at a crossing, testimony that other trains than the one that caused the injury passed the whistling-post and did not whistle, is not admissible. *Railroad v. Porterfield*, 92 T. 442, 49 S. W. 861.

In an action for injuries sustained by plaintiff on his jumping from a moving train, which he had boarded to seat his wife, held proper to permit a witness to testify that he had attended his mother on the train that morning, and that he had done the same thing before with other passengers. *Texas & P. Ry. Co. v. Crockett*, 27 C. A. 463, 66 S. W. 114.

Upon the issue of whether a person run over by a railway train was standing or walking on the track, or lying on it, when struck, evidence that a train, striking a man standing on the track would throw him off, and would not run over him, unless he was lying down, was relevant and material. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 28 C. A. 92, 66 S. W. 588.

Evidence, in an action by a servant for injuries, that witness, an experienced man, had never seen a like injury inflicted in like manner, was properly rejected. *Bering Mfg. Co. v. Peterson*, 28 C. A. 194, 67 S. W. 133.

Where plaintiff's horse was killed on defendant's railway, and it introduced evidence that to fence the track would interfere with switching, it was not error to admit evidence as to fencing other parts of the switch yard. *Texas & P. Ry. Co. v. Seay* (Civ. App.) 69 S. W. 177.

Where a survey in controversy must be construed on its calls for courses and distances, a witness cannot state that surveys made about the same time in the vicinity contained excessive acreage, as it was irrelevant. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

In an action for unlawful arrest on a charge imputing want of chastity, held error to refuse to permit defendant to ask plaintiff if she had not often before been arrested on similar charges. *Texas Midland R. R. v. Dean*, 98 T. 517, 85 S. W. 1135, 70 L. R. A. 943.

In an action involving a disputed boundary, the admission in evidence of the call in field notes of several surveys other than those in question, to be considered in locating the line in dispute, held not error. *Barrow v. Lyons*, 38 C. A. 585, 86 S. W. 773.

In an action against a railroad for the death of an engineer, caused by the giving way of a track undermined by heavy rains, evidence as to other heavy rains in the vicinity held admissible on the issue of negligence. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

Evidence that a turntable was no more attractive than ordinary pools of water near by held irrelevant and incompetent on the issue of an implied invitation to children to go on and use it. *Denison & P. S. Ry. Co. v. Harlan*, 39 C. A. 427, 87 S. W. 732.

In an action against a city for injuries to a pedestrian from a defect in a sidewalk, it was proper to admit evidence that the sidewalk on each side of the street and adjoining the point where the injury occurred was defective. *City of Rockwall v. Heath* (Civ. App.) 90 S. W. 514.

In a cross-action for breach of a contract to furnish water for irrigation, evidence of what similar lands also planted in rice, properly cultivated and irrigated, yielded in the same year, held admissible. *Colorado Canal Co. v. McFarland & Southwell* (Civ. App.) 94 S. W. 400.

In action for breach of pasturage contract, evidence as to condition of another pasture held admissible in connection with other testimony given. *Tuttle v. Robert Moody & Son*, 100 T. 240, 97 S. W. 1037.

In a suit against telephone companies for failure to deliver a call to plaintiff, evidence of other acts of alleged negligence was improperly admitted. *Sabine Valley Telephone Co. v. Oliver*, 46 C. A. 428, 102 S. W. 925.

In an action for injuries to an employé, caused by defective appliance, testimony with respect to repairs held competent when applied to the appliance in question, but incompetent when applied to other appliances. *Houston & T. C. R. Co. v. Patrick*, 50 C. A. 491, 109 S. W. 1097.

Where, in an action against a railroad company for fire set by a locomotive the evidence showed that a particular locomotive set the fire, the proof was properly limited to the construction, condition, and operation of the particular locomotive. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 420, 110 S. W. 973.

In an action against a railroad company for flooding land, certain evidence held pertinent; and, being legitimate, that it might serve the purpose of comparison did not render it objectionable. *Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Civ. App.) 112 S. W. 733.

In a suit to enjoin the use of lots as a feed and wagon yard, deeds to neighboring lots held admissible, as tending to show dedication of the block involved to residence purposes exclusively. *Lowrance v. Woods*, 54 C. A. 233, 118 S. W. 551.

In a brakeman's action for injuries caused by the derailment of a caboose because of the bad condition of the track, evidence was admissible that the track was in bad condition all along that part of the road and in the vicinity of the wreck. *San Antonio & A. P. Ry. Co. v. Spencer*, 55 C. A. 456, 119 S. W. 716.

In an action for fire set by an engine, evidence of the defective condition of the fire arrester on an engine subsequent to the fire held admissible to contradict the proof of the railroad company. *Texas & P. Ry. Co. v. Owen* (Civ. App.) 128 S. W. 1139.

In an action against a buyer for shrinkage of cattle while awaiting acceptance of delivery, evidence held admissible to show their condition and the probability of their losing flesh by shrinkage on being placed in a pasture at the point of delivery. *Cox v. Steed* (Civ. App.) 131 S. W. 246.

In an action for injuries to plaintiff by being struck by a spike thrown from a railroad track by a passing train, evidence that the ties were rotten a quarter of a mile from

the place of the accident held inadmissible. *Blackshear v. Trinity & B. V. Ry. Co.* (Civ. App.) 131 S. W. 854.

An agreement to cohabit as husband and wife made while one of the parties had a living wife, and their conduct thereunder, held not to be considered in determining whether they entered into a contract of marriage after the death of such wife. *Grigsby v. Reib* (Civ. App.) 139 S. W. 1027.

In an action for injuries to cattle en route, in which defendant claimed that plaintiff contributed to their injury by dipping them in oil, the evidence of another shipper who dipped cattle in oil held not admissible. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 140 S. W. 368.

Omission of other steamship companies to provide handrails for the safety of passengers held not to show freedom from negligence. *North German Lloyd S. S. Co. v. Roehl* (Civ. App.) 144 S. W. 322.

In an action for injuries to a servant by the breaking of a chain, testimony of one who had at another time been engaged in the same work that he had never seen a chain break, held properly excluded. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

In an action for failure to deliver sound cattle as contracted for, testimony of a shipper of other cattle which had run with the cattle in controversy that he had inspected his cattle and found them free from disease was not admissible. *O'Brien v. Von Lienen* (Civ. App.) 149 S. W. 723.

In an action against a railway company for setting fire to cotton bales, testimony that defendant's engines had previously emitted sparks when passing that point held properly excluded, where the identity of the engine that set the fire was established beyond controversy. *Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co.* (Civ. App.) 149 S. W. 1083.

On an issue as to the efficiency of a gasoline engine which was sold for irrigation purposes, it was proper to show the horse power developable by the engine by showing that a 15 horse power steam engine developed as much power as was shown by the gasoline engine which was sold under representation that it would develop 50 horse power. *Southern Gas & Gasoline Engine Co. v. Peveto* (Civ. App.) 150 S. W. 279.

— **Difference in time.**—In an action for damages resulting from the use of a defective hand-car, evidence of its condition a week or ten days after the injury was relevant, there being no reason to believe that its condition had been changed. *Railway Co. v. Johnson*, 83 T. 628, 19 S. W. 151.

Evidence of defective condition of machinery shortly after accident held admissible to show a like condition at time of accident. *Austin & N. W. Ry. Co. v. Flannagan* (Civ. App.) 40 S. W. 1043.

Evidence of the result of inspection of the elevator by the falling of which plaintiff was injured, which inspection occurred six months before the accident, held admissible. *The Oriental v. Barclay*, 16 C. A. 193, 41 S. W. 117.

Evidence that an engineer was incompetent before the accident held admissible to show his incompetency at the time of the accident. *Terrell v. Russell*, 16 C. A. 573, 42 S. W. 129.

Testimony of a witness that he examined the track a month after the accident, caused by a low joint, and found low joints, held admissible. *San Antonio & A. P. Ry. Co. v. Beam* (Civ. App.) 50 S. W. 411.

Evidence of the existence of a hole in a depot platform 10 hours after an accident caused thereby held properly admitted to prove the condition of the platform at the time of the accident. *Texas Midland R. R. v. Brown* (Civ. App.) 58 S. W. 44.

In an action for injury received by locomotive engineer in a collision caused by a brakeman going to sleep and leaving a switch open, testimony of a witness that she saw the brakeman just before he went out, and that he looked bad and worried, and seemed unable to walk, was admissible to show his condition. *St. Louis S. W. Ry. Co. v. Kelton*, 28 C. A. 137, 66 S. W. 387.

Where the engine which emitted sparks by which fire was set was identified, it was error to permit a witness to testify that defendant's engines generally emitted sparks 10 months prior to the event in question. *San Antonio & A. P. Ry. Co. v. Home Ins. Co.* (Civ. App.) 70 S. W. 999.

Evidence as to the condition of a highway long before it was appropriated by a railroad, and of a new road long after it was built to replace the old one, held inadmissible in an action by a county for damages for such appropriation. *St. Louis, S. F. & T. Ry. Co. v. Grayson County*, 31 C. A. 611, 73 S. W. 64.

Evidence in regard to a defect in the street, long after the time that the injury sued for was received, is inadmissible. *City of Dallas v. Moore*, 32 C. A. 230, 74 S. W. 95.

On appeal by defendant in action against it for damages from fire defendant held not entitled to complain of admission of evidence as to the emission of fire from other locomotives at different times. *Texas Midland R. R. v. Moore* (Civ. App.) 74 S. W. 942.

In an action for injuries to a brakeman by derailment at a derailing switch, evidence that an examination on the day succeeding the accident showed that the switch was not obscured by grass and weeds held admissible as original testimony. *St. Louis Southwestern Ry. Co. of Texas v. Arnold* (Civ. App.) 87 S. W. 173.

Exclusion of evidence of records showing classification of school lands in May, 1901, on issue as to their classification in September, 1899, held not ground for reversal. *Smithers v. Lowrance* (Civ. App.) 91 S. W. 606.

In an action for breaking into plaintiff's house, his testimony as to the condition of the house, and articles missing therefrom, upon his return home some time after the breaking held admissible. *Jesse French Piano & Organ Co. v. Phelps*, 47 C. A. 385, 105 S. W. 225.

Evidence of incompetence of a foreman a year before the occurrence of an accident tends to show incompetence when the accident occurred. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

Evidence as to the condition of a railroad track at a certain place in December is admissible as to its condition the previous May at the time of the accident in question, where there is further evidence that its condition was practically the same at both dates. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 117 S. W. 1043.

In an action by one partner against a copartner to recover his share of the net profits of the partnership during a certain year, evidence as to the profits and losses of the business during another year was inadmissible. *Hatzfeld v. Walsh*, 55 C. A. 573, 120 S. W. 525.

In an action for death of an engineer killed by striking his head against a mail crane near the track, evidence of the rocking of the engine at the time in question, and as to the condition of the track near the crane at a previous date, held admissible in connection with other evidence as to sameness of conditions. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 103 T. 228, 125 S. W. 881.

In an action for injuries sustained by a spike thrown from the track by a passing train, evidence of the condition of the track at the point of the accident three or four weeks thereafter held admissible. *Blackshear v. Trinity & B. V. Ry. Co. (Civ. App.)* 131 S. W. 854.

In an action against an electric light company for death by electric shock, evidence of the condition of the insulation of the wires at or near the place of the accident as observed by a witness a few days after the accident held admissible. *Jacksonville Ice & Electric Co. v. Moses (Civ. App.)* 134 S. W. 379.

In an action for injuries to a servant while winding up doors of ballast cars, evidence of the condition of the cars several months after the accident held properly excluded. *Tex. Traction Co. v. Morrow (Civ. App.)* 145 S. W. 1069.

Where a servant was injured by the splintering of a pick with which he struck a steel rail, testimony as to the condition of the pick several days after the accident was admissible; the pick having remained in the custody of defendant. *Freeman v. Wilson (Civ. App.)* 149 S. W. 413.

In an action for a seller's failure to deliver sound cattle as contracted for, testimony as to the diseased condition of the cattle two or three months after the tender of delivery held inadmissible to show the condition of the cattle at the time of tender. *O'Brien v. Von Lienen (Civ. App.)* 149 S. W. 723.

— **Associated or explanatory transactions.**—On the question whether the release of amounts overpaid for rent in previous years by the lessee was for a valuable consideration, the lessor can give in evidence the circumstances under which a subsequent lease was made. *Roberson v. Gill (Civ. App.)* 44 S. W. 326.

In a suit by attorneys upon an assignment of an interest in their client's judgment against defendant, held, in view of the court's charge, that an earlier assignment to other attorneys claimed to have been also for the benefit of plaintiffs, was admissible in evidence. *Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.)* 152 S. W. 487.

— **Similar wrongful acts.**—Suit was brought against a tax collector for the recovery of money collected as taxes for the year 1844. Evidence that defendant failed to account for taxes for the year 1843 was not admissible. *Burnett v. Henderson*, 21 T. 588.

The publication by defendant of another libel, in no wise connected with the one at issue, is immaterial. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580.

To justify a slander charging theft, a theft committed in connection with a transaction other than the one charged may be proven. *Quaid v. Tipton*, 21 C. A. 131, 51 S. W. 264.

In a suit to set aside a mortgage on land on the ground of duress, held proper to admit evidence as to statements made by the mortgagee and his attorney to relatives of the mortgagor prior to the execution of the mortgage. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1105.

In a suit to cancel a mortgage, held proper to permit a showing that the date of the mortgage had been altered after its execution. *Id.*

Evidence that an expelled member of a beneficial association had taken illegal fees as a witness, and had testified as an expert when he was not one, held not admissible to support his expulsion on other charges. *St. Louis S. W. Ry. Co. of Texas v. Thompson*, 102 T. 89, 113 S. W. 144, 19 Ann. Cas. 1250.

— **Similar transactions.**—Authority of an agent to contract to put a passenger off at a point not a station may be inferred from frequent exercise of the power with his principal's knowledge. *Hull v. E. L. & R. R. Co.*, 66 T. 619, 2 S. W. 831.

In an action to recover school land on a certificate, it was proper to admit in evidence the application made by plaintiff for the purchase of the adjoining portion of the same section of the school lands on which he had settled, since it showed his right to purchase the portion in controversy. *Simon v. Stearns*, 17 C. A. 13, 43 S. W. 50.

Evidence of unrepudiated like transactions by an agent of a building and loan association with other borrowers held competent to show his authority. *People's Building, Loan & Savings Ass'n v. Keller*, 20 C. A. 616, 50 S. W. 183.

Proof that C. made affidavits for defendant's pleas as its agent held admissible on question of his agency. *Parlin & Orendorff Co. v. Miller*, 25 C. A. 190, 60 S. W. 881.

In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, it was competent to examine witnesses as to the demand for such lands, and applications to purchase and offers therefor made, and the probable cost of selling the remaining lands. *McLane v. Maurer*, 28 C. A. 75, 66 S. W. 693.

In an action for services of a tenant in caring for defendant's cattle, evidence of one of defendant's former tenants under a similar lease as to what plaintiff's duties were under his lease held inadmissible. *Stapper v. Wolter (Civ. App.)* 85 S. W. 850.

In an action on mutual benefit certificate, evidence of delivery of other certificate by clerk of local camp of benefit association held admissible to show authority to deliver the certificate in question. *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 C. A. 29, 90 S. W. 921.

In an action for broker's commissions on the sale of certain stock, evidence concerning the purchase and sale of other similar stock by the purchaser held inadmissible. *Ross v. Moskowitz (Civ. App.)* 95 S. W. 36.

In an action on an insurance policy on gin property, evidence that defendant's local agents had written policies on similar property shortly before and after writing the policy in question held admissible. *St. Paul Fire & Marine Ins. Co. v. Stogner*, 44 C. A. 60, 98 S. W. 218.

In an action against a railway company for death of a pedestrian at a street crossing, evidence of the speed of the train between different stations when nearing the place of accident held admissible. *Galveston, H. & S. A. Ry. Co. v. Murray* (Civ. App.) 99 S. W. 144.

In an action against a corporation on a note signed by its vice president and treasurer, evidence that he had signed other notes in the same manner held not admissible. *Dreeben v. First Nat. Bank*, 100 T. 344, 99 S. W. 850.

In an action for the price of goods sold, evidence held admissible to show why a deviation from plaintiff's regular terms had been made as defendant contended, and that plaintiff had previously filled orders from defendant on the same terms. *Central Texas Grocery Co. v. Globe Tobacco Co.*, 45 C. A. 199, 99 S. W. 1144.

On an issue as to the authority of one to represent defendant as his agent, a contract executed by such person for defendant held properly admitted in evidence. *Thompson v. Mills*, 45 C. A. 642, 101 S. W. 560.

The expenses incurred by a landlord in maturing and harvesting a crop growing at the time he wrongfully evicted his tenant on shares held properly taken as evidence of the expenses which the tenant would have incurred. *Crews v. Cortez*, 102 T. 111, 113 S. W. 523, 38 L. R. A. (N. S.) 713.

Evidence of payment of city taxes is not admissible to show payment of state and county taxes sued for. *State v. Quillen* (Civ. App.) 115 S. W. 660.

In an action against a telegraph company for delay in delivering a telegram, evidence of the sender's having sent other telegrams and receiving prompt replies two days after delivering the message in question to defendant was admissible, on the issue whether telegrams could be sent during the strike then on. *Western Union Telegraph Co. v. Guinn* (Civ. App.) 130 S. W. 616.

In an action for the price of shoes in which defendant claimed breach of warranty, evidence that another merchant had sold the same without complaining held inadmissible. *Hill v. Hanan & Son* (Civ. App.) 131 S. W. 245.

In an action for shrinkage in cattle, it was error to permit a witness to testify that he had sold to defendants 19 head of steers that weighed an average of 986 pounds each. *Cox v. Steed* (Civ. App.) 131 S. W. 246.

In an action for shrinkage of certain cattle, evidence of certain transactions with reference to a portion of the cattle between plaintiff H. and another held irrelevant. *Id.*

Where, in an action against a carrier for injuries to plaintiff's wife by alleged conversation with defendant's conductor in insisting on fare for plaintiff's child, defendant claimed that the acts of the conductor were not calculated to produce the effect alleged, evidence that a few days before the conversation in question the wife had a similar conversation with the same conductor, who adopted the same manner as on the occasion in question, and that no bad effects resulted to the wife therefrom, was admissible. *Trinity & B. V. Ry. Co. v. Carpenter* (Civ. App.) 132 S. W. 837.

Proof of agency before and after a contract sustained a finding of agency at the time of contracting. *Big Valley Irr. Co. v. Hughes* (Civ. App.) 146 S. W. 715.

In an attorneys' suit on an assignment of an interest in a client's judgment, held, that a subsequent assignment to other attorneys, claimed to have been for the benefit of plaintiffs, was admissible to prove that the assignment in question, which was also to other attorneys, was also for the benefit of plaintiffs. *Missouri, K. & T. R. Co. of Texas v. Wood* (Civ. App.) 152 S. W. 487.

Where a contract for the sale of land contained no agreement by the vendor to furnish water for irrigation, contracts by the vendor with other persons for the sale of other land, and containing such an agreement, were not admissible to show what the first contract should have been. *Judson v. Bell* (Civ. App.) 153 S. W. 169.

Where a salesman's contract of employment provided for a forfeiture for canceled orders, evidence that defendant had not enforced such forfeiture against salesmen employed under similar contracts was inadmissible. *Iowa Mfg. Co. v. Taylor* (Civ. App.) 157 S. W. 171.

Exclusion as res inter alios acta.—Testimony to show that defendant tried to make an agreement with another like that alleged in the complaint is inadmissible. *Stuart v. Kohlberg* (Civ. App.) 53 S. W. 596.

Declarations of principal as to contract made by him with third person held inadmissible in support of factors' action against him. *Beakley v. Rainier* (Civ. App.) 78 S. W. 702.

In an action by a lessee, against the lessor, for breach of contract, it was improper to permit plaintiff to show that defendant had not complied with his contract with former tenants. *Lewis v. Crouch* (Civ. App.) 85 S. W. 1009.

Evidence held immaterial and irrelevant. *International & G. N. R. Co. v. Boykin*, 99 T. 259, 89 S. W. 639.

In an action by tenants against their landlords for breach of contract to furnish water, a contract between the landlords and an irrigation company for the water held inadmissible as res inter alios acta. *Stockton v. Brown* (Civ. App.) 106 S. W. 423.

Letters of a third person to defendant were inadmissible as res inter alios acta. *Taylor v. McFatter* (Civ. App.) 109 S. W. 395.

A land office map, an archive of the land office, and which was relevant, was not res inter alios acta. *Haile v. Johnson* (Civ. App.) 133 S. W. 1088.

Where a compress company was charged with having been a party to a fraudulent division of certain cotton bales shipped to plaintiff as full bales, evidence that several months prior to the transaction the shipper's alleged partner asked another different compress operator to divide certain cotton bales was inadmissible. *Wichita Falls Compress Co. v. W. L. Moody & Co.* (Civ. App.) 154 S. W. 1032.

Similarity of conditions.—Evidence of the changed condition of property adjacent to that of plaintiff, due to a nuisance, held admissible. *Brennan v. Corsicana Cotton Oil Co.* (Civ. App.) 44 S. W. 588.

In an action for damages for burning grass, testimony as to the time it took for grass to grow again in another place held inadmissible. *Dunn v. Newberry* (Civ. App.) 86 S. W. 626.

Where defendants contracted to pasture plaintiffs' cattle, and plaintiffs sued for damages on account of the cattle having been insufficiently supplied with water, held proper to admit evidence as to the result obtained by plaintiffs in grazing cattle in another pasture. *Tuttle v. Robert Moody & Son* (Civ. App.) 94 S. W. 134.

In an action for death of a servant not shown to be inexperienced, evidence as to whether an inexperienced man would have realized the danger held inadmissible. *Yellow Pine Oil Co. v. Noble* (Civ. App.) 97 S. W. 332.

In an action for the failure of an irrigation corporation to furnish water to raise a crop, the inquiry as to what was made on other lands held limited to crops on substantially the same character of land and under the same conditions and character of cultivation. *Erp v. Raywood Canal & Milling Co.* (Civ. App.) 130 S. W. 897.

In an action for shrinkage of certain cattle, evidence held inadmissible to show the grass conditions of a pasture in which the cattle were confined awaiting delivery. *Cox v. Steed* (Civ. App.) 131 S. W. 246.

Where plaintiff claimed his injury resulted in melancholia, it was error to permit a physician in charge of an insane hospital to state capacities of patients suffering from other forms of insanity. *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155.

In an action against carriers for loss of cotton bales which burned in transit, wherein defendants claimed that fire was concealed in the cotton when it was shipped, it was error to permit a witness to testify for defendants concerning the breaking out of fire in other cotton loaded on a barge where the two shipments were not made under the same conditions. *S. Samuels & Co. v. Texas & N. O. R. Co.* (Civ. App.) 150 S. W. 291.

Negligence in transportation of a shipment of cattle cannot be shown by evidence of another shipment about the same time having made the trip safely; it not being shown the two shipments were made under the same conditions. *Texas & P. Ry. Co. v. Good* (Civ. App.) 151 S. W. 617.

In an action against an express company for damages to fish shipped, evidence that other shipments made on the same day to a different destination from the same batch of fish were paid for without complaint was not admissible, in absence of a showing that all of the fish shipped that day were prepared for shipment in the same manner. *Wells Fargo & Co. Express v. Gentry* (Civ. App.) 154 S. W. 363.

Where it appeared in an action against an express company for damages to a shipment of fish that the fish shown to witness was of the same batch of fish as those shipped, evidence of such witness as to the condition of the fish at a certain time was admissible. *Id.*

Showing physical or mental condition.—Where the issue is the mental competency of a vendor, his mental condition at any time prior or subsequent to the conveyance is admissible. *Williams v. Sapiuha* (Civ. App.) 62 S. W. 72.

Evidence of habit of trainmen as to drinking held admissible, in action against the railroad company for death of a car repairer, run into by their train; they being at the time under the influence of liquor. *Missouri, K. & T. Ry. Co. of Texas v. Jones* (Civ. App.) 75 S. W. 53.

In an action for personal injuries, question as to plaintiff's use of intoxicants some years prior to the accident held properly excluded. *Houston E. & W. T. Ry. Co. v. McCarty*, 40 C. A. 364, 89 S. W. 805.

In an action for negligence, evidence as to the injured person's previous condition held admissible. *St. Louis & S. F. R. Co. v. Ross* (Civ. App.) 89 S. W. 1105.

Testimony of a physician as to the physical condition of the injured person as shown by an examination made by him nearly three months after the injury held admissible to show her condition at the time of the examination. *Texas Midland R. R. v. Ritchey*, 49 C. A. 409, 108 S. W. 732.

Testimony of the injured woman's mother as to a visit to her daughter three or four days after the injury, and that the daughter was then "suffering from her back and neck, and, well, principally all over," held not inadmissible as being too remote. *Id.*

In an injury action, certain evidence of a physician as to the extent of plaintiff's injuries at a previous time held properly excluded. *Houston & T. C. R. Co. v. Johnson*, 103 T. 320, 127 S. W. 539.

In an action on a benefit certificate, in which the issue was as to whether female insured died of an abdominal disease evidence that about 25 per cent. of the women of the United States have trouble down in the abdominal front held inadmissible. *Modern Brotherhood of America v. Chandler* (Civ. App.) 146 S. W. 626.

Evidence of prior or habitual acts of drunkenness was inadmissible, in an action for injuries to a passenger, on the question of his sobriety at the time of the alleged injury. *Mason v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 151 S. W. 350.

Showing intent or malice or motive.—In a suit to recover damages for the wrongful seizure of goods, evidence that, after the goods were seized under attachment by the defendant, other attachments were levied on the plaintiff's property, at the suit of other creditors, is not admissible. *Blum v. Stein*, 68 T. 608, 5 S. W. 454.

In an action against a telegraph company for the refusal to receive and transmit a message, certain evidence held admissible on the issue of motive of the company. *Western Union Telegraph Co. v. Simmons* (Civ. App.) 93 S. W. 686.

— **Fraud.**—On the trial of an issue of fraud, charged to have been committed by the defendant in procuring the title to land purchased by him to be conveyed to his brother, and afterwards conveyed by the brother to defendant in trust with power to sell, evidence that a similar disposition of the title to other lands bought by defendant was made a month previous, in connection with other testimony tending to show a disposition of lands by defendant in fraud of his creditors, is admissible. *Day v. Stone*, 59 T. 612.

In an action by a wife under the civil damage law, it is error to admit evidence that she had brought suits against other saloon keepers, since she had a right to sue all who had sold liquor to her husband. *Tarkington v. Brunett* (Civ. App.) 51 S. W. 274.

Where vendee of land alleged fraud in representations as to an incumbrance, held

not error to allow a witness to testify as to what vendor had told was the amount of the incumbrance. *Adcock v. Creighton*, 27 C. A. 243, 65 S. W. 42.

Where it was alleged that defendant's signature on a note sued on was a forgery, evidence that the forger had forged the name of another to other notes held inadmissible. *Kingsbury v. Waco State Bank* (Civ. App.) 70 S. W. 551.

On the issue whether a landlord's claim for rent against a debtor who executed a deed to a trustee for the benefit of creditors was fraudulent, evidence that a bank's claim against the debtor was fraudulent, held admissible. *Baum v. Corsicana Nat. Bank*, 32 C. A. 531, 75 S. W. 863.

Evidence of misrepresentation by a married woman as to the amount of land in a tract conveyed, after the contract had been closed, held admissible to corroborate the purchaser's claim that she had made a previous misrepresentation as to such amount. *Lewis v. Hoeldtke* (Civ. App.) 76 S. W. 309.

On an issue whether a transfer by an insolvent was fraudulent, evidence that shortly before the transfer the insolvent had transferred other property to another party for less than it was worth was admissible. *Horstman v. Little* (Civ. App.) 88 S. W. 286.

In an action for the price of steel bars sold under a written order, where defendant alleged that plaintiff's agent fraudulently increased the amount of the order, evidence of similar acts of plaintiff's agent was admissible to show a fraudulent intent. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Civ. App.) 107 S. W. 651.

In an action to recover property alleged to have been fraudulently obtained, plaintiff could not show that one of the defendants had been arrested for swindling. *Wittliff v. Spreen*, 51 C. A. 544, 112 S. W. 98.

Showing knowledge.—In an action for damages against a railway company for damages resulting to the plaintiff from negligence in keeping the track in order, for the purpose of showing that due care was not taken to keep the road in order, evidence as to the general bad condition of road at and about the place where the injury occurred for some time previous thereto was admissible to show knowledge of the defendant of such defects and its indisposition to remedy them. Where a party is charged with the negligent use of a dangerous agency, and the case against him is that he did not use care proportionate to the danger, then the question becomes material whether he knew or ought to have known the extent of the danger. On such an issue as this, it is relevant for the party aggrieved to put in evidence of disconnected facts, which, if he was cognizant of them, would have advised him of the extent of the danger, and would have made it his duty to take precautions that would, if faithfully applied, have prevented the injury sued for. Thus, in an action against a railroad company for injuries sustained from a car running off the track, evidence has been received to prove seven or eight runnings off the track on the same road by the same line of cars in the previous month. *T. & P. Ry. Co. v. De Milley*, 60 T. 194.

In an action for personal injury, proof of other negligent acts of employé causing the injury may be shown, to charge defendant with negligence in knowingly retaining in its employ one who was habitually negligent. *International & G. N. R. Co. v. Branch* (Civ. App.) 56 S. W. 542.

Evidence that wires often broke held to show that such an accident was one which defendant electric light company might reasonably have anticipated. *San Antonio Gas & Electric Co. v. Speegle* (Civ. App.) 60 S. W. 884.

In an action for failing to notify plaintiff of a telephone call from her father, evidence that the father had telephoned from the same station the day before to his son was inadmissible to charge defendant's operatives with notice of the purpose of his communication with plaintiff. *Wiggs v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 110 S. W. 179.

Custom or course of business and part of series showing system or habit.—Liability of a carrier cannot be limited by evidence of custom or special contract. *Texas Exp. Co. v. Dupree*, 2 App. C. C. § 320.

Where there is evidence as to what a surveyor actually did in making a survey, the custom of surveyors under like circumstances to do or not to do the same thing cannot be shown. *Tucker v. Smith*, 68 T. 473, 3 S. W. 671.

On the question of negligence the custom of other railways is evidence. *Railway Co. v. Harriett*, 80 T. 73, 15 S. W. 556.

Custom is admissible on the question of negligence. *Earle v. Marx*, 80 T. 39, 15 S. W. 595.

Custom and usages of trade are admitted to explain incidental rights of parties appertaining to the particular trade in question, to construe contracts in relation thereto, and to ascertain the meaning of words and expressions therein, etc. *Schaub v. Dallas Brewing Co.*, 80 T. 634, 16 S. W. 429.

Custom among persons in same business as defendant, held immaterial in action for personal injuries. *Sincere v. Union Compress & Warehouse Co.* (Civ. App.) 40 S. W. 326.

Evidence as to custom of accepting weigher's receipts as conclusive, held admissible to show a complete sale of cotton. *Loeb v. Crow*, 15 C. A. 537, 40 S. W. 506.

In action by a railroad employé for injuries, held, that it was not prejudicial error to admit evidence that it was customary to give signals at a crossing, where signals were required by statute. *Houston & T. C. R. Co. v. Rodican*, 15 C. A. 556, 40 S. W. 535.

In an action for killing a mule plaintiff cannot show the usual speed of defendant's train before and after the accident. *Houston & T. C. R. Co. v. Jones*, 16 C. A. 179, 40 S. W. 745.

Evidence of custom allowing builders time to check up bills of lumber purchased held inadmissible. *Low v. Griffin* (Civ. App.) 41 S. W. 73.

Whether a rule prohibiting carrying passengers on freight trains has been generally disregarded could be shown only by the general practice. *Houston, E. & W. T. Ry. Co. v. Norris* (Civ. App.) 41 S. W. 708.

In an action for injuries sustained while uncoupling cars in motion, evidence that it was customary for brakemen to go between cars while moving held admissible on issue of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.) 42 S. W. 255.

In an action for injuries at a railroad crossing, plaintiff's companion cannot testify

as to his habit of looking for trains when at crossings. *Gulf, C. & S. F. Ry. Co. v. Hamilton*, 17 C. A. 76, 42 S. W. 358.

Evidence of a general custom of engineers to employ assistants is inadmissible to prove the authority of an engineer in a particular case. *San Antonio Waterworks Co. v. White* (Civ. App.) 44 S. W. 181.

Evidence that when trains approached a certain crossing they usually gave the statutory signals is admissible to show the duty to give them at that crossing. *Galveston, H. & S. A. Ry. Co. v. Eaten* (Civ. App.) 44 S. W. 562.

In condemnation proceedings it was held not error to admit evidence that telegraph wires were usually built 25 feet from the railroad, but that plaintiff intended to erect its lines a greater distance away. *Houston & T. C. R. Co. v. Postal Tel. Cable Co.*, 18 C. A. 502, 45 S. W. 179.

In an action by an engineer for injury in a collision, proof that he frequently slept at his post and ran by stations held properly excluded. *Missouri, K. & T. Ry. Co. v. Johnson*, 92 T. 380, 48 S. W. 568.

Evidence that engineer suing for injuries would frequently go to sleep held inadmissible, there being no evidence that he was asleep at the time of the accident. *Missouri, K. & T. Ry. Co. v. Johnson* (Civ. App.) 49 S. W. 265.

In an action against a railroad for causing death at a crossing, testimony that it was not uncommon for trains on the road to pass the whistling post and not whistle is inadmissible. *Chicago, R. I. & T. Ry. Co. v. Porterfield*, 92 T. 442, 49 S. W. 361.

In an action for injuries received by a brakeman while riding on the pilot of an engine, evidence that it is customary for a brakeman to ride on the pilot, to make a pilot-bar coupling, is admissible. *San Antonio & A. P. Ry. Co. v. Beam* (Civ. App.) 50 S. W. 411.

In an action for the price of goods, to which the defense is payment, evidence of defendant's habit of paying his bills promptly is inadmissible. *May v. Behrends* (Civ. App.) 50 S. W. 413.

The fact that testimony showed a custom held not ground for excluding it. *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 20 C. A. 688, 50 S. W. 417.

In action for injuries, on an issue whether repairs to machinery were promised, defendant cannot show a custom not to make such repairs. *Missouri, K. & T. Ry. Co. of Texas v. Nordell*, 20 C. A. 362, 50 S. W. 601.

Where the evidence did not indicate that an employé was intoxicated when injured, evidence that he sometimes drank, and that he took a drink the morning of the injury, was inadmissible. *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

Where employé was injured in the making up of a train, it was not error to allow evidence that it was made up in the usual manner.—*Id.*

In an action against a railway company for an injury to a child on a turntable, held competent, as establishing an implied invitation, for plaintiff to show the custom of children to use the turntable for amusement. *San Antonio & A. P. Ry. Co. v. Morgan*, 24 C. A. 58, 58 S. W. 544.

In an action for injury received while coupling cars, held not error to exclude evidence as to the general rule whether a brakeman, having given a signal, should look to see whether it was received; the evidence not being with reference to the particular facts of the case. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.) 58 S. W. 964.

It is not error to exclude, as immaterial, evidence showing it not to be a custom for warehousemen to insure property stored with them, such custom being alleged, where no evidence was introduced to support the allegation. *Pittman v. Harris*, 24 C. A. 503, 59 S. W. 1121.

Where agent of a seller of 87° gasoline represented that it could be safely stored in a certain place, it was not error to reject evidence of custom not to make such representation, which was not confined to 87° gasoline, in an action for injuries from an explosion. *Waters-Pierce Oil Co. v. Davis*, 24 C. A. 508, 60 S. W. 453.

In an action for injuries caused by fright from a passing train at crossing, held competent for plaintiff to show that he had previously crossed at this place and heard the whistle blown 400 or 500 yards before the train reached the crossing. *St. Louis S. W. Ry. Co. of Texas v. Mitchell*, 25 Cr. R. 197, 60 S. W. 891.

In an action for injuries to an employé occurring from a failure to inspect the freight cars of the employer, evidence that the employer had formerly had two inspectors at the place of the injury, but had none at the time of the accident, held competent. *Missouri, K. & T. Ry. Co. of Texas v. Miller*, 25 C. A. 460, 61 S. W. 978.

Evidence of the general custom of keeping dynamite in hardware stores for the purpose of trade was improperly excluded in an action by a property owner against an adjoining owner for damages to his property by the explosion by dynamite on the latter's premises, used as a hardware store. *Barnes v. Zettlemoyer*, 25 C. A. 468, 62 S. W. 111.

Admissibility of evidence to show custom of railroad employés on moving freight trains determined. *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561.

In action for injuries to trespasser ejected from train, evidence as to the fact of a general custom to disobey instructions as to ejecting such trespassers held admissible. *Houston & T. C. Ry. Co. v. Rutherford*, 94 T. 518, 62 S. W. 1056.

In an action for injuries to a person on a railroad track, held proper to admit evidence of defendant's custom to signal approaching stations and road crossings. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

In an action against a railway company for the death of a brakeman, evidence that the place occupied by deceased at the time of the accident was the usual customary place for brakemen to ride held admissible. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

Evidence of defendant's engineers in an action against a railroad by an engineer, injured in a collision, that they usually commence to slow up at a certain place, held not admissible to show where plaintiff should have commenced to slow up. *Texas & N. O. R. Co. v. Mortensen*, 27 C. A. 106, 66 S. W. 99.

In an action against a railroad company for damages by fire set by sparks from a locomotive, evidence showing that locomotives operated by the company other than the

one claimed to have set the fire were in bad condition held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 95 T. 461, 68 S. W. 159.

It being in issue whether plaintiff had violated a rule of the company in not having his train under control, held proper to admit evidence as to the speed of other trains through the same station. *Missouri, K. & T. Ry. Co. of Texas v. Mayfield*, 29 C. A. 477, 68 S. W. 807.

In connection with evidence that a carrier contracted to carry freight over its own and a connecting line, evidence of its custom so to contract is admissible. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 29 C. A. 507, 69 S. W. 119.

An instruction that if a custom prevailed in the yards where a switchman was killed, and was known to him, it was immaterial how the work was done in other yards, held proper. *Gulf, C. & S. F. Ry. Co. v. Hill*, 29 C. A. 12, 70 S. W. 103.

In an action for death of railroad employe, boarding moving hand car, evidence held admissible showing custom to stop or slow up to permit persons to get aboard. *Galveston, H. & S. A. Ry. Co. v. Puente*, 30 C. A. 246, 70 S. W. 362.

In an action for the killing of a car inspector while he was hanging to the side of a moving car, evidence that inspectors had been accustomed to so hang from the cars while they were inspecting the trains held competent. *International & G. N. R. Co. v. Bearden*, 31 C. A. 58, 71 S. W. 558.

Testimony of plaintiff, struck by a train at a crossing, of the knowledge of the customary speed there of trains, held admissible on the question of contributory negligence. *Carraway v. Houston & T. C. Ry. Co.*, 31 C. A. 184, 71 S. W. 769.

Where plaintiff was injured at a railroad crossing, evidence of previous acts of negligence of plaintiff at such crossing was inadmissible. *International & G. N. R. Co. v. Ives*, 31 C. A. 272, 71 S. W. 772.

Where, in an action against two electric companies, it was alleged that they were in fact one concern, evidence as to what the custom was about interchanging power held admissible. *Dallas Electric Co. v. Mitchell*, 33 C. A. 424, 76 S. W. 935.

Evidence that it was the custom for foremen to ride on hand car in the manner one injured did held admissible. *Galloway v. San Antonio & G. Ry. Co. (Civ. App.)* 78 S. W. 32.

In an action for injuries at a crossing, plaintiff cannot establish negligence complained of by showing habitual negligence in same respects. *Stewart v. Galveston, H. & S. A. Ry. Co.*, 34 C. A. 370, 78 S. W. 979.

On the issue whether a brakeman was guilty of contributory negligence in coupling a car, evidence of custom of brakeman held admissible. *International & G. N. R. Co. v. Penn (Civ. App.)* 79 S. W. 624.

In an action by a servant for injuries from being struck by a bale of cotton thrown from a building by another servant, held proper to permit plaintiff to testify that the passway he was using at the time of his injury was used by all the men around the building. *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847.

Evidence that people were accustomed to pass between cars of defendant's trains blocking street in city held admissible on question of negligence. *Gulf, C. & S. F. Ry. Co. v. Grison*, 36 C. A. 630, 82 S. W. 671.

In an action against a railroad for killing certain ponies, evidence that some of defendant's trains ran "pretty fast" at and near the point of the accident held admissible. *Gulf, C. & S. F. Ry. Co. v. Anson (Civ. App.)* 82 S. W. 785.

In an action against a railroad company for killing certain ponies, evidence that a witness had reported a train two miles further away for running at a high rate of speed held inadmissible. *Id.*

In an action against a carrier for delay of cattle intended to arrive for market on a particular Monday morning, evidence that the market was generally better early in the morning than later in the day held admissible. *Texas & P. Ry. Co. v. Slaughter*, 57 C. A. 624, 84 S. W. 1085.

In an action for injuries to a section man, evidence that it was customary for engineers to blow the whistle on approaching the curve in the track where the accident occurred held admissible. *Gulf, C. & S. F. Ry. Co. v. Winter*, 38 C. A. 8, 85 S. W. 477.

In an action against railroad for the death of a person in an accident at a public crossing, evidence of the daily custom of the defendant in running the same engine over the same road at a rate of speed greater than six miles an hour was admissible. *McKerley v. Red River, T. & S. Ry. Co. (Civ. App.)* 85 S. W. 499.

In an action against a carrier for injury to a shipment of cattle, evidence as to customary length of time consumed by trains between points on defendant's line held admissible. *Texas & P. Ry. Co. v. Crowley (Civ. App.)* 86 S. W. 342.

In an action against a railroad for injuries, testimony of the engineer that it was his habit to ring the bell, etc., at the place where the accident occurred, was properly excluded. *Texas & P. Ry. Co. v. Frank*, 40 C. A. 86, 88 S. W. 383.

Evidence showing that it was the custom of a railway company to notify regular trains of the presence of work trains was admissible. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

In an action on a note payable to a bank, evidence of the bank's custom of requiring payment of interest on loans in advance held admissible. *Ellis v. Littlefield*, 41 C. A. 318, 93 S. W. 171.

On the issue of the boundary of certain land, evidence of a prior custom of draftsmen in the General Land Office to make changes in field notes held inadmissible to show a change in field notes in question. *Clawson v. Wilkins (Civ. App.)* 93 S. W. 1086.

On an issue as to a servant's contributory negligence in violating a railway company's rule, evidence that he had habitually violated the company's rules and that accident had resulted therefrom held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Parrott*, 43 C. A. 325, 96 S. W. 950.

A teacher in an action for damages for his discharge held entitled to show when teachers are usually employed, in view of his duty, after being discharged, to use diligence to get other employment. *Peacock v. Coltrane*, 44 C. A. 530, 99 S. W. 107.

In action for injuries at railroad crossing, exclusion of testimony that it was the habit

of witness to ring the bell when the engine was started held proper. *Gulf, C. & S. F. Ry. Co. v. Garrett* (Civ. App.) 99 S. W. 162.

In a suit by a partner for a settlement of the accounts of a firm engaged in the real estate business, evidence of custom in regard to sales of real estate by brokers held admissible to give the jury a basis on which to act. *Morgan v. Barber* (Civ. App.) 99 S. W. 730.

In an action by a railroad conductor for injuries, evidence that the manner in which he did the switching was the usual way held admissible, notwithstanding defendant's rule prohibited a flying switch except where it would cause great delay to do the work otherwise. *Galveston, H. & S. A. Ry. Co. v. Still*, 45 C. A. 169, 100 S. W. 176.

In an action by a seller for the price of goods, proof of custom in the sale of the goods held admissible. *Z. T. Fort Produce Co. v. Dissen*, 45 C. A. 403, 101 S. W. 477.

Where plaintiff sued for injuries received while in the employ of defendant railway company and engaged in helping to move rails, held error to allow evidence of how a particular railroad handled rails. *Texas Cent. R. Co. v. Waldie* (Civ. App.) 101 S. W. 517.

In an action against a railroad company for injuries to a boy forced to leave a freight car on which he was riding, certain evidence held admissible to prove a custom of the employes of the company to eject trespassers from trains notwithstanding a rule of the company on that subject. *Texas & N. O. R. Co. v. Buch* (Civ. App.) 102 S. W. 124.

In an action by a broker for compensation, evidence as to defendant's dealings with other brokers held inadmissible. *J. B. Lloyd & Son v. Kerley* (Civ. App.) 106 S. W. 696.

In an action for the death of an engineer in a derailment held the company could not show he had been previously disciplined for negligently running his train at high speed in violation of orders. *Galveston, H. & S. A. Ry. Co. v. Gillespie*, 48 C. A. 56, 106 S. W. 707.

In an action for injury to a pedestrian while passing between cars, special instances of blockading crossings held proper to be considered on the question whether crossings were habitually blockaded by the railroad. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 111 S. W. 758.

Evidence of a custom of railway conductors to alight from moving trains at a particular station held admissible in an action against a company for injury to an alighting conductor caused by a defective platform. *Missouri, K. & T. Ry. Co. of Texas v. Kennedy*, 51 C. A. 466, 112 S. W. 339.

Evidence that a railroad crossing where an injury occurred was such as are in common use throughout the state where public highways cross railroads in towns of similar size was properly refused as immaterial. *Texas Cent. R. Co. v. Randall*, 51 C. A. 249, 113 S. W. 180.

Buyers of a piano suing to rescind for breach of a warranty made by the seller's agents could not show that the agents customarily warranted pianos sold by them. *Jesse French Piano & Organ Co. v. Garza & Co.*, 53 C. A. 346, 116 S. W. 150.

Testimony as to what stipulations it was customary to insert in contracts for hauling logs held inadmissible to prove that such stipulation was also embraced in the contract in question. *Dayton Lumber Co. v. Stockdale*, 54 C. A. 611, 118 S. W. 805.

In action for breach of a land contract, plaintiff held entitled to show that it was not customary to execute releases for vendor's lien notes when paid. *McMillan v. First Nat. Bank*, 56 C. A. 45, 119 S. W. 709.

In an action against a railroad for frightening a horse on a public road, evidence of the habit of the engineer held admissible. *Adams v. International & G. N. R. Co.* (Civ. App.) 122 S. W. 895.

It does not matter as to the liability for entering a house without the owner's consent and building a fire in the fireplace, thereby burning the house, that others had entered and made use of it without his consent. *Wetzel v. Satterwhite* (Civ. App.) 125 S. W. 93.

In an action for delay in a shipment of live stock, evidence is admissible that defendant did not run freight trains on Sunday between specified points on the route of transportation. *Missouri, K. & T. Ry. Co. of Texas v. Howell* (Civ. App.) 126 S. W. 899.

In an action against an irrigation corporation for breach of contract to furnish water to make a crop, certain evidence held admissible to show a fact testified to by witnesses. *Erp v. Raywood Canal & Milling Co.* (Civ. App.) 130 S. W. 897.

On the issue whether a verbal contract by an irrigation corporation to furnish water to make a crop was made, evidence as to the custom to make written contracts held admissible. *Id.*

In an action against a carrier on an alleged contract of shipment of a corpse C. O. D. undertakers' charges, where no such contract was proved, proof of custom as to the making of such contracts was inadmissible as immaterial. *Pacific Express Co. v. Gathright* (Civ. App.) 130 S. W. 1035.

In a railroad fireman's action for injuries by the falling of a coal chute, testimony held admissible as to how other firemen lowered the coal chute. *Missouri, K. & T. Ry. Co. of Texas v. Gilbert* (Civ. App.) 130 S. W. 1037.

In an action for damages for delay in the shipment of live stock which were held by the defendant in its pen for four days, evidence that certain owners of cattle had sometimes voluntarily left them in the defendant's pen, while they were making arrangements to sell them, was properly excluded, where it appeared that the shippers were insisting on a prompt shipment. *Texas & P. Ry. Co. v. Leslie* (Civ. App.) 131 S. W. 824.

Evidence held admissible to rebut plaintiff's claim that defendant's physicians neglected plaintiff's former injury. *Gulf, C. & S. F. Ry. Co. v. Dooley* (Civ. App.) 131 S. W. 831.

Plaintiffs held properly denied the right to give evidence as to their customs in dealing with agents other than defendant. *Couturie v. Roensch* (Civ. App.) 134 S. W. 413.

In an action for broker's commissions, evidence of a member of a corporation to whom plaintiff claimed to have sold the land that it was the practice of the company to buy and sell land direct held admissible. *Pope v. Ansley Realty Co.* (Civ. App.) 135 S. W. 1103.

In a brakeman's action for personal injuries by switching cars against a caboose in which he was sleeping, evidence as to what was usually done before switching cars onto

the caboose track held admissible. *Houston & T. C. R. Co. v. Gray* (Civ. App.) 137 S. W. 729.

On an issue of a carrier's negligence causing extra expenditure for feeding cattle, evidence showing what was done under ordinary shipments held immaterial. *Chicago, R. I. & G. Ry. Co. v. Rich* (Civ. App.) 138 S. W. 223.

Where the evidence as to the make of a hammer, by the chipping of which plaintiff was injured, was conflicting, evidence that hammers made in defendant's shops, as there was evidence to show this one was, were inferior, was admissible. *Freeman v. Starr* (Civ. App.) 138 S. W. 1150.

A usage or custom only possesses evidentiary value where the evidence clearly establishes a fixed habit or custom. *Nocoma Nat. Bank v. Bolton* (Civ. App.) 143 S. W. 242.

In an action for destruction of a cotton compress, evidence that other railroads were reducing the number of oil-burning engines held admissible. *Nacogdoches Compress Co. v. Texas & N. O. R. Co.* (Civ. App.) 143 S. W. 302.

In an action to charge defendants with the loss of a horse and buggy hired by their minor children from plaintiff, evidence of a custom held improperly admitted. *Klapproth v. Smith* (Civ. App.) 144 S. W. 688.

In an action for injuries to a pedestrian attempting to pass between cars in a train obstructing a street, evidence that other persons went between the cars held admissible on the issue of contributory negligence especially where the company introduced evidence that some went around the train. *Freeman v. Terry* (Civ. App.) 144 S. W. 1016.

On the issue whether farm implements sold under a warranty complied with the warranty, evidence of defects in implements sold by the seller to others was inadmissible. *Fetzer v. Haralson* (Civ. App.) 147 S. W. 290.

On the issue whether a seller waived performance of the conditions in the warranty, evidence that the seller had waived the conditions of the warranty in transactions with third persons was inadmissible. *Id.*

In an action against a transfer company and a carrier for loss of baggage, evidence that it had long been the custom of transfer men to leave the baggage of prospective customers in an inclosed place in a union depot was admissible to show delivery. *Houston E. & W. T. R. Co. v. Anderson* (Civ. App.) 147 S. W. 353.

In a shipper's action for injuries to live stock for failure to unload them for food and water during a delay in transit, where it appeared that defendant had received the live stock from a connecting carrier and receipted for them prior to the delay, evidence of the usual custom of it and the connecting carrier in regard to delivering cars to each other was immaterial. *Kansas City, M. & O. Ry. Co. v. West* (Civ. App.) 149 S. W. 206.

In a suit for breach of a seller's implied warranty of seed, evidence of a custom among dealers not to be bound by an implied warranty of seed was inadmissible, where such custom was unknown to the buyer. *American Warehouse Co. v. Ray* (Civ. App.) 150 S. W. 763.

Testimony that mortgagee, an insurance company, issued a policy and sent a bill for the premium held competent to show agreement by it to attend to the insurance on premises covered by another deed of trust executed at the same time. *Commonwealth Fire Ins. Co. v. Obenchain* (Civ. App.) 151 S. W. 611.

In a personal injury action by a servant, who denied that he was ever instructed to fix anything out of order, testimony by the master's vice principal that he always instructed the employes to fix anything out of order was admissible. *Van Geem v. Cisco Oil Mill* (Civ. App.) 152 S. W. 1108.

Where a compress company was charged with having been a party to a fraudulent division of certain cotton shipped to plaintiff, evidence that it was not customary for compresses to divide bales held admissible as showing that the shipper's request that the compress company divide the cotton was notice to it that a fraud was intended. *Wichita Falls Compress Co. v. W. L. Moody & Co.* (Civ. App.) 154 S. W. 1032.

Where a contract of employment authorized defendant to cancel orders at its discretion in case it believed the buyers were irresponsible, evidence that plaintiff always made diligent inquiries as to the responsibility of buyers and never sent in orders unless he thought the parties good was immaterial. *Iowa Mfg. Co. v. Taylor* (Civ. App.) 157 S. W. 171.

In an action against a carrier for ejection of a passenger because she was on the wrong train, evidence that it was customary for defendant's brakeman at a station where plaintiff boarded the train to inspect passengers' tickets was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Humphries* (Civ. App.) 157 S. W. 1174; *Same v. Jackson* (Civ. App.) 157 S. W. 1177.

Showing methods of preventing injury.—Proof of rules of certain other companies for the protection of employes in switching and making up trains held inadmissible to show defendant company's negligence in failing to provide such rules. *St. Louis & S. F. R. Co. v. Nelson*, 20 C. A. 536, 49 S. W. 710.

Where defendant was sued for injuries to a car of vegetables caused by its neglect to keep them properly iced, evidence that other cars shipped in the same way just before and just after the injured shipment arrived in good condition was irrelevant and inadmissible. *Ft. Worth & D. C. Ry. Co. v. Harlan* (Civ. App.) 62 S. W. 971.

In an action by a servant for injuries by the breaking of a belt, it was error to refuse to allow the employer to show that it had adopted the most approved fasteners for the belt. *Bering Mfg. Co. v. Peterson*, 28 C. A. 194, 67 S. W. 133.

In an action for injuries resulting from a collision on a street crossing, evidence as to how lights were maintained at other street crossings is properly excluded. *Missouri, K. & T. Ry. Co. of Texas v. Matherly*, 35 C. A. 604, 81 S. W. 589.

In an action against a railway company for injuries to a servant on a work train, the question, which of two rules regulating the movement of trains was the safer, held immaterial. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

On the issue of negligence of a railroad in making an inspection in consequence of which negligence a servant was injured, evidence as to the similarity of the inspection to inspections made by other roads held competent. *Hover v. Chicago, R. I. & G. Ry. Co.*, 40 C. A. 280, 89 S. W. 1084.

Evidence that the equipment used by defendant is in general use among reasonably prudent persons engaged in the same business is admissible on the question of ordinary care. *Lyon v. Bedgood*, 54 C. A. 19, 117 S. W. 897.

In an action against a railroad company for the destruction of property by fire set by an engine, evidence of the inspection of a particular engine with reference to its spark arrester held properly excluded in the absence of certain other evidence. *Missouri, K. & T. Ry. Co. of Texas v. Neiser* (Civ. App.) 118 S. W. 166.

Other injuries or accidents from same or similar causes.—In a suit for damages to an animal caused by stepping into a ditch in the street of a city left in an unsafe condition, for the purpose of showing defendant's negligence, evidence that other animals in crossing the ditch had sunk into it, that danger signals had not been erected, and plank had not been laid over the same, was admissible. *Paris Gas Light Co. v. McHam*, 2 App. C. C. § 654.

That other horse teams became frightened at crossing is competent as a circumstance to show the condition as to safety, etc., at and before the injury. *Railway Co. v. Hill*, 71 T. 451, 9 S. W. 351.

Where, in an action for damages caused by sparks from a railway engine, it is shown that approved appliances to prevent fires, etc., have been used, it is competent to show other fires on the same road about the same time. *Railway Co. v. Donaldson*, 73 T. 124, 11 S. W. 163.

The question of the liability of a railway company for damages is confined to the condition of the road at the time and place of the occurrence, and evidence as to the condition of the road elsewhere, as well as of previous wrecks, is inadmissible. *Railway Co. v. Mitchell*, 75 T. 77, 12 S. W. 810; *Railway Co. v. Johnson*, 72 T. 95, 10 S. W. 325; *Railway Co. v. Shuford*, 72 T. 165, 10 S. W. 408; *Railway Co. v. Turner*, 1 C. A. 625, 20 S. W. 1008.

In an action for injuries by fire, evidence of fires on right of way before and after the one in question held competent. *International & G. N. R. Co. v. Newman* (Civ. App.) 40 S. W. 854.

Evidence of subsequent derailments at the same place held admissible to show negligence causing injury to servant, where there is conflicting testimony as to condition of the track. *Galveston, H. & S. A. Ry. Co. v. Ford* (Civ. App.) 46 S. W. 77.

That engine which exploded causing injury to plaintiff had been previously wrecked held admissible to show its condition. *Missouri, K. & T. Ry. Co. of Texas v. Canon*, 20 C. A. 697, 50 S. W. 422.

In an action for damage to land by overflow and seepage from a reservoir, not resulting from permanent injuries, exclusion of pleadings in a former suit for similar, but not the same, injuries, is not error. *Texas & P. Ry. Co. v. O'Mahoney* (Civ. App.) 50 S. W. 1049.

In issue to determine injury from construction of railroad, evidence of effect on property of another from presence of railroad in street held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Civ. App.) 51 S. W. 511.

On trial of action by an engineer for injuries by explosion of locomotive, injuries received in same explosion by a witness are not proper subjects of inquiry. *Missouri, K. & T. Ry. Co. of Texas v. Sherman* (Civ. App.) 53 S. W. 386.

Evidence as to a former killing on a track held incompetent to show whether an animal was killed by railroad or placed on the track. *St. Louis S. W. Ry. Co. of Texas v. Terry*, 22 C. A. 176, 54 S. W. 431.

In an action for injuries received through defendant causing plaintiff's horse to become frightened by its cars, evidence of other horses becoming frightened from the same cause is competent. *San Antonio Edison Co. v. Beyer*, 24 C. A. 145, 57 S. W. 851.

Evidence as to fire set some six months before the fire in controversy held not too remote. *Wilson v. Pecos & N. T. Ry. Co.*, 23 C. A. 706, 58 S. W. 183.

In an action for injuries to plaintiff's land by allowing sewage to escape into a water course, the effect of the sewage on lands below plaintiff may be shown. *City of San Antonio v. Diaz* (Civ. App.) 62 S. W. 549.

Where the defense was that insured had set the fire, the testimony of insured as to previous fires in the store caused by an arc lamp held admissible. *Phoenix Assur. Co. of London v. Stenson* (Civ. App.) 63 S. W. 542.

In a suit for damages to goods of a tenant, evidence that the roofs of buildings in the town were so injured by a storm that the rain damaged goods therein is admissible, as showing that the damages were caused by the storm. *Meyer v. Wolnitzek* (Civ. App.) 63 S. W. 1058.

Evidence of a similar accident from a charged electric street car to another passenger held admissible as tending to show that the car was not in proper condition and to show the company's knowledge. *Dallas Consol. Electric St. Ry. Co. v. Broadhurst*, 28 C. A. 630, 68 S. W. 315.

In an action against a railroad company for setting a fire, evidence of another fire nearby and about a month before held admissible. *Texas & P. Ry. Co. v. Rutherford*, 28 C. A. 590, 68 S. W. 825.

In an action for damages from fire claimed to have been started by a locomotive, there being no direct proof as to the origin of the fire, evidence of other fires about the same time started by the locomotive held proper. *Galveston, H. & S. A. Ry. Co. v. Chittim*, 31 C. A. 40, 71 S. W. 294.

On the issue of whether meal sold plaintiff for his cattle was unsound and unwholesome, held, that evidence as to the effect on the cattle of others of the same kind of meal was admissible. *Houston Cotton Oil Co. v. Trammell* (Civ. App.) 72 S. W. 244.

In action against railroad for destruction of cotton set on fire by defendant's locomotive, testimony of witnesses as to certain locomotive having set other fires that day in the neighborhood held properly admitted. *Texas & Pac. Ry. Co. v. Scottish Union Nat. Ins. Co.*, 32 C. A. 82, 73 S. W. 1038.

In an action for damage by the overflow of a farm from the negligent construction of a railroad's embankment, evidence as to damage done to other farms held inadmissible. *Bell v. Missouri, K. & T. Ry. Co. of Texas*, 36 C. A. 569, 82 S. W. 1073.

In an action for injuries to plaintiff alleged to have been caused by use of dangerous

system of loading cotton at defendant's gin, evidence that on prior occasion witness narrowly escaped injury held admissible. *Northern Texas Const. Co. v. Crawford*, 39 C. A. 56, 87 S. W. 223.

In an action against a railroad company for damages from a fire alleged to have been communicated by defendant's locomotive, evidence that one of defendant's locomotives had caused a fire some time before that sued for held inadmissible. *McFarland v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 88 S. W. 450.

In action against railroad for injury to crops and realty by construction of dam, evidence as to effect of overflows subsequent to removal of portion of dam held admissible. *Gulf, C. & S. F. Ry. Co. v. Harbison* (Civ. App.) 88 S. W. 452; *Same v. Wetherly* (Civ. App.) 88 S. W. 456; *Same v. Oates* (Civ. App.) 88 S. W. 457.

In an action against a railroad for damages to plaintiff's farm from an overflow of water resulting from defendant's negligence in the construction of its embankment along a creek, evidence that other lands than plaintiff's in the same vicinity were inundated by the same flood held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Bell* (Civ. App.) 93 S. W. 198.

Proof of the engine having emitted sparks on other occasions, but not proof of fires on other occasions near the train, held admissible in an action for the setting of fires by sparks from an engine. *D. H. Fleming & Son v. Pullen* (Civ. App.) 97 S. W. 109.

In an action against a railroad for overflowing plaintiff's land by means of an embankment, certain evidence held inadmissible. *Gulf, C. & S. F. Ry. Co. v. Caldwell* (Civ. App.) 102 S. W. 461.

In an action for damages from fire caused by sparks from a locomotive, evidence of other fires caused from a similar source held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Dawson Bros.* (Civ. App.) 109 S. W. 1110.

In an action against a railway company for the loss of buildings by fire, evidence as to another fire held admissible as tending to show that the fire which destroyed plaintiff's building came from defendant's locomotive. *Missouri, K. & T. Ry. Co. of Texas v. Miller* (Civ. App.) 110 S. W. 549.

Where defendant had introduced evidence that its spark arrester was in good repair, it was proper for plaintiff to introduce rebutting evidence of other fires caused by sparks from the locomotive. *St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co.*, 53 C. A. 125, 115 S. W. 648.

In an action for the destruction of timber and grass for pasture and hay by fire set by a railroad engine, the fact of another fire on the same land is inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Neiser* (Civ. App.) 118 S. W. 166.

In an action for injuries to a laborer by the fall of an embankment in a gravel pit, evidence that, some days before, a similar embankment had fallen to the foreman's knowledge, held admissible. *St. Louis Southwestern Ry. Co. of Texas v. Marshall* (Civ. App.) 120 S. W. 512.

Where it was alleged that a female passenger was made sick by the unsanitary condition of the car in which she was riding, it was proper to admit evidence as to a child being sick in an adjoining compartment of the car, to be considered as a circumstance in connection with the other evidence. *International & G. N. R. Co. v. Duncan*, 55 C. A. 440, 121 S. W. 362.

A passenger injured by the upsetting of a step box placed on a rough pavement as the means for alighting may show that step boxes used at the station had upset on other occasions when passengers stepped on them. *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 57 C. A. 411, 122 S. W. 574.

Where an engineer was charged with negligently operating a train and frightening a horse, held error to permit the engineer to testify that in his experience he did not recall an instance of having frightened a horse. *Adams v. International & G. N. R. Co.* (Civ. App.) 122 S. W. 895.

In an action for injuries to a servant, evidence that plaintiff, who had previously received an injury on another railroad, had received a sum as compensation therefor, was properly excluded as immaterial. *Houston & T. C. R. Co. v. Johnson*, 103 T. 320, 127 S. W. 539.

In an action against a railroad company for injuries by frightening plaintiff's horse at a street crossing by escaping steam, certain testimony as to another accident held properly excluded. *St. Louis Southwestern Ry. Co. of Texas v. Mitchell* (Civ. App.) 127 S. W. 876.

In an action against a carrier for injuries to live stock, evidence as to injury to such stock in a former shipment was admissible on the issue of damages. *Gulf, C. & S. F. R. Co. v. Peacock* (Civ. App.) 128 S. W. 463.

In an action against a carrier for injuries to live stock, testimony on the part of defendant as to a previous injury to such stock in a former shipment was not admissible where the stock had fully recovered from such injury. *Id.*

In an action by a passenger for personal injuries from an assault by a street car conductor, it was error to ask the conductor as to the number of fights he had had with passengers on other occasions. *Houston Electric Co. v. Park* (Civ. App.) 135 S. W. 229.

Admission of evidence of other fires set out by defendant railroad company, in rebuttal of testimony as to equipment of locomotives, held proper. *Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng.* (Civ. App.) 137 S. W. 401.

In an action for injuries in a collision with an automobile, certain evidence held inadmissible on the issue whether a servant acted within the scope of his employment. *Reid Auto Co. v. Gorsczya* (Civ. App.) 144 S. W. 688.

In an action against a railroad for burning plaintiff's property, evidence that other engines at other times on defendant's railroad emitted sparks and set out fires near the place in question held admissible. *Freeman v. Nathan* (Civ. App.) 149 S. W. 248; *Same v. Peacock* (Civ. App.) 149 S. W. 259.

Showing value—Sales of other property in general.—The value of land cannot be shown by evidence of the amount paid for adjoining property, unless the conditions regarding improvements, quality and the like are first shown to be identical. Nor can it be shown by evidence of what was bid for it, without proof of the circumstances and conditions of the sale. *Chaney v. Coleman*, 77 T. 100, 13 S. W. 850.

In an action for conversion, evidence that people, compelled to sell, sold similar furniture at a certain price, is not sufficient to show its market value. *Lincoln v. Packard*, 25 C. A. 22, 60 S. W. 682.

In a proceeding to condemn land for a railroad right of way, where the owner had recently sold a similar tract in the immediate vicinity, it was error to refuse to receive testimony as to the price received therefor. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 429, 68 S. W. 745.

Evidence in condemnation proceedings of market value of other land held not irrelevant or immaterial. *St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Civ. App.) 73 S. W. 976.

In an action against a carrier for unreasonable delay in delivering potatoes, certain evidence held to show market value of merchantable potatoes. *Garlington v. Ft. Worth & D. C. Ry. Co.*, 34 C. A. 274, 78 S. W. 368.

In an action against a railroad for injuries to property, certain evidence held too remote to show the value of property in the vicinity of plaintiff's property. *Dallas, C. & S. W. Ry. Co. v. Langston* (Civ. App.) 98 S. W. 425.

While a single sale of a chattel may not make a market, it does not require any great number to give market value to similar chattels in a specified locality. *St. Louis, B. & M. Ry. Co. v. Drodody* (Civ. App.) 132 S. W. 946.

Evidence of price received for other cattle shipped at same time is not admissible where the price was fixed by contract made two or three weeks before shipment. *Houston Packing Co. v. Griffith* (Civ. App.) 144 S. W. 1139.

— **Difference in location of other property.**—In action for breach of contract for sale of cotton to be delivered at W., held error to admit evidence of price at different places, in the absence of evidence that it had no market value at W. *Steinlein v. S. Blaisdell, Jr., Co.* (Civ. App.) 44 S. W. 200.

Where plaintiff is not suing for damages to cattle sold at W., evidence of price paid for cattle there is inadmissible. *Houston Cotton Oil Co. v. Trammell*, 96 T. 598, 74 S. W. 899.

In action against railroad for damages sustained by one whose property abutted on a street, owing to construction of the road in the street, evidence as to what another lot sold for after such construction held erroneously admitted. *Newbold v. International & G. N. R. Co.* (Civ. App.) 78 S. W. 1079.

Evidence of purchases of certain land by a witness in the vicinity of that condemned for a railroad right of way held inadmissible without proof of similarity. *Kirby v. Panhandle & G. Ry. Co.*, 39 C. A. 252, 88 S. W. 281.

On the issue of the value of property at a certain place at which there is no market value, proof of the market value at other places held admissible. *Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Civ. App.) 92 S. W. 823.

In an action for breach of contract to install a pumping plant on a rice plantation resulting in the loss of rice crops, certain evidence held admissible on the issue of damages. *Erie City Iron Works v. Noble* (Civ. App.) 124 S. W. 172.

Where market value of cattle at one place was in issue, evidence as to value at another place was competent, where the value at both places was shown to be the same. *Ft. Worth & R. G. Ry. Co. v. Poindexter* (Civ. App.) 154 S. W. 581.

— **Value of other property.**—In proceedings to assess damages for land condemned for a railroad right of way, the owner's testimony as to the amount he and another had offered for adjacent and similar property, and of the price at which the owners of such land offered it for sale, was incompetent. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 429, 68 S. W. 745.

The value of an improved property can furnish no basis for determining the market value of unimproved land in controversy. *Fox v. Robbins* (Civ. App.) 70 S. W. 597.

In ascertaining the value of land, rule as to admissibility of evidence of the value of other lands stated. *Koppe v. Koppe*, 57 C. A. 204, 122 S. W. 68.

In an action for a private nuisance from the operation of a gas and electric light plant, evidence of the general decrease of value of property in the city is irrelevant. *Sherman Gas & Electric Co. v. Belden*, 103 T. 59, 123 S. W. 119, 27 L. R. A. (N. S.) 237.

— **Services.**—In an action for injuries to a child, rendering her a cripple for life, held not error, under the pleading and proof to permit evidence of the ordinary compensation to household servants. *San Antonio & A. P. Ry. Co. v. Skidmore*, 27 C. A. 329, 65 S. W. 215.

In an action for injuries to a physician, evidence of a physician of another place to the amount of his own obstetrical business held inadmissible. *St. Louis S. W. Ry. Co. of Texas v. Ball*, 28 C. A. 287, 66 S. W. 879.

A railway brakeman in line for promotion to a conductorship, suing for personal injury, may show what a conductor earns on the question of loss of future earning capacity. *Missouri, K. & T. Ry. Co. of Texas v. Lasater*, 53 C. A. 51, 115 S. W. 103.

In an action for injuries to a servant, the exclusion of certain testimony that railroad service paid better than ordinary jobs of similar character held not erroneous. *St. Louis, S. F. & T. R. Co. v. Taylor* (Civ. App.) 134 S. W. 819.

On motion to fix compensation of infant defendants' guardian ad litem, evidence as to the amount paid the attorneys for plaintiff, who sought relief of the same character as the infants and recovered less than they recovered, was admissible. *Japhet v. Pullen* (Civ. App.) 153 S. W. 1188.

RULE 7. A VARIANCE BETWEEN THE ALLEGATION IN PLEADING AND THE EVIDENCE WHICH MISLEADS THE ADVERSE PARTY IS FATAL

See notes under Arts. 1819, 1827, and at end of chapter 8 of Title 37.

RULE 8. THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED

See notes under Art. 1827 (72-77, 79, 81, 83, 85, 88, 90, 96-98, 194-196), and notes at end of Chapter 8 of Title 37.

RULE 9. THE BEST EVIDENCE IS TO BE PRODUCED

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| <ol style="list-style-type: none"> 1. Necessity and admissibility of best evidence—Existence of better evidence as ground of exclusion. 2. — Admissibility of best evidence. 3. — Existence of better evidence. 4. — Matters not required to be in writing or recorded. 5. — Exclusion of documentary evidence as inferior to oral evidence. 6. Contents of writing, and facts or transactions described in or evidenced thereby. 7. — Payment or release. 8. — Ownership, possession or control. 9. — Judicial acts, proceedings and records. 10. — Official acts, proceedings and records. 11. — Corporate acts, proceedings and records. 12. — Conveyances, contracts and other instruments. 13. — Books of account, private memoranda, statements and correspondence. 14. — Notices. 15. Fact of making or existence of writing. | <ol style="list-style-type: none"> 16. Writings collateral to issues. 17. Original writing as best evidence—Copies in general. 18. — Books of account. 19. — Letters and telegrams. 20. — Contracts. 21. — Public records or documents. 22. Grounds for admission of secondary evidence. 23. — Possession or control of primary evidence. 24. Preliminaries to admission of secondary evidence. 25. — Proof as to existence of primary evidence. 26. — Proof as to destruction or loss of and search for primary evidence. 27. — Proof as to possession or control of primary evidence. 28. Character and degrees of secondary evidence. 29. — Oral evidence. 30. — Subscribing witnesses. 31. — Memoranda and other documents. 32. — Copies and counterparts. 33. — Sufficiency. 34. — Records. |
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1. Necessity and admissibility of best evidence—Existence of better evidence as ground of exclusion.—When a witness discloses that there is evidence of a higher degree concerning the fact about which he is testifying, his testimony should not be received. *Cotton v. Campbell*, 3 T. 493.

When a fact from its nature and the circumstances surrounding it is susceptible of direct proof, the absence of which proof is not explained, evidence secondary in its character and tending remotely by inference to establish it should be excluded. *Watson v. Walker*, 67 T. 651, 4 S. W. 576.

Evidence by a witness who had examined a record that a certain fact was not there recorded is not inadmissible, on the ground that the record is the best evidence. *Sanders v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 135 S. W. 718.

In an action on notes for a stallion claimed not registered as represented, evidence by the seller that the horse taken from his place was registered, was not objectionable on the ground that the books of the association were the best evidence. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 152 S. W. 646.

2. — Admissibility of best evidence.—Testimony held not incompetent, as not being the best evidence, the existence of a writing not being shown. *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 20 C. A. 688, 50 S. W. 417.

Where, in an action against a railroad, there was testimony that not all the rules of the company were printed or promulgated by posting on bulletin boards, and that there were unwritten rules in use, admission of testimony as to what certain rules were was not error, on the ground that the rules themselves were the best evidence. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 69 S. W. 930.

Testimony of officers and agents of a corporation held admissible on an issue as to whether contemplated purchasers of its property had satisfied it by a specified date of their ability to carry out an option contract for its sale. *Washington v. Rosario Min. & Mill. Co.*, 23 C. A. 430, 67 S. W. 459.

A pay roll of a vessel held primary evidence of the presence on the vessel of a person named therein. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 334.

Where, in an action for commissions for procuring the sale of realty, there was an issue whether plaintiff was authorized to sell and whether the purchaser closed the deal through plaintiff, a carbon copy of an earnest money receipt given by defendant's agent to the purchaser was admissible in evidence on the question of plaintiff's authority, though not signed by the purchaser. *Carl v. Wolcott* (Civ. App.) 156 S. W. 334.

3. — Existence of better evidence.—Secondary evidence is inadmissible when a written instrument may be obtained by a subpoena duces tecum. *Hall v. York*, 16 T. 18.

The rule that the best evidence is to be produced does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. *Longino v. Ward*, 1 App. C. C. § 523.

Evidence showing on its face that better evidence existed was properly excluded. *Kleine Bros. v. Gidcomb* (Civ. App.) 152 S. W. 462.

4. — Matters not required to be in writing or recorded.—Where the by-laws of a beneficial association do not require that an assessment be recorded, the fact that an assessment was made may be shown by parol. *Supreme Council American Legion of Honor v. Landers*, 23 C. A. 625, 57 S. W. 307.

Parol evidence may be admitted to show that a commissioner in condemnation proceedings was sworn. *Railway Co. v. Day*, 3 C. A. 353, 22 S. W. 538.

5. — Exclusion of documentary evidence as inferior to oral evidence.—In an action on a note the defendant pleaded that he was a minor at the date of its execution, and offered in evidence the family bible. A brother of the defendant identified the bible as that which had been recognized as such, and as containing the family record, since his first recollection; he testified that his father was dead and that their mother was living

in the county in which the trial was had. Held, that the entries in the family bible were secondary evidence, and cannot be received when the father, mother or other declarant is within reach of the process of the court. *Campbell v. Wilson*, 23 T. 252, 76 Am. Dec. 67.

The entries made by a party in his books of payments made cannot be better evidence to prove such payments than the sworn testimony of those who made or received the payments. *Austin City Water Co. v. Capital Ice Co.*, 1 App. C. C. § 1132.

A memorandum of a fact is secondary evidence and no higher evidence than the recollection of the maker. *Allerkamp v. Gallagher* (Civ. App.) 24 S. W. 372. See *Clark v. Kirby* (Civ. App.) 25 S. W. 1096, as to recitals in deeds.

Objection that certain books of account are the best evidence held without merit. *Echols v. Jacobs Mercantile Co.*, 38 C. A. 65, 84 S. W. 1082.

Where a witness makes a record, but can testify independent of such record, it is error to sustain an objection to his testimony on the ground that the record is the best evidence. *Callen v. Collins* (Civ. App.) 135 S. W. 651.

6. Contents of writing, and facts or transactions described in or evidenced thereby.—The publication itself is the best evidence of a libel. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580.

Evidence of the items "taken into consideration" in making up a written statement is not subject to the objection that the statement is the best evidence. *Sheldon Canal Co. v. Miller*, 40 C. A. 460, 90 S. W. 206.

A physician held properly permitted to testify as to a life expectancy, over objections that his testimony was not the best evidence. *Ft. Worth & D. C. Ry. Co. v. Spear* (Civ. App.) 107 S. W. 613.

One may testify his hotel business was injured through loss of patronage by a raid on his hotel, without producing the hotel register or other books showing the amount of his business. *Cartwright v. Canode* (Civ. App.) 138 S. W. 792.

Testimony as to the market value of cattle held not rendered inadmissible, on the theory that a report of the sales thereof was the best evidence. *Southern Kansas Ry. Co. of Texas v. Lockhart* (Civ. App.) 141 S. W. 127.

While ordinarily the business which a corporation was chartered to conduct must be stated in its charter, the purpose of its organization may be shown independent of the charter recitals. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.* (Civ. App.) 153 S. W. 680.

7. — Payment or release.—A written receipt is better evidence than evidence of a verbal acknowledgment. *Cotton v. Campbell*, 3 T. 493. Cited in *Matlock v. Glover*, 63 T. 231.

Suit was brought to recover an amount due on an account for goods sold and delivered. The defendant pleaded payment and offered in evidence a receipt signed by a third party, whose authority to execute it was questioned. Proof of payment was also made independent of the receipt. The court say: The receipt was not the only nor the best evidence of the payment of money. It was not an instrument which the law requires to be in writing, nor did it evidence any contract between the parties; nor was the existence or contents of the receipt the question in dispute. It was a matter collateral to the question in issue,—the payment of the money,—and there was no necessity to produce it, or account for its nonproduction, to let in other evidence of payment. *McAlpin v. Ziller*, 17 T. 508; *Muse v. Burns*, 3 App. C. C. § 75.

8. — Ownership, possession or control.—It is competent to allow a witness conversant with the history of a title, part of the links of which were lost, and in part inheritance, to narrate the history, naming the several links. In this case the papers forming part of the chain were proved by other competent testimony. *Capp v. Terry*, 75 T. 391, 13 S. W. 52. See *Burleson v. Collins* (Civ. App.) 28 S. W. 898.

In an action for damages for the destruction of a house by the culpable negligence of the defendant, it was competent to prove ownership by parol by showing exclusive possession of the premises. *Pacific Exp. Co. v. Dunn*, 81 T. 85, 16 S. W. 792.

The purchase of a railroad may be shown by oral testimony. *International & G. N. R. Co. v. Hall*, 35 C. A. 545, 81 S. W. 82.

In an action of trespass for burning a house, there was no error in admitting testimony of plaintiff as to his ownership thereof. *Wetzel v. Satterwhite* (Civ. App.) 125 S. W. 93.

On the issue whether property levied on belonged to a third person, parol testimony held admissible. *Marrett v. Herrington* (Civ. App.) 145 S. W. 254.

9. — Judicial acts, proceedings and records.—The transcript of a record of a case in the supreme court, which contained a copy of the depositions of a witness was offered to show the unreliability of his memory, he having answered that he had never testified in that case. It was held to be inadmissible for that purpose, and that the fact could have been shown by the officer who took his deposition, or by the production of the depositions and proof of his handwriting thereto. *Coleman v. Smith*, 55 T. 254.

A witness stated that he was an attorney; that he made a strict examination of the records of a county court, and they did not show that a certain estate had ever been distributed or closed. Held, that the evidence was inadmissible, as the record or a certified copy of the same was the best evidence. *Williams v. Davis*, 56 T. 253; *Bigham v. Talbot*, 63 T. 271; *Stafford v. King*, 30 T. 257, 97 Am. Dec. 304.

The testimony of a witness to prove the contents of the judgment was objected to on the ground: (1) That parol evidence was not admissible to prove the contents of a destroyed judgment, except in the court where the loss occurred. (2) That it did not appear that the witness was the custodian of the record at the time of their destruction, and therefore his testimony was not the best evidence of their contents. Both objections were overruled. *Johnson v. Skipworth*, 59 T. 473.

The records of a court, or properly certified copies thereof, are the best and generally the only competent evidence of their contents. But when twenty-five years after the destruction of records and papers pertaining to the administration of an estate, and after the death of the administrator, in a suit by heirs to recover land, the production of the deed from the administrator, made twenty-five years before, containing recitals showing the regularity of the sale, and its confirmation, in connection with evidence of

payment of the purchase-money and that the note was paid, the validity of the sale was sustained. *White v. Jones*, 67 T. 238, 4 S. W. 161.

The indorsement on a rejected claim against an estate is the best evidence of its rejection. *Dosche v. Nette*, 81 T. 265, 16 S. W. 1013.

A justice's judgment may be proven by the original docket. *Willis v. Nichols*, 23 S. W. 1025, 5 C. A. 154; *Houze v. Houze*, 16 T. 598; *Wallis v. Beauchamp*, 15 T. 303; *Hardin v. Blackshear*, 60 T. 132.

The judgment entry on the docket of a justice of the peace is primary evidence, and its loss must be shown in order to admit secondary evidence. *Holt v. Maverick* (Civ. App.) 24 S. W. 532.

The inventory is the best evidence as to whether the personal property of estate is sufficient to pay debts. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

The citation of the probate court requiring an administratrix to give a new bond, and the return of the sheriff thereon, is the best evidence of its issuance and service. *Green v. White*, 18 C. A. 509, 45 S. W. 339.

An order made by a county judge in vacation must be entered on the minutes of the court, and not simply on the judge's docket, under Art. 3239, to entitle it to be admitted in evidence in another action. *Id.*

It is incompetent to show by parol that there is an action pending in another county. *Preston v. State*, 40 Cr. R. 72, 48 S. W. 581.

In an action to recover an interest in land, parol evidence that plaintiff did not include it as part of his assets in filing a petition in bankruptcy held competent, though the schedule itself was not accounted for. *Clark v. Clark*, 21 C. A. 371, 51 S. W. 337.

Where one appeals from a justice giving affidavit of inability, he may show by parol that the court was in session when affidavit was made and filed. *Hutcherson v. Blewett* (Civ. App.) 53 S. W. 150.

Where a party, objecting to the report of commissioners appointed to partition community property, attempts to show that a certain note signed by him is invalid as being subject to an offset, oral statements of the contents of the written pleadings filed in a suit on the note pending in a foreign territory are not admissible, but the facts tending to show such offset must be shown. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

A county clerk's certificate of the record of an abstract of judgment is not objectionable as secondary evidence. *Weinert v. Simmang*, 29 C. A. 435, 68 S. W. 1011.

In a suit based on an execution levied on a justice's judgment, evidence of the sheriff making the levy, that a copy of the execution attached to the justice's deposition was correct, held not objectionable as not the best evidence. *Peebles v. Slayden-Kirksey Woolen Mills* (Civ. App.) 90 S. W. 61.

Letter signed by one as trustee in bankruptcy reciting sale held not the best evidence of the sale. *Keller v. Faickney*, 42 C. A. 483, 94 S. W. 103.

To show that a person is insolvent, secondary evidence that he had filed a petition in bankruptcy and turned over his property to the trustees is improper. *First Nat. Bank v. Robinson* (Civ. App.) 124 S. W. 177.

In an action on a vendor's lien note transferred to plaintiffs as collateral security for other notes, the judgments which plaintiffs recovered on the other notes, being the best evidence of the amount due, were properly admitted in evidence. *Brasfield v. Young* (Civ. App.) 153 S. W. 180.

10. — **Official acts, proceedings and records.**—The bond of a tax collector with the approval thereof required by law is the best evidence of the time when the officer qualified as such. *Webb County v. Gonzales*, 69 T. 455, 6 S. W. 781.

The deposition of the commissioner of the general land office is not admissible to prove a matter of fact shown by the records of his office. *Bass v. Mitchell*, 22 T. 285.

It was assumed that there was an error in certain field-notes apparent on their face, in this, that the field-notes called for a line one thousand two hundred and fifty varas long, while the plat showed that the line was four hundred and fifteen varas long. Held, that the proof should be made by the exhibition of the plat and field-notes to the jury, and not by the statement of a witness. *Coleman v. Smith*, 55 T. 254.

The records of the general post office department at Washington are better evidence of the establishment of a post office than an encyclopedia. *Howard v. Russell*, 75 T. 171, 12 S. W. 525.

To prove that the debtor was insolvent, the tax rolls were given in evidence to show that he did not render certain property claimed by him. The original assessment lists signed by him were not offered. Held, that the tax rolls could not thus be used as a statement by him of his financial condition. *Greer v. Richardson Drug Co.*, 1 C. A. 634, 20 S. W. 1127.

Testimony as to the contents of a government report of the quantity of rock shipped is inadmissible, the report itself being the best evidence. *Sabine Land & Improvement Co. v. Perry* (Civ. App.) 54 S. W. 327.

It was error to admit tax rolls to show that certain property was assessed to defendant, unless it was first shown that the original assessment could not be produced. *First Nat. Bank v. Bruce* (Civ. App.) 55 S. W. 126.

The action of a city council in authorizing the mayor of a city to make a contract for the city, and in ratifying such contract, cannot be established by parol testimony, in the absence of loss or destruction of the record. *Wagner v. Porter* (Civ. App.) 56 S. W. 560.

Parol evidence of contents of a writing held properly excluded, where it was not shown that the writing was not of record, or was not one of which the original, or a copy, could not be procured. *Thompson Sav. Bank v. Gregory* (Civ. App.) 59 S. W. 622.

Oral evidence of the contents of a certificate held inadmissible, in the absence of an excuse for the failure to produce original. *Commerce Milling & Grain Co. v. Morris*, 27 C. A. 553, 65 S. W. 1118.

Testimony held inadmissible, because not the best evidence. *Mass v. Bromberg*, 23 C. A. 145, 66 S. W. 468.

Official character of a public officer need not be proved by his commission, or through written evidence, unless on an issue directly between the officer and the state. *De Lucenay v. State* (Cr. App.) 68 S. W. 796.

A letter from one of the railroad commissioners is not proper evidence to show the commission rates on goods shipped by a common carrier, in an action against the carrier for overcharges. *Wells Fargo Exp. Co. v. Williams* (Civ. App.) 71 S. W. 314.

In a suit to determine boundary, a county surveyor cannot state that the records of his office recognized a corner as claimed by defendant as the corner of a certain county, as it was secondary. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

In trespass to try title, evidence as to what the abstract and books of the county assessor showed, and a diagram from such abstract books showing in whose name the property was assessed, held not the best evidence. *Hicks v. Pogue*, 33 C. A. 333, 76 S. W. 786.

In action against carrier, admission of testimony of witness, who had not seen cattle weighed, but claimed knowledge from weighmaster's tickets, as to weights and prices of cattle, held not reversible error. *St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co.* (Civ. App.) 76 S. W. 947.

In an action involving a disputed boundary, a compiled abstract of title, patented and located lands of 1877, held secondary evidence, and inadmissible. *Clawson v. Wilkins* (Civ. App.) 93 S. W. 1086.

Oral testimony of a commissioner of the land office, based entirely upon the records of his office, is not admissible, but a copy of the records or a certificate as to their contents should be introduced. *Patterson v. Knapp* (Civ. App.) 99 S. W. 125.

Evidence that plaintiff was walking near defendant's railroad track on or towards S. street was not objectionable as secondary evidence. *International & G. N. R. Co. v. Morin*, 53 C. A. 531, 116 S. W. 656.

Evidence of a witness having knowledge of the facts that certain railroad tracks were located in a street was not objectionable as secondary evidence. *Id.*

A witness having knowledge of the fact could testify as to the location of the commonly used streets of a city or public roads of a county. *Id.*

City maps and records are not the best evidence of the actual location of city streets on the ground. *Id.*

In trespass to try title, in which defendant claimed that a prior patent covered the land in plaintiff's patent, a certified copy of the prior patent and a certified plat from the map in the land office held original evidence. *Hackbarth v. Gordon* (Civ. App.) 120 S. W. 591.

Field notes and maps prepared for and used in the general land office, held admissible as original evidence. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

Where the land sought to be recovered was originally located by what is known as office work, without being actually surveyed on the ground or tied to any survey or object, it is not necessary to produce the original field notes and maps, and a patent containing the field notes afterwards prepared and used in the general land office is presumed to be in accordance with the work by the surveyors and admissible as original evidence. *Id.*

In an action against a city on notes given in payment of fire hose, an oral statement of a witness held inadmissible. *City of Cleburne v. Gutta Percha & Rubber Mfg. Co.* (Civ. App.) 127 S. W. 1072.

In an action against a city upon notes given in payment for fire hose, where the books of the city treasurer, together with the minutes of the council, showed the amount received and placed in the general fund, together with the items of expense and other obligations of defendant incurred and paid during a certain year, an oral statement as to whether the current expenses for a certain year were greater than the current revenue for that period was inadmissible, when the books and other records relative to the facts were in the possession of the defendant. *Id.*

Proof of an order of a commissioners' court authorizing execution of a deed held properly made by the records of the court only. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

In an action by a delinquent taxpayer to recover costs alleged to have been illegally exacted upon payment of the taxes, parol testimony as to the amount of costs paid to the collector is admissible. *Typer & Knudson v. Tom* (Civ. App.) 132 S. W. 850.

Facts shown by the records in the office of the Secretary of State cannot be proved by that officer's deposition. *Smith v. Briggs-Weaver Machinery Co.* (Civ. App.) 132 S. W. 954.

11. — **Corporate acts, proceedings and records.**—Testimony as to contents of record kept by witness held properly excluded, when no reason for the nonproduction of the record itself was given. *St. Louis & S. W. Ry. Co. of Texas v. Miller*, 27 C. A. 344, 66 S. W. 139.

Where a conductor is injured in a collision, an expert cannot testify as to the precautions he should have taken under the rules, over objection that the rules were the best evidence. *Missouri, K. & T. Ry. Co. of Texas v. Pawkett*, 23 C. A. 583, 68 S. W. 323.

In an action against two electric companies for personal injuries, testimony that it was naturally assumed that both companies belonged to the same people held incompetent. *Dallas Electric Co. v. Mitchell*, 33 C. A. 424, 76 S. W. 935.

In an action against a railroad company for damages caused by failure to furnish stock cars within a reasonable time, evidence of defendant's train dispatcher as to the number of cars ordered during a certain period held inadmissible. *Texas & P. Ry. Co. v. Smith & White*, 34 C. A. 571, 79 S. W. 614.

On an issue as to the date of a voter's birth, deposition as to a baptismal record held incompetent. *Bailey v. Fly*, 35 C. A. 410, 80 S. W. 675.

The cashier of a bank may properly be allowed to testify, without producing the books, that certain money held by the bank was credited to a certain person. *Smith v. First Nat. Bank*, 43 C. A. 495, 95 S. W. 1111.

One who actually knew that a construction company owned the stock of another company could so testify as against an objection that the stock records were the best evidence on the question, especially where it was claimed that the construction company had purchased land through the town-site company which transferred it to defraud the construction company's creditors. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.* (Civ. App.) 153 S. W. 680.

12. — **Conveyances, contracts and other instruments.**—In a suit on a note, the note itself is the best evidence; but if secondary evidence of its contents is admitted without objection, the error is waived. *Long v. Garnett*, 59 T. 229.

Secondary evidence is admissible to show contents of a deed to land situated in this or another state. *Harvey v. Edens* 69 T. 420, 6 S. W. 306.

When rights involved in a sale are fixed by written contract between the parties which is not produced on the trial, and the sale is proved by parol without objection, the failure to produce the written contract of sale becomes immaterial. *Brown v. Lessing*, 70 T. 544, 7 S. W. 783.

A recital in a note of the vendor's lien is original evidence. *Behrens v. Dignowitty*, 25 S. W. 288, 4 C. A. 201.

The deed conveying land is primary evidence. *Macdonnell v. De Los Fuentes*, 26 S. W. 792, 7 C. A. 136; *Rogers v. Wallace* (Civ. App.) 28 S. W. 246.

Where there was a written contract for shipment, parol evidence as to the time of delivery is inadmissible. *Gulf, C. & S. F. Ry. Co. v. Baugh* (Civ. App.) 42 S. W. 245.

In a controversy between an attorney and client as to compensation, held error to allow the client to testify to his construction of the contract, where it was contained in correspondence not produced at the trial. *Fulton v. Western Stove Mfg. Co.* (Civ. App.) 45 S. W. 1035.

In an action against a carrier on a written contract of shipment, parol evidence that the shipment was made with a certain privilege is inadmissible. *San Antonio & A. P. Ry. Co. v. Woodley*, 20 C. A. 216, 49 S. W. 691.

Parol evidence held inadmissible to prove a written assignment of an account, in the absence of an excuse for failure to produce the writing. *Bruce v. Strawn Coal-Min. Co.* (Civ. App.) 59 S. W. 52.

Parol evidence of written lease is not admissible, in absence of proof of loss or destruction, or inability to produce it. *Grayson v. Peyton* (Civ. App.) 67 S. W. 1074.

Complaint cannot be made in the appellate court for the first time that a contract was proved by secondary evidence. *Mensing Bros. & Co. v. Cardwell*, 33 C. A. 16, 75 S. W. 347.

A gift of a bank deposit to plaintiff by her father during his lifetime may be proved by parol. *Hill v. Escort*, 38 C. A. 487, 86 S. W. 367.

Recitals in trust deeds that they secured vendor's lien notes held primary evidence, not only against the parties, but as against third persons in privity of estate. *Flach v. Zanderson* (Civ. App.) 91 S. W. 348.

Where no proof of the execution of a deed was offered, and there was no predicate laid for the introduction of secondary evidence, parol evidence of its contents was inadmissible. *Davis v. Ragland*, 42 C. A. 400, 93 S. W. 1099.

Whether decedent at the time of his injuries was employed by an independent contractor or by defendant could not be shown by the understanding of the men employed under the written contract. *Walker v. Texas & N. O. R. Co.*, 51 C. A. 391, 112 S. W. 430.

Where the testimony of a witness showed that a deed was in existence, and that inquiry of a certain person would show where it was, it was error to permit witness to testify as to the contents of such deed. *Merrill v. Bradley* (Civ. App.) 121 S. W. 561.

That a debtor tendered to his creditor a check in full settlement held provable by parol. *Cristler v. Williams* (Civ. App.) 130 S. W. 608.

Where, in replevin, plaintiff claimed title through a firm, parol evidence as to what property had been delivered by W. to one of the members of the firm, independent of the execution of a bill of sale, held admissible. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

Oral evidence of the contents of a bill of sale is inadmissible in the absence of a proper predicate. *Id.*

A deed held the best evidence of what was thereby conveyed. *Jones v. Harris* (Civ. App.) 139 S. W. 69.

In the absence of a proper predicate, secondary evidence, in the form of the record of a deed, held inadmissible. *Producers' Oil Co. v. Bean & Markowitz* (Civ. App.) 147 S. W. 1166.

13. — **Books of account, private memoranda, statements and correspondence.**—A letter is the best evidence of its contents. *Mo. Pac. Ry. Co. v. Rountree*, 2 App. C. C. § 388. A witness, over objection, was permitted to testify that he had received a letter from the agent of defendant, refusing to settle the claim sued on. Held error, as the letter was the best evidence of its contents. *Mo. Pac. Ry. Co. v. Rountree*, 2 App. C. C. § 388.

The original telegraph message, as written by the sender, is the best evidence, and its non-production must be accounted for, in order to admit secondary evidence. *Abernathy v. Hewlett*, 2 App. C. C. § 806.

Secondary evidence of the contents of a letter or other written instrument without this state is admissible. *McBride v. Willis*, 82 T. 141, 18 S. W. 205; *Clapp v. Engledow*, 82 T. 290, 18 S. W. 146; *Hunter v. Lanus*, 82 T. 677, 18 S. W. 201.

Estimate of the amount of plaintiff's business held not objectionable as secondary. *Gulf, C. & S. F. Ry. Co. v. Brown*, 16 C. A. 93, 40 S. W. 608.

Secondary evidence of the contents of books of account held inadmissible. *Garrett v. Garrett* (Civ. App.) 47 S. W. 76.

One cannot, without accounting for nonproduction of a letter, testify to its contents. *Cabaness v. Holland* (Civ. App.) 47 S. W. 379.

Evidence that certain books of account show a certain indebtedness is a violation of the best evidence rule, and inadmissible. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

On issue as to an account arising in an action on a note, the best evidence thereof is the books of account. *Rogers v. O'Barr & Dinwiddie* (Civ. App.) 76 S. W. 593.

In an action on a note, one of the defendants held not entitled to testify to a particular payment by his recollection of the entry thereof on a lost ledger leaf. *Eastham v. Patty & Brockinton*, 37 C. A. 336, 83 S. W. 885.

In action against carrier for damages caused by delay in shipment of cattle, testi-

mony as to contents of books of stockyards held inadmissible. *Sterling v. St. Louis, I. M. & S. Ry. Co.*, 38 C. A. 451, 86 S. W. 655.

On an issue as to the fraudulent character of a chattel mortgage, a witness held not entitled to testify to written statements made by the mortgagor as to his financial standing. *Bruce v. Bruce* (Civ. App.) 89 S. W. 435.

A witness cannot testify what certain books show; the books being the best evidence. *Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co.*, 40 C. A. 489, 90 S. W. 197.

Evidence by plaintiff's mother that plaintiff had been offered a certain sum per week, was properly excluded, where the offer was made by letter, the letter being the best evidence. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.) 96 S. W. 653.

Where plaintiff sued a telegraph company for delayed delivery of a message held error to allow the company to read in evidence "relay copies" of the message. *Buchanan v. Western Union Telegraph Co.* (Civ. App.) 100 S. W. 974.

A statement of the condition of the account of a depositor with a bank is inadmissible; the bank book being the best evidence. *Berry v. Joiner*, 45 C. A. 461, 101 S. W. 239.

A witness' evidence as to statements contained in a letter held objectionable as not the best evidence, but such objection did not apply to his further statement that he had lost sight of certain land in question, and thought it had been included in a sale to A. *Poitevent v. Scarborough* (Civ. App.) 117 S. W. 443.

Evidence as to items contained in the books of a partnership held admissible. *Hatzfeld v. Walsh*, 55 C. A. 573, 120 S. W. 525.

Refusing to allow a witness to testify as to an item on the books of a partnership held not error where it did not appear that he had charge of the books, or had personal knowledge of their contents. *Id.*

The contents of a letter not produced are inadmissible as a rule. *Merriman v. Black*, 57 C. A. 270, 122 S. W. 403.

The memoranda kept in a telephone exchange, showing the date and hour when customers put in a call and when they get through talking, are the best evidence of what they contained, and mere proof that the telephone business has been sold, since the memoranda were made, and the papers were delivered to the new owner, is not sufficient to admit secondary evidence. *Edwards v. Adams* (Civ. App.) 122 S. W. 898.

In an action for damages for loss of property by fire caused by sparks from an engine, held error to allow a bookkeeper to testify as to what his books contained; they being the best evidence. *Houston & T. C. R. Co. v. Washington* (Civ. App.) 127 S. W. 1126.

A witness, who was the addressee of a letter, held not entitled to testify as to its contents without some evidence excusing its nonproduction. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

Testimony as to amount of sales by plaintiff held not rendered inadmissible by the fact that he kept duplicate slips of most of the sales. *Missouria Glass Co. v. Roberts* (Civ. App.) 137 S. W. 433.

As a rule, original books of entry are the best evidence as to the items of a book account. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 155 S. W. 325.

Where coal was sold and shipped f. o. b. mines upon mine weights, and was also weighed at destination, the testimony of the buyer as to shortage of weight, without accounting for the record taken by the weigher at either place, was inadmissible as secondary evidence. *Richard Cocke & Co. v. Big Muddy Coal & Iron Co.* (Civ. App.) 155 S. W. 1019.

14. — Notices.—In an action for rent, admissions of the landlord's agent that he had notified the landlord that he had rented the land to the tenant are not admissible as primary evidence of such notice. *Majors v. Goodrich* (Civ. App.) 54 S. W. 919.

15. Fact of making or existence of writing.—Evidence of the existence of a writing, the contents thereof not being stated, is not within the rule as to secondary evidence. *Shaw v. Adams*, 2 App. C. C. § 183.

That the demand for possession was made in writing as required by the statute relating to forcible entry and detainer can be shown by parol. *Steele v. Steele*, 2 App. C. C. § 347.

Where a party has lost the deeds of land to which he has asserted ownership for 40 years, evidence that deeds of the form and tenor claimed were recorded in another county held admissible, as tending to show that such deeds were in existence at that time. *Logan's Heirs v. Logan*, 31 C. A. 295, 72 S. W. 416.

Fact of having advertised land held provable by real estate broker's testimony in his action for commissions. *Yarborough v. Creager* (Civ. App.) 77 S. W. 645.

In locomotive fireman's action for injuries, engineer's testimony for plaintiff that he noted defect in engine in company's book held admissible, though the book was not produced. *Missouri, K. & T. Ry. Co. of Texas v. Crum*, 35 C. A. 609, 81 S. W. 72.

In trespass to try title, testimony that defendant's predecessor in title had the land in controversy patented to him held admissible. *Ellis v. Lewis* (Civ. App.) 81 S. W. 1034.

Where the testimony of a witness showed that a deed was in existence and that inquiry of a certain person would show where it was, it was error to permit witness to testify as to the execution of such deed. *Merrill v. Bradley* (Civ. App.) 121 S. W. 561.

Statements of witness concerning the substance of documents, copies of which were attached to his answers as exhibits, held admissible by way of explanation and identification of the exhibits. *Robertson v. Brothers* (Civ. App.) 139 S. W. 657.

Evidence that a tenant held under a written lease, offered to show a holding through a tenant to establish adverse possession by the landlord, did not violate the best evidence rule. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

The testimony of a party to a contract that the contract was delivered to him is not objectionable as secondary evidence. *Pecos & N. T. Ry. Co. v. Cox* (Civ. App.) 150 S. W. 265.

Where defendant pleaded avoidance of the policy sued on by breach of a provision against other insurance, parol evidence to show the execution, but not the contents of such other policies, was admissible. *Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown* (Civ. App.) 151 S. W. 899.

16. **Writings collateral to issues.**—In a suit by the vendee for the recovery of personal property in the possession of the administrator of the vendor, the statement of the vendor to a third person that the property in question had been sold by him to plaintiff was admissible as evidence of title without accounting for the bill of sale stated to have been made. *Dooley v. McEwing*, 8 T. 306.

Where there is no contention as to the contents of a written lease it is competent to prove by parol its existence and its transfer without accounting for its non-production. Nor would the admission of a certified copy of such lease, without accounting for the original, be material error, the terms of the instrument not being in issue. *Howard v. Britton*, 71 T. 286, 9 S. W. 73.

Parol evidence is admissible of purely introductory matters although written evidence may be in existence. *Parker v. Chancellor*, 78 T. 524, 15 S. W. 157.

A copy of an unrecorded deed admissible in corroboration of other evidence. *Cox v. Rust* (Civ. App.) 29 S. W. 307.

On an issue as to whether certain property was purchased with the separate money of a wife, her prior ownership of other property which might have been converted into the money with which the purchase was made can be proved by parol. *Oaks v. West* (Civ. App.) 64 S. W. 1033.

In action against a fire insurance company, held, that the authority of an agent was not merely in issue collaterally, so as to render secondary evidence of the agent's authority admissible without notice to produce better authority shown to exist. *Continental Fire Ass'n of Ft. Worth v. Bearden*, 29 C. A. 569, 69 S. W. 982.

In action for right of way, plaintiff's oral testimony as to defendants' title to the land held admissible. *Holman v. Patterson*, 34 C. A. 344, 78 S. W. 989.

The fact of the appointment of a public officer may in collateral proceedings be shown by other means than his commission. *Callaghan v. McGown* (Civ. App.) 90 S. W. 319.

In an action for injuries to a passenger traveling on a pass issued by an express company, plaintiff held entitled to prove the provisions of the contract between the express company and the railroad company without showing an excuse for nonproduction of the contract. *International & G. N. R. Co. v. Lynch* (Civ. App.) 99 S. W. 160.

Secondary evidence of the contents of a telegram held admissible in a suit to restrain enforcement of a default judgment, without excusing failure to procure the original telegram. *Dalhart Real Estate Agency v. Le Master* (Civ. App.) 132 S. W. 860.

Where a telegram was not the basis of plaintiff's action, but was merely proof of a collateral fact, a copy thereof was admissible in evidence without first accounting for the original. *Heidenheimer v. Beer* (Civ. App.) 155 S. W. 352.

17. **Original writing as best evidence—Copies in general.**—When copy of instrument admissible. *Miller v. Goodman*, 15 C. A. 244, 40 S. W. 743.

Where publication in a newspaper of the proceedings of a convention was alleged to be libelous, copies of such publications held admissible as originals. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

Objections to a certified copy of a title bond, on the ground that it was a copy of a copy, held without merit. *Tenzler v. Tyrrell*, 32 C. A. 443, 75 S. W. 57.

A letterpress copy of a waybill held objectionable as secondary evidence. *Texas & P. Ry. Co. v. Lynch*, 39 C. A. 96, 87 S. W. 884.

A copy of an instrument is not admissible where the party offering it had not used sufficient diligence to obtain the original. *Missouri, K. & T. Ry. Co. of Texas v. Morrison*, 42 C. A. 598, 94 S. W. 173.

In libel, where the undisputed evidence showed that defendant published the article in its paper, a copy of the paper containing the alleged libelous article was properly admitted. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

A witness cannot testify as to the contents of a paper which is a record in the land office. A certified copy of the paper or an examined copy proved as at common law is the best evidence. *Lewright v. Walls*, 55 C. A. 643, 119 S. W. 723.

In an action for injuries from fire set by sparks from passing locomotives, admission of copies of certain train records held error. *Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 124 S. W. 217.

A copy of a receipt given by consignees to defendant railroad for goods shipped by plaintiff held admissible, though witness was requested in giving his deposition to attach the original receipt. *A. B. Patterson & Co. v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 126 S. W. 336.

18. — **Books of account.**—Original books of entry are the best evidence. The ledger may be, under certain circumstances, admitted in evidence, but not when the original books of entry are accessible. *Pohl v. Bradford* (Civ. App.) 25 S. W. 984.

Copy of accounts from a weigher's book is not admissible when no excuse is shown for failure to produce the book. *Eppler v. Brown* (Civ. App.) 30 S. W. 710.

Copies of account attached to a deposition held admissible, though the books from which the accounts were taken were not produced. *Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co.* (Civ. App.) 116 S. W. 154.

19. — **Letters and telegrams.**—In a suit against a telegraph company for damages for failure to deliver messages sent, copies of the messages delivered by the company were admissible evidence. *Telegraph Co. v. Bennett*, 1 C. A. 558, 21 S. W. 699.

In an action for the erroneous transmission of a telegram, copies furnished by defendant's agents at the sending and receiving stations held inadmissible, in the absence of evidence tending to excuse the nonproduction of the originals. *Western Union Tel. Co. v. Kapp*, 35 C. A. 663, 80 S. W. 840.

A carbon copy of a letter held inadmissible without accounting for the nonproduction of the original. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

Evidence of contents of carbon copy of letter held objectionable as not the best. *Booker-Jones Oil Co. v. National Refining Co.* (Civ. App.) 131 S. W. 623.

20. — **Contracts.**—A writing is the best evidence of a contract. *Maverick v. Maury*, 79 T. 435, 15 S. W. 686.

Secondary evidence of an instrument held properly rejected. *Read v. Chambers* (Civ. App.) 45 S. W. 742.

21. — **Public records or documents.**—The best evidence of the terms of an act of the legislature is a copy of the enrolled bill. *Railway Co. v. Hearne*, 32 T. 546.

An original state abstract book, containing memoranda of the abstracts of title to patented lands, held admissible to show that the land in controversy had been patented to *L. Jones v. Wagner* (Civ. App.) 141 S. W. 280.

22. **Grounds for admission of secondary evidence.**—The evidence of a witness as an expert was offered to explain an account book. The court say there was no error in refusing to hear the testimony. No occasion for explaining the books was shown, and, if the testimony was proper, the bill of exceptions does not show that the witness would have sworn to any material fact. It was not shown that the book was kept in accordance with any technical or scientific system of book-keeping. *McKay v. Overton*, 65 T. 82.

Where tickets in an election contest were inspected in the presence of the jury, and they were numerous, it was proper to relax the rule requiring primary evidence, and to permit a witness to testify how many of the tickets bore certain characteristics. *Davis v. Harper*, 17 C. A. 88, 42 S. W. 788.

Refusal of witness to attach to his deposition original documents held sufficient foundation for introduction of copies. *Sayles v. Bradley & Metcalf Co.*, 92 T. 406, 49 S. W. 209.

Where the deposition of a railway agent was being taken in a county other than that where the trial was held, and he was asked to attach a certain waybill, but did not, his testimony as to its contents was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Dilworth*, 95 T. 327, 67 S. W. 38.

The weight of coal as shown by the invoice sent from the mines held not the best evidence. *St. Louis Southwestern Ry. Co. of Texas v. McLeod* (Civ. App.) 115 S. W. 85.

Where a party testified that certified copies of deeds of land showed the price and number of acres sold and admitted the execution of the deeds, the copies were properly introduced to show the price and number of acres sold. *C. W. Hahl & Co. v. Southland Immigration Ass'n*, 53 C. A. 592, 116 S. W. 831.

23. — **Possession or control of primary evidence.**—See notes under Rules 10, 11.

24. **Preliminaries to admission of secondary evidence.**—When secondary evidence is resorted to for the purpose of establishing the former existence of a deed claimed to be lost, and no copy of which was preserved, after the lapse of twenty years a general description of the property conveyed and of the substance of the deed is all that can be required. *Parks v. Caudle*, 58 T. 216.

An action against a carrier may be founded upon a special contract evidenced by the bill of lading, in which case the bill must be produced, or its non-production accounted for, in order to show its contents by parol evidence. *T. & P. Ry. Co. v. Wheat*, 2 App. C. C. §§ 165, 166; *I. & G. N. R. R. Co. v. Watt*, 2 App. C. C. § 781.

Secondary evidence of the contents of a written contract cannot be admitted in the absence of proper diligence to secure the original. *Low v. Tandy*, 70 T. 745, 8 S. W. 620.

The proof of loss and contents can be made without a preliminary affidavit. *Blanton v. Ray*, 66 T. 61, 17 S. W. 264; *Gray v. Thomas*, 83 T. 246, 18 S. W. 721.

The evidence of a witness on the stand as to the execution and loss of a deed may suffice in lieu of a written affidavit as a predicate for secondary evidence to prove the contents of such deed. *Dohoney v. Womack*, 1 C. A. 354, 19 S. W. 883, 20 S. W. 950.

Where a deed which a party desires to use in evidence is made to and is in possession of a third party, the party must either have it produced under a subpoena duces tecum, or show that it is beyond his power to produce it in some other way, before he will be allowed to introduce secondary evidence of its contents. *Greer v. Richardson Drug Co.*, 1 C. A. 634, 20 S. W. 1127.

A copy of a writing inadmissible, sufficient excuse for the non-production of the original not being shown. *Eppler v. Brown* (Civ. App.) 30 S. W. 710. See *Telegraph Co. v. Williford* (Civ. App.) 27 S. W. 700; *Telegraph Co. v. Smith* (Civ. App.) 26 S. W. 216.

Testimony as to contents of letter held inadmissible without proper foundation laid. *Pughe v. Coleman* (Civ. App.) 44 S. W. 576.

Predicate laid for introduction of secondary evidence of a note held sufficient. *Boyd v. Leith* (Civ. App.) 50 S. W. 618.

Where a delivering carrier is sued for damage to fruit which was diverted from its original destination by the consignee's order, plaintiffs should account for their failure to produce the order itself as a predicate to the introduction of its contents. *Missouri, K. & T. Ry. Co. v. Mazzie*, 29 C. A. 295, 68 S. W. 56.

In an action against a telegraph company for negligent delay in delivering the message, the proper foundation held to have been laid for parol testimony as to a written instrument. *Western Union Telegraph Co. v. Salter* (Civ. App.) 95 S. W. 549.

To render a copy of a bill of lading admissible it was necessary to prove its execution or that it had been duly substituted on the former trial for the original. *W. R. Morris & Co. v. Southern Shoe Co.*, 44 C. A. 488, 99 S. W. 178.

On an issue as to the verity of the record of a lost deed, evidence that such deed was recorded with another deed and that the original of the latter deed is in existence and was correctly recorded, is admissible. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 128 S. W. 629.

In an action against a railroad company for loss of property by fire, held error to permit a station agent to read from train records. *Cathey v. Missouri, K. & T. Ry. Co. of Texas*, 104 T. 39, 133 S. W. 417, 33 L. R. A. (N. S.) 103.

In an action by a physician, the exclusion of a copy of his license to practice medicine is proper, where no explanation of his failure to produce the original is made. *Feingold v. Lefkovitz* (Civ. App.) 147 S. W. 346.

25. — **Proof as to existence of primary evidence.**—Where the existence of an ancient lost instrument has been shown, further proof of its execution is unnecessary to admit proof of its contents. *Smith v. Cavitt*, 20 C. A. 558, 50 S. W. 167.

The testimony of a party that a letter from the adverse party had never been received does not warrant the exclusion of a copy of the letter after a sufficient predicate had been laid for its introduction. *Jacksboro Stone Co. v. Fairbanks Co.*, 48 C. A. 639, 107 S. W. 567.

Testimony of an executive officer of a company as to the authority of its agent held inadmissible, in the absence of proof that the agent's authority had been conferred in writing. *Waco Mill & Elevator Co. v. Allis-Chalmers Co.*, 49 C. A. 426, 109 S. W. 224.

A sheriff's deed under a foreclosure decree held admissible to establish title without proof that an order of sale was not functus officio at the date of sale. *Anderson v. Casey-Swasey Co.* (Civ. App.) 120 S. W. 918.

26. — **Proof as to destruction or loss of and search for primary evidence.**—See notes under Rule 11.

27. — **Proof as to possession or control of primary evidence.**—See, also, notes under Rule 11.

An affidavit that the party "cannot procure the original deed" is insufficient. *Hoop-er v. Hall*, 30 T. 154. See *Robertson v. Moor-er*, 25 T. 423; *Kinney v. Vinson*, 32 T. 125; *Bray v. Aiken*, 60 T. 668.

The memoranda kept in a telephone exchange being the best evidence of what they contain, secondary evidence held not admissible on proof that the telephone business had been sold and papers delivered to new owner. *Edwards v. Adams* (Civ. App.) 122 S. W. 898.

28. **Character and degrees of secondary evidence.**—A party, not being able to produce the best evidence, may offer any grade of secondary evidence, though there is other secondary evidence available of a greater weight than that offered. *Simpson Bank v. Smith*, 52 C. A. 349, 114 S. W. 445.

29. — **Oral evidence.**—The testimony of a witness to prove the contents of the judgment was objected to on the ground: 1st. That parol evidence was not admissible to prove the contents of a destroyed judgment except in the court where the loss occurred. 2d. That it did not appear that the witness was the custodian of the records at the time of their destruction and therefore his testimony was not the best evidence of their contents. Both objections were overruled. *Johnson v. Skipworth*, 59 T. 473.

Under a statute (Early Laws, art. 3484) requiring that official oaths of executors and administrators and all inventories of estates should be copied at length in the records of the court, and which gave the same effect to certified copies of such record entries as original copies would have, the loss of the original inventory will not authorize parol evidence of its former existence and return, nor will such evidence be admitted to show that an executor qualified as such. Neither will the custodian of the records be permitted to testify that a will has been duly recorded and that the executor returned an inventory of all property belonging to the estate. *Roberts v. Connellee*, 71 T. 11, 8 S. W. 626.

A party to an action in which the pleadings had been lost could testify as to whether it was to recover against him personally or against the estate of which he was an executor, though he did not remember the petition nor its contents. *Croom v. Winston*, 18 C. A. 1, 43 S. W. 1072.

A witness testifying as to a lost receipt may give his best recollection of its contents or state what purported to be its contents. *Gordon v. McCall*, 20 C. A. 233, 48 S. W. 1111.

Where the tax rolls were lost, evidence of a deputy assessor and collector, who assisted in making the rolls, held admissible to show that the tax rolls of the city were true copies of the assessment rolls. *Grace v. City of Bonham*, 26 C. A. 161, 63 S. W. 158.

Where evidence is introduced to avoid a judgment pleaded as *res judicata* of rights involved and the pleadings on which such judgment is based are lost, a witness may testify what the issues were as shown by the pleadings, but may not give his understanding of what was involved in the suit. *Robbins v. Hubbard* (Civ. App.) 108 S. W. 773.

The keeper of books of account beyond the control of the party and beyond the reach of a subpoena held authorized to testify as to their contents. *Barclay v. Deyerle*, 53 C. A. 236, 116 S. W. 123.

In trespass to try title, held proper to admit testimony that witness saw a tax deed on record in another county. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

30. — **Subscribing witnesses.**—A lost deed held properly proved by the admission of a copy, instead of by the oral evidence of subscribing witnesses. *Masterson v. Harris*, 37 C. A. 145, 83 S. W. 428.

31. — **Memoranda and other documents.**—Documents showing the consideration and purpose of an alleged grant of land sought to be established by circumstantial evidence, the original being lost, are competent evidence. *Mackey v. Armstrong*, 84 T. 159, 19 S. W. 463.

The recital in a second deed, made to supply the lost deed, of the execution of such prior deed, is admissible as evidence of that fact. *Dohoney v. Womack*, 1 C. A. 354, 19 S. W. 333, 20 S. W. 950.

An original citation in a foreclosure suit is proper secondary evidence of the contents of the original petition. *Oppermann v. McGown* (Civ. App.) 50 S. W. 1078.

32. — **Copies and counterparts.**—As to proof of contents of lost instrument, see Art. 3700. *Loftin v. Nally*, 24 T. 565.

Photographic copies of writings are secondary evidence, and it is a question of fact whether, when offered in evidence, they are exact reproductions of the originals. *Eborn v. Zimpelman*, 47 T. 503, 26 Am. Rep. 315; *Houston v. Blythe*, 60 T. 506.

When the affidavit of the loss of a deed is filed in a suit, a certified copy from the record, showing that the deed had been recorded thirty years, with strong corroborating circumstances of its authenticity, will authorize the introduction of such copy as a copy of an ancient instrument, though an affidavit has been filed impeaching the genuineness of the original. Otherwise if there be no authentic entry on the record or evidence showing the date of registration. *Brown v. Simpson*, 67 T. 225, 2 S. W. 644; *Davis v. Pearson*, 26 S. W. 241, 6 C. A. 593; *Walker v. Peterson* (Civ. App.) 33 S. W. 269.

An examined copy of a certified copy of a recorded instrument is not admissible in evidence. *Lasater v. Van Hook*, 77 T. 650, 14 S. W. 270.

A copy of an instrument, the original of which is without this state, is admissible in evidence. *Railway Co. v. Gernan*, 84 T. 141, 19 S. W. 461; *Howard v. Galbraith* (Civ.

App.) 30 S. W. 689; Masterton v. Jordan (Civ. App.) 24 S. W. 549. As to letter press copies, see Thomson-Houston Electric Co. v. Berg, 10 C. A. 200, 30 S. W. 454.

In an action for delay in delivering a telegram, copies of the telegram delivered to plaintiff are admissible as secondary evidence. Western Union Tel. Co. v. Thompson, 18 C. A. 279, 44 S. W. 402.

Loss of a patent from the republic of Texas being shown by affidavit, the grant may be proved by certified copy from the records of the county court. Baylor v. Tillebach, 20 C. A. 490, 49 S. W. 720.

Where original field notes are lost an identified copy thereof held admissible. Stewart v. Crosby (Civ. App.) 56 S. W. 433.

Where two copies of a letter are made at the same time, and one is sent and the other retained, the one sent becomes the original and the other the copy. McDonald v. Hanks, 52 C. A. 140, 113 S. W. 604.

Generally, copies of copies are not admissible as secondary evidence of the contents of the original instruments. William M. Rice Institute v. Freeman (Civ. App.) 145 S. W. 688.

33. — **Sufficiency.**—In action for the death of plaintiffs' decedent, evidence as to contents of policies on the life of the deceased for plaintiffs' benefit held inadmissible. Houston & T. C. R. Co. v. Johnson, 27 C. A. 420, 66 S. W. 72.

Evidence held to warrant a finding of the execution of a lost deed to defendant and to establish the contents thereof. Simpson Bank v. Smith, 52 C. A. 349, 114 S. W. 445.

Evidence held insufficient to prove the execution of a lost deed. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

34. — **Records.**—To establish a lost deed held that an improper record thereof was admissible. Jones' Estate v. Neal, 44 C. A. 412, 98 S. W. 417.

RULE 10. SECONDARY EVIDENCE OF THE CONTENTS OF A WRITING IS ADMISSIBLE WHEN THE PAPER IS IN THE HANDS OF THE OPPOSITE PARTY AND NOTICE TO PRODUCE IT HAS BEEN GIVEN

Possession by adverse party.—Facts held to authorize the admission of secondary evidence of a deed. Heintz v. O'Donnell, 17 C. A. 21, 42 S. W. 797.

A tenant held entitled to testify as to contents of letters written to his deceased landlord after notice to produce the same. Hazlewood v. Pennybacker (Civ. App.) 50 S. W. 199.

Parol evidence of the contents of a written instrument is admissible, where opposite party has the only copy of the instrument in his possession, and fails to produce it after notification. Galveston, H. & S. A. Ry. Co. v. Robinett (Civ. App.) 54 S. W. 263.

Where, on defendant's failure, on notice from plaintiff, to produce contracts, plaintiff proved them by secondary evidence, such evidence will not be stricken out on defendant's subsequently introducing them. Gulf, C. & S. F. Ry. Co. v. Leatherwood, 29 C. A. 507, 69 S. W. 119.

A shipper, under the facts, held entitled to show by secondary evidence the contents of a waybill. Gulf, C. & S. F. Ry. Co. v. Harris (Civ. App.) 72 S. W. 71.

A certified copy of a deed of trust held admissible, where defendant, to whom the original had been executed and delivered, failed to produce it after notice, or to give any sufficient reason therefor. Kothman v. Faseler (Civ. App.) 84 S. W. 390.

Refusal to strike out certain secondary evidence held not erroneous, in view of defendants' failure to produce the primary evidence after being notified so to do. Sheldon Canal Co. v. Miller, 40 C. A. 460, 90 S. W. 206.

Where a husband and wife executed an instrument designating a homestead, and failed, after being notified, to produce the original instrument of designation, a certified copy thereof was admissible in evidence. McGaughey v. American Nat. Bank, 41 C. A. 191, 92 S. W. 1003.

Secondary evidence of the contents of a writing held admissible. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

Secondary evidence held admissible to prove the contents of a written contract. Witherspoon v. Duncan (Civ. App.) 131 S. W. 660.

A copy of a letter held admissible. Austin v. Rupe (Civ. App.) 141 S. W. 547.

Proof as to possession or control of primary evidence.—An affidavit by a party stating that his adversary, the grantee, has possession of a deed, has been absent from the state for more than a year, still is absent and his whereabouts unknown to affiant; that he has had no opportunity of procuring the instrument; that it is in existence, but knows not where it is and cannot produce it, affords a sufficient predicate for the admission of secondary evidence as to its contents. Robertson v. Moorner, 25 T. 428.

It was shown that a copy of the black list (sought to be proved) had been in possession of an assistant superintendent of the defendant railway company; that said assistant had returned the paper to the general superintendent and notice to produce had been served upon defendant. Held, that the predicate was sufficient to admit secondary evidence of the contents of such paper or list. Behee v. Railway Co., 71 T. 424, 9 S. W. 449.

Evidence as to the contents of a letter was properly excluded, in the absence of proof that it was ever mailed to the plaintiff, where he denied its receipt. Robson v. Brown (Civ. App.) 57 S. W. 83.

Notice to produce primary evidence—Necessity in general.—Suit was brought by plaintiff on a note in the ordinary form, alleged to have been given for a part of the purchase-money of land as evidenced by a bond for title. No notice was given to the defendant to produce the bond for title on the trial and it was not in evidence. Parol evidence of the sale of the land was inadmissible. Farmer v. Simpson, 6 T. 303.

In a suit for the recovery of personal property the defendant pleaded that he held it as agent of J. C. A witness testified that he had read a bill of sale purporting to be from J. C. to R. H., plaintiff's intestate, conveying to him the property sued for, but witness did not know the handwriting of J. C. B. E. and J. C. lived in the same house, and at the time had a dispute about a settlement. About two hours after this occur-

rence, B. E. came to his death by violence in the house of J. C., and when his death was discovered J. C. had absented himself, and had not been since seen in the country. The bill of sale mentioned had never been found. No notice was given to defendant to produce. Held, that evidence of the contents of the bill of sale was admissible. *Cheatnam v. Riddle*, 8 T. 162.

A suit was brought to recover possession of a written instrument in the possession of the defendant as administrator, or to recover the value of the property. There was a demand and refusal to return the instrument or account for the proceeds, before suit, but notice to produce it on the trial was not given. Parol evidence of the contents of the written instrument was not admissible. *Muller v. Hoyt*, 14 T. 49.

When a written instrument is in the hands of the adverse party, to lay the foundation for the introduction of parol evidence of its contents, notice must be given to him or his attorney to produce it. To this rule are exceptions: 1. Where the instrument to be produced and that to be proved are duplicate originals. 2. Where the instrument to be proved is itself a notice, such as the notice of the dishonor of a bill. 3. Where from the nature of the action or pleading the party has notice that his adversary intends to charge him with the possession of the instrument. *Dean v. Border*, 15 T. 298; *Hamilton v. Rice*, 15 T. 385; *Reliance Lumber Co. v. W. U. T. Co.*, 58 T. 394, 44 Am. Rep. 620. See *Muller v. Hoyt*, 14 T. 49, supra.

In a suit against a telegraph company for damages resulting from alleged failure to deliver a telegraph message, parol evidence of the contents of the message is admissible without first giving the defendant notice to produce the written message. *Reliance Lumber Co. v. W. U. T. Co.*, 58 T. 394, 44 Am. Rep. 620.

Before secondary evidence of the contents of letters addressed to the adverse party is admissible it is necessary that notice to produce has been given. *Tinsley v. Penniman*, 83 T. 54, 13 S. W. 718; *McCormick H. M. Co. v. Millett* (Civ. App.) 29 S. W. 80.

Contents of a letter cannot be shown where no notice to produce is given, and absence of original is not accounted for. *First Nat. Bank v. Oliver*, 16 C. A. 428, 41 S. W. 414.

Notice to produce an instrument in writing in the hands of the opposite party is not necessary when the nature of the action requires its introduction in evidence. *Battaglia v. Stahl* (Civ. App.) 47 S. W. 683.

When from the nature of the suit the defendant knows that the plaintiff will offer secondary evidence of contents of written instrument in his possession, he is bound to produce the original, without special notice so to do, if he is not willing for such secondary evidence to be so used. *Ellis v. Sharp*, 20 C. A. 482, 49 S. W. 409.

Defendant could not prove the contents of letters written by him to plaintiff, where it did not appear that proper notice to plaintiff to produce the originals had been given. *Stevens v. Equitable Mfg. Co.*, 29 C. A. 168, 67 S. W. 1041.

Before a copy of proofs of loss can be admitted in evidence by the insured, a predicate must be laid by giving notice to insurer to produce the original. *Underwriters' Fire Ass'n v. Henry* (Civ. App.) 79 S. W. 1072.

A letter-press copy of a letter held not admissible, without notice to the other party to whom it was addressed, to produce the original. *King v. Cisco Compress Co.*, 35 C. A. 653, 81 S. W. 114.

Copies of letters cannot be read in evidence as matter of right without notice having been given before the trial to produce the originals. *Higgins v. Mallock, Miller & Dycus* (Civ. App.) 95 S. W. 571.

Parol evidence as to the contents of a bill of lading held incompetent. *Texas Cent. R. Co. v. Fowler* (Civ. App.) 102 S. W. 732.

In an action based upon a deed, held, that secondary evidence thereof might be introduced without laying a foundation by giving notice to produce the original. *Harlan v. Harlan* (Civ. App.) 125 S. W. 950.

— **Description or identification of primary evidence.**—A notice to produce papers on the trial of a case must describe the writing demanded. It should contain a plain and concise statement of what is called for. If it is sufficiently certain to avoid misleading the opposite party, it will be held good, though it be inartificially drawn. *I. & G. N. R. Co. v. Donaldson*, 2 App. C. C. § 241.

A notice to produce letters written by R. to B. and M. was insufficient to require the production of letters written by R. to M. *Bryson & Hartgrove v. Boyce*, 41 C. A. 415, 92 S. W. 820.

— **Time of service.**—Secondary evidence of the contents of papers is not admissible unless notice to the adverse party to produce the originals is given in time to enable him so to do. *Ellis v. Sharp* (Civ. App.) 47 S. W. 670.

A notice to produce a document held insufficient to authorize parol evidence. *Continental Fire Ass'n of Ft. Worth v. Bearden*, 29 C. A. 569, 69 S. W. 982.

— **Filing of suit as notice.**—In an action for delay in delivering a message, secondary evidence of the message is admissible without notice having been given the company to produce the original. *Western Union Tel. Co. v. Thompson*, 18 C. A. 279, 44 S. W. 402.

Notice to adverse party to produce an instrument, the foundation of an action, held unnecessary in order to prove its contents by parol. *Battaglia v. Stahl* (Civ. App.) 47 S. W. 683.

Secondary evidence of a contract sued on held admissible, where it was in defendant's possession, though he was given no notice to produce it. *Ellis v. Sharp*, 20 C. A. 482, 49 S. W. 409.

In an action against a county, parol evidence of the contents of a written claim filed with the commissioners' court held admissible, though defendant was not notified to produce such claim. *Presidio County v. Clarke*, 38 C. A. 320, 85 S. W. 475.

Where the foundation of an action is a deed, so that the adverse party knows that he will be charged with possession of the deed and that it will be required in evidence, notice to produce it is unnecessary before offering secondary evidence thereof; and hence, in an action against plaintiff's alleged husband merely for divorce and against him and his grantee to set aside a deed ignoring plaintiff's rights as wife in the land

conveyed, the deed being the basis of the action, secondary evidence, consisting of the deed records in the county showing the deed and its contents, was admissible for all purposes of the suit, where the original was shown to be in defendant's possession. *Harlan v. Harlan* (Civ. App.) 125 S. W. 950.

— **Service on counsel or representatives.**—Service of notice to produce upon attorney for secretary of a convention held to justify the introduction of secondary evidence, on his failure to produce papers referred to. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

A sufficient predicate held laid for the admission in evidence of a copy of a letter. *Jacksboro Stone Co. v. Fairbanks Co.*, 48 C. A. 639, 107 S. W. 567.

In an action by an alleged wife against her alleged husband and his grantee to quiet title to a half interest in land conveyed by the husband, where written notice to produce the original deed from the grantor to the husband was given defendants' attorney, and defendants failed to produce it or to offer any explanation for their failure, plaintiff, after testifying that the original deed had been delivered by her to the defendant husband, could testify that, while she and her alleged husband were living together as man and wife after their marriage, they bought from a certain person the land in question for a certain consideration, and that the grantor conveyed it to the husband. *Harlan v. Harlan* (Civ. App.) 125 S. W. 950.

Under such circumstances, the grantor of the land in question to plaintiff's alleged husband could testify to the contents of the deed, and that he had released a vendor's lien therein; the release being shown him and identified. *Id.*

Character and degrees of secondary evidence.—See notes under Rule 9.

RULE 11. WHEN A WRITTEN INSTRUMENT IS LOST, DESTROYED OR MUTILATED, OR IS OUT OF REACH OF A SUBPŒNA DUCES TECUM, SECONDARY EVIDENCE IS ADMISSIBLE

Mutilation, destruction or loss of primary evidence.—By party offering secondary evidence.—Where canceled checks drawn by a husband on a deposit of his wife's separate funds cannot be found, the bank may show their payment by other evidence, in an action by the wife to charge the bank with a conversion thereof. *Coleman v. First Nat. Bank* (Civ. App.) 64 S. W. 93.

Writings in general.—Where an instrument has been mutilated or defaced by the unlawful act of a stranger, so that its identity is lost, the law regards it, so far as the rights of the parties are concerned, merely as an accidental destruction of primary evidence, compelling a resort to that which is secondary, and in such cases the mutilated portion may be admitted as secondary evidence of so much of the original. *Wooten v. Dunlap*, 20 T. 183.

Where a petition for the incorporation of a town was lost, parol evidence held admissible to prove its boundaries. *Judd v. State*, 25 C. A. 418, 62 S. W. 543.

In an action for injuries to a passenger traveling on a pass, parol proof of the provisions thereof held admissible on proof of its loss. *International & G. N. R. Co. v. Lynch* (Civ. App.) 99 S. W. 160.

Evidence of translation based on copy of original held inadmissible where it did not appear that the original was lost. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

— **Sealed instruments.**—In an action involving title to land claimed by defendant by adverse possession by himself and grantor, it was proper to allow defendant to testify as to contents of lost deed, to show privity between defendant and grantor. *Texas & N. O. R. Co. v. Bancroft* (Civ. App.) 56 S. W. 606.

In ejectment, secondary evidence held admissible on the issue of transfer of title. *Lochridge v. Corbett*, 31 C. A. 676, 73 S. W. 96.

Where the loss of an original deed was shown, parol evidence as to its execution and contents was admissible. *Poittevent v. Scarborough* (Civ. App.) 117 S. W. 443.

A copy of a right of way deed to a railroad company held admissible to show that the place where plaintiff in crossing its right of way fence was injured was not in a street. *Miller v. Freeman* (Civ. App.) 127 S. W. 302.

— **Judicial papers.**—Oral testimony held admissible to show what was done under execution when papers had been lost. *Davis v. Beall* (Civ. App.) 50 S. W. 1036.

An alias execution being lost, it was not error to permit parol evidence of its contents. *Smith v. Ridley*, 30 C. A. 158, 70 S. W. 235.

When the report of commissioners to partition an estate has been lost, and is incapable of production, circumstantial evidence is admissible to prove its contents. *Johnson v. Franklin* (Civ. App.) 76 S. W. 611.

Where pleadings in a suit are lost, parol evidence held competent to show what was in controversy. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

In scire facias on a bail bond, secondary evidence of its contents held admissible under the circumstances. *Day v. State*, 51 Cr. R. 324, 101 S. W. 806.

Secondary evidence held admissible to show what issues were decided by a judgment pleaded as *res judicata* where the pleadings are lost. *Robbins v. Hubbard* (Civ. App.) 108 S. W. 773.

Where an original order of sale under a foreclosure decree was lost, the entry in the execution docket showing the return on the order of sale held admissible. *Anderson v. Casey-Swasey Co.* (Civ. App.) 120 S. W. 918.

Where it appears, in an action on a justice's judgment, that the citation and all the papers in the original action are lost, and that in the trial of such action plaintiff had adopted his citation as his pleadings, parol evidence is admissible to show what the citation contained and to identify the present defendant with the defendant in the justice's court. *Easterwood v. Burnitt* (Civ. App.) 126 S. W. 934.

— **Orders, warrants and negotiable instruments.**—Motion to dismiss an action wherein a distress warrant was wrongfully sued out for want of jurisdiction held properly admitted in evidence in an action for damages therefor, though not sworn to. *Kingsley v. Schmicker* (Civ. App.) 60 S. W. 331.

Evidence of the contents of a distress warrant wrongfully sued out and the list of property held properly admitted in an action therefor, where such warrant and list were shown to have been lost. *Id.*

Proof as to destruction or loss of and search for primary evidence—Method of proof.—The judgment in a suit having been reversed on the ground that secondary evidence of the contents of a written instrument was improperly admitted, the affidavit of its loss being defective, and the cause having been remanded for a new trial, the plaintiff was permitted to file an additional affidavit of loss. *Bateman v. Bateman*, 21 T. 432.

To authorize the introduction of secondary evidence of a lost instrument, it must be shown that notice to produce has been given where it is necessary, that there has been diligent search and inquiry made of the proper person and in the proper place, and the loss must be proved, if possible, by the person in whose custody it was at the time of the loss, if such person be living, and if dead, application should be made to his representatives, and search made among the documents of the deceased. The declarations merely as to loss of the person in whose custody it was at the time will not do; such custodian must be produced or his absence satisfactorily accounted for. *Vandergriff v. Piercy*, 59 T. 371. Citing *Dunn v. Choate*, 4 T. 14; *Crayton v. Munger*, 9 T. 285; *Bateman v. Bateman*, 16 T. 544; *Butler v. Dunagan*, 19 T. 559; *Hooper v. Hall*, 30 T. 154.

An affidavit of the loss of an instrument is not necessary in order to admit evidence of its contents. *Smith v. Cavitt*, 20 C. A. 558, 50 S. W. 167.

Evidence by a person not the owner or legal custodian held insufficient to lay the foundation for the introduction of secondary evidence as to writings. *Pennybacker v. Hazlewood*, 26 C. A. 183, 61 S. W. 153.

Weight and sufficiency in general.—Secondary evidence of the contents of an instrument is admissible where a witness testified that he and the last custodian thereof made a joint search for it among the latter's papers, and that it could not be found. *Thompson v. Chaffee*, 39 C. A. 567, 89 S. W. 285.

Foundation held insufficient to admit secondary evidence of contents of writing. *Dyer v. McWhirter*, 51 C. A. 200, 111 S. W. 1053.

Secondary evidence of the contents of the family record contained in a family Bible held admissible. *Ragley-McWilliams Lumber Co. v. Hare* (Civ. App.) 130 S. W. 864.

Records.—An affidavit that the building in which a record was kept had been destroyed by fire; that the witness had been informed at the proper office that a great many of the records and nearly all of the office papers were missing, and that the clerk had told him that they had been burned, but no evidence of inquiry for the particular record or of its destruction was shown, was insufficient to authorize parol evidence of its contents. *Bray v. Alken*, 60 T. 688.

There being evidence indicating that certain ancient court records had been lost, evidence of a tradition that they were missing, and testimony of the clerk that he was told when elected that they were missing, is admissible. *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

Evidence held to constitute a sufficient predicate for the introduction of secondary evidence in proof of a judgment. *Houston & T. C. R. Co. v. De Berry*, 34 C. A. 180, 78 S. W. 736.

In an action against a telephone company for failure to notify plaintiff of a sick call, evidence held not to show such search for an original ticket record claimed to be lost as justified the admission of a copy thereof. *Southwestern Telegraph & Telephone Co. v. Owens* (Civ. App.) 116 S. W. 89.

Where the evidence showed that a Bible was the family Bible of a person and contained a family record, and that a party had tried to procure the Bible as evidence, and was unable to do so, secondary evidence of the contents of the family record was admissible. *Ragley-McWilliams Lumber Co. v. Hare* (Civ. App.) 130 S. W. 864.

Judicial papers.—There being no entry on justice's docket of issuance of execution, secondary evidence thereof may be given, on an issue as to the dormancy of judgment, after diligent search among the papers. *Corder v. Steiner* (Civ. App.) 54 S. W. 277.

Secondary evidence held inadmissible to prove contents of an abandoned pleading stated to have been mislaid in the absence of evidence of loss and proof of search. *Smith v. Texas & N. O. R. Co.* (Civ. App.) 105 S. W. 528.

Books of account.—Parol evidence of the contents of books of account or papers is not admissible until the writings have been accounted for as lost after reasonable search was made to obtain them. *Cobb v. Bryan* (Civ. App.) 97 S. W. 513.

Bonds.—Proof of diligent but unsuccessful search at bank for bond left with cashier held a sufficient predicate to authorize parol evidence. *Hassard v. May* (Civ. App.) 152 S. W. 665.

Contracts and assignments.—The refusal to admit parol evidence of the contents of a lost contract held error. *Collins v. Boyd* (Civ. App.) 59 S. W. 831.

Where a contract was traced to the possession of defendants' attorneys, and it was not shown that any search was made for it, or that it could not be produced, parol evidence held not admissible to show its contents. *Abeel v. Levy* (Civ. App.) 61 S. W. 937.

Where a contract for the sale of land was made in duplicate, parol evidence thereof was inadmissible without an effort to account for the nonproduction of both duplicates. *Bryson & Hartgrove v. Boyce*, 41 C. A. 415, 92 S. W. 820.

In an action on a written contract, testimony of plaintiff and his attorneys showing that the original contract had been lost was sufficient predicate to authorize the admission of a copy in evidence. *Fred W. Wolf Co. v. Galbraith* (Civ. App.) 94 S. W. 1100.

Letters and telegrams.—Proof of loss of letters held insufficient to warrant proof of their contents. *Stevens v. Equitable Mfg. Co.*, 29 C. A. 168, 67 S. W. 1041.

Evidence held sufficient to authorize secondary evidence of the contents of letters. *Price v. Oatman* (Civ. App.) 77 S. W. 258.

Where the writing of letters to third persons was a part of plaintiff's services, production of the originals was sufficiently excused to justify the admission of copies. *Curtisinger v. McGown* (Civ. App.) 149 S. W. 303.

— **Conveyances.**—Search for and loss of a deed should be proven by the person in whose custody it was, or by his legal representative in case of his death. *Dunn v. Choate*, 4 T. 14; *Bateman v. Bateman*, 16 T. 541; *Id.*, 21 T. 432; *White v. Burney*, 27 T. 50; *Olive v. Bevil*, 55 T. 423; *Vandergriff v. Piercy*, 59 T. 371; *Lea v. Hogue*, 1 App. C. C. § 607. See *Harvey v. Edens*, 69 T. 420, 6 S. W. 306; *Shifflet v. Morelli*, 68 T. 382, 4 S. W. 843.

A party claiming title to land through a lost deed testified that he saw it executed in 1858; searching for it in 1869, he found it among the papers of one who had been county clerk. He delivered the deed to another person to have it recorded, and afterwards was informed by him that it had been destroyed by fire. This person afterwards died and his papers came into witness' possession, who knew that it was not among the papers of the deceased party to whom he had intrusted it, and who reported its destruction by fire. Held, that the evidence of its former pre-existence and loss was sufficient to admit secondary evidence of its contents. *Parks v. Caudle*, 58 T. 216.

To justify the admission of secondary evidence of the execution and contents of a lost instrument, it must be proved that there has been diligent search and inquiry made of the proper persons, and in the proper places, for the lost instrument. The loss must be proved by the person in whose custody it was at the time of the loss (*Southall v. Southall*, 26 S. W. 150, 6 C. A. 694), if he should be living, and, if dead, application should be made to his representative, and search made among the papers of the deceased. *Vandergriff v. Piercy*, 59 T. 372; *Bounds v. Little*, 75 T. 316, 12 S. W. 1109; *Hill v. Taylor*, 77 T. 299, 14 S. W. 366; *Trimble v. Edwards*, 84 T. 497, 19 S. W. 772; *Gayle v. Perryman*, 24 S. W. 850, 6 C. A. 20; *Baldwin v. Goldfrank*, 26 S. W. 155, 9 C. A. 269; *Id.*, 88 T. 249, 31 S. W. 1064; *Howard v. Galbraith* (Civ. App.) 30 S. W. 689; *Daniels v. Creekmore*, 27 S. W. 148, 7 C. A. 573; *Texas M. & I. Co. v. Arkell* (Civ. App.) 29 S. W. 816; *Battaglea v. Thomas*, 23 S. W. 335, 5 C. A. 563; *Harvesting Machine Co. v. Millett* (Civ. App.) 29 S. W. 80; *Olive v. Morgan*, 28 S. W. 572, 8 C. A. 654; *Cason v. Laney* (Civ. App.) 27 S. W. 420; *Masterton v. Jordan* (Civ. App.) 24 S. W. 549; *Harrison v. Hawley*, 26 S. W. 765, 7 C. A. 308; *Prior v. National Bank* (Civ. App.) 29 S. W. 84; *Adkins v. Galbraith*, 10 C. A. 175, 30 S. W. 291; *Telegraph Co. v. Willford* (Civ. App.) 27 S. W. 700; *Telegraph Co. v. Smith* (Civ. App.) 26 S. W. 216.

Evidence held sufficient to show that a deed was burned, and to warrant secondary evidence of its contents. *Walker v. Pittman*, 18 C. A. 519, 46 S. W. 117.

Loss of deed held sufficiently established to admit secondary evidence of its contents. *Smith v. Cavitt*, 20 C. A. 558, 50 S. W. 167.

An immaterial clerical variance between a certified copy of a deed and the affidavit of loss held not to preclude the introduction of the copy in evidence. *Williams v. Cessna*, 43 C. A. 315, 95 S. W. 1106.

In an action of trespass to try title, evidence held insufficient to authorize the admission of parol proof of the execution and contents of a certain deed. *Tallaferro v. Rice*, 47 C. A. 3, 103 S. W. 464.

To establish the execution of a lost deed by circumstances a predicate must be laid by showing a search for and an inability to find the deed. *Punchard v. Masterson* (Civ. App.) 103 S. W. 826.

Evidence as to the loss of and search for a deed held sufficient as a predicate for the introduction of secondary evidence. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

Certain facts held to lay a proper foundation for the introduction of secondary evidence of the execution of a deed. *Rushing v. Lanier*, 51 C. A. 278, 111 S. W. 1089.

Certain testimony held admissible to prove that a lost deed in a chain of title had been executed and conveyed the land. *Kirby v. Blake*, 53 C. A. 173, 115 S. W. 674.

In trespass to try title, evidence as to the loss of original deeds, and as to diligence in searching for them, held sufficient to warrant the introduction of the foreign record of such deeds. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 128 S. W. 629.

Certain facts held to excuse the necessity of making inquiry of a grantor in a deed as to its existence as preliminary to the introduction of secondary evidence. *Id.*

Secondary evidence of a lost deed may be received without a showing that the grantor is dead or that inquiry was made of him as to the existence of the deed, where the deed was executed 40 years before the trial, and there was evidence that a subsequent grantee recorded the deed in question at the same time he recorded other instruments affecting the title of the land, thus raising the inference that such grantee must have had possession of such deed, and hence that the grantor had parted with its possession. *Id.*

Failure to show by a recorder what he did with deeds now lost after recording them held not a prerequisite to admission of secondary evidence to show their execution and contents. *William M. Rice Institute v. Freeman* (Civ. App.) 145 S. W. 688.

Primary evidence beyond the court's jurisdiction.—Schedules of charges filed by railroad company with interstate commerce commission may be proved by testimony of the secretary of the commission. *Gulf, C. & S. F. Ry. Co. v. Dimmitt*, 17 C. A. 255, 42 S. W. 583.

Where original documents were beyond the jurisdiction of the court, secondary evidence held admissible. *St. Louis & S. F. Ry. Co. v. May*, 53 C. A. 257, 115 S. W. 900.

Showing that account books are beyond the court's jurisdiction is a sufficient predicate for secondary evidence of their contents. *Missouri, K. & T. Ry. Co. v. Gober* (Civ. App.) 125 S. W. 383.

Character and degrees of secondary evidence.—See notes under Rule 9.

Determination of question of admissibility of secondary evidence.—The quantity of preliminary proof is to be determined by the judge. *White v. Barry*, 27 T. 50; *Jackson v. Deslonde*, 1 U. C. 674. The question cannot be raised by an instruction to the jury. *Robertson v. Coates*, 1 C. A. 664, 20 S. W. 875.

Discretion of trial court in the admission of secondary evidence held subject to revision by appellate court. *Dyer v. McWhirter*, 51 C. A. 200, 111 S. W. 1053.

The sufficiency of the proof offered as a predicate for the admission of an alleged lost deed is within the judicial discretion of the trial court under all the circumstances of the particular case. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

Extent of review of discretion of trial court in excluding secondary evidence of a lost instrument stated. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 128 S. W. 629.

In trespass to try title, where plaintiffs claimed that the lost deed on which defendants relied was forged, evidence of the loss of the instrument held admissible only for the purpose of allowing secondary evidence. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

RULE 12. THE BURDEN OF PROOF LIES ON THE PARTY ASSERTING A FACT ESSENTIAL TO HIS RIGHT OF ACTION OR DEFENSE AND PUT IN ISSUE BY THE PLEADINGS OF THE ADVERSE PARTY

I. Presumptions in general.

1. Inference from facts proved.
2. Official proceedings and acts.
3. Grounds.
4. Presumption on presumption.
5. Identity of persons and things.
6. Personal status and condition in general.
7. Nature and condition of property or other subject-matter.
8. Health and physical condition.
9. Love of life and avoidance of danger.
10. Innocence.
11. Character.
12. Mental capacity in general.
13. Sanity.
14. Intent.
15. Knowledge of law.
16. Knowledge of fact.
17. Continuance of fact or condition.
18. Consequences of acts.
19. Regularity of course of business or conduct of affairs.
20. Making, validity and genuineness of writings.
21. Mailing and delivery of mail matter.
22. Corporate acts and records.
23. Evidence withheld or falsified.
24. — Failure of party to testify or giving evasive answers.
25. — Failure to call witness.
26. — Suppression or spoliation of evidence.
27. Laws of other states.
28. Laws of foreign countries.
- 29, 30. Judicial proceedings — In general.
31. — Administration of estate.
32. — Courts in general.
33. — Jurisdiction.
34. — Judgment.
35. — Jury.
36. — Judicial sales.
37. Operation and effect.
38. Conflicting presumptions of fact.
39. Rebuttal of presumptions.
40. Legitimacy of child.
41. Negotiable instruments.
- 41½. Limitations.
42. Boundaries.
43. Compromise and settlement.
44. Contracts.
45. Damages.
46. Death.
47. Delivery of deed.
48. Descent of property.
49. Fraud.
50. Gifts.
51. Separation of husband and wife.
- 51½. Separate property.
52. Community property.
53. Insurance.
54. Liquor license.
55. Judicial sales.
56. Libelous statements.

57. Priority of lien.
58. Marriage.
59. Mortgages.
60. Negligence in general.
61. — Proximate cause.
62. — Contributory negligence.
63. — Carriage of goods.
64. — Telegraphs and telephones.
65. Notice.
- 65½. — Giving of notice of claim for damages.
66. Partnership.
67. Payment.
68. Existence of agency and extent of authority.
69. Ownership and possession.
70. Public lands.
71. Receivers.
72. Sales.
- 72½. Bona fide purchaser.
73. Validity of statutes.
74. Tenants in common.
75. Malice.
76. Making of will.

II. Presumptions on appeal or writ of error.

77. In general.
78. Burden of showing error.
79. Grounds and forms of action or defense.
80. Jurisdiction.
81. Venue.
82. Parties.
83. Process and appearance.
84. Pleading.
85. — Demurrer.
86. — Amendments.
87. — Striking out or dismissal.
88. Interlocutory proceedings.
89. Qualification and selection of jurors.
90. Conduct of trial.
91. Admissibility and reception of evidence.
92. Dismissal or direction of verdict.
93. Instructions.
94. Custody and conduct of jury.
95. Verdict.
96. Findings of court.
97. Order granting or refusing new trial.
98. Amount of recovery.
99. Judgment.
100. Orders and proceedings after judgment.
101. Costs.
102. Taking and perfecting appeal or other proceeding for review.
103. Making and contents of bill of exceptions, case or statement of facts.
104. Appeal from justice court.
105. Appeal from intermediate court.

III. Res ipsa loquitur.

106. The fact speaks for itself.

IV. *Burden of proof in general.*

107. Nature and scope in general.
108. Party asserting or denying existence of facts.
109. Proof of negative.
110. Extent of burden in general.
111. Failure to sustain burden.
112. Effect of plea of non est factum.
113. Accord and satisfaction.
114. Limitations and adverse possession.
115. Alteration of instruments.
116. Wrongful attachment.
117. Attorney and client.
118. Bailment.
119. Bills and notes.
120. Bona fide purchasers.
121. Boundaries.
122. Brokers.
123. Carriers.
124. Contracts in general.
125. Want or failure of consideration.
126. Corporations.
127. Damages.
128. Death and survivorship.
129. Dedication.
130. Descent.
131. Residence.
132. Election contest.
133. Condemnation of property.
134. Estoppel.
135. Writ of execution.
136. Administration of estate.
137. False imprisonment.
138. Forgery.
139. Fraud.
140. Statute of frauds.
141. Garnishment.
142. Guardian and ward.
143. Homestead.
- 143½. Community property.
144. Separate property.
145. Indemnity.
146. Emancipation of child.
147. Insane persons.
148. Insurance.
149. Intoxicating liquors.
150. Judgment or order.
151. Landlord and tenant.
152. Libel and slander.
153. Lost instruments.
154. Malicious prosecution.
155. Mandamus.
156. Marriage.
157. Master and servant in general.
158. Mechanics' liens.
159. Mortgages.
160. Ordinance.
161. Names.
162. Notice.
163. Nuisance.
164. Parties.
165. Partition.
166. Partnership.
167. Payment.

168. Agency and authority.
169. Principal and surety.
170. Title and ownership.
171. Public lands.
172. Receivers.
173. Reformation of instruments.
174. Release.
175. Religious societies.
176. Sales.
177. Sequestration.
178. Set-off and counterclaim.
179. Sheriffs and constables.
180. Statutes.
181. Taxes and taxation.
182. Torts in general.
183. Recovery of land in general.
184. Conversion of property.
185. Trusts and following trust property.
186. Usury.
187. Vendor and purchaser.
188. Venue.
189. Warehousemen.
190. Water courses and water supply.
191. Negligence—Injuries to person in general.
192. — Proximate cause of injury.
193. — Fellow servant.
194. — Assumption of risk.
195. — Contributory negligence.
196. — Theaters and shows.
197. — Delay and failure to deliver telegrams.
198. — Carriage of goods and live stock.
199. — Negligent fires.
200. — Killing or injuring live stock.
201. — Injuries to third persons by acts of servants and independent contractors.

V. *Sufficiency of evidence to sustain burden of proof in first instance.*

202. Prima facie case.

VI. *General rules as to weight and sufficiency of evidence.*

203. Weight and conclusiveness in general.
204. Number of witnesses.
205. Positive and negative evidence.
206. Circumstantial evidence.
207. Credibility of witnesses.
208. Evidence introduced by adverse party.
209. Evidence improperly admitted.
210. Uncontroverted evidence.
211. Degree of proof in general.
212. Sufficiency to support verdict or finding.
213. Preponderance of evidence.
214. Matters of defense and rebuttal.
215. Particular facts or issues.

I. *Presumptions in General*

1. Inferences from facts proved.—See Rule 19.

2. Official proceedings and acts.—See Rule 14.

While Act 1848 (Art. 7159) makes it the duty of the county clerk to note the date on which a brand is recorded, it will, after a lapse of 30 years, be presumed that a recorded brand which has no date mark was recorded on the date immediately preceding it. *Dugat v. State* (Cr. App.) 148 S. W. 789.

3. Grounds.—Rule stated as to implication of damages naturally arising from tort complained of. *Dallas Consol. Electric St. Ry. Co. v. Pettit*, 47 C. A. 354, 105 S. W. 42.

Presumptions must be based on some necessity, and the court will not go into the domain of presumptions when direct proof can be obtained. *Skov v. Coffin* (Civ. App.) 137 S. W. 460.

4. Presumption on presumption.—A presumption cannot be based on a presumption. *Tull v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 87 S. W. 910; *Moore v. Hanscom*, 103 S. W. 665; *Jones v. Ft. Worth & D. C. R. Co.*, 47 C. A. 596, 105 S. W. 1007; *Ryle*

v. Davidson (Civ. App.) 116 S. W. 823; Missouri, K. & T. Ry. Co. of Texas v. Byrd, 124 S. W. 738; Tompkins v. Creighton-McShane Oil Co., 143 S. W. 306.

A presumption of fact cannot be made the basis of another presumption in arriving at a conclusion of fact. St. Louis Southwestern Ry. Co. of Texas v. McIntosh & Carlisle (Civ. App.) 126 S. W. 692.

An inference of the jury held a presumption on a presumption, and so not permissive. Vernon Cotton Oil Co. v. Jones (Civ. App.) 137 S. W. 424.

A presumption of judicial regularity furnishes no basis for a further presumption that the disqualification of the trial judge, which was of record, had been removed before judgment. Burnham v. Hardy Oil Co. (Civ. App.) 152 S. W. 182.

5. **Identity of persons and things.**—Identity does not appear from the following names: Conrad Furnash—Conrad Furinash. Shields v. Hunt, 45 T. 425. McKee—McRee. McRee v. Brown, 45 T. 503. Favers—Faver. Faver v. Robinson, 46 T. 204; Kern v. Reynolds (Civ. App.) 32 S. W. 711.

A certificate for land was issued to Joseph S. Guest. The plaintiff in an action of trespass to try title claimed under a transfer of the certificate signed by J. J. Guest. It was held that the identity of the parties was not shown by the names. Golden v. Patterson, 56 T. 628.

The strength of the presumption arising from similarity of names depends largely upon circumstances in evidence. McNeil v. O'Connor, 79 T. 227, 14 S. W. 1058.

Emerly and Emley are idem sonans. So held where interrogatories were filed and crossed to take depositions of Emerly when the commission was returned with depositions of Emley. Railway Co. v. Daniels, 1 C. A. 695, 20 S. W. 955. And see Bosley v. Pease (Civ. App.) 22 S. W. 516. "Asahel Savery," "Asal Savery," and "A Savary," held to be the same name. Smith v. Gillum, 80 T. 120, 15 S. W. 794; Chamblee v. Tarbox, 27 T. 144, 84 Am. Dec. 614; Robertson v. Du Bose, 76 T. 6, 13 S. W. 300. Albert Cebanis and Albert Cabaniss show identity. Lemberg v. Cabaniss, 75 T. 229, 12 S. W. 844. Forris and Farris are idem sonans. Lyne v. Sanford, 82 T. 53, 19 S. W. 847, 27 Am. St. Rep. 852; "Dillahunty," "Dillaunty," "Dillahinty," are within the rule of idem sonans and show one name. Dillahunty v. Davis, 74 T. 344, 12 S. W. 55. See Smith v. Gillum, 80 T. 120, 15 S. W. 794; Tevis v. Collier, 84 T. 638, 19 S. W. 801. "William Hieronymus," "William Hieronymas," are the same and not different names. Tevis v. Collier, 84 T. 638, 19 S. W. 801. Banks and Burks are not the same name. Collins v. Ball, 82 T. 259, 17 S. W. 614, 27 Am. St. Rep. 877. Burkhead and Bankhead are not synonymous. Id. The Southern Pacific Railroad Company and the Southern Pacific Company are not identical. Southern Pacific Co. v. Block Bros., 84 T. 21, 19 S. W. 300. Busse—Bosse. (Ogden v. Boose, 86 T. 336, 24 S. W. 798); Calvet—Calvert. (Day L. & C. Co. v. N. Y. & T. L. Co. [Civ. App.] 25 S. W. 1089), are idem sonans. The following are not presumed to be the same; McKinzie—McKezie. McKinzie v. Stafford, 27 S. W. 790, 3 C. A. 121. See Robertson v. Du Bose, 76 T. 1, 13 S. W. 300; McNeil v. O'Connor, 79 T. 223, 14 S. W. 1058; Smith v. Gillum, 80 T. 125, 15 S. W. 794; Yarbrough v. Johnson 12 C. A. 95, 34 S. W. 310.

Similarity of names of persons evidence of identity. Davidson v. Wallingford (Civ. App.) 30 S. W. 827. Identity of persons is shown by the following names: "Lennoyn" and "Lernoynne," Smith v. Shinn, 53 T. 1; Lindsey—Lindsay—Lindsay, Roberts v. State, 2 App. 4; Marietta—Mary Etta, Goode v. State, 2 App. 520; William—Williams, Williams v. State, 5 App. 226; Whiteman—Whitman, Henry v. State, 7 App. 388; Chatham—Chatam, Roth v. State, 10 App. 27; Hiram K. Harley—H. Harley, McAfee v. State, 14 App. 668; F. A. Fater—F. R. Fater, Delphino v. State, 11 App. 30.

See, also, on the question of identity, W. U. Tel. Co. v. Drake, 14 C. A. 601, 38 S. W. 632; Brown v. Brown (Civ. App.) 36 S. W. 918; Grant v. Searcy (Civ. App.) 35 S. W. 861; Wallace v. Byers, 14 C. A. 574, 38 S. W. 228.

Jos. Marx and J. Marx held names of the same person. Whitener v. State, 38 Cr. R. 146, 41 S. W. 595.

The names "Morris" and "Maurice" are idem sonans. Thompson v. State (Cr. App.) 97 S. W. 316.

"Georgia Holland" and "Georgia Harland" held idem sonans. Ex parte Holland, 53 Cr. R. 301, 108 S. W. 1181.

"Boulden" is not idem sonans with "Bourland." McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Identity of names is prima facie evidence of identity of persons. Ryle v. Davidson (Civ. App.) 116 S. W. 823.

The difference between the names "Zan" and "Zann" held immaterial. Zan v. Clark, 53 C. A. 525, 117 S. W. 892.

"Rowland" and "Roland" are idem sonans. Deckard v. State, 57 Cr. R. 359, 123 S. W. 417.

Similarity of name is sufficient to establish identity only when identity is not put in issue by the evidence. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

Where the name of the grantee of a patent was identical with that of the signer of a will who was named in probate proceedings, the identity of names will, in the absence of other evidence, sufficiently establish the fact that the testator was the grantee of the patent. McDoel v. Jordan (Civ. App.) 151 S. W. 1178.

6. **Personal status and condition in general.**—Plaintiff brought suit as the sole heir of J. C., to whom a patent for the land in controversy was issued in 1847. The evidence showed that J. C. died in 1848, leaving plaintiff his only child surviving. Held, that there was no presumption that J. C. was a married man at the time of the grant of the certificate for 640 acres of land to him, on which the patent was based. Brandon v. McNelly, 43 T. 76.

Where, after a long separation, husband and wife each marry another, it is presumed that they had been divorced. Nixon v. Wichita L. & C. Co., 84 T. 408, 19 S. W. 560.

In absence of proof to the contrary it will be presumed that a person was a citizen. State v. Zanco's Heirs, 18 C. A. 127, 44 S. W. 527.

A man and woman being of age at time of alleged marriage, it will be presumed they were competent to marry. Cuneo v. De Cuneo, 24 C. A. 436, 59 S. W. 284.

The fact that a man who had been married subsequently married another woman raised no presumption of a legal divorce. Hammond v. Hammond, 43 C. A. 234, 94 S. W. 1067.

7. **Nature and condition of property or other subject-matter.**—There is no presumption as to its employes that a railroad keeps its bridges in good repair. *Missouri, K. & T. Ry. Co. of Texas v. Parker*, 20 C. A. 470, 49 S. W. 717.

8. **Health and physical condition.**—See notes under Rule 19.

9. **Love of life and avoidance of danger.**—Contributory negligence cannot be presumed. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

One struck by a train at a place long used as a footway by the public held to have presumptively looked and listened for the approach of trains. *Ft. Worth & D. C. Ry. Co. v. Longino*, 54 C. A. 87, 118 S. W. 198.

In the absence of satisfactory evidence as to the death of a person being accidental or suicidal, the presumption is in favor of death by accident. *Mutual Life Ins. Co. v. Ford* (Civ. App.) 130 S. W. 769.

It is presumed that an insured's death was not by suicide. *Grand Fraternity v. Green* (Civ. App.) 131 S. W. 442.

Contributory negligence will not be presumed, but must be proved. *Jacksonville Ice & Electric Co. v. Moses* (Civ. App.) 134 S. W. 379.

10. **Innocence.**—A wife charged with marital infidelity is presumed to be innocent until the contrary is proved. *Williams v. Williams*, 67 T. 198, 2 S. W. 823.

The court, in the absence of evidence to the contrary, held required to assume that a person, having liquors in a local option territory, had them on hand for sale in compliance with the local option law, and sold them in compliance therewith. *Davis v. Kuehn* (Civ. App.) 119 S. W. 118.

In the absence of evidence to the contrary, the court will presume that one selling drinks in a local option territory sold only soft drinks, as testified to by him. *Id.*

In construing a contract, it must be presumed that the parties intended to obey the law. *Foard County v. Sandifer*, 105 T. 420, 151 S. W. 523.

11. **Character.**—Plaintiff in action for libel cannot prove good reputation in the first instance. *Young v. Sheppard* (Civ. App.) 40 S. W. 62.

In libel, in absence of a plea attacking plaintiff's character, or of evidence of bad character, held, that good character is presumed. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

In the absence of proof to the contrary, plaintiff in breach of marriage promise is presumed to have been a woman of good moral character. *Huggins v. Carey* (Civ. App.) 149 S. W. 390.

12. **Mental capacity in general.**—The law will presume, in the absence of proof to the contrary, that a minor did not appreciate and assume the ordinary risks of his employment, unless they were so obvious that any one must be held to know them. *Tucker v. National Loan & Investment Co.*, 35 C. A. 474, 80 S. W. 879.

13. **Sanity.**—Plaintiff's insanity at the time suit was brought for his benefit by a bank for the foreclosure of a vendor's lien would be presumed, in a suit by plaintiff to set aside a sale for inadequacy of price, to have resulted in deterring bidders. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

The presumption is that one signing a note is of sane mind, and the burden of proving the contrary is on the party alleging it. *Barnes v. McCarthy* (Civ. App.) 132 S. W. 85.

14. **Intent.**—That a purchaser on credit knew of his insolvency at the time held evidence of fraudulent intent. *Boaz v. Coulter Mfg. Co.* (Civ. App.) 40 S. W. 866.

No presumption of an intent to dedicate arises, unless it is clearly shown by the owner's acts and declarations or by a line of conduct, the only reasonable explanation of which is that a dedication was intended. *International & G. N. R. Co. v. Cuneo*, 47 C. A. 622, 108 S. W. 714.

In false imprisonment, malice held not necessary to be proved, where it is shown that imprisonment is unlawful. *Gold v. Campbell*, 54 C. A. 269, 117 S. W. 463.

Fraudulent intent of husband in inducing wife to institute action held not to be presumed, in action against her to collect allowance to guardians in the former action. *Thompson v. Morrow* (Civ. App.) 147 S. W. 706.

Fraudulent intent of an owner in withdrawing property from a broker, to defeat the right to a commission, may be inferred from the surrounding facts. *Anderson v. Crow* (Civ. App.) 151 S. W. 1080.

There is no presumption of law that a mortgage of property is made with fraudulent intent if the mortgagor at the time is actually indebted to another. *Hudson v. Childree* (Civ. App.) 156 S. W. 1154.

15. **Knowledge of law.**—Every one is presumed to know the law. *Day v. Snyder Brokerage & Storage Co.* (Civ. App.) 130 S. W. 716.

A member of a fraternal insurance organization is presumed to know its by-laws. *Modern Woodmen of America v. Owens* (Civ. App.) 130 S. W. 858.

Members of a fraternal beneficiary society are conclusively presumed to have notice of the by-laws of the order. *McWilliams v. Modern Woodmen of America* (Civ. App.) 142 S. W. 641.

A person will be presumed to know that the law requires tax records to be kept. *Cartwright v. La Brie* (Civ. App.) 144 S. W. 725.

Though every one is presumed to know the law as soon as a law is passed, there is no such presumption as to instructions given by heads of departments, or by the governor or president as to regulations formulated for carrying a law into effect. *State v. Palacios* (Civ. App.) 150 S. W. 229.

A court in construing a contract must presume that the parties knew the law. *Foard County v. Sandifer*, 105 T. 420, 151 S. W. 523.

A special statute granting a right of way to a railroad company through the public lands of the state is a public law, so as to be constructive notice to another railroad company of the extent of the rights of the grantee. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.* (Civ. App.) 151 S. W. 850.

There is a pseudo-presumption that every one is presumed to know the law. *Id.*

16. **Knowledge of fact.**—An employe of a railroad company is presumed to know the rules governing his duties. *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

Where the bill is silent as to when the mistake was discovered, it will be presumed to have been known since the deed was made. *Mathews v. Benavides*, 18 C. A. 475, 45 S. W. 31.

The presumption is that one falsely representing himself to be an experienced well digger knew the falsity thereof. *Davis v. Driscoll*, 22 C. A. 14, 54 S. W. 43.

A purchaser of county bonds on their face purporting to be for court-house purposes is presumed to have notice of the order of the commissioners' court by authority of which they were issued, and hence cannot be held an innocent purchaser. *Noel Young Bond & Stock Co. v. Mitchell County*, 21 C. A. 638, 54 S. W. 284.

Where a policy was made part of the petition in an action thereon, assured was conclusively presumed to have knowledge of a clause attached and mentioned in the body of the policy. *Hartford Fire Ins. Co. v. Post*, 25 C. A. 428, 62 S. W. 140.

A telegraph operator in New Orleans held not presumed in law to know the Sunday hours of the company at a town in Texas. *Western Union Tel. Co. v. McConnico*, 27 C. A. 610, 66 S. W. 592.

The rules of law with reference to the presumption arising from the recent possession of stolen property held to apply in a certain civil suit to recover possession of the property. *Cotner v. McCullough* (Civ. App.) 70 S. W. 344.

That defendant's track was straight on either side of a crossing near which plaintiff's horses were killed held insufficient to raise a presumption that defendant's servants saw the horses in time to avoid injury. *Gulf, C. & S. F. Ry. Co. v. Simpson*, 41 C. A. 125, 91 S. W. 874.

It is presumed that a vendor knew the boundaries of the land which he sold. *Gaffney v. Clark* (Civ. App.) 118 S. W. 606.

Where because an animal was unlawfully running at large the railroad owed no duty to look out for the animal, it could not be presumed from the fact that the track was straight where the animal was killed, and the view unobstructed, that the employés discovered the animal on the track. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 738.

An owner of land is presumed to know his own boundaries. *West Lumber Co. v. Chessher* (Civ. App.) 146 S. W. 976.

Persons engaged in a particular trade are presumed to know the customs thereof; and contracts relating thereto are presumptively made with reference to such customs. *Holder v. Swift* (Civ. App.) 147 S. W. 690.

17. Continuance of fact or condition.—Partnership once proved to exist is presumed to continue until dissolution is shown, and notice of such dissolution must be given to dealers and customers, which fact may be shown by direct or circumstantial evidence. *Mann v. Clapp*, 1 App. C. C. § 504.

A connecting carrier completing the transportation and delivering goods in a damaged condition is liable for the damages in the absence of evidence that he received them in the condition in which he delivered them, or without proof that some fact existed exonerating him from liability. *Railway Co. v. Barnhart*, 5 C. A. 601, 23 S. W. 801, 24 S. W. 331.

Admitted withdrawal value of stock at certain date will be presumed to be its value seven days later. *Bexar Building & Loan Ass'n v. Seebe* (Civ. App.) 40 S. W. 875.

An owner of land held entitled to recover damages for nuisance, though the evidence showed that his vendor had a lien 10 years previously. *Denison & P. S. Ry. Co. v. O'Maley*, 18 C. A. 200, 45 S. W. 225.

A person once adjudged insane is presumed to continue in that condition. *Herndon v. Vick*, 18 C. A. 583, 45 S. W. 852.

Where an application of a general rule of equity is shown to have existed in a state at one time, it is presumed to be still in force until the contrary is shown. *Babcock v. Marshall*, 21 C. A. 145, 50 S. W. 728.

Existence of power of attorney to convey land presumed, where it had been exercised 20 years previously, and the grantor had made no objection, and had admitted its exercise in another deed. *McCulloch County Land & Cattle Co. v. Whitefort*, 21 C. A. 314, 50 S. W. 1042.

In the absence of proof of the value of property at the time of trial, its value will be presumed to be the same as when replevied. *Monday v. Vance* (Civ. App.) 51 S. W. 346.

Where fruit is received by an initial carrier in good condition, and is delivered by a terminal carrier in a damaged condition, a prima facie case is made against the delivering carrier for damages. *Missouri, K. & T. Ry. Co. v. Mazzie*, 29 C. A. 295, 68 S. W. 56.

Evidence that, before an applicant for the purchase of school land moved onto it, he had it leased from the state for 10 years, is not conclusive that the lease was in force at the time he applied to purchase. *Anderson v. Walker* (Civ. App.) 70 S. W. 1003.

It will be presumed that the facts which establish a homestead right continue until the contrary is shown. *M. H. Lauchheimer & Sons v. Saunders*, 97 T. 137, 76 S. W. 750.

Where plaintiff delivered baggage to a hotel when not a guest, an inference that the baggage was still in the hotel when plaintiff later became a guest held justified. *Oriental Hotel Ass'n v. Faust*, 38 C. A. 573, 86 S. W. 373.

Proof of residence of trustee under deed of trust in another state prior to maturity of note secured held to raise presumption of his continued residence there, so that appointment of substitute trustee was valid. *Ward v. Forrester* (Civ. App.) 87 S. W. 751.

Where a person who has been employed under a written contract continues in the same service after the expiration of the contract by lapse of time, such continuation of service is presumed to be on the same terms as those embraced in the written contract. *Houston Ice & Brewing Co. v. Nicolini* (Civ. App.) 96 S. W. 84.

The homestead character of property will be presumed to continue until its use as such has been discontinued permanently. *H. P. Drought & Co. v. Stallworth*, 45 C. A. 159, 100 S. W. 188.

The law does not presume that what is once known will always be present in the memory. *Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co.*, 50 C. A. 172, 109 S. W. 1134.

Proof that testatrix was afflicted with senile dementia in 1899 was proof that she was in no better condition in 1902. *Mason v. Rodriguez*, 53 C. A. 445, 115 S. W. 868.

Proof of a decision rendered by the supreme court of the territory of Oklahoma in 1894, determining the law on a particular subject, held not such conclusive proof of the law of the state of Oklahoma as to warrant a charge that the law of the state of Oklahoma was as laid down in such decision. *Western Union Telegraph Co. v. Parsley*, 57 C. A. 8, 121 S. W. 226.

Where, in an action against connecting carriers for damage to cattle shipped, the evidence was conflicting whether the final carrier made another contract with the shipper at the connecting point, the doubt should be resolved in the shipper's favor, where the carrier did not introduce the alleged contract in evidence. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737, judgment reversed 104 T. 92, 134 S. W. 328.

The presumption that damage to freight shipped over several connecting lines occurred on the last connecting line is for the shipper's convenience, and cannot be invoked by an initial or intermediate carrier for its own protection. *Id.*

Where, in a suit against connecting carriers for damage to stock, the undisputed evidence shows that they were in the exclusive control of defendants, and were received by the initial carrier in sound condition, and injured when delivered at their destination, and no proof was offered that they were injured by one of the excepted agencies, and without negligence, which would exonerate from liability under the common-law rule, negligence is presumed. *St. Louis & S. F. R. Co. v. Franklin* (Civ. App.) 123 S. W. 1150.

If, in a suit against connecting carriers for damage to stock, their delivery in a sound or uninjured condition to the initial carrier is shown, and it further appears they were injured when delivered to consignee at destination, it establishes a prima facie case of negligence, and the burden then rests on defendants to show such injuries resulted from the inherent nature or propensity or "proper vice" of the animals, and without their neglect. *Id.*

That a bank was placed in charge of a receiver on November 7th is no proof of its condition on the preceding 24th of October. *Milmo Nat. Bank v. Cobbs* (Civ. App.) 128 S. W. 151.

A final carrier which delivers goods in a damaged condition is prima facie liable therefor. *Houston & T. C. R. Co. v. Kemendo* (Civ. App.) 131 S. W. 634.

Where, after a land commissioner had certified the center of a county, a new designation was made, it would be presumed, in the absence of any claim of fraud or mistake, that there had been such changes in the county lines as to materially change the center of the county. *Parrish v. Ralls* (Civ. App.) 133 S. W. 933.

The presumption is that an injury to freight occurred on the line of the terminal carrier, in the absence of any showing on the subject. *Martin v. Kansas City M. & O. Ry. Co.* (Civ. App.) 139 S. W. 615.

In trespass to try title to land which, in a previous action, had been adjudicated to be defendant's homestead, the presumption of continuity placed upon plaintiff the burden of proving that defendant had abandoned his homestead. *Holt v. Abby* (Civ. App.) 141 S. W. 173.

A definite state of facts, shown to have once existed, is presumed to continue. *Id.*
It cannot be presumed as a matter of law that the houses in the built-up part of a town were the same in 1910 as in 1891, when the town was made the county seat. *Ralls v. Parish* (Civ. App.) 151 S. W. 1089.

The court cannot presume that, because a part of the plat of an existing town was within five miles of the center of the county, any part of the town itself, as it previously existed, was within that radius; that being a matter of proof. *Id.*

The presumption of negligence against the last carrier, who receives live stock in good condition and subsequently delivers it in a damaged condition can only be indulged in the absence of testimony accounting for the injury. *Texas Cent. R. Co. v. Scott & Robertson* (Civ. App.) 151 S. W. 1113.

Where plaintiff in trespass to try title claimed as heir of his half-brothers, whose mother was shown to have been divorced, it could not be presumed that this status continued, and that she did not remarry and have other children. *Steddum v. Kirby Lumber Co.* (Civ. App.) 154 S. W. 273.

There is a presumption that a rule of foreign law, shown to exist, does not change. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

Sanity once shown to exist will be presumed to continue unless the contrary is established. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

The Carmack amendment to the interstate commerce act re-established the common-law rule that, when freight is delivered to a carrier in good condition and reaches its destination in bad condition, the presumption of negligence arises throwing the burden on the carrier of exonerating itself from liability. *Chicago, R. I. & G. Ry. Co. v. Scott* (Civ. App.) 156 S. W. 294.

In an action by a seller of corn, evidence that it was sound when loaded only five days before delivery will, in the absence of evidence showing subsequent exposure to damaging conditions, support a verdict that it was sound at time of delivery. *Levy v. Lupton* (Civ. App.) 156 S. W. 362.

The pleading and evidence showing a contract of through shipment of live stock, a delivery thereof in uninjured condition, and redelivery at destination with many thereof dead and others severely injured, and that no one accompanied the stock for the shipper, a presumption of negligence arises which becomes conclusive in the absence of any explanation. *Texas & N. O. R. Co. v. Drahn* (Civ. App.) 157 S. W. 282.

18. Consequences of acts.—Colored voters held not presumed to have been improperly influenced by circular addressed to them appealing for their votes. *Wallis v. Williams*, 50 C. A. 623, 110 S. W. 785.

19. Regularity of course of business or conduct of affairs.—In matters of contract parties are presumed to have acted legally until the contrary is shown. *Tucker v. Streetman*, 38 T. 71.

Upon the sheriff executing a deed to the purchaser it will be presumed that payment was made. *Blum v. Rogers*, 71 T. 669, 9 S. W. 595.

A debt secured on land will be presumed to be for the sum named. *Building & Loan Ass'n of Dakota v. Cunningham*, 92 T. 155, 47 S. W. 714.

Where municipal obligations were contracted to meet current expenses, it would be presumed that current revenue was sufficient, if collected, to have liquidated same. *City of Tyler v. L. L. Jester & Co.*, 97 T. 344, 78 S. W. 1058.

It is presumed that a train arrived at its usual time. *Western Union Telegraph Co. v. McDavid*, 103 T. 601, 132 S. W. 115.

Where train schedules were proven, it is presumed, in absence of contrary evidence, that trains were operated in compliance therewith. *Western Union Telegraph Co. v. Harris* (Civ. App.) 132 S. W. 876.

The supreme court will presume that a patriotic society, such as the Daughters of the Republic, will perform their legal duties. *Conley v. Daughters of the Republic* (Sup.) 157 S. W. 937.

20. Making, validity and genuineness of writings.—See notes under Rules 17, 18.

The draft sued on was as follows: St. Louis, February 2, 1876. At ninety days, pay to the order of N. O. Kerr, president, one hundred and seventy dollars, with exchange, value received, and charge to account of N. C. Bignall & Co. To Messrs. Hoffman & Garside, Dallas. "Hoffman & Garside" was written across the face. Held, that the draft was presumed to be drawn on funds, that the acceptor was primarily liable, and the drawer a mere guarantor or surety. *Hoffman & Garside v. Bignall & Co.*, 1 App. C. C. § 703.

When credits are indorsed on a note, the presumption is that the indorsement was made by the holder or with his assent and that the credits are just. *Holland v. Cook*, 10 T. 244.

In the absence of proof to the contrary, the indorsement of a note, in presumption of law, is contemporaneous with the making of it, and the defendant must prove that it was indorsed after it was due, if he would set up defenses which he might make against the payee. *Watson v. Flanagan*, 14 T. 355; *Linn v. Willis*, 1 U. C. 158.

A power to sell land may be presumed from great lapse of time with circumstances supporting it. *Watrous v. McGrew*, 16 T. 513; *Harrison v. McMurray*, 71 T. 122, 8 S. W. 612.

The fact that a person was not able to read or write does not necessarily imply that a signature purporting to be his is a forgery. If he acknowledges it to be his, though actually written by another, it is his act and deed as truly as if he had signed it with his own hand. *Willis v. Lewis*, 28 T. 185.

Facts and circumstances independent of a deed, and contemporaneous with its execution, coupled with evidence of possession of the title papers by the grantee, and his acts and declarations in regard to the land conveyed by the deed, repeated through a series of years, afford presumptive evidence of the genuineness of the deed. *Newby v. Haltaman*, 43 T. 314.

The record of a deed properly acknowledged is a circumstance bearing upon the issue of its execution. *Holmes v. Coryell*, 53 T. 680; *Railway Co. v. Stealey*, 66 T. 468, 1 S. W. 186; *Crain v. Huntington*, 31 T. 614, 17 S. W. 243; *Burleson v. Collins* (Civ. App.) 29 S. W. 688.

A power to convey lands under certain circumstances may be presumed after the lapse of thirty years. *Harrison v. McMurray*, 71 T. 122, 8 S. W. 612; *Garner v. Lasker*, 71 T. 431, 9 S. W. 332; *Harris v. Nations*, 79 T. 409, 15 S. W. 262.

On the production of an instrument, if it appears to have been altered, it is incumbent upon the party offering it in evidence to explain this appearance. If nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. If ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when, the person by whom, and the intent with which, the alteration was made as matters of fact to be found by the jury upon the evidence. *Rodriguez v. Haynes*, 76 T. 225, 13 S. W. 296; *Warren v. Frederichs*, 76 T. 647, 13 S. W. 643; *Ammons v. Dwyer*, 78 T. 639, 15 S. W. 1049; *Pasture Co. v. Preston*, 65 T. 448; *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437; *Kennard v. Withrow* (Civ. App.) 28 S. W. 226.

Interlineations in a deed are presumed to have been made before signing when the deed and its surroundings are free from suspicion. *Collins v. Ball*, 82 T. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

Under the act of April 14, 1874, in so far as it requires that the original deed be recorded within four years, the existence of the original will be presumed, in absence of evidence showing its loss or destruction. *Magee v. Merriman*, 85 T. 105, 19 S. W. 1002.

Proof held sufficient to raise a presumption of genuineness of a deed without proof of possession under it. *Williams v. Hardie* (Civ. App.) 21 S. W. 267.

Presumption as to validity of a deed executed by the attorney in fact of an executor. *Smith v. Swan*, 22 S. W. 247, 2 C. A. 563.

The husband had been dead 15 years when the widow assumed to convey a land certificate, community property, in discharge of an obligation against the common estate. In the meantime she had taken out letters of administration upon the estate, it had been partitioned either in whole or in part, and the administration had been closed. Held: 1. That her power over the community as survivor had ceased. 2. Any presumption which should be indulged by reason of lapse of time as to her power to make a conveyance would be met by the counter presumption that she had fully administered the estate and had exhausted her power over the community property. 3. The deed of the widow did not affect the rights of the heirs of the husband. *Corzine v. Williams*, 85 T. 499, 22 S. W. 399.

In the absence of evidence the delivery of deed is presumed as of the date of the acknowledgment. *Kent v. Cecil* (Civ. App.) 25 S. W. 715.

Where a transfer of land is proved to have been executed, it is presumed, after a lapse of 50 years, that the transfer was delivered. *Timmony v. Burns* (Civ. App.) 42 S. W. 133.

Where a certificate of acknowledgment was defective in omitting to state that the party executed the deed, lapse of time would not raise the presumption in favor of the legality of the record of the instrument. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

The record of a deed is presumptive, but not conclusive, evidence of its delivery. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797; *Belgarde v. Carter* (Civ. App.) 146 S. W. 964; *Williams v. Neill*, 152 S. W. 693.

To support an ancient deed of an administrator, the sale will be presumed to have been properly conducted. *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

A conveyance by a surviving wife of community property will be presumed in payment of community debts after a lapse of some 30-odd years. *Hasseldenz v. Dofflemyre* (Civ. App.) 45 S. W. 820.

Validity of power of attorney in ancient instruments such as location certificates will be presumed. *Batcheller v. Besancon*, 19 C. A. 137, 47 S. W. 296.

In view of the evidence, authority of an administrator to execute a deed on which plaintiff relied held not presumable from lapse of time. *Perry v. Blakey* (Civ. App.) 47 S. W. 843.

Signing a power of attorney to convey lands in the owner's maiden name, though she was then a widow and known by her deceased husband's name, held not to raise the inference of forgery. *Crimp v. Yokely*, 20 C. A. 231, 48 S. W. 1116.

Insanity of heir held not to preclude presumption of execution of deed by ancestor. *Herndon v. Burnett*, 21 C. A. 25, 50 S. W. 581.

Relation of mutual friendship held not such a confidential relation as raises presumption of fraud, and imposes on a grantee the burden of showing a conveyance was free from fraud. *Wells v. Houston*, 23 C. A. 629, 57 S. W. 584.

Where conditions were written into a printed order given by defendant to plaintiff, in the absence of evidence as to when the writing was inserted, there is no presumption that the contract was signed as printed and afterwards changed by plaintiff. *Whitaker v. Zehme* (Civ. App.) 61 S. W. 499.

In trespass to try title, in which defendant claimed through a chain of title in which a deed was lacking, evidence held insufficient to raise a presumption that such deed was ever executed. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892.

In suit to recover land that had been community property and sold by the surviving husband, held, that it would be presumed he had authority to sell. *Cruse v. Barclay*, 30 C. A. 211, 70 S. W. 358.

The power of persons to convey held inferable, after a lapse of 60 years, from recitals in a bond for title given by them that they were administrators. *Lynch v. Pittman*, 31 C. A. 553, 73 S. W. 862.

Where contract for compounding interest was valid in its terms, no presumptions of illegality could be indulged against it. *Hillsboro Oil Co. v. Citizens' Nat. Bank*, 32 C. A. 610, 75 S. W. 336.

Where community property was sold by the husband after the death of the wife, and no hostile claim was made for many years by the heirs of the wife, it would be presumed that the sale was made to pay community debts. *Milby v. Hester* (Civ. App.) 94 S. W. 178.

Where a lost deed is shown to have been executed, it will be presumed, in the absence of evidence to the contrary, that it was executed with due formality, including the acknowledgment of a married woman. *Laird v. Murray* (Civ. App.) 111 S. W. 730.

It will not be presumed that a lost deed contained an express reservation of a vendor's lien. *Id.*

In the absence of proof to the contrary, it must be presumed that the holder of a vendor's lien, who released a part of the land, was acquainted with the contents of the release. *Watson v. Vansickle* (Civ. App.) 114 S. W. 1160.

Where a deed in person's chain of title to land was void because the authority of the agent of the owner, who executed it, had been revoked by the owner's death, the agent's authority to convey could not be presumed from mere lapse of time. *Wall v. Lubbock*, 52 C. A. 405, 118 S. W. 886.

A mutilated ballot will be presumed to have been mutilated after it was counted by the election officers. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

The court, in a suit by the grantor to cancel a deed of land in trust for specified purposes, will not presume that the deed was executed in fraud of the creditors of the grantor, on the ground that he had no other property, or that he was insolvent, in the absence of allegations to that effect. *Smith v. Olivarri* (Civ. App.) 127 S. W. 235.

A certificate filed in the general land office with the first survey, and which, though for a time withdrawn, was again filed with the field notes of the survey, and was found in the original file, came from the proper custody, and a reasonable presumption as to its genuineness arose. *Jackson v. Nona Mills Co.* (Civ. App.) 128 S. W. 923.

Where the indorsers of two promissory notes surrendered them to one of the makers, who then sold them, in an action by such purchaser against the indorsers, the burden of proof was on the purchaser to show that such maker's name did not appear on the notes as maker at the time of his purchase, as the presumption is that the signatures of the apparent makers were attached at the date of the execution of the notes. *Downing v. Neeley & Stephens* (Civ. App.) 129 S. W. 1192.

Possession of a deed by the grantee raises a presumption of its due delivery to him, and the date of the deed is prima facie evidence of the time of its execution and delivery, and where a deed has been acknowledged, delivered, and recorded when offered in evidence, and there is no evidence as to the delivery on any particular date, it should be presumed to have been delivered at the time it bears date or at the date of its acknowledgment. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

A recital in a deed executed by a trustee held not to create a presumption that the deed was executed in pursuance of power contained in a deed of trust not introduced in evidence. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

To establish execution of a deed by presumption, held, that the proof need not exclude every other reasonable hypothesis than that the deed was executed. *Surghenor v. Ducey* (Civ. App.) 139 S. W. 22.

After a lapse of more than 50 years and in the absence of any claim to the contrary, it will be presumed that a conveyance by a married woman was with the consent of her husband. *Wm. Cameron & Co. v. Cuffie* (Civ. App.) 144 S. W. 1024.

A notary's seal is presumed to have been attached to an acknowledgment of a deed. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

21. Mailing and delivery of mail matter.—In an action on an account, evidence of the proper mailing of a check by defendant to plaintiff held to present the issue of its receipt by plaintiff, and the latter's acceptance or negligent failure to collect or return it. *Pink Front Bankrupt Store v. G. A. Mistrot & Co.*, 40 C. A. 375, 90 S. W. 75.

A letter held presumed to have been delivered. *Opet v. Denzer, Goodhart & Schener* (Civ. App.) 93 S. W. 527; *Smith v. F. W. Heitman Co.*, 44 C. A. 358, 93 S. W. 1074.

A letter will not be presumed to have been received by the addressee, unless it is shown that it was deposited in the post office properly addressed and stamped. *Trezevant & Cochran v. R. H. Powell & Co.* (Civ. App.) 130 S. W. 234.

Evidence held to justify an inference that an instrument mailed at a post office reached the addressee before a specified time. *Eatman v. Eatman* (Civ. App.) 135 S. W. 165.

22. Corporate acts and records.—The presumption is that notes and mortgages executed by corporations are valid. *Brownwood Ice Co. v. York Mfg. Co.* (Civ. App.) 37 S. W. 339.

Signature of president of a corporation to an assignment of a chose in action, and attestation by secretary, held prima facie evidence that the assignment was authorized by the corporation. *Texas & P. Ry. Co. v. Davis*, 93 T. 378, 54 S. W. 381.

Acts of a corporation's officers, showing its construction of a doubtful contract, will be presumed to have been done by the corporation's authority; and hence it cannot subsequently claim that the powers assumed by such officers were unlawful. *Southern Cotton-Oil Co. v. Wallace* (Civ. App.) 54 S. W. 638.

Independent of proof, it is presumed that congregations of Baptist churches conduct themselves in an orderly and decent manner and according to the rules, customs, and usages of deliberative bodies. *Gipson v. Morris*, 36 C. A. 593, 83 S. W. 226.

In an action on a note given for stock in a corporation, in the absence of evidence to the contrary, the presumption would be that the affidavit to procure the corporate charter was true in its statement of facts. *Cherry v. First Texas Chemical Mfg. Co.* (Civ. App.) 115 S. W. 81.

Where the unauthorized act of an agent of a corporation is beneficial to it, a presumption of ratification by the corporation arises from slight circumstances. *Knowles v. Northern Texas Traction Co.* (Civ. App.) 121 S. W. 232.

A suit by a corporation sanctioned by its president and other officers will be presumed to have been authorized by the corporation. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

23. Evidence withheld or falsified.—When the evidence is conflicting, the failure of a party to produce evidence known to be in his possession, to explain or rebut circumstances of suspicion, or which is cumulative to that already given, will raise a presumption against him. Suit was brought against husband and wife for goods contracted for by the wife and sold and delivered to her as necessaries. After the death of the husband, the wife answered for herself, denying the purchase, etc., and as administratrix answered by general denial and plea of limitation. The plaintiff was required to produce his original book of entries on the trial, which he refused to do, and proved his account by his son, who had been his clerk. Judgment was rendered in favor of the defendant, and the supreme court, in affirming the judgment, say: "When the evidence was so conflicting, and there was so much evidence going to prove that the credit was given exclusively to the husband, the non-production of the books in which the goods were charged can but be regarded as a circumstance unfavorable to the plaintiff; one which had, and was entitled to have, its weight with the jury in forming their conclusion as to the fact." *Bailey v. Hicks*, 16 T. 222.

In a prosecution for selling spirituous liquors without a license, the state introduced circumstantial evidence from which it might be inferred that the defendant was interested in the establishment at which it was sold. The court say that "the force of testimony on the mind is increased by the failure to rebut it, where, from the nature of the circumstances, its falsity can be easily shown, if it be false." *Needham v. State*, 19 T. 332.

Admitting subpoena for witness, with order to produce books, to raise presumption against the parties for failure to appear, held error. *Texas & N. O. R. Co. v. Farmer* (Civ. App.) 43 S. W. 805.

Failure to produce writing raises no unfavorable presumption in absence of notice requiring its production. *Sullivan v. Cranz*, 21 C. A. 498, 52 S. W. 272.

Where plaintiff, in an action for injuries, refuses to submit to an examination by physicians, such fact is proper for the jury, as bearing on the credibility and sufficiency of the testimony on which he seeks to recover. *Austin & N. W. R. Co. v. Cluck*, 97 T. 172, 77 S. W. 403, 64 L. R. A. 494, 104 Am. St. Rep. 863, 1 Ann. Cas. 261.

Where, in an action for injuries to an infant, the father refused to permit physicians to examine it, evidence of such refusal was admissible on the issue of the extent of the injuries. *Houston Electric Co. v. Lawson*, 37 C. A. 193, 85 S. W. 459.

In an action for injuries, defendant held entitled to prove that plaintiff had refused to submit to an examination before trial, and ask her as a witness if she was then willing to submit to such an examination. *Gulf, C. & S. F. Ry. Co. v. Booth* (Civ. App.) 97 S. W. 128.

Testimony that defendant was in the city during trial, but made no appearance in courthouse, and plaintiff could not serve subpoena on him, held admissible. *Walker v. Dickey*, 44 C. A. 110, 93 S. W. 658.

Where the evidence is closely balanced, the failure of the party who has the means of making it certain to produce the evidence may be considered as a potent circumstance against him. *Pullman Co. v. Cox*, 56 C. A. 327, 120 S. W. 1058.

A telephone company seeking to enjoin an ordinance fixing telephone rates, having given no evidence of want of notice of the election at which it was passed under the initiative and referendum, held presumed to have had it. *Southwestern Telegraph & Telephone Co. v. City of Dallas* (Civ. App.) 131 S. W. 80.

Failure to produce accessible proof held to warrant an adverse inference. *Missouri, K. & T. Ry. Co. of Texas v. Day*, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

24. — **Failure of party to testify or giving evasive answers.**—Failure of guardian to disclose transaction with which he was familiar held not circumstance against him, in action by him of trespass to try title, as he is not party in interest. *Muckelroy v. House*, 21 C. A. 673, 52 S. W. 1038.

Where, in an action against a sleeping car company for lost baggage, there is no testimony as to value other than that of plaintiff, and the court finds about one-third of his estimate, the finding should not be set aside on objection, first taken on appeal, to the admissibility of part of plaintiff's testimony. *Pullman Palace Car Co. v. Arents*, 28 C. A. 71, 66 S. W. 329.

Interrogatories propounded to a party and which he refused to answer must be taken as confessed, in the absence of reasons excusing such failure. *Locust v. Randle*, 46 C. A. 544, 102 S. W. 946.

25. — **Failure to call witness.**—When the controversy was as to the ownership and identity of an animal purchased by defendant from a person residing in the county, the unexplained omission of the defendant to call his vendor as a witness was a circumstance subject to comment, and which admitted of an inference unfavorable to him. *Gray v. Burk*, 19 T. 228.

Where plaintiff testified that defendant's foreman made a certain statement in the presence of a witness, which the foreman denied, plaintiff's failure to call such witness held to weaken the probative force of his testimony. *Galveston, H. & S. A. Ry. Co. v. Walker*, 38 C. A. 76, 85 S. W. 28.

No presumption can be drawn from the failure of either party to question a witness who had moved from the state. *Reynolds v. International & G. N. Ry. Co.*, 38 C. A. 273, 85 S. W. 323.

In an action for injuries to a passenger, proof of the failure of plaintiff to call certain persons as witnesses held improperly excluded. *Texas & N. O. R. Co. v. Harrington*, 44 C. A. 386, 98 S. W. 653.

26. — **Suppression or spoliation of evidence.**—The failure to produce certain evidence held to create a presumption that the party would not have been benefited by it. *Galveston, H. & S. A. Ry. Co. v. Young*, 45 C. A. 430, 100 S. W. 993.

27. **Laws of other states.**—In the absence of proof the courts of Texas will presume a law of another state to be the same as that of this state. *Crosby v. Houston*, 1 T. 232; *Armendiaz v. Serna*, 40 T. 291; *James v. James*, 81 T. 381, 16 S. W. 1087; *Tempel v. Dodge*, 89 T. 69, 32 S. W. 514, 33 S. W. 222; *Silliman v. Thornton*, 10 C. A. 303, 30 S. W. 700.

A foreign law must be proved as a fact, and in the absence of proof the presumption is that it is the same as in Texas. *Franks v. Hancock*, 1 U. C. 554.

The laws of a sister state will be presumed to be similar to the law of the forum unless the contrary is shown. *Paul v. Chenault* (Civ. App.) 44 S. W. 682; *Burgess v. Western Union Tel. Co.*, 92 T. 125, 46 S. W. 794, 71 Am. St. Rep. 833; *Blethen v. Bonner* (Civ. App.) 52 S. W. 571; *Southern Pac. Co. v. D'Arcais*, 27 C. A. 57, 64 S. W. 813; *National Bank of Commerce v. Kenney*, 98 T. 293, 83 S. W. 368; *White v. Richeson* (Civ. App.) 94 S. W. 202; *Southern Kansas Ry. Co. of Texas v. Curtis Bros. & Davidson*, 44 C. A. 477, 99 S. W. 566; *Green v. Hewett*, 54 C. A. 534, 118 S. W. 170; *Kin Kaid v. Lee* (Civ. App.) 119 S. W. 342; *Same v. Buck* (Civ. App.) 119 S. W. 345; *Atchison, T. & S. F. Ry. Co. v. Smythe*, 55 C. A. 557, 119 S. W. 892; *Wingo v. Rudder* (Civ. App.) 120 S. W. 1073; *Western Union Telegraph Co. v. Parsley*, 57 C. A. 8, 121 S. W. 226; *Swift v. Kelly* (Civ. App.) 133 S. W. 901; *Pullman Co. v. Custer*, 140 S. W. 847; *Houston & T. R. Co. v. Fife*, 147 S. W. 1181; *Washington Life Ins. Co. v. Lovejoy*, 149 S. W. 398.

Where a bill of exception fails to show that a statute book of another state admitted in evidence was not published by authority, the presumption will be indulged that it was. *Blethen v. Bonner* (Civ. App.) 52 S. W. 571.

Where a husband seeks to enforce property rights against his wife under the law of another state, the courts of Texas will, without proof as to the law of such other state, apply the law as it prevails in Texas. *Blethen v. Bonner*, 93 T. 141, 53 S. W. 1016.

Law of sister state governing assignments of notes presumed, in absence of proof, to be the same as that of Texas. *Ft. Dearborn Nat. Bank v. Berrott*, 23 C. A. 662, 57 S. W. 340.

In a suit against a railroad company for injury to goods in transit, the contract of carriage having been made in California, the laws of such state will be presumed to forbid a carrier limiting its common-law liability for loss resulting from its negligence, in the absence of any proof as to the California statutes. *Southern Pac. Co. v. Anderson*, 26 C. A. 518, 63 S. W. 1023.

Where defendant in an action for debt pleaded a judgment obtained in another state against him as garnishee for the same debt, the statutes of such state relating to garnishment proceedings and exemptions not being shown, it will be presumed that they are the same as in this state. *Texarkana & Ft. S. Ry. Co. v. Gray* (Civ. App.) 65 S. W. 85.

On an issue as to whether lands in Arkansas had been deeded absolutely, or whether the conveyance was intended to create a trust, it was to be presumed that the law of Arkansas was the same as that of Texas. *Boyd v. Boyd*, 34 C. A. 57, 78 S. W. 39.

When community property, located in Oklahoma, is in controversy in Missouri, the law with reference to community property will be presumed to be the same in the territory as in the state, in the absence of evidence to the contrary. *Ex parte Latham*, 47 Cr. R. 208, 82 S. W. 1046.

Where a statement of facts was agreed to which omitted the laws of another state, introduced in evidence, it would be presumed on appeal that such laws were such as to support the judgment. *National Bank of Commerce v. Kenney*, 98 T. 293, 83 S. W. 368.

It will be presumed that the laws of Missouri are the same as those of Texas, and that a contract illegal in Texas is illegal in Missouri. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.) 90 S. W. 189.

In the absence of evidence of the construction the court of a sister state has placed on the common-law doctrine of fellow servants, it is presumed that the doctrine receives the same construction in the sister state that is placed on it by the courts of Texas. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465.

Under a rule stated, in an action against a railway company for injury to a fireman caused in another state, an instruction respecting the laws of that state held properly refused. *Atchison, T. & S. F. Ry. Co. v. Mills*, 49 C. A. 349, 108 S. W. 480.

It will be presumed that the law as to the fellow-servant doctrine is the same where the injury occurs as it is where suit is brought. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

In an action for injuries to an employé in another state, in the absence of any showing that the law of such other state is different from the law of the forum, the latter will be applied. *Atchison, T. & S. F. Ry. Co. v. Pickens* (Civ. App.) 118 S. W. 1133.

From the known powers of appellate courts and pursuant to statute, the supreme court will presume that the supreme court of Louisiana is a court of record, and hence has a seal. *Houston Oil Co. v. Kimball*, 103 T. 94, 122 S. W. 533.

In the absence of evidence, it will be presumed, in construing a statute of another state relating to limitation for the bringing of actions, that the statutory period is the same as that of the state where the action is brought. *Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros.* (Civ. App.) 128 S. W. 932.

The effect of a judgment under the laws of another state is presumed to be the same as under the laws of Texas. *Southwestern Surety Ins. Co. v. Anderson* (Civ. App.) 152 S. W. 816.

28. Laws of foreign countries.—An exception in an action in Texas to a counterclaim arising in Mexico, on the ground that the Mexican laws on the subject on which the counterclaim was based were so dissimilar to the Texas laws that the court could not entertain jurisdiction, overruled. *Mexican Cent. Ry. Co. v. Olmstead* (Civ. App.) 60 S. W. 267.

In absence of allegations of proof showing the laws of Mexico, the rights of the parties must be determined by the laws of Texas, though the subject-matter of the action be situated in Mexico. *Combest v. Glenn* (Civ. App.) 142 S. W. 112.

In absence of a contrary showing, it will be presumed that the laws of the republic of Mexico are the same as those of Texas. *Id.*

29, 30. Judicial proceedings—in general.—Independent of recitals in deed the presumption exists that the court acted regularly. *Withers v. Patterson*, 27 T. 491, 86 Am. Dec. 643; *Davis v. Touchstone*, 45 T. 496; *Hurley v. Barnard*, 48 T. 87; *Perry v. Blakey*, 23 S. W. 804, 5 C. A. 331; *Harris v. Shafer* (Civ. App.) 21 S. W. 110.

An instrument conveying land of minors, signed by one representing himself to be their guardian, is inoperative without the production of orders of a court of competent jurisdiction in the premises, although it contains recitals of the authority of the guardian. Courts will not presume the existence of the authority to act in such cases in the absence of all proof of the existence of the power and its loss or destruction, even after the lapse of thirty years. *Terrell v. Martin*, 64 T. 121; *Tucker v. Murphy*, 66 T. 355, 1 S. W. 76; *White v. Jones*, 67 T. 640, 4 S. W. 161; *House v. Brent*, 69 T. 27, 7 S. W. 65.

The presumption will be indulged that the wife and children were properly made parties plaintiff to a suit instituted during the life of a deceased husband and father to recover damages for an injury inflicted on the wife, when the cause of action survives. *Fordyce v. Dixon*, 70 T. 694, 8 S. W. 504.

Presumption, in action against indorser of note, that one voluntarily appearing after indorser's death was a duly authorized administrator. *Williams v. Planters' & Mechanics' Nat. Bank* (Civ. App.) 44 S. W. 617.

If nothing appears to the contrary it is presumed that the parties appeared at the time required by the statute, that is, at the first term and made up their issues, and that the trial was properly continued. *Chappell v. Ferrell* (Civ. App.) 54 S. W. 1072.

Where the pleadings in a case commenced in 1900 showed that a ward was 14 years old in 1886, when a guardian was appointed for him for the sole purpose of selling realty, it was error to hold that the guardianship had not been closed, though no record of such termination appeared. *Lynch v. Munson* (Civ. App.) 61 S. W. 140.

Where records in foreclosure suit were destroyed by fire after 40 years acquiescence held, that every inference will be indulged in favor of the validity and regularity of the proceedings. *Gallup v. Flood*, 46 C. A. 644, 103 S. W. 426.

It will be presumed that the construction placed on the common law by the supreme court of a territory is the same as that of the supreme court of the United States. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

The court in a suit to enjoin the execution of a justice's judgment will presume that the plea in abatement alleging the right of defendant to be sued in another county was properly overruled. *Coca Cola Co. v. Allison*, 52 C. A. 54, 113 S. W. 308.

The court will not presume that a rule of construction adopted in the territory of Oklahoma by its territorial supreme court extended over and is made applicable after the admission of Oklahoma into the Union to a part of the state never a part of the territory. *Western Union Telegraph Co. v. Parsley*, 57 C. A. 8, 121 S. W. 226.

In an action on a note against the principal and sureties, held, that it must be presumed, in absence of a contrary showing that the principal was solvent, a resident of the state, and within reach of process. *Hume v. Perry* (Civ. App.) 136 S. W. 594.

31. — Administration of estate.—Where husband and wife died about the same time, it not appearing which died first, and administration was taken out on the estate of the husband and land was sold for the payment of debts, in absence of proof to the contrary it was presumed that the debts were community debts. *Soye v. McCallister*, 13 T. 80, 67 Am. Dec. 689. But no such presumption existed when the wife died in 1852, and the husband died nearly two years after, especially as it was shown that the decedents were economical and prompt in the payment of debts. *Moody v. Butler*, 63 T. 210.

When one has acted as executor, and was recognized and treated as such by the court which could rightfully exercise jurisdiction, the mere fact that the records of the court do not affirmatively show that he has given bond will not avoid his actions as such, or those of the court, or render them subject to collateral attack. *Moody v. Butler*, 63 T. 210.

Ten years after the death of the testator his independent executors conveyed land, reciting that the sale was made for the payment of the debts of the testator. Held,

that in the face of the recitals there is no presumption against the existence of debts. *McDonald v. Hamblen*, 78 T. 628, 14 S. W. 1042.

In a collateral proceeding it will be presumed that one acting as administrator had executed a bond. *Saul v. Frame*, 22 S. W. 984, 3 C. A. 596.

Under a petition to subject property in the hands of heirs and devisees to the payment of decedent's debts, it was presumed that defendants did not receive the estate until the close of the administration. *Blinn v. McDonald*, 92 T. 604, 46 S. W. 787.

Where no order of probate court appears of record for the sale of land, it will be presumed from the order of confirmation that it was legally made. *Arnold v. Hodge*, 20 C. A. 211, 49 S. W. 714.

Where land was conveyed to a grantee, described as executor of an estate, and pursuant to order of the probate court he sold the land as property of the estate, it will be presumed that the conveyance was for the benefit of the estate, and that no title or interest in the land descended to the executor's heirs. *Coleman v. Florey* (Civ. App.) 61 S. W. 412.

Lapse of time raises no presumption that the estate of a decedent has been closed. *Kosminsky v. Estes*, 27 C. A. 69, 65 S. W. 1108.

An order directing an administrator's sale of realty cannot be presumed where there was no confirmation of the sale nor anything indicating the passing of an order of sale. *Cruise v. O'Gwin*, 43 C. A. 48, 106 S. W. 757.

Presumption in favor of judgment admitting to probate will of minor that court made finding as to jurisdiction of proceedings for removal of disabilities stated. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

The court held required to presume, as against a collateral attack, that the administration of the estate of a decedent was open at the time of the appointment of an administrator de bonis non. *Stephenson v. Wiess* (Civ. App.) 145 S. W. 287.

Proceedings and instruments in an administration proceeding in probate court, certified to by the clerk of probate court, are presumed to have been copied from the records of the probate court, although the certificate did not in terms show that they were copied from the records, where it is shown that they could only have been properly in such records. *Conoway v. Morrow* (Civ. App.) 147 S. W. 344.

32. — **Courts in general.**—From the known powers of appellate courts and pursuant to statute, the supreme court will presume that the supreme court of Louisiana is a court of record, and hence has a seal. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533.

33. — **Jurisdiction.**—Probate courts are courts of general jurisdiction over the estates of deceased persons, and all presumptions are in favor of the regularity of their proceedings. *Graham v. Hawkins*, 1 U. C. 514.

Whether the jurisdiction of a court be general or special, it cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The same presumption must be indulged in favor of jurisdiction whether service be had personally or by publication. *Stewart v. Anderson*, 70 T. 588, 8 S. W. 295.

A presumption of jurisdiction held to obtain. *Clark v. Groce*, 16 C. A. 453, 41 S. W. 668.

Where a motion to reinstate a cause after dismissal at a former term was agreed to, and the court acted on facts not clearly appearing, it will be assumed that it acted within its power. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

As against purchasers pendente lite, in the absence of showing of fraud or collusion, it is presumed that the court ascertained all facts necessary to its jurisdiction. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

Certain recitals in proceedings in a cause held insufficient to justify the presumption that a nonresident defendant had submitted to the jurisdiction of the court by appearance. *Humphrey v. Beaumont Irrigating Co.*, 41 C. A. 308, 93 S. W. 180.

In the absence of anything to show what was pleaded in an action in justice's court, it will be presumed in a collateral action that proper allegations were made to give the court jurisdiction. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

34. — **Judgment.**—A foreign judgment is held to have the same legal effect as if rendered here, in the absence of evidence showing the contrary. *James v. James*, 81 T. 374, 16 S. W. 1087.

Presumption is that judgment of foreign court was within its jurisdiction. *T. & H. Smith & Co. v. Taber*, 16 C. A. 154, 40 S. W. 156.

Justification by a constable for the seizure of property under an execution against a guarantor—presumptions in support of the justice's judgment. *Parlin & Orendorff Co. v. Cantrell* (Civ. App.) 40 S. W. 415.

The presumption arises that a judgment was rendered after the court ascertained it had jurisdiction by service of a citation. *Woolley v. Sullivan*, 92 T. 28, 46 S. W. 629.

Execution sale under a judgment reviving a former judgment, entered at the same term as a previous void judgment in same action, is valid, as said void judgment is presumed to have been set aside. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

In trespass to try title, a judgment under which defendants claimed title held to be presumed regular as to the term of court at which it was rendered, process, time of appearance, trial, and rendition. *Smith v. Ridley*, 30 C. A. 158, 70 S. W. 235.

In support of a judgment against indorser of note after maturity, in consideration of its extension, it will be presumed that suit was not brought until ample time had been given. *Hollimon v. Karger*, 30 C. A. 553, 71 S. W. 299.

Though the return of service indorsed on a justice's summons does not show that the person making the service had not authority to make it, the presumption is in favor of the judgment. *Foust v. Warren* (Civ. App.) 72 S. W. 404.

In suit to set aside a justice's judgment held, that all presumptions were in favor of the justice's jurisdiction. *Warren v. Foust*, 36 C. A. 59, 81 S. W. 323.

It will be presumed, in aid of a judgment granting more than the petition prayed for, that an amendment to the petition praying for the relief granted was filed. *Campbell v. Upson* (Civ. App.) 81 S. W. 358.

To sustain a judgment against a dead person it will be presumed that the heirs of the deceased were in court at the trial. *Id.*

From recitals in a judgment it would be presumed that defendants appeared at the trial. *Id.*

Where a judgment warrants a writ of execution it will not be presumed that execution will be levied on property not subject to the debt. *Hartz v. Hausser* (Civ. App.) 90 S. W. 63.

A presumption of service of citation on a nonresident defendant, arising from a recital in a judgment, held not to authorize a presumption that such citation was served prior to a conveyance by such defendant pendente lite. *Humphrey v. Beaumont Irrigating Co.*, 41 C. A. 308, 93 S. W. 180.

Where a citation served by publication was insufficient, but the judgment recited service, it will be presumed that another citation had been issued and duly served. *Id.*

On collateral attack, it will be presumed, in aid of a judgment, that some disposition was made of a party not mentioned in the judgment prior to its rendition. *Dunn v. Taylor*, 42 C. A. 241, 94 S. W. 347.

The presumption prevails that execution has been issued on a judgment under which garnishment is applied for, and that the judgment is not dormant. *Baze v. Island City Mfg. Co.* (Civ. App.) 94 S. W. 460.

The presumptions in support of a judgment appointing a guardian on a collateral attack on such judgment stated. *Johnson v. Grace* (Civ. App.) 94 S. W. 1064.

Where, on the face of the proceedings, the only defense available to an action for the foreclosure of a trust deed was the statute of limitations, it will be presumed that a verdict directed without reason assigned therefor, and the judgment rendered thereon, were merely intended to adjudicate the question of limitation. *Bandy v. Cates*, 44 C. A. 33, 97 S. W. 710.

On collateral attack on a foreclosure decree against the mortgagor's administrator, it would be presumed that the administrator was properly served as prayed, though the decree contained no recitals of service. *Flack v. Braman*, 45 C. A. 473, 101 S. W. 537.

Under an execution levied on personalty under a judgment foreclosing a lien on other personalty held it must be presumed that the property covered by the judgment was first subjected to its payment. *Hubert v. Hubert* (Civ. App.) 102 S. W. 948.

Where the record of the county court does not negative the existence of facts authorizing the court to make an order, the law presumes, as against a collateral attack, that such facts were established. *Moore v. Hanscom*, 101 T. 293, 106 S. W. 876.

A judgment is presumed to be correct on collateral attack if the court had jurisdiction of the subject-matter. *Williams v. Steele*, 101 T. 382, 108 S. W. 155.

Plaintiff held required to show from the record that a tax foreclosure judgment is void to overcome its effect as a bar to plaintiff's right to recover in trespass to try title. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 74.

The act of 1889 (Acts 1889, p. 152, c. 128), creating the fourteenth and forty-fourth judicial district courts of Dallas county, gave them concurrent jurisdiction throughout that county, and conferred the power upon the judges of the respective districts to transfer, at their discretion, cases from one district to the other for trial. Held that, inasmuch as the legal presumption is that judgments of courts of record are valid, where a judgment was rendered in the fourteenth district court, and judgment restraining issuance of execution thereon was rendered in the forty-fourth district court, and the record on writ of error in the latter case fails to show that the writ of injunction was not issued by the fourteenth district court and then transferred to the forty-fourth district court for trial, it would be presumed, if necessary to sustain the validity of the judgment, that it was issued in the fourteenth district court, where the former judgment was rendered, and then transferred to the other court. *Kruegel v. Rawlins* (Civ. App.) 121 S. W. 216.

A recital in a judgment that an estate which was the only defendant sued, though duly cited, did not appear, is meaningless, and affords no presumption in favor of service. *Perry v. Whiting*, 56 C. A. 550, 121 S. W. 903.

Where a judgment adjudging a person a lunatic does not affirmatively show that the person was not present in court when it was rendered, it will be presumed that he was before the court. *Ferguson v. Ferguson* (Civ. App.) 128 S. W. 632.

Appointment of an attorney ad litem to represent unknown heirs cited by publication presumed. *Houston Oil Co. of Texas v. Bayne* (Civ. App.) 141 S. W. 544.

On collateral attack on a judgment, it will be presumed that the pleadings asking for the affirmative relief granted against interveners were filed before nonsuit was taken as to them. *Blunt v. Houston Oil Co.* (Civ. App.) 146 S. W. 248.

Every presumption is in favor of the jurisdiction of a court of general jurisdiction in a collateral attack on its judgment. *Wilkin v. Simmons* (Civ. App.) 151 S. W. 1145.

On collateral attack in trespass to try title, on a judgment relied on by defendants, it will be presumed that matters necessary to sustain the judgment were alleged and proved. *Gibson v. Oppenheimer* (Civ. App.) 154 S. W. 694.

Where the county court has general jurisdiction in insanity inquisitions, it will be presumed upon introduction of an order adjudging plaintiff insane that facts existed which authorized its rendition and entry, so that it was not necessary that it recite the facts conferring jurisdiction. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

35. — **Jury.**—In action by servant for injuries, the jury would be presumed to have based their verdict on an issue which the evidence fully sustained. *Texas & N. O. R. Co. v. Gardner*, 29 C. A. 90, 69 S. W. 217.

In an action for injuries to a passenger caused by escaping cinder, it would be presumed that jury were not influenced by exhibition of unidentified wire netting, belonging to spark arrester, in their presence. *Missouri, K. & T. Ry. Co. of Texas v. Flood*, 35 C. A. 197, 79 S. W. 1106.

36. — **Judicial sales.**—In a suit in 1838 for the specific performance of a contract for the conveyance of land by the defendant's intestate, the defendant was appointed attorney ad litem for minor heirs. It was held that, there being no positive rule of law prescribing the manner in which minors should be made parties, it is presumed that they were properly made parties. *Kegans v. Allcorn*, 9 T. 25.

The administratrix of an estate resigned in favor of R., who was appointed administrator and gave bond in 1840. In 1843 R. was removed and the former administratrix was reappointed. In 1846 an order was made requiring R. to settle, but, on the appearance of R. by attorney, the further action of the court in the matter was postponed. In 1848 R. filed his final account, but no action was had thereon. In January, 1849, upon the application of R., an order was made for the sale of personal property, and a return and confirmation of sale were duly made. For several years thereafter R. appeared to be engaged in the administration of the estate. The validity of the sale being brought in question, it was held that it would be presumed that R. was legally reinstated in the administration, and the sale was upheld. *Dancy v. Stricklinge*, 15 T. 557, 65 Am. Dec. 179; *Alexander v. Maverick*, 18 T. 179, 67 Am. Dec. 693; *Guilford v. Love*, 49 T. 715; *Tom v. Sayers*, 64 T. 339.

A conveyance of land was made on the 15th of November, 1834, by the curator of an estate. In support of the deed the party claiming under it read a certified copy of the proceedings in 1834 before the alcalde of the proper jurisdiction, showing the appointment of the curator, an appraisal of the property and a schedule of the sale, including the land described in the deed. The curator's deed was executed before the alcalde, who also signed it. It was held that all necessary presumptions would be indulged in favor of the validity of the deed which had the sanction and authorization of the judge. *Baker v. Coe*, 20 T. 429.

Possession under an administrator's deed for 25 years, the deed containing recitals showing the regularity of the sale and its confirmation by the court, will, in a suit brought 25 years after the destruction of the probate records, support a presumption that all requisite orders were made to give validity to the sale. *White v. Jones*, 67 T. 638, 4 S. W. 161.

Where a widow declined to take under a will, and the court ordered the property sold to pay the widow's allowance, it will be presumed that the conditions authorized the sale, in support of the title of the purchaser as against the widow. *Johnson v. Weatherford*, 31 C. A. 180, 71 S. W. 789.

37. Operation and effect.—In sales under execution not made in accordance with the law, the conclusive presumption is that the property did not bring such a price as if the levy and sale had been legally made. *Gunter v. Cobb*, 82 T. 598, 17 S. W. 848.

Possession by the maker of an overdue promissory note is presumptive evidence of payment, but such presumption has no conclusive effect. *Halfin v. Winkleman*, 83 T. 165, 18 S. W. 433.

One who acted as executor for about 18 years held conclusively presumed such on a collateral attack of his act. *Halbert v. De Bode*, 15 C. A. 615, 40 S. W. 1011.

In action for breach of warranty, while the buyer's failure to return the goods or complain may raise a presumption that his action is not well founded, it is evidence on a question of fact, and not a presumption of law. *Ash v. Beck* (Civ. App.) 68 S. W. 53.

The presumption arising from the payment of interest in advance on a note is a presumption of fact, not of law. *Guerguin v. Boone*, 33 C. A. 622, 77 S. W. 630.

A transfer by an attorney in fact of a certificate issued in lieu of a headright, held to carry with it a conclusive presumption of the authority of the attorney. *Simmonds v. Simmonds*, 35 C. A. 151, 79 S. W. 630.

The presumption that a sufficient affidavit was filed to authorize the issuance of a citation by publication is on collateral attack rebuttable, unless rebutting it involves a contradiction of the record. *Stoneman v. Bilby*, 43 C. A. 293, 96 S. W. 50.

Normal conditions will be presumed to exist in every instance until the contrary is shown, and presumptions arising from proof of a given status operate prospectively, and not retrospectively. *Western Union Telegraph Co. v. Hughey*, 55 C. A. 403, 118 S. W. 1130.

"Constructive notice" is a legal presumption not to be controverted. *Missouri, K. & T. Ry. Co. of Texas v. Wood* (Civ. App.) 152 S. W. 487.

38. Conflicting presumptions of fact.—Where the evidence showed prima facie that the master was not negligent, the existence of facts to rebut such showing cannot be presumed. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

39. Rebuttal of presumptions.—The possession by the acceptor of a draft, drawn with a blank for the name of the payee and without an indorsement, is prima facie evidence that the draft had been in circulation and had been paid by the acceptor, but was rebutted by proof of custom to leave draft for acceptance, or other fact tending to controvert the presumption arising from possession, especially where the acceptor failed to prove to whom payment was made. *Close v. Field*, 9 T. 422.

The presumption arising from the form of the conveyance as between the parties and against those not claiming as bona fide purchasers may be rebutted by evidence showing that the property was paid for by the separate means of one of the spouses. *Rose v. Houston*, 11 T. 326, 62 Am. Dec. 478; *Chapman v. Allen*, 15 T. 278; *T. & P. Ry. Co. v. Durrett*, 57 T. 48; *Philipowski v. Spencer*, 63 T. 604; *Winfield v. Rilling* (Civ. App.) 132 S. W. 328.

The presumption in favor of the community, resulting from a deed made to either husband or wife, may be rebutted by proof that it was bought with the separate funds of either. When the deed is made to the wife, it may be shown to be for her benefit, not only from the advance by her of the purchase money, but if the funds be advanced from the separate means of the husband, the presumption of a gift arises, and if from the community fund, it may be proven that the husband intended a gift, and directed the deed to be made in her name. *Dunham v. Chatham*, 21 T. 231, 73 Am. Dec. 228; *Smith v. Strahan*, 16 T. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 T. 389, 70 Am. Dec. 394; *Story v. Marshall*, 24 T. 305, 76 Am. Dec. 106; *Hatchett v. Conner*, 30 T. 104; *Tucker v. Carr*, 39 T. 98. Such a trust cannot be engrafted on a deed to the prejudice of creditors or purchasers without notice; and the fact that a conveyance is made to a married woman does not put the purchaser upon inquiry. *Cooke v. Bremond*, 27 T. 457, 36 Am. Dec. 626; *Flanagan v. Oberthier*, 50 T. 379; *Alstin v. Cundiff*, 52 T. 453; *McDaniel v. Weiss*, 53 T. 257; *Wallace v. Campbell*, 54 T. 87.

In an action of trespass to try title, the issue was whether a lot claimed by defendant was the homestead of his vendor at the date of his purchase. On this issue and to

rebut the presumption of fraud, evidence was admissible to show that defendant, before purchasing the property, took the advice of counsel as to the validity of the title he was about to purchase. *Scheuber v. Ballow*, 64 T. 166.

Actual prior possession is prima facie evidence of title, which is not overcome by evidence of an outstanding title which does not defeat plaintiff's right. *House v. Reavis*, 89 T. 626, 35 S. W. 1063.

Evidence held insufficient to overcome presumption that land awarded by commissioner of the general land office as detached land was not in fact detached. *Shaver v. Tinsley*, 16 C. A. 369, 40 S. W. 1042.

The presumption that a debt long overdue has been paid is rebuttable. *Shotwell v. McCardell*, 19 C. A. 174, 47 S. W. 39.

Where plaintiff relied on an administrator's deed, evidence for defendant of another deed by the administrator to the same grantee, to different lands, held admissible to rebut presumption that an order confirming a sale of undescribed land referred to the deed on which plaintiff relied. *Berry v. Blakey* (Civ. App.) 47 S. W. 843.

The presumption of authority to execute a deed from the age of the instrument and long-continued assertion of title may be rebutted. *Mitchell v. McLaren* (Civ. App.) 51 S. W. 269.

A person, not an employé who rides on a work train, is presumed to be a trespasser, and this presumption is not overcome by proof of former trespassers having ridden thereon. *International & G. N. Ry. Co. v. Hanna* (Civ. App.) 58 S. W. 548.

In an action against a railway company, an instruction that, to rebut the defendant's prima facie negligence arising from the fact that a fire was caused by sparks escaping from its engine, the defendant must show to the satisfaction of the jury that the engines were in good condition, held to impose too high a degree of proof. *Gulf, C. & S. F. Ry. Co. v. Jordan*, 25 C. A. 82, 60 S. W. 784.

Where cotton delivered to a railroad company for transportation was destroyed by fire while in its possession, the origin of the fire being unexplained, the presumption that the carrier was negligent is not overcome by showing due care while the cotton was on moving trains. *Texas & P. Ry. Co. v. Richmond* (Civ. App.) 61 S. W. 410.

In an action for damages from fire by sparks from a locomotive, proof that the railroad company used the best spark arresters and that the fire did not originate on the right of way is insufficient to overcome a prima facie case by plaintiff. *San Antonio & A. P. Ry. Co. v. Adams* (Civ. App.) 66 S. W. 578.

The presumption that a letter mailed was received is rebutted by positive evidence that it was not received. *American Cent. Ins. Co. v. Heath*, 29 C. A. 445, 69 S. W. 235.

Proof of certain facts showing use of ordinary care on part of defendant railroad held to rebut plaintiff's prima facie case, where his property was destroyed by fire starting on track. *St. Louis Southwestern Ry. Co. of Texas v. Gentry* (Civ. App.) 74 S. W. 607.

Evidence that application had been made by defendant for a continuance for the want of the testimony of a certain witness, introduced in order to account for defendant's failure to have such testimony, was improperly admitted. *Gillum v. New York & T. S. S. Co.* (Civ. App.) 76 S. W. 232.

The prima facie inference that the possessor is the owner of the property is rebutted, where such property is vacant public domain. *Austin v. Espuela Land & Cattle Co.*, 34 C. A. 39, 77 S. W. 830.

Though prior possession is prima facie evidence of title, sufficient to warrant a recovery of land against an entry without title, the presumption that the possessor is the owner is rebuttable. *Lynn v. Burnett*, 34 C. A. 335, 79 S. W. 64.

Where the proof shows that plaintiffs have a superior title from the common source, proof that some third person once had the title is not sufficient to rebut the presumption that title was in the common source. *Ellis v. Lewis* (Civ. App.) 81 S. W. 1034.

Evidence merely that the engine, which struck plaintiff on defendant's track, belonged to the A. Co. and was operated by its servants, held not to overcome the presumption that it was operated by defendant and under its control, so as to relieve it of liability. *Gulf, C. & S. F. Ry. Co. v. Miller*, 98 T. 270, 83 S. W. 182.

The exclusion of evidence showing the efforts of defendant to procure the attendance of an important witness held reversible error. *Western Union Tel. Co. v. Waller*, 37 C. A. 515, 84 S. W. 695.

Proof of an unexplained killing of persons on a railroad track held not to overcome the presumption in favor of the railroad that a proper watch was kept by those on the engine. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 451, 84 S. W. 1049.

A bond for title alleged to have been executed by a decedent held insufficient to show that it was the same bond on which the judgment was based, or rebut the presumption that the court had sufficient evidence before it on which to render the judgment it did. *Dutton & Rutherford v. Wright & Vaughn*, 38 C. A. 372, 85 S. W. 1025.

In an action on a liquor dealer's bond, held proper for the district attorney to state that the minor's mother was mentally unsound, as rebutting any unfavorable inference from failure to put her on the stand. *Brewster v. State*, 40 C. A. 1, 88 S. W. 858.

In trespass to try title, the burden held on defendant to rebut a presumption of right of possession arising from plaintiff's title, and to show defendant's injury by reason of the levy of a writ of sequestration. *Freeman v. Slay*, 99 T. 514, 91 S. W. 6.

Mere failure of one having prior possession to connect himself with the sovereignty of the soil does not destroy the presumption of title created by such possession. *Kirby v. Boaz*, 41 C. A. 282, 91 S. W. 642.

In view of the recitals of a judgment foreclosing delinquent taxes and the record, the presumption that a proper affidavit was filed to render a citation by publication proper held overcome. *Stoneman v. Bilby*, 43 C. A. 293, 96 S. W. 50.

To rebut the prima facie case of negligence made out against a railroad company by proof that its locomotive set fire to plaintiff's property, it is necessary to show that the company had exercised ordinary care to keep in repair the spark arresting appliances on its locomotive. *Ross v. St. Louis Southwestern Ry. Co. of Texas*, 47 C. A. 24, 103 S. W. 708.

Where a railroad proves such proper equipment, etc., as to tend to show absence of negligence in setting out a fire by sparks from its engines, the question of negligence must be determined upon the whole evidence. *Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co.*, 48 C. A. 443, 106 S. W. 1140; *Same v. McFarland* (Civ. App.) 106 S. W. 1144.

A railroad company in disproving negligence presumably established by the setting out of fire by the locomotive must negative every fact which would justify a finding of negligence. *Id.*

Proof of proper construction and management of locomotive held to exclude presumption of negligence from fact that fire was occasioned by sparks from engine. *Id.*

The presumption of superior title in plaintiffs from their prior possession is not overcome, as against trespassers, by proof of a grant from the state to one with whose patent plaintiffs' chain of title does not connect. *Teagarden v. Patten*, 48 C. A. 571, 107 S. W. 909.

Any implication of ownership of drafts in a bank because of possession held subject to be disproved by evidence that the bank merely had the drafts for collection. *National Bank of Commerce of Minneapolis v. Rotan Grocery Co.* (Civ. App.) 108 S. W. 1192.

The fact that a father has voluntarily parted with the custody of his child, and contributed little or nothing to its support, but allowed another to assume his obligations, held to overcome the presumption of his fitness, and require him to establish it before he can be awarded the child's custody again. *Peese v. Gellerman*, 51 C. A. 39, 110 S. W. 196.

Facts held to rebut the prima facie liability of a railroad company for the burning of property. *St. Louis Southwestern Ry. Co. of Texas v. McLeod* (Civ. App.) 115 S. W. 85.

Evidence held sufficient to overcome the presumption that ballots received were cast by legal voters. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

In trespass to try title, where defendants claimed that another by long silence as to his title to the land in controversy had abandoned claim thereto, and relied on that fact to raise a presumption of a transfer of his right to one under whom defendants claimed, testimony of such other's children as to declarations by him as to his ownership of the land was admissible to show that he had not abandoned his claim thereto. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533.

The presumption of negligence of the carrier, arising from proof by a passenger of the derailment of the train and consequent injury to him is one of fact, and may be overcome by proof that the derailment resulted from unavoidable accident, or was an occurrence which could not have been provided against by the highest practicable degree of foresight. *Texas & P. Ry. Co. v. Mosley* (Civ. App.) 124 S. W. 485.

The presumption of a waiver of a vendor's lien by the taking of other security may be rebutted by evidence of a contrary intention. *Noblett v. Harper* (Civ. App.) 136 S. W. 519.

In an action of trespass to try title, the plaintiff's title being based upon a vendor's lien securing certain purchase-money notes, certain evidence held admissible to rebut the presumption of payment. *Buckley v. Runge* (Civ. App.) 136 S. W. 533.

Certain evidence, in an action to enforce defendants' liability on notes signed by them with the plaintiffs and paid by the plaintiffs alone, held to have no tendency to rebut the prima facie showing of the insolvency of another person who had signed the notes, but who was not made a party defendant. *Webster v. Frazier* (Civ. App.) 139 S. W. 609.

Degree of proof overcoming presumption arising from title from common source stated. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 335.

The presumption of a negligent defect in an appliance held overcome by the evidence. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 144 S. W. 1045.

Levy of execution on the interest of the grantor in an alleged lost deed and purchase at the sale by the grantee held not to be evidence of an assertion of title by the grantor which would rebut the presumption of the grant. *Masterson v. Harrington* (Civ. App.) 145 S. W. 626.

On pleadings in an action to enjoin the laying out of a highway, held, that the presumption that the action of defendants was regular and legal was not overcome by the pleader's allegation to the contrary upon information and belief. *Schlinke v. De Witt County* (Civ. App.) 145 S. W. 660.

40. Legitimacy of child.—When a woman gives birth to a fully developed child so soon after marriage as to render it certain that it was begotten before marriage, the legal presumption is that it was begotten by him who became her husband, until such presumption is overcome by some evidence to the contrary. Until this presumption is overcome the marriage contract cannot be annulled by reason of her pregnancy before her marriage. *McCulloch v. McCulloch*, 69 T. 682, 7 S. W. 593, 5 Am. St. Rep. 96.

In the absence of evidence to the contrary, it must be presumed that one was born in lawful wedlock. *McAllen v. Alonzo*, 46 C. A. 449, 102 S. W. 475.

41. Negotiable Instruments.—Promissory note: The possession of, payable to bearer, entitles the holder to recover. *Hansborough v. Towns*, 1 T. 58. A note payable to A. or bearer was assigned by B. to A. In a suit by C. against A. and B., C., who had the note in his possession, was authorized to recover. *Johnson v. Mitchell*, 50 T. 212, 32 Am. Rep. 602. The possession of a note payable to order and indorsed in blank entitles the holder to recover. *Greneaux v. Wheeler*, 6 T. 522; *Weathered v. Smith*, 9 T. 625, 60 Am. Dec. 186; *Whithed v. McAdams*, 18 T. 553; *Ross v. Smith*, 19 T. 172, 70 Am. Dec. 327; *Johnson v. Mitchell*, 50 T. 212, 32 Am. Rep. 602; *Lyon v. Kempinski*, 1 App. C. C. § 80. The purchase and possession of a negotiable promissory note entitles the holder to recover. *Faulkner v. Warren*, 1 App. C. C. § 659.

41½. Limitations.—One claiming land under vendee who had not paid purchase-money notes and had abandoned the land held not entitled to a presumption that the note was barred by limitations. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017.

42. Boundaries.—Recognition by the parties or their privies of a particular line is presumptive evidence that it is the correct line. *Floyd v. Rice*, 28 T. 341; *Logov v. Glover*, 77 T. 448, 14 S. W. 141.

When a particular line has been recognized by adjoining owners as their common boundary, it affords a strong presumption that such is the true dividing line, but no period is fixed which renders it conclusive. *Medlin v. Wilkins*, 60 T. 409; *Davis v. Smith*, 61 T. 18.

Acquiescence in a boundary line, not amounting to an estoppel, does not create a presumption that it is the correct line. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

In the absence of proof to the contrary, the presumption is that the survey by virtue of which the land is patented or appropriated was actually made on the ground as required by law (*Robertson v. Mooney*, 1 C. A. 379, 21 S. W. 143); and in such case it will control (*Lutcher v. Hart* [Civ. App.] 26 S. W. 94).

A claim of possession of land between a section and other land held without merit where the survey of such land called for the line and corner of such section. *Galloway v. State Nat. Bank* (Civ. App.) 56 S. W. 236.

Where bearing trees called for in a survey have disappeared, it will be presumed that the trees had been at the distances called for in the survey. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

The presumption is that a surveyor actually surveyed all lines called for by him in a survey, certified to by him, and a party asserting the contrary has the burden of proving it. *Cochran v. Kapner*, 46 C. A. 342, 103 S. W. 469.

43. Compromise and settlement.—The execution of a note, where there have been mutual dealings between the parties, raises the presumption that there was a settlement of the antecedent liabilities. *McCorkle v. Lawrence*, 21 T. 731; *Rowe v. Collier*, 25 T. Sup. 252.

44. Contracts.—No legal presumption can exist that one who has located a land certificate issued to another did so under contract which entitled him to compensation in land. No other presumption can be indulged in such case than the existence of a contract for pecuniary compensation for services rendered. *House v. Brent*, 69 T. 27, 7 S. W. 65.

Where the president and teller of a bank agree to secure control of sufficient stock to elect their directors and re-elect themselves, it will be presumed that such officers are lucrative, and the contract therefore void. *Withers v. Edwards*, 26 C. A. 189, 62 S. W. 795.

From the allegation of a contractor, in an action for breach of the contract, that the collapse of a building was due to defective plans, no presumption arises that the owner failed to exercise ordinary care in selecting an architect, or that the architect failed to exercise proper care and skill in preparing his plans. *American Surety Co. of New York v. San Antonio Loan & Trust Co.* (Civ. App.) 98 S. W. 387.

45. Damages.—Where the message directed the digging of a grave, and by reason of delay in delivery the sender was obliged to dig the grave himself, by reason of the fact that the body required immediate burial, held, that it could not be presumed that the company could have contemplated the necessity of immediate burial, and that it was not liable for mental suffering, etc. *Ikard v. W. U. Tel. Co.* (Civ. App.) 22 S. W. 534.

Facts held not to raise a presumption that stipulated damages in a building contract amounted to a penalty. *Brown Iron Co. v. Norwood* (Civ. App.) 69 S. W. 253.

Where, in an action for death, plaintiff failed to prove that amounts paid for medical services were reasonable charges, such amounts could not be recovered. *International & G. N. R. Co. v. Boykin*, 32 C. A. 72, 74 S. W. 93.

In an action for damages for failure to deliver a telegram announcing the serious illness of plaintiff's daughter, whereby she was prevented from being with her daughter at the latter's death, there is a presumption of mental anguish, and it need not be affirmatively proved. *Western Union Tel. Co. v. Blair*, 51 C. A. 427, 113 S. W. 164.

In an action for overflowing land, it was error to authorize recovery of the difference between the probable yield of crops destroyed and the expense of marketing them, where there was no evidence of such expense. *Gulf, C. & S. F. Ry. Co. v. Felts* (Civ. App.) 135 S. W. 719.

In an action for loss of a sale of potatoes by nondelivery of a telegram there was no presumption that the plaintiff would have been to any expense in getting his produce from his farm and loading it for shipment. *Western Union Tel. Co. v. Federolf* (Civ. App.) 145 S. W. 314.

46. Death.—See notes under Art. 5707.

47. Delivery of deed.—The possession of a deed by the grantee raises the presumption of its due delivery to him. *Tuttle v. Turner*, 28 T. 760.

48. Descent of property.—Where there was no evidence that an owner of land disposed of it by will, and he survived his wife, the court would presume that the land passed under the statutes of descent to all his children, who became tenants in common. *Kirby v. Blake*, 53 C. A. 173, 115 S. W. 674.

49. Fraud.—Fraud may be presumed from facts tending to establish it. *Cooper v. Friedman*, 23 C. A. 585, 57 S. W. 581.

The law never presumes fraud. *Wells, Fargo & Co. v. Neiman-Marcus Co.* (Civ. App.) 125 S. W. 614.

The presumption of law is against fraud, and he who alleges it must prove it. *Reed v. Holloway* (Civ. App.) 127 S. W. 1189.

50. Gifts.—When a conveyance of land purchased with community funds or the separate funds of the husband is made to the wife by him or by his direction, the presumption as between husband and wife, and against all others not claiming as bona fide purchasers, is that the conveyance was intended as a gift to her. *Avery v. Avery*, 12 T. 54, 62 Am. Dec. 513; *Smith v. Strahan*, 16 T. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 T. 389, 70 Am. Dec. 394; *Story v. Marshall*, 24 T. 305, 76 Am. Dec. 106; *Smith v. Boquet*, 27 T. 507; *Price v. Cole*, 35 T. 461; *Peters v. Clements*, 46 T. 114.

A deed from a parent to his child for the expressed consideration of love and affection is presumed to be a gift by way of advancement. *Lott v. Kaiser*, 61 T. 665.

From the fact that a deed was taken in the wife's name, no presumption arises that property acquired during the marriage relationship was intended as a gift to her. *Caffey's Ex'rs v. Cooksey*, 19 C. A. 145, 47 S. W. 65.

No presumption arises that improvements erected by a husband out of community funds on land which is the separate property of his wife are a gift, in the absence of evidence to show such intention. *Collins v. Bryan*, 40 C. A. 88, 88 S. W. 432.

Conveyance which a woman caused to be executed to her minor children held presumptively a gift to them of her interest in the property. *Reeves v. Simpson* (Civ. App.) 144 S. W. 361.

Evidence held insufficient to show benefit to grantee in a deed so as to raise presumption of its acceptance as a gift from the grantor. *Taylor v. Sanford* (Civ. App.) 150 S. W. 262.

51. Separation of husband and wife.—Where the court finds that a husband and wife are living apart by agreement, by reason of the cruel treatment of the husband, it will be presumed that the separation was justified, and that she had not forfeited her right to an allowance from the estate. *Linares v. De Linares*, 93 T. 84, 53 S. W. 579.

That several years after the separation of a husband and wife he obtained a divorce held insufficient to establish that she had not obtained a divorce, and where she in the meantime had married another, every presumption will be indulged in favor of the legality of such second marriage. *Wingo v. Rudder* (Civ. App.) 120 S. W. 1073.

51½. Separate property.—Heirs of a wife held not entitled to recover certain stock levied on as against the husband's creditors as the property of the wife, without tracing the wife's separate funds into such stock. *Hoopes v. Mathis*, 40 C. A. 121, 89 S. W. 36.

That the apparent title to lots was in a married woman does not of itself authorize a finding that they were her separate property. *Keith v. Aubrey* (Civ. App.) 127 S. W. 278.

52. Community property.—See notes under Art. 4623.

53. Insurance.—One under a duty to insure property of another is presumptively required to insure it for its full value. *Broussard v. South Texas Rice Co.*, 103 T. 535, 131 S. W. 412, Ann. Cas. 1913A, 142.

54. Liquor license.—The presumption in an action on a retail liquor dealer's bond held that the license was issued on an application therefor. Art. 7435; *White v. Manning*, 46 C. A. 298, 102 S. W. 1160.

55. Judicial sales.—Presumption exists that community debts existed where sale of community property is ordered. *Dickson v. Moor*, 30 S. W. 76, 9 C. A. 514.

Irregularities by a sheriff in making a sale of lands are presumed to affect the price when the lands are sold at a grossly inadequate price, and the burden is on the purchaser to rebut the presumption. *Kennedy v. Walker* (Civ. App.) 138 S. W. 1115.

56. Libelous statements.—A libelous statement made on a privileged occasion is presumed to be untrue, and the burden of proving its truth is on defendants. *Cranfill v. Hayden* (Civ. App.) 75 S. W. 573.

57. Priority of liens.—Where the date of assignment of notes for the purchase money of land for which a vendor's lien was reserved was not shown, on a question of priority of liens, the presumption would be that the assignment was on the date of the notes. *Maas v. Tacquard's Ex'rs*, 33 C. A. 40, 75 S. W. 350.

58. Marriage.—A presumption that no license was issued and no marriage solemnized held not to arise from the fact that the clerk's office contained no record thereof. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

Where a wife married a second husband during the life of her first husband, and continued to live with him after the first husband's death, a marriage after the first husband's death was presumed. *Bull v. Bull*, 29 C. A. 364, 68 S. W. 727.

59. Mortgages.—Facts held to raise presumption that deed, preceding another deed accompanied by written defeasance, was either a satisfied mortgage or that a reconveyance had taken place. *Turner v. Cochran*, 30 C. A. 549, 70 S. W. 1024.

The court held authorized to presume after a lapse of 30 years that a sale under a deed of trust was valid. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

60. Negligence in general.—Where the hirer of a horse drove further than he represented he intended to drive, and the horse died from such use, misuse was conclusively presumed. *Evertson v. Frier* (Civ. App.) 45 S. W. 201.

A person, not an employé, who rides on a work train, is presumed to be a trespasser, and this presumption is not overcome by proof of former trespassers having ridden thereon. *International & G. N. Ry. Co. v. Hanna* (Civ. App.) 58 S. W. 548.

Under the facts, held, there was an inference of negligence by a contractor, making him liable for destruction of property of the one for whom he was doing the work. *Chapman v. Warden*, 50 C. A. 282, 110 S. W. 533.

It is presumed, in trespass to try title to land claimed by adverse possession, that one residing on land under a deed thereto, and who is admitted to have paid the taxes, paid them for himself, and not for another. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

61. — Proximate cause.—It cannot be presumed without evidence that negligence in running a train at an excessive speed and not giving warning signals was the proximate cause of the death of a horse on the track. *Texas & P. Ry. Co. v. Bailey* (Civ. App.) 150 S. W. 962.

62. — Contributory negligence.—Contributory negligence held not conclusively presumable in action for injuries on track. *Houston & T. C. R. Co. v. Laskowski* (Civ. App.) 47 S. W. 59.

From the facts shown, held, it could not be conclusively presumed that deceased was guilty of contributory negligence in stepping on defendant's railway in front of an approaching train. *Missouri, K. & T. Ry. Co. of Texas v. Cardena*, 22 C. A. 300, 54 S. W. 312.

In an action for the death of a person on a track, it cannot be presumed that deceased was guilty of contributory negligence. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 451, 84 S. W. 1049.

63. — **Carriage of goods.**—See, also, notes as to continuance of fact, ante.

Rule that the loss is presumed to have occurred through the fault of the last carrier of a connecting line does not apply, when. *I. & G. N. Ry. Co. v. Wolf*, 22 S. W. 187, 3 C. A. 383.

In an action for delay in delivering cotton seed hulls under a contract specifying no place for delivery, refusal of an instruction that the law would presume that the hulls were to be delivered at the place where sold was not error. *Farmers' Cotton Oil Co. v. Wilson* (Civ. App.) 103 S. W. 1184.

Where cattle were injured en route, in the absence of evidence showing how they were injured, in an action against the carrier for failure to carry safely, the injuries must be attributed to breach of the carrier's duty to carry safely. *Galveston, H. & S. A. R. Co. v. Jones* (Civ. App.) 123 S. W. 737, judgment reversed 104 T. 92, 134 S. W. 328.

A carrier's liability for damages for breach of contract for carriage of a passenger is subject to the same rules, and may be established by like testimony and presumptions, as in cases of torts based on the same facts. *El Paso & N. E. Ry. Co. v. Landon* (Civ. App.) 124 S. W. 744.

In an action for loss of market by a carrier's delivery of goods in bad order, it could not be presumed that the purchaser's obligations for the part of the price for which he was to have credit would bear interest at at least 6 per cent., be secured by a lien on the goods, and be prima facie worth their face. *Gulf, C. & S. F. Ry. Co. v. Coulter* (Civ. App.) 139 S. W. 16.

Under facts stated, held, that owner of cotton delivering it to railroad and accepting a bill of lading would be presumed to have thereby acquiesced in the terms of the bill of lading. *St. Louis Southwestern Ry. Co. of Texas v. Gilbreath* (Civ. App.) 144 S. W. 1051.

The Carmack amendment to the interstate commerce act re-established the common-law rule that, when freight is delivered to a carrier in good condition and reaches its destination in bad condition, the presumption of negligence arises throwing the burden on the carrier of exonerating itself from liability. *Chicago, R. I. & G. Ry. Co. v. Scott* (Civ. App.) 156 S. W. 294.

The fact that goods were delivered to a named consignee raises only a presumption of title in the consignee, subject to rebuttal by proof and notice of actual ownership by another. *Ft. Worth & D. C. Ry. Co. v. Caruthers* (Civ. App.) 157 S. W. 238.

64. — **Telegraphs and telephones.**—Proof of receipt of a message, under circumstances similar to those whereby similar messages were received from the same person, authorizes an inference, if not contradicted, that it was sent by the person purporting to send it. *Pullman Palace-Car Co. v. Nelson*, 22 C. A. 223, 54 S. W. 624.

An unexplained delay in the transmission of a telegram will be presumed to be caused by the telegraph company's negligence. *Western Union Tel. Co. v. Bouchell*, 23 C. A. 23, 67 S. W. 159.

65. **Notice.**—The order of the county commissioners' court, approving the report of the jury of view, showing a condemnation of land, raises no presumption that the jury caused notice of the proceeding to be legally served on the owner. *Bowie County v. Powell* (Civ. App.) 66 S. W. 237.

It is presumed that notices of sale under a trust deed were posted in some manner which would, under the provisions of the deed relating to posting notices, sustain the validity of the sale. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

65½. — **Giving of notice of claim for damages.**—See notes under Art. 5714.

66. **Partnership.**—Where plaintiff and defendant contracted to furnish ice, but did not specify their relative rights or the basis for the division of profits, there was a rebuttable presumption that both were to be divided equally. *El Paso Ice & Refrigerator Co. v. Consumers' Ice & Cold Storage Co.* (Civ. App.) 141 S. W. 551.

67. **Payment.**—The possession by the plaintiff of a note signed by him as surety for the defendant, who was the principal, is presumptive proof of payment by plaintiff. *Reynolds v. Shelton*, 2 T. 516; *Halfin v. Winkleman*, 83 T. 165, 18 S. W. 433.

The possession by plaintiff of an acceptance drawn by defendant on him in favor of third parties is sufficient to raise the presumption of payment. *Hays v. Samuels*, 55 T. 560.

In trespass to try title it was held that, though the deed to plaintiff was over 20 years old, the payment of purchase money would not be presumed when the claim of title was not accompanied with possession, especially when the money, if paid, was paid by plaintiff himself, who was a witness. *Bremer v. Case*, 60 T. 151.

Possession of time check by third person held to raise no presumption of right to sum named therein. *Robinson v. Texas Pine Land Ass'n* (Civ. App.) 40 S. W. 620.

Delivery of goods and payment therefor will be presumed to be concurrent acts, where the contract is silent as to time of payment. *Howard v. Emerson* (Civ. App.) 65 S. W. 382.

Payment made by a debtor held not presumably made on a mortgage debt, instead of on another. *Powers v. McKnight* (Civ. App.) 73 S. W. 549.

Where a deed reserved a vendor's lien, and the vendor retook possession after the vendee had abandoned the land shortly after the purchase, and maintained possession for 40 years, it would be presumed that the price had not been paid. *Evans v. Ashe*, 50 C. A. 54, 108 S. W. 398.

Reason for the legal presumption of payment of a debt after the lapse of 20 years stated. *Millwee v. Phelps*, 53 C. A. 195, 115 S. W. 891.

It will be presumed that payments made on tax assessments were made by the party rendering the land for taxation. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

A purchase-money note reserving a lien on the property sold is presumptively paid after the lapse of over 30 years, unless the presumption is rebutted by evidence of non-payment. *Buckley v. Runge*, 57 C. A. 322, 122 S. W. 596.

Lapse of time and nonclaim by 3 of 11 heirs held to raise no presumption that their shares of land of ancestor were satisfied out of other parts not conveyed by the other heirs. *Bayle v. Norris* (Civ. App.) 134 S. W. 767.

Facts held to warrant a presumption of payment of taxes. *Surghenor v. Ayers* (Civ. App.) 139 S. W. 28.

A presumption held to arise from a lapse of time that a debt secured by a mortgage was paid. *Hume v. Le Compte* (Civ. App.) 142 S. W. 934.

Payment may be presumed from lapse of time less than 20 years, where there are other circumstances tending to show payment, but which in themselves would not establish payment. *Hutton v. Pederson* (Civ. App.) 153 S. W. 176.

The payee's possession of a note at the time of suit, in the absence of marks or indorsements showing payment, is presumptive proof that the note is unpaid. *Id.*

That five years and three months elapsed after maturity of a note before its presentation to the maker who was able to pay did not raise a presumption of payment. *Id.*

Fifty years after the maturity of a debt secured by a mortgage, it would be presumed, in the absence of evidence to the contrary, that the debt was paid, and that the instrument was no longer effective as a mortgage. *Fulshear v. Deadman* (Civ. App.) 154 S. W. 616.

68. Existence of agency and extent of authority.—A presumption of agency will arise from the relations of the parties, as that of husband and wife. *Blanchet v. Dugat*, 5 T. 507; *Black v. Bryan*, 18 T. 453.

The existence of a power of attorney was presumed from the facts established in evidence. *Dailey v. Starr*, 26 T. 562.

The consignee is, in general, the agent of the owner for the delivery of goods to the carrier, and is presumed to have authority to stipulate for the terms of transportation, and the carrier is not required to inquire into his authority to make a particular shipment. *Ryan v. M., K. & T. Ry. Co.*, 65 T. 13, 57 Am. Rep. 589.

Facts held to warrant presumption of existence of power of attorney at times of conveyance by attorney in fact. *Bean v. Bennett*, 35 C. A. 398, 80 S. W. 662.

Authority to collect the interest on a note forms no presumption of authority to collect the principal. *Higley v. Dennis*, 40 C. A. 133, 88 S. W. 400.

The fact that one performs personal services for another for an agreed compensation carries with it the presumption of the right of control and discharge by the employer. *Texas & N. O. R. Co. v. Parsons* (Civ. App.) 109 S. W. 240.

The authority of an agent to contract for the storage of cotton at his principal's risk of fire may be presumed or inferred from his general authority to buy and ship cotton, though other cotton bought and shipped by him had not been so stored. *Birge-Forbes Co. v. St. Louis & S. F. R. Co.*, 53 C. A. 55, 115 S. W. 333.

The presumption of ratification will arise on slight evidence when the act is plainly for the benefit of the principal. *Davis v. Nueces Valley Irr. Co.*, 103 T. 243, 126 S. W. 4.

An attorney is presumed to have authority to represent any client for whom he professes to act, and, unless properly contested, he need not show his authority. *State v. Murphy* (Civ. App.) 137 S. W. 708.

Under certain circumstances, held, that the authority of an agent to act would be presumed as to third persons. *Cannel Coal Co. v. Luna* (Civ. App.) 144 S. W. 721.

Authority on the part of a wife to act as agent for her husband may be presumed from the acts and conduct of the parties. *Lilly v. Yeary* (Civ. App.) 152 S. W. 823.

In the absence of motion, an attorney who has possession of a note and files a suit thereon in the name of the holder, and prosecutes the same in a regular and lawful manner, will be presumed to have authority to do so. *Brasfield v. Young* (Civ. App.) 153 S. W. 180.

69. Ownership and possession.—The possession of a note negotiable by delivery raises a presumption of ownership; but the possession of one not so negotiable does not create such a presumption as to dispense with proof of the fact. *Merlin v. Manning*, 2 T. 351; *Close v. Fields*, 2 T. 232.

In an action of trespass to try title, the defendants claimed the land under a deed executed on the 27th of November, 1865, while the plaintiffs claimed it under a sheriff's sale, by virtue of a judgment which was recorded in the county on the same 27th of November, at 4 o'clock in the afternoon; and the relative merits of the title depended on the question of fact whether the registration of the judgment or the execution of the deed was prior in point of time. Held that, as the plaintiffs in this form of action can only recover on the strength of their own title, the burden of proof rested upon them to show that the judgment was recorded before the deed was executed; and, in the absence of evidence on that question, there is no presumption that the judgment lien attached previous to the execution of the deed. *Hillmann v. Meyer*, 35 T. 538.

The law will presume a superior title to land from prior possession as against a trespasser, but this presumption is destroyed by proof that the title to the land is in a third party. *Bates v. Bacon*, 66 T. 348, 1 S. W. 256; *Branch v. Baker*, 70 T. 190, 7 S. W. 808; *Railway Co. v. Cusenberry*, 86 T. 525, 26 S. W. 43; *Tobar v. Losano*, 6 C. A. 698, 25 S. W. 973; *House v. Reavis* (Civ. App.) 34 S. W. 646.

Possession of personal property is evidence of ownership. *Robertson v. Gourley*, 84 T. 575, 19 S. W. 1006; *Le Page v. Slade*, 79 T. 473, 15 S. W. 496. See *National Bank v. Day*, 87 T. 101, 26 S. W. 1049.

Where plaintiff was in actual possession of a stock of cattle, and a part of them were seized and converted without any right, it was proper to charge the jury "that the defendant, not having shown any right to or interest in the cattle in controversy, cannot question the plaintiff's right of possession of said cattle, if they found plaintiff had such possession." *National Bank v. Brown*, 85 T. 80, 23 S. W. 862.

Plaintiff having alleged ownership and possession of cattle as against defendant, who exhibited no claim, was entitled to recover upon proving such possession; that on his purchase of the cattle he took a bill of sale would not require the production of such bill of sale in order to recover. *Id.*

Possession of land under a claim of title is prima facie evidence of title in the possessor, unless the possession has been abandoned for a long time. *Burroughs v. Farmer* (Civ. App.) 45 S. W. 846.

One claiming title under a headright certificate held not required to show how she obtained possession of conveyance. *McCoy v. Pease*, 19 C. A. 657, 48 S. W. 208.

In an action on a note, plaintiff's possession at the trial is sufficient proof of ownership, though it be indorsed by him. *Garrett v. Findlater*, 21 C. A. 635, 53 S. W. 839.

Possession of property covered by an insurance policy is prima facie evidence of ownership thereof, in an action on such policy. *Liverpool & L. & G. Ins. Co. v. Nations*, 24 C. A. 562, 59 S. W. 817.

Where defendant shows that a mortgage foreclosure through which the common grantor derived his title has been set aside, the court will not presume that such grantor acquired the title in some other way. *Scates v. Fohn* (Civ. App.) 59 S. W. 837.

In trespass to try title, the burden held on defendant to rebut a presumption of right of possession arising from plaintiff's title, and to show defendant's injury by reason of the levy of a writ of sequestration. *Freeman v. Slay*, 99 T. 514, 91 S. W. 6.

Proof that a person for 11 years paid taxes on a tract of land raises no presumption of possession by him of the land. *Lutcher v. Allen*, 43 C. A. 102, 95 S. W. 572.

Where both parties claim title under a common grantor, it will be presumed that he acquired the title of a former owner. *Cocke v. Texas & N. O. R. Co.*, 46 C. A. 363, 103 S. W. 407.

Facts held not to raise a presumption that a grantee had reconveyed to his grantor, or that he held by deed of trust, and had no authority to sell. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

Under the presumption of the validity of the land commissioner's award and sale of land, held that it will be presumed that one purchasing school land in addition to his home section was owner of his home section when he applied. *McKee v. West*, 55 C. A. 460, 118 S. W. 1135.

In a suit on notes, that some of the notes bore indorsement of plaintiff did not render such notes inadmissible in evidence where plaintiff claimed ownership, and, in the form in which the notes were, they could have been sued on by any possessor, as mere possession is presumptive evidence of ownership. *Bynum v. Hobbs*, 56 C. A. 557, 121 S. W. 900.

Where a creditor of a depositor depositing money in a bank to his credit, followed by the word "agent," attempted to garnish the fund, the fact that the depositor is in possession and control of the fund is prima facie evidence of his ownership. *Sillsbee State Bank v. French Market Grocery Co.*, 103 T. 624, 132 S. W. 465, 34 L. R. A. (N. S.) 1207.

That a depositor of money as agent is in control of the fund is prima facie evidence of ownership. *Sillsbee State Bank v. French Market Grocery Co.* (Civ. App.) 133 S. W. 713.

In an action by a payee in possession of a note showing payee's and other indorsements, held that it would be presumed that the note had been returned to him as his own property. *Anderson v. Milburn Wagon Co.* (Civ. App.) 147 S. W. 603.

There is no presumption of title in a grantor based on his undertaking to convey, as where one purports to convey as an heir, even though the conveyance be ancient. *Villalva v. Brown* (Civ. App.) 148 S. W. 1124.

The fact that a negotiable instrument in the hands of plaintiffs was produced at trial raises the presumption of plaintiffs' ownership, though, if plaintiffs be the payees, and the paper be found to have been indorsed, the presumption will be that the indorsement has not been completed by delivery, or that plaintiffs merely held the note for collection. *Gray v. Altman* (Civ. App.) 149 S. W. 760.

In view of Art. 7749, the law presumes that the common source of title, conveying the land for himself and as attorney in fact for third persons, had a power of attorney, in the absence of any proof to the contrary. *Woodward v. Ross* (Civ. App.) 153 S. W. 158.

70. Public lands.—Under a contract to locate and procure a patent for land, the locator having proved that he had procured the issuance of the patent and paid the dues and fees, it was presumed that he, and not somebody else, had procured the location and survey to be made. *Emmons v. Oldham*, 12 T. 18.

Where a prior application for the purchase of school lands is refused, and the lands sold to a subsequent purchaser, it will be inferred, in a suit involving title thereto, in the absence of evidence, that the prior applicant had not complied with all conditions, and that his application was rightfully refused. *Forst v. Rothe* (Civ. App.) 66 S. W. 575.

The fact that the commissioner awarded school land to an applicant to purchase does not raise a presumption that the land was classified. *Anderson v. Walker* (Civ. App.) 70 S. W. 1003.

The action of the official of the land office in making sales of school land would not support a presumption that classification and appraisal had been made. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 68.

School land awarded by Commissioner of General Land Office held presumed to have been classified as applied for and appraised at price offered. *Smithers v. Lowrance*, 100 T. 77, 93 S. W. 1064.

The presumption is that the original survey of a league was actually made on the ground, but the fact that the surveyor did not go on the ground and measure and mark the lines and corners may be shown. *Wilkins v. Clawson*, 50 C. A. 82, 110 S. W. 103.

In an action to determine title to public land which both parties claimed to have entered, where the commissioner of the general land office awarded the land to plaintiff, it will be presumed that the land had been appraised or placed on the market and therefore, the plaintiff had title in himself at the time of the bringing of the action. *Smyth v. Saigling* (Civ. App.) 110 S. W. 550.

Where one showed that his title consisted of a purchase of school lands, which was recognized by the officers of the state in the manner prescribed by the statute, and an adversary claiming under a subsequent rejected application claimed that the elder sale was void, the court should charge that the adversary had the burden of proving the facts invalidating the elder sale. *Barnes v. Williams*, 102 T. 444, 119 S. W. 89.

71. Receivers.—Receiver of telegraph line will be presumed to have authority to contract to transmit a message beyond his line. *Jones v. Roach*, 21 C. A. 301, 51 S. W. 549.

72. Sales.—As to the presumption in support of the sale of community property by the marital survivor, see *Brown v. Elmendorf* (Civ. App.) 25 S. W. 145; *Id.*, 26 S. W. 1043, 87 T. 56.

In an action for breach of warranty, the price paid may be regarded as the value of an article such as it is warranted to be, in the absence of any showing to the contrary. *Ash v. Beck* (Civ. App.) 68 S. W. 53.

The lapse of 38 years after the sale of community property by the surviving husband is sufficient to raise the presumption that the sale was made to pay community debts. *Stipe v. Shirley*, 33 C. A. 223, 76 S. W. 307.

Proof of a sale of personal property is evidence of the delivery thereof. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

That a sale is for cash, and that a delivery is subject to the condition of a cash payment being made, may be inferred from acts and circumstances, and need not be express. *Continental Bank & Trust Co. v. Hartman* (Civ. App.) 129 S. W. 179.

72½. Bona fide purchaser.—There being no evidence to contradict it, it will be presumed that the purchaser of land purchased without notice of an outstanding deed, where proof of payment of the purchase money is made, more than 40 years have elapsed, and all the parties to the transaction are dead. *Dean v. Gibson* (Civ. App.) 58 S. W. 51.

There is no presumption that a second grantee of land previously conveyed to another, who failed to record his deed, was a bona fide purchaser. *Green v. Robertson*, 30 C. A. 236, 70 S. W. 345.

Facts held to raise a presumption that the grantee purchased in good faith. *Dean v. Gibson* (Civ. App.) 79 S. W. 363.

A purchaser, having paid full value for the entire tract, held presumed to have been without notice of a prior unrecorded deed from his grantor to a third person of an undivided interest. *J. M. Guffey Petroleum Co. v. Hooks*, 47 C. A. 560, 106 S. W. 690.

It may be presumed from the payment of the purchase money that a purchaser bought without notice of a prior unrecorded deed. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

As against an equity or an equitable estate, the purchaser of a legal title held presumed to hold in good faith. *R. B. Godley Lumber Co. v. Teagarden* (Civ. App.) 135 S. W. 1109.

73. Validity of statutes.—In the absence of pleading and proof to the contrary, it will be presumed that a law repealing a charter was passed in accordance with the constitutional requirements in article 3, § 57. *Thompson v. State*, 23 C. A. 370, 56 S. W. 603.

A territorial statute, in the absence of disapproval by Congress, as authorized by act of Congress, held presumptively valid. *Buttron v. El Paso Northeastern Ry. Co.* (Civ. App.) 93 S. W. 676.

The court, in the absence of proof to the contrary, must presume that the Legislature, in adopting a local or special law, complied with Const. art. 3, § 57, and Art. 5494, and this is true, though the act purports on its face to be a general law. *Cravens v. State*, 57 Cr. R. 135, 122 S. W. 29, 136 Am. St. Rep. 977.

74. Tenants in common.—In the absence of evidence to the contrary, the interests of tenants in common are presumed to be equal. *Gilmer v. Beauchamp*, 40 C. A. 125, 87 S. W. 907.

75. Malice.—When an attachment is issued without probable cause malice may be inferred. This inference may be repelled by facts which show a fair and honest effort to collect a just debt. *Dwyer v. Testard*, 1 App. C. C. § 1232; *Walcott v. Hendrick*, 6 T. 406; *Wiley v. Trailwick*, 14 T. 662; *Culbertson v. Cabeen*, 29 T. 247; *Harrison v. Harwood*, 31 T. 657; *Kaufman v. Wicks*, 62 T. 234. Evidence that a full and fair statement of facts was submitted to counsel upon whose opinion the party acted is admissible in rebuttal. *Dunn v. Cole*, 2 App. C. C. § 822.

Malice may be inferred from an intentional wrongful act. *Telegraph Co. v. Kennedy*, 80 T. 71, 15 S. W. 704.

76. Making of will.—There is no presumption that a deceased person made a will. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

II. Presumptions on Appeal or Writ of Error

77. In general.—In the absence of a statement of facts, it will be presumed that facts relied on by appellant were not proved. *Missouri, K. & T. Ry. Co. of Texas v. Cock* (Civ. App.) 51 S. W. 354.

The objection that the affidavits and applications to purchase certain public lands were not in conformity with any legal classifications and appraisements held not sustainable, where certain classifications and appraisements appeared by the statement of facts as duly made, and it did not appear that such applications and affidavits were not in conformity with them. *Clark v. McKnight*, 25 C. A. 60, 61 S. W. 349.

In the absence of a statement of facts, held, that certain presumptions would obtain on a writ of error, in an action of trespass to try title. *Rountree v. Haynes* (Civ. App.) 73 S. W. 435.

Under the condition of the record and briefs held the court was justified in deciding the appeal on a certain assumption. *Cope v. Blount*, 38 C. A. 516, 91 S. W. 615.

Recital in a statement of facts held sufficient to show that documents annexed to the petition as exhibits were before the jury as evidence. *Byers v. Thacker*, 42 C. A. 492, 94 S. W. 138.

If that part of the record on appeal made for the purpose of exhibiting the evidence is susceptible of an interpretation which will support the judgment, that interpretation should be given. *Id.*

Statement of presumption on appeal. *United States & Mexican Trust Co. v. Western Supply & Mfg. Co.* (Civ. App.) 109 S. W. 377.

All presumptions consistent with the record are in favor of conclusions of the trial court. *Lindly v. Lindly*, 102 T. 135, 113 S. W. 750.

In absence of anything in the record to show the action of the trial court complained of, the action cannot be presumed as a reason for reversal, but a presumption that the court did not so act ought rather to be indulged. *Smith v. Smith* (Civ. App.) 123 S. W. 198.

The court on appeal held authorized to presume that there was evidence justifying the ruling complained of. *Midleton v. Presidio County* (Civ. App.) 129 S. W. 637.

In absence of a transcript showing notice of an application to probate a will was not issued, or that notice issued was insufficient, held, that the presumption obtained that it was issued and served in compliance with the statute. *White v. Holmes* (Civ. App.) 129 S. W. 874.

Where the judgments both on the former and the present trials recited that a defendant was duly cited, and the question of citation was not raised until on appeal in the second trial, it will be presumed that such defendant was duly served. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.* (Civ. App.) 153 S. W. 680.

78. Burden of showing error.—See, also, notes under Art. 4645.

Presumptions will not be indulged in to show error. *Ferguson v. Cochran* (Civ. App.) 45 S. W. 30.

In a suit to restrain the obstruction of a road, defendant held not precluded from urging that the burden was on plaintiff to show affirmatively that he was not under legal disability during the prescriptive period, because he objected to the testimony when offered. *Evans v. Scott*, 37 C. A. 373, 83 S. W. 874.

Where appellant objected that a material finding of fact was not supported by any evidence, it was incumbent on appellee to point out the evidence on which the finding was based, if there was any in the record. *Cox v. Combs*, 51 C. A. 346, 111 S. W. 1069.

The burden is upon appellant to show error in rejecting a charge. *Beavers v. Baker* (Civ. App.) 124 S. W. 450.

While error will not be presumed, and a judgment correct on its merits will not be reversed merely because the court gave an erroneous reason for its ruling, yet if error appears, the burden is on appellee to show affirmatively from the record that it was harmless to avoid a reversal, and hence where the trial court erroneously sustained exceptions to a petition for removal to the United States Circuit Court, the court on appeal cannot presume in order to make the error harmless, that the petition was not filed within the time required by Judiciary Act March 3, 1875, c. 137, § 3, 18 Stat. 471 (U. S. Comp. St. 1901, p. 510), and Art. 1904, in the absence of any affirmative showing of such fact in the record. *Bilby v. Hancock* (Civ. App.) 125 S. W. 370.

Where the grounds relied on to support a judgment for plaintiff do not appear from the court's conclusions of law, the burden is on defendant on appeal to show that the judgment cannot be sustained on any of the grounds alleged. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

Where the evidence in trespass to try title conclusively showed that the equitable title was in defendant's wife, plaintiff, to seek a reversal of a judgment in favor of defendant, must show that the judgment was not based on the theory that he was a purchaser with notice, on which theory the judgment might have been based. *Aycock v. Thompson* (Civ. App.) 146 S. W. 641.

Where plaintiff on appeal has the duty of raising an issue by assignment of error, and fails to do so, it will be presumed that the judgment was correct as to that issue. *Id.*

Where no sufficient reason is given why an assignment of error should be sustained, it will be overruled. *Krugel v. Nitschman* (Civ. App.) 147 S. W. 319.

Where the record leaves it in doubt whether an alleged erroneous instruction was requested by appellant as claimed by appellee, it will be presumed that it was so requested, since it is the duty of an appellant to show error. *Lilly v. Yeary* (Civ. App.) 152 S. W. 823.

79. Grounds and forms of action or defense.—Where the record contains no statement of facts or findings of fact, the question whether the suit was brought within a reasonable time will be presumed to have been determined by the court below. *Link v. City of Houston*, 94 T. 378, 59 S. W. 566.

Where the jury found in favor of a plea of limitation, and the record is silent as to the time when the suit is brought, there being more than 10 years between the taking of adverse possession of land and the date of trial, it will be presumed on appeal that the period of limitation had elapsed when the suit was brought. *Texas & N. O. R. Co. v. Speights* (Civ. App.) 59 S. W. 572.

Where plaintiff's brief concedes failure to comply with a statute pleaded in abatement, it will be assumed that such requirements have not been complied with. *Sawyer v. El Paso & N. E. Ry. Co.*, 49 C. A. 106, 108 S. W. 718.

In an action for the killing of cattle which escaped through a gate claimed to be defective, where the complaint also alleged that defendant's engineer failed to use due care in stopping the train after seeing the cattle, even if a finding that the gate was defective was erroneous, a judgment for plaintiff need not necessarily be reversed, since a judgment might be supported on the other ground of recovery submitted by the charge. *Texas & P. Ry. Co. v. Corn* (Civ. App.) 110 S. W. 485.

Where there is neither a statement of facts nor conclusions of fact in the record, it must be presumed in favor of the judgment that the evidence warranted sustaining a plea of limitations. *Schneider v. Schneider* (Civ. App.) 118 S. W. 789.

Where a cause was tried on the second amended petition filed after the running of limitations, in lieu of the first amended petition filed in time, and not in the record, the contention that the cause was barred must be overruled. *Anderson v. Crow* (Civ. App.) 151 S. W. 1080.

80. Jurisdiction.—The district court was presumed to have jurisdiction of an appeal from the county court, though the appeal bond did not appear in the record. *Shiner v. Shiner*, 14 C. A. 489, 40 S. W. 439.

Where the record affirmatively shows that the special judge took the oath "prescribed by law," it will be presumed that he took the oath prescribed by the constitution. *D'Arrigo v. Texas Produce Co.*, 18 C. A. 41, 44 S. W. 531.

Where plaintiff's written pleadings, in suit upon note for \$190 and 10 per cent. attorney's fees, show that he claimed damages for \$200, a sum within court's jurisdiction, it will be presumed that credit existed, though not indorsed on note. *Hackney v. Schow*, 21 C. A. 613, 53 S. W. 713.

Though a plea is sufficient to raise the question of jurisdiction in the court below, on appeal, when the record does not raise the question, it will not be considered. *Roach v. Malotte*, 23 C. A. 400, 56 S. W. 701.

On appeal, held, that it would be presumed, in favor of jurisdiction of the trial court, that the amount alleged as damages was the same in the petition on which the cause was tried as in the original petition. *St. Louis Southwestern Ry. Co. of Texas v. Dolan* (Civ. App.) 84 S. W. 393.

Record on appeal held to justify an order overruling a plea to the jurisdiction. *Receivers of Kirby Lumber Co. v. Poindexter* (Civ. App.) 103 S. W. 439.

On an appeal from the county court to the Court of Appeals, where the demand was not within the jurisdiction of the county court, and there was no transcript on appeal from justice's court in the county court transcript, held it would not be presumed the county court had jurisdiction. *Royal Fraternal Union v. Bedford* (Civ. App.) 105 S. W. 523.

In an action for damages, where the petition alleges several items and claims a lump sum large enough to give the court jurisdiction and there are some items upon which plaintiff is not entitled to recover, in the absence of a special exception calling on plaintiff to specify the amount of damages claimed in respect to the items upon which he could recover, it will be presumed on appeal that the amounts so claimed were sufficient to give the court jurisdiction. *Rich v. Western Union Telegraph Co.* (Civ. App.) 110 S. W. 93.

In the face of an affirmative showing in the record, held, it cannot be presumed the amount in controversy was within the jurisdiction of the trial court. *Texas & P. Ry. Co. v. Hood* (Civ. App.) 125 S. W. 982.

Where, at the time of the trial the judge of the lower court was disqualified, it cannot, in the absence of any evidence to the contrary, be presumed that the disqualification was removed in less than a month, so as to entitle him to render judgment. *Burnham v. Hardy Oil Co.* (Civ. App.) 152 S. W. 182.

81. Venue.—It is presumed that the court correctly changed the venue when the evidence is not in the record. *Williams v. Planters' & Mechanics' Nat. Bank*, 91 T. 651, 45 S. W. 690.

Where the record does not show that defendant's plea of personal privilege to be sued in the county of his residence was called to the attention of the court or was acted on, the court will regard the plea as having been waived. *Texas & N. O. R. Co. v. Parsons* (Civ. App.) 109 S. W. 240.

The court on appeal from a judgment sustaining a plea of privilege held required to assume that defendants were nonresidents of the county in which the action was begun. *Moorhouse v. King County Land & Cattle Co.* (Civ. App.) 139 S. W. 883.

82. Parties.—In support of a judgment against a temporary administrator who acted after his term expired, it was presumed that his authority was continued, and that he was authorized to defend the case. *Williams v. Planters' & Mechanics' Nat. Bank*, 91 T. 651, 45 S. W. 690.

It will be presumed on appeal that plaintiff is a corporation, where the question is raised for the first time on appeal from a judgment secured by it. *Hunter v. William J. Lemp Brewing Co.* (Civ. App.) 46 S. W. 371.

Where continuance in order to perfect service on new parties is refused, it will be presumed that court refused to make them parties to suit, and final judgment need not dispose of them. *Ellis v. Harrison* (Civ. App.) 52 S. W. 581.

The appellate court, in the absence of a contrary showing, will presume the defendants to have been sued individually, when such presumption is necessary to support the judgment. *Grayson v. Hollingsworth* (Civ. App.) 148 S. W. 1135.

83. Process and appearance.—In the absence of a contrary showing, it must be presumed that the mother had notice of proceedings to appoint a third party guardian for her children. *Beardsley v. Thomas*, 31 C. A. 452, 72 S. W. 411.

On appeal, held, that upon the record it would be presumed that a certain person was an attorney of record for one of the parties. *Gilmer v. Beauchamp*, 40 C. A. 125, 87 S. W. 907.

Upon the filing of an indorsed citation by the clerk, held, that it would be presumed that the return thereon was made before it was filed. *Lester v. First State Bank of Bovina* (Civ. App.) 139 S. W. 661.

Though a petition alleged that defendant railroad company had an agent in H. county if it was also served in P. county, it will be presumed that the necessary steps were taken to make the issuance of the process in P. county legal. *Pecos & N. T. Ry. Co. v. Cox* (Civ. App.) 141 S. W. 327.

A bill of exceptions upon objection to the sufficiency of the return of a citation, which does not set out the citation in full, where the return recites service "by delivering to each of the within-named defendants in person a true copy of this citation (together with the accompanying certified copy of the plaintiff's) at the following times and places," does not present for review the objection that a copy of the petition was not served on defendant, as it will be presumed that the citation commanded a delivery of a true copy of the writ with the accompanying petition; the omission of the word "petition" being merely a clerical error. *Hardwicke v. Pickle* (Civ. App.) 146 S. W. 960.

In the absence of an affirmative showing to the contrary, the court, on appeal, will presume, in a case where there has been a trial on the merits and all the parties were present, that the party against whom a cause of action is asserted had either been served with citation, or had waived service. *Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co.* (Civ. App.) 150 S. W. 259.

84. Pleading.—There being nothing in the record showing exception interposing limitations was ruled on, it will be presumed waived. *Turner v. Clark*, 18 C. A. 606, 46 S. W. 381.

From an incomplete record of a probate court relating to its administration of an estate it will not be presumed that a complaint was filed by a creditor against devisees, entitled to an independent administration to compel them to give bond as provided by Probate Act 1848, § 110. *Wood v. Mistretta*, 20 C. A. 236, 50 S. W. 135.

Where defendant moved for continuance on ground that allegation in amended

petition was different from that in prior petitions, and on appeal from a denial of the motion only last petition was sent up, held, it would be presumed the former pleadings charged defendant with notice of facts as last alleged. *International & G. N. R. Co. v. Newburn*, 94 T. 310, 60 S. W. 429.

Plea in abatement held presumably abandoned. *Word v. Kennon* (Civ. App.) 75 S. W. 334.

Where a petition to recover possession of a policy was amended, on the day the policy was tendered, so as to charge a conversion thereof, it would be presumed, on appeal from a judgment for plaintiff, that the tender was after the amendment. *First Nat. Bank v. Cleland* (Civ. App.) 82 S. W. 337.

Where, in an action on a liquor's dealer's bond, the record failed to show the ground on which a plea in abatement was overruled, or the evidence in support thereof, it will be presumed on appeal that the ruling was proper. *Hawthorne v. State*, 39 C. A. 122, 87 S. W. 839.

A presumption that an exception in the nature of a plea in abatement was not seasonably made held to obtain in support of a judgment. *St. Louis, I. M. & S. Ry. Co. v. Berry*, 42 C. A. 470, 93 S. W. 1107.

Where the record does not contain appellee's superseded pleadings, the presumption is that they stated an amount within the jurisdiction of the court. *Ft. Worth & D. Ry. Co. v. Underwood* (Civ. App.) 98 S. W. 453.

In a suit against a railroad company for coal delivered to its receiver, the petition held sufficient to admit proof that the railroad's property was returned to it without a sale, and, in the absence of a statement of facts, it would be presumed on appeal that such was the proof. *Gulf & Interstate Ry. Co. v. Southwestern Coal Selling Co.* (Civ. App.) 105 S. W. 64.

On appeal from county court after appeal from justice court, oral pleadings of plaintiff held to be presumed such as to admit proof sufficient to sustain a judgment for plaintiff. *Bowman v. Southwestern Land Co.* (Civ. App.) 107 S. W. 585.

Where the grounds of a plea in abatement were not in the record, it may not be said that the trial court erred in sustaining it. *Hartford Fire Ins. Co. v. City of Houston* (Civ. App.) 110 S. W. 973.

Under the facts, held, the Court of Civil Appeals would presume that there was no pleading authorizing plaintiff to recover interest as part of his demand. *Morris v. Smith*, 51 C. A. 357, 112 S. W. 130.

The court, on appeal from a judgment disallowing a claim against an estate, held not entitled to presume that the original pleading demanded the allowance of the claim and was filed within 90 days after the rejection of the claim. *Whitmire v. Powell* (Civ. App.) 117 S. W. 433.

Where, on appeal in an action for breach of contract, the transcript of the testimony contains a statement that the contract was put in evidence, but it is not made a part of the record, and the transcript states that the contract was correctly set forth in the pleadings, the court may assume that the contract put in evidence was correctly set forth in the petition. *St. Louis, S. F. & T. Ry. Co. v. Fenley* (Civ. App.) 118 S. W. 845.

The ruling of a trial court on a plea not in the record will be presumed to be correct, unless the contrary is shown. *Gardner v. Planters' Nat. Bank of Honey Grove*, 54 C. A. 572, 118 S. W. 1146.

The appellate court should indulge every reasonable inference as to the sufficiency of the pleadings where their substance is questioned on appeal. *Donnell v. Currie & Dohoney* (Civ. App.) 131 S. W. 88.

Where plaintiff's statement of cause of action in a case originating in a justice's court is not incorporated in the record on appeal to the Court of Civil Appeals, that court will assume that the pleadings other than those appearing from the transcript were oral. *Loomis v. Broadus & Leavell* (Civ. App.) 134 S. W. 743.

Where exceptions to plaintiff's petitions were not presented to nor acted on by the trial court, it would be presumed on appeal that they stated a cause of action. *Prosser v. First Nat. Bank* (Civ. App.) 134 S. W. 781.

Where a judgment rendered on April 18th adjudicated the issues raised by a cross-bill, it will be presumed that the clerk's file mark on the cross-bill dated April 19th was a clerical error, and that the cross-bill was on file when the judgment was rendered. *Early & Clement Grain Co. v. Fite* (Civ. App.) 147 S. W. 673.

Where a cross-bill is filed to bring in new parties which seeks no relief against the plaintiff, and a motion to continue is sought to enable the petitioner to bring in such parties which is denied, and such parties were not brought in at the time of trial, it will be presumed that the cross-bill was abandoned. *Thompson v. Harmon* (Civ. App.) 152 S. W. 1161.

Where, in an action originating in justice court on an account more than two years old, the plaintiff filed written pleadings in the county court, but failed to plead any agreement fixing the time when the account should become due, though defendant specifically pleaded limitations, it will not be presumed, on appeal from the county court, that an instruction on the existence of such agreement was proper; such presumption being indulged only where the pleadings are oral. *Young v. Sorenson & Hooper* (Civ. App.) 154 S. W. 676.

85. — **Demurrer.**—In reviewing the overruling of a demurrer to the complaint, its allegations must be accorded every reasonable intentment in favor of the right claimed. *St. Louis Southwestern Ry. Co. of Texas v. Spivey*, 97 T. 143, 76 S. W. 748.

On appeal held presumable that certain demurrers filed were not presented, but were waived. *St. Louis Southwestern Ry. Co. of Texas v. Rollins* (Civ. App.) 89 S. W. 1099.

Where the record shows no action by the court on a demurrer, the same must be considered waived. *Whitmire v. Farmers' Nat. Bank of Hillsboro* (Civ. App.) 97 S. W. 512.

Where the record does not show that any action was taken by the trial court on defendant's exceptions to the petition, error therein, if any, is presumed to have been waived. *Boardman v. Woodward* (Civ. App.) 118 S. W. 550.

Where a cause was tried by the court without a jury, the judgment for plaintiff

will not be reversed for failure to sustain special exceptions to the petition. *Martin v. A. B. Frank Co.* (Civ. App.) 125 S. W. 958.

Where plaintiffs by their supplemental petition excepted to the allegation of defendants' pleading, but no ruling was had upon these exceptions, the appellate court will assume that they were abandoned. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

The fact that exceptions to the petition on the ground of misjoinder of parties plaintiff were not presented to the trial court at the term at which they were filed held not to warrant a holding on appeal that the court had no jurisdiction to pass on them at a subsequent term in view of the record. *Sharp v. Johnson* (Civ. App.) 127 S. W. 837.

Where the record fails to show any ruling on a general demurrer, it will be presumed on appeal to have been either abandoned or overruled. *Cheek v. Nicholson* (Civ. App.) 133 S. W. 707.

Where the facts developed on the trial in the county court on appeal from a justice's court disclosed a good cause of action, the court on further appeal must presume in favor of the county court's ruling on a demurrer to the pleadings. *Loomis v. Broadus & Leavell* (Civ. App.) 134 S. W. 743.

Special exceptions in pleadings not acted upon by the court will be presumed to have been waived except in case of a general demurrer. *Beaumont Irrigating Co. v. Gregory* (Civ. App.) 136 S. W. 545.

Under the record, held, that it would be presumed on appeal that exceptions to the petition were waived. *Mecca Fire Ins. Co. of Waco v. Stricker* (Civ. App.) 136 S. W. 599.

A judgment sustaining a demurrer held not reversible, although erroneous, where no complaint was made of the action in sustaining exceptions to petition, it being presumed that with the matter to which it related stricken out the petition was insufficient. *Kruegel v. Nitschman* (Civ. App.) 147 S. W. 319.

86. — Amendments.—When the bill of exceptions fails to set forth the grounds of a ruling excluding an amendment to the pleadings, the presumption is that the court's discretion was properly exercised. *Hurd v. Texas Brewing Co.*, 21 C. A. 296, 51 S. W. 883.

There is no presumption, on an appeal from a judgment holding an action barred by limitations, that the original petition, filed before the running of limitations, stated a different cause of action from an amendment filed thereafter and on which the judgment was rendered. *Dwight v. Matthews*, 94 T. 533, 62 S. W. 1052.

87. — Striking out or dismissal.—In a suit for partition, in which plaintiff filed a motion to strike out the answer of one who appeared as next friend of one of the defendants, held that it would be presumed on appeal that the court made proper inquiry before ruling on the motion. *Lindly v. Lindly*, 102 T. 135, 113 S. W. 750.

Where the record on appeal fails to show the ruling of the court on motion to strike out a pleading, the court on appeal will presume that the movant abandoned his motion. *McComas v. Curtis* (Civ. App.) 130 S. W. 594.

88. Interlocutory proceedings.—The overruling of a motion to vacate a receivership held not erroneous where evidence is not in the record. *Byrne v. First Nat. Bank*, 20 C. A. 194, 49 S. W. 706.

Where the original petition is not in the record, an order denying defendant's application for continuance on the ground of surprise by the amended petition will be presumed proper. *Texas Midland R. Co. v. Crowder*, 25 C. A. 536, 64 S. W. 90.

In the absence of a statement of facts held it would be presumed in favor of a temporary injunction that defendant was selling intoxicating liquor without license or payment of the required tax other than as alleged in his answer. *Barckell v. State* (Civ. App.) 106 S. W. 190.

In an action on a note, in which defendant was granted an injunction staying the suit until plaintiff had exhausted other securities, it will be presumed, on plaintiff's appeal from the restraining order, that the court found that the injunction would not delay plaintiff in the collection of the note. *Chemical Nat. Bank v. Kiam*, 52 C. A. 253, 113 S. W. 948.

In the absence of evidence to the contrary, it cannot be presumed on appeal that receivership proceedings were not conducted according to law. *Dilley v. Jasper Lumber Co.* (Civ. App.) 114 S. W. 878.

The denial of a motion for a continuance to procure testimony to meet an issue raised by a trial amendment is not cause for reversal, where neither the motion for continuance nor for new trial shows the existence of such testimony. *Chicago, R. I. & P. Ry. Co. v. Clements*, 53 C. A. 143, 115 S. W. 664.

To support a judgment making an allowance to the clerk of court in receivership proceedings, the court on appeal must indulge the presumption that the allowance was on grounds and for a claim authorized by law. *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 296.

A petition for a receiver not in the record on appeal held presumably sufficient ground for the court's action thereon. *American Bonding Co. v. Williams* (Civ. App.) 131 S. W. 652.

Where the evidence on an application for a temporary restraining order does not appear in the statement of facts on an appeal from the judgment, it will be presumed that the order would not have been granted if the plaintiff had not shown himself entitled thereto. *Nelson v. Lamm* (Civ. App.) 147 S. W. 664.

Where the statement of facts shows that the evidence on an application for a temporary restraining order was by agreement read and considered on the trial of the case, but does not set out such evidence, it will be presumed that the evidence was sufficient to support the court's findings. *Id.*

The court, on appeal from a judgment denying a temporary injunction, will presume that the trial judge did not abuse his discretion, in the absence of any statement of facts, bill of exceptions, or findings of fact in the record. *Spence v. Fenchler* (Civ. App.) 151 S. W. 1094.

89. Qualification and selection of jurors.—Presumption that the court acted properly in accepting jurors who had not paid their poll tax held not destroyed by the reasons

given by the court for its action in qualifying the bill of exceptions. *San Antonio & A. P. Ry. Co. v. Lester* (Civ. App.) 84 S. W. 401.

90. **Conduct of trial.**—It is not necessary that the record should show that the jury was sworn, that being presumed, unless the contrary appears. *Clark v. Davis*, 7 T. 556; *Drake v. Brander*, 8 T. 351; *Freiberg v. Lowe*, 61 T. 436.

If the bill of exceptions does not show that admissions required by Dist. Ct. Rule No. 31 (20 S. W. xiv) were made and recorded, it will be presumed that everything was done to entitle defendant to the right to open and close, and that it was properly adjudged to him. *McCardell v. Henry*, 23 C. A. 383, 57 S. W. 908.

Where the record does not show otherwise, the presumption from the action of the trial court in allowing a jury should be that all that was essential to entitle the defendant thereto had been done. *San Jacinto Oil Co. v. Culberson*, 100 T. 462, 101 S. W. 197.

Where defendant filed a plea of privilege, and alleged that the assignment sued on was fraudulent for the purpose of conferring venue, and pleaded estoppel upon the merits of the case, and where special exceptions to the plea of privilege were sustained, the court, in the absence of a statement of facts, must presume that defendant was not allowed to prove his allegations of estoppel and fraudulent assignment. *Drummond v. Allen Nat. Bank* (Civ. App.) 152 S. W. 739.

91. **Admissibility and reception of evidence.**—In an action on notes for the price of land which the vendee claims is deficient in quantity, the admission of parol evidence that the sale was in gross, in the absence of a deed, will not be presumed erroneous. *Elder v. First Nat. Bank* (Civ. App.) 42 S. W. 124.

It will be presumed on appeal that a deed was properly delivered if on the trial no objection was made to its admission in evidence. *Hurst v. McMullen* (Civ. App.) 47 S. W. 666.

Where on appeal it appeared that the court admitted the statutes of another state in evidence, it will be presumed, where the bill of exceptions does not show the contrary, that the volume was published by authority of such other state and was admissible under Art. 3692. *Blethen v. Bonner* (Civ. App.) 52 S. W. 571.

Where a witness was asked to attach a certain paper to his deposition, but did not do so, and the court admitted his testimony as to its contents, it will be assumed, in favor of the court's ruling, that witness did not reside within the county. *Missouri, K. & T. Ry. Co. of Texas v. Dilworth*, 95 T. 327, 67 S. W. 88.

Testimony held to be presumed on appeal to be as to market value. *Caplen v. Cox*, 42 C. A. 297, 92 S. W. 1048.

Where it was not shown that a deed was not proved as at common law, it will be presumed that it was so proved in support of its admission over an objection that it was not filed, that no notice was given, nor agreement had authorizing its introduction. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

In the absence of a showing what the answer of a witness would have been to a question to which an objection was sustained, the court on appeal cannot assume that the answer would have been of benefit to the party complaining, or that its exclusion was harmful to him. *Goldstein v. Susholtz*, 46 C. A. 582, 105 S. W. 219.

On appeal held it must be presumed certain evidence was properly admitted. *Sterling v. De Laune*, 47 C. A. 470, 105 S. W. 1169.

In the absence of a statement in the brief of evidence, showing that an expert witness was not qualified to give an opinion, it will be presumed that the ruling of the trial court is correct. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

When the excluded evidence is not made a part of the bill of exceptions or shown in the record, it will be presumed that it was properly excluded. *St. Louis & S. F. R. Co. v. McAnellia* (Civ. App.) 110 S. W. 936.

Error in refusing to require a whole letter to be read in evidence held insufficiently shown. *T. A. Robertson & Co. v. Russell*, 51 C. A. 257, 111 S. W. 205.

Presumptions as to the evidence in absence of a statement of fact, stated. *Garza v. Cotton* (Civ. App.) 120 S. W. 212.

In the absence from the record of any evidence of the qualification of a witness to express his opinion, the ruling of the trial court excluding such opinion will be presumed to be correct. *Peters v. Strauss* (Civ. App.) 132 S. W. 956.

Where the record does not show the contents of certain memoranda offered in evidence and improperly excluded, the court cannot presume that the exclusion was prejudicial. *Southwestern Telegraph & Telephone Co. v. Pearson* (Civ. App.) 137 S. W. 733.

92. **Dismissal or direction of verdict.**—Where a judgment fails to include one of the defendants to the action, it will be presumed that it was dismissed as to him. *Smith v. Wilson*, 18 C. A. 24, 44 S. W. 556.

On appeal from an order denying a motion to reinstate a cause after a voluntary nonsuit, held that it would be presumed that the court found that statements in the motion were untrue. *Sanchez v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 90 S. W. 689.

On appeal in trespass to try title held it must be presumed on the record that the court did not err in directing verdict for plaintiff. *Newnom v. Williamson*, 46 C. A. 615, 103 S. W. 656.

On the pleadings and proceedings in the case, a verdict having been directed for defendant, held, that it would be presumed on appeal that the matters pleaded by plaintiff were proved or admitted, and were such as to entitle her to recover, unless defeated by plaintiff's noncompliance with a statute pleaded in abatement. *Sawyer v. El Paso & N. E. Ry. Co.*, 49 C. A. 106, 108 S. W. 718.

The appellate court will presume that an action was dismissed as to parties whom the record does not show were served, or answered, although there is no judgment entry of the dismissal. *Porter v. Pecos & N. T. Ry. Co.*, 56 C. A. 479, 121 S. W. 897.

On appeal from a judgment for defendant upon a directed verdict, testimony conflicting with that favorable to plaintiff and tending to support the defense will not be considered. *Smith v. Queen City Lumber Co.* (Civ. App.) 141 S. W. 309.

In the absence of a statement or conclusion of facts, the appellate court must indulge every presumption necessary to sustain the ruling of the trial court in directing a verdict. *McCoy v. Pafford* (Civ. App.) 150 S. W. 968.

For the purposes of an appeal from a judgment on a directed verdict for defendant, plaintiff's evidence must be taken as true. *Grubb v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 153 S. W. 694.

93. Instructions.—In the absence of proof to the contrary, it will be presumed that the court, in instructing the jury to find on special issues, did so at the request of one of the parties. *Belknap v. Groover* (Civ. App.) 56 S. W. 249.

On appeal, it will be presumed that a charge, requested because of certain alleged argument of plaintiff's counsel, was refused because no such argument was made. *International & G. N. R. Co. v. Mills*, 34 C. A. 127, 78 S. W. 11.

A charge expressly given, "In view of the argument of plaintiff by his counsel," presumed on appeal to have been warranted by the argument. *Beaty v. El Paso Electric Ry. Co.* (Civ. App.) 91 S. W. 365.

In the absence of a statement of facts or bill of exceptions, the judgment will not be reversed for errors in the charge, unless they are so glaring as to leave no doubt that the findings must have been controlled thereby. *Oliver v. Grant* (Civ. App.) 100 S. W. 1022.

Where the court's charge was acted upon, the jury returning a verdict in accordance therewith, it will be presumed that the charge was filed as required by law. *Carter v. Kieran* (Civ. App.) 115 S. W. 272.

An erroneous requested instruction will be regarded as having invited error in the court's general charge embracing the same instruction when there is nothing in the record to show that the requested instruction was not responsible for the error. *Nagle v. Simmank*, 54 C. A. 432, 116 S. W. 862.

Where an instruction as to damages may be construed as not authorizing a double recovery, it will be presumed that the jury so construed it, though it cannot be said to be incapable of a different construction. *Ft. Worth & D. C. Ry. Co. v. Morrison* (Civ. App.) 129 S. W. 1157.

From the record on appeal, in an action to try title, the Court of Civil Appeals held not entitled to assume certain facts in support of special charges. *Fleming v. Mistletoe Heights Land Co.* (Civ. App.) 133 S. W. 923.

Statement of trial court instruction as to contention of parties held to be accepted as correct, in absence of showing in the record to the contrary. *Davis v. Mills* (Civ. App.) 133 S. W. 1064.

Where the court's general charge was warranted by the pleadings, in the absence of a statement of facts, the Supreme Court will assume that the evidence warranted it. *International & G. N. R. Co. v. Alexander* (Civ. App.) 135 S. W. 703.

In determining whether or not an instruction misled the jury, they will be presumed to have read and considered the entire charge. *Texas Cent. R. Co. v. Cameron* (Civ. App.) 149 S. W. 709.

In the absence of a statement of facts, the court, on appeal, cannot presume that the evidence raised any issue of fact on a point not submitted by the trial court to the jury. *Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co.* (Civ. App.) 150 S. W. 259.

94. Custody and conduct of jury.—It must be presumed, in the absence of any showing to the contrary, that the jury obeyed an instruction to disregard certain testimony. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

Where counsel withdrew his remarks when objected to, and the jury were instructed to disregard them, the court on appeal will presume that the jury obeyed the instruction. *Texas & N. O. R. Co. v. Scarborough* (Civ. App.) 104 S. W. 408.

In the absence of a statement of facts, a finding of the trial court that the report of the jury of view appointed to lay out a road was accepted will be presumed to be correct, though the fact is not shown by the record of the commissioners' court. *Cator v. Hays* (Civ. App.) 122 S. W. 953.

95. Verdict.—It will be presumed, in support of the refusal to submit special issues, that the request came too late. *Galveston, H. & S. A. Ry. Co. v. Ford*, 22 C. A. 131, 54 S. W. 37.

In the absence of a statement of facts on appeal, in an action against defendants who had replevied chattels, where the verdict did not find the value of each article replevied, it would be presumed that the finding was unnecessary. *Bonner v. Springfield Wagon Co.* (Civ. App.) 69 S. W. 1032.

Where appellants failed to request the submission of an issue to the jury, and the judgment rests on a special verdict, it will be presumed that the court found against them on such issue. *Walker v. Marchbanks*, 32 C. A. 303, 74 S. W. 929.

The record being silent, held, that it would be presumed, if necessary to sustain the action of the court, that a request for submission of special issues was made. *Stahl v. Askey* (Civ. App.) 81 S. W. 79.

Where the appeal record did not contain all of the evidence, it will be presumed on appeal that evidence was admitted tending to prove a fact found in the absence of a showing by appellant that such was not the fact. *Sawyer v. First Nat. Bank*, 41 C. A. 486, 93 S. W. 151.

In the absence of a showing to the contrary, it must be presumed that the jury based their verdict on the evidence. *Houston & T. C. R. Co. v. Davenport* (Civ. App.) 110 S. W. 150.

It will be presumed that the jury in determining the amount of their verdict confined themselves to evidence. *St. Louis Southwestern Ry. Co. of Texas v. Garber*, 51 C. A. 70, 111 S. W. 227.

Any reasonable explanation of the evidence consistent with the verdict must be adopted by the court in reviewing the sufficiency of the evidence to sustain the verdict. *Grand Fraternity v. Melton* (Civ. App.) 111 S. W. 967.

Where a charge did not authorize a consideration of any damages not proved, it will not be presumed that the jury considered such damages, in the absence of anything in the record showing that they might have done so. *Missouri, K. & T. Ry. Co. of Texas v. Craig*, 52 C. A. 611, 114 S. W. 850.

It will be inferred that the jury assessed the damages according to the case proved and the instructions of the trial court. *St. Louis, S. F. & T. Ry. Co. v. Hutson & Brown*, 56 C. A. 74, 120 S. W. 213.

It should be assumed on appeal that the jury considered the charge as a whole. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

Where objection is sustained to improper argument of counsel, and the jury instructed to ignore it, the presumption is that the jury heeded the court's instructions. *Continental Casualty Co. v. Deeg* (Civ. App.) 125 S. W. 353.

An appellate court reviewing a judgment rendered on a verdict must presume that the jury followed the instructions. *Barnes v. Dallas Consol. Electric St. Ry. Co.*, 103 T. 387, 128 S. W. 367.

A motion to enter judgment on a jury's findings on special issues does not call into question the sufficiency of the evidence to support the verdict or conclusions of the court as involved in its judgment, but requires the appellate court to assume all findings and conclusions as proven. *Eisenstadt Mfg. Co. v. Copeland* (Civ. App.) 149 S. W. 713.

Where material issues, on which the evidence was conflicting, were submitted, but not answered, it must be assumed upon a motion or judgment upon the verdict that the parties consented that the court, instead of the jury, decide such issues of fact. *Id.*

Where a general verdict is rendered for defendant in a case involving several defenses, and the evidence sustains one defense, it is immaterial that it does not sustain the others, the presumption being that the verdict was based on the defense sustainable. *Parker v. Naylor* (Civ. App.) 151 S. W. 1096.

Where, on objection to a question asked by counsel of the opposing counsel during argument, the court instructed the jury not to consider the same, it must be presumed that the instruction was obeyed. *San Antonio Traction Co. v. Roberts* (Civ. App.) 152 S. W. 455.

The court must presume that the jury followed the instructions. *Wyatt v. Moore* (Civ. App.) 152 S. W. 1133.

In the absence of a statement of facts, it will be assumed that all material facts necessary to support the verdict were established at trial. *Tiefel Bros. & Winn v. Maxwell* (Civ. App.) 154 S. W. 319.

96. Findings of court.—When presumed that immaterial and irrelevant evidence did not affect findings. *Frenkel v. Caddou* (Civ. App.) 40 S. W. 638.

Where the conclusions of fact of the court trying a case without a jury are not a part of the record, the court on appeal must assume that the trial court did not consider improper evidence. *Ward v. Armistead*, 17 C. A. 374, 43 S. W. 63; *Texas & N. O. Ry. Co. v. Dorman* (Civ. App.) 62 S. W. 1086; *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898; *Rowan v. Stockwell* (Civ. App.) 124 S. W. 148; *Martin v. A. B. Frank Co.*, 125 S. W. 958; *Robinson v. Dale*, 131 S. W. 308; *Bauknight v. St. Louis S. W. Ry. of Texas*, 133 S. W. 936.

There being no findings of fact in the record, the appellate court must assume that a certain point in issue, on which the evidence is conflicting, was found in favor of the successful party. *City Drug Store v. Scottish Union & National Ins. Co.* (Civ. App.) 44 S. W. 21.

It was presumed from the record that the question of the garnishee's indebtedness was submitted to the court orally, and that the evidence justified a finding of indebtedness. *Seinsheimer v. Flanagan*, 17 C. A. 427, 44 S. W. 30.

A conclusion deduced from facts set out in findings which are contrary to such conclusion will be presumed to have been overcome by evidence. *Jarrell v. Sproles*, 20 C. A. 387, 49 S. W. 904.

Where there is no statement of facts and conclusion of facts filed in the trial court, the presumption on appeal is the court heard the evidence on the issues presented, and his findings were correct. *Graves v. George* (Civ. App.) 54 S. W. 262.

Where neither the agreed facts nor the special verdict furnished the facts necessary to form a basis for the judgment, the trial court will be presumed to have found the facts essential to support the judgment, if such facts are found in the statement of facts. *State Nat. Loan & Trust Co. v. Fuller*, 26 C. A. 318, 63 S. W. 552.

A specific finding of fact will be presumed, in the absence of statement of facts, to have been made on sufficient evidence. *Sweet v. Lowery* (Civ. App.) 63 S. W. 1022.

Where the trial court does not find a certain fact in issue, it will be presumed on appeal that the evidence did not warrant such finding. *Rilling v. Schultze*, 95 T. 352, 67 S. W. 401.

In the absence of a statement of facts on appeal, it will be presumed that there was evidence to support a finding. *Thatcher v. Jeffries* (Civ. App.) 91 S. W. 1091; *Western Supply & Mfg. Co. v. United States & Mexican Trust Co.*, 41 C. A. 478, 92 S. W. 986; *Johnson v. Grace* (Civ. App.) 94 S. W. 1064; *Stevens v. Taylor*, 102 S. W. 791; *Rivers v. Campbell*, 51 C. A. 103, 111 S. W. 190; *Goode v. Pierce* (Civ. App.) 112 S. W. 688; *Gorman v. Campbell*, 135 S. W. 177; *McCoy v. Pafford*, 150 S. W. 968.

Where the record contains no finding of fact, the court will impute to the trial court such a finding, if supported by the evidence, as will support the judgment. *Ragley Lumber Co. v. Insurance Co. of North America*, 42 C. A. 511, 94 S. W. 185.

In a trial by the court, in the absence of findings of fact, the appellate court will impute such findings as supported by the evidence will sustain the judgment. *Houston & T. C. R. Co. v. Thompson* (Civ. App.) 97 S. W. 106.

The court, on appeal from a judgment in an action on a note by a transferee thereof, held bound to find that the maker had no valid defense as against the transferee. *Adams v. Bartell*, 46 C. A. 349, 102 S. W. 779.

Under Arts. 3347 and 4117-4119, held, to uphold the county judge in reducing a guardian's bond, it cannot be presumed that another inventory was taken reducing the value of the estate. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

Where the trial judge files no conclusions of fact, it will be assumed on appeal that he found every disputed fact in such a way as to support the judgment. *Campbell v. Stover*, 101 T. 82, 104 S. W. 1047.

There being no conclusions of the trial judge, all issues on which there was evidence must be taken as resolved by the trial court in favor of the judgment. *Webb County v. Hasie*, 52 C. A. 16, 113 S. W. 188.

A stated presumption held to arise on appeal from a judgment for plaintiff in an action on a health policy providing for indemnity only for illness beginning after 60 days after the policy issued. *General Accident Ins. Co. v. Hayes*, 52 C. A. 272, 113 S. W. 990.

The overruling of a motion in an action for damages caused by and to restrain the maintenance of a dam held presumptively proper. *Boyd v. Schreiner* (Civ. App.) 116 S. W. 100.

It will be presumed that the trial judge did not consider testimony improperly admitted, where he stated that he would not consider improper testimony, unless it affirmatively appears from the findings that such testimony was considered. *Edwards v. White* (Civ. App.) 120 S. W. 914.

Where the lower court in a nonjury trial makes its written conclusions of fact, in accordance with certain testimony, in the absence of a showing that such facts were not considered by it in the final determination of the case, an appeal must be disposed of upon the theory that they were so considered. *Missouri, K. & T. Ry. Co. of Texas v. Vandiver*, 57 C. A. 470, 122 S. W. 955.

The case having been tried on an agreement of parties that all evidence should be considered as objected to as irrelevant, immaterial, hearsay, and not the best evidence, and the court having stated that it would not consider irrelevant, immaterial, hearsay, or inadmissible evidence, it must be assumed that any evidence inadmissible on any such grounds was not considered by the court. *Rowan v. Stockwell* (Civ. App.) 124 S. W. 148.

In the absence of a bill of exceptions to the refusal of a trial judge to grant a motion for findings of fact and conclusions of law, it will be presumed that the judge knew nothing about the motion. *Covington v. Sloan* (Civ. App.) 124 S. W. 690.

In a suit to enjoin the collection of taxes on the ground of discrimination in assessing plaintiff's land, held, that it could not be assumed from a finding made that the court would have found that the valuation placed upon plaintiff's land was more than two-thirds of its fair cash market value. *Lufkin Land & Lumber Co. v. Noble* (Civ. App.) 127 S. W. 1093.

Where a case is tried by the court, it will be presumed that improper evidence submitted over objection was not considered. *Skinner v. D. Sullivan & Co.* (Civ. App.) 134 S. W. 426.

The court on appeal, in view of the absence of an assignment of error, held required to assume the existence of evidence to prove a fact. *Goodwin v. Simpson* (Civ. App.) 136 S. W. 1190.

In an action against carriers for misdelivery of live stock, a finding of no delivery to the consignee held presumed to have been sustained by competent evidence, as against an assignment of error to the admission of certain testimony. *Southern Kansas Ry. Co. of Texas v. Lockhart* (Civ. App.) 141 S. W. 127.

Where the court does not file its findings and conclusions, it is incumbent upon appellant to negative, by appropriate assignments of error, every theory upon which the judgment might have been based. *Aycock v. Thompson* (Civ. App.) 146 S. W. 641, following *Walker v. Cole*, 34 S. W. 713, 89 T. 323; *Hathaway v. Texas Building & Loan Ass'n*, 45 S. W. 1023, 19 C. A. 240.

The court on appeal from a judgment on the ground of the insufficiency of the evidence to support the findings will take the testimony most favorable to the findings. *St. Louis, I. M. & S. Ry. Co. v. Landa & Storey* (Civ. App.) 149 S. W. 292.

In support of the judgment for defendant in sequestration, on his plea for damages, filed after plaintiff had moved to dismiss, trial having been without citation, if one was otherwise necessary, the circumstances will be viewed most favorably to the court's finding that plaintiff was represented at the trial by attorneys, though they claimed to be acting only as friends of the court. *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

The appellate court will not presume that the court based his finding of damages on certain inadmissible evidence, where the admissible evidence would have authorized a finding for a much greater amount. *Garrett v. Grisham* (Civ. App.) 156 S. W. 505.

97. Order granting or refusing new trial.—Where no assignment attacks the verdict as excessive, the court will presume in support of the judgment that, if the jury found in plaintiff's favor on account of lessened earning capacity, they found only nominal damages shown by the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Niblack*, 53 C. A. 619, 117 S. W. 188.

98. Amount of recovery.—Where a petition for new trial does not negative a recital in the judgment attacked that a certain defendant answered, the court will presume the recital true. *Woolley v. Sullivan*, 92 T. 28, 45 S. W. 377.

Where in reconviction for damages, actual and exemplary, for a wrongful sequestration, there was a judgment for actual damages alone, held, that it would be presumed that certain evidence was not considered in arriving at the decision. *Falls City Clothing Co. v. Cannon* (Civ. App.) 106 S. W. 189.

Where the trial judge has entertained a motion for new trial, it will be presumed that the motion was filed in time. *Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson* (Civ. App.) 133 S. W. 725.

99. Judgment.—In the absence of a statement of facts, the right of defendant in error to the recovery allowed will be presumed to have been established by competent evidence. *Frenkel v. Caddou* (Civ. App.) 40 S. W. 638; *Ward v. Armistead*, 17 C. A. 374, 43 S. W. 63; *Adams v. Weir & Flagg* (Civ. App.) 99 S. W. 726; *Sullivan-Sanford Lumber Co. v. Cline*, 114 S. W. 175.

A court in rendering a judgment is presumed to have disposed of the issues presented by the pleadings. *Woolley v. Sullivan* (Civ. App.) 43 S. W. 919.

Every reasonable presumption is indulged to support a judgment. *State v. Zanco's Heirs*, 18 C. A. 127, 44 S. W. 527; *Colbert v. Brown* (Civ. App.) 51 S. W. 521; *Voges v. Dittlinger*, 72 S. W. 875; *Parker v. Citizens' Ry. Co.*, 43 C. A. 168, 95 S. W. 38; *Dilley v. Jasper Lumber Co.* (Civ. App.) 114 S. W. 878; *Kreugel v. Rawlins*, 103 T. 86, 124 S. W. 419; *Elwood Arnett & Arnett v. Copeland* (Civ. App.) 129 S. W. 146; *Maes v. Thomas*, 140 S. W. 846; *Ben C. Jones & Co. v. Gammel-Statesman Pub. Co.*, 141 S. W. 1048; *Sutherland v. Cabiness*, 146 S. W. 331; *Ralls v. Parish*, 151 S. W. 1089; *Tobin v. Benson*, 152 S. W. 642; *Western Union Telegraph Co. v. Glenn*, 156 S. W. 1116; *Missouri, K. & T. Ry. Co. v. Watson*, 157 S. W. 438.

It will be presumed, in support of a judgment, that every issue of fact made by the pleadings, and not determined in the court's findings, has been found in favor of the prevailing party. *Texas & P. Ry. Co. v. Purcell*, 91 T. 585, 44 S. W. 1058.

It will be presumed that land described in a judgment is the same as that in the petition, there being no contradiction in the petition. *Leavell v. Seale* (Civ. App.) 45 S. W. 171; *Seale v. Leavell*, Id.

Where there is no statement or conclusions of fact, it will be presumed that the facts supported the judgment. *Woolley v. Sullivan* (Civ. App.) 46 S. W. 861; *Billingsley v. Houston, E. & W. T. Ry. Co.*, 49 S. W. 407; *Cabell v. Floyd*, 50 S. W. 478; *Turner v. City of Houston*, 21 C. A. 214, 51 S. W. 642; *Bonner v. Freedman* (Civ. App.) 57 S. W. 306; *Anderson v. Carter*, 29 C. A. 240, 69 S. W. 78; *Voges v. Dittlinger* (Civ. App.) 72 S. W. 875; *Ward v. Cameron*, 76 S. W. 240; *Adams v. Bartell*, 46 C. A. 349, 102 S. W. 779; *Newnom v. Williamson*, 46 C. A. 615, 103 S. W. 656; *Ryan v. Teague*, 50 C. A. 153, 110 S. W. 117; *Griffith v. Reagan* (Civ. App.) 114 S. W. 1167; *Bradshaw v. Lyles*, 55 C. A. 384, 119 S. W. 918; *Garza v. Cotton* (Civ. App.) 120 S. W. 212; *Donnell v. Currie & Dohoney*, 131 S. W. 88; *Hamburger & Dreyling v. Settegast*, Id. 639; *Maes v. Thomas*, 140 S. W. 846; *Chickasha Milling Co. v. Crutcher*, 141 S. W. 355; *Chambers v. Shook*, 145 S. W. 1039; *Kittrell v. Irwin*, 149 S. W. 199.

Where addition to note after delivery of name of signer will release sureties, their consent will be presumed in support of a judgment against them, there being no finding as to such consent. *Connor v. Thornton* (Civ. App.) 51 S. W. 354.

Where there is nothing shown to the contrary, it will be presumed that, when a trial judge did not decide a case tried in January until July, it was taken under advisement by agreement. *Brown v. Boles* (Civ. App.) 52 S. W. 120.

It will not be presumed, in aid of a judgment on appeal from a justice, that there was an oral plea of estoppel, where the record affirmatively shows the contrary. *Stanger v. Dorsey*, 22 C. A. 573, 55 S. W. 129.

In the absence of a statement of facts, it must be presumed on appeal that allegations of fact in the petition were proved. *Ackermann v. Ackermann*, 22 C. A. 612, 55 S. W. 801; *Petty v. Petty* (Civ. App.) 57 S. W. 923; *Howard v. Emerson*, 65 S. W. 382; *Varnar v. Varnar*, 35 C. A. 381, 80 S. W. 386; *Ellis v. National Exch. Bank*, 38 C. A. 619, 86 S. W. 776; *Longwell v. Longwell*, 39 C. A. 612, 88 S. W. 416; *Owens v. Owens*, 40 C. A. 641, 90 S. W. 664; *Mateer v. Jones* (Civ. App.) 102 S. W. 734; *International & G. N. R. Co. v. Alexander*, 135 S. W. 703; *Pioneer Lumber Co. v. Smither*, 135 S. W. 705; *Pecos & N. T. R. Co. v. Cox*, 141 S. W. 327.

No presumption will be indulged that the trial court had before it sufficient evidence to sustain a plea of privilege. *Hall v. Howell* (Civ. App.) 56 S. W. 561.

Where proceedings to enjoin incorporation of a town for school purposes, sought because the consent of voters of infringed districts was not provided for, were dismissed, such consent will be presumed on appeal, the contrary not appearing. *Pinson v. Vesey*, 23 C. A. 91, 56 S. W. 593.

A finding that defendants had abandoned their homestead when they mortgaged it will be made on appeal in support of the judgment where justified by the evidence. *Hooks v. Scottish-American Mortg. Co.* (Civ. App.) 57 S. W. 685.

A petition alleging that defendant qualified as executrix, and by the terms of the will was appointed independent executrix, it must be presumed, in the absence of a statement of facts in the record, that the proof showed that defendant had qualified and was acting as such independent executrix. *Ellis v. Mabry*, 25 C. A. 164, 60 S. W. 571.

On appeal, it will be presumed, in the absence of the pleadings, that they were sufficient to sustain the judgment. *Boyd v. Ghent*, 95 T. 46, 64 S. W. 929; *Western Supply & Mfg. Co. v. United States & Mexican Trust Co.*, 41 C. A. 478, 92 S. W. 936; *Holloway v. Hall* (Civ. App.) 151 S. W. 895.

It will be presumed on appeal, in support of a judgment, so as to justify the trial court's finding that the question of notice to him was immaterial, that the trial court found that a judgment creditor, purchasing at his own execution sale and testifying that he credited his bid on his judgment, was not a purchaser for value. *Masterson v. Burnett*, 27 C. A. 370, 66 S. W. 90.

In support of judgment, held, that a fact, though not specially found, would be presumed under the circumstances. *Puster v. Anderson*, 27 C. A. 626, 66 S. W. 684.

In an action for wrongful attachment of goods by an agent, held that it would be presumed on appeal, in the absence of a statement of facts, that the evidence showed knowledge of the principal and acquiescence in the agent's acts. *Leonard v. Harkleroad* (Civ. App.) 67 S. W. 127.

The court having held that a mortgage by surviving husband who had remarried was void as to the children who inherited the wife's community interest, it will be presumed on appeal that the court found that the mortgagee had notice of the facts. *American Freehold Land Mortg. Co. v. Dulock* (Civ. App.) 67 S. W. 172.

In the absence of evidence in the record, it will be presumed that a judgment denying a plea of privilege was warranted. *Robinson v. Chamberlain*, 29 C. A. 170, 63 S. W. 209.

The court on appeal, in a suit to recover school land by an applicant for the purchase thereof, cannot infer, in aid of the judgment, that the applicant proved that he was an actual settler on the land or an owner of and settler on other land. *Sterling v. Self*, 30 C. A. 284, 70 S. W. 238.

In trespass to try title, in absence of conclusions of fact and judgment for defendant, the court on appeal will presume evidence for plaintiff insufficient. *Tuggle v. Wakefield Iron & Coal Land Imp. Co.*, 30 C. A. 393, 70 S. W. 555.

Failure to make a sufficient finding held not ground for reversal; a further finding not being asked, and there being evidence to support one, and it being presumed that the court resolved the issue so as to support the judgment. *Malone v. Fisher* (Civ. App.) 71 S. W. 996.

In support of a judgment, held, that it would be presumed on appeal that a certain league of land was located and surveyed by virtue of a certain certificate. *Lynch v. Pittman*, 31 C. A. 563, 73 S. W. 862.

Where the court charged that a certificate was located on tracts in an organized county, and bill of exceptions showed stipulation that the county was organized, it would be assumed, on appeal, in the absence of statement of facts, that the county was organized and land afterwards located. *McCaleb v. Rector* (Civ. App.) 78 S. W. 956.

In the absence of evidence as to the nature and character of injuries, it will be presumed that a default judgment in a certain sum was supported by the testimony heard by the trial judge. *El Paso & S. W. Ry. Co. v. Kelly* (Civ. App.) 83 S. W. 855.

Court on error held not entitled to presume that nunc pro tunc entries were made at a special term, so that they were necessarily considered as made in vacation. *Accousi v. G. A. Stowers Furniture Co.* (Civ. App.) 83 S. W. 1104.

In a suit for divorce and partition of community property, it must be presumed, in the absence of a statement of facts, that the court made a fair and equitable settlement, and that its adjudication was founded on evidence sustaining it. *Longwell v. Longwell*, 39 C. A. 612, 88 S. W. 416.

In a suit for divorce and partition of community property, it must be presumed in favor of the judgment that a sum adjudged to defendant as a charge on the community was proven, as alleged, to be the amount of his separate funds invested in the community property. *Id.*

Where it does not appear on appeal what the exception sustained to a plea in bar was, the court will consider any valid exceptions that may have been interposed, and assume in favor of the judgment. *Hummel v. Del Greco*, 40 C. A. 510, 90 S. W. 339.

A presumption in favor of the propriety of the entry of a judgment nunc pro tunc held to arise on the failure of the bill of exceptions to state all the facts before the court on the hearing of the motion for the judgment. *S. W. Slayden & Co. v. Palmo* (Civ. App.) 90 S. W. 908.

In the absence of evidence, the rights of a person by virtue of an instrument executed by one to whom money had been advanced held determined by the instrument alone. *Mansfield v. Wardlow* (Civ. App.) 91 S. W. 859.

On appeal in an action for damages for breach of a contract to lease held on the record that it must be deemed established that the contract was oral. *Pinto v. Rintleman*, 42 C. A. 344, 92 S. W. 1003.

Where the appeal record disclosed that the judgment did not conform to the verdict, no presumption arose in favor thereof from the absence of a statement of facts. *Letot v. Peacock* (Civ. App.) 94 S. W. 1121.

Leave of court to intervener to file his petition will be presumed to sustain the judgment of the trial court. *American Surety Co. of New York v. San Antonio Loan & Trust Co.* (Civ. App.) 98 S. W. 387.

On appeal in action brought in justice's court, held not presumable in order to sustain the judgment that there were oral pleadings as well as the written demand filed by plaintiff. *Harrington Lumber Co. v. Smith*, 44 C. A. 363, 99 S. W. 110.

Presumption of appellate court that every fact essential to the correctness of the trial court's judgment was proved, held not to apply where there are findings. *Kimball v. Houston Oil Co.*, 100 T. 336, 99 S. W. 852.

Where statement of facts fails to show holding of courts in cases introduced in evidence, it will be presumed that it would support the action of the trial court. *Western Union Telegraph Co. v. Sloss*, 45 C. A. 153, 100 S. W. 354.

Allegations of petition against a railroad company for coal sold to its receiver held sufficient to admit proof of the value of the property returned to the railroad company on the receiver's discharge, so that in the absence of a statement of facts it would be presumed on appeal that sufficient value was proved to warrant the judgment. *Gulf & Interstate Ry. Co. v. Southwestern Coal Selling Co.* (Civ. App.) 105 S. W. 64.

Where, in a suit to set aside a judgment, proof of a fact would have supported the judgment and defeated the action, it must be presumed in support of the decision of the trial court setting aside the judgment that no such proof was made, no statement of facts appearing. *American Surety Co. v. Bernstein*, 101 T. 189, 105 S. W. 990; *Same v. Hockwald*, 101 T. 197, 105 S. W. 992; *Same v. Allen*, *Id.*

Where a plea of privilege to be sued in a different county was determined by the court along with the case on its merits and judgment was for defendant, held, it could not be assumed that judgment was rendered on the plea of privilege alone, and the other questions are open for review. *Gibbs Nat. Bank v. Citizens' Bank* (Civ. App.) 108 S. W. 776.

Where plaintiff sued for six separate penalties covering successive years and recovered two, and he was not entitled to recover for the first two years, to support the judgment the Court of Civil Appeals will assume the two recovered covered the subsequent years. *International & G. N. R. Co. v. Voss*, 49 C. A. 566, 109 S. W. 984.

Where judgment is for defendant, who sets up two grounds of defense, one of which is invalid, it will be presumed on appeal that the judgment was based on the valid ground. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 74.

Where, in an action on notes, the court refused to find whether plaintiff was a bona fide holder, the Court of Civil Appeals cannot assume in aid of a judgment for him that he was such a holder. *Smith v. Carey* (Civ. App.) 110 S. W. 157.

To sustain a judgment, a corporation's control of suretyship presumed valid on appeal in the absence of a showing to the contrary. *Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co.* (Civ. App.) 111 S. W. 417.

Where the petition does not show the amount of capital stock and there is no statement of facts in the record, the appellate court will not presume that the vendor lien notes exceeded the capital stock so as to invalidate a judgment thereon, although the defendant's answer alleged that they exceeded the capital stock. The answer is not proof. *Id.*

Even if there was no finding that an agent acted under a power of attorney in executing a conveyance to defendants' ancestor, it will be presumed in support of the judgment for defendants that the court so found. *Neill v. Kleiber*, 51 C. A. 552, 112 S. W. 694.

Facts in a personal injury action held to require a presumption by the Court of Civil Appeals on defendant's appeal that plaintiff was entitled to recover. *Dallas Consol. Electric St. Ry. Co. v. Motwiller*, 51 C. A. 432, 112 S. W. 794.

The Supreme Court on writ of error must resolve every conflict of evidence in favor of defendant in error, and draw that conclusion which the most favorable view of the evidence will warrant in support of the judgment. *San Antonio Irr. Co. v. Deutschman*, 102 T. 201, 114 S. W. 1174.

Where judgment was rendered against a claimant seeking to establish a claim against an estate, the court on appeal could not presume that the claim, when presented to the administrator and by him rejected, was verified, as required by statute. *Whitmire v. Powell* (Civ. App.) 117 S. W. 433.

Where findings are sufficient to support the judgment, it will be presumed to have been based thereon, in the absence of a showing to the contrary in the record. *Lowrance v. Woods*, 54 C. A. 233, 118 S. W. 551.

Where only a general demurrer was interposed to a plea of reconvention, and the demurrer was not acted upon by the court, every intendment that could have been indulged in favor of the plea had the demurrer been insisted on should be given it on appeal, where the judgment is assailed on account of the insufficiency of the plea. *Knox v. McElroy* (Civ. App.) 113 S. W. 1142.

Under a partition decree, no presumption held to arise that the court determined that the land was capable of partition. *Fagan v. Fagan*, 56 C. A. 175, 120 S. W. 550.

Where the trial court did not find any fact inconsistent with its conclusions of law, the court on appeal must presume that the trial court's determination of the issue of fact supported the judgment. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

There being nothing in the record to indicate that the judgment was not based on a certain finding which was sufficient to sustain it, the judgment will be affirmed. *Barnett & Record Co. v. Fall* (Civ. App.) 131 S. W. 644.

The court on appeal will presume that the trial court would not render judgment against all of the defendants in the action if all had not been cited or had not appeared and answered. *McDonald v. Denton* (Civ. App.) 132 S. W. 823.

Court held presumed, under statute, to have made finding on issue in such a way as to support the judgment rendered. *Fitzhugh v. Johnson* (Civ. App.) 133 S. W. 913.

In the absence of findings of fact or conclusions of law in the record, the appellate court must presume, to sustain the judgment, that a finding necessary to sustain it was made, if the evidence would sustain such a finding. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

In an action on a note, where defendant introduced a release showing on its face payments on the note in suit, held, that it would be presumed on appeal that all of the items claimed as credits were adjusted by such release, or that the amount mentioned therein did not include all payments made prior thereto. *Abernathy v. McCrummen* (Civ. App.) 146 S. W. 665.

Where no conclusions of fact are requested, or if requested none are filed, the appellate court will impute to the trial court such a finding as will sustain the judgment. *Velasco Fish & Oyster Co. v. Texas Co.* (Civ. App.) 148 S. W. 1184.

Where there is no assignment of error that the evidence was insufficient to authorize a judgment on a cross-action, every presumption in favor of the correctness of the judgment in that respect must be indulged. *Rotan Grocery Co. v. Tatum* (Civ. App.) 149 S. W. 342.

In an action by insured to recover premiums and for damages for the insurer's breach of its contract, held that, in support of the judgment for the insured, a certain finding would be presumed to have been made. *Washington Life Ins. Co. v. Lovejoy* (Civ. App.) 149 S. W. 398.

Where, in determining priorities between two transfers, the judgment stated that one should be paid in full before the other, there being no statement of facts in the record, the judgment will be sustained. *A. A. Fielder Lumber Co. v. Smith* (Civ. App.) 151 S. W. 605.

Where there is no statement of facts in the record, the Court of Civil Appeals, in order to support a judgment for a prior chattel mortgagee, will impute to the court a finding against the subsequent mortgagee on the issue of priority. *Neely-Harris-Cunningham Co. v. Lacy Bros. & Jones* (Civ. App.) 152 S. W. 441.

It is presumed on appeal that the trial court considered the contents of certain petitions, if their consideration were necessary to the rendition of the proper judgment. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

100. Orders and proceedings after judgment.—Where a record on appeal does not contain the testimony upon which the trial court overruled a motion to vacate the judgment, made upon the ground that the case was tried on appeal from justice's court without notice that an appeal had been perfected and in absence of defendants, it cannot be said by the Supreme Court, that there was error in overruling the motion. *Smith Bros. v. Flanders* (Civ. App.) 122 S. W. 80.

The presumption should not be indulged that a default judgment was set aside because of a defective citation or service thereof, if it operates to invalidate a subsequent default entered. *Smith v. Smith* (Civ. App.) 123 S. W. 198.

101. Costs.—Decision on motion to retax costs, not stating the grounds, will be presumed on the merits, and correct, in the absence of a statement of facts in the record. *Watkins v. Atwell*, 21 C. A. 193, 50 S. W. 1047.

Where, on appeal from order overruling motion to retax costs, there is no statement of facts in the record, though time was given in which to file same, it will be presumed that there was no error. *Texas & P. Ry. Co. v. Davis* (Civ. App.) 66 S. W. 598.

102. Taking and perfecting appeal or other proceeding for review.—It will be presumed by Court of Civil Appeals, testimony not being before it, on appeal from dismissal of appeal by county court for failure to file bond, that facts stated in pauper's oath filed in lieu thereof were disproved. *Cook v. Burson & Gaines* (Civ. App.) 80 S. W. 871.

Where a bond on a writ of error was dated and filed before citations were issued,

but the deputy clerk did not indorse his approval thereon, it would be presumed that the deputy clerk accepted the bond as sufficient. *International & G. N. R. Co. v. Taylor* (Civ. App.) 131 S. W. 620.

On an appeal transferred from another Court of Civil Appeals, held, that it would be presumed that the clerk observed rule 2 (67 S. W. xiii) in filing a transcript. *City of Eagle Lake v. Lakeside Sugar Refining Co.* (Civ. App.) 144 S. W. 709; *Same v. Lakeside Rice Mill Co.* (Civ. App.) 144 S. W. 712.

103. Making and contents of bill of exceptions, case or statement of facts.—When it does not otherwise appear, it will be presumed that the bill was presented for approval, as required, within 10 days after trial. *San Antonio & A. P. Ry. Co. v. De Ham* (Civ. App.) 54 S. W. 395.

It will be presumed that the bill of exceptions states all that occurred at the trial. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 40 C. A. 93, 88 S. W. 509.

Where a motion for a new trial was heard on bills of exceptions, it will be presumed that the bills were drawn and numbered and were before the court for approval when the motion for a new trial was filed. *City of Austin v. Forbis*, 99 T. 234, 89 S. W. 405.

It will be presumed on appeal that a party making a general objection to evidence given on a former trial intended to incorporate the ground of objection made by him at the former trial as set forth in the stenographer's report of the testimony. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 49 C. A. 184, 108 S. W. 490.

In the absence of a contrary showing in a bill of exceptions, an objection held presumed to be made at such time as to justify the holding of the trial court. *Harris v. Harris*, 50 C. A. 188, 109 S. W. 1138.

In the absence of a bill of exceptions signed by the judge or bystanders, it will be assumed on appeal that a qualification of a bill of exceptions presented by appellant was made with appellant's consent. *Brunner Fire Co. v. Payne*, 54 C. A. 501, 118 S. W. 602.

Testimony of witnesses, stricken out from the statement of facts by having pencil marks drawn across it, held to be treated on appeal as though the witnesses had never testified. *St. Louis, S. F. & T. Ry. Co. v. Wall*, 56 C. A. 48, 121 S. W. 207.

Where erasures appear in the original statement of facts filed on appeal, it will be presumed that they were made before it was signed by the parties and approved by the judge. *Fletcher v. First Nat. Bank* (Civ. App.) 126 S. W. 936.

Under a statute empowering the district judge to extend time for filing statement of facts and upon the facts, the district judge held presumed to have exercised a sound discretion in refusing application to extend the time. *Kingsley v. Kerr* (Civ. App.) 135 S. W. 161.

Where a statement of facts on appeal is signed only by counsel for the appellant and the trial judge, it will be presumed that the parties failed to agree, and that the duty of preparing a statement of facts devolved on the trial judge, under Art. 2069. *Houston Oil Co. of Texas v. Myers* (Civ. App.) 150 S. W. 762.

In the absence of some recital to the contrary in the order extending the time for filing of bills of exceptions and statement of facts, it will be presumed, when such order is made in vacation, that it was made with consent. *Brown v. Gatewood* (Civ. App.) 150 S. W. 950.

Where an application for an extension of time for the filing of bills of exceptions was made by appellants alone, there was no presumption that appellee agreed to the extension. *Unknown Heirs of Criswell v. Robbins* (Civ. App.) 152 S. W. 210.

104. Appeal from justice court.—Where the citation and written pleadings in a justice's court show that a definite sum was sued for, it cannot be presumed on appeal that there were oral pleadings authorizing a judgment for a greater sum. *Missouri, K. & T. Ry. Co. of Texas v. Dawson Bros.* (Civ. App.) 84 S. W. 298.

On appeal from justice's court in a suit brought by a partnership in the firm name, held presumed that the justice had some information not disclosed by the docket. *Amarillo Commercial Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 140 S. W. 377.

The pleadings in an action commenced in justice court being oral, it must be presumed in the Court of Civil Appeals that plaintiff properly plead as to whether it was a corporation, a partnership, or an individual. *Midkiff & Caudle v. Johnson County Savings Bank* (Civ. App.) 144 S. W. 705.

105. Appeal from intermediate court.—Where the court of civil appeals does not decide an assignment of error as to a finding of fact, the supreme court, on error, will deem the assignment overruled. *National Oil & Pipe Line Co. v. Teel*, 95 T. 586, 68 S. W. 979.

That there was a proper appeal from probate court, giving the district court jurisdiction, cannot be assumed on appeal from the district court in probate matters. *Goodwin v. Walker* (Civ. App.) 124 S. W. 462.

In the absence of a showing that the cause of action alleged in the county court on appeal from a justice is different from that asserted in the justice's court, the presumption is that they were the same. *Threadgill v. Shaw* (Civ. App.) 130 S. W. 707.

Pleadings in a case originating in justice's court will be presumed to have been sufficient to sustain judgment rendered on appeal in the county court. *Daniel v. Brewton* (Civ. App.) 136 S. W. 815.

In a stated case, held that the Court of Civil Appeals would presume that the county court acquired jurisdiction of an action by appeal from the justice court. *Dunlap v. Broyles* (Civ. App.) 141 S. W. 289.

Where, in an action in justice's court on an assigned claim, the pleadings were oral, the court, on appeal from a judgment of the county court rendered on appeal from the justice's court, will presume that the claim and assignment were sufficiently pleaded. *Chapa v. Compton* (Civ. App.) 147 S. W. 1175.

That there were sufficient oral pleadings before a justice of the peace will not be assumed, where the record shows that the pleadings were in writing. *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 149 S. W. 753.

Where a ruling of the Court of Civil Appeals was made the subject of one of the errors assigned in the Supreme Court, and the ruling was ignored by the Supreme Court,

it may be presumed that the ruling was not considered error. *Pecos & N. T. Ry. Co. v. Cox* (Civ. App.) 150 S. W. 265.

III. *Res Ipsa Loquitur*

106. **The fact speaks for itself.**—Proof that personal property was injured while in the custody of a common carrier raises the presumption of negligence on the part of the carrier. *Ryan v. Railway Co.*, 65 T. 13, 57 Am. Rep. 589; *Railway Co. v. Horn*, 69 T. 643, 9 S. W. 440; *Railway Co. v. China Mfg. Co.*, 76 T. 26, 14 S. W. 785; *Railway Co. v. Gorman*, 21 S. W. 158, 2 C. A. 144; *Railway Co. v. Hohn*, 21 S. W. 942, 1 C. A. 36; *Railway Co. v. Scott*, 4 C. A. 76, 26 S. W. 239; *Railway Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210; *Railway Co. v. Cooper* (Civ. App.) 30 S. W. 470; *M., K. & T. Ry. Co. v. McGlamory* (Civ. App.) 34 S. W. 359.

In an action against the lessee of a building in which plaintiff was injured by the falling of an elevator, defendant's liability was not fixed by the mere fact that the elevator was defective. *The Oriental v. Barclay*, 16 C. A. 193, 41 S. W. 117.

Circumstances of an accident to freight car held to justify an inference that the car was defective. *Jones v. Shaw*, 16 C. A. 290, 41 S. W. 690.

The mere fact that an engineer ran his engine off the track is not sufficient to prove his incompetency. *Terrell v. Russell*, 16 C. A. 573, 42 S. W. 129.

Rule stated as to what a railroad company must show to rebut the presumption of negligence arising from the setting of a fire. *Texas M. R. Co. v. Hooten*, 21 C. A. 139, 50 S. W. 499.

Proof that sparks from an engine ignited property along a railroad track held to establish a prima facie case of negligence. *Texas M. R. Co. v. Hooten*, 21 C. A. 139, 50 S. W. 499; *Gulf, C. & S. F. Ry. Co. v. Johnson*, 92 T. 591, 50 S. W. 563; Same v. *Meentzen Bros.*, 52 C. A. 416, 113 S. W. 1000; *St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co.*, 53 C. A. 125, 115 S. W. 648; Same v. *Henderson*, 55 C. A. 425, 119 S. W. 891; *Houston & T. C. R. Co. v. Washington* (Civ. App.) 127 S. W. 1126; *Trinity & B. V. Ry. Co. v. Gregory*, 142 S. W. 656; Same v. *Burke*, Id. 658; *St. Louis Southwestern Ry. Co. of Texas v. Waco Cotton Pickery*, 146 S. W. 201; *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.*, 146 S. W. 336.

In action for injuries, proof of accident and injury are insufficient to recovery. Proof of defendant's negligence is necessary. *Missouri, K. & T. Ry. Co. of Texas v. Crowder* (Civ. App.) 55 S. W. 380.

Negligence held not to be presumed from the happening of an accident to a passenger while alighting from a train, where none of the attending circumstances tended to show negligence in the carrier. *Texas Midland R. Co. v. Frey*, 25 C. A. 386, 61 S. W. 442.

The unaccountable presence on a railroad track of a single small wire, in which the section foreman caught his foot, causing injury, does not show negligence on the part of the railroad company for which he can recover. *McNiff v. Texas Midland R. Co.*, 26 C. A. 558, 64 S. W. 1010.

The mere fact that one is run over and killed by a train, in the absence of any evidence as to the manner in which the accident occurred, raises no presumption of negligence on the part of the railroad. *Tucker v. International & G. N. R. Co.* (Civ. App.) 67 S. W. 914.

Evidence of the circumstances surrounding an injury to a passenger by an electric shock from a charged street car held sufficient to raise a presumption of negligence on the part of the defendant. *Dallas Consol. Electric St. Ry. Co. v. Broadhurst*, 28 C. A. 630, 68 S. W. 315.

In action against railroad for damages from fire, evidence that the fire was communicated by sparks held to raise presumption of negligence in equipment and management. *Texas Southern Ry. Co. v. Hart*, 32 C. A. 212, 73 S. W. 833.

In action against railroad for destruction of cotton by sparks from defendant's locomotive, a showing that the cotton was burned by sparks constituted a prima facie case. *Texas & Pac. Ry. Co. v. Scottish Union Nat. Ins. Co.*, 32 C. A. 82, 73 S. W. 1088.

The fact that the top of a pear burner blew off while it was being operated in accordance with the directions held insufficient to raise a presumption of negligence in its construction on the part of the manufacturers. *Talley v. Beaver & Hindes*, 33 C. A. 675, 78 S. W. 23.

Mere fact that passenger train, which killed mules going onto track, was running at high rate of speed, held not to show negligence in action for their death. *Galveston, H. & S. A. Ry. Co. v. Cassinelli & Co.* (Civ. App.) 78 S. W. 247.

The doctrine of *res ipsa loquitur* does not apply to cases of injuries to servants caused by explosions. *G. A. Duerler Mfg. Co. v. Dullnig* (Civ. App.) 83 S. W. 889.

The fact of causal connection between an alleged negligent act and an injury cannot be presumed. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 461, 84 S. W. 1049; *Chicago, R. I. & G. Ry. Co. v. Latham*, 53 C. A. 210, 115 S. W. 890; *Coffman v. Texas Midland R. R.* (Civ. App.) 126 S. W. 619.

In an action for wrongful death resulting from decedent's falling down a coal shaft, evidence examined, and held to make out a clear case of *res ipsa loquitur*. *Texas & P. Coal Co. v. Daves*, 41 C. A. 289, 92 S. W. 275.

Negligence cannot be inferred from the mere fact of injury. *Jones v. Ft. Worth & D. C. Ry. Co.*, 47 C. A. 596, 105 S. W. 1007.

A brakeman having proved that he was thrown from a car while setting the brake by the breaking of the chain, he established a prima facie case against the railroad company. *Galveston, H. & S. A. Ry. Co. v. Harris*, 48 C. A. 434, 107 S. W. 108.

To raise a presumption of negligence of a railroad company causing the destruction of property by fire set by its engine, there must be affirmative proof that the fire was caused by sparks from the engine. *Gulf, C. & S. F. Ry. Co. v. Meentzen Bros.*, 52 C. A. 416, 113 S. W. 1000.

In an action for injuries to an employé by the slipping of a skid, the mere happening of the accident was insufficient to raise a presumption of negligence. *Lone Star Brewing Co. v. Willie*, 52 C. A. 550, 114 S. W. 186.

Where specific acts of negligence are charged, the principle of *res ipsa loquitur* is inapplicable. *Id.*

Except where the acts of defendant speak negligence, it cannot be inferred from the mere happening of the accident. *Id.*

The attendant circumstances of a given case may be sufficient to raise an inference of negligence, where such inference points to defendant as the person guilty of the negligence. *Houston, E. & W. T. Ry. Co. v. Roach*, 52 C. A. 95, 114 S. W. 418.

The doctrine of *res ipsa loquitur* has no application unless the thing causing the accident is under the control of defendant or his servants, and the accident is of a kind which does not ordinarily occur if due care has been exercised. *Paris & G. N. Ry. Co. v. Robinson*, 53 C. A. 12, 114 S. W. 658.

The derailment of an engine, in the absence of explanation, raises a presumption of negligence against the railroad company. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.) 116 S. W. 106.

That decedent was killed while working in defendant cotton oil company's hull house by a falling of a mass of cotton seed hulls does not create a presumption of negligence of the company. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 117 S. W. 451.

The rule of evidence as to the shifting of the burden of proof held not to create a presumption of negligence as against defendant. *Texas & P. Ry. Co. v. Rankin* (Civ. App.) 118 S. W. 823.

The fact that a switchman is injured by having his foot caught in a wire on the track is not sufficient evidence of negligence on the part of the railroad company. *Ft. Worth & D. C. Ry. Co. v. Anderson* (Civ. App.) 118 S. W. 1113.

Where a licensee on defendant's right of way was injured by a swinging car door on a passing train striking him as he was standing beside the track, the accident, being such as ordinarily would not happen if due care was used, was reasonable evidence, in absence of explanation, that it was caused by want of ordinary care. *Texas & P. Ry. Co. v. Endsley* (Civ. App.) 119 S. W. 1150.

Proof that the death of deceased, an engineer, was caused by a displaced, unlocked switch held to make out a prima facie case of negligence against defendant railroad. *International & G. N. R. Co. v. Bradt*, 57 C. A. 82, 122 S. W. 59.

Where the inference of negligence tended to establish an act of negligence not pleaded, as well as that specifically alleged, the doctrine of *res ipsa loquitur* was inapplicable. *Gulf Pipe Line Co. v. Brymer* (Civ. App.) 124 S. W. 1007.

Where deceased was killed by the derailment of a motor in a coal mine, and the cause of the derailment was not shown, a verdict for plaintiff was not sustainable under the doctrine *res ipsa loquitur*. *Texas & P. Coal Co. v. Kowsikowski*, 103 T. 173, 125 S. W. 3.

Evidence that a switch point did not work just prior to the derailment of a motor, resulting in decedent's death in a coal mine, held insufficient to warrant a presumption of negligence of defendant. *Id.*

A defendant, in a position to explain an accident resulting in injury, will not be presumed negligent in the absence of such explanation, where the facts are equally consistent with the negligence of the person injured as that of the defendant, or both combined. *Id.*

In an action for injuries to a switchman, who in alighting from an engine stepped on a bolt and was thrown, held, that it could not be presumed that defendant was negligent. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 103 T. 187, 125 S. W. 309.

The mere happening of an injury to a servant due to the defective condition of machinery does not raise the presumption that the master was negligent, but the servant must show that the defective condition was due to the negligence of the master, or that he might have discovered it by a proper inspection. *Galveston, H. & S. A. Ry. Co. v. Senn* (Civ. App.) 125 S. W. 322.

Where a coach standing in a yard was occupied by passengers, and the carrier with knowledge thereof moved the car with such violence as to hurl the passengers to the floor or against the arms of the chairs occupied by them, causing injury, the carrier was prima facie negligent, and the burden rested on it to show the circumstances that would exonerate it. *Missouri, K. & T. Ry. Co. of Texas v. Stone* (Civ. App.) 125 S. W. 587.

An inference of negligence arises from the death of an engineer killed while in the proper performance of his duty by striking his head against a mail crane near the track, and it is for the railroad company in an action for his death to excuse the occurrence. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Sup.) 125 S. W. 881.

The mere fact of a servant being injured growing out of unsafe conditions will not charge the master with liability; the doctrine of *res ipsa loquitur* not applying as between master and servant. *Lone Star Brewing Co. v. Solcher* (Civ. App.) 126 S. W. 26.

In an action for negligent death, the jury held not authorized to infer negligence; the doctrine of "*res ipsa loquitur*" not applying. *Coffman v. Texas Midland R. R.* (Civ. App.) 126 S. W. 619.

Proof that fire escaped from defendant's engine while being operated alongside a platform, and set fire to plaintiff's cotton stored thereon, made out a prima facie case, and the burden of proof was shifted to defendant to defeat plaintiff's right of recovery. *Crawford & Byrne v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 127 S. W. 869.

Though, in order to make a prima facie case of negligence by reason of fire claimed to have originated from the sparks of an engine, it is necessary that there be affirmative proof that the fire so originated, this proof may be made by circumstantial evidence. *Houston & T. C. R. Co. v. Washington* (Civ. App.) 127 S. W. 1126.

Proof of injury to a passenger by the derailment of a train establishes a prima facie case of negligence, whereupon the burden is shifted to the carrier to show that the accident could not have been avoided by the utmost care and foresight reasonably compatible with the prosecution of its business. *Southern Pac. Co. v. Blake* (Civ. App.) 128 S. W. 668.

Injury to a servant caused by the presence of a rolling substance on the floor was no evidence of the negligence of the employer, where the cause of the injury was as much under the control of the servant as of the employers. *St. Louis, S. F. & T. Ry. Co. v. Cason* (Civ. App.) 129 S. W. 394.

The rule of "*res ipsa loquitur*" is not one of substantive law, but is a rule of evidence only. *Id.*

Unless the circumstances surrounding an injury render it more probable that it resulted from the negligence of defendant than otherwise, the injury itself affords no just inference against defendant, and the doctrine of *res ipsa loquitur* does not apply. *Id.*

Negligence must be proved, and it cannot be presumed. *International & G. N. Ry. Co. v. Wilson* (Civ. App.) 129 S. W. 849.

Where a track and train were entirely under the control of defendant railway company at the time and place of a derailment which caused injury to plaintiff's property, this presents an instance for the application of the doctrine of *res ipsa loquitur*. *Texas & P. Ry. Co. v. Corr* (Civ. App.) 130 S. W. 185.

Where goods are damaged by fire occurring upon premises in possession or under control of a carrier, the carrier is presumed to be negligent, and the burden is on it to rebut the presumption. *Southern Pacific Co. v. Weatherford Cotton Mills* (Civ. App.) 134 S. W. 778.

In an action for injuries to a passenger, the doctrine of *res ipsa loquitur* held inapplicable. *Adams v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 137 S. W. 437.

On plaintiff's allegations, in an action against a railroad for personal injuries sustained while riding in a freight train caboose, held, that plaintiff was bound to prove some negligence on the part of defendant, as the doctrine of *res ipsa loquitur* did not apply. *Ft. Worth & R. G. Ry. Co. v. Neal* (Civ. App.) 140 S. W. 398.

In an action for injuries to a mail clerk while alighting from his train by the sudden movement thereof without warning, the circumstances raised a presumption of the defendant's negligence. *Houston & T. C. Ry. Co. v. Keeling* (Civ. App.) 142 S. W. 108.

Evidence held sufficient *prima facie* to raise a presumption of negligence of the master. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 144 S. W. 1045.

Where an act is done which creates or increases a condition of danger, the duty of the person creating the condition to take necessary steps to guard the public from the danger will be presumed. *San Antonio Traction Co. v. Emerson* (Civ. App.) 152 S. W. 468.

Where one is injured by contact with an electric wire suspended over a street, the presence of the wire is presumptive evidence of negligence. *Southwestern Telegraph & Telephone Co. v. Shirley* (Civ. App.) 155 S. W. 663.

IV. Burden of Proof in General

107. **Nature and scope in general.**—The nature of the burden of proof stated. *Southwestern Telegraph & Telephone Co. v. Luckett* (Civ. App.) 127 S. W. 856.

108. **Party asserting or denying existence of facts.**—See *Williams v. Beckham*, 26 S. W. 652, 6 C. A. 739; *Ayers v. Beatty* (Civ. App.) 24 S. W. 366; *Sherwood v. La Salle County* (Civ. App.) 26 S. W. 650; *Bland v. Smith* (Civ. App.) 26 S. W. 773; *Knippa v. Umlang* (Civ. App.) 27 S. W. 918; *Worsham v. Morgan* (Civ. App.) 28 S. W. 918; *Shelton v. Bone* (Civ. App.) 26 S. W. 224; *McCown v. Hill*, 26 T. 361; *Castleman v. Ponton*, 51 T. 84; *Koepsel v. Allen*, 68 T. 446, 4 S. W. 856; *Allen v. Koepsel*, 77 T. 505, 14 S. W. 151; *Smith v. Boone*, 19 S. W. 702, 84 T. 526; *McAninch v. Freeman*, 69 T. 445, 4 S. W. 369.

The burden of proof upon each issue rests upon the party having the affirmative. *Latham v. Selkirk*, 11 T. 314.

The burden of proof is with the party controverting the answer. *Howard v. Crawford*, 21 T. 399; *Ellison v. Tuttle*, 26 T. 283; *East Line Ry. v. Terry*, 50 T. 129.

When plaintiff, in his original petition, sets up a deed under which he alleges that defendant claims, and then by allegations seeks to avoid the effect of the deed, he assumes the burden of proof on the issue thus made by him. *Hill v. Allison*, 51 T. 390.

When a defendant in his answer admits plaintiff's cause of action and pleads in avoidance, the burden of proof is upon him to establish the defense. *Gann v. Shaw*, 2 App. C. § 255.

One who asserts an agreement avoiding the effect of certain acts has the burden of proving the same. *Florida Athletic Club v. Hope Lumber Co.*, 18 C. A. 161, 44 S. W. 10.

The burden is on a purchaser of community property, sold under order in the administration of the father's estate, to show, as against the mother's heirs, that the sale was made to pay a community debt. *Roy v. Whitaker*, 92 T. 346, 49 S. W. 367.

If, in an action to recover the price of goods, defendant does not dispute the sale, but alleges payment, the burden of proof is on defendant, as payment is the only issue. *May v. Behrends* (Civ. App.) 50 S. W. 413.

Where defendant claimed under an alleged sale by survivor in community to pay community debt, an instruction placing the burden on defendant to show the sale was in good faith held erroneous. *Solomon v. Mowry* (Civ. App.) 61 S. W. 335.

A party attacking the division of property made by commissioners appointed to partition community property has the burden of showing that the property allotted to him is not as valuable as that allotted to the other party. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

Allegation of order of sale, not excepted to and not stricken from plaintiff's pleading, held to obviate necessity of proof by defendant. *Crosby v. Bonnowsky*, 29 C. A. 455, 69 S. W. 212.

Plaintiff in replevin held to have the burden of proof, though in an addition to a general denial it was alleged that one of the defendants, who sold the articles to the other defendants, was a partner with plaintiff in the articles. *Downtain v. Ray*, 31 C. A. 298, 71 S. W. 758.

In a suit by a landlord to foreclose a lien on cotton, intervener's plea held an affirmative defense, requiring him to establish it by sufficient evidence to justify a verdict in his favor. *Antone v. Miles*, 47 C. A. 289, 105 S. W. 39.

Burden of proof held upon plaintiff in a suit to cancel notes to dissolve a joint-stock company and for an accounting to prove his allegation. *Harpold v. Moss* (Civ. App.) 106 S. W. 1131.

The burden is on one who asserts alienage by an heir to establish that plea. *Douthitt v. Southern* (Civ. App.) 155 S. W. 315.

109. Proof of negative.—Burden of proof lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant. This rule applies whether the fact be proved by affirmative or negative evidence. *Hoerr v. Coffin*, 1 App. C. C. § 186.

A provision in a vendor's lien note voiding it should title to the land fail held not to throw the burden on payee of showing that title had not failed. *Medlan v. Abeel* (Civ. App.) 47 S. W. 1041.

110. Extent of burden in general.—Plaintiff's possession being shown, the burden shifted to defendant to show a better title. *Caplen v. Drew*, 54 T. 493.

The rule that the burden of proof rests upon plaintiff and never shifts relates to the entire case, but not to every contention in it. *Odom v. Woodward*, 74 T. 41, 11 S. W. 925; *Evans v. Foster*, 79 T. 48, 15 S. W. 170; *Maddox v. Fenner*, 79 T. 279, 15 S. W. 237; *Wyatt v. Foster*, 79 T. 413, 15 S. W. 679; *Cullers v. Platt*, 81 T. 258, 16 S. W. 1003; *Stephens v. Mott*, 82 T. 81, 18 S. W. 99; *Gregg v. Hill*, 82 T. 405, 17 S. W. 838; *Koehler v. Wilson*, 82 T. 638, 18 S. W. 317; *Richardson v. Powell*, 83 T. 588, 19 S. W. 262; *Umscheid v. Scholz*, 84 T. 265, 16 S. W. 1065.

In an action for loss by fire set by a railroad company, the burden of proof does not shift after proof that the fire was set by sparks from defendant's engine. *St. Louis Southwestern Ry. Co. v. Moss*, 37 C. A. 461, 84 S. W. 281.

In an action for damages to plaintiff's land, through an overflow from construction of defendant's road, an instruction as to burden of proof held erroneous. *Gurley v. San Antonio & A. P. Ry. Co.* (Civ. App.) 124 S. W. 502.

In an action for injury to a switchman, who in alighting from an engine stepped on a bolt and was thrown, the fact that it would be difficult for plaintiff to show more than he had, held not to take away the requirement of evidence to warrant a judgment. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 103 T. 187, 125 S. W. 309.

The burden of proof does not shift at any time in the trial of a cause though the weight of the evidence often does, and it is never permissible for the trial court in a case in which the affirmative facts necessary to sustain plaintiff's suit are controverted by any evidence offered by the defendant to charge the jury that the burden of proof on such facts is on the defendant. *Southwestern Telegraph & Telephone Co. v. Lockett* (Civ. App.) 127 S. W. 856.

One having the affirmative of the issue as determined by the pleadings has the burden of proof, and it never shifts. *Barnes v. McCarthy* (Civ. App.) 132 S. W. 85.

The burden of proof held not to shift to defendant on plaintiff establishing a prima facie case, unless defendant relies on an affirmative defense. *Kirby Lumber Co. v. Stewart* (Civ. App.) 141 S. W. 295.

The burden of proof on the whole case resting on a passenger suing for injuries by the derailment of the train never shifts, though proof of an accident to the train and injury to the passenger creates a presumption of fact against the carrier. *Abilene & S. Ry. Co. v. Burleson* (Civ. App.) 157 S. W. 1177.

111. Failure to sustain burden.—In an action of trespass to try title and for partition plaintiffs claimed half of a tract of land as heirs of their deceased mother, and in support of their claims proved that the land was conveyed to the husband during the marriage with their mother, that after their mother's death the father had administered on their mother's estate, inventoried the land in controversy as community property of himself and wife, and under the orders of the probate court sold the same as property of her estate. Plaintiffs claimed that the administration sale was null and void. Admitting that the sale was void as claimed, the defendant was not estopped from denying that the property was community, and asserting that it was separate property of the father, by reason of its having been paid for with his separate funds and that as against him they had acquired a valid title to the entire tract. *Watson v. Hewitt*, 45 T. 472.

112. Effect of plea of non est factum.—See notes under Art. 3710.

113. Accord and satisfaction.—One claiming that the payment of less than the sum due is an accord and satisfaction has the burden of showing that there was a bona fide controversy or dispute. *Bergman Produce Co. v. Brown* (Civ. App.) 156 S. W. 1102.

114. Limitations and adverse possession.—There must be affirmative evidence to establish both the existence of the disability at the time the statute of limitation commenced to run and its continuance for a sufficient period. *Corley v. Anderson*, 23 S. W. 839, 5 C. A. 213.

Every fact necessary to show limitations must be proved. *Barnett v. Houston*, 18 C. A. 134, 44 S. W. 689.

The burden held on one pleading coverture to show that coverture existed at time the suspension of the statute during the civil war ceased. *McConnico v. Thompson*, 19 C. A. 539, 47 S. W. 537.

When one proves title by limitation he is not required to show affirmatively want of disability in the holders of an outstanding title which is proved under plea of not guilty. Disability is a defensive plea. *Travis v. Hall*, 95 T. 116, 65 S. W. 1077, 1078.

Where one party has established his title to land, and another seeks to break it down under a plea of limitations, he has the burden of proof. *Rountree v. Thompson*, 30 C. A. 595, 71 S. W. 574.

The burden is on a municipal corporation to prove that the debts, for which notes executed by it were given, were barred by the statute of limitations. *City of Tyler v. L. L. Jester & Co.* (Civ. App.) 74 S. W. 359.

Where persons assert a right to a road over the land of another by prescription, the burden of proof is on them to establish that the owners were free from legal disability and persons against whom a prescriptive right could be acquired by adverse use. *Evans v. Scott*, 37 C. A. 373, 83 S. W. 874.

The burden is on the party asserting a right of way by prescription to show open and adverse use for the prescriptive period, and that the owners were free from legal disability. *Wright & Vaughn v. Fanning* (Civ. App.) 86 S. W. 786.

The burden of proving a disability that will bar the operation of the statute of limitations is on the party asserting the disability. *Elcan v. Childress*, 40 C. A. 193, 89 S. W. 84.

One claiming a right by prescription must prove that the persons against whom the right is sought to be asserted were not under disability during the prescriptive period. *Dees Bros. v. Harrison* (Civ. App.) 95 S. W. 1093.

Where defendants pleaded limitations in an action of trespass to try title, the burden was upon them to show the action was barred, unless it was undisputedly shown by plaintiff's own evidence. *McAllen v. Alonzo*, 46 C. A. 449, 102 S. W. 475.

Plaintiff, in order to establish a prima facie case of adverse possession, is not required to show that the prior owners were under no disability. *Romine v. Littlejohn* (Civ. App.) 106 S. W. 439.

Plaintiff's burden of proof stated in trespass to try title to land claimed by a city under an alleged dedication, where plaintiff claimed title under the ten-year statute of limitations. *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

In an action on a note more than four years after it became due defendant having left the state before the debt was barred, plaintiff did not have the burden of stating the precise periods during which defendant visited the state. *Dignowity v. Sullivan*, 49 C. A. 582, 109 S. W. 428.

In trespass to try title, the burden was on the defendant, who claimed by adverse possession, to show that a pasture claimed by him had been inclosed for ten years before the suit was brought. *Haynes v. Texas & N. O. R. Co.*, 51 C. A. 49, 111 S. W. 427.

The burden of establishing a defense of limitations in trespass to try title held to be on defendants. *Lofton v. Miller*, 55 C. A. 253, 118 S. W. 911.

Where defendant pleads limitation, the burden is upon it to prove what is essential to the plea. *Texas & G. Ry. Co. v. Whiteside*, 55 C. A. 593, 119 S. W. 126.

A defendant has the burden of sustaining the defense of limitation. *Lafferty v. Stevenson* (Civ. App.) 135 S. W. 216.

In an action for the possession of land where the party in possession set up and shows title by limitation, the burden is upon those attempting to defeat his title to show that they were laboring under some disability which prevented the running of the statute. *Roos v. Thigpen* (Civ. App.) 140 S. W. 1180.

Where defendant shows adverse possession of land, covering a time sufficient to constitute a statutory bar, the burden falls on plaintiff to show disability of coverture or minority, defeating the defense of limitations. *Sabine Valley Timber & Lumber Co. v. Cagle* (Civ. App.) 149 S. W. 697.

A defendant has the burden of showing that the cause of action sued on is barred. *Anderson v. Crow* (Civ. App.) 151 S. W. 1080.

115. **Alteration of Instruments.**—Under a special plea alleging alteration, the burden of proof is upon the party pleading. *Wells v. Moore*, 15 T. 521; *Richers v. Helmcamp*, 1 App. C. C., § 682.

In an action on the administrator's bond, which remained in official custody until the time of trial, the burden of proof that it has been altered as to its amount is upon the defendants. *Peveler v. Peveler*, 54 T. 53.

One suing on a note, the face of which shows alteration, must prove that maker consented to the alteration. *Davis v. Crawford* (Civ. App.) 53 S. W. 384.

In action for goods sold and delivered, burden of proving certain erasure of terms of order for goods held on plaintiff. *Patton-Worsham Drug Co. v. Stark* (Civ. App.) 89 S. W. 799.

Where, in an action upon a building contractor's bond, the defendants alleged an alteration of the specifications of the contract after its execution, the burden was upon them to show it. *McKenzie v. Barrett*, 43 C. A. 451, 98 S. W. 229.

Where complainants claimed under a deed of trust which showed a material alteration on its face, the burden was on complainants to explain the same. *Kalteyer v. Mitchell* (Civ. App.) 110 S. W. 462.

In an action defended on the ground of alterations in the contract on which it is based, plaintiff held to have the burden of proving either that there was no alteration or that the alteration was made with the consent of defendant. *Pope v. Tallaferra* (Civ. App.) 115 S. W. 309.

Where an alteration appears on the face of the instrument, the burden is on the party offering it to account for the alteration. *Kalteyer v. Mitchell*, 102 T. 390, 117 S. W. 792, 132 Am. St. Rep. 889.

Where a material alteration of a written instrument is apparent on the face thereof, the person claiming rights thereunder must show that the alteration was made under such circumstances that it did not prevent his recovery. *Matson v. Jarvis* (Civ. App.) 133 S. W. 941.

A surety, relying on the defense of alteration of contract, has the burden of proving it. *General Bonding & Casualty Ins. Co. v. Beckville Independent School Dist.* (Civ. App.) 156 S. W. 1161.

116. **Wrongful attachment.**—The burden of proof rests upon the party seeking to recover damages to show: 1. That the grounds upon which the writ issued are untrue. 2. The damages resulting to him from the issuance of the writ. In order to recover exemplary damages he must also show: 3. That there was no probable cause for plaintiff's believing that the grounds upon which the attachment issued were true. 4. That the plaintiff sued out the writ maliciously. *Dwyer v. Testard*, 1 App. C. C. § 1228.

To authorize damages against an attorney for the party suing out the writ, the burden is on the plaintiff to show such participation in the wrongful act as would render him liable. *Matthews v. Boydston* (Civ. App.) 31 S. W. 814; *Koyer v. White*, 25 S. W. 46, 6 C. A. 381.

In an action for wrongful attachment, the burden is on plaintiff to show that the attachment was wrongful. *Armstrong v. Ames & Frost Co.*, 17 C. A. 46, 43 S. W. 302.

In an action for conversion by attachment, the burden is on plaintiff to show ownership of the property at the time of levy. *Sanger v. Thomasson* (Civ. App.) 44 S. W. 408.

Where in an attachment suit the answer claimed that the attachment was wrongfully sued out, the burden was on plaintiff to show the contrary. *McFaddin v. Sims*, 43 C. A. 598, 97 S. W. 335.

One reconvening for wrongful attachment was bound to show that the writ of attachment was wrongfully sued out. *Richburg v. McIlwaine, Knight & Co.* (Civ. App.) 131 S. W. 1166.

Plaintiff, in claiming land under foreclosure of an attachment lien, has the burden to show that the attachment creditor, at the time his lien attached, did not know of a deed under which defendant claims, executed before, but not recorded until after, the lien attached. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

In order to entitle one to recover for wrongfully suing out an attachment, the burden is on him to show that no probable cause existed and that defendant was actuated by malice. *Hale v. Barnes* (Civ. App.) 155 S. W. 358.

117. **Attorney and client.**—In an action on a contract for attorney's services, the burden of proof that the contract was void for unreasonableness was on the defendant. *Tabet v. Powell* (Civ. App.) 78 S. W. 997.

An attorney seeking to sustain a transaction between himself and his client held to have the burden of showing certain facts. *Barnes v. McCarthy* (Civ. App.) 132 S. W. 85.

118. **Bailment.**—Where a bailor proves delivery of property to a bailee and the bailee's failure or refusal to return the same, the burden is then on the bailee to relieve himself from liability by showing that the property was not lost through his negligence. *Bagley v. Brack* (Civ. App.) 154 S. W. 247.

119. **Bills and notes.**—One alleging that one of two makers of a note secured by mortgage on the other's land was liable as principal held to have the burden of showing that he had the benefit of the loan. *Devine v. United States Mortg. Co. of Scotland* (Civ. App.) 48 S. W. 585.

In an action against a firm on a note, burden held on plaintiff, under the pleadings, to establish the partnership and the execution of the note. *Clifton & Wadkins v. Roysse Cotton Oil Co.*, 39 C. A. 188, 87 S. W. 182.

Where the indorsers of two promissory notes surrendered them to one of the makers, who then sold them in an action by such purchaser against the indorsers, it was held that the burden of proof was on the purchaser to show that such maker's name did not appear on the notes as makers at the time of his purchase. *Downing v. Neeley & Stephens* (Civ. App.) 129 S. W. 1192.

120. **Bona fide purchasers.**—In a contest between one who has purchased the legal title and one holding the equitable title, the burden rests upon the latter to show that the former had notice of the superior equitable title when he purchased. *Barnes v. Jamison*, 24 T. 362; *Johnson v. Newman*, 43 T. 642; *Cameron v. Romele*, 53 T. 241; *Hill v. Moore*, 62 T. 612; *Saunders v. Isbell*, 24 S. W. 307, 5 C. A. 513.

A conveyance of land to a married man vests the legal title in him. In a contest between a purchaser from him and a purchaser from the wife, who held the equitable title by reason of the investment of her money therein, the burden of proof is upon the latter to show that the former had notice of the superior equitable title. *Saunders v. Isbell*, 24 S. W. 307, 5 C. A. 513. Citing *Barnes v. Jamison*, 24 T. 362; *Johnson v. Newman*, 43 T. 642; *Hill v. Moore*, 62 T. 612; *Cameron v. Romele*, 53 T. 241.

The burden of proof is on the purchaser to show that he has paid value. *Cleveland v. Butts*, 13 C. A. 272, 35 S. W. 804.

Burden held on the holder of an equitable title to show that a subsequent purchaser having the legal title had notice of the equitable interest. *Halbert v. De Bode*, 15 C. A. 615, 40 S. W. 1011.

The burden held on defendant to prove that the negotiation by the payee was after maturity. *Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co. v. Roberts* (Civ. App.) 41 S. W. 111.

Where constable's deed is apparently valid, and execution defendant would avoid it as against subsequent purchaser for value, he must show that purchaser had notice of extrinsic defenses. *Lebreton v. Lemaire* (Civ. App.) 43 S. W. 31.

In a suit on a note indorsed in blank, the burden is on defendant to allege and prove lack of bona fides. *Ricker Nat. Bank v. Brown* (Civ. App.) 43 S. W. 909.

Where a note is fraudulently put in circulation, the burden rests on the holder to show that he is an innocent purchaser for value and before maturity. *Griffin v. Boyd* (Civ. App.) 46 S. W. 664; *Hart v. West*, 92 T. 416, 49 S. W. 361; *People's Nat. Bank v. Mulkey* (Civ. App.) 61 S. W. 528; *Taylor v. Trussell*, 139 S. W. 660.

Where defendant relies on a parol extension of time for payment of the debt secured by a trust deed under which plaintiff claims as purchaser, defendant must show that plaintiff had notice thereof. *Silverman v. Landrum*, 19 C. A. 402, 47 S. W. 404.

A prior unrecorded deed is superior to a subsequent recorded transfer, unless the subsequent vendee is an innocent purchaser for value, the burden of proving which is on him. *Robertson v. McClay*, 19 C. A. 513, 48 S. W. 35.

The burden in an action on a note which plaintiff had obtained from a third person, who was assignee of the payee, held on defendant to show that such third person had notice of defenses against it when he acquired it, where the note was procured by fraud, and plaintiff showed that such third person paid value for it before maturity. *Prouty v. Musquiz*, 94 T. 87, 58 S. W. 721, 996.

Where a note payable to payee's order has been transferred by assignment, and by the assignee to plaintiff, the burden is on plaintiff, in an action against the maker, to protect himself as against a set-off claimed by the maker against the payee, to show that he acquired it before maturity, for a valid consideration, without notice of such set-off. *Prouty v. Musquiz* (Civ. App.) 59 S. W. 568.

Where land is sold under a trust deed given to secure a note, the burden is on those claiming under the purchaser at such sale to show, in an action to recover the land from the assignees of the grantee in a prior unrecorded warranty deed, that the grantee in the trust deed had no notice of the senior unrecorded deed. *Turner v. Cochran*, 94 T. 480, 61 S. W. 923.

Where parties respectively claimed land under an unrecorded deed and under creditors purchasing the land without notice of such deed, the burden of proof to show notice of the equity of claimants under the unrecorded deed, or that purchasers under the original deed subsequently recorded had paid no value, held to be on those claiming through the creditors. *Turner v. Cochran* (Civ. App.) 63 S. W. 151.

Where the heirs of a deceased wife claim from her husband's grantee land purchased by her husband, in his own name with her money, the burden is on them to show notice to such purchaser. *Oaks v. West* (Civ. App.) 64 S. W. 1033.

Where an agent, having a power to sell real estate conveys for a consideration running to himself, the grantee of the purchaser in a suit by the owner to recover the land has the burden of showing that he is an innocent purchaser without notice. *Hunter v. Eastham*, 95 T. 648, 69 S. W. 66.

One claiming, as against a subsequent purchaser of the legal title, an equitable estate of which there was no record notice, has the burden of showing notice to such purchaser. *Lane v. De Bode*, 29 C. A. 602, 69 S. W. 437.

Where plaintiff claimed title to land under a deed which was junior to one executed by the same grantor to defendant, but recorded in the wrong county, after a certified copy of such record was recorded in the proper county, the burden was on plaintiff to show that he was a purchaser for value without notice. *Moody v. Ogden*, 31 C. A. 395, 72 S. W. 253.

One seeking to establish title to land against a purchaser from the original owner, on the ground of bona fide purchase from his heirs, must show that they were the heirs. *Lochridge v. Corbett*, 31 C. A. 676, 73 S. W. 96.

Where defendant claimed under the holder of the certificate sold under a void order to the patentee, the burden was on him to prove that plaintiff was not a bona fide purchaser. *Bogart v. Moody*, 35 C. A. 1, 79 S. W. 633.

The burden was on defendant to show, by proof other than the recitals in his deeds, that he was a bona fide purchaser for value. *Id.*

In trespass to try title by the owner of the legal title against one claiming an equitable interest, the burden was on defendant to show plaintiff not a purchaser for value. *Catrett v. J. S. Brown Hardware Co.* (Civ. App.) 86 S. W. 1045.

One claiming title under a purchaser in a contract for the purchase of land held bound to prove that the purchase price was paid by the purchaser. *Davis v. Ragland*, 42 C. A. 400, 93 S. W. 1099.

Burden held on defendant to show that plaintiff was not an innocent purchaser. *J. S. Brown Hardware Co. v. Catrett*, 45 C. A. 647, 101 S. W. 559.

Where plaintiff's vendor purchased the legal and apparently the only title to an entire tract, and defendants' claim was a mere equity, the burden was on them to show that such equity, was superior to the legal title, and that plaintiff's vendor was not a bona fide purchaser for value. *Laffare v. Knight* (Civ. App.) 101 S. W. 1034.

In an action of trespass to try title, the burden held upon defendants to prove that they were purchasers in good faith for value and without notice of the deed through which plaintiffs claim. *McAllen v. Alonzo*, 46 C. A. 449, 102 S. W. 475.

Where, in an action on a note, defendants relied upon a tender to plaintiff, a married woman and her former husband's executrix, it devolved upon them to show her right to receive the payment and execute the required release without being joined by her husband. *Stevens v. Taylor* (Civ. App.) 102 S. W. 791.

Where at the time H. purchased an entire tract there was outstanding a prior unrecorded deed to a portion of the tract to another, the burden was on those claiming through H. to show that he had no knowledge of such unrecorded deed. *J. M. Guffey Petroleum Co. v. Hooks* (Civ. App.) 106 S. W. 690.

Principle that party claiming land under equitable title against one who purchased legal title has the burden of proving that it was purchased without notice of his equity, etc., held to have no application where one party claims through administration proceedings and the other under deeds from the heirs. *Holland v. Ferris* (Civ. App.) 107 S. W. 102.

In order for the title of a subsequent purchaser to take precedence over a prior one, he must show that he was a bona fide purchaser for value without notice of the senior title. *Id.*

The burden of proving that a purchaser of a note before maturity had notice of defenses held upon defendant. *Cochran v. Priddy*, 49 C. A. 39, 107 S. W. 616.

In trespass to try title, where plaintiffs claimed an equity as against the legal title in defendants, the burden was on the plaintiffs to show that the defendants were not bona fide purchasers. *Wallis, Landes & Co. v. Dehart* (Civ. App.) 108 S. W. 180.

One who seeks to ingraft on the legal title a secret equity must prove that the purchaser of the legal title had notice of such equity. *Middleton v. Johnston* (Civ. App.) 110 S. W. 789.

The holder of a prior equitable interest, in order to prevail over a purchaser of the legal title, must show that the latter is not a bona fide purchaser. *Thomason v. Berwick*, 52 C. A. 153, 113 S. W. 567.

The burden is on the party asserting equitable title against a legal title to show that at the time the legal title was acquired the purchaser had notice of the equity sought to be asserted against it. *Louisiana & T. Lumber Co. v. Dupuy*, 52 C. A. 46, 113 S. W. 973.

One seeking to postpone a prior unregistered deed must show that he paid the purchase price of the land without actual notice of the existence of the prior deed, which may be shown by circumstances. *Holland v. Nance*, 102 T. 177, 114 S. W. 346; *Same v. Ferris*, *Id.*

When a draft is executed through the fraud of the payee, and is fraudulently put in circulation, the burden is upon the holder to prove that he is a bona fide holder for value. *Johnson County Savings Bank v. Kemp Mercantile Co.* (Civ. App.) 114 S. W. 402.

The burden is on one asserting an equitable title to show that the holder of the legal title purchased with notice of the equitable title. *Davidson v. Renfro*, 52 C. A. 483, 114 S. W. 449.

One claiming as innocent purchaser for value and those claiming under him as against a prior unrecorded deed have the burden of proof to show that fact. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

Where a person purchased land from heirs which had been previously deeded to a third person by the ancestor, the burden was upon a person claiming title through the heirs to show that the purchaser from them was a purchaser for value without notice of the prior conveyance. *La Brie v. Cartwright*, 55 C. A. 144, 118 S. W. 785.

The burden is on one claiming to be a purchaser in good faith to prove his claim. *Downs v. Stevenson*, 56 C. A. 211, 119 S. W. 315.

In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, held, that the burden was upon defendants to show fraud or mistake in the

description in their deed, and that plaintiff had notice thereof on purchasing. *Beavers v. Baker* (Civ. App.) 124 S. W. 450.

Ordinarily, the burden is upon a subsequent grantee to show that he is a bona fide purchaser for value without notice of a prior grantee's title. *Id.*

In trespass to try title, plaintiffs claimed that D. and Y., their parents, were married, and that on D.'s death plaintiffs inherited his community interest, while defendant claimed under conveyances from the vendees of Y., who they contended was not married. Held that, plaintiffs' title, if any, being merely an equitable one, the burden was on them to prove that defendant and each of his vendors either had notice of plaintiffs' title when he purchased, or was not a purchaser for value. *Ruedas v. O'Shea* (Civ. App.) 127 S. W. 891.

Where plaintiffs claim as heirs to community property, the burden is not on them to show that defendant was an innocent purchaser. *Ross v. Martin* (Civ. App.) 128 S. W. 718.

A subsequent purchaser has the burden of proving that he is a purchaser without notice of a prior conveyance by the grantor. *Keller v. Lindow* (Civ. App.) 133 S. W. 304.

In trespass to try title, the burden was on defendant to show that he was an innocent purchaser without notice and for value. *Wilkerson v. Ward* (Civ. App.) 137 S. W. 158.

For a subsequent vendee of land to successfully defend against a prior unrecorded deed, the burden is on him to show that he is a bona fide purchaser without notice, and for value. *Bledsoe v. Haney* (Civ. App.) 139 S. W. 612.

Where a note was secured by fraud, and without consideration, held that a subsequent holder had the burden of proving that he took without knowledge of the failure of consideration. *Taylor v. Trussell* (Civ. App.) 139 S. W. 660.

The burden of showing that a subsequent purchaser had actual notice of a prior unrecorded deed held in the persons claiming under such deed. *Phillips v. Campbell* (Civ. App.) 146 S. W. 319.

In a purchaser's action to establish title to land as a bona fide purchaser for value, without notice, the burden of proving notice is upon the defendant. *Aycock v. Thompson* (Civ. App.) 146 S. W. 641.

Usually where it is shown that plaintiff has acquired a negotiable instrument before maturity for value, the burden is on the maker to show that the plaintiff had notice of defenses. *Brannin v. Richardson* (Civ. App.) 148 S. W. 348.

The burden was on defendant in an action to recover land to prove that one to whom the record showed defendants' remote grantor had theretofore conveyed the land had reconveyed it to such grantor, and also that defendants and their grantor were innocent purchasers. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

The interest of a person in land purchased by himself and others, where his name does not appear among the grantees, is an equity, and the burden is on him to show that a purchaser had notice of his equity, or did not pay a valuable consideration. *Teagarden v. R. B. Godley Lumber Co.*, 105 T. 616, 154 S. W. 973.

Defendant in trespass to try title claiming as a bona fide purchaser without notice under a deed subsequent to that of plaintiff had the burden of proving payment of a valuable consideration and want of notice. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

121. Boundaries.—The law does not require the distance named in the field-notes of a grant to be greatly extended to reach a line merely because it is found on the ground with marks corresponding in age with the date of the grant. He who claims the right to so extend the distance, and give superior dignity to the marked line, must show that the line was the one marked on the ground by the surveyor preparatory to the issuance of the grant. *Fagan v. Stoner*, 67 T. 286, 3 S. W. 44.

In trespass to try title the burden of proof rests upon the plaintiff to establish the boundaries as claimed by him. *Briggs v. Pierson*, 26 S. W. 467, 7 C. A. 638.

Where plaintiff, in a suit to recover land, merely established a conflict between two calls in the survey of his land, he is not entitled to recover. *Morgan v. Mowles* (Civ. App.) 61 S. W. 155.

In an action to establish a boundary, the burden of establishing the defense of limitations is on the defendant. *Sloan v. King*, 33 C. A. 537, 77 S. W. 48.

One claiming under a junior survey seeking to change the construction of a senior survey held required to show that the bearing trees called for in the senior survey were not at the place fixed by the distances called for. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

The burden of proof of the location of the land sued for and of the existence of a certain creek by which it was described held on plaintiffs. *McDonald v. Downs*, 45 C. A. 215, 99 S. W. 892.

The burden of proving that the land was located in a designated lot according to a plat of a survey held to rest on plaintiff. *Cochran v. Kapner*, 46 C. A. 342, 103 S. W. 469.

The burden was upon plaintiff to prove the land was within surveys claimed by him. *Newnom v. Williamson*, 46 C. A. 615, 103 S. W. 656.

In a boundary dispute, the burden was on plaintiff to show that a stream separating the land in controversy from other land owned by defendant was the east branch of a certain river, and not a mere slough, as contended by defendant. *Selkirk v. Watkins* (Civ. App.) 105 S. W. 1161.

Plaintiff in trespass to try title by proof of location of a corner held required to show with reasonable certainty the existence of the monument or natural object relied on. *Jagers v. Stringer*, 47 C. A. 571, 106 S. W. 151.

In a suit by an abutter against a city involving boundaries of streets, the burden was on her to show that her boundaries did not conflict with the streets. *Perry v. Ball*, 52 C. A. 134, 113 S. W. 588.

In an action to try title to property lying between a boundary fixed by former owners by agreement and the original line, where defendant claims that plaintiffs were estopped to dispute the location of the line as fixed by agreement, burden is on defendant to show knowledge of such agreement. *Louisiana & T. Lumber Co. v. Dupuy*, 52 C. A. 46, 113 S. W. 973.

Where defendant pleaded not guilty, and, in a cross-action sought to have the boundary established between himself and plaintiff, the burden was on defendant to prove that

the boundaries were as alleged by him, even though plaintiff failed to sustain the burden of showing title in the principal action. *Gaffney v. Clark* (Civ. App.) 118 S. W. 606.

The burden is on plaintiff of showing the land in dispute to be a part of the tract owned by him as alleged, rather than a part of the tract owned by defendant. *Thacker v. Wilson* (Civ. App.) 122 S. W. 938.

The party who asserts, in an action of trespass to try title, that the channel of the water course recognized as the boundary line between two states is not in fact, at the point in controversy, the true boundary, resting his contention upon a sudden shifting of the course of the channel, assumes the burden of proving that fact. *Plummer v. Marshall* (Civ. App.) 126 S. W. 1162.

Plaintiff, in trespass to try title, has the burden of establishing the true location of the lines of the survey claimed. *Lafferty v. Stevenson* (Civ. App.) 135 S. W. 216.

In trespass to try title, plaintiff held to have the burden of proving that his survey in fact included land inclosed by defendant. *Hill v. Collier* (Civ. App.) 135 S. W. 1084.

In an action for damages for removing timber and carrying away gravel from land, the burden held to be on the defendants to show that a boundary line established by the field notes of the surveyor for a section was not the true boundary, and that a line claimed by them was the proper boundary. *Burke v. Braumiller* (Civ. App.) 150 S. W. 206.

122. **Brokers.**—A party was entitled to commission on sales and leases of personal property on collection of amounts due. On proof of the amount of sales, of the delivery of the purchase notes to the principal and that they were over due, he was prima facie entitled to recover his commission from his principal. If the notes and contracts had not in fact been collected, the burden was upon the defendant to prove the fact. *Singer Mig. Co. v. Wood*, 1 App. C. C. § 1178.

Burden held on vendor, sued by a real estate broker for commissions, to show materiality of broker's misrepresentations, on discovering which purchaser refused to consummate sale. *Scottish American Mortg. Co. v. Davis* (Civ. App.) 72 S. W. 217.

In an action for broker's services on an implied contract, it is only necessary for plaintiff to show that he performed acts as the broker of the seller, and that the latter accepted his agency and adopted his acts. *Ross v. Moskowitz* (Civ. App.) 95 S. W. 86.

The burden is on brokers suing for commission on a sale of land to prove, not only that they were agents to effect it, but procured the sale which defendants consummated. *English v. William George Realty Co.*, 55 C. A. 137, 117 S. W. 996.

Where a sale failed because of an outstanding lease, the burden was on the owners in a suit for brokers' commissions to show that the brokers had knowledge of the situation. *Willson v. Crawford* (Civ. App.) 130 S. W. 227.

Under a certain contract for purchase of timber, held, that a broker could not recover commissions in the absence of evidence showing the amount of timber that the purchaser was compelled to take under the contract. *Saunders v. Montgomery* (Civ. App.) 134 S. W. 775.

123. **Carriers.**—Negligence of carrier, see post, § 191.

When a recovery is sought upon a bill of lading, reciting that weights are subject to correction, the burden is upon the plaintiff to show that there is an overcharge. *Johnson v. Railway Co.*, 9 C. A. 619, 30 S. W. 260, citing *Railway Co. v. Loonie*, 84 T. 262, 19 S. W. 385; *Railway Co. v. Nelson*, 4 C. A. 345, 23 S. W. 732; *Railway Co. v. Roberts*, 3 C. A. 370, 22 S. W. 183; *Schloss v. Railway Co.*, 85 T. 602, 22 S. W. 1014; *Railway Co. v. Wood* (Civ. App.) 23 S. W. 744; *Railway Co. v. McCown*, 26 S. W. 745.

In a suit against a carrier to recover the penalty for overcharges, consisting in the excess of the interstate rate over the commission rates of Texas, the burden of proving that the shipment was a domestic shipment was on the plaintiff. *Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.* (Civ. App.) 72 S. W. 419.

124. **Contracts in general.**—In action to enforce conveyance of land because of certain acts to be performed by plaintiff, the burden was on plaintiff to prove the execution of the contract by him. *Cook v. Roberson* (Civ. App.) 46 S. W. 866.

Burden is on grantor, seeking to avoid deed in part, to show real intent of parties. *Jordan v. Young* (Civ. App.) 56 S. W. 762.

Burden held to be on one suing for breach of contract to deliver cotton seed hulls during the running season of defendant's plant to show that the running season was over. *Hume v. S. Netter, A. Geismar & Co.* (Civ. App.) 72 S. W. 865.

In action on building contract, burden held to be on contractors to show completion of building within time named, or that delay fell within exception named in contract. *Neblett v. McGraw & Brewer*, 41 C. A. 239, 91 S. W. 309.

The burden of showing the existence of an implied warranty is on him who seeks its protection. *American Surety Co. of New York v. San Antonio Loan & Trust Co.* (Civ. App.) 98 S. W. 387.

Where an action on contracts was defended for their illegality, the burden held on plaintiffs to prove their case by a preponderance of evidence and upon defendant to show the illegality of the contracts. *Smith v. Bowen*, 45 C. A. 222, 100 S. W. 796.

A seller failing to comply with his contract to sell and deliver petroleum oil held required to prove a defense relied on that its wells did not produce sufficient oil. *San Jacinto Oil Co. v. Texas Co.*, 47 C. A. 477, 105 S. W. 1163.

One suing for breach of a contract to convey has the burden to show the breach. *Dobson v. Zimmerman*, 55 C. A. 394, 118 S. W. 236.

Where the petition discloses a legal contract, the burden to establish its illegality as violating the Interstate Commerce Law is on defendants. *St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co.* (Civ. App.) 139 S. W. 3.

One seeking to escape liability under an implied promise to pay for work done held to have the burden of proof that he was not to pay for the work, except on conditions, and that such conditions had not been performed. *Frost v. Grimmer* (Civ. App.) 142 S. W. 615.

125. **Want or failure of consideration.**—The burden of proof of establishing want or failure of consideration is upon the defendant. *Tolbert v. McBride*, 75 T. 95, 12 S. W. 752; *Newton v. Newton*, 77 T. 508, 14 S. W. 157; *Buchanan v. Wren*, 10 C. A. 560, 30 S. W. 1077; *Wright v. Hardie*, 88 T. 653, 32 S. W. 885; *Mulberger v. Morgan* (Civ. App.)

47 S. W. 738; *Kampmann v. McCormick*, 24 C. A. 462, 59 S. W. 832; *Masterson v. F. W. Heitmann & Co.*, 38 C. A. 476, 87 S. W. 227; *Stevens v. Taylor* (Civ. App.) 102 S. W. 791; *Gutta Percha & Rubber Mfg. Co. v. City of Cleburne*, 107 S. W. 157; *McCormick v. Kampmann*, 109 S. W. 492; *Gutta Percha & Rubber Mfg. Co. v. City of Cleburne*, 102 T. 36, 112 S. W. 1047; *Western Mfg. Co. v. Freeman*, 126 S. W. 924; *City of Cleburne v. Gutta Percha & Rubber Mfg. Co.*, 127 S. W. 1072; *Barnes v. Sparks*, 131 S. W. 610; *Taylor v. Trussell*, 139 S. W. 660; *Boyce v. Bickford*, 145 S. W. 1082; *Key v. Hickman*, 149 S. W. 275.

The burden of proof of want of consideration in a written instrument rests upon the party denying a consideration. *Newton v. Newton*, 77 T. 508, 14 S. W. 157; *Railway Co. v. Wright*, 1 C. A. 402, 21 S. W. 80; *Railway Co. v. Klepper*, 24 S. W. 567; *Stocksbury v. Swan*, 85 T. 563, 22 S. W. 963; *Railway Co. v. Hughes* (Civ. App.) 31 S. W. 411; *Railway Co. v. Pennington*, 32 S. W. 706.

The burden of proving the consideration is not shifted upon the payee by a verified plea alleging want of consideration. *Railway Co. v. Hughes* (Civ. App.) 31 S. W. 411.

In trespass to try title to half of the land entered under a headright certificate which was conveyed by the administratrix of the holder of the certificate under an invalid order of court, if defendants are entitled to recover the consideration paid for the land, the burden is on them to show the amount of such consideration. *Broocks v. Payne* (Civ. App.) 124 S. W. 463.

126. Corporations.—In an action to recover an unpaid balance alleged to be due on stock subscriptions, the burden is not on the receiver to show that the creditors did not know the consideration for which the stock was issued to defendants as promoters. *Cole v. Adams* (Civ. App.) 49 S. W. 1052.

In action on notes of a corporation, the burden is on the defendant to show that they were given in violation of an agreement between the stockholders prohibiting the creation of a new debt without the consent of four-fifths of all the stockholders. *King County Land & Live-Stock Co. v. Thomson*, 21 C. A. 473, 51 S. W. 890.

In suit to recover stock subscription burden held on plaintiff to prove the amount of the subscription. *Ables & Walton v. Terrell University School* (Civ. App.) 85 S. W. 1010.

Where plaintiff, a foreign corporation, alleged its right to do business in the state at the time of the execution of instruments sued on, a general denial held to raise the issue of a permit vel non, and to place on plaintiff the burden of proving authority to do business in the state at the time in question. *Turner v. National Cotton Oil Co.*, 50 C. A. 468, 109 S. W. 1112.

In an action on a stock subscription, wherein defendant filed a special plea that he withdrew it before plaintiff's organization, the burden of proof was on defendant to show that notice of the revocation of his subscription on which he relied was given anterior to the date of the meeting at which plaintiff was organized. *Steely v. Texas Improvement Co.*, 55 C. A. 463, 119 S. W. 319.

127. Damages.—When the principal object of the suit is to recover special damages, the burden of proof ought to be on the plaintiff to show such negligence as caused the damage. *W. U. Tel. Co. v. Bennett*, 1 C. A. 558, 21 S. W. 699.

In an action for personal injuries, value of plaintiff's time should be proved to warrant recovery for loss thereof, wherever such value is susceptible of proof. *Missouri, K. & T. Ry. Co. v. Vance* (Civ. App.) 41 S. W. 167.

In action by husband for loss of wife's services, value of such services need not be proved unless of an extraordinary character. *Id.*

Even where the law implies damages such as necessarily result from a wrongful act, proof is required to show the extent and amount of damages. *Davis v. Texas & P. Ry. Co.* (Civ. App.) 42 S. W. 1008.

Where the injury appears serious and permanent, direct evidence of mental suffering is unnecessary if alleged in the petition. *City of San Antonio v. Kreusel*, 17 C. A. 594, 43 S. W. 615.

The burden of proving that plaintiff had been able to or had obtained employment after his wrongful dismissal is on defendant. *Southwestern Telegraph & Telephone Co. v. Bross* (Civ. App.) 45 S. W. 178.

Where, after plaintiff made out a prima facie case for breach of contract for services, by showing a wrongful dismissal, it appeared that he earned money in another business thereafter during the term, he must show the amount of such earnings. *Id.*

The burden of proving reduction of damages for breach of a contract of hire is on defendants. *Allgeyer v. Rutherford* (Civ. App.) 45 S. W. 628.

In suit for personal injuries, medical attendance cannot be recovered without proving value of services. *Houston & T. C. R. Co. v. Pereira* (Civ. App.) 45 S. W. 767.

Medical expenses incurred in treating personal injuries must be proved. *Houston, E. & W. T. Ry. Co. v. Richards*, 20 C. A. 203, 49 S. W. 687.

Where there is evidence of physical injury justifying submission of injury from mental suffering, the amount of mental damages need not be proved. *International & G. N. Ry. Co. v. Rhoades*, 21 C. A. 459, 51 S. W. 517.

Though proof of injured servant's life expectancy is admissible in an action against the master for personal injury, it is not essential to recovery. *International & G. N. R. Co. v. Elkins* (Civ. App.) 54 S. W. 931.

In an action for injuries, direct evidence that plaintiff suffered mental anguish is not necessary to authorize a recovery therefor. *International & G. N. R. Co. v. Mitchell* (Civ. App.) 60 S. W. 996.

To recover for medical care and nursing in an action for personal injury, there should be evidence that the charges and expenses were reasonable. *City of Dallas v. Moore*, 32 C. A. 230, 74 S. W. 95.

Mental suffering need not be shown by direct proof, when the injury is serious and permanent. *Galveston, H. & S. A. Ry. Co. v. Hubbard*, 33 C. A. 343, 76 S. W. 764.

In action for breach of contract to supply water, plaintiff has burden of proving damages with reasonable certainty. *City of Van Alstyne v. Morrison*, 33 C. A. 670, 77 S. W. 655.

In an action for injuries, there could be no recovery for expenses for a drug account, domestic help, and attendance of nurses, in the absence of evidence that those expenses were reasonable and necessary. *Dallas Consol. Electric St. Ry. Co. v. Ison*, 37 C. A. 219, 83 S. W. 408.

Where plaintiff lost a leg by reason of defendant's negligence, the jury was entitled to fix his damages for impaired earning capacity, without proof of his present earning capacity. *Texarkana & Ft. S. Ry. Co. v. Tolliver*, 37 C. A. 437, 84 S. W. 375.

In a personal injury action, there can be no recovery for medical services, in the absence of proof of their value. *St. Louis Southwestern Ry. Co. of Texas v. Haynes* (Civ. App.) 86 S. W. 934.

In an action for injuries, charges made by physicians cannot be recovered in the absence of a showing that they were reasonable. *Metropolitan St. Ry. Co. v. Wishert* (Civ. App.) 89 S. W. 460.

In an action for personal injuries, medical and surgical expenses incurred by plaintiff cannot be considered in estimating his damages, in the absence of evidence that such expenses were reasonable in amount. *Houston E. & W. T. Ry. Co. v. McCarty*, 40 C. A. 364, 89 S. W. 805.

In an action by a servant for wrongful discharge, he is not required to show the amount that he could or did earn after his discharge, but the burden to show the same is on defendant. *Pacific Express Co. v. Walters*, 42 C. A. 355, 93 S. W. 496.

The fact that damages suffered by discharge in violation of a contract for personal services might have been reduced by obtaining other employment is a matter of defense to be shown by the employer. *Jefferson & N. W. Ry. Co. v. Dreeson*, 43 C. A. 282, 96 S. W. 63.

Where a husband sues to recover for the loss of the society of his wife, specific proof of the value of her society is not necessary, but, the loss of society being established, the assessment of damages is within the sound discretion of the jury. *Northern Texas Tractor Co. v. Mullins* (Civ. App.) 99 S. W. 433.

A jury held entitled to make an allowance for inconvenience sustained by plaintiff because of the flooding of his property, though there was no evidence as to the money value of such damage. *International & G. N. R. Co. v. Stewart* (Civ. App.) 101 S. W. 282.

The burden of proof that plaintiff could have obtained other employment at the same salary for the remainder of the contract period after his discharge was on the defendant. *San Antonio Light Pub. Co. v. Moore*, 46 C. A. 259, 101 S. W. 867.

In an action for damages, plaintiff could not recover medical expense where there was no proof of the value of the physician's services, or that any sum was paid or contracted to be paid therefor. *Gulf, C. & S. F. Ry. Co. v. Craft* (Civ. App.) 102 S. W. 170.

In an action for personal injuries, it is error to submit as elements of damages doctor and drug bills, in the absence of evidence that they are reasonable. *Missouri, K. & T. Ry. Co. of Texas v. Morgan*, 49 C. A. 212, 108 S. W. 724.

In a passenger's action for sickness caused by his wrongful ejection, it was error to permit the jury to consider the amount paid out for medicines and doctors' bills, where there was no evidence as to the reasonableness of those expenditures. *Missouri, K. & T. Ry. Co. of Texas v. Willis* (Civ. App.) 117 S. W. 170.

A passenger held not entitled to recover for being required to hire a conveyance to transport her to her destination, in the absence of proof of the amount paid therefor. *International & G. N. R. Co. v. Doolan*, 56 C. A. 503, 120 S. W. 1118.

Proof of the reasonableness of a physician's charges held essential to a recovery thereof in an action for injuries. *Id.*

In an action for injuries to a crop, evidence held not to shift the burden of proof to defendant to show the expense of making and marketing the crop. *Texas Co. v. Lacour* (Civ. App.) 122 S. W. 424.

A master held to have the burden of proving the negligence of a servant resulting in aggravating the injury complained of. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 138 S. W. 188.

Where plaintiff claimed to have lost a sale of certain goods for part cash and part credit by their being delivered in bad order, the burden was on him to show the buyer's solvency, and whether the deferred payments bore interest, and, if so, at what rate. *Gulf, C. & S. F. Ry. Co. v. Coulter* (Civ. App.) 139 S. W. 16.

Loss of profits alleged as an element of damages cannot be recovered unless the amount be shown by competent evidence with reasonable certainty. *American Const. Co. v. Caswell* (Civ. App.) 141 S. W. 1013.

In a personal injury action, where the only evidence of the value of medicines used was the testimony of plaintiff that he paid a lump sum for the medicine, there can be no recovery therefor; it not appearing that the charge was reasonable. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678.

128. Death and survivorship.—Held error for the court to assume, in his charge, that the alleged ancestor, if dead, left neither wife nor children surviving; the burden is on plaintiffs to show a reasonable probability that, at the time of his death, there were no such survivors. *French v. McGinnis*, 21 S. W. 941, 3 C. A. 86.

Where a life policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the beneficiary against the insurance company and the administrator of insured, the burden was on plaintiff to show that his decedent had survived the insured. *Hildebrandt v. Ames*, 27 C. A. 377, 66 S. W. 128.

129. Dedication.—In an action by the owner of property to recover from a city a strip of land dividing his tract, the burden was on the city to show a dedication and acceptance of the strip as a street. *City of Houston v. Finnigan* (Civ. App.) 85 S. W. 470.

County claiming dedication by city of public square held to have the burden of showing the dedication. *City of Victoria v. Victoria County* (Sup.) 128 S. W. 109.

130. Descent.—One claiming under an instrument purporting to have been made by heirs must prove the heirship. *McCoy v. Pease*, 17 C. A. 303, 42 S. W. 659.

An heir is not required, before taking as heir, to prove that the deceased was intestate. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

A purchaser from an heir, under a deed sufficient to carry the after-acquired title, would not be required to prove that the ancestor was intestate before he could rely on his deed. *Id.*

131. Residence.—The holder of the note has the burden of proving that the residences of the principal obligors are unknown to him and cannot be ascertained by reasonable diligence, and the testimony of his attorneys that neither of them knew the residence of the principal obligor is insufficient. *Whitaker v. Brooks* (Civ. App.) 137 S. W. 921.

132. Election contest.—The burden is on the party asserting that a local option election was illegal to show such illegality. *Snead v. State*, 40 Cr. R. 262, 49 S. W. 595.

The burden is on one contesting an election to show that the election was null and void, or that he received a majority of the ballots legally cast. *Garcia v. Cleary*, 50 C. A. 465, 110 S. W. 176.

The burden is on contestants in an election contest to show that votes received and counted were illegal. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

It was incumbent on the party alleging that a certain voter was not a citizen of the United States to show that such voter's father was not a citizen thereof during his son's minority. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

The burden was on the party, who complained of a finding that a certain person was a legal voter, to show that the voter was legally subject to a municipal poll tax, and had failed to pay it. *Linger v. Balfour* (Civ. App.) 149 S. W. 795.

133. Condemnation of property.—In suit to enjoin opening of road, defense of subsequent condemnation must be affirmatively established. *Missouri, K. & T. Ry. Co. of Texas v. Austin* (Civ. App.) 40 S. W. 35.

In an action for damages to certain property caused by the construction of a railroad, the burden is on defendants to show to what extent any special benefits resulting from the construction of a road affects the property. *Pochilla v. Calvert, W. & B. V. Ry. Co.*, 31 C. A. 398, 72 S. W. 255.

In proceedings to condemn land for a railroad right of way, the court properly placed the burden of proof on the landowners. *Stephenville, N. & S. T. Ry. Co. v. Moore*, 51 C. A. 205, 111 S. W. 758.

In a landowner's suit to enjoin a county from opening a road over his land, the burden is on defendant to show affirmatively that notice of the time for assessing damages was given to the landowner as required by Art. 6880. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

134. Estoppel.—The burden is on the party pleading an estoppel to show that, if the estoppel is not sustained, loss will result. *Anderson v. Walker* (Civ. App.) 49 S. W. 937.

One relying on facts which will estop another from asserting the legal insufficiency of a conveyance has the burden of proving them. *Southern Pine Lumber Co. v. Arnold* (Civ. App.) 139 S. W. 917.

The court properly charged that the burden was on defendant to prove facts constituting an estoppel relied on. *Organ v. Maxwell* (Civ. App.) 140 S. W. 255.

The burden of proving the facts which constitute an estoppel by conduct rests upon the party claiming the benefit of the estoppel. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

135. Writ of execution.—The holder of a note purporting on its face to be for purchase-money for the land offered for sale announced, in the hearing of bidders present, that such a lien existed. In a suit to foreclose his lien upon the land, the burden of proof was upon him in asserting his equitable claim against the legal title of the purchaser at the execution sale. *Barnes v. Jamison*, 24 T. 365; *Willis v. Gay*, 43 T. 469, 26 Am. Rep. 328; *Rawles v. Perkey*, 50 T. 315; *Robertson v. Guerin*, Id. 323; *McAlpine v. Burnett*, 23 T. 651; *Grace v. Wade*, 45 T. 527; *Borden v. McRae*, 46 T. 401; *Grimes v. Hobson*, Id. 416; *Catlin v. Bennett*, 47 T. 170. *McAfee v. Wheelis*, 1 U. C. 65.

In motion to recover against constable amount of judgment for neglect to return writ of execution, burden of showing property was not sufficient to satisfy judgment is on officer. *Ranken v. Jones* (Civ. App.) 53 S. W. 583.

Defendant, in suit to enjoin sale under execution because the judgment was dormant, need not show that it was due and unpaid. *Corder v. Steiner* (Civ. App.) 54 S. W. 277.

Plaintiff in trespass to try title held required to show that judgment creditor through whom he claims acquired his lien without notice of defendant's claim under unrecorded deed. *Walker v. Downs* (Civ. App.) 64 S. W. 682.

136. Administration of estate.—It is incumbent on one who claims that a widow has forfeited her right to an allowance by reason of her separation from her husband to show that there was no sufficient cause for such separation. *Linares v. De Linares*, 93 T. 84, 53 S. W. 579.

The burden is on the widow, seeking to recover property pledged by deceased, to show that the pledgee's claim is of a character which does not take precedence of her demand for allowances. *Fulton v. National Bank*, 26 C. A. 115, 62 S. W. 84.

Burden of proof to charge community property in interest of separate estate of deceased husband held to be on husband's administrator. *Allardyce v. Hambleton*, 96 T. 30, 70 S. W. 76.

137. False imprisonment.—In an action for false imprisonment against an officer, the arrest being legal, the burden was upon the plaintiff to show that the officer had authority to take bail, that bail was offered and refused, that a magistrate was accessible, and that the officer failed to carry plaintiff immediately before him for examination. *Sheehan v. Holcomb*, 1 App. C. C. § 464.

Proof of certain allegations in a petition in an action for damages sustained by a passenger by reason of having been illegally arrested by an agent of the railroad company held not necessary to a recovery. *Texas Midland R. R. v. Dean* (Civ. App.) 82 S. W. 524.

138. **Forgery.**—Where a prima facie case is made by plaintiff the burden of proof rests upon the party charging forgery of the instrument. *Smith v. Gillum*, 80 T. 120, 15 S. W. 794.

The burden of proof is upon the party charging that an apparent ancient instrument is a forgery. *Masterton v. Todd*, 24 S. W. 682, 6 C. A. 131; *Chamberlain v. Showalter*, 23 S. W. 1017, 5 C. A. 226.

Burden of proving that an ancient deed was a forgery is on the person attacking the deed. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 334.

139. **Fraud.**—An attaching creditor attacking the transfer of property by his debtor as fraudulent must prove the indebtedness to himself. The attachment proceeding instituted by himself is not competent evidence of that fact. *Freiburg v. Foreman*, 1 App. C. C. § 473.

A party relying upon fraudulent representation to rescind a contract must show: 1. False representations. 2. That they were material. 3. That he believed and relied upon them, and was thereby induced to make the contract. 4. That upon discovering the fraud, he, within a reasonable time, demanded a rescission of the contract. *Gann v. Shaw*, 2 App. C. C. § 258.

Where a deed is valid on its face, but fraud is alleged on the ground of insolvency, the burden to show fraud is on the creditor. *Greer v. Richardson Drug Co.*, 1 C. A. 634, 20 S. W. 1127.

Burden of proving a deed of trust fraudulent or not accepted is on the party assailing it. *De Ware v. Bailey* (Civ. App.) 40 S. W. 323.

The burden of proving a fraudulent sale by his debtor is on an attaching creditor who alleges such fact. *Ellis v. Hudson* (Civ. App.) 44 S. W. 550.

In an action to rescind a sale, the burden of proof was on plaintiff to show that the defendant made the misrepresentations charged, and that plaintiff relied on them. *Cole v. Carter*, 22 C. A. 457, 54 S. W. 914.

In an action to rescind a sale, it was not necessary for plaintiff to show that misrepresentations made by the seller were made with intent to deceive. *Id.*

Burden of proof stated in an action by a creditor to reach property fraudulently conveyed by his debtor. *Talcott v. Rose* (Civ. App.) 64 S. W. 1009.

A creditor, taking a mortgage on real estate from the grantee of his debtor to secure the debt, with knowledge that the land was conveyed to defraud creditors, has the burden, as against other creditors existing at the time of the fraudulent conveyance, of showing the existence of his debt before such conveyance. *Rilling v. Schultze*, 95 T. 352, 67 S. W. 401.

In proceedings to compel a sheriff to pay over proceeds of execution sale, where adverse claimants under an assignment from plaintiffs were made parties, burden was on plaintiffs to show false representations, invalidating assignment. *W. T. Rickards & Co. v. J. H. Bemis & Co.* (Civ. App.) 78 S. W. 239.

Burden of proving fraud in transaction by which attorney took deed of trust, held on grantor, in suit to cancel where relation of attorney and client did not exist. *Jinks v. Moppin* (Civ. App.) 80 S. W. 390.

The intent on the part of a grantor to place his property beyond the reach of subsequent creditors, thereby rendering the conveyance void, must be shown by either direct or circumstantial evidence. *Searcy v. Gwaltney Bros.*, 36 C. A. 158, 81 S. W. 576.

In an action to recover attorney's fees and the costs included in the voluntary payment of a note, the burden of showing mistake or fraud inducing such payment held to be on those making the claim. *Collins v. Kelsey* (Civ. App.) 97 S. W. 122.

Where plaintiffs alleged that quitclaim deeds executed by them were fraudulently obtained, the burden to show the fraud by preponderance of the evidence rested upon them. *Brewer v. Cochran*, 45 C. A. 179, 99 S. W. 1033.

The burden is not on plaintiff, in an action for fraudulent conversion of timber, to prove that defendant fraudulently cut such timber knowing that it belonged to plaintiff. *Young v. Pine Ridge Lumber Co.* (Civ. App.) 100 S. W. 784.

As against the creditors of a husband, one seeking to support a gift from the husband to the wife has the burden of proving that, at the time of the gift, the husband was not insolvent. *Zuckerman v. Munz*, 48 C. A. 337, 107 S. W. 78.

The burden of proving material misrepresentations as to the indebtedness of a partnership in making a sale of an interest in the business held upon the party charging it. *Seal v. Holcomb*, 48 C. A. 330, 107 S. W. 916.

A party alleging that a conveyance was fraudulent as against the creditors of the grantor has the burden of proving fraud with clearness. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

Burden of proof in an action to recover notes and mortgages assigned by decedent to her son and by him to plaintiff, defended upon the ground of the son's fraud, etc., stated. *McHay v. Peterson*, 52 C. A. 195, 113 S. W. 981.

Representatives of grantor asserting that deed was simulated transaction held to have the burden of proof. *Robertson v. Hefley*, 55 C. A. 368, 118 S. W. 1159.

In a suit to partition lands in which plaintiffs claimed a one-half interest through a conveyance by an attorney in fact of defendants, the burden was on defendants to show that plaintiffs had notice of the fact that the power of attorney, under which the attorney acted, was obtained by misrepresentations. *Merrill v. Bradley* (Civ. App.) 121 S. W. 561.

The burden is on the drawee of a draft to prove, in avoidance of liability thereon, fraud inducing its acceptance. *Milmo Nat. Bank v. Cobbs* (Civ. App.) 128 S. W. 151.

The burden is on one seeking to rescind a contract or to relieve himself of some contractual liability on account of the fraud of another to clearly prove the fraud or the circumstances from which it should be presumed. *Hoeldtke v. Horstman* (Civ. App.) 128 S. W. 642.

One seeking to rescind a settlement of several accounts on the ground of fraud has the burden of proving it. *Altman v. Powell* (Civ. App.) 140 S. W. 1178.

In an action on a note wherein plaintiff garnished insurance proceeds which defendant's brother claimed under an assignment, the burden was on plaintiff to show that the assignment was fraudulent. *Dickerson v. Central Texas Grocery Co.* (Civ. App.) 147 S. W. 695.

A purchaser seeking rescission of a contract for fraud has the burden of showing a right to rescission. *Adams v. Hill* (Civ. App.) 149 S. W. 349.

The burden was on the maker, sued on a \$600 negotiable note by a bona fide purchaser, to prove that the note was procured, without negligence on his own part, by fraudulent representation that it was only for \$100. *Garlitz v. Runnels County Nat. Bank* (Civ. App.) 152 S. W. 1151.

140. Statute of frauds.—When the undertaking is to pay another's debt, the burden of proof under the statute of frauds is on the party who seeks to prove that the undertaking is an original and independent contract, so as to escape the statute. The evidence, to change an existing contract relation between the plaintiff and a third party, and to prove a promise by the defendant to pay the debt of another, as a new and original undertaking, must be clear and satisfactory. *Ridgell v. Reeves*, 2 App. C. C. § 438.

In a suit to compel specific performance of a verbal contract to convey land, the burden was on plaintiff to establish facts taking the contract out of the statute of frauds. *Cobb v. Johnson*, 101 T. 440, 108 S. W. 811.

141. Garnishment.—The burden of proof rests upon the party controverting the answer of the garnishee, who denies all such facts as would have entitled the plaintiff to a judgment. In respect to his liability he stands precisely in the position he would occupy in a suit against him by the defendant. *Ellison v. Tuttle*, 26 T. 283; *East Line & R. R. Co. v. Terry*, 50 T. 129; *Grace v. Koch*, 1 App. C. C. § 1063; *Schneider v. Bullard*, 1 App. C. C. § 1187; *Winslett v. Randle*, 1 App. C. C. § 1194.

In garnishment the burden of proof is on the creditor. See *Scheuber v. Simmons*, 22 S. W. 72, 2 C. A. 672.

Where the garnishee's answer showed that the fund in his hands was not subject to garnishment by a creditor of the debtor, held, that the burden was on plaintiff in garnishment to prove the contrary. *Smith v. Merchants' & Planters' Nat. Bank* (Civ. App.) 40 S. W. 1038.

A garnishee held to have the burden of proving that a note and draft paid by it were firm paper, instead of individual paper. *Progressive Lumber Co. v. Rogers & Croley* (Civ. App.) 120 S. W. 260.

Where a garnishee answers fully, denying any indebtedness to the judgment debtor, the burden is upon the creditor to show that the garnishee was indebted at the time of the service of writ. *Silsbee State Bank v. French Market Grocery Co.* (Civ. App.) 133 S. W. 713.

Where the garnishee admitted the indebtedness to the debtor, the burden was upon the debtor to establish a plea that the fund in the garnishee's hands was exempted. *Lyon & Matthews Co. v. Modern Order of Prætorians* (Civ. App.) 142 S. W. 29.

142. Guardian and ward.—When it is claimed that vouchers have been improperly approved, the burden of proof is on the party to show that the guardian is not entitled to a credit. *Parish v. Alston*, 65 T. 194.

In action against guardian for services, some of which were charged against him and some against his estate, held the burden of proving separate value of items was on plaintiff. *Moore v. Bannerman* (Civ. App.) 45 S. W. 825.

143. Homestead.—In an action to enjoin an execution sale of land because at the time of levy the intent to permanently abandon had not been formed, though it was later, the burden is on plaintiff to show the existence of the intent to occupy the property as a homestead at the time of the proposed sale. *Bell v. Greathouse*, 20 C. A. 478, 49 S. W. 258.

Burden of proof is not on debtor to show that value of land claimed as homestead did not exceed amount limited by the constitution. *Fitzhugh v. Connor*, 32 C. A. 277, 74 S. W. 83.

Burden of proof in a suit to enjoin the sale of certain lots on execution, on the ground that they were part of a rural homestead, held to be on owner to show that they were rural property. *Harris v. Matthews*, 36 C. A. 424, 81 S. W. 1198.

On an attachment of land shown by defendant husband and wife to have been their homestead, the burden was on plaintiffs to show an abandonment of the homestead. *Gaar, Scott & Co. v. Burge*, 49 C. A. 599, 110 S. W. 181.

Where land conveyed to a debtor in part payment for a business homestead and other property was conveyed by the debtor after it had been attached, the burden was on the debtor's grantee to show that the land was exempt when attached. *McGovern v. Taliaferro* (Civ. App.) 112 S. W. 814.

Defendant claiming a homestead held to have the burden of proof. *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

The burden held to be upon one claiming land under an attachment sale to prove that defendant abandoned it as a homestead before the levy. *Baker v. Magee* (Civ. App.) 136 S. W. 1161.

The burden held upon one executing a trust deed to show that the property was his homestead, making the trust deed void. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

143½. Community property.—What constitutes community property, see notes under Art. 4623.

Where the circumstances attending a sale of community property to pay a community debt show no fraud, the burden is on the party attacking the sale to prove fraud, as alleged. *Burkitt v. Key* (Civ. App.) 42 S. W. 231.

One who wishes to establish a charge on lands for a reimbursement of community funds expended in their acquisition has the burden of proving such expenditure. *Welder v. Lambert*, 91 T. 510, 44 S. W. 281.

If a mother dies before the father and the latter's estate is being administered, sales of the community property do not affect the interest of the mother's heirs therein, unless they were made to pay community debts, and the burden is on the purchaser if he claims that the sale passed the right of the heirs of the wife, to show that the sale was made to pay a community debt. *Roy v. Whitaker*, 92 T. 346, 48 S. W. 892, 49 S. W. 367.

Where plaintiffs claimed as heirs of D., contending that he and Y. were married, and

that the property was community property, and defendants claimed title under conveyances from Y., plaintiffs had the burden of proving the marriage and that the property was community property. *Ruedas v. O'Shea* (Civ. App.) 127 S. W. 891.

The burden is on one claiming that a husband's separate conveyance of community property is invalid to prove the facts invalidating it. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 152 S. W. 856.

The rule that the burden of proof is on him who asserts the separate character of property does not apply where defendant denies the allegations of plaintiff who asserts the community character of the property, and plaintiff has the burden of proving the community character. *Emery v. Barfield* (Civ. App.) 156 S. W. 311.

144. Separate property.—The burden of proving that property acquired by husband or wife during marriage by onerous title is separate property rests on the party asserting it. *Epperson v. Jones*, 65 T. 425; *Smith v. Bailey*, 66 T. 553, 1 S. W. 627; *Kimberlin v. Westerman*, 75 T. 127, 12 S. W. 978.

The burden of proof is on a married woman, who claims as separate property a stock of goods seized for the husband's debt, with which he was doing business as a merchant, to show that she purchased them with cash of her separate means, and if the property made by sales were mingled with her separate money in purchases, to show how much of her separate money she used in buying the goods. If she mingles the gains of the business in replenishing her stock from time to time, and is unable to show how much of her separate means was invested in the goods at the time of the seizure for the debt of the husband, she cannot protect them as her separate property. *Jones v. Epperson*, 69 T. 586, 7 S. W. 488.

The burden is on the wife to trace the proceeds of her separate estate through and into changes it may undergo. She must combat the presumption that all property acquired during coverture is community. *Hamilton-Brown Shoe Co. v. Lastinger* (Civ. App.) 26 S. W. 924.

Burden of proof is on wife to show that property standing in name of both husband and wife, and against which plaintiff is endeavoring to foreclose mechanic's lien for materials ordered by husband, is her separate property, and that plaintiff had notice of that fact. *Hord v. Owens*, 20 C. A. 21, 48 S. W. 200.

Where property presumptively community is taken on execution against the husband, the burden is on the wife to prove it is her separate estate acquired during coverture. *Simpson v. Texas Tram & Lumber Co.* (Civ. App.) 51 S. W. 655.

A wife, whose separate property, acquired during marriage by gift, has undergone various changes, must, in a controversy as to whether the property last acquired is separate or community property, trace the property, all the changes made, and clearly show that the last-acquired property is her separate property. *First Nat. Bank v. Thomas* (Civ. App.) 118 S. W. 221.

In a suit by a married woman to restrain the sale of property on execution against her husband, the burden is on plaintiff to show that the property belongs to her as alleged. *Broussard v. Lawson* (Civ. App.) 124 S. W. 712.

145. Indemnity.—In an action on a note by a holder after maturity, the burden was on a party thereto to establish a special defense of a contract by which the payee agreed to indemnify him from liability. *Citizens' Nat. Bank v. Cammer* (Civ. App.) 86 S. W. 625.

146. Emancipation of child.—In an action by an infant son, residing with his father, to recover cattle seized on execution against the father, the burden was on plaintiff to show emancipation, under circumstances changing the general rule that the property acquired by him was apparently his father's. *Love v. Hudson*, 24 C. A. 377, 59 S. W. 1127.

147. Insane persons.—The burden of proving the restoration to reason and the termination or practical abandonment of the guardianship of one insane is upon him who seeks the enforcement of a contract against him who pleads insanity. *Elston v. Jasper*, 45 T. 409.

In an action to cancel a conveyance under power of attorney on the ground that the grantor was not of sound mind, where the defendants introduce a judgment restoring plaintiff to sanity previous to the conveyance, the burden is upon the plaintiff to show that he was insane at the time he executed the power of attorney. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

148. Insurance.—The burden of proof is on the insurer to show that the property was burned by procurement of the insured. *Dwyer v. Continental Ins. Co.*, 57 T. 181.

In an action on a policy the insured must prove his ownership of personal property covered by the policy. *Queen Ins. Co. v. Jefferson Ice Co.*, 64 T. 578.

In an action on a policy of insurance against the insurance company to recover a loss, the defendant alleged that plaintiff had violated a stipulation in the policy, which had been made for an additional consideration, "that the building might remain vacant for sixty days. All openings to be kept securely closed." Held, that the burden of proof was on the defendant to show that plaintiff had negligently permitted the openings to be and remain unclosed, and that thereby the risk of the insurer was increased, and the property probably destroyed by reason of such negligence. *Eakin v. Home Ins. Co.*, 1 App. C. C. § 368.

When the defense to an action on an insurance policy is of overvaluation, the burden is on the defendant to show gross overvaluation, intentionally and fraudulently made by the insured. *Id.*

In an action on a policy of insurance against loss by fire, a stipulation as to the occupancy of the building insured must be proven. *Sun Ins. Co. v. Tex. Foundry & Machine Co.*, 4 App. C. C. § 31, 15 S. W. 34.

In an action on a life insurance policy payable to creditor as his interest may appear, the burden is on administratrix to show to what extent the debt has been paid. *Andrews v. Union Cent. Life Ins. Co.* (Civ. App.) 44 S. W. 610.

The burden is on defendant, in action for insurance, to show noncompliance with policy requiring a set of books to be kept. *German Ins. Co. v. Pearlstone*, 18 C. A. 706, 45 S. W. 832.

In an action on an accident policy for death from an anæsthetic administered by a physician, plaintiff had the burden of proving that the anæsthetic was proximately the sole cause of the death. *Maryland Casualty Co. v. Glass*, 29 C. A. 159, 67 S. W. 1062.

In an action on a life policy, the burden of showing suicide by deceased is on defendant. *Equitable Life Assur. Soc. v. Liddell*, 32 C. A. 252, 74 S. W. 87.

In an action on a fire insurance policy, admission that plaintiff was entitled to recover, unless defendant established a defense affirmatively pleaded, held to impose on defendant the burden of establishing a substantial breach of contract. *Phoenix Assur. Co. v. Stenson*, 34 C. A. 471, 79 S. W. 866.

In an action on a policy, the burden was on the insurance company, claiming a breach of an iron-safe clause, to show that the fire occurred when the policy required books to be kept in the safe. *First Nat. Bank v. Cleland*, 36 C. A. 478, 82 S. W. 337.

In an action on a benefit certificate, the burden held on defendant to show that the member committed suicide. *Sovereign Camp of Woodmen of the World v. Boehme*, 44 C. A. 159, 97 S. W. 847.

Where insured had not been reinstated to membership after forfeiture of his benefit certificate prior to his death, the burden was on the beneficiary suing thereon to show some action prior to such death preventing the enforcement of the forfeiture. *Brotherhood of Ry. Trainmen v. Dee*, 101 T. 597, 111 S. W. 396.

A fraternal insurance society issuing a certificate stipulating that it shall be void if the member shall die by self-destruction held required to establish that the member intentionally took his life. *Grand Fraternity v. Melton* (Civ. App.) 111 S. W. 967.

In an action on a life policy, the burden held upon insured to show that insured's illness was embraced by a certain clause. *General Accident Ins. Co. v. Hayes*, 52 C. A. 272, 113 S. W. 990.

Persons attacking the validity of a change of beneficiary in a policy of insurance on the ground of mental incapacity of insured have the burden of proof. *Hazard v. Western Commercial Travelers' Ass'n*, 54 C. A. 110, 116 S. W. 625.

In an action for life insurance, defended on the ground of suicide, where plaintiff proved that insured died, he established a prima facie case, and the burden was on the defendant to prove its defense. *Grand Fraternity v. Melton*, 102 T. 399, 117 S. W. 788.

In an action on a policy, the burden was on insurer to prove that plaintiffs, or one of them, caused or procured the destruction of the property. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

The burden of proof of insurer's plea of overvaluation is on it. *Id.*

Burden held on insurer to show loss of property by fire. *Milwaukee Mechanics' Ins. Co. v. Frosch* (Civ. App.) 130 S. W. 600.

If delay of a beneficiary association in delivery of a benefit certificate was of any avail to the beneficiary, it devolved on the party asserting the delay to prove it. *Modern Woodmen of America v. Owens* (Civ. App.) 130 S. W. 858.

The burden is on an objecting member of a fraternal order to show that the acts of its officers in relating members were unsustainable. *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Civ. App.) 131 S. W. 92.

Insurer held to have the burden of proving that insured was the aggressor in the difficulty in which he lost his life, as regards the condition of the policy that it should be void if insured should die in consequence of the violation or attempted violation of the laws. *Sovereign Camp of Woodmen of the World v. Jackson* (Civ. App.) 138 S. W. 1137.

Insurer whose constitution provided for a forfeiture of a member's policy on delinquency and notice thereof held to have the burden of proving a forfeiture, and the notice necessary to effect a forfeiture. *Haywood v. Grand Lodge of Texas, K. P.* (Civ. App.) 138 S. W. 1194.

In an action on a fire policy, the burden was on the insurer to prove plaintiff's breach of conditions. *Northern Assur. Co. of London v. Applegate* (Civ. App.) 145 S. W. 295.

Where the maker of a premium note sought to recover over against the payee, an insurance agent, for the latter's failure to pay the premium, the burden was on him not only to allege and prove that the policy was not in force, but that the insurer had made no arrangement to waive the provision requiring payment in cash. *Newman v. Norris Implement Co.* (Civ. App.) 147 S. W. 725.

Where there has been a failure in the payment of a premium or a premium note and a policy by its express provision has become forfeited, the burden of showing waiver is upon the insured. *Security Life & Annuity Co. of America v. Underwood* (Civ. App.) 150 S. W. 293.

Under *Sayles' Ann. Civ. St. 1897, art. 3071*, providing that where a life insurance company fails to pay a loss within the time specified in the policy, after demand, it shall be liable in addition to the amount thereof to pay 12 per cent. damages, together with all reasonable attorney's fees, and article 3096, providing that that title shall not apply to mutual relief associations, if the principal officer thereof makes an annual statement as therein required, but that, if it refuses or neglects to make the annual report, it shall be deemed an insurance company conducted for profit and amenable to the laws governing such companies, the burden was on the party suing on a benefit certificate, and claiming to be entitled to the penalty and attorney's fees, provided by article 3071, to show failure to make the annual report required by article 3096. *Grand Lodge F. & A. Masons of Texas v. Moore* (Civ. App.) 154 S. W. 362.

In an action on a fire policy, the defendant was bound to establish its defense that plaintiff set fire to the house by a preponderance of the evidence, but not beyond a reasonable doubt. *Mott v. Spring Garden Ins. Co.* (Civ. App.) 154 S. W. 658.

149. *Intoxicating liquors.*—Where, in an action for selling liquor to plaintiff's husband, it was proved that he was an habitual drunkard, the burden of proof of good faith in making such sales was on the defendant. *Haney v. Mann* (Civ. App.) 81 S. W. 66.

In an action on a liquor dealer's bond, the burden of proof is on plaintiff, who must establish all the facts necessary to his recovery by a preponderance of the evidence. *Allen v. Houck & Dieter Co.* (Civ. App.) 92 S. W. 993.

In an action on a liquor dealer's bond, the burden of proving good faith, founded on a belief that the minor to whom liquor was sold was of age, held on defendant. *Farr v. Waterman* (Civ. App.) 95 S. W. 65.

A party seeking relief by mandamus for an abuse by a city council of discretion conferred on it in ruling on applications for a liquor license has the burden of showing such abuse. *Berger v. De Loach*, 56 C. A. 532, 121 S. W. 591.

150. Judgment or order.—The burden is on one attacking the order of the court to show that it was not rightfully entered. *Bowman v. State*, 38 Cr. R. 14, 41 S. W. 635.

In action on foreign judgment, burden of proving lack of service in former action held to be on defendant. *Russell v. Butler* (Civ. App.) 47 S. W. 406.

In an action to set aside a prima facie valid judgment, the burden of proof is on plaintiff to establish its invalidity. *Briseno v. International & G. N. R. Co.* (Civ. App.) 81 S. W. 579.

In a suit to restrain enforcement of a judgment, plaintiff held bound to prove by a preponderance of the evidence an allegation that her signature to a purported acceptance of service was forged, and that she did not appear. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

Parties asserting invalidity of former judgment held to have the burden to prove affirmatively the insufficiency of service in the suit. *Cain v. Hopkins* (Civ. App.) 141 S. W. 834.

The burden of proof is upon the party making a collateral attack on a judgment. *Hopkins v. Cain*, 105 T. 591, 143 S. W. 1145.

Burden held upon persons collaterally attacking judgment to establish its invalidity. *Blunt v. Houston Oil Co.* (Civ. App.) 146 S. W. 248.

151. Landlord and tenant.—One claiming as against landlord's lien through purchase from tenant has the burden of proving waiver of lien. *Bivins v. West* (Civ. App.) 46 S. W. 112.

In a contest between a city and a landlord as to the priority of a landlord's lien over the city's lien for taxes, the burden of proof was on the city to identify the particular portion of the stock subject to the lien. *City of Ft. Worth v. Boulware*, 26 C. A. 76, 62 S. W. 928.

A tenant on shares claiming damages for wrongful dispossession has the burden of proving the damages sustained. *Springer v. Riley* (Civ. App.) 136 S. W. 577.

152. Libel and slander.—It is not incumbent on plaintiff to prove the falsity of the slanderous charge. *Ledgerwood v. Elliott* (Civ. App.) 51 S. W. 872.

In an action by a sheriff for libel in publishing a charge that a prisoner was illegally received and held in the county jail, the jail being actually in charge of guards, one of whom received the prisoner, the burden is on plaintiff to prove that the libel was aimed at him. *Boone v. Herald News Co.*, 27 C. A. 546, 66 S. W. 313.

Where the party writing a libelous letter respecting plaintiff was defendant's general passenger and ticket agent, it was unnecessary to show that defendant had ratified his conduct to render it liable for exemplary damages. *St. Louis S. W. Ry. Co. of Texas v. McArthur*, 31 C. A. 205, 72 S. W. 76.

A libelous statement made on a privileged occasion is presumed to be untrue, and the burden of proving its truth is on defendants. *Cranfill v. Hayden* (Civ. App.) 75 S. W. 573.

The fact that a communication forming the basis of an action of libel was conditionally privileged does not shift the burden of proving its falsity to the plaintiff. *Cranfill v. Hayden*, 97 T. 544, 80 S. W. 609.

The burden is on a party suing for libel to prove that the libel was directed at him. *Express Pub. Co. v. Orsborn* (Civ. App.) 151 S. W. 574.

In an action for slander of title plaintiff has the burden of proving the falsity of the statement complained of, and that the statement was made maliciously. *Fant v. Sullivan* (Civ. App.) 152 S. W. 515.

153. Lost instruments.—In a suit on a lost writing, its execution is put in issue by a general denial, and the burden of proof is on the party claiming under it. *Erskine v. Wilson*, 20 T. 77; *Robinson v. Brinson*, 20 T. 438; *Hampshire v. Floyd*, 39 T. 103; *Jordan v. Robson*, 27 T. 615.

154. Malicious prosecution.—Malicious prosecution defined; burden of proof rests where. *Hurlbut v. Boaz*, 23 S. W. 446, 4 C. A. 371.

155. Mandamus.—In mandamus to compel the district clerk to issue execution, where the judgment debtors were permitted to intervene, the burden is on them to show why the writ should not be granted. *Kruegel v. Murphy & Bolanz* (Civ. App.) 126 S. W. 680.

156. Marriage.—In trespass to try title by one claiming as the widow of a slave marriage, held, that it was incumbent on her to show marriage at least by a continuance of the relation of husband and wife after emancipation. *Wood v. Cole*, 25 C. A. 378, 60 S. W. 992.

Where plaintiffs claimed as heirs of D., contending that he and Y. were married, and that the property was community property, and defendants claimed title under conveyances from Y., plaintiffs had the burden of proving the marriage and that the property was community property. *Ruedas v. O'Shea* (Civ. App.) 127 S. W. 891.

157. Master and servant in general.—One suing for a wrongful discharge from an employment calling for expert skill has the burden of proving his ability and willingness to perform his work. *Canthen v. Breyer* (Civ. App.) 131 S. W. 853.

158. Mechanics' liens.—In a suit by a subcontractor to enforce a mechanic's lien, held that he had the burden of proving that a balance was due the contractor from the owner. *Carson v. Gilchrist* (Civ. App.) 136 S. W. 529.

The burden is on one claiming a laborer's lien for wages in doing railroad construction work to show the amount of each item for which a lien is claimed. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 140 S. W. 111.

159. Mortgages.—The burden of establishing the invalidity of a mortgage held on the creditor, and not on the purchaser at mortgage sale. *Kosminsky v. Walter* (Civ. App.) 44 S. W. 540.

The burden of proof rests on defendant under a plea of not guilty, to establish that at the time judgment lien was fixed on the lot the judgment creditor had no notice of an outstanding unrecorded mortgage. *Barnett v. Squyres* (Civ. App.) 52 S. W. 612.

One claiming under an unrecorded mortgage, as against judgment creditor whose lien was acquired subsequent to the mortgage, has burden of proof that creditor, when he acquired lien, had notice of the mortgage. *Barnett v. Squyres*, 93 T. 193, 54 S. W. 241, 77 Am. St. Rep. 854.

In a suit by mortgagees for conversion of mortgaged property, defendant justified under a mortgage held by it, and alleged that plaintiff's mortgage was not filed in the county of which the mortgagor was a resident. Held, that the burden was on defendant to show that the mortgagor was a resident of the county in which its mortgage was filed, and not of that in which plaintiff's mortgage was filed. *Hockaday-Gray Co. v. Jonnett & Campbell* (Civ. App.) 74 S. W. 72.

A party asserting that a transaction prima facie transferring title was a mortgage held required to prove it. *Johnson v. Scrimshire*, 42 C. A. 611, 93 S. W. 712.

Where an absolute deed is claimed to be a mortgage, the burden is on claimant to prove with clearness and certainty that the instrument was intended by both parties as a mortgage. *Goodbar & Co. v. Bloom*, 43 C. A. 434, 96 S. W. 657.

A party alleging that a deed is a mortgage has the burden of proving the same. *Irvine v. Johnson*, 44 C. A. 436, 98 S. W. 405.

Where an instrument is in form an absolute deed, the burden of proof that it was intended as a mortgage is on the parties claiming such fact. *Lowry v. Carter*, 46 C. A. 488, 102 S. W. 930.

In an action by husband and wife for conversion, the burden of proving that property sold was not included in a mortgage was on plaintiffs. *Lowmiller v. Heasley* (Civ. App.) 143 S. W. 947.

Where a junior mortgage was not on record at the time of foreclosure of a prior vendor's lien, and the mortgagee was not made a party to the suit, the burden was on him to show facts charging the plaintiff with notice of his rights at the time of the foreclosure in order to retain his right to redeem. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

160. **Ordinance.**—Where the unreasonableness of an ordinance is relied upon to have it declared void, the burden is upon the party attacking it to prove the facts making it invalid. *City of Brenham v. Holle & Seelhorst* (Civ. App.) 153 S. W. 345.

161. **Names.**—A middle name or initial is not known in law, unless it affirmatively appears that it is used to designate a different person. *McKay v. Speak*, 8 T. 376; *Cummings v. Rice*, 9 T. 527; *State v. Manning*, 14 T. 402; *Stockton v. State*, 25 T. 772; *Steen v. State*, 27 T. 86; *Page v. Arnim*, 29 T. 53.

In an action by a mortgagee for conversion of chattels by purchase from the mortgagor under a name different from that under which he had executed the mortgage, the burden held upon the purchaser to show that the name under which the mortgage was given was an assumed name. *Bradford v. Lembke* (Civ. App.) 118 S. W. 159.

162. **Notice.**—Burden of proof held to rest on plaintiff to show that defendant had notice of plaintiff's equitable claim. *Baldwin v. Root*, 90 T. 546, 40 S. W. 3.

Defendant, setting up contract requiring plaintiff to give notice of claim within a certain time, has the burden of showing that it was not given. *Western Union Tel. Co. v. Jackson*, 19 C. A. 273, 46 S. W. 279.

In foreclosure of an unregistered mortgage, the burden of showing want of actual notice is on the one claiming to be a bona fide purchaser. *Oak Cliff College for Young Ladies v. Armstrong* (Civ. App.) 50 S. W. 610.

The burden of proof held to be on judgment creditor to show that when his lien attached to the land he had no notice of prior unrecorded mortgage. *Barnett v. Squyres* (Civ. App.) 52 S. W. 612.

Under Arts. 583 and 584, where a portion of a claim for damages for personal injuries was assigned to attorneys in consideration of their services, and covered the fund to be obtained either by suit or settlement, the burden was on such attorneys, in a proceeding against the defendant in such suit to recover their proportion of a settlement made without their knowledge or consent, to show that defendant had knowledge of the assignment before settlement. *Gulf, C. & S. F. Ry. Co. v. Eldredge*, 80 S. W. 556, 35 C. A. 467.

The burden is upon one claiming under a prior unrecorded deed to prove that the plaintiff in an execution under which the land is sold as the grantors had notice of such deed when execution was levied thereon. *Whitaker v. Farris*, 45 C. A. 378, 101 S. W. 456.

In a contest between one who has bought the legal title and one holding the equitable title, the burden is upon the latter to show that the buyer had notice of his title. *Wootton v. Thomson*, 55 C. A. 583, 119 S. W. 117.

Where plaintiff claimed under a trust deed executed by defendant, the burden was upon defendant to show failure by the trustee to post notices of sale as required by the deed. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

163. **Nuisance.**—One seeking to recover for personal inconvenience or reduction in the value of his property, occasioned by another conducting a lawful business, held required to prove a nuisance. *Sherman Gas & Electric Co. v. Belden*, 103 T. 59, 123 S. W. 119, 27 L. R. A. (N. S.) 237.

The construction and operation of a cotton gin near private residences held not per se a nuisance, and one alleging that a proposed gin will be a nuisance has the burden of proof. *Robinson v. Dale* (Civ. App.) 131 S. W. 308.

164. **Parties.**—Where a third person, claiming an interest, is made a defendant in foreclosing a mortgage, and the petition does not admit that he has any interest, the burden is on him to show an interest. *Montague County v. Meadows* (Civ. App.) 42 S. W. 326.

165. **Partition.**—In a partition suit brought by alleged heirs of decedent against the heir having possession of the property, the burden is on plaintiffs to prove their title; defendant's possession alone being sufficient to entitle him to judgment otherwise. *Lafriere v. Richards*, 28 C. A. 63, 67 S. W. 125.

166. **Partnership.**—In an action against a firm on a note, burden held on plaintiff, under the pleadings, to establish the partnership and the execution of the note. *Clifton & Wadkins v. Royse Cotton Oil Co.*, 39 C. A. 188, 87 S. W. 182.

A partner suing on a firm claim, and alleging that his copartner had transferred his interest in the claim to him, must prove such transfer. *Allen v. Fleck*, 54 C. A. 507, 118 S. W. 176.

The burden to prove notice of dissolution of a firm is on the retiring partners. *Thompson v. Harmon* (Civ. App.) 152 S. W. 1161.

167. **Payment.**—Where a defendant admits that the debt upon which suit is brought is correct, but claims that it has been paid by him, the burden of proof is upon him to establish these facts. *Cherry v. Butler*, 4 App. C. C. § 271, 17 S. W. 1090.

In an action on an obligation to pay a given sum of money at a specified time, the burden is on the defendant to prove payment. *Bannister v. Wallace*, 14 C. A. 452, 37 S. W. 250.

Defendants, contracting to pay a note of plaintiffs, when sued for their failure to pay, held to have the burden of proving the credits to which the note was entitled. *Tinsley v. McIlhenny*, 30 C. A. 352, 70 S. W. 793.

Defendants having pleaded payment, the burden is on them to show that a particular payment should have been applied to the note sued on. *Eastham v. Patty & Brockinton*, 37 C. A. 336, 83 S. W. 885.

In an action on a note, where the defense was payments to one other than the plaintiffs, who held the note, the burden was on defendant to show that the one to whom payments were made had authority to collect it. *Higley v. Dennis*, 40 C. A. 133, 88 S. W. 400.

In an action on an open verified account, where the evidence showed certain payments appropriated by defendant firm and plaintiff to the payment of the account due from the firm to plaintiff, an instruction imposing the burden of proof on defendant to show direction to so appropriate the payments held properly denied. *Rotan Grocery Co. v. Tatum* (Civ. App.) 149 S. W. 342.

The maker of a note secured by a deed of trust on real estate suing to enjoin a sale under the deed of trust had the burden of showing payment either by direct or circumstantial evidence. *Hutton v. Pederson* (Civ. App.) 153 S. W. 176.

168. **Agency and authority.**—The burden of proof rests upon the party executing a contract, who claims that he is not personally bound because he was an agent for another, within the knowledge of the adverse party. *Cullers v. Moore*, 1 App. C. C. § 197. See *Loomis v. Satterthwaite* (Civ. App.) 25 S. W. 68; *Goldfrank v. Half* (Civ. App.) 26 S. W. 778; *Railway Co. v. Neel* (Civ. App.) 26 S. W. 788; *Western Industrial Co. v. Chandler* (Civ. App.) 31 S. W. 314; *Tynan v. Dulling* (Civ. App.) 25 S. W. 818; *Blain v. Express Co.*, 69 T. 74, 6 S. W. 679.

Where both parties claimed under deed of an executor, the burden of showing want of executor's authority was on defendant. *Wade v. Boyd*, 24 C. A. 492, 60 S. W. 360.

Burden of proof held to be upon plaintiff, in an action upon a note signed on behalf of a corporation by the president thereof, to show that the corporation had assumed the payment of the note. *Wilson v. Tyler Coffin Co.*, 28 C. A. 172, 66 S. W. 865.

Where one having authority to sell land sells to himself, in a suit by the owner against a grantee of the purchaser, the burden is on plaintiff to show that defendant had notice of plaintiff's equities. *Hunter v. Eastham* (Civ. App.) 67 S. W. 1080.

A vendee, suing a landowner to recover money paid his agent on an unauthorized contract of sale made by the latter, has the burden of proving the landowner's ratification of such contract. *Edwards v. Davidson* (Civ. App.) 79 S. W. 48.

Where plaintiff claimed the right to recover a fund in the hands of a garnishee, under an assignment executed on defendants' behalf by their alleged attorney in fact, the burden was on plaintiff to show that the assignment was executed by defendants' authority. *Darlington Miller Lumber Co. v. National Surety Co.*, 80 S. W. 238, 35 Civ. App. 346.

Persons dealing with an assumed agent have the burden of showing, not only the fact of agency, but the extent of his authority. *T. H. Baker & Co. v. Kellett-Chatham Machinery Co.* (Civ. App.) 84 S. W. 661.

In an action against a railroad company by a physician for services rendered on the employment of a conductor, the burden of proof held on plaintiff to show the conductor's authority. *Wills v. International & G. N. R. Co.*, 41 C. A. 58, 92 S. W. 273.

The burden of proving that a principal ratified the unauthorized act of his agent in conveying land rests on the party asserting it. *Skirvin v. O'Brien*, 43 C. A. 1, 95 S. W. 696.

There is no presumption of authority in one who is the vice president and general manager of a land and cattle company to sell the lands of the company. *Hurlbut v. Gairnor*, 45 C. A. 588, 103 S. W. 409.

One claiming under ratification of agent's unauthorized acts held to have burden of proof. *Lightfoot v. Horst* (Civ. App.) 122 S. W. 606.

One suing on an order for goods, signed by one as president of a voluntary association, held to have the burden to prove individual liability. *Southern Badge Co. v. Smith* (Civ. App.) 141 S. W. 185.

One who relies on the agency of another to bind the alleged principal has the burden of proving the extent of the agent's authority. *John Stember & Co. v. Keene* (Civ. App.) 152 S. W. 661.

169. **Principal and surety.**—Where defendants were sued as sureties on the official bond of a county treasurer, and admitted the default, but claimed that it occurred prior to the time when they became sureties, the burden of proof was on them to establish such defense. *Skipwith v. Hurt* (Civ. App.) 58 S. W. 192.

In a collateral attack, on an order of a county court discharging sureties on a guardian's bond, the burden held not to rest on the sureties to prove the existence of facts sustaining the order. *Moore v. Hanscom*, 101 T. 293, 106 S. W. 876.

In an action by a landowner on a building contractor's bond, plaintiff held bound to show that the contractor's president had actually applied out of his personal funds,

to the expense of the building, \$600, credited by plaintiff on the personal debt of such president. *Zang v. Hubbard Building & Realty Co.* (Civ. App.) 125 S. W. 85.

Plaintiff seeking to defeat defendant's claim under a better title from the common source, must show that the common source had no title. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

170. Title and ownership.—In an action of trespass to try title, the defendants claimed the land under a deed executed on the 27th of November, 1865, while the plaintiffs claimed it under a sheriff's sale, by virtue of a judgment which was recorded in the county on the same 27th of November, at 4 o'clock in the afternoon; and the relative merits of the title depended on the question of fact whether the registration of the judgment or the execution of the deed was prior in point of time. Held, that as the plaintiffs in this form of action can only recover on the strength of their own title, the burden of proof rested upon them to show that the judgment was recorded before the deed was executed; and in the absence of evidence on that question, there is no presumption that the judgment lien attached previous to the execution of the deed. *Hillmann v. Meyer*, 35 T. 538.

In a suit for property its identity and the defendant's possession must be proven. *Shaw v. Adams*, 2 App. C. C. § 181.

A special plea by defendant in trespass to try title does not relieve the plaintiff from the necessity of proving his title. *Koenigheim v. Miles*, 67 T. 113, 2 S. W. 81.

To maintain ejectment by one tenant in common against another, it devolves upon the plaintiff to prove ouster unless the defendant in pleading assert entire ownership. *Railway Co. v. Prather*, 75 T. 53, 12 S. W. 969.

It is incumbent upon the defendant in trespass to try title to prove such facts as will disprove the evidence of title offered by the plaintiff. Deeds being offered by the plaintiff which apparently convey to him the land claimed in his petition, he is entitled to judgment in the absence of proof by the defendant. *McNamara v. Meunch*, 66 T. 68, 17 S. W. 397.

Where common source of title is admitted, the burden of connecting himself therewith by proper evidence rests upon plaintiff. *Wallace v. Berry*, 83 T. 328, 18 S. W. 595.

Defendants denied that they were in possession of the land sued for, alleging possession of an adjoining tract. In such case it devolved upon the plaintiffs to prove that the defendants were in possession of the land sued for; failing in this, plaintiffs could not recover. *Medlin v. Wilkens*, 1 C. A. 465, 20 S. W. 1026.

To enable plaintiff to recover by reason of his title under a common source, he must show that he and the defendant claim the same interest and that his title is the superior. *Halley v. Fontaine* (Civ. App.) 33 S. W. 260.

Where a deed of a right of way reserved the right to use water in a ditch thereon for stock in a certain pasture, held, in an action for the destruction of the ditch, that plaintiff must prove that he owned the pasture. *Galveston, H. & S. A. Ry. Co. v. Haas*. 17 C. A. 309, 42 S. W. 658.

Where plaintiffs fail to make out their case, defendants are entitled to a judgment forever concluding all claims of plaintiffs to the premises. *Hill v. Grant* (Civ. App.) 44 S. W. 1016.

Parties claiming the benefit of a judgment of partition must connect themselves therewith in order to enjoy its benefits. *Owens v. New York & T. Land Co.* (Civ. App.) 45 S. W. 601.

Where a deed introduced under Art. 7749, shows that defendant claims under two titles, one of which does not spring from the common source, the burden is on plaintiff to show a superior title, even though defendant's title be invalid. *Story v. Birdwell* (Civ. App.) 45 S. W. 847.

Where defendant city claimed a highway over plaintiff's lands, held, that the burden of proof was on the city to show such easement. *City of San Antonio v. Ostrom*, 18 C. A. 673, 45 S. W. 961.

In suit to restrain judgment against plaintiff in action to recover personal property, the burden is on plaintiff to show that he owned the property. *Rumfield v. Neal* (Civ. App.) 46 S. W. 262.

Where plaintiffs proved a common source, and then introduced evidence tending to disprove the identity of their ancestor with the common source, it was held error to put on them the burden of establishing identity. *Smith v. Davis*, 18 C. A. 563, 47 S. W. 101.

Where plaintiff alleges that it is owner of certain lands, and that defendant has fenced them, and that the land claimed by him embraces portions of plaintiff's land, the burden of proof is on plaintiff. *New York & T. Land Co. v. Votaw* (Civ. App.) 52 S. W. 125.

In trespass to try title, the burden is on plaintiff to establish a superior title. *Parker v. Campbell* (Civ. App.) 65 S. W. 434.

Where plaintiff shows common source and superior title thereunder, burden held on defendant to show title in himself paramount to common source. *Gordon v. Hall*, 29 C. A. 230, 69 S. W. 219.

A suit, originally one to remove cloud on title, held, in view of a cross-plea of certain defendants, one in trespass to try title, as between them and plaintiffs, requiring them to show better right than plaintiffs. *Lynch v. Pittman*, 31 C. A. 553, 73 S. W. 862.

In trespass to try title, the burden of establishing value of improvements made in good faith is on defendant. *Wilson v. Wilson*, 35 C. A. 192, 79 S. W. 839.

Where the evidence shows that plaintiffs have a superior title from the common source, the burden is on defendants to show that the common source was without title. *Ellis v. Lewis* (Civ. App.) 81 S. W. 1034.

In a suit by the state of Texas to recover lands within its borders, it devolves on defendants, claiming under the United States, to show that the state has parted with its title. *State v. Jadwin* (Civ. App.) 85 S. W. 490.

In an action to recover certain land, the burden was on plaintiffs to show that their ancestor was the same person as the original grantee. *Dorsey v. Olive Sternberg & Co.*, 42 C. A. 568, 94 S. W. 413.

In trespass to try title, the adverse party held required to prove the superiority of his title. *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4.

The breaking down of defendants, older title held a prerequisite to recovery by plaintiff. *Stith v. Moore*, 42 C. A. 528, 95 S. W. 587.

In trespass to try title, the burden of proving a certain fact held to rest on defendants. *Irvin v. Johnson*, 44 C. A. 436, 98 S. W. 405.

Plaintiff seeking to recover a specified tract of land held required to show title to the land. *Jaggers v. Stringer*, 47 C. A. 571, 106 S. W. 151.

In a suit to recover cattle seized on execution against a third person, held, that there was no confusion of goods, and that a charge therefore erroneously put the burden of proof on defendant to establish title in such third person. *Merchants' & Farmers' Nat. Bank of Cisco v. Johnson*, 49 C. A. 242, 103 S. W. 491.

One seeking to establish title to land under a verbal conveyance or gift in a court of equity has the burden of showing his right to have title decreed to him. *Altgelt v. Escalero*, 51 C. A. 108, 110 S. W. 989.

To entitle one to allowance for improvements, held, he must show how much the value of the land is enhanced thereby. *Fain v. Nelms* (Civ. App.) 113 S. W. 1002.

If the plaintiff desires to show title from a common source, the burden is upon him to connect both his own and defendant's title with the same source. *Caruthers v. Hadley* (Civ. App.) 115 S. W. 80.

Plaintiffs in trespass to try title were not relieved of the necessity of affirmatively proving title because defendant unsuccessfully relied on limitations. *Uvalde County v. Oppenheimer*, 53 C. A. 137, 115 S. W. 904.

In trespass to try title, plaintiffs and others seeking affirmative relief against the original defendants have the burden of showing title. *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 75.

Plaintiffs in trespass to try title are the actors in the case on whom rests the burden of proving title against the world in case there is no common source shown. *Connor v. Weik* (Civ. App.) 116 S. W. 650.

In an action by the state to enforce a personal liability for taxes, penalties, and interest, and costs for failure to pay the same, the burden is on plaintiff to show that defendant owned the property at the time of the assessment, or when the same should have been legally assessed. *Central Hotel Co. v. State* (Civ. App.) 117 S. W. 880.

A plea of not guilty as to the part of land not disclaimed by defendant put plaintiff on proof of his title, and on his failure to show title defendant would be entitled to a judgment denying a recovery of the land not disclaimed. *Gaffney v. Clark* (Civ. App.) 118 S. W. 606.

Plaintiff in trespass to try title has the burden of proving title. *Baillie v. Western Live Stock & Land Co.*, 55 C. A. 473, 119 S. W. 325.

In trespass to try title, a party cannot show title from a third person without connecting such title with the sovereignty of the soil. *Hamman v. Presswood* (Civ. App.) 120 S. W. 1052.

Plaintiffs in trespass to try title, being deprived of the claim of common source of title, must deraign title from the sovereignty. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

A plea of not guilty having been filed by defendant in a formal action of trespass to try title, the object of which was to recover possession, the burden rested on plaintiff to prove either a legal or equitable title sufficient to justify judgment awarding the possession. *Hoffman v. Buchanan*, 57 C. A. 368, 123 S. W. 168.

In trespass to try title defendant's plea of not guilty held to require plaintiff to prove that he had title to the land he sought to recover. *Dean v. Furrh* (Civ. App.) 124 S. W. 431.

Defendant's plea held not to relieve plaintiff from the necessity of showing the identity of the land sought to be recovered with that described in his patent. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

Where plaintiff claimed through a deed describing the land conveyed as consisting of 177 acres of the C. survey, but the evidence showed that there were two C. surveys, the burden was upon plaintiff to identify the land claimed as the 177-acre survey. *Long v. Shelton* (Civ. App.) 126 S. W. 40.

Defendant's plea as to his title may limit him in his recovery, yet plaintiff is not relieved of the burden of establishing his title to the land in controversy, and on his failure to support such burden, judgment will be rendered for defendant. *Oklahoma City & T. R. Co. v. Magee* (Civ. App.) 132 S. W. 901.

The burden is on plaintiff in trespass to try title to show title in himself. *Houston v. Koonce* (Civ. App.) 136 S. W. 1159.

In trespass to try title, the burden of proving his title is on plaintiff. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

A plaintiff in trespass to try title held to have the burden of showing title to the land charged to be in possession of defendant. *Finberg v. Gilbert*, 104 T. 539, 141 S. W. 82.

Plaintiff in suing for the cutting of timber on his land held to have the burden of proving his ownership of the land and that the timber was his timber. *Kirby Lumber Co. v. Stewart* (Civ. App.) 141 S. W. 295.

A defendant in trespass to try title held entitled to judgment for the land in controversy, unless plaintiff affirmatively shows title. *Fewell v. Kinsella* (Civ. App.) 144 S. W. 1174.

Where defendants in trespass to try title established adverse possession for the statutory period, the burden was on plaintiff to show that no title was acquired as against a certain owner because of her disability by minority. *Louisiana & Texas Lumber Co. v. Lovell* (Civ. App.) 147 S. W. 366.

Where defendant relies on a deed as conveying part of the tract claimed by plaintiff, and such deed is too uncertain by itself to identify the tract conveyed, the burden of showing extrinsic facts to identify the tract is on defendant. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

Plaintiff, seeking to defeat defendant's claim under a better title from the common source, must show that the common source had no title. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

In trespass to try title, the plaintiff must show a good title in himself. *Id.*

171. Public lands.—Vendees of the surviving husband, who five years after the wife's death sold their headright certificate, after the lapse of over thirty years from the sale of the certificate are not charged with the burden of proving affirmatively the equities which would conclude the heirs of the wife. *Hensel v. Kegans*, 79 T. 347, 15 S. W. 275.

The burden of proving that one was an actual settler on public school lands at the time of his application to the land office to purchase is on the person setting up such fact. *Jordan v. Payne*, 18 C. A. 382, 45 S. W. 189.

The burden of showing that a subsequent location does not conflict with a prior one is on the one claiming under the latter location. *Allen v. Worsham* (Civ. App.) 49 S. W. 525.

Where plaintiff claims as an actual settler on state school lands, she must rely upon the strength of her own title, and the burden of proof is upon her to show that she was an actual settler at the time she made her application. *Renner v. Peterson* (Civ. App.) 51 S. W. 867.

In trespass to try title to school lands, where the parties each claimed title under an application to purchase, the plaintiff must show compliance with the law entitling him to an award of the land by the land commissioners. *Willoughby v. Townsend*, 93 T. 80, 53 S. W. 581.

The burden of proof is on the plaintiff to show that a junior patent to lands does not conflict with a prior location. *Childress County Land & Cattle Co. v. Baker*, 23 C. A. 451, 56 S. W. 756.

Where a bounty warrant recited that the ancestor of the heirs entitled to the land described therein was killed at the Alamo, the burden of proof is on those disputing it to show the contrary. *Malone v. Dick*, 94 T. 419, 61 S. W. 112.

Plaintiff held to have the burden of proving that his location included lands claimed by defendant. *Clawson v. Williams*, 27 C. A. 130, 66 S. W. 702.

The plaintiff in an action of trespass to try title between applicants to purchase school lands held to have the burden of showing that he had not purchased the quantity of land authorized by statute prior to the purchase of the land in question. *Nowlin v. Hall* (Civ. App.) 66 S. W. 851.

Plaintiffs, in trespass to try title to public lands claimed by plaintiffs and defendant as additional lands, held to have the burden of showing that defendant was not an actual settler on her home tract when she made application for the additional lands, or of showing that she was acting in collusion with her son to fraudulently acquire the land for the latter. *Bell v. Williams*, 29 C. A. 109, 66 S. W. 1119.

One contesting an award of school land, on the ground that it had not been appraised at the price offered by the first applicant, has the burden of showing that the land was not so appraised. *Davis v. McCauley*, 28 C. A. 211, 66 S. W. 1124.

Plaintiff in trespass to try title to school land held by defendant under an award from the land office has the burden of proof. *McBane v. Angle*, 29 C. A. 594, 69 S. W. 433.

In action to recover land claimed to have been public free school land, settled on and applied for by plaintiff, burden of proof held on plaintiff to show that either the defendant had never completed his purchase of the land, or that he had in some manner forfeited his right before plaintiff made his application. *Boaz v. Powell*, 96 T. 3, 69 S. W. 976.

Burden of proof held to be on those impeaching legality of construction given by commissioner of land office to lease of school lands. *McGee v. Corbin*, 96 T. 35, 70 S. W. 79.

In an action to recover school lands, plaintiff must show that award to prior applicant was unauthorized. *Lenders v. Boliver* (Civ. App.) 73 S. W. 1075.

In trespass to try title, the burden held to be on defendant to show that a lease of the lands, made prior to plaintiff's application to purchase from the state, was still in force at the time of that application. *Jones v. Wright* (Civ. App.) 81 S. W. 569.

Where plaintiff claimed as a purchaser of school lands, and introduced in evidence an application to purchase which had been indorsed "Rejected," it was incumbent on plaintiff to show that the application was wrongfully rejected. *Knapp v. Patterson*, 99 T. 400, 90 S. W. 163.

Burden of proof held to be on second purchaser of school lands to show that the first award was invalid, though the first award was canceled by the commissioner of the general land office. *Smithers v. Lowrance*, 100 T. 77, 93 S. W. 1064.

In an action of trespass to try title to school land, the burden held upon plaintiff to establish title superior to defendant's. *Fellers v. McFatter*, 46 C. A. 335, 101 S. W. 1065.

Where defendant by mistake took up her residence on land adjoining the school land she had applied to purchase, during which time plaintiff settled on such land and applied to purchase it, the burden was on defendant to show that her settlement was made by mistake under the belief that she was actually residing on the land applied for. *Morgan v. Armstrong* (Civ. App.) 102 S. W. 1164.

A party asserting that a purchaser of headright certificates or persons claiming under him had retransferred the certificates to the original holder or persons claiming under him has the burden of proving the fact. *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

172. Receivers.—Where petition in action against railroad in hands of receivers alleges that their operation of the road is illegal, the burden is on plaintiff to prove such fact. *Trinity & S. Ry. Co. v. Brown*, 91 T. 673, 45 S. W. 793.

In an action against a railroad for injuries to a servant, burden held to be on plaintiff to show invalidity of appointment of a receiver. *Adams v. San Antonio & A. P. Ry. Co.*, 34 C. A. 413, 79 S. W. 79.

173. Reformation of instruments.—In a suit to reform a policy for mistake, the burden is on assured to show that he did not know its contents when it was accepted. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

The burden was upon defendants in trespass to try title, seeking to reform a deed

from plaintiff to their grantor for mistake in the description, to show that the mistake was mutual to both the grantors and grantees. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

174. **Release.**—In an action by a servant against a master for injuries received through his negligence, the burden of showing a release was procured by false representations is on the servant. *Houston & T. C. R. Co. v. Milam* (Civ. App.) 58 S. W. 735.

Where an employé suing for personal injuries admitted the execution of a release therefor, the burden was on him to show the release invalid. *St. Louis, S. F. & T. Ry. Co. v. Bowles* (Civ. App.) 131 S. W. 1176.

175. **Religious societies.**—In a suit involving the right to property conveyed to trustees for the use of a church of a particular faith, the burden of proof held to rest on defendants, who entered into a different religious organization. *Clark v. Brown* (Civ. App.) 108 S. W. 421.

Plaintiff, seeking to foreclose a lien on the property of a church, held required to establish the authority of the trustees acting for the church. *Owens v. Caraway* (Civ. App.) 110 S. W. 474.

176. **Sales.**—On a sale by samples, the burden is on the seller to show that the goods correspond with the sample, and that the buyer accepted them. *Pontiac Shoe Mfg. Co. v. Hamilton*, 18 C. A. 283, 44 S. W. 405.

In an action by the seller to recover the price of goods sold, the burden was on defendant to prove the making and breach of an express warranty. *C. H. Dean Co. v. Standifer*, 37 C. A. 181, 83 S. W. 230.

Vendors, seeking by reason of an alleged lien for the purchase price to subject to the payment of their claims the proceeds of goods sold by them, must show what particular or specific part of the property on hand when the receiver of the vendee took possession was acquired by the sale of, or resulted from the proceeds of the sale of, their property. *Wright v. Texas Moline Plow Co.*, 40 C. A. 434, 90 S. W. 905.

Where plaintiff proved a sale under a power contained in a deed of trust, and the proceedings were apparently regular, the burden was on defendant to show that the sale was invalid. *Evants v. Erdman* (Civ. App.) 153 S. W. 929.

177. **Sequestration.**—The burden of proof rests upon the party whose property has been seized under a writ of sequestration of showing that it was wrongfully issued. *Harris v. Finberg*, 46 T. 79.

The burden is on defendant who seeks damages for wrongful sequestration to prove that the grounds for suing out the writ did not exist. *McMillan v. Moon*, 18 C. A. 227, 44 S. W. 414.

In trespass to try title, the burden held on defendant to rebut a presumption of right of possession arising from plaintiff's title, and to show defendant's injury by reason of the levy of a writ of sequestration. *Freeman v. Slay*, 99 T. 514, 91 S. W. 6.

In sequestration, an instruction held erroneous as imposing the burden of proof on defendant. *Rea v. P. E. Schow & Bros.*, 42 C. A. 600, 93 S. W. 706.

178. **Set-off and counterclaim.**—The burden is upon a defendant in conversion to prove the justness of a counterclaim. *Baldwin v. G. M. Davidson & Co.* (Civ. App.) 143 S. W. 716.

179. **Sheriffs and constables.**—In an action against a constable for negligence in failing to serve writs of garnishment, the burden is on the officer to show insolvency of garnishees. *Taylor v. Fryar*, 18 C. A. 266, 44 S. W. 183.

In an action against a sheriff for failure to return an execution, the burden of excusing his failure and showing that it was harmless is upon the sheriff. *Waxahachie Nursery Co. v. Sansom* (Civ. App.) 138 S. W. 422.

180. **Statutes.**—The burden of proof is on one claiming a statute to be unconstitutional to establish the fact. *St. Louis S. W. Ry. Co. of Texas v. Smith*, 20 C. A. 451, 49 S. W. 627.

Where an excerpt from a decision offered by the defendant as proof of the law of a foreign state did not show the date, it could not be taken as establishing the law of that state at the time the obligation arose, the burden of proof being upon the defendant. *Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce* (Civ. App.) 139 S. W. 665.

181. **Taxes and taxation.**—In a suit against a tax collector and the sureties on his official bond for failure to pay over money collected by him, evidence that the tax rolls were delivered to him by the proper authority for collection renders him responsible for the whole amount of the rolls, and the burden of proof is on him to show what amount he has collected and paid over, or to show lawful excuse for his failure to collect. *Houston County v. Dwyer*, 59 T. 113.

In a suit on a tax deed, it is necessary to show the performance of all precedent requisites. *Meredith v. Coker*, 65 T. 29. Citing *Hadley v. Tankersly*, 8 T. 12; *Yenda v. Wheeler*, 9 T. 408; *Robson v. Osborn*, 13 T. 298; *Davis v. Farnes*, 26 T. 296.

One attempting to escape the payment of a tax, on the ground that municipal debts are invalid, has the burden of proving it. *Winston v. City of Ft. Worth* (Civ. App.) 47 S. W. 740.

One attempting to escape the payment of a tax for invalidity of municipal debts must prove it. *Wright v. City of San Antonio* (Civ. App.) 50 S. W. 406.

In a suit to collect taxes levied for refunding bonds, the burden was on the taxpayer to show the falsity of recital that they were issued to pay valid warrants. *City of Tyler v. Tyler Building & Loan Ass'n* (Civ. App.) 82 S. W. 1066.

Where a conveyance of mineral rights operated to sever the ownership of the minerals from the ownership of the surface, the burden was on the grantee resisting a tax on his interest to show that the land did not contain minerals. *State v. Downman* (Civ. App.) 134 S. W. 787.

One seeking to enjoin collection of taxes on the ground that, with others previously levied, they exceeded the limit, the question depending on the order in which two ordinances were approved, held to have the burden of proof as to such order. *City of Marshall v. Elgin* (Civ. App.) 143 S. W. 670.

A taxpayer seeking to enjoin collection of taxes by a city to pay bonds for an improvement held to have the burden of showing the bonds were not in the hands of bona fide holders, where the city would be estopped to assert their invalidity against such holders. *Id.*

In an action to restrain the collection of taxes, the burden is on plaintiff to show that the taxes are not due and owing by him. *McMahan v. Morgan* (Civ. App.) 151 S. W. 1123.

182. Torts in general.—In an action for the recovery of damages to property the plaintiff must show that the injury was caused by the act of the defendant. *Munson v. Metz*, 1 App. C. C. § 245.

183. Recovery of land in general.—The burden of proof is on the junior equitable title. *Jackson v. Waldstein* (Civ. App.) 27 S. W. 26.

The burden of proof rests upon the plaintiff in trespass to try title. *Byers v. Wallace*, 28 S. W. 1056, 87 T. 503.

In an action to recover land, the burden of proof is on the plaintiff, and the jury should be so charged. *Halsell v. McCutchen* (Civ. App.) 64 S. W. 72.

184. Conversion of property.—In an action for conversion of sacks in which cotton seed was sold, held, that the burden was on plaintiff to show that the sacks were not also sold. *Texas Standard Cotton-Oil Co. v. National Cotton-Oil Co.* (Civ. App.) 40 S. W. 159.

In an action against the sheriff and another for conversion, where defendant claims the goods were fraudulently transferred to plaintiff, the burden was on defendant to establish it. *Reynolds v. Weinman* (Civ. App.) 40 S. W. 560.

Where defendant is in possession of property for which plaintiff brings trover, the burden is not on defendant to show title. *Mershon v. Bosley* (Civ. App.) 62 S. W. 799.

Where, in an action for timber trespass, plaintiff elected to treat the manufacture of the timber into lumber as the period of conversion, the burden was on her to prove that the timber was so manufactured. *Rippy v. Less*, 55 C. A. 492, 118 S. W. 1084.

185. Trusts and following trust property.—*Cestui que trustent* have the burden of proving that a grantee of their trustee had notice of their equitable title, or did not purchase for a valuable consideration. *Hanrick v. Gurley* (Civ. App.) 48 S. W. 994.

In a suit by chattel mortgagees to establish a trust in the proceeds of the sale of the mortgaged property, the burden is on plaintiffs to identify the property into which the proceeds of the sale passed. *Texas Moline Plow Co. v. Kingman Texas Implement Co.*, 32 C. A. 343, 80 S. W. 1042.

Where a transfer of claims by an administrator did not on its face include a claim to a trust fund, in the accounting by the trustee of the fund, the burden was not on the distributees to show that such claim was excepted. *Routledge v. Elmendorf*, 54 C. A. 174, 116 S. W. 156.

One asserting that a purchaser at an execution sale holds the property in trust held to have the burden of proving the trust. *Buckner v. Carter* (Civ. App.) 137 S. W. 442.

An attorney, who has acquired the subject-matter of a suit in which he is employed, has the burden to establish good faith, in a suit by his client to declare a trust. *Henyman v. Trevino* (Civ. App.) 137 S. W. 458.

A party seeking to establish a trust in his favor in land the legal title to which is in another has the burden of proving the facts necessary to constitute a trust. *Hengy* (Civ. App.) 151 S. W. 1127.

186. Usury.—Defendant alleging that the contract sued on, which on its face made defendant a stockholder in and a borrower of plaintiff building and loan association, was but a scheme to cover up usury, and that the contract was purely a loan, has the burden of proof. *Cotton States Bldg. Co. v. Peightal*, 28 C. A. 575, 67 S. W. 524.

In an action to recover a penalty, the burden was on plaintiff to prove that defendant collected usurious interest. *Stewart v. Lattner* (Civ. App.) 142 S. W. 631.

187. Vendor and purchaser.—*Bona fide purchaser*, see ante.

The burden of proof is upon the party asserting that the vendor's lien has been waived. *Irvin v. Garner*, 50 T. 54; *Ellis v. Singletary*, 45 T. 47; *Hodges v. Roberts*, 74 T. 517, 12 S. W. 222; *Robertson v. Guerin*, 50 T. 317.

One seeking to postpone a prior legal title on the ground that he acquired a subsequent claim for value without notice must establish both these facts in evidence outside of the recitals in his deed. *Bremer v. Case*, 60 T. 151; *Olcott v. Ferris* (Civ. App.) 24 S. W. 848.

In an action by the vendor to enforce the specific performance of a contract for the sale of land, he must, when his ability to contract for the sale of land is contested, make proof that the title offered is reasonably safe and will be satisfactory to a person of ordinary prudence. Where the defect is trivial, compensation therefor may be allowed. *Upton v. Maurice* (Civ. App.) 34 S. W. 642.

The burden is on the purchaser to establish a defense, in action for breach of the contract to purchase, that the vendor agreed to furnish an abstract of title, and failed to do so. *Jackson v. Martin* (Civ. App.) 41 S. W. 837.

The burden is on the vendee to show a waiver of vendor's lien. *Marshall v. Marshall* (Civ. App.) 42 S. W. 353.

In action against vendee to recover possession or the price, the burden is on defendant to show that vendor had no title. *Pughe v. Coleman* (Civ. App.) 44 S. W. 576.

In a suit to redeem from foreclosure of a prior vendor's lien, the purchaser held not bound to prove that he had no notice of plaintiff's claim, based on an unrecorded assignment of lien. *Rogers v. Houston*, 94 T. 403, 60 S. W. 869.

The burden of showing that facts extraneous to an abstract of title tend to impair the title and diminish the marketable value of land is on one refusing to comply with his contract to purchase on account of an alleged defective title. *Hollifield v. Landrum*, 31 C. A. 187, 71 S. W. 979.

Burden of proof held to be on plaintiffs, in action to foreclose vendor's lien, to show amount of balance due on debt. *Harbers v. Levy*, 33 C. A. 480, 77 S. W. 261.

Burden held on grantor, suing on purchase-money notes, to show that stipulation in deed for clear title had been complied with. *Zimmermann v. Owen*, 34 C. A. 31, 77 S. W. 971.

Where defendant denied liability on a vendor's lien note for failure of title, the burden was on him to show a legal eviction by a superior title. *Wilson v. Moore* (Civ. App.) 85 S. W. 25.

In a suit to enforce a vendor's equitable lien, the burden is on the purchaser to show waiver of the lien. *Springman v. Hawkins*, 52 C. A. 249, 113 S. W. 966.

A purchaser who, in an action for the price, pleads an offset based on a payment to cure a defect in the title held required to prove an outstanding title which he was compelled to purchase to protect himself. *De Steaguer v. Pittman*, 54 C. A. 316, 117 S. W. 481.

One asserting a title resulting from the reservation of an express lien on land for the purchase price as against a grantee of the purchaser has the burden of proving that the purchaser had notice of an express lien. *Buckley v. Runge*, 57 C. A. 322, 122 S. W. 596.

A purchaser holding under an executed contract of conveyance held required to show certain facts to defeat the collection of the price. *Blewitt v. Greene*, 57 C. A. 588, 122 S. W. 914.

In a suit to enforce a vendor's lien, defendant having proved the taking of other security, the burden was on plaintiff to establish that that was not intended to operate as a waiver of the lien. *Noblett v. Harper* (Civ. App.) 136 S. W. 519.

Where a junior incumbrancer holding under an unrecorded mortgage was not made a party to a suit to foreclose a prior vendor's lien, the burden was on him to show possession or notice to the holder of the vendor's lien in order to sustain his right to redeem. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

188. **Venue.**—A defendant, who pleads his privilege to be sued in the county of his residence, notwithstanding the allegations of the petition alleging a cause of action to pay money in another county in which the action was brought, has the burden of proving that he did not so obligate himself. *Witherspoon v. Duncan* (Civ. App.) 131 S. W. 660.

189. **Warehousemen.**—In an action against a warehouseman the burden of proof rests upon the plaintiff to establish the facts showing the defendant's liability. When there is a total default in delivering the goods, or a failure to account for their nondelivery, a prima facie case of negligence is made out, and the burden of proof is on the defendant to show that the loss did not happen in consequence of his neglect to use all that care and diligence that a prudent and careful man would exercise in relation to his own property. When it is shown that the goods were destroyed by fire, the burden of proof is upon the plaintiff to show that the fire was the result of want of ordinary care on the part of defendant or his servants. *T. & P. R. R. Co. v. Morse*, 1 App. C. C. §§ 411-414; *T. & P. Ry. Co. v. Capps*, 2 App. C. C. § 36. See *Sullivan v. Kindred* (Civ. App.) 26 S. W. 150.

190. **Water courses and water supply.**—In an action for damages to crops alleged to be due to interference with the natural flow of water, plaintiff has the burden of proving that the crops were damaged by reason of such interference. *Gulf, C. & S. F. Ry. Co. v. Huffman* (Civ. App.) 81 S. W. 536.

In an action by a landowner against a city for damages to his crops from leakage from a water supply pipe line maintained by the city, the burden was on plaintiff to show that the city failed to use ordinary care in constructing and maintaining the line. *City of Paris v. Tucker* (Civ. App.) 93 S. W. 233.

In an action by a riparian proprietor for damage to his cattle caused by drinking oil emptied into the stream by another proprietor, plaintiff need not show that he had used ordinary care in handling his cattle, as that was matter of defense. *Benjamin v. Gulf, C. & S. F. Ry. Co.*, 49 C. A. 473, 108 S. W. 408.

191. **Negligence—Injuries to person in general.**—Burden of proof of negligence rests where. *Railway Co. v. Crowder*, 63 T. 502; *Waters-Pierce Oil Co. v. King*, 24 S. W. 700, 6 C. A. 93; *Railway Co. v. Waldo* (Civ. App.) 26 S. W. 1004; *Same v. Christian*, 27 S. W. 932, 8 C. A. 246; *W. U. Tel. Co. v. Womack*, 29 S. W. 932, 9 C. A. 607; *Railway Co. v. Lankford*, 29 S. W. 933, 9 C. A. 593; *Same v. Poras* (Civ. App.) 29 S. W. 945; *McCray v. Railway Co.*, 32 S. W. 548; *Houston & T. C. R. Co. v. Harris*, 103 T. 422, 128 S. W. 897; *Missouri, K. & T. Ry. Co. v. Tolbert* (Civ. App.) 134 S. W. 280.

Proof of negligence rests upon the party affirming. *Eakin v. Home Ins. Co.*, 1 App. C. C. § 370; *T. & P. Ry. Co. v. Anderson*, 2 App. C. C. § 208; *E. L. & R. R. R. Co. v. Hart*, 2 App. C. C. § 420. It must be shown that the act complained of was the proximate cause of injury. *H. & T. C. R. R. Co. v. McDonough*, 1 App. C. C. § 653; *W. U. T. Co. v. Bertram*, 1 App. C. C. § 1152; *Railway Co. v. Burns*, 71 T. 779, 9 S. W. 467; *Railway Co. v. Bartlett*, 69 T. 79, 6 S. W. 549; *Railway Co. v. Shieder* (Civ. App.) 26 S. W. 509; *Id.*, 30 S. W. 902, 88 T. 152, 28 L. R. A. 538; *Railway Co. v. Scott* (Civ. App.) 27 S. W. 827; *Railway Co. v. Vaughn*, 23 S. W. 745, 5 C. A. 195; *Railway Co. v. Cox* (Civ. App.) 27 S. W. 1050; *Railway Co. v. Stafford* (Civ. App.) 31 S. W. 319.

The burden of proof rests upon plaintiff to show negligence of defendant without contributory negligence of person injured. *Railway Co. v. Porter*, 73 T. 304, 11 S. W. 324.

An employé suing for personal injury has the burden of proving negligence on the part of the master. *Railway Co. v. Lehmburg*, 75 T. 61, 12 S. W. 838; *Same v. Waldo* (Civ. App.) 26 S. W. 1004; *Hutchens v. St. Louis Southwestern Ry. Co.*, 40 C. A. 245, 89 S. W. 24; *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 C. A. 110, 116 S. W. 93; *Houston & T. C. R. Co. v. Davenport*, 102 T. 369, 117 S. W. 790; *Vernon Cotton Oil Co. v. Catron* (Civ. App.) 137 S. W. 404; *Kampmann v. Mendoza*, 141 S. W. 161; *Taylor v. White*, 156 S. W. 349.

Where shipper of live stock accompanies them to care for them, the burden is not on the carrier to show that the injury occurred on another line. *St. Louis S. W. Ry. Co. of Texas v. Vaughan* (Civ. App.) 41 S. W. 415.

A servant relying upon the nonenforcement of a railroad company's rule governing its employé's duties must prove such fact. *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

Where the injury did not occur at a public crossing, the burden is on plaintiff to show that the engine was not provided with a proper bell. *Boyd v. Cross*, 19 C. A. 426, 47 S. W. 478.

The burden held to be on the company to show that defects in its track had no effect in overturning a car which, in a wreck caused by an open switch, fell on a brakeman and killed him. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

Where an injury to a passenger on defendant's train was caused by a spark from the engine, it was not error to charge that the burden of proof was on the defendant to show that it was not occasioned by its negligence. *Texas Midland R. Co. v. Jumper*, 24 C. A. 671, 60 S. W. 797.

Where it is shown that a passenger has been injured by cinders from an engine, the burden of proof is on the company to show that the engine was properly equipped. *Id.*

In an action against a telephone company for negligence in permitting its wires to come in contact with high current wires, it is not error to require plaintiff to prove negligence alleged. *Barrett v. Independent Tel. Co. (Civ. App.)* 65 S. W. 1128.

Burden held to be on city employé to show that promise to repair defect was made by some one authorized to bind the city. *City of Houston v. Owen (Civ. App.)* 67 S. W. 788.

Where plaintiff's evidence in an action against a railroad company for injuries due to a defective bridge fairly made out a case, without showing that a stranger removed a plank from it, defendant has the burden of proving that the defect was due to a stranger removing the plank. *Denison & P. S. Ry. Co. v. Foster*, 28 C. A. 578, 68 S. W. 299.

In action against railroad for damages from fire, the burden held on it to show that the locomotive was properly equipped and handled. *Texas Midland R. R. v. Moore (Civ. App.)* 74 S. E. 942.

Burden held not on railway company to show that it gave sufficient warning on approaching crossing. *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 133.

In an action for injuries charged to have been committed by joint tort-feasors, the burden was on plaintiff to show that he was injured by defendant's sole or concurrent negligence. *Robertson v. Trammell*, 37 C. A. 53, 83 S. W. 258; *Id.*, 98 T. 364, 83 S. W. 1098.

In an action against a railroad for the death of a brakeman, the burden is upon plaintiff to prove that such death was caused by defendant's negligence. *Missouri, K. & T. Ry. Co. v. Greenwood*, 40 C. A. 252, 89 S. W. 810.

Where an injury to a railroad employé was caused by defective construction of the track, held that it was incumbent on the railroad company to show that it had exercised ordinary care in the construction. *Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.)* 91 S. W. 375.

An employé suing a railway company for injuries sustained by an employé because of a defective stirrup on a foreign car held bound to prove that the company knew or could have known of the defect. *Galveston, H. & S. A. Ry. Co. v. Parish (Civ. App.)* 93 S. W. 682.

In an action for injuries to an employé, certain proof held to establish a prima facie case of negligence, casting on the employer the burden of meeting it. *El Paso Foundry & Machine Co. v. De Guereque*, 46 C. A. 86, 101 S. W. 814.

In an action for injuries received by plaintiff's train running into another, where the company's rules required plaintiff's train to run into the station under full control and ten minutes behind another train, the burden was on plaintiff to establish that the collision occurred after the time his train was due. *International & G. N. R. Co. v. Brice (Civ. App.)* 111 S. W. 1094.

One injured by fire escaping from the land of another held required to prove that the latter was guilty of negligence in starting the fire, or in not exercising ordinary care to confine the fire on his own premises. *Pfeiffer v. Aue (Civ. App.)* 115 S. W. 300.

In an action for injuries to a person on a railroad track, the burden was upon plaintiff to show defendant's negligence in keeping a lookout. *Houston, E. & W. T. Ry. Co. v. Sallee*, 56 C. A. 23, 120 S. W. 216.

In an action for injuries to a servant through stumbling over a box in a passageway and having his hand caught in the machinery, plaintiff had the burden of proving when the box was placed in the passageway and by whom it was put there. *Lone Star Brewing Co. v. Solcher (Civ. App.)* 126 S. W. 26.

In an action against a railroad for injuries to an intestate, a passenger, plaintiff has the burden of establishing by a preponderance of evidence that intestate was injured while a passenger, and did not die from other causes than such injuries. *Houston & T. C. R. Co. v. Maxwell (Civ. App.)* 128 S. W. 160.

To recover of an employer for an injury, the employé must prove that a defect existed in the place furnished him. *St. Louis, S. F. & T. Ry. Co. v. Cason (Civ. App.)* 129 S. W. 394.

Where a passenger was ejected from a train at the station prior to his destination under a rule discontinuing the destination station as a stopping place for such train, plaintiff was not bound to plead that the rule had been so disregarded as to constitute its abrogation as the burden rested on defendant to show that the rule was in force. *Missouri, K. & T. Ry. Co. of Texas v. Herring (Civ. App.)* 130 S. W. 1039.

While the burden is on plaintiff, in action for death of defendant's locomotive engineer, to show negligence, yet it being shown that his train was derailed, and that this was occasioned by a defective switch, it devolved on it to show it was not negligent in respect thereto. *Gulf, C. & S. F. R. Co. v. McGinnis (Civ. App.)* 147 S. W. 1188.

In order to recover for injuries from being struck by a train, the plaintiff was required to prove that the train operatives knew the injured person was on the track, and realized his peril in time to have stopped the train. *Texas & P. Ry. Co. v. Hope (Civ. App.)* 149 S. W. 1077.

One who seeks to recover damages for an alleged breach of duty of a master to provide a safe place for work has the burden of proving that the relation of master and servant existed at the time of the injury. *Marshall & E. T. Ry. Co. v. Sirman (Civ. App.)* 153 S. W. 401.

192. — **Proximate cause of Injury.**—In an action for injuries to an employé caused by an explosion of mineral water, held, that plaintiff must prove that defendant violated a legal duty, and facts showing negligence proximately causing the injury. *G. A. Duerler Mfg. Co. v. Dullnig (Civ. App.)* 83 S. W. 889.

Where, in an action for death caused by negligence, plaintiff failed to establish prima facie the cause of action, it was not incumbent on defendant to explain the connection of its servants with the occurrence. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 461, 84 S. W. 1049.

In order to hold the master liable for injuries to a servant, the master's negligence must be proved to have been the proximate cause of the injury. *Missouri, K. & T. Ry. Co. v. Greenwood*, 40 C. A. 252, 89 S. W. 810.

In an action for injuries to a servant, the burden was on the servant to offer evidence of the defect in the place to work, the character of the defect, and that it was the proximate cause of the injury. *St. Louis, S. F. & T. Ry. Co. v. Cason* (Civ. App.) 129 S. W. 394.

In an action for injuries caused by negligence, plaintiff must not only prove actionable negligence, but must show that the negligence charged was the proximate cause of the injury. *Southern Kansas Ry. Co. of Texas v. Emmett* (Civ. App.) 139 S. W. 44.

In an action for a wrongful death caused by a team becoming frightened through the negligent operation of an automobile upon a highway by the defendant's minor son, the burden was on plaintiff to show that the driver of the automobile was negligent as alleged in the petition, and that his negligence was the proximate cause of the injury. *Riley v. Fisher* (Civ. App.) 146 S. W. 581.

193. — **Fellow servant.**—Burden is on master to establish defense of fellow servant. *Patterson v. Houston & T. C. R. Co.* (Civ. App.) 40 S. W. 442.

194. — **Assumption of risk.**—The burden of proving the incapacity of a party injured by dangerous machinery to appreciate the danger is on such party, unless he is so young as to be conclusively presumed incapable. *San Antonio Waterworks Co. v. White* (Civ. App.) 44 S. W. 181.

The burden of proving assumed risk, in an action for injuries to a servant, is on the defendant. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 35 C. A. 584, 80 S. W. 852; *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365; *El Paso & S. W. R. Co. v. Welter* (Civ. App.) 125 S. W. 45; *Galveston, H. & S. A. Ry. Co. v. Hanson*, 125 S. W. 63.

In an action against a railroad for injuries to an employé through a defective car step or stirrup, the burden of proving the issue of assumed risk held to be on defendant. *El Paso & S. W. R. Co. v. O'Keefe*, 50 C. A. 579, 110 S. W. 1002.

A master, sued for the negligent death of a servant, has the burden of proving the knowledge of the servant of the conditions on which to predicate assumption of risk. *Lewis v. Texas & P. Ry. Co.*, 57 C. A. 585, 122 S. W. 605.

195. — **Contributory negligence.**—In a suit for damages alleged to have resulted from the negligence of defendant, if the plaintiff's evidence shows that the injury was caused by the negligence of defendant, and does not disclose any fact from which a want of care on plaintiff's part might be inferred, then the burden of proof is on the defendant, if he relies on contributory negligence as a defense, to show that the plaintiff was guilty of such negligence. *Railway Co. v. Redeker*, 67 T. 181, 2 S. W. 513.

Where no signals were given, and view at crossing was obstructed, the fact that traveler did not stop to look or listen does not cast on him the burden of proving absence of contributory negligence. *Dalwigh v. International & G. N. R. Co.* (Civ. App.) 42 S. W. 1009.

Burden of proof as to contributory negligence is on defendant. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 43 S. W. 536; *City of Hillsboro v. Jackson*, 18 C. A. 325, 44 S. W. 1010; *Houston & T. C. R. Co. v. O'Neal* (Civ. App.) 45 S. W. 921; *Lambert v. Western Union Tel. Co.*, 45 S. W. 1034; *San Antonio & A. P. Ry. Co. v. Belt*, 46 S. W. 374; *Missouri, K. & T. Ry. Co. of Texas v. Lyons*, 53 S. W. 96; *Texas & P. Ry. Co. v. Mayfield*, 23 C. A. 415, 56 S. W. 942; *Galveston, H. & S. A. Ry. Co. v. Dehnisch* (Civ. App.) 57 S. W. 64; *Same v. Jackson*, 31 C. A. 342, 71 S. W. 991; *Chicago, R. I. & P. Ry. Co. v. Buie*, 31 C. A. 654, 73 S. W. 853; *Houston & T. C. R. Co. v. Anglin*, 99 T. 349, 89 S. W. 966, 2 L. R. A. (N. S.) 386; *Beaty v. El Paso Electric Ry. Co.* (Civ. App.) 91 S. W. 365; *San Antonio Traction Co. v. Levyson*, 52 C. A. 122, 113 S. W. 569; *Beaumont Traction Co. v. Happ*, 57 C. A. 427, 122 S. W. 610; *Missouri, K. & T. Ry. Co. of Texas v. King* (Civ. App.) 123 S. W. 151; *Texas & N. O. R. Co. v. McLeod*, 131 S. W. 311; *Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas*, 142 S. W. 977. Operation of railroads. *International & G. N. R. Co. v. Brooks* (Civ. App.) 54 S. W. 1056; *Missouri, K. & T. Ry. Co. of Texas v. Scarborough*, 68 S. W. 196; *El Paso Electric Ry. Co. v. Kendall*, 78 S. W. 1081; *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 133; *Houston & T. C. R. Co. v. Anglin*, 45 C. A. 41, 99 S. W. 897; *Ft. Worth & R. G. Ry. Co. v. Morris*, 45 C. A. 596, 101 S. W. 1038; *Missouri, K. & T. Ry. Co. of Texas v. Plunkett* (Civ. App.) 103 S. W. 663; *Boyd v. St. Louis Southwestern Ry. Co. of Texas*, 101 T. 411, 108 S. W. 813; *Missouri, K. & T. Ry. Co. of Texas v. Wall* (Civ. App.) 110 S. W. 453; *Huber v. Texas & P. Ry. Co.*, 113 S. W. 984; *Caldwell v. Houston & T. C. Ry. Co.*, 54 C. A. 399, 117 S. W. 488; *Chicago, R. I. & G. Ry. Co. v. Clay*, 55 C. A. 526, 119 S. W. 730; *Missouri, K. & T. Ry. Co. of Texas v. Sharp*, 120 S. W. 263. Defective sidewalks. *City of Dallas v. Myers* (Civ. App.) 64 S. W. 683. Injuries to employés. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204; *Galveston, H. & S. A. Ry. Co. v. Collins*, 24 C. A. 143, 57 S. W. 884; *San Antonio & A. P. Ry. Co. v. Lindsey*, 27 C. A. 316, 65 S. W. 668; *Chicago, R. I. & T. Ry. Co. v. Long*, 32 C. A. 40, 74 S. W. 59; *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847; *Bonn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 82 S. W. 808; *Galveston, H. & S. A. Ry. Co. v. Worcester*, 45 C. A. 501, 100 S. W. 990; *Industrial Lumber Co. v. Bivens*, 47 C. A. 396, 105 S. W. 831; *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365; *Houston & T. C. R. Co. v. Davenport*, 102 T. 369, 117 S. W. 790; *Producers' Oil Co. v. Barnes* (Civ. App.) 120 S. W. 1023; *El Paso & S. W. R. Co. v. Welter*, 125 S. W. 45; *Buchanan & Gilder v. Blanchard*, 127 S. W. 1153; *El Paso Electric Ry. Co. v. Shaklee*, 138 S. W. 188; *Orange Lumber Co. v. Ellis*, 105 T. 363, 150 S. W. 582; *Yellow Pine Paper Mill Co. v. Wright* (Civ. App.) 154 S. W. 1168. Injuries to passenger. *Pares v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 57 S. W. 301; *Galveston, H. & S. A. Ry. Co. v. Morris*, 60 S. W. 813; *Missouri, K. & T. Ry. Co. of Texas v. Gist*, 31 C. A. 662, 73 S. W. 857; *St. Louis Southwestern Ry. Co. of Texas v. Addis* (Civ. App.) 142 S. W. 955.

The burden is upon the defendant to show that deceased had knowledge of a defect in the appliance that caused the injury. *Gulf, C. & S. F. Ry. Co. v. Royall*, 18 C. A. 86, 43 S. W. 815.

It is error in a personal injury case to instruct that the burden of proving contributory negligence is on defendant, where the issue has been raised by testimony produced by plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Jolley*, 31 C. A. 512, 72 S. W. 871.

In an action against a railroad company for personal injuries sustained by a trespasser in defendant's yards, the burden is on plaintiff to show that he was discovered by defendant's employes in time for them to have avoided the injury. *Luna v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.)* 73 S. W. 1061; *Whitney v. Texas Cent. R. Co.*, 50 C. A. 1, 110 S. W. 70.

Where the undisputed evidence on the trial of an action for negligent injuries establishes prima facie, as a matter of law, contributory negligence, the burden of proof is on plaintiff to show lack of such negligence. *Gillum v. New York & T. S. S. Co. (Civ. App.)* 76 S. W. 232.

Unless the pleadings or evidence of plaintiff establishes contributory negligence, as a matter of law, the burden is on defendant to show that fact. *Gulf, C. & S. F. Ry. Co. v. Melville (Civ. App.)* 87 S. W. 863.

An instruction in an action for negligent death, which places the burden of proof on plaintiff to show that decedent was not guilty of contributory negligence, is erroneous and properly refused. *Texas & P. Ry. Co. v. Huber (Civ. App.)* 95 S. W. 568.

The burden of establishing the defense of contributory negligence is on the defendant, except where plaintiff's evidence convicts him prima facie of contributory negligence. *Texas & N. O. Ry. Co. v. Conway*, 44 C. A. 68, 98 S. W. 1070.

In an action for death, evidence held not to show prima facie negligence on decedent's part, so as to devolve on those suing for his death the burden to show facts from which, on the whole case, he might be found free therefrom. *Galveston, H. & S. A. Ry. Co. v. Conuteson*, 51 C. A. 1, 111 S. W. 187.

In an action for injuries sustained in a collision of plaintiff's train with another, if plaintiff's evidence established a prima facie case of contributory negligence by him as a matter of law the burden was on him to show, upon the whole case, facts from which a jury could find him free from negligence. *International & G. N. R. Co. v. Brice (Civ. App.)* 111 S. W. 1094.

Where the evidence of contributory negligence springs out of and forms a part of the case relied on by plaintiff, the burden is on him to show freedom from contributory negligence. *Chicago, R. I. & G. Ry. Co. v. Clay*, 55 C. A. 526, 119 S. W. 730.

Where there was nothing in plaintiff's evidence showing contributory negligence, the burden of proving contributory negligence rested on defendant. *Id.*

Circumstances under which the burden of proof is on plaintiff to show freedom from contributory negligence, stated. *Houston & T. C. R. Co. v. Harris (Civ. App.)* 120 S. W. 500.

In an action by the husband for personal injuries to his wife, defendant has the burden of proving that the husband could by proper care and attention avoid the damages sustained by reason of the wife's injury. *International & G. N. R. Co. v. Sandlin*, 57 C. A. 151, 122 S. W. 60.

The burden of proving contributory negligence continued to rest on defendant, where the facts proved by plaintiff indicating contributory negligence were fully excused by other evidence offered on his behalf. *Western Union Telegraph Co. v. Conder (Civ. App.)* 138 S. W. 447.

Where plaintiff's pleadings and testimony do not show contributory negligence, the burden of showing such negligence is on the defendant, if it has pleaded it as a defense. *Chicago, R. I. & G. Ry. Co. v. Evans (Civ. App.)* 143 S. W. 966.

196. — **Theaters and shows.**—Where, in an action against a railroad maintaining an amusement pavilion for injuries to a patron thereof, it was shown that the company granted exclusive privileges therein to a third person, who agreed to keep the floor free from obstructions, and that the injury resulted from negligence, the burden of showing exclusive control of the premises in the third person was on the railroad. *Wichita Falls Traction Co. v. Adams (Civ. App.)* 146 S. W. 271.

197. — **Delay and failure to deliver telegrams.**—Negligence of a telegraph company in delivering a message must be shown affirmatively by plaintiff, as that the message was not delivered, or delivered in a materially altered or changed condition; a prima facie case being established, the burden is upon the company to show that the failure was from unavoidable causes. *W. U. T. Co. v. Bertram*, 1 App. C. C. § 1152; *Daniel v. Telegraph Co.*, 61 T. 457, 48 Am. Rep. 305.

Facts held to cast burden of proof on telegraph company to show that it was not negligent in transmission of message. *Western Union Tel. Co. v. Tobin (Civ. App.)* 56 S. W. 540.

Where, in an action for failure to deliver a telegram as sent, the company defend on ground that it related to an illegal contract, the burden is on defendant to show such fact. *Western Union Tel. Co. v. Hill (Civ. App.)* 65 S. W. 1123.

Delivery of message announcing illness of addressee's wife to person in whose care it was sent held insufficient to relieve telegraph company from burden of proving that its negligent delay in delivery did not affect addressee's time of leaving for home. *Western Union Tel. Co. v. Hamilton*, 36 C. A. 300, 81 S. W. 1052.

In an action for damages for delay in sending a telegram summoning plaintiff's brother, the burden is on plaintiff to show that her brother could have come in time had the message not been delayed. *Western Union Telegraph Co. v. Landry (Civ. App.)* 108 S. W. 461.

In an action for nondelivery of an unrepeatable telegram, plaintiff, in order to recover, held required to prove negligence on the part of the telegraph company. *Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.)* 109 S. W. 265.

Where a defense for failure to deliver a telegram was that it was in a foreign language and not understood by the company's agents, the burden of proving such lack of knowledge rested on the company. *Western Union Telegraph Co. v. Olivarri (Civ. App.)* 110 S. W. 930.

In an action for error in transmitting a telegram, the burden is on plaintiff to show that the error was caused by misconduct, fraud, or want of due care of defendant, its servants or agents. *Postal Telegraph-Cable Co. v. Sunset Const. Co.*, 102 T. 148, 114 S. W. 98.

In an action against a telegraph company for failure to deliver a telegram, held, that there was no burden on plaintiff to show that had he arrived home at the time he could have arrived had the telegram been promptly delivered, that his wife, who was unconscious when he arrived, was conscious 15 hours earlier. *Western Union Telegraph Co. v. Hughey*, 55 C. A. 403, 118 S. W. 1130.

A telephone company sued in Texas by an addressee of a message sent from Arkansas for delivery in Oklahoma, for mental anguish for failure to promptly deliver, held to have the burden of proving that the laws of Arkansas and Oklahoma do not permit a recovery for mental anguish. *Western Union Telegraph Co. v. Parsley*, 57 C. A. 8, 121 S. W. 226.

An addressee of a message directed in care of a third person held required to prove a negligent delay in the delivery of the message to the third person. *Johnson v. Western Union Telegraph Co.* (Civ. App.) 132 S. W. 814.

In an action against a telegraph company for delay in delivering a message, the court properly placed the burden of proving contributory negligence in failing to answer the message on defendant. *Western Union Telegraph Co. v. Conder* (Civ. App.) 138 S. W. 447.

While the burden is on the plaintiff to establish negligence, yet, where the exact time of the filing of the message for transmission was important testimony for plaintiff as to such time, though indefinite, will be construed in her favor, where it appears that, though it was within the power of the defendant to show the exact time, it did not do so. *Western Union Telegraph Co. v. Cates*, 105 T. 324, 148 S. W. 281, affirming judgment (Civ. App.) 132 S. W. 92.

Where a telegraph company establishes free delivery limits in cities and towns, the burden is on it to show that notice thereof was brought home to the sender of a message to an addressee located in such a place, that the addressee was not within such limits, and to demand payment of the additional charge required for delivery. *Western Union Telegraph Co. v. Harris*, 105 T. 320, 148 S. W. 284.

198. — **Carriage of goods and live stock.**—Under an ordinary bill of lading, with no special exceptions, if the goods are lost by the act of God, the burden is upon the carrier to prove that his negligence did not contribute to cause the loss. So when the goods are lost by some agency excepted by the carrier in the bill of lading, the plaintiff has merely to aver and prove that they were delivered to the carrier and were not received at the point of destination. This makes a prima facie case of negligence. To avoid liability the carrier must show that the loss was caused by one of the excepted agencies, and must also rebut the presumption of negligence. *Ryan v. M., K. & T. Ry. Co.*, 65 T. 13, 57 Am. Rep. 589.

In all cases of loss or injury to goods intrusted to the common carrier the burden of proof is on the carrier to exempt himself from liability. Proof of loss or injury while en route fixes prima facie the carrier's liability; and to avoid such liability the burden rests upon the carrier to prove such facts as will constitute a valid defense. *G., C. & S. F. Ry. Co. v. Golding*, 3 App. C. C. § 35; *Mo. Pac. Ry. Co. v. Barnes*, 2 App. C. C. § 578.

In a suit for loss of baggage against a carrier, who, as alleged, sold plaintiff a ticket over connecting lines, which recites that defendant sold it as agent, the burden is on defendant to show that the loss did not happen on its road. *International & G. N. Ry. Co. v. Foltz*, 22 S. W. 541, 3 C. A. 644.

When goods are destroyed by fire in transit the burden of proof is on the carrier to show that the loss was not caused by his negligence. *Railway Co. v. Efron* (Civ. App.) 38 S. W. 639.

Where goods are received for as in apparent good order by initial carrier, burden is on connecting carrier, in action for damages, to show that they were damaged when received. *Houston & T. C. R. Co. v. Ney* (Civ. App.) 58 S. W. 43.

Where a railway company in Texas received cotton to carry to another state, stipulating that it should not be liable for destruction of the cotton by fire, and the cotton burned, the burden was on the company to show that the fire did not result from its negligence or that of its servants. *Texas & P. Ry. Co. v. Richmond*, 94 T. 571, 63 S. W. 619.

Where, in an action against a carrier for injuries to cattle shipped, the carrier introduced evidence that the injuries to the cattle resulted from poisoning produced by improper feeding, and not from any negligence on its part, the court properly charged that the burden of proof was on plaintiffs, notwithstanding the rule that where a carrier receives cattle in good condition, and delivers them in a damaged condition, and no caretaker accompanies the shipment, the burden is on the carrier to show that the condition in which the cattle arrived was not due to its negligence. *Baker v. Missouri, K. & T. Ry. Co. of Texas*, 57 C. A. 25, 121 S. W. 907.

In an action against connecting carriers for injuries to stock en route, the burden was upon the final carrier to show that the injury did not occur on its line. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737, judgment reversed, 104 T. 92, 134 S. W. 328.

If, in a suit against connecting carriers for damage to stock, their delivery in a sound or uninjured condition to the initial carrier is shown, and it further appears they were injured when delivered to consignee at destination, it establishes a prima facie case of negligence, and the burden then rests on defendants to show such injuries resulted from the inherent nature or propensity or "proper vice" of the animals, and without their neglect. *St. Louis & S. F. R. Co. v. Franklin* (Civ. App.) 123 S. W. 1150.

In an action against a buyer for the price of bananas sold, in which defendant filed a cross-action against plaintiff and the carriers, the carriers alleged in defense that any damage to the fruit was caused by the negligence of the shipper's agent who accompanied the shipment under the contract between the shipper and the consignee, but no

such contract between the carriers and the shipper was alleged. Held that, since no benefit could inure to the carriers from the contract between the shipper and consignee, the burden was not on the consignee to show that any damage to the fruit was not the result of the messenger's negligence. *Kemendo v. Fruit Dispatch Co.* (Civ. App.) 131 S. W. 73.

Where the delay in delivering freight is extraordinary, the burden is on the carrier in actions for damages for delay to show unusual conditions justifying the delay. *Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co.*, 103 T. 542, 131 S. W. 410, modifying judgment (Civ. App.) 120 S. W. 1146.

A shipper desiring to avail himself of the presumption that where goods are shipped over the lines of connecting carriers and are damaged, and the evidence fails to show on what particular line the injury occurred, that the fault was that of the last carrier, has the burden of first showing that the goods were in good order at the time of delivery to the initial carrier. *Texas Cent. Ry. Co. v. Barr* (Civ. App.) 132 S. W. 971.

Where a final carrier delivers goods to the shipper in a damaged condition, it has the burden of proof to show that the goods were damaged when it received them. *San Antonio & A. P. Ry. Co. v. Winn* (Civ. App.) 132 S. W. 972.

A carrier held to have the burden of proving a shipper's contributory negligence. *Houston & T. C. R. Co. v. Parker* (Civ. App.) 138 S. W. 437.

A shipper of live stock who sues the initial carrier for injury to the stock has the burden of showing that the carrier's negligence caused the injury. *Martin v. Kansas City, M. & O. Ry. Co.* (Civ. App.) 139 S. W. 615.

The rule that the terminal carrier has the burden of proof to show freedom from negligence held not to apply where the line of the terminal carrier did not extend to the point of delivery. *Missouri, K. & T. Ry. Co. v. Jarmon* (Civ. App.) 141 S. W. 155.

A carrier of cattle has the burden of proving that a loss of cattle was not caused by its negligence, though the shipper accompanied the cattle. *Pecos & N. T. Ry. Co. v. Brooks* (Civ. App.) 145 S. W. 649.

In an action for damages to cattle in transit, the burden held not on the carrier of proving a lack of damage or negligence by a preponderance of evidence. *Kansas City, M. & O. Ry. Co. of Texas v. Worsham* (Civ. App.) 149 S. W. 755.

A carrier of live stock has the burden of explaining a delay. *Texas & P. Ry. Co. v. Dunford* (Civ. App.) 152 S. W. 1129.

Where plaintiff proved delivery of the goods to the steamship company in good order and delivery by the company to the terminal carrier in a damaged condition, the burden was then on the company to show that its vessel was seaworthy when it left port, and that the injury was not due to its negligence. *Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co.* (Civ. App.) 154 S. W. 232.

199. — *Negligent fires.*—It appearing that the property of plaintiff was destroyed by fire originating from sparks emitted by defendant's engine used in operating its railroad, the burden of proof is on the defendant to show that all reasonable and proper precautions had been used in the construction of the engine to prevent the injury. *H. & T. C. R. R. Co. v. McDonough*, 1 App. C. C. § 653.

In an action for the value of property destroyed by fire originating from sparks emitted from a locomotive engine, slight proof of negligence is sufficient to throw the burden of exculpation upon the defendant. *G., C. & S. F. Ry. Co. v. Holt*, 1 App. C. C. § 838. But see *T. & P. Ry. Co. v. Ervay*, 3 App. C. C. § 47; *G., C. & S. F. Ry. Co. v. Johnson*, 3 App. C. C. § 123; *Railway Co. v. McDonough*, 1 App. C. C. § 653.

When property contiguous to the right of way is burned by sparks from the engine passing over the road, which ignite the dry grass on the right of way, and injury results therefrom, in a suit for damages the burden of proof is on the railway company to show that there was no negligence. *Railway Co. v. Hogsett*, 67 T. 685, 4 S. W. 365; *Same v. Benson*, 69 T. 407, 5 S. W. 822, 5 Am. St. Rep. 74; *Same v. Horne*, 69 T. 643, 9 S. W. 440.

A charge that the burden was on defendant to show that a spark arrester on his engine was in good condition, and that the train was properly handled, held proper. *Tyler S. E. Ry. Co. v. Hitchins*, 26 C. A. 400, 63 S. W. 1069.

In action against railroad for damages from fire communicated by sparks, evidence that equipment was proper held not to relieve defendant from burden of proving no negligence in management. *Texas Southern Ry. Co. v. Hart*, 32 C. A. 212, 73 S. W. 833.

Where property is shown to have been damaged by fire from the locomotive of a railroad company, the burden is on the railroad to overthrow presumption of negligence. *St. Louis Southwestern Ry. Co. of Texas v. Goodnight*, 32 C. A. 256, 74 S. W. 583.

Where plaintiff has proved that a fire was set out by defendant's engine, the burden is upon defendant to show that there was no negligence. *Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co.* (Civ. App.) 106 S. W. 1140; *Same v. McFarland* (Civ. App.) 106 S. W. 1144.

Proof that fire escaped from defendant's engine while being operated alongside a platform, and set fire to plaintiff's cotton stored thereon, made out a prima facie case, and the burden of proof was shifted to defendant to defeat plaintiff's right of recovery. *Crawford & Byrne v. St. Louis S. W. Ry. Co.* (Civ. App.) 127 S. W. 869.

Where the petition, in an action against a railroad for setting fire to property, alleged a duty on the company to use fuel oil in its engines, the burden of showing that it was negligent in using coal, instead of oil, was on plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.* (Civ. App.) 146 S. W. 336.

A charge, in an action for setting fire to property, that the fact that sparks from the engine set the fire made out a prima facie case, rebuttable only by proof of use of ordinary care in selecting a fuel ordinarily used, and requiring such care to be proved by a preponderance of evidence placed the burden of disproving negligence as to the fuel used on the company, and was erroneous. *Id.*

An instruction in an action against a railroad company for injury to property by fire held erroneous for placing the burden of negating contributory negligence on plaintiff. *Furst-Edwards & Co. v. St. Louis S. W. Ry. Co.* (Civ. App.) 146 S. W. 1024.

200. — *Killing or injuring live stock.*—Negligence of railroad must be shown where stock is killed at a point fenced in by company. *Bethje v. Railroad Co.*, 26 T. 604; *T. C.*

R. R. Co. v. Childress, 64 T. 346; I. & G. N. R. R. Co. v. Samora, 1 App. C. C. § 155; T. & P. R. R. Co. v. Miller, 1 App. C. C. § 263; I. & G. N. R. R. Co. v. Smith, 1 App. C. C. § 844.

In an action for damages against a railroad company for killing stock at a point which had been fenced, or in the street of an incorporated city, the plaintiff must show negligence on the part of defendant. I. & G. N. R. R. Co. v. Samora, 1 App. C. C. § 155; I. & G. N. R. R. Co. v. Leuders, 1 App. C. C. § 314; I. & G. N. R. R. Co. v. Smith, 1 App. C. C. § 844; I. & G. N. R. R. Co. v. Cocke, 64 T. 151.

When the plaintiff shows the killing of his stock, the burden of proof is on the defendant to show that the track where the injury occurred was fenced or within a street of an incorporated city (T. & P. R. R. Co. v. Miller, 1 App. C. C. § 263; T. C. Ry. Co. v. Childress, 64 T. 346), so as to impose upon plaintiff the burden of proving negligence.

In the absence of evidence showing negligence in an action for killing horses on track, defendant need not show that statutory signals were given. Missouri, K. & T. Ry. Co. of Texas v. Willis, 17 C. A. 228, 42 S. W. 371.

In an action for killing stock at a public crossing, where the company cannot fence its track, the burden is on plaintiff to prove negligence. Texas & P. Ry. Co. v. Scrivener (Civ. App.) 49 S. W. 649.

In an action to recover for horses killed by defendant's trains, where the evidence shows that they were on the main track when struck, the burden of showing that it was relieved from fencing its tracks at that point is on the defendant. Missouri, K. & T. Ry. Co. of Texas v. Willis (Civ. App.) 52 S. W. 625.

In an action against a railroad company for killing a horse on its unfenced right of way, the burden of proof held to be on the plaintiff throughout. Missouri, K. & T. Ry. Co. v. Kennedy, 33 C. A. 445, 76 S. W. 943.

In an action against a railroad for the value of mules killed at a siding, the burden was on plaintiff to prove negligence of defendant's employes. Galveston, H. & S. A. Ry. Co. v. Cassinelli & Co. (Civ. App.) 78 S. W. 247.

In an action against a railroad for the killing of a mule at a point on defendant's line not required to be fenced, the burden is on plaintiff to show negligence. Houston, E. & W. T. Ry. Co. v. McMillan, 37 C. A. 483, 84 S. W. 296.

Where plaintiff's mare was killed within defendant's switch limits, and at a place where public policy prevented the fencing of the tracks, the burden was on plaintiff to establish negligence of defendant. Gulf, C. & S. F. Ry. Co. v. Bennett (Civ. App.) 126 S. W. 607.

In an action against a railroad company for killing mules, the burden of establishing that the company was not required to fence its track at the place of the accident held to be upon it. Texas Cent. R. Co. v. Hico Oil Mill (Civ. App.) 126 S. W. 627.

One suing for an injury to an animal by a train at a place where the railroad company was not required to fence its tracks held to have the burden of proving negligence in the operation of the train; proof that is merely consistent with negligence being insufficient. St. Louis Southwestern Ry. Co. of Texas v. Conley (Civ. App.) 142 S. W. 36.

One suing a railroad company for the loss of an animal killed by a train must, to discharge the burden of proof, show that a train struck and killed the animal. Marshall & E. T. Ry. Co. v. Boaz (Civ. App.) 157 S. W. 216.

201. — Injuries to third persons by acts of servants and independent contractors. — The burden held upon defendant to show that contractors through whose negligence plaintiff was injured were independent contractors. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

Where a plaintiff injured in a collision with an automobile shows defendant's ownership of the automobile and its negligent operation by a servant, defendant, to escape liability, must show that the servant was not acting within the scope of his employment. Studebaker Bros. Co. v. Kitts (Civ. App.) 152 S. W. 464.

V. Sufficiency of Evidence to Sustain Burden of Proof in First Instance

202. Prima facie case.—The possession by the acceptor of a draft, drawn with a blank for the name of the payee and without an indorsement, is prima facie evidence that the draft had been in circulation and had been paid by the acceptor, but was rebutted by proof of custom to leave draft for acceptance, or other fact tending to controvert the presumption arising from possession, especially where the acceptor failed to prove to whom payment was made. Close v. Fields, 9 T. 422.

Where the plaintiff gave in evidence a deed to himself, and proved his possession of the land subsequent to the date thereof until within a short time before the alleged trespass, and his title appeared to be notorious, and the discontinuance of his possession was explained in such a manner as to raise no presumption against his right, it was held that there was sufficient evidence of title to enable the plaintiff to maintain a suit for damages for cutting timber. Kolb v. Bankhead, 18 T. 228.

An order, in writing, from the person entitled to a bounty warrant to the adjutant-general, to issue the warrant in the name of the person to whom the order was delivered, stating that the latter is the rightful owner of the warrant by purchase, was held, as between the parties, to be prima facie evidence that the person receiving the order was the owner of the warrant. Andrews v. Smithwick, 20 T. 111.

When the plaintiff has proved a prima facie legal title in himself, and the evidence of defendant does not establish title in him, it is proper for the court to instruct the jury to return a verdict for plaintiff. Montgomery v. Carlton, 56 T. 361.

The receipt of a carrier for articles in good order prima facie establishes its liability, and shifts upon it the burden of proof to contradict the recital in the receipt. Tex. Exp. Co. v. Dupree et al., 2 App. C. C. § 318.

Before the burden of proof shifts in any case the plaintiff in trespass to try title must establish a prima facie case in his favor. This cannot be done by merely showing a levy under writ of attachment, judgment, execution and sheriff's deed to plaintiff, and then showing that defendant claims under the defendant in execution. The plaintiff must also show that the defendant's claim originated after the levy of the writ of attachment. Sebastian v. Martin-Brown Co., 75 T. 291, 12 S. W. 986.

A verdict at an inquest is prima facie evidence to show death by suicide. *Insurance Co. v. Hayward* (Civ. App.) 27 S. W. 36.

Plaintiff showing title from a common source makes out a prima facie case. *Simmons Hardware Co. v. Davis*, 27 S. W. 62, 87 T. 146; *Collins v. Davidson*, 24 S. W. 858, 6 C. A. 73.

In an action for breach of warranty in a deed, plaintiff is required only to make out a prima facie case. *Witte v. Pigott* (Civ. App.) 55 S. W. 753.

In an action on a claim against an estate, plaintiff makes a prima facie case on proving the debt, and it is not necessary for him to prove that payment has not been made. *Kartoghian v. Harboth* (Civ. App.) 56 S. W. 79.

Where the name of the addressee of a telegram was changed from "Norris" to "Nortys" in the transmission of the message, such change was prima facie evidence of the company's negligence. *Western Union Tel. Co. v. Norris*, 25 C. A. 43, 60 S. W. 982.

Testimony of the insured that the property described in the policy sued on was in his private dwelling held prima facie proof of ownership. *American Cent. Ins. Co. v. White*, 32 C. A. 197, 73 S. W. 827.

In trespass to try title, plaintiff's evidence of purchase of premises as free public school land held to have made a prima facie case. *Binion v. Harris*, 32 C. A. 371, 74 S. W. 580.

In an action against a carrier for injuries to a passenger, evidence held not to show her prima facie guilty of contributory negligence. *Gillum v. New York & T. S. S. Co.* (Civ. App.) 76 S. W. 232.

Proof of delivery of forged message and of loss resulting from reliance thereon held a prima facie case against telegraph company, casting burden of showing freedom from negligence on it. *Western Union Tel. Co. v. Uvalde Nat. Bank*, 97 T. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573.

Where defendant claimed title by adverse possession and payment of taxes for five years, production of receipts for the taxes established prima facie that the land had been rendered for taxes for the years covered by the receipts. *Thomson v. Weisman*, 98 T. 170, 82 S. W. 503.

Where plaintiff has proved that both he and defendant claim from the same grantor and that plaintiff has the superior title from that source, he has made out a prima facie case. *Gilmer v. Beauchamp*, 40 C. A. 125, 87 S. W. 907.

Where, in an action to recover for breach of a contract to deliver cattle, plaintiff proved the contract price and the market price of the cattle, no further burden rested on him. *McKay v. Elder* (Civ. App.) 92 S. W. 268.

Burden on defendant to show plaintiff not a purchaser of land for value held prima facie discharged. *J. S. Brown Hardware Co. v. Catrett*, 45 C. A. 647, 101 S. W. 559.

In an action against a railroad company for damages to plaintiff's crop, held, that defendant sustained its burden of proving that the fence inclosing plaintiff's land was down by showing that the fence was down at one place. *Kansas City, M. & O. Ry. Co. of Texas v. Mayfield* (Civ. App.) 107 S. W. 940.

A purchaser in a contract of sale of real estate held prima facie liable on a note given and accepted as a cash payment at the time of the execution of the contract. *Beauchamp v. Couch*, 54 C. A. 471, 117 S. W. 924.

One who shows that his title consists of a purchase of school lands, which is recognized by the officers of the state in the manner prescribed by the statute, makes a prima facie case against an adversary claiming under a subsequent rejected application. *Barnes v. Williams*, 102 T. 444, 119 S. W. 89.

The nature of the burden of proof resting on a plaintiff in trespass to try title showing a good prima facie title, upon the production of a patent issued by the state, stated. *Murphy v. Luttrell*, 56 C. A. 149, 120 S. W. 905.

In an action on a sworn account, defendant's sworn plea, by admitting the correctness of the items of the account, made a prima facie case for plaintiff, though the plea also alleged that defendant was entitled to certain credits from the amount claimed as due, and the burden was upon defendant to establish such credits by other proof. *Blackwell Durham Tobacco Co. v. Jacobs*, 57 C. A. 295, 122 S. W. 66.

A showing that a package was delivered to and accepted by a carrier for transportation and was lost while in its custody established a prima facie case of negligence. *Head v. Pacific Express Co.* (Civ. App.) 126 S. W. 682.

Under a contract to furnish telephone service from month to month on payment of rent in advance, a receipt for any one month is prima facie proof that previous months have been paid. *Southwestern Telegraph & Telephone Co. v. Luckett* (Civ. App.) 127 S. W. 856.

In trespass to try title, in which plaintiff relied upon a purchase from the state as school lands, evidence held to show prima facie that the land had been forfeited. *Houston v. Koonce* (Civ. App.) 136 S. W. 1159.

Proof held to establish prima facie a carrier's liability for freight lost. *Houston & T. C. R. Co. v. Parker* (Civ. App.) 138 S. W. 437.

Plaintiff, who showed a conveyance from the common source to one from whom plaintiff claimed title by virtue of a sheriff's sale in attachment, held to cast the burden of proof on defendant by introducing the order of sale and the sheriff's return, though he did not offer the sheriff's deed in evidence. *Levy v. Persons* (Civ. App.) 145 S. W. 286.

In an action to foreclose a vendor's lien note brought by a transferee, the note introduced in evidence, and proof of the contemporaneous execution of the conveyance and of a transfer of the note before maturity for a valuable consideration, established a prima facie case. *Watts v. Snodgrass* (Civ. App.) 152 S. W. 1149.

A prima facie case of negligence is made out when it is shown that the tracks projected above the street so as to cause an obstruction, which resulted in causing the wheels of the vehicle to skid, so that it could not avoid the collision. *San Antonio Traction Co. v. Cassanova* (Civ. App.) 154 S. W. 1190.

The failure of a telegraph company to deliver a message received for transmission at Santo, Tex., at 8 p. m. January 14th, to Clairmont, Tex., until 11 a. m. January 16th, establishes a prima facie case of negligence, and the company has the burden to show

some cause excusing it. *Western Union Telegraph Co. v. Glenn* (Civ. App.) 156 S. W. 1116. For *res ipsa loquitur* doctrine, see ante, § 106.

VI. General Rules as to Weight and Sufficiency of Evidence

203. Weight and conclusiveness in general.—In a suit to reform an insurance policy for mistake, it is not necessary to the granting of such relief that the plaintiff and defendant should agree in their evidence that the mistake was mutual. *Ætna Ins. Co. v. Brannon* (Civ. App.) 91 S. W. 614.

Statements of what the witness felt or thought are not conclusive, and facts which he afterwards admits to be true, when of sufficient probative force, are much safer guides as to his thoughts, feelings, or knowledge than his statements of that fact. *Western Union Telegraph Co. v. Burton*, 53 C. A. 378, 115 S. W. 364.

Certain contradicting testimony held entitled to little weight. *Uvalde County v. Oppenheimer*, 53 C. A. 137, 115 S. W. 904.

The jury must weigh conflicting evidence, and determine its probative force. *Morgan's L. & T. R. & S. S. Co. v. Street*, 57 C. A. 194, 122 S. W. 270.

204. Number of witnesses.—Uncorroborated testimony of single witness that deed executed by decedent was intended as mortgage is insufficient to establish such fact. *Muckelroy v. House*, 21 C. A. 673, 52 S. W. 1038.

Evidence is not weighed by the number, but the credibility, of the witnesses and the probable truthfulness of their testimony. *International & G. N. R. Co. v. Poloma* (Civ. App.) 123 S. W. 1149.

205. Positive and negative evidence.—Testimony of witnesses, one that "the last I heard of Mrs. H. was during the war after the divorce. I understood she lived with a man named E. in 1863 or 1864 in Galveston. There was a report that she was dead, but I cannot say anything about her. I think I heard the report of her death several years ago;" another, that "the last I heard of Mrs. H. was during the war." "I never heard of Mrs. H. after she left old Mr. H.; that is, since eighteen or twenty years;" and another, that "I have heard nothing from my former wife since the divorce. N. told me her mother was dead; that a report of her death reached her; that she died not long since. I never inquired as to my former wife in Galveston," is sufficient to prove the death of a party. *Schwarzhof v. Necker*, 1 U. C. 325.

A finding that no signals were given by a train on approaching a crossing held supported by evidence, where the witnesses did not swear they heard no signals, but testified they were in a position to have heard them and did not. *International & G. N. R. Co. v. Dalwigh* (Civ. App.) 48 S. W. 527.

Evidence of a physician held not contradictory to testimony that other physicians had treated plaintiff for a particular disease. *St. Louis & S. F. R. Co. v. Smith*, 34 C. A. 612, 79 S. W. 340.

Evidence in an action for injury to a live stock shipment held insufficient to raise the issue of the stock having no market value at their destination. *St. Louis, I. M. & S. Ry. Co. v. Berry*, 42 C. A. 470, 93 S. W. 1107.

A direct connection between the negligence and injury must be shown, but it is not necessary that plaintiff's evidence exclude all mere possibilities that the injury may have been produced by other causes, if the reasonable deduction from the evidence is that defendant's negligence was the producing cause. *Houston Lighting & Power Co. of 1905 v. Barnes* (Civ. App.) 152 S. W. 722.

206. Circumstantial evidence.—Colin De Bland and Colin Bland were by circumstantial evidence shown to have been used as names by one person. *Leland v. Eckert*, 81 T. 226, 16 S. W. 897.

See circumstantial evidence sufficient to sustain an ancient grant as to power of the officer granting, the locality of the land, the subsequent recognition of its validity, possession as established by documentary testimony, the state of country and the changes in government accounting for the absence of the original grants or authenticated copies. *Railway Co. v. Uribe*, 85 T. 386, 20 S. W. 153.

Negligence of a company in injuring a cow on the track held shown by circumstantial evidence. *San Antonio & A. P. Ry. Co. v. Yeager* (Civ. App.) 43 S. W. 28.

To establish title under a lost deed, the existence of which is proven by circumstantial evidence, proof that the grantee took possession of a part of the land conveyed by the deed and asserted ownership of all of it was sufficient. *Simmons v. Hewitt* (Civ. App.) 87 S. W. 188.

Where negligence is sought to be proved by circumstantial evidence, the circumstances must be such as to reasonably lead up to and establish such negligence. *Missouri, K. & T. Ry. Co. v. Greenwood*, 40 C. A. 252, 89 S. W. 810.

In an action against an executrix for architect services rendered to her testator, circumstantial evidence held sufficient to show plaintiff's employment and the rendition of the services at decedent's request. *Buckler v. Knezell* (Civ. App.) 91 S. W. 367.

Circumstantial evidence held admissible to prove the sending of papers by a certain person. *Cain v. Corley*, 44 C. A. 224, 99 S. W. 168.

In establishing the execution of a deed by circumstantial evidence, it is not necessary that the circumstances should remove all reasonable doubt as to the execution, a preponderance of the evidence being sufficient. *Brewer v. Cochran*, 45 C. A. 179, 99 S. W. 1033.

The doctrine of the presumption of the execution of a deed by circumstances, where no better evidence is obtainable, must be liberally applied for the protection of titles long relied on in good faith, the evidence of which has been lost through carelessness or accident, the destruction of records, and the death of all the persons originally connected therewith, especially when the claim of title is accompanied by the entire absence of any assertion of claim of right inconsistent with the claim under the deed sought to be established. *Pratt v. Townsend* (Civ. App.) 125 S. W. 111.

To establish the existence of a deed 45 years old, the same circumstantiality of proof is not required as where testimony of the precise transaction is supposedly accessible. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

Negligence may be proved by circumstantial evidence. *St. Louis, B. & M. Ry. Co. v. Drodgy* (Civ. App.) 132 S. W. 946.

Negligence held provable by circumstantial evidence. *Wilson v. Werry* (Civ. App.) 137 S. W. 390.

Negligence must be proved, but may be inferred or proved by circumstantial evidence. *Houston E. & W. T. Ry. Co. v. Boone*, 105 T. 188, 146 S. W. 533.

Special finding of the jury that pipe delivered by seller would stand the pressure required by the contract of sale held supported by the evidence, although no witness testified directly that it would. *Mound Oil Co. v. F. W. Heitmann Co.* (Civ. App.) 148 S. W. 1187.

207. **Credibility of witnesses.**—See Rule 1, ante.

208. **Evidence introduced by adverse party.**—Evidence offered by defendant in trespass to try title to show that plaintiff's and defendant's title is from a common source cannot be used by plaintiff to establish her title. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

209. **Evidence improperly admitted.**—Incompetent evidence will not be considered in determining whether a finding in a case tried to the court is contrary to the evidence. *Talbot v. Dillard*, 22 C. A. 360, 54 S. W. 406.

Certain evidence, though hearsay, yet having been admitted without objection, held not without probative force. *Gray v. Fussell*, 48 C. A. 261, 106 S. W. 454.

Evidence introduced cannot be considered in support of a judgment, unless the pleadings are sufficient to support it. *Kindell-Clark Drug Co. v. Myers* (Civ. App.) 140 S. W. 463.

Certain evidence in trespass to try title, in which defendant sought to reform a deed executed by plaintiff and wife for mistake, in description, though hearsay, if not objected to, held to sustain a finding that plaintiff's wife knew that the deed did not convey an omitted tract. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

In an action by a physician for compensation for professional services, testimony by the defendant, who was not a medical expert, that the physician was incompetent is not sufficient evidence to support a finding in favor of the defendant on that ground. *Feingold v. Lefkovitz* (Civ. App.) 147 S. W. 846.

210. **Uncontroverted evidence.**—The force of evidence, though slight, is greatly increased by the failure of the opposite party to rebut it, where it is obvious that the means to do so are readily accessible to the party. *Bailey v. Hick*, 16 T. 222; *Thompson v. Shannon*, 9 T. 563; *Gray v. Burk*, 19 T. 228; *Needham v. State*, 19 T. 332; *Shackelford v. Wheeler*, 7 T. 553. But this rule does not apply to one acting in a fiduciary capacity. *Chandler v. Meckling*, 22 T. 26.

Uncontradicted evidence held sufficient to establish a fact in issue, though of little probative force. *Crebbin v. Farmers' Nat. Bank* (Civ. App.) 50 S. W. 402.

The uncontradicted testimony of a foreman in charge of the construction of a telegraph line that the erection of the poles required special skill, and that an employé was incompetent, is sufficient to establish the incompetency of such servant. *Postal Tel. Cable Co. v. Coote* (Civ. App.) 57 S. W. 912.

In an action for personal injury, held, the jury was not bound to take as conclusive testimony as to what witness saw and heard when the accident occurred. *McCracken v. Lantry-Sharpe Contracting Co.*, 45 C. A. 485, 101 S. W. 520.

In an action for injuries to an employé assisting in raising a smokestack to a perpendicular position, the jury held authorized to find that the employer was negligent in failing to furnish a proper hook for the block and tackle used in lifting it. *El Paso Foundry & Machine Co. v. De Guereque*, 46 C. A. 86, 101 S. W. 814.

The uncontradicted evidence of one substantially a party to the suit is not necessarily conclusive on the jury. *Dubinski Electric Works v. J. Lang Electric Co.* (Civ. App.) 111 S. W. 169.

The jury cannot lawfully deny proper weight to undisputed facts with no suspicion cast thereon. *Grand Fraternity v. Melton*, 102 T. 399, 117 S. W. 788.

The undisputed testimony of an employé of one of the parties, consisting largely of opinions and conclusions, would not necessarily be binding on the jury. *Texas & P. Ry. Co. v. Taylor*, 64 C. A. 419, 118 S. W. 1097.

The jury need not believe the evidence of a party, though not directly contradicted. *Hobart Nat. Bank v. Fordtran* (Civ. App.) 122 S. W. 413.

The testimony of a party is not necessarily binding, though it is not expressly contradicted. *Thos. Goggan & Bros. v. Synnott* (Civ. App.) 134 S. W. 1184.

The question of what the law is in a foreign country held one of fact. *Banco Minero v. Ross & Masterson* (Civ. App.) 138 S. W. 224.

A court or jury is not bound to accept the uncontradicted statements of a witness as true. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

A verdict for plaintiff based on no evidence except the testimony of defendants negating plaintiff's contention cannot stand. *Starkey v. H. O. Wooten Grocery Co.* (Civ. App.) 143 S. W. 692.

The trial court cannot disregard uncontroverted evidence, in proceedings involving the custody of minor children, because of his peculiar knowledge of the parties or his observations from the testimony of the witnesses. *Hall v. Whipple* (Civ. App.) 145 S. W. 308.

Where all the witnesses testifying to the value of a horse placed its market value at a specified sum, and there was no evidence of any less value, the jury could not find a less sum. *Moore v. St. Louis, S. F. & T. Ry. Co.* (Civ. App.) 146 S. W. 1070.

Where the testimony as a whole is undisputed, the jury may not disregard it. *Brooks v. Davis* (Civ. App.) 148 S. W. 1107.

Although plaintiff gave the only testimony as to the value of the property charged to have been negligently burned, and was not contradicted, it was not conclusive on the jury. *Thomas v. Saunders* (Civ. App.) 150 S. W. 768.

211. **Degree of proof in general.**—To permit a contemporaneous condition to be engrafted on a deed in writing, it should be upon proper allegations of fraud, accident or mistake and upon clear and satisfactory evidence. *Railway Co. v. Garrett*, 52 T. 133; *Railway Co. v. Pfeuffer*, 56 T. 66; *Railway Co. v. Dawson*, 62 T. 260; *Bruner v. Strong*, 61 T. 555; *Monks v. McGrady*, 71 T. 134, 8 S. W. 617.

The fact that a fraudulent or criminal fact is involved does not require a greater de-

gree of certainty. *Heilgmann v. Rose*, 81 T. 222, 16 S. W. 931, 13 L. R. A. 272, 26 Am. St. Rep. 804; *Wylie v. Posey*, 71 T. 34, 9 S. W. 87.

It is error in a foreclosure action to charge that the issue must be established "beyond a reasonable doubt." *Pace v. American Freehold Land & Mortgage Co.*, 17 C. A. 506, 43 S. W. 36.

Testimony that it was a common thing for passengers to ride on freight trains of defendant held not an expression of witness' opinion. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.) 55 S. W. 517.

In a civil suit, it is not necessary to prove a contested point to the "satisfaction" of the jury. *Collins v. Clark*, 30 C. A. 341, 72 S. W. 97.

In an action for breach of contract, evidence considered, and held insufficient to justify a finding that parol stipulations were omitted from the contract by mistake, and that the contract as to its terms was not conclusive. *Kansas City Packing Box Co. v. Spies* (Civ. App.) 109 S. W. 432.

A party is only required to establish a fact by a preponderance of the evidence, and not by clear and positive proof. *Simpson Bank v. Smith*, 52 C. A. 349, 114 S. W. 445.

Evidence which might serve to create a bare surmise or suspicion of a person's guilty participation in a joint act, but no more, is no evidence thereof, and is insufficient. *Wetzel v. Satterwhite* (Civ. App.) 125 S. W. 93.

In order to reform a policy for mistake, the evidence must be clear and convincing. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

One claiming that a deed absolute on its face is a mortgage must prove such fact by clear and satisfactory evidence. *Frazer v. Seureau* (Civ. App.) 128 S. W. 649.

Plaintiff held to have the burden of proving his case only by a preponderance of the evidence, and not to the satisfaction of the jury. *Grigsby v. Texas & P. Ry. Co.* (Civ. App.) 137 S. W. 709.

The jury should decide all issues according to the preponderance of evidence. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

212. Sufficiency to support verdict or finding.—Where contradictory statements have been made by witnesses the evidence is sufficient to support the findings of the court; but when these statements are made by the same witness they are not enough to justify a reliable conclusion. *Cherry v. Butler*, 4 App. C. C. § 271, 17 S. W. 1090; *Easton v. Dudley*, 78 T. 236, 14 S. W. 583.

Testimony that a person died about 1860 will not support a finding that the death occurred prior to August 14, 1860. *Lindsay v. Freeman*, 33 T. 259, 18 S. W. 727.

Undisputed possession under a common source for more than thirty years, together with the testimony of a witness that in his belief he had seen a deed from the party having power to execute it, held sufficient to support a finding that such deed was executed. *Wells v. Burts*, 22 S. W. 419, 3 C. A. 430; *Smith v. Swan*, 22 S. W. 247, 2 C. A. 563; *Blackburn v. Norman* (Civ. App.) 30 S. W. 718.

Evidence held insufficient to sustain finding. *Heidenheimer v. Tannenbaum* (Civ. App.) 44 S. W. 57.

A finding that an ambiguous written contract of sale was not a gambling contract held supported by the evidence. *Cleveland v. Heidenheimer* (Civ. App.) 44 S. W. 551.

Evidence considered, and held to sustain a finding that the names "Moore" and "Moroe," in certain instruments, were intended for "Monroe." *Green v. Fisher* (Civ. App.) 45 S. W. 429.

A finding that an execution was issued is supported by evidence that a judgment was recovered against the defendants therein, and their property sold by the sheriff to satisfy it. *Boyd v. Miller*, 22 C. A. 165, 54 S. W. 411.

Where plaintiff's testimony as to a cause of injury is corroborated by two other witnesses, it is sufficient evidence to support a verdict of the jury in his favor. *San Antonio & A. P. Ry. Co. v. Choate*, 22 C. A. 618, 56 S. W. 214.

An assignment of error that a verdict for defendant, in an action on a note defended on the ground of a failure of consideration, was contrary to the evidence, held not sustainable. *McCardell v. Henry*, 23 C. A. 383, 57 S. W. 908.

Testimony to the effect that "cattle" were in the habit of going across the right of way to higher ground held to include horses and mules. *Gulf, C. & S. F. Ry. Co. v. Clay*, 23 C. A. 176, 66 S. W. 1115.

In an action against a railroad company for personal injury, evidence held to support a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Edwards* (Civ. App.) 67 S. W. 891.

Testimony that there were five or six families residing in a village at a certain time will support a finding that there were six families then residing there. *Mikael v. Equitable Securities Co.*, 32 C. A. 182, 74 S. W. 67.

Evidence in action for purchase price of land held not to require a finding of failure of title. *Kiser v. Lunsford*, 38 C. A. 463, 86 S. W. 927.

In trespass to try title, evidence held to sustain a finding of the execution and delivery of a lost deed under which defendants claimed title. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

In an action against a telegraph company for damages for breach of its contract to furnish stock market reports, evidence held to sustain a finding that the contract was not made to enable plaintiff to deal in margins in violation of law. *Western Union Telephone Co. v. Bradford*, 52 C. A. 392, 114 S. W. 686.

In an action for breach of marriage promise, evidence held to support a verdict for plaintiff. *Hill v. Houser*, 51 C. A. 359, 115 S. W. 112.

In an action on notes claimed to have been given for the purchase price of land, competent evidence held to support a finding that the purchase money had been paid by the purchaser when he executed notes reciting that they were for the purchase price. *Edwards v. White* (Civ. App.) 120 S. W. 914.

In an action against a city for injuries to a mule hired by the street commissioner, while it was being worked in repairing streets, evidence held to justify a finding that the commissioner and his agent in doing the work were acting within the scope of their authority in using the mule to repair the streets. *City of Houston v. Dupree* (Sup.) 126 S. W. 1115.

In forcible entry and detainer to recover land from which plaintiff was forcibly ejected under an execution which did not include the land taken, evidence held to sustain a finding that the beginning call of the land described in the writ was correct, so that the land described did not include that from which plaintiff was ousted. *Granberry v. Storey* (Civ. App.) 127 S. W. 1122.

Evidence held to justify a finding that a vendor did not contract to waive the vendor's lien at the time of sale. *Wittliff v. Biscoe* (Civ. App.) 128 S. W. 1153.

Negligence is a fact, and its causal connection with the catastrophe must be established with a moral certainty to justify a verdict. *Houston, E. & W. T. Ry. Co. v. Boone* (Civ. App.) 131 S. W. 616.

In an action by one of the signers of a written contract, against the other signers for contribution for money advanced, evidence held to sustain a finding that one of the signers, after acquiring knowledge of the erasure of the name of another signer from the instrument, consented to or ratified such alteration. *Matson v. Jarvis* (Civ. App.) 133 S. W. 941.

In an action by a trustee in bankruptcy to recover a payment made by the bankrupt within four months of bankruptcy, evidence held sufficient to support a finding that defendant had no knowledge of the insolvency of the bankrupt at the time the payment was made. *Couturie v. Crespi* (Civ. App.) 134 S. W. 257.

In trespass to try title, evidence held to support a finding that there was a lost grant to the predecessors in the interest of the defendant. *Masterscn v. Harrington* (Civ. App.) 145 S. W. 626.

A finding will not be held to be unsupported by evidence, if it is supported by unobjected to, though incompetent, testimony. *Boyce v. Bickford* (Civ. App.) 145 S. W. 1082.

In action to foreclose vendor's lien by assignee whose assignment was not recorded, evidence held to support finding that subsequent lienor acquired its lien in good faith without notice that its agent exercised ordinary care and prudence, that a reasonably prudent person would have believed that plaintiff's assignor was the owner of the notes, and that the agent did so believe. *Busch v. Broun* (Civ. App.) 152 S. W. 683.

In trespass to try title, where defendants relied on a lost deed, evidence held to sustain a finding that no such instrument was ever executed. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

213. Preponderance of evidence.—A preponderance of evidence is in general sufficient to support the verdict. *Sparks v. Dawson*, 47 T. 133; *Prather v. Wilkins*, 63 T. 187, 4 S. W. 252; *Wyllie v. Posey*, 71 T. 34, 9 S. W. 87; *Railway Co. v. Matula*, 79 T. 577, 15 S. W. 573; *Wallace v. Berry*, 83 T. 328, 18 S. W. 595; *Emerson v. Mills*, 83 T. 385, 18 S. W. 805; *Railway Co. v. Bartlett*, 81 T. 42, 16 S. W. 638. Error in the admission of evidence is not ground for a reversal when no other verdict could have been rendered on the competent evidence. *Nelson v. Walker* (Civ. App.) 33 S. W. 160.

In determining whether a deed was intended by the parties to it as a mortgage, a preponderance of evidence is sufficient. *Prather v. Wilkins*, 63 T. 187, 4 S. W. 252.

In civil cases a verdict may be based on the preponderance of evidence. *Baines v. Ullmann*, 71 T. 537, 9 S. W. 543; *Wallace v. Berry*, 83 T. 328, 18 S. W. 595; *Mo. Pac. Ry. Co. v. Bartlett*, 81 T. 42, 16 S. W. 638.

To overcome a prima facie proof of negligence, a preponderance of evidence is necessary. *Texas & P. Ry. Co. v. Ballinger* (Civ. App.) 40 S. W. 822.

Prima facie case, made by proof that fire was set by sparks from defendant's locomotive, requires defendant only to meet it, and not to show by preponderance that it was not negligent. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 28 C. A. 395, 67 S. W. 182.

A charge in action on warranty of a chattel held to have required plaintiff to prove by a preponderance of evidence every material allegation of the complaint. *Ash v. Beck* (Civ. App.) 68 S. W. 53.

A plaintiff, in an action for being run over by a train while on the tracks, has not the burden of proving by a preponderance of the evidence that he was not guilty of contributory negligence. *Kroeger v. Texas & P. Ry. Co.*, 30 C. A. 87, 69 S. W. 809.

A verdict that there was no partnership held not against the preponderance of the evidence. *Casey-Swasey Co. v. S. G. Treadwell & Co.*, 32 C. A. 480, 74 S. W. 791.

In a debtor's action to enforce an alleged agreement permitting him to redeem incumbered property, bought in by the secured creditor, it is sufficient if the debtor prove his case by preponderance of the evidence. *First Nat. Bank v. Moor*, 34 C. A. 476, 79 S. W. 53.

One repudiating a release of all claims for personal injuries on the ground that he was mentally incapable of understanding the effect of the execution thereof need only establish the fact by a preponderance of the evidence. *Galveston, H. & S. A. Ry. Co. v. Green* (Civ. App.) 91 S. W. 380.

An instruction, in an action against a railroad company for fire set by sparks from its locomotive, held erroneous because requiring from the company a preponderance of the evidence to rebut plaintiff's case. *St. Louis & S. F. R. Co. v. Hooser*, 44 C. A. 229, 97 S. W. 708.

A jury need not be "satisfied that plaintiff has established his cause of action by a preponderance of evidence" before they may find for him; it being only necessary that they believe from a preponderance of the evidence that he has proved the facts essential to recovery. *O'Connell v. Storey* (Civ. App.) 105 S. W. 1174.

The state, in an action by it for the recovery of a statutory penalty, need prove its case only by a preponderance of the evidence. *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 918.

The preponderance of the evidence does not necessarily depend on the number of witnesses on either side. *El Paso Electric Ry. Co. v. Sierra* (Civ. App.) 109 S. W. 986; *Williams v. Hennefeld*, 57 C. A. 54, 120 S. W. 567.

A railway company held not bound to show by a preponderance of the evidence that it has used ordinary care in equipping its locomotives, etc., to rebut the presumption of negligence arising from damage caused by a fire from a locomotive. *St. Louis Southwestern Ry. Co. of Texas v. Starks* (Civ. App.) 109 S. W. 1003.

In determining whether an award of damages for property taken in condemnation

was excessive, the mere excess in the number of witnesses to a lower value cannot control. *Foley v. Houston Belt & Terminal Ry. Co.*, 50 C. A. 218, 110 S. W. 96.

Proof by a "preponderance of evidence" means proof inducing that state of mind in which there is felt to be a preponderance of the evidence in favor of the proposition, and the number of witnesses or quantity of the evidence is not the test in determining where lies the preponderance; the personal element behind the testimony which induces the state of mind in the trier of facts being the controlling consideration. *San Antonio Traction Co. v. Higdon* (Civ. App.) 123 S. W. 732.

Requiring defendant in an action for setting fire to property to overcome a prima facie case by a preponderance of the evidence held error. *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.* (Civ. App.) 146 S. W. 336.

214. Matters of defense and rebuttal.—When a publication is privileged and believed to be true, the prima facie case of libel from the false and defamatory publication is deemed to have been fully met, and malice in fact must be established by other evidence, as by the style or manner of the writing or by extraneous facts. *Behee v. Railway Co.*, 71 T. 424, 9 S. W. 449.

In prosecution for slander of female, defendant need not establish the defense of bad reputation beyond a reasonable doubt. *Ballew v. State*, 48 Cr. R. 46, 85 S. W. 1063.

215. Particular facts or issues.—Evidence that the subscribing witness to a deed, and the officer before whom it was proven for record, were persons of good repute, is insufficient to establish the genuineness of the deed. *Belcher v. Fox*, 60 T. 527.

Sale is established by evidence of the contract of sale and delivery of thing sold. *Cooper v. Bumpass*, 1 App. C. C. § 499.

In a suit to reform a deed mistake or fraud should be clearly shown. *Monks v. McGrady*, 71 Tex. 134, 8 S. W. 617.

Similarity of name ordinarily is sufficient evidence of identity of the person in a chain of title. In absence of any other testimony it is error to submit to the jury the question of such identity. *Holstein v. Adams*, 72 T. 485, 10 S. W. 560; *Robertson v. Du Bose*, 76 T. 1, 13 S. W. 300; *Chamblee v. Tarbox*, 27 T. 144, 84 Am. Dec. 614; *Cox v. Cock*, 59 T. 524; *McCament v. Roberts*, 80 T. 316, 15 S. W. 580, 1054; *Smith v. Gillum*, 80 T. 120, 15 S. W. 794; *Ansaldva v. Schwing*, 81 T. 198, 16 S. W. 989.

Proof of name of patentee held sufficient to establish that plaintiffs were the rightful heirs. *Texas Land & Mort. Co. v. Bridgeman*, 21 S. W. 141, 1 C. A. 383.

Evidence held insufficient to show fraud in sale of machinery. *Haley v. Manning*, 21 S. W. 711, 2 C. A. 17.

Market value of stock of goods is what it can be sold for in bulk or in convenient lots and evidence of what it can be sold for at retail is not sufficient evidence of value. *Needham Piano & Organ Co. v. Hollingworth*, 91 T. 49, 40 S. W. 787.

Evidence examined, and held, that vendee could not avoid payment of price on the ground of the fraudulent representations of vendor. *Rowland v. Hamilton* (Civ. App.) 41 S. W. 541.

Evidence held to warrant a conclusion that property damaged belonged to plaintiff. *Texarkana & Ft. S. Ry. Co. v. Bulgier* (Civ. App.) 47 S. W. 1047.

Evidence held sufficient to warrant delivery of administrator's deed. *Miller v. Anders*, 21 C. A. 72, 51 S. W. 897.

Testimony of one witness of what was told him one year after an alleged agreement held insufficient to prove such agreement. *Parrish v. Williams* (Civ. App.) 53 S. W. 79.

Evidence held not to show certain conveyances as fraudulent, so as to constitute abandonment. *Butler v. Daniel*, 21 C. A. 628, 54 S. W. 29.

Evidence held sufficient to sustain plaintiffs' claim of title, based on a land certificate issued in the name of an ancestor several years after his death. *Lewis v. Bergess*, 22 C. A. 52, 54 S. W. 609.

Evidence held sufficient to show vacancy between adjacent surveys, notwithstanding field notes stated that boundary lines were identical. *Koch v. Poerner* (Civ. App.) 55 S. W. 386.

Evidence held to show that a location of one-half of the land called for in a headright certificate was located for the grantee, and not for the benefit of the locator. *Pool v. Greer*, 23 C. A. 423, 58 S. W. 171.

Evidence of a witness who had been in adverse possession of land for 11 years, that that tract was included in a larger tract, is not destroyed by his evidence, on cross-examination, that he does not know the corners of the larger tract. *Payton v. Caplen*, 24 C. A. 364, 59 S. W. 624.

That a father contracted with his minor child for his services held evidence that he had emancipated him. *Granrud v. Rea*, 24 S. A. 299, 59 S. W. 841.

Evidence of death of plaintiff's ancestor held insufficient. *Ross v. Blount*, 25 C. A. 344, 60 S. W. 894.

Evidence held not sufficient to show that plaintiffs were heirs of the person named in the bounty warrant as entitled to certain lands. *Malone v. Dick*, 94 T. 419, 61 S. W. 112.

Where suit was brought to establish a note as a claim against the estate of the deceased maker, the note having been given for money to be used in payment of a judgment against the maker, held not necessary for plaintiff to show that the judgment had not been paid; there being no evidence connecting them with the judgment. *George v. Ryon* (Civ. App.) 61 S. W. 138.

In an action against a carrier for failure to deliver stock at a place beyond its own route, evidence held to show a contract for the through transportation of the stock. *Texas Mexican Ry. Co. v. Gallagher* (Civ. App.) 64 S. W. 809.

Where the question was whether the beneficiary in a life policy had survived the insured, both having perished in a flood, evidence held insufficient to raise any issue as to the survivorship. *Hildebrandt v. Ames*, 27 C. A. 377, 66 S. W. 128.

Evidence held insufficient to show that an applicant for a homestead donation had obtained any right to a homestead. *Yarbrough v. De Martin*, 28 C. A. 276, 67 S. W. 177.

In a contest between adverse claimants of school land, evidence considered and held insufficient to show a sale to defendant prior to the date of notice from the general land office to the county clerk of such sale. *Steward v. Wagley* (Civ. App.) 68 S. W. 297.

Evidence examined, and held to sufficiently show that a particular headright land certificate had been passed upon and recommended as genuine by the traveling board of land commissioners, so as to authorize a survey, though the number and date given for the certificate in the report of the board did not correspond with its actual number and date. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

In view of evidence showing that lease of school lands issued in name of "Reedy" was in fact issued and delivered to "Reeder," who acquired the leasehold title, objections to evidence of payments by Reeder, and his assignment to plaintiff, were properly overruled. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 703.

Where the evidence shows that deposits of dead animals, etc., near plaintiff's residence were made by the city scavenger, and had been made frequently for many months, an objection that the evidence shows that the offensive deposits were not made by the city or any of its officers should be overruled. *City of Stephenville v. Bower*, 29 C. A. 384, 68 S. W. 333.

Evidence held to show executor's sale was for an inadequate price. *James v. Nease* (Civ. App.) 69 S. W. 110.

Evidence in an action for libel held to tend to show express malice, warranting exemplary damages. *St. Louis S. W. Ry. Co. of Texas v. McArthur*, 31 C. A. 205, 72 S. W. 76.

Evidence in an action by real estate broker for commissions held not to show such misrepresentations by broker, defeating sale, as to preclude recovery. *Scottish American Mortg. Co. v. Davis* (Civ. App.) 72 S. W. 217.

Evidence held to show that public lands had for some reason been withdrawn from the market after the first classification and appraisal. *Binion v. Harris*, 32 C. A. 371, 74 S. W. 530.

Evidence in an action for libel published, as charged by plaintiff, in pursuance of a conspiracy, examined, and held to show such conspiracy. *Cranfill v. Hayden* (Civ. App.) 75 S. W. 573.

A servant's earning capacity at the time of his injuries, which were permanent, held not conclusive as to his earning capacity as an element of damages. *Galveston, H. & S. A. Ry. Co. v. Appel*, 33 C. A. 575, 77 S. W. 635.

Under statute relative to homestead donations, proof of occupancy and improvement of one tract, held insufficient to warrant patent for another survey; there being nothing therein to identify the two tracts. *McClallahan v. Marshall*, 35 C. A. 579, 80 S. W. 862.

In an action for damages from a nuisance, causing sickness, a verdict awarding damages for the loss of time in caring for children held not sustained. *Houston, E. & W. T. Ry. Co. v. Reasonover*, 36 C. A. 274, 81 S. W. 329.

On the issue as to when defendant became able to pay the note sued on, evidence held insufficient to show that at a certain time he owned certain land. *Glass v. Adoue & Lobit*, 39 C. A. 21, 86 S. W. 798.

Evidence held insufficient to establish a novation. *Conly v. Hampton* (Civ. App.) 87 S. W. 1171.

In an action for injuries, evidence held sufficient to justify a recovery for time lost in the past and future. *Texas & P. Ry. Co. v. McDowell*, 40 C. A. 28, 88 S. W. 415.

Evidence outside of plaintiff's testimony showing that his services were rendered at the instance and by direction of deceased, and were at the latter's disposal, held sufficient to raise an implied promise to pay. *Buckler v. Kneezell* (Civ. App.) 91 S. W. 367.

In an action for injuries, probable duration of plaintiff's life may be found from evidence as to plaintiff's age and physical condition, without the introduction of mortality tables. *Galveston, H. & S. A. Ry. Co. v. Paschall*, 41 C. A. 357, 92 S. W. 446.

Evidence examined, and held to show that at the time of plaintiff's application to purchase certain public lands defendant had acquired a superior right thereto. *Winans v. McCabe*, 41 C. A. 99, 92 S. W. 817.

In an action against a canal company for damages to a crop of rice owing to an overflow of water, the evidence held to have clearly identified the land claimed to have been damaged. *Colorado Canal Co. v. Sims*, 42 C. A. 442, 94 S. W. 365.

Evidence held sufficient to prove the genuineness of lost deeds sought to be established. *Jones' Estate v. Neal*, 44 C. A. 412, 98 S. W. 417.

In an action on an order drawn by a contractor on the owner of a building in favor of a materialman, evidence considered, and held sufficient to show that at the time the order was presented to the owner he had sufficient funds due the contractor to pay the order. *Foley v. Houston Co-op. & Mfg. Co.* (Civ. App.) 106 S. W. 160.

In an action for personal injuries which will be suffered, held, that the evidence is sufficient if it shows that there is a reasonable probability that the injured party will suffer in the future as a result of the injuries. *St. Louis Southwestern Ry. Co. of Texas v. Garber* (Civ. App.) 108 S. W. 742.

In an action for personal injuries, evidence held sufficiently definite to show loss of earning power to the extent indicated by it. *Dallas Consol. Electric St. Ry. Co. v. Mot-willer*, 101 T. 511, 109 S. W. 918.

One relying on the abandonment of a homestead must show it clearly where no new homestead has been acquired. *Gaar, Scott & Co. v. Burge*, 49 C. A. 599, 110 S. W. 181.

Certain evidence held not to establish the death of the families of certain members of a family. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

Certain proof held to show that members of a family died at sea. *Id.*

In an action on a note for the price of stock subscribed evidence held not to raise the issue as to fraudulent representations by an officer of the corporation. *Cherry v. First Texas Chemical Mfg. Co.* (Civ. App.) 115 S. W. 81.

In an action for personal injuries, a judgment for at least nominal damages for impairment of earning capacity held justified under the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Niblack*, 53 C. A. 619, 117 S. W. 188.

Evidence in an action for breach of a contract to convey held to show that a firm of brokers was trustee for both parties, and not an exclusive agent of the vendor. *Dobson v. Zimmerman*, 55 C. A. 394, 118 S. W. 236.

A tortious taking of property is sufficient proof of a conversion. *Ripy v. Less*, 55 C. A. 492, 118 S. W. 1084.

In an action for injuries to plaintiffs' business, caused by false statements by defendant to plaintiffs' customers, evidence held to justify a verdict of \$4,000 actual damage, and \$10,000 exemplary damages, to plaintiffs. *American Freehold Land Mortgage Co. of London v. Brown*, 54 C. A. 448, 118 S. W. 1106.

Evidence, in an action by a passenger for injuries, held not to show that plaintiff before the accident had any earning capacity. *El Paso & N. E. Ry. Co. v. Sawyer*, 56 C. A. 195, 119 S. W. 107.

Plaintiffs' evidence, in an action on account, held sufficient. *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 C. A. 553, 120 S. W. 532.

Evidence as to what plaintiff's crop would have afterwards brought in the market held insufficient to show the amount of loss by the injury sued for. *Texas Co. v. Lacour* (Civ. App.) 122 S. W. 424.

Evidence in trespass to try title held to show that a deed upon which defendant relied was not a forgery. *Houston Oil Co. v. Kimball*, 103 T. 94, 122 S. W. 533, affirming judgment (Civ. App.) 114 S. W. 662, rehearing denied, 103 T. 94, 124 S. W. 85; *Rudolph v. Tinsley* (Civ. App.) 143 S. W. 209.

In an action against a carrier of sulphuric acid for injuries caused by the escape of the acid from a car in flowing into the street, evidence held to show that it had notice of the dangerous character of the acid, and that it negligently permitted it to escape. *Gulf, C. & S. F. Ry. Co. v. Fowler*, 57 C. A. 556, 122 S. W. 593.

In a personal injury action evidence held insufficient to warrant a recovery for doctor's services. *Texas & P. Ry. Co. v. Hemphill* (Civ. App.) 125 S. W. 340.

In an action to recover a deposit on a bid for municipal bonds, evidence held insufficient to warrant an inference that the bidder's attorneys in refusing the bonds for illegality acted capriciously and in bad faith. *City of San Antonio v. E. H. Rollins & Sons* (Civ. App.) 127 S. W. 1166, 1199.

Evidence, in an action against a railway company for death of a Shetland pony struck by a train, held to show ownership as alleged by plaintiff. *Freeman v. Taylor* (Civ. App.) 130 S. W. 733.

In an action for personal injuries, evidence held not to make the issue of the necessity of an operation so as to support a separate recovery therefor. *Chicago, R. I. & G. Ry. Co. v. Swan* (Civ. App.) 130 S. W. 855.

In an action by a lessee for the rental value of a barn wrongfully withheld by the lessor, a finding of the value of its use held sustained by the evidence. *Goodhue v. Hawkins* (Civ. App.) 133 S. W. 283.

That a person had a spouse living might be considered as tending to show that a marriage was not valid, but it is not sufficient to impeach the fact of a ceremonial marriage. *Clayton v. Haywood* (Civ. App.) 133 S. W. 1082.

Evidence of circumstances held sufficient to establish genuineness of a deed, though the grantor denied executing it. *Roberts v. Coleman* (Civ. App.) 138 S. W. 1120; *Word v. Houston Oil Co. of Texas*, 144 S. W. 334.

Proof in an action for damages to plaintiff's business from an obstruction of a street held sufficiently certain as a basis for a verdict allowing loss of profits. *American Const. Co. v. Caswell* (Civ. App.) 141 S. W. 1013.

In an action for injury to a passenger, evidence held to warrant a finding that plaintiff's previous physical afflictions were aggravated by the accident. *North German Lloyd S. S. Co. v. Roehl* (Civ. App.) 144 S. W. 322.

In an action for the rental value of a car alleged to have been unreasonably detained, evidence held to show that the detention was unreasonable, and that a recovery of \$136.97 was proper. *Gulf Refining Co. v. Pagach Bros.* (Civ. App.) 146 S. W. 719.

In an action by an injured servant, evidence held to show that the servant, knowing that his delay in having his injured eye removed endangered the sight of the other eye, permitted the eye to remain until after trial. *Freeman v. Wilson* (Civ. App.) 149 S. W. 413.

Evidence, in an action against a corporation upon notes given by it as part of the purchase price of its own stock, held to show that the corporation at the time of the purchase was solvent, and its stock at par. *San Antonio Hardware Co. v. Sanger* (Civ. App.) 151 S. W. 1104.

In an action for injuries to a pedestrian stepping into a hole in the street alongside a street car track, evidence held to justify a finding that the injuries affected plaintiff's mind, and rendered her a mental wreck. *San Antonio Traction Co. v. Emerson* (Civ. App.) 152 S. W. 468.

Evidence held to show that physical pain, loss of time, and diminished capacity to labor and earn money would naturally and necessarily result from plaintiff's injuries. *City of Greenville v. Branch* (Civ. App.) 152 S. W. 478.

Where evidence was sufficient as against an attorney employed to clear up title, who acquired title for his own benefit, it was sufficient against a corporation controlled by him, and used as a medium for his operations. *Home Inv. Co. v. Strange* (Civ. App.) 152 S. W. 510.

In an action for personal injuries, evidence of the reasonableness and amount of expenses for nursing held sufficient to warrant a recovery therefor. *Dallas Consol. Electric St. Ry. Co. v. Carroll* (Civ. App.) 152 S. W. 1165.

Evidence, in an action for damages for defendant's alleged breach of a contract to convey land taken from the plaintiff in discharge of his indebtedness to any purchaser plaintiff might find within a certain time, held insufficient to sustain the allegations. *Rotan Grocery Co. v. Jackson* (Civ. App.) 153 S. W. 687.

In an action against a railroad company for damages to a shipment of cattle, evidence held sufficient to support findings of the value of the cattle injured and killed. *El Paso & Southwestern Co. v. Hall* (Civ. App.) 156 S. W. 356.

Evidence held to support a finding that the condition of one suing for a personal injury was due to a blow on his leg, negligently inflicted. *Texas & N. O. R. Co. v. Murray* (Civ. App.) 156 S. W. 594.

Evidence in an action to recover possession of a diamond stud or its value, alleging a lien thereon and its conversion by defendant, held sufficient to sustain a finding that defendant had converted it. *Clay v. Marmar* (Civ. App.) 156 S. W. 1125.

RULE 13. PUBLIC OFFICERS ARE WHAT THEY ARE REPUTED TO BE

De facto officers in general.—Acts of officers de facto are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers de jure. What shall constitute an officer de facto may admit of doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer de facto. There must be at least some colorable election and induction into the office ab origine, and some action thereunder, or so long an exercise of the office, and acquiescence therein of the public authorities, as to afford to an individual citizen a strong presumption that the party was duly appointed; and, therefore, that any person might compel him, for the legal fees, to do his business, and for same reason was bound to submit to his authority in such official capacity. *Bien-court v. Parker*, 27 T. 558; *Chowning v. Boyer*, 2 App. C. C. § 744; *Cox v. Railway Co.*, 68 T. 226, 4 S. W. 455.

In an action of trespass to try title the plaintiff claimed under an ancient Spanish grant; as a defense against this title, the defendant, an incorporated town, set up certain official proceedings of the authorities of Tamaulipas and Matamoras, whereby, in 1826, the title under said grant was divested by expropriation for public uses, and the lands were conceded to the party under which defendant claimed. Held, that a foreign government or forum is the best judge of the validity of its own political or judicial acts, exercised upon subjects within its jurisdiction, and they will not be reviewed by this court. *City of Brownsville v. Basse and Hurd*, 36 T. 461; *State v. De Leon*, 64 T. 553.

An officer de facto is one who performs the duty of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act. *Aulanier v. Governor*, 1 T. 653.

Where an appointment to office is not merely irregular or informal, but is absolutely void, the appointee, though attempting to discharge the duties of the office, is not an officer de facto. *Brumby v. Boyd*, 66 S. W. 874, 28 C. A. 164.

Sheriffs and constables.—In an action of trespass to try title one of the parties claimed title under an execution sale, and it was objected to the validity of the deed that it was executed by a sheriff appointed by the governor under the enabling act of 1870, which it was claimed was unconstitutional. It was held that the act of a sheriff de facto could not be questioned in this manner. *Thulemeyer v. Jones*, 37 T. 560.

In an action of trespass to try title, the plaintiff offered in evidence a sheriff's deed, executed in the name of the sheriff by his deputy. It was objected that the deed was not admissible without proof that the person who executed it was a deputy sheriff. The law recognizes the existence of such officers as sheriffs and deputy sheriffs, and it is not necessary for persons who offer in evidence instruments executed by them in the course of their official duties to prove that they were the officers in fact and in law which in their acts they profess to be. This the law presumes, and the burden of showing to the contrary rests upon the person who denies it. *Burrow v. Brown*, 59 T. 457.

Under Art. 7125, permitting the appointment of deputies by the sheriff to perform all the duties of their principals, acts done by a deputy who had taken the oath of office under an appointment for the special purpose of serving a writ of garnishment and a citation in a certain action, in serving such papers, are binding on the persons so served, though the limitations in the appointment were void, since the deputy was at least a de facto officer, acting under color of authority. *Trammel v. Shelton*, 45 S. W. 319, 18 C. A. 366.

Under the constitutional provision declaring that no person shall hold two civil offices of emolument, with stated exceptions, though a constable be ineligible to hold or perform the duties of deputy sheriff, he may be a de facto deputy; and his capacity as such to make a sale of land on execution, and convey the same, cannot be questioned in an action for the land. *Broach v. Garth* (Civ. App.) 50 S. W. 594.

The appointment of a person as deputy sheriff constitutes him a de facto officer, though it was not made in writing, as the statute provides, and though he does not give bond or take oath. *Id.*

Where a deputy sheriff, on being appointed, refused to take the oath, and cut the same off from his appointment, and there was no showing that he exercised the duties of the office, or had the reputation in the community of being a deputy sheriff, he was not an officer de facto. *Brown v. State*, 66 S. W. 547, 43 Cr. R. 411.

Collector of taxes.—In a suit by the governor of the state against a person to recover a penalty for not having paid his license tax to the collector before engaging in a taxable occupation, the defense was that the person acting as such officer had not been duly elected and had not given bond. It was held that the officer having been commissioned and acting under color, his authority could not be questioned except in a proceeding directly instituted for that purpose. *Aulanier v. Governor*, 1 T. 653; *Kingsland v. Harrell*, 1 App. C. C. § 736.

A receipt of the assessor and collector of taxes having been admitted in evidence to show the payment of taxes, it is said by the court, "as respects the authority of the person who gave the receipt, the fact that he acted in the capacity of tax collector is sufficient prima facie evidence of his authority." *Deen v. Willis*, 21 T. 642.

Justices of the peace.—Whether justices' courts are to be deemed for any purpose courts of record has never been determined in this state. *Wahrenberger v. Horan*, 18 T. 57.

The mere absence of a justice of the peace from his precinct does not create a vacancy, within Art. 2240, authorizing the commissioners' court to fill any vacancy in the office. *Crawford v. Saunders*, 9 C. A. 225, 29 S. W. 102.

Judge.—Under Const. art. 4, § 1, providing that judges of the supreme and inferior courts shall hold their office for four years, the term of office of a judge appointed on the death of the incumbent before the expiration of his term is four years, and not merely the unexpired term of his predecessor. *Shelby v. Johnson*, *Dallam*, Dig. 597. The authority of a judge de facto to hear a prosecution and convict the accused,

cannot, on habeas corpus to procure a discharge of the accused, be questioned on the ground that the judge was not lawfully elected because ineligible. A direct proceeding to try his title is necessary. *Ex parte Call*, 2 T. App. 497.

The congress of Coahuila and Texas decreed that during recess the government of Texas might provisionally appoint a superior judge. Held, that the appointee's term did not necessarily terminate at the end of the recess. *Chambers v. Fisk*, 22 T. 504.

Const. art. 6, § 24, provides that county judges, etc., "may be removed" by the judges of the district court for incompetency, official misconduct, etc., upon the cause therefor being set forth in writing, and the finding of its truth by a jury. Held, that such provision refers only to persons who are officers in the full sense of the term, after they have been elected or appointed and have qualified as by law required, and not to persons who have been elected, but have refused or neglected to qualify. *Flatan v. State*, 56 T. 93.

A resignation of a county judge, to take effect instantan, creates a vacancy, without an acceptance of the resignation, within Const. art. 5, § 28, requiring a vacancy to be filled by the commissioners' court. *Byars v. Crisp*, 2 App. C. C. § 708.

Under Const. art. 5, § 15, providing for the election in each county of "a county judge, who shall be well informed in the laws of the state," it is not competent, on the contest of an election for county judge, to examine the contestant as to his knowledge of law. *Little v. State*, 75 T. 616, 12 S. W. 965.

A judge who assumes to exercise judicial functions after the court in which he presides has been abolished by law is not a judge de facto, since there cannot be an officer de facto where there is no lawful office. *Daniel v. Hutcheson*, 4 C. A. 239, 22 S. W. 278.

Under Const. art. 16, § 17, providing that all officers in the state shall continue to perform the duties of their offices until their successors are qualified, the unconditional tender of his resignation by a county judge creates no vacancy where it is not accepted and is afterwards withdrawn. *McGhee v. Dickey*, 4 C. A. 104, 23 S. W. 404.

Where, on the disqualification of the resident judge, the governor without authority appointed a member of the bar to try the cause, he was not a judge de facto. *Oates v. State*, 121 S. W. 370, 56 Cr. R. 571.

County attorney.—One who did not perform any of the duties of an assistant county attorney, except to sign a certain information, could not be regarded as a de facto officer. *Murrey v. State*, 48 Cr. R. 219, 87 S. W. 349.

Notaries.—A single act by a notary public, who had vacated his office by accepting an incompatible office, did not make him a notary public de facto, but such act is void. *Blencourt v. Parker*, 27 T. 558.

Municipal officers.—Where certain members of a city board of equalization held over after the termination of their term, their places not having been filled by appointment, and plaintiff and other taxpayers of the city appeared and recognized them as constituting a legal board of equalization, their acts were valid as a de facto board. *Nalle v. City of Austin*, 93 S. W. 141, 41 C. A. 423.

Corporate officers.—A de facto authority in an officer of a corporation to act as such cannot arise where his election was void, and not merely irregular, and where there has been no assertion of the right to discharge the duties of the office, except in the instance where the authority is questioned, and where there has been no acquiescence in his official acts. *Franco-Texan Land Co. v. Laigle*, 59 T. 339.

A void election of one claiming under it to exercise the functions of a corporate office is subject to collateral attack. *Id.*

RULE 14. THE REGULARITY OF OFFICIAL ACTS IS PRESUMED

In general.—In action of trespass to try title the defendant claimed under a grant of land made by the governor of the state of Coahuila and Texas in 1832, the validity of which was questioned on the ground that the officers by whom it was issued had no such authority, and if they had it was made in violation of law. It was held that the construction of their powers and of the laws which confirmed them, adopted and acted upon by the authorities under the former government of the country, must be respected until it be shown that they have clearly transcended their powers, or have acted manifestly in contravention of law. *Hancock v. McKinney*, 7 T. 384; *Martin v. Parker*, 26 T. 253. As was done in the following cases: *Jones v. Garza*, 11 T. 186; *Norton v. Mitchell*, 13 T. 47; *Jones v. Muisbach*, 26 T. 235; *Holliday v. Harvey*, 39 T. 670; *Baldridge v. Penland*, 68 T. 441, 4 S. W. 565; *Clark v. Hills*, 67 T. 141, 2 S. W. 356; *Johns v. Schulz*, 47 T. 578. See *Von Rosenberg v. Haynes*, 20 S. W. 143, 85 T. 357; *Guerra v. City of San Antonio*, 1 C. A. 422, 20 S. W. 935.

In a suit against a tax collector and the securities on his official bond, for failing to pay over money collected as such, it should be shown that the tax collector received the tax rolls from the proper authorities, and that they were in his hands for collection. When he thus receives them, he is justly chargeable with the whole amount of the rolls. The burden is then, and not before, on the collector to show that he has collected and paid over, or to show lawful cause for his failure to do so. *Cordray v. State*, 55 T. 141; *Swan v. State*, 48 T. 121; *Shaw v. State*, 43 T. 359; *Allbright v. Governor*, 25 T. 695, and other cases, cited and followed. *Houston County v. Dwyer*, 59 T. 113.

The presumption obtains that taxes received from nonresidents of a county were paid on legal assessments on personal property. *Webb County v. Gonzales*, 69 T. 455, 6 S. W. 781.

Even after the lapse of forty years, no presumption will be indulged that the laws regulating the assessment and sale of land for taxes have been complied with so as to supply the missing evidence of power in the officer to make the sale. *Telfener v. Dillard*, 70 T. 139, 7 S. W. 847.

After the lapse of over a century, followed by possession under a grant executed under the Spanish government, it ought not to be claimed that the officer extending the grants did not have power to do so. A testimonio of the acts of such officer in appointing surveyor, etc., would prove itself after lapse of time. *Von Rosenberg v. Haynes*, 85 T. 357, 20 S. W. 143.

It is well settled in this state that the acts of an officer assuming to discharge an attribute of his office are presumed to be within the scope of his authority unless the contrary be shown. *Guerra v. City of San Antonio*, 1 C. A. 422, 20 S. W. 935.

There is no presumption in favor of the validity of official acts involving the forfeiture of an individual's rights. *Irwin & Sanders v. Mayes*, 31 C. A. 517, 73 S. W. 33.

Where, in an action to quiet title to land, plaintiff claimed under proceedings to foreclose a deed of trust for nonpayment of taxes, she was not bound to prove that the taxes unpaid were properly levied. *Clark v. Elmendorf* (Civ. App.) 73 S. W. 538.

It is a presumption of law that the acts of officers are within their authority. *City of San Antonio v. Tobin* (Civ. App.) 101 S. W. 269.

The presumption, in the absence of proof to the contrary, is that the officer issuing a liquor license complied with the law (Art. 7427 et seq.), and that application therefor had been made. The bond in this case recites that application was made. *White v. Manning*, 46 C. A. 298, 102 S. W. 1161.

It will be presumed, in the absence of evidence to the contrary, that a voter produced the proper evidence that he had paid his poll tax as required by law. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

A presumption can no more be indulged in favor of the validity of a tax sale, where the state is the purchaser, than where an individual purchases. *Lewright v. Walls*, 55 C. A. 643, 119 S. W. 721.

It is always presumed that in any official act or act purporting to be official the officer has not exceeded his authority. *Slaughter v. Cooper*, 56 C. A. 169, 121 S. W. 173.

Where the conduct of an officer is attacked as in excess of authority, and there are any conditions under which he may exercise the powers assumed, the court will presume that such conditions existed and formed the basis of his conduct. *Sanders State Bank v. Hawkins* (Civ. App.) 142 S. W. 84.

One alleging that an officer has violated his instructions must show a violation and must show that the instructions were received, and the court will require full proof that the officer has exceeded his powers before it will so determine. *State v. Palacios* (Civ. App.) 150 S. W. 229.

Of municipalities and officers in general.—The court would not presume under the circumstances that a bid for a street improvement was submitted in compliance with law, nor that it was the best that could have been obtained, nor that the abutters were not injured by irregularities concerning same. *City of Waco v. Chamberlain* (Civ. App.) 45 S. W. 191.

The presumption is that a city council, in making ordinances levying taxes, acted lawfully. *Berry v. City of San Antonio* (Civ. App.) 46 S. W. 273.

Persons who fill the office of the board of equalization of a city are at least de facto officers, and their legal appointment will be presumed until the contrary is shown. *Nalle v. City of Austin*, 23 C. A. 595, 56 S. W. 954.

Where a city is authorized to levy a license tax on particular property or business, and such tax has been imposed, it will be presumed that the levy was made for the purposes authorized by law. *Brown v. City of Galveston*, 97 T. 1, 75 S. W. 488.

Where a city has authority to refund waterworks bonds, it will be presumed, in the absence of any facts stated to the contrary, that the law was complied with, and a taxpayer cannot set up irregularities in the issuance of the bonds as a defense against the collection of the tax. *City of Tyler v. Tyler B. & L. Ass'n*, 98 T. 69, 81 S. W. 4.

Facts held to warrant a presumption that the assistant auditor of a city had authority to sign a warrant. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

Of officers in land department.—A patent is not void because no survey of the land was ever made. In the absence of evidence to the contrary a survey will be presumed. *Williamson v. Simpson*, 16 T. 440; *Stafford v. King*, 30 T. 270, 94 Am. Dec. 304; *Boon v. Hunter*, 62 T. 582; *Gerald v. Freeman*, 68 T. 201, 4 S. W. 256; *Moore v. Reiley*, 68 T. 668, 5 S. W. 618; *Lilly v. Blum*, 70 T. 705, 6 S. W. 279; *Brown v. Bedinger*, 72 T. 247, 10 S. W. 90; *Booker v. Hart*, 77 T. 146, 12 S. W. 16; *Rand v. Cartwright*, 82 T. 399, 18 S. W. 794. See *Railway Co. v. Uribe*, 85 T. 386, 20 S. W. 153; *Groesbeck v. Harris*, 82 T. 411, 19 S. W. 850; *Robertson v. Mooney*, 1 C. A. 379, 21 S. W. 143.

The plaintiff, in an action of trespass to try title, claimed the land in controversy by patent dated in 1851. The defendant claimed under a grant from the state of Coahuila and Texas, dated in 1834, and offered in evidence a land office copy in support of his title. The plaintiff claiming the superior title, on the ground that the older grant was not filed in the land office at the inception of his title, the court say that it is to be presumed that defendant's title was filed in the land office within the time prescribed by law, and therefore antedated plaintiff's title. *Nicholson v. Horton*, 23 T. 47.

In the absence of evidence to the contrary it is presumed that a survey is made for the grantee named in the certificate. *Snider v. Railroad Co.*, 52 T. 306.

The action of a legally constituted board of land commissioners in 1838, deciding who were the heirs of a deceased party, who had been entitled under the law to land, and issuing to them a headright certificate, is conclusive of their right to it, on a collateral inquiry, whether the decision of the board was right or not. *Burkett v. Scarborough*, 59 T. 495.

In a conflict of title to land, in support of the action of the proper officers in issuing the patent, it was presumed that the field-notes of a previous survey were withdrawn by the person interested in the survey. *Atkinson v. Ward*, 61 T. 383.

It is presumed that all facts necessary existed to authorize the issuance of a patent. *Sheppard v. Avery*, 89 T. 301, 34 S. W. 440.

It is presumed that the land was located before the land certificate was filed. *Timmony v. Burns* (Civ. App.) 42 S. W. 133.

Classification and appraisement of public lands before sale must not only be alleged, but proved; there being no presumption thereof. *Thompson v. Gallagher*, 32 C. A. 591, 75 S. W. 567.

Where, in trespass to try title, both parties claimed under applications to purchase from the state, and defendant was in possession, the burden was on plaintiff to show the invalidity of defendant's purchase. *Jones v. Wright*, 98 T. 457, 84 S. W. 1053.

Where plaintiff made application to purchase from the state, but the land was awarded to defendant on his later application, held to have the burden of proof to overcome the presumption of regularity. *Smith v. Hughes*, 39 C. A. 113, 86 S. W. 936.

When one, suing upon his rejected application for the purchase of school land, has shown compliance with the statute, he has overcome the presumption that the commissioner of the land office has acted lawfully. *Knapp v. Patterson* (Civ. App.) 87 S. W. 394.

Where the land commissioner canceled an award of school lands because of mistake in classification, presumption of regularity of his act held to apply to the cancellation and not to the award. *Smithers v. Lowrance* (Civ. App.) 91 S. W. 606.

Cancellation of award of school lands by land commissioner, indorsed on the purchaser's obligation and on classification and appraisal record, held provable by certified copies of the documents. *Id.*

No presumption arises in favor of the validity of an award of land by the commissioner of the general land office during the life of a lease as against the validity of his action in making the lease. *Buchanan v. Barnsley*, 51 C. A. 253, 112 S. W. 118.

Under Paschal's Dig. Arts. 4302 and 4211 et seq., it was the duty of the commissioner of the general land office to satisfy himself that the original certificate was a valid one, before issuing an unlocated balance certificate, and it will be presumed that he discharged this duty; hence, where a survey was made in B. county in 1838, under which land was patented in 1847 and canceled in 1855, because in conflict with older valid claims, and not for any infirmity of the certificate, and another survey, made in B. county in 1847 by virtue of the certificate, was patented during that year, and the commissioner in 1855, after canceling the patent issued on the survey made in 1838, again recognized the certificate as valid by issuing the unlocated balance certificate, the original certificate was prima facie valid. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

Of counties and officers thereof.—In 1854 the chief justice and county commissioners conveyed a lot in the town of Crockett donated to the county; the records of the county had been destroyed, and with them the deed of gift, and its terms and conditions were not known. It was shown that the lots in the town had, since 1837, been conveyed in the same manner. It was held that it is to be presumed that the sale and conveyance of the lots was in the manner authorized by the deed to the county, or that by proper orders of the county court the officers who made the conveyance were properly appointed as commissioners, etc. *Wooters v. Hall*, 61 T. 15.

There is no presumption of the validity of special proceedings by the county courts directed towards the establishment of boundary lines. *Wise County v. Montague County*, 21 C. A. 444, 52 S. W. 615.

A certificate of the county clerk of a county attached to an abstract of judgment held to presumptively show an indexing of the judgment in alphabetical order, as required by statute. *Abee v. Bargas*, 45 C. A. 243, 100 S. W. 191.

In a proceeding involving the validity of an order of the commissioner's court changing the course of a public road, it should be presumed in favor of the order, in the absence of proof to the contrary, that the court took every preliminary step essential to its validity. *Smith v. Ernest*, 46 C. A. 247, 102 S. W. 129.

Of notaries.—Where the certificate of the officer recites that he had affixed his official seal to an instrument, it is presumed that it was properly attached, although in the copy from the record its place is not indicated by a scroll and the initial letters "L. S.," as is customary. *Alexander v. Houghton*, 26 S. W. 1102; citing *Hines v. Thorn*, 57 T. 104; *Witt v. Harlan*, 66 T. 661, 2 S. W. 41; *Coffey v. Hendricks*, 66 T. 677, 2 S. W. 47.

The acknowledgment of a married woman being in statutory form, the law will presume that the officer performed his duty, and that the certificate of acknowledgment is true in all its details. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

Of clerks of courts.—In an action of trespass to try title the defendants offered in evidence duly certified copies of a power of attorney, and of a deed executed in 1835 before a judge of the first instance. They were objected to on the ground that the certificate of the clerk did not show that the originals had been filed prior to the first Monday in February, 1837. Held that, in the absence of proof to the contrary, it is to be presumed that the originals were filed at the proper time; and the certificate of the clerk, to the effect that they are archives of his office, is equivalent to a certificate that they had been filed at the proper time. *Hooper v. Hall*, 35 T. 82.

No presumption arises from evidence that the abstract of the judgment was recorded that the index thereof has been made. *Miller v. Koertge*, 70 T. 162, 7 S. W. 691, 8 Am. St. Rep. 587.

Where clerk recorded instrument, it will be presumed that certificate of acknowledgment duly attested was annexed, it being necessary for recordation, so as to render certified copy admissible. *Caudle v. Williams* (Civ. App.) 51 S. W. 560.

Where a case is appealed to the supreme court and remanded, it will be presumed that the clerk either collected the costs before remand, or issued an execution for costs thereafter. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

Where the filing of a citation by the clerk is a judicial act required by statute, and a citation requiring defendant to appear and answer November 8, 1909, is entered by the clerk and indorsed, "Filed 20th day of September, 1909," it will be presumed that the return made upon the writ was made before it was filed. *Lester v. First State Bank* (Civ. App.) 139 S. W. 661.

Of sheriffs and constables.—The maxim, "Omnia præsumentur recte," is only applicable to the record of judicial proceedings, and is not to be applied to the exercise of ministerial functions. Thus, the recitals in a sheriff's deed are regarded only as an inducement, and are not evidence of his power to sell, which must be shown independently. *Leland v. Wilson*, 34 T. 79.

Presumption will not obtain, from the fact that the judgment recites that all the defendants were served with personal service, that service was made on an amended petition. *Carlton v. Miller*, 21 S. W. 697, 2 C. A. 619.

Two executions in same case were issued on the same day, one to the sheriff of the county where the judgment was rendered. This execution was returned on the day issued. Held, that it will be presumed that such return was made before the issuance of the oth-

er, which was directed to officers of another county, and under which sale was made. *Brackenridge v. Cobb*, 85 T. 448, 21 S. W. 1034.

A citation, duly issued and served by the sheriff, and acted on by the court in entering a default judgment, will be presumed to have been returned by the sheriff as required by law. *Calvert, W. & B. V. Ry. Co. v. Driskill*, 31 C. A. 200, 71 S. W. 997.

The presumption in favor of the regularity of official conduct will not apply to hold a sheriff liable for the acts of his deputies. *Brown v. Wallis* (Civ. App.) 101 S. W. 1068.

In the absence of a showing to the contrary, it will not be presumed that a constable made service of process outside of his county. *Mahan v. McManus* (Civ. App.) 102 S. W. 789.

In the absence of any showing to that effect it will be presumed that when an officer returned a delivery bond, on the nondelivery of the property to him that he marked it "forfeited." *Webb v. Caldwell* (Civ. App.) 112 S. W. 98.

A petition against unknown heirs was filed on August 10, 1898; the following term of court beginning on September 26th. The sheriff returned a publication of the citation, according to its directions to him, for four weeks with the dates thereof to the September term, and judgment was rendered at the next term thereafter against the unknown heirs, but there was no recital in the judgment of due service of process. Held, that it could not be presumed in support of jurisdiction that proper service was had; it affirmatively appearing from the entire record that there was no legal service. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 132 S. W. 808.

The court, in the absence of a contrary showing, held authorized to presume that a sheriff selling land under attachment gave notice of sale in the manner required by law. *Levy v. Persons* (Civ. App.) 145 S. W. 286.

Where there is no evidence of any private grudge or unfriendly relation between a marshal and a person arrested by him, the court will presume that he was acting as an official merely. *Riter v. Neatherly* (Civ. App.) 157 S. W. 439.

Of state officers in general.—It will be presumed that the act of the sanitary commission in excluding cattle from the state as coming from an infected district was properly exercised. *St. Louis S. W. Ry. Co. v. Smith*, 20 C. A. 451, 49 S. W. 627.

The presumption in favor of the validity of an official act held insufficient to render the existence of a receipt for the franchise tax of a foreign corporation affirmative evidence of the issuance of a permit to do business, notwithstanding the law as to the duties of the Secretary of State. *Turner v. National Cotton Oil Co.*, 50 C. A. 468, 109 S. W. 1112.

Where it was apparent from the face of a grant by the Spanish government that the governor waived the use of stamped paper in making it, it must be presumed that he had authority so to do. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

In the absence of evidence to the contrary, it will be presumed that the governor of the province of Texas had authority to execute a grant of land. *Id.*

In the absence of a showing to the contrary, the court must presume that the board of medical examiners did its duty in issuing a certificate authorizing the practice of medicine. *State Board of Medical Examiners v. Taylor*, 103 T. 444, 129 S. W. 600.

The supreme court will presume that the governor will seek the public good in discharging his official duties. *Conley v. Daughters of the Republic* (Sup.) 157 S. W. 937.

Surveyors.—Where a survey was actually made and the field notes recorded and a patent subsequently issued by the proper authorities, it must be presumed that the surveyor's action was regular. *Waterhouse v. Corbett*, 43 C. A. 512, 96 S. W. 651.

In the absence of proof it must be presumed that surveyors did their duty and marked corners with some object of permanence. *Thatcher v. Matthews*, 101 T. 122, 105 S. W. 317.

In the absence of proof to the contrary, it will be presumed that a surveyor of a grant of public lands performed his duty. *Finberg v. Gilbert*, 104 T. 539, 141 S. W. 82.

RULE 15. COURTS WILL, WITHOUT PROOF, TAKE NOTICE OF FACTS OF A PUBLIC OR GENERAL NATURE

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| 1. Judicial notice in general. | 19. Matters relating to government and its administration in general. |
| 2. Matters of common knowledge in general. | 20. Political divisions and bodies—Counties and county seats. |
| 3. Course and laws of nature. | 21. Cities. |
| 4, 5. Qualities and properties of matter. | 22. Foreign governments. |
| 6. Operation and effect of natural forces. | 23. Laws of the state—Public statutes. |
| 7. Scientific facts and principles. | 24. — Private statutes. |
| 8. Geographical facts. | 25. — Charters of public and private corporations. |
| 9. Historical facts. | 26. — Municipal ordinances. |
| 10. Statistical facts. | 27. Laws of United States. |
| 11. Phenomena of animal and vegetable life. | 28. Laws of other states. |
| 12. Facts relating to human life, health, habits, and acts. | 29. Laws of foreign countries. |
| 13. Language, words and phrases, and abbreviations. | 30. Jurisdiction and powers of courts. |
| 14. Weights, measures, and values. | 31. Terms of courts. |
| 15. Management and conduct of occupations. | 32. Rules and procedure of courts. |
| 16. — Railroads. | 33. Judicial proceedings and records. |
| 17. Customs and usages. | 34. Offices and official position and authority. |
| 18. Corporations and associations and members thereof. | 35. Official proclamations and orders. |
| | 36. Administrative rules and regulations. |
| | 37. Official proceedings and acts. |

1. **Judicial notice in general.**—The courts will not take judicial notice of the ownership of one of several railroad tracks lying in close proximity. *Pierce v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 108 S. W. 979.

2. **Matters of common knowledge in general.**—The court does not judicially know that running a train at 50 or 55 miles an hour is running it at a dangerous rate of speed. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 686.

The court of civil appeals will take judicial notice that railway cars and the cowcatcher of a locomotive extend beyond the rails of the track on both sides. *San Antonio & A. P. Ry. Co. v. Mertink* (Civ. App.) 102 S. W. 153.

That common cogwheels used in operating machinery are not peculiar to oil mills, but are used in gins and numerous other places for transmitting and distributing power, held to be matters which may be judicially assumed. *Brownwood Oil Mill v. Stubblefield*, 53 C. A. 165, 115 S. W. 626.

Courts may judicially know that one near a railroad track may protect his eyes from flying cinders, without retiring beyond the reach of cinders. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

The court judicially knows that prior to its admission into the Union, Oklahoma consisted of the territory of Oklahoma and Indian Territory, and that the territories were governed in a large measure by different laws emanating from different sources. *Western Union Telegraph Co. v. Parsley*, 57 C. A. 8, 121 S. W. 226.

The court cannot take judicial notice that a particular locality along a railroad right of way was free from Russian thistles at a particular time, though it may take judicial notice that the thistle grew throughout the state and was a great nuisance. *Vance v. Southern Kansas Ry. of Texas* (Civ. App.) 152 S. W. 743.

3. Course and laws of nature.—The court will take judicial knowledge of the fact that on or about January 10th no fruit is growing on peach and apple trees. *Putnam v. St. Louis Southwestern Ry. Co. of Texas*, 43 C. A. 448, 94 S. W. 1102.

The courts do not judicially know that a foggy night brings a foggy morning. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 686.

The court of civil appeals will not take judicial notice of how often during each year Johnson grass goes to seed. *International & G. N. R. Co. v. Voss*, 49 C. A. 566, 109 S. W. 984.

A court knows, as a matter of common knowledge, that at a certain time of the year crops have matured and been gathered. *McCullough v. Rucker*, 53 C. A. 89, 115 S. W. 323.

The court of civil appeals will take judicial notice of when a rice crop is matured and gathered in the state. *Matagorda Canal Co. v. Markham Irr. Co.* (Civ. App.) 154 S. W. 1176.

4, 5. Qualities and properties of matter.—The court takes judicial notice that beer means a malt and intoxicating liquor. *Maler v. State*, 21 S. W. 974, 2 C. A. 296; *White v. Manning*, 46 C. A. 298, 102 S. W. 1160; *Moreno v. State*, 64 Cr. R. 660, 143 S. W. 156.

Courts will take judicial notice that whisky is intoxicating. *Aston v. State* (Cr. App.) 49 S. W. 385; *Loveless v. Same* (Cr. App.) 49 S. W. 602.

The court will take judicial notice that such well-known beverages as whisky, brandy, gin, and the like are intoxicating. *Dallas Brewery v. Holmes Bros.*, 51 C. A. 514, 112 S. W. 122.

In an action for the destruction of property by fire communicated by crude oil permitted to saturate the soil surrounding the property, the court will take judicial notice that crude oil is of an inflammable character. *Texas & N. O. R. Co. v. Bellar*, 51 C. A. 154, 112 S. W. 323.

6. Operation and effect of natural forces.—The court takes knowledge of the fact that by the operation of natural laws severe injuries to the person produce physical and mental pain. *T. & P. Ry. Co. v. Curry*, 64 T. 85. The loss of an arm reduces the capacity of a man to earn money. *T. & P. Ry. Co. v. O'Donnell*, 58 T. 27.

7. Scientific facts and principles.—The court of civil appeals will take judicial notice that a rapidly moving body creates a partial vacuum in its path, drawing to such body objects near its path, and that such objects are carried or thrown forward with a force proportionate to the rapidity of its movement. *San Antonio & A. P. Ry. Co. v. Mertink* (Civ. App.) 102 S. W. 153.

Courts will take judicial notice of the accuracy of X-ray photographic views of the bones of a living body, when properly taken. *Houston & T. C. R. Co. v. Shapard*, 54 C. A. 596, 118 S. W. 596.

8. Geographical facts.—Courts will take judicial notice of location of a county, as to a given degree of longitude, that a certain city is a county seat, and of the location of a reservation made by legislature, and whether a definitely described tract is within such reservation. *Hall v. Rushing*, 21 C. A. 631, 54 S. W. 30.

Courts held to take judicial notice of railroads in the state. *Texas Cent. R. Co. v. Marrs* (Civ. App.) 101 S. W. 1177.

A court held not authorized to take judicial notice that a place, not the county seat, was in a certain county. *Dallas Brewery v. Holmes Bros.*, 51 C. A. 514, 112 S. W. 122.

Judicial notice may be taken that a city is in a certain county. *Gaddy v. Smith* (Civ. App.) 116 S. W. 164.

Judicial notice will be taken of the boundaries and geographical shape of a county of the state. *Hughes v. Adams*, 55 C. A. 197, 119 S. W. 134.

The court takes judicial notice of geographical subdivisions of the state, and of state and federal boundaries. *Cator v. Hays* (Civ. App.) 122 S. W. 953.

The court of civil appeals will take judicial notice, as a geographical fact, that a specified railroad operates a main line and branches within the state, traversing different counties, and that some of those lines do not pass through a certain city. *City of Tyler v. Coker* (Civ. App.) 124 S. W. 729.

The courts held authorized to take judicial notice of the boundary line between the United States and Mexico, as recognized by the political authorities of the United States and Mexico. *Reese v. Cobb* (Civ. App.) 135 S. W. 220.

It is doubtful if the court of civil appeals can take judicial notice of the limits of a city. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

9. Historical facts.—It is not necessary to prove facts established by general history; as, that the general land office was closed November 13, 1835 (*Parker v. Bains*, 59 T. 15), and was not open for the issuing of patents until 1844 (*Dobbin v. Bryan*, 5 T. 285). That a particular section of country was comprehended within the limits of the colony contract of Austin & Williams until the rights of Robertson were established by the decree of the 29th of April, 1834. *Robertson v. Teal*, 9 T. 344. The existence of Martin De

Leon's colonial contract, and that Fernando De Leon was the commissioner of that colony. *Wheeler v. Moody*, 9 T. 372; *Williams v. Simpson*, 16 T. 433. That in 1833 and 1839 this country was subject to dangers and annoyances from Indians, and that traveling from point to point was dangerous. *Magee v. Chadoin*, 30 T. 657. That yellow fever prevailed in Galveston in the fall of 1867. *Harrison v. Sheirburn*, 36 T. 73. That the war ceased in Texas on the 28th of May, 1865. *Clark v. State*, 31 T. 574. That the emancipation of slaves took effect in Texas on the 19th of June, 1865. *Hall v. Keese*, 31 T. 504; *Algier v. Black*, 32 T. 168; *McDaniel v. White*, 32 T. 488. That the Roman Catholic church is an episcopacy. *Blanc v. Alsbury*, 63 T. 489, 51 Am. Rep. 666.

The court will take judicial notice that one C. in 1832, was the first alcalde of the municipality of Austin. *McCarty v. Johnson*, 20 C. A. 184, 49 S. W. 1098.

Courts will take judicial notice of matters of history and of the leading public events of their own country. *Blethen v. Bonner* (Civ. App.) 52 S. W. 571.

The court will take judicial notice of the facts that in 1778 San Antonio de Bexar was a royal presidio; that the village of San Fernando was under its protection; and that an individual was at the time governor of the province of Texas. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

10. **Statistical facts.**—The court on appeal will not take judicial notice of what the deceased would have earned during the period of his life expectancy. *White v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 146 S. W. 692.

11. **Phenomena of animal and vegetable life.**—The court may take judicial notice that rice cannot be grown to maturity without water. *Barr v. Cardiff*, 32 C. A. 495, 75 S. W. 341.

12. **Facts relating to human life, health, habits, and acts.**—In a suit by an abandoned wife to recover her husband's wages as community property, judicial notice will be taken that \$24.50 is not in excess of the wife's necessities for support. *Irwin v. Irwin* (Civ. App.) 110 S. W. 1011.

13. **Language, words and phrases, and abbreviations.**—The court will take notice of English words, but not of a foreign language. A deed authenticated in a foreign language and offered in evidence without a translation will not be admitted. *Sartor v. Bolinger*, 59 T. 411.

Our courts are not presumed to be acquainted with the peculiar forms of expression of the Spanish language; these are matters of proof, and without evidence upon the subject the language of a Spanish grant, translated into English, cannot be treated otherwise than as if the original grant had been in English. *Linney v. Wood*, 66 T. 22, 17 S. W. 244.

Where interrogatories were propounded to "Selia," but plaintiff took the deposition of "Celia," the court will not judicially know that in Spanish the names were not idem sonans. *Galveston, H. & S. A. Ry. Co. v. Sanchez* (Civ. App.) 65 S. W. 893.

Judicial notice taken of the meaning of the word "yearlings." *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

14. **Weights, measures, and values.**—Judicial notice will be taken that a \$10 currency bill cannot be worth \$20. *Jones v. State*, 39 Cr. R. 387, 46 S. W. 250.

Courts judicially know the quantity of land in a league. *Long v. Shelton* (Civ. App.) 126 S. W. 40.

The court of civil appeals cannot judicially know, in the absence of proof, that \$50 was so grossly inadequate a consideration for 120 separate lots conveyed by sheriff's deed as to warrant holding the deed void upon collateral attack. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

15. **Management and conduct of occupations.**—The court will take judicial notice that wholesale dealers ordinarily make sales to their customers in the state by sending traveling salesman to their customers' places of business. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

16. — **Railroads.**—Rule of railroads, that persons who have no tickets and cannot pay fare will be ejected by conductor, held not to require proof. *Galveston, H. & H. R. Co. v. Scott*, 34 C. A. 501, 79 S. W. 642.

Though it is matter of common knowledge that the business of operating electric street railways is generally carried on by corporations, it cannot be judicially known that no others than corporations are carrying on such business in the state. *Beaumont Traction Co. v. State*, 57 C. A. 605, 122 S. W. 615, 618.

The court of civil appeals will take judicial notice that the greater part of a railroad's rolling stock is required to be constantly in use on its various lines, but that only a comparatively small portion would be normally in a certain city. *City of Tyler v. Coker* (Civ. App.) 124 S. W. 729.

The jury cannot take judicial note that all railroad engines emit sparks and cinders which may be blown by the wind a given distance. *St. Louis Southwestern Ry. Co. of Texas v. McIntosh & Carlisle* (Civ. App.) 126 S. W. 692.

That railroads are the only common carriers engaged in transporting commodities in large quantities the courts judicially know. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

17. **Customs and usages.**—The court will take judicial notice of the fact that in making conveyances of land after location of certificate and before issuance of patent instruments in the form of powers of attorney were used. *Sims v. Sealy*, 53 C. A. 518, 116 S. W. 630.

Judicial notice will be taken that it is the almost universal custom, in official and business affairs, to pay bills and salaries monthly, and usually on the 1st of the month following the accrual of the indebtedness. *Southwestern Telegraph & Telephone Co. v. City of Dallas* (Civ. App.) 131 S. W. 80.

18. **Corporations and associations and members thereof.**—It is within the judicial knowledge that the Texas & Pacific Railway was a part of the Missouri Pacific Railway system, and was operated by appellant; proof of this fact was not required and the court should have so instructed the jury. *Mo. Pac. Ry. Co. v. White*, 3 App. C. C. § 163; *Mo. Pac. Ry. Co. v. Graves*, 2 App. C. C. § 679; *Miller v. Railway Co.*, 83 T. 518, 18 S. W. 954.

The courts will take judicial notice of the respective runs and locations of railroads between a point in the state to a point in another state. *Texas & N. O. Ry. Co. v. Walker*, 43 C. A. 273, 95 S. W. 743.

The court takes judicial notice of the direction, run, and location of important railroads within the state, and of the location of county seats, but not of towns which are not county seats. *Missouri, K. & T. Ry. Co. of Texas v. Lightfoot*, 48 C. A. 120, 106 S. W. 395.

The court of civil appeals can take judicial notice of the location of the line of a railroad, but it is doubtful if it can take notice of the location of a depot. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

19. Matters relating to government and its administration in general.—While the courts take judicial cognizance of the territorial extent of the sovereignty and jurisdiction exercised by their own government, and of the political subdivisions of the country and their relative positions, they do not take notice of their precise boundaries, otherwise than as defined by public statutes, nor whether a particular locality is or is not within a particular county. *Boston v. State*, 5 App. 333, 32 Am. Rep. 575; *Long v. State*, 1 App. 709.

Judicial notice cannot be taken that in 1895 more than half the public domain had been exhausted for the benefit of others than the public free school fund. *State v. Powell* (Civ. App.) 134 S. W. 746.

The court judicially knows that free school land is, on a sale by the state, incumbered by a first lien for the price. *Texas Moline Plow Co. v. Clark* (Civ. App.) 145 S. W. 266.

20. Political divisions and bodies—Counties and county seats.—The division of any other state or country than Texas into counties, or the location of their towns and cities, when material, must be proven. *Andrews v. Hoxie*, 5 T. 171; *Ellett v. Britton*, 6 T. 229; *Ellis v. Park*, 8 T. 205; *Russell v. Martin*, 15 T. 238; *Yale v. Ward*, 30 T. 17.

The court will take notice of the counties of this state. *State v. Jordan*, 12 T. 205; *Bryan v. Crump*, 55 T. 1. But not of the location of cities in other states. *Andrews v. Hoxie*, 5 T. 171; *Ellis v. Park*, 8 T. 205; *Russell v. Martin*, 15 T. 238; *Yale v. Ward*, 30 T. 17. It will take notice of the terms of court. *Griffith v. Gary*, 31 T. 163; *Davidson v. Peticolas*, 34 T. 27. Of the proceedings of the suit therein pending. *Long v. Wortham*, 4 T. 331; *Castro v. Whitlock*, 15 T. 437. Of facts established by general history. *Dobbin v. Bryan*, 5 T. 276; *Robertson v. Teal*, 9 T. 344; *Wheeler v. Moody*, 9 T. 372; *Williamson v. Simpson*, 16 T. 433; *Magee v. Chadoin*, 30 T. 644; *The Emancipation Cases*, 31 T. 504; *Clark v. State*, 31 T. 574; *Bryan v. Crump*, 55 T. 1.

Facts within common knowledge need not be proven, as the division of this state into counties (*State v. Jordan*, 12 T. 205); that a particular town, which is the county seat of a county, is in that county (*Carson v. Dalton*, 59 T. 500).

Courts do not take judicial notice of the date of the organization of a county. *Trimble v. Edwards*, 84 T. 497, 19 S. W. 772; *Hill v. Grant* (Civ. App.) 44 S. W. 1016.

The locality of a county seat need not be proven. *Hambel v. Davis*, 89 T. 256, 34 S. W. 439, 59 Am. St. Rep. 46.

Where a title involved proof of the appointment of an administrator prior to 1850, the court will take judicial notice that the county was organized in 1848. *Moseley v. Vander Stucken*, 26 C. A. 290, 62 S. W. 1103.

The court of civil appeals will take judicial knowledge that Eagle Pass is the county seat of Maverick county. *Flynt v. Eagle Pass Coal & Coke Co.* (Civ. App.) 77 S. W. 331.

The court judicially knows that Culberson county was created out of a part of the territory of El Paso county by Acts 32d Leg. c. 38. *McCammant v. Webb* (Civ. App.) 147 S. W. 693.

21. Cities.—Courts will take judicial notice that the city of Houston has been incorporated for more than 40 years, and that its charter has from time to time been amended. *City of Houston v. Dooley*, 40 C. A. 371, 89 S. W. 777.

22. Foreign governments.—The division of any other state or country than Texas into counties, or the location of their towns and cities, when material, must be proven. *Andrews v. Hoxie*, 5 T. 171; *Ellett v. Britton*, 6 T. 229; *Ellis v. Park*, 8 T. 205; *Russell v. Martin*, 15 T. 238; *Yale v. Ward*, 30 T. 17.

23. Laws of the state—Public statutes.—The court will take judicial notice of the public acts and statutes of the United States and of this state, and facts which are recited in them. *Jones v. Laney*, 2 T. 342; *Watrous v. McGrew*, 16 T. 506; *Wright v. Hawkins*, 28 T. 452; *Railroad Co. v. Knapp*, 51 T. 569.

Where the petition in an action against a county to recover taxes paid on an alleged illegal assessment of property did not separate the amounts paid for state and county taxes, the court could take judicial notice of the rate of taxation fixed by general law for state purposes, and thereby determine the amount of county taxes due in determining the amount in controversy and jurisdiction of the county court. *Texas Land & Cattle Co. v. Hemphill County* (Civ. App.) 61 S. W. 333.

The federal courts take judicial notice of the laws of every state. *Edwards v. Smith* (Civ. App.) 137 S. W. 1161.

The court will take judicial notice that at a certain time at which an appeal record was filed, none of the acts of the Legislature at its last regular session had been published. *Lester v. Riley* (Civ. App.) 157 S. W. 458.

24. — Private statutes.—Private acts of this state must be proven (*Sterret v. Houston*, 14 T. 153; *Holmes v. Anderson*, 59 T. 481) by the printed statute book (Art. 3692) or by a certified copy of the act (Art. 3627).

The court held to take judicial notice of a special act of the legislature. *International & G. N. R. Co. v. Hall*, 35 C. A. 545, 81 S. W. 82.

25. — Charters of public and private corporations.—The court cannot take judicial notice of how the charter of a particular city requires ordinances to be enacted. *Wade v. Nunnally*, 19 C. A. 256, 46 S. W. 668.

Where a city charter is made a public act, judicial notice will be taken thereof. *City of Austin v. Forbis*, 99 T. 234, 89 S. W. 405.

Where a case involves the validity of a special city charter, the charter should be

offered in evidence, where it contains no provisions authorizing judicial notice to be taken of it. *City of Paris v. Tucker*, 101 T. 99, 104 S. W. 1046.

Courts will construe pleadings as though relevant provisions of Paris city charter were incorporated. *McCuiston v. Fenet* (Civ. App.) 144 S. W. 1155.

26. — Municipal ordinances.—Ordinances of a municipal corporation must be alleged and proven. *City of Austin v. Walton*, 68 T. 507, 5 S. W. 70.

The court held not authorized to take judicial notice of ordinances of a city incorporated under the general laws. *International & G. N. R. Co. v. Hall*, 35 C. A. 545, 81 S. W. 82.

27. Laws of United States.—The court will take judicial notice of the public acts and statutes of the United States and of this state, and facts which are recited in them. *Jones v. Laney*, 2 T. 342; *Watrous v. McGrew*, 16 T. 506; *Wright v. Hawkins*, 28 T. 452; *Railroad Co. v. Knapp*, 51 T. 569.

A state court will take judicial notice of state statutes which an act of congress puts in force in a territory. *Red River Nat. Bank v. De Berry*, 47 C. A. 96, 105 S. W. 998.

The court takes judicial notice of an act of congress, but does not take judicial notice of the construction placed on the common law by the supreme court of a sister state. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465.

The state courts take judicial notice of the laws of the United States. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574; *Edwards v. Smith* (Civ. App.) 137 S. W. 1161.

28. Laws of other states.—The court does not take judicial cognizance of the laws of the several states or of foreign countries, which, in the absence of proof, are supposed to be the same as our own. *Crosby v. Huston*, 1 T. 203; *Bryant v. Kelton*, 1 T. 434; *Nimmo v. Davis*, 7 T. 26; *Bufford v. Holliman*, 10 T. 560, 60 Am. Dec. 223; *Sadler v. Anderson*, 17 T. 245; *Wallace v. Burden*, 17 T. 467; *Bradshaw v. Mayfield*, 18 T. 21; *Grant v. Bledsoe*, 20 T. 456; *Armendiaz v. Serna*, 40 T. 291; *Porcheler v. Bronson*, 50 T. 555; *Moseby v. Burrow*, 52 T. 396; R. S. 2317 (Art. 3709).

When it is proven that the common law of England was in force in a particular state where the rights in controversy accrued, the court will take notice of the principles of the common law, including equity applicable to the case. *Nimmo v. Davis*, 7 T. 26; *Wallace v. Burden*, 17 T. 467; *Vardeman v. Lawson*, 17 T. 10.

The court cannot take judicial notice of a law of another state, making a judgment of a justice a judgment of the court of record to which a certified copy is returned. *I. B. Rosenthal Millinery Co. v. Lennox* (Civ. App.) 50 S. W. 401.

Judicial notice cannot be taken of the construction placed by the courts of another state on its statutes. *Pacific Exp. Co. v. Pitman*, 30 C. A. 626, 71 S. W. 312; *Loyal Americans of the Republic v. McClanahan*, 50 C. A. 256, 109 S. W. 973.

Judicial notice will not be taken of the laws of another state. *White v. Richeson* (Civ. App.) 94 S. W. 202.

Judicial notice will be taken of an act of congress organizing a territory but not of laws passed by the legislature of the territory, nor of the construction placed by its supreme court on the common law. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

In the absence of an express statute of the forum to the contrary, the court will not take judicial notice of the law of another state. *Texas & N. O. R. Co. v. Miller* (Civ. App.) 128 S. W. 1165.

29. Laws of foreign countries.—The court does not take judicial cognizance of the laws of the several states or of foreign countries, which, in the absence of proof, are supposed to be the same as our own. *Crosby v. Huston*, 1 T. 203; *Bryant v. Kelton*, 1 T. 434; *Nimmo v. Davis*, 7 T. 26; *Bufford v. Holliman*, 10 T. 560, 60 Am. Dec. 223; *Sadler v. Anderson*, 17 T. 245; *Wallace v. Burden*, 17 T. 467; *Bradshaw v. Mayfield*, 18 T. 21; *Grant v. Bledsoe*, 20 T. 456; *Armendiaz v. Serna*, 40 T. 291; *Porcheler v. Bronson*, 50 T. 555; *Moseby v. Burrow*, 52 T. 396; R. S. 2317 (Art. 3709).

A surviving wife, suing for injuries inflicted on her husband in a foreign country, must prove the laws of such country showing that such a cause of action would survive to her. *Mexican Cent. Ry. Co. v. Goodman*, 20 C. A. 109, 48 S. W. 778.

The court judicially knows what the law was in the state of Tamaulipas prior to the independence of Texas. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

30. Jurisdiction and powers of courts.—Courts of Texas will take judicial notice of the fact that courts in Louisiana cannot administer réalty situated in Texas. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

A copy of an order probating a will, certified by the clerk of the county court, held to show presumptively a probate by a court having jurisdiction. *Yarbrough v. De Martin*, 28 C. A. 276, 67 S. W. 177.

31. Terms of courts.—The appellate courts will take judicial knowledge of the terms of the district courts of the state. *Emery v. League*, 31 C. A. 474, 72 S. W. 603; *Accoussi v. G. A. Stowers Furniture Co.* (Civ. App.) 83 S. W. 1104.

The court of criminal appeals will take judicial notice that in a large part of Texas the district courts convene only twice a year, and that in many of the counties they remain in session for periods of time ranging from one to four or five weeks. *Ex parte Looper*, 61 Cr. R. 129, 134 S. W. 345, Ann. Cas. 1913B, 32.

32. Rules and procedure of courts.—Courts will judicially notice the general principles of equity. *Babcock v. Marshall*, 21 C. A. 145, 50 S. W. 728.

The court will look to the judicial reports of other states to learn what application, if any, is given there to the general principles of equity. *Id.*

33. Judicial proceedings and records.—Judicial notice will be taken of the records of a case on a former appeal. *Wood v. Cahill*, 21 C. A. 38, 50 S. W. 1071.

Court of appeals will affirm judgment of trial court, entered on stipulated facts, though it knows judicially that the statement is inaccurate. *Jackson v. West* (Civ. App.) 54 S. W. 297.

Where, in an action to foreclose the lien of a judgment rendered in another county, no issue as to its validity was raised below, and a judgment in an action of the same

title has been reversed in the appellate court, that court cannot take judicial notice that it is the same action. *Goodwin v. Harrison*, 28 C. A. 7, 66 S. W. 308.

An allegation in a pleading need not be offered in evidence to be considered against the pleader. *Crosby v. Bonnowsky*, 29 C. A. 455, 69 S. W. 212.

In garnishment proceedings, the court must take judicial notice of the provisions of the main judgment. *Jeffries v. Smith*, 31 C. A. 582, 73 S. W. 48.

The court of civil appeals takes judicial notice of the effect of its own proceedings. *Avocato v. Dell'Ara* (Civ. App.) 84 S. W. 444.

Court of civil appeals held entitled to take judicial notice of its own records. *Sawyer v. First Nat. Bank*, 41 C. A. 486, 93 S. W. 151.

A court will take judicial notice in garnishment proceedings of the original judgment when rendered in the same court. *Baze v. Island City Mfg. Co.* (Civ. App.) 94 S. W. 460.

The court by certifying in a supplemental proceeding that it took judicial notice of facts exhibited in the main case in effect holds that the facts judicially noticed are sufficient to support its decision. *Waters-Pierce Oil Co. v. State*, 47 C. A. 299, 105 S. W. 851.

The court of civil appeals will take judicial cognizance of its records and judgments. *Edgar v. McDonald* (Civ. App.) 106 S. W. 1135.

In a suit on a note providing for the payment of attorney's fees if suit was instituted, the court would take judicial notice of the institution of the suit. *Elmore v. Rugely*, 48 C. A. 456, 107 S. W. 151.

The court will take judicial cognizance of an attachment without formal introduction of the papers in evidence. *Johnson v. W. H. Goolsby Lumber Co.* (Civ. App.) 121 S. W. 883.

The court cannot take judicial notice of the record in another case. *Taylor v. Shelton* (Civ. App.) 134 S. W. 302.

The court of civil appeals could take judicial notice of a prior decision holding a local option election void. *Savage v. State* (Civ. App.) 138 S. W. 211; *State v. Savage*, 105 T. 467, 151 S. W. 530.

The court of civil appeals cannot take judicial notice that the word "refused," written on a request to charge, was in the handwriting of the trial judge. *Missouri, K. & T. Ry. Co. of Texas v. Hurdle* (Civ. App.) 142 S. W. 992.

An appellate court will take judicial notice of a former decision by it in the same case, although it does not appear in the record on appeal. *McGee v. Anderson* (Civ. App.) 146 S. W. 1198.

The court will take judicial notice in garnishment proceedings of the judgment in the principal case. *Texas & P. Ry. Co. v. W. C. Powell & Son* (Civ. App.) 147 S. W. 363.

A court will take judicial notice of its own records made in the same case. *Central Bank & Trust Co. of Houston v. Davis* (Civ. App.) 149 S. W. 290.

This court takes official cognizance of the facts shown by its own records in another case between the same parties. *Allen v. Thomson* (Civ. App.) 156 S. W. 304.

34. **Offices and official position and authority.**—The court will take judicial notice of who was clerk of the county in which a court is sitting at the time of filing of an abstract of judgment from another county. *Goodwin v. Harrison*, 28 C. A. 7, 66 S. W. 308.

35. **Official proclamations and orders.**—The courts will take judicial notice of a proclamation of the governor. *Missouri, K. & T. Ry. Co. of Texas v. McIlhanev* (Civ. App.) 129 S. W. 153.

Since courts will take judicial notice of the regulations of the department of agriculture as to the transportation of cattle, and a proclamation of the secretary of agriculture putting such regulations in force, it was not error, in an action against a carrier for alleged default in carrying such regulations into effect, to introduce in evidence a pamphlet issued by the government purporting to contain such regulations without further authenticating it. *Pecos & N. T. R. Co. v. Jarman & Arnett* (Civ. App.) 138 S. W. 1131.

36. **Administrative rules and regulations.**—As the court will take judicial notice of the regulations of the agricultural department concerning the transportation of cattle, it was not error to admit in evidence a pamphlet containing such regulations. *Pecos & N. T. Ry. Co. v. Jarman & Arnett* (Civ. App.) 138 S. W. 1131.

37. **Official proceedings and acts.**—The court knows, as a matter of law, that the consent of the federal executive of Mexico was essential to a grant of land within the littoral leagues, and no presumption can exist in favor of a grant made without such consent. *Wilcox v. Chambers*, 26 T. 180.

RULE 16. ANCIENT WILLS, DEEDS AND OTHER INSTRUMENTS MORE THAN THIRTY YEARS OLD, WHEN OFFERED IN EVIDENCE, UNBLEMISHED BY ALTERATIONS AND COMING FROM SUCH CUSTODY AS AFFORDS A REASONABLE PRESUMPTION IN FAVOR OF GENUINENESS, WITH OTHER CIRCUMSTANCES OF CORROBORATION, WILL BE ADMITTED IN EVIDENCE WITHOUT PROOF OF THEIR EXECUTION

In general.—It is sufficient if an instrument is thirty years old when it is offered in evidence. *Bass v. Sevier*, 58 T. 567; *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437; *Pendleton v. Robertson* (Civ. App.) 32 S. W. 442; *Huff v. Crawford* (Civ. App.) 32 S. W. 592; *Walker v. Peterson* (Civ. App.) 33 S. W. 269. When it appears that the party offering an instrument as an ancient writing could have examined competent witnesses of the handwriting, the omission to make proof of the handwriting is a circumstance to excite suspicion of the genuineness of the instrument; and the suspicion is strengthened in a case where the instrument in question purported to be the act of public officers, with whose handwriting many persons were likely to be acquainted. *Stroud v. Springfield*, 28 T. 649; *Belcher v. Fox*, 60 T. 527; *Newby v. Haltaman*, 43 T. 314. Where a deed would be evidence as an ancient deed, without proof of its execution, the power

under which it purports to have been executed will be presumed. *Watrous v. McGrew*, 16 T. 506; *Johnson v. Timmons*, 50 T. 521.

An ancient instrument produced from the proper custody is admissible in evidence without proof of its execution, although an affidavit of forgery be filed. *Parker v. Chancellor*, 73 T. 475, 11 S. W. 503; *Ammons v. Dwyer*, 78 T. 639, 15 S. W. 1049; *Davis v. Pearson*, 20 S. W. 241, 6 C. A. 593; *Stooksbury v. Swan*, 85 T. 563, 22 S. W. 963; *Kenward v. Withrow* (Civ. App.) 29 S. W. 226; *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437; *Hill v. Templeton* (Civ. App.) 29 S. W. 535; *Morgan v. Tutt*, 52 C. A. 301, 113 S. W. 958; *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

Ancient instrument defined. *Holt v. Maverick*, 23 S. W. 751, 5 C. A. 650; *Id.* (Civ. App.) 24 S. W. 532.

A paper indorsed thereon as having been acted on by the court will be received after 50 years as marked "filed." *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

The power under which an ancient instrument was executed held to be presumed. *Jones' Estate v. Neal*, 44 C. A. 412, 98 S. W. 417.

Specified ancient instruments held admissible in evidence without proof of execution. *Millwee v. Phelps*, 53 C. A. 195, 115 S. W. 891.

An instrument executed in 1838 is admissible as an ancient instrument without proof of its execution. *Sims v. Sealy*, 53 C. A. 518, 116 S. W. 630.

Date of instrument held not to prove it an ancient document. *West v. Houston Oil Co. of Texas*, 56 C. A. 341, 120 S. W. 228.

Statement of things which must exist to authorize admission of a deed as an ancient document. *Id.*

On a proper showing, an instrument held admissible as an ancient document, without calling attesting witnesses or offering other usual evidence. *Id.*

Where an instrument more than 30 years old is brought from a proper custody and the instrument is honest on its face, it is admissible as evidence on the presumption that it is genuine, which presumption is sufficient to justify a finding in favor of its validity, and the party offering it need not account for its possession during a period of over 100 years of its existence. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

The rule as to ancient documents applies to domestic, and not to foreign, records. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 128 S. W. 629.

Custody of instrument.—Ancient document held admissible on proof of genuineness of a signature of a witness, though not coming from the proper depository. *Harris v. Hosins*, 2 C. A. 486, 22 S. W. 251.

To render an instrument admissible as an ancient document, held necessary only to show that it was found in the office where it should have been filed, and not that it was in any particular file in the office. *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 75.

To render an ancient instrument admissible in evidence, it must have been in and come from some place where it would be natural to find a genuine document of the same tenor. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

Effect of alterations.—One offering in evidence an ancient instrument without proof of execution has the burden of explaining any suspicious change in the instrument. *Morgan v. Tutt*, 52 C. A. 301, 113 S. W. 958.

Deeds.—The great weight of authority is that possession under such a deed is not essential. *Mapes v. Leal's Heirs*, 27 T. 345; *Gainer v. Cotton*, 49 T. 101; *Williams v. Conger*, 49 T. 582; *Glasscock v. Hughes*, 55 T. 461; *Holmes v. Coryell*, 58 T. 680; *Cox v. Cock*, 59 T. 521; *Chamberlain v. Showalter*, 5 C. A. 236, 23 S. W. 1017; *Williams v. Hardie* (Civ. App.) 21 S. W. 267; *Kellogg v. McCabe*, 14 C. A. 598, 38 S. W. 542; *West v. Houston Oil Co. of Texas*, 56 C. A. 341, 120 S. W. 228.

What circumstances of corroboration are necessary to authenticate a writing offered as an ancient deed must greatly depend in every case upon the purpose and character of the instrument itself. They must be auxiliary to the apparent antiquity of the deed and be sufficient to raise a reasonable presumption of its genuineness. *Stroud v. Springfield*, 28 T. 649.

In an action of trespass to try title, the defendant, for the purpose of showing a superior outstanding title in one Reynolds, offered in evidence the original grant, or certified copy of same, to Manchaca, in which is incorporated the copy of deed and power of attorney from Manchaca to Reynolds, in September, 1830, as a certified copy of an ancient instrument, and in connection with the other evidence of the existence of the deed from Manchaca to Reynolds, and to prove its existence and contents. This evidence not being offered as an archive of the general land office, but as a certified copy of an ancient instrument, the antiquity of which was not shown, was properly excluded. *Dotson v. Moss*, 58 T. 152.

As to proof of an ancient deed, see *Holmes v. Coryell*, 58 T. 680; *Cox v. Cock*, 59 T. 521; *Belcher v. Fox*, 60 T. 527.

A deed more than 30 years old is admissible in evidence, without proof of its execution, as an ancient deed, where it is produced by the party claiming under it and entitled to its custody, and nothing is adduced in proof to cast suspicion upon it. *Fletcher v. Ellison*, 1 U. C. 661; *Ammons v. Dwyer*, 78 T. 640, 15 S. W. 1049; *Lunn v. Scarborough*, 24 S. W. 846, 6 C. A. 15; *Walker v. Peterson* (Civ. App.) 33 S. W. 269; *Stooksberry v. Swann*, 12 C. A. 66, 34 S. W. 369; *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

The party offering an instrument charged to be a forgery must offer evidence of its execution, and when this is done the burden of proof shifts to the party assailing it. In case of a deed, its antiquity, due registration, long and continuous possession by those claiming under it, are sufficient, unless rebutted. *Trinity Co. L. Co. v. Pinckard*, 23 S. W. 720, 4 C. A. 671.

A sheriff's deed 30 years old, in absence of proof of loss of the judgment and execution on which it is based, is not admissible in evidence. *French v. McGinnis*, 10 C. A. 7, 29 S. W. 656. See Same Case, 9 S. W. 323, 69 T. 19; *Id.*, 21 S. W. 941, 3 C. A. 86.

A deed purporting to have been executed by an attorney in fact, no claim under it having been made for 25 years, is not admissible as an ancient deed. *Baldwin v. Goldfrank*, 31 S. W. 1064, 88 T. 249.

Deed more than 35 years old (*Pendleton v. Robertson* [Civ. App.] 32 S. W. 442; *Huff v. Crawford* [Civ. App.] 32 S. W. 592) admitted as an ancient instrument against an affi-

davit impeaching its genuineness (*McWhirter v. Allen*, 20 S. W. 1007, 1 C. A. 649). See *Stribling v. Atkinson*, 79 T. 162, 14 S. W. 1054; *Holt v. Maverick*, 23 S. W. 751, 5 C. A. 650; *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437; *Harris v. Hoskins*, 22 S. W. 251, 2 C. A. 486; *De La Vega v. League*, 21 S. W. 565, 2 C. A. 252; *Lunn v. Scarborough*, 6 C. A. 15, 24 S. W. 846; *Threadgill v. Bickerstaff*, 26 S. W. 739, 7 C. A. 406.

In determining the age of an ancient deed, indorsements and certificates attached are to be considered. *Bell v. Hutchings* (Civ. App.) 41 S. W. 200.

The rule in regard to ancient instruments does not apply to a deed that has been in the possession of the grantor and his heirs since the alleged execution. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

Whether an ancient deed admitted in evidence was properly acknowledged is immaterial. *Smith v. Cavitt*, 20 C. A. 553, 50 S. W. 167.

Ancient deed between third parties, establishing corner not in dispute, but from which disputed line may be located, held admissible. *Pierce v. Schram* (Civ. App.) 53 S. W. 716.

A deed not recorded 30 years prior to its introduction in evidence held not admissible as an ancient instrument. *Ehrenberg v. Baker's Ex'rs* (Civ. App.) 54 S. W. 435.

A deed over 30 years old, signed, "R., by His Attorney, J." was admissible as an ancient document, though the body of the instrument did not show the attorney's authority to execute. *Ferguson v. Ricketts* (Civ. App.) 55 S. W. 975.

Where a deed was executed by one purporting to act as agent for the owners, it was not error to charge that, in determining his authority or the ratification of his acts, they might "look to the age of the transaction and the assertion of the title thereunder," though the deed was not 30 years old. *Kirkpatrick v. Tarlton*, 29 C. A. 276, 69 S. W. 179.

Facts held to authorize admission in evidence of an ancient deed, though the record did not show by whom or when it was recorded. *Kimball v. Morris* (Civ. App.) 71 S. W. 759.

Age of the record of a deed held not conclusive evidence of its execution. *Gann v. Roberts*, 32 C. A. 561, 74 S. W. 950.

An administrator's deed, over 30 years of age, was admissible as an ancient instrument, without proof. *Dutton & Rutherford v. Wright & Vaughn*, 38 C. A. 372, 85 S. W. 1025.

The record of an unproved ancient deed or contract of sale held admissible with other evidence, in trespass to try title, to show a sale of the land in controversy. *Veatch v. Gray*, 41 C. A. 145, 91 S. W. 324.

In trespass to try title, recitals in a certain ancient deed held admissible in evidence. *Sydor v. Texas Savings & Real Estate Inv. Ass'n*, 42 C. A. 138, 94 S. W. 451.

In trespass to try title to certain property, recitals in an ancient deed held sufficient to show that the sale was made under order of the probate court. *Williams v. Cessna*, 43 C. A. 315, 95 S. W. 1106.

A deed 50 years old, custody of which was traced back to a representative of the estate of the grantee, held admissible as an ancient instrument. *Jones' Estate v. Neal*, 44 C. A. 412, 98 S. W. 417.

When a deed by an agent is shown by circumstances to have been executed, and is more than 30 years old, the agent's power will be presumed. *Fruglia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

The fact that an ancient, duly executed deed was found among the papers of one of the grantees in possession of his daughter instead of among the public archives does not throw suspicion on it. *Id.*

A deed held to come from the proper custody to be admissible as an ancient instrument. *Stark v. Harris* (Civ. App.) 106 S. W. 837.

A deed held admissible as an ancient instrument, without being filed in the papers of the suit as a recorded instrument. *Id.*

Recitals of a deed 26 years old were admissible, along with other circumstances, to establish defendants' chain of title. *McMahon v. McDonald*, 51 C. A. 613, 113 S. W. 322.

A county clerk's certificate of the record of a deed in question held admissible to show the prior existence and record of the deed. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

Recitals in ancient instruments which are a part of a chain of title are admissible as tending to show the execution of a lost deed in such chain. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 123 S. W. 629.

A deed held to possess the character of an ancient instrument and admissible in evidence as such. *Ardoin v. Cobb* (Civ. App.) 136 S. W. 271.

A deed executed in 1858, by persons purporting to act as trustees of a corporation, is admissible in evidence, without proof of their authority to so act, although the deed was not recorded until 1902, where those claiming under the instrument have exercised acts of ownership thereunder. *Askew v. Cantwell* (Civ. App.) 146 S. W. 720.

Land certificates.—A paper purporting to be a transfer of a headright claim, dated January 9, 1838, was originally written with blank spaces, which were afterwards filled up with amounts and names. In the body of the instrument the vendor's name was spelled differently in different places, though evidently not written thus by himself. This transfer had, at various times, been recognized and acted on by parties claiming under it until May, 1879, when it was offered in evidence as the basis of title, after showing that it had been found in a place where, under the circumstances, it might have been reasonably looked for, and came from a proper custody, accompanied with the evidence of several witnesses, who testified to their belief in the genuineness of the signature of the vendor. Held: 1. That the custom of preparing such transfers in blank was so frequent as not to require explanation. *Stone v. Brown*, 54 T. 330; *Threadgill v. Butler*, 60 T. 599. 2. The fact that the vendor's name was spelled differently in different places would not vitiate it. 3. It was an ancient instrument, and the evidence was sufficient to support a verdict in favor of its genuineness. 4. Though made before the issuance of the headright certificate, it took effect when the certificate was granted. 5. Such a transfer constituted, as against the heirs of the vendor, a superior title to the land covered by the certificate. *Hollis v. Dashiell*, 52 T. 187.

As to the transfer of a land certificate on file in the general land office, see *Chamberlain v. Showalter*, 23 S. W. 1017, 5 C. A. 226.

A land certificate over 30 years of age free from suspicion and coming from the land office, is admissible as an ancient document. *Timmony v. Burns* (Civ. App.) 42 S. W. 133.

A land certificate held admissible as an ancient document, though an affidavit was filed that a transfer indorsed thereon was a forgery. *Id.*

It is also presumed that the transfer of a land certificate was indorsed on the instrument before it was filed. *Id.*

Transfer of land certificate, made more than 30 years before trial, proves itself under rule admitting ancient instruments. *Walker v. Peterson* (Civ. App.) 42 S. W. 1045.

Fact that signature to a transfer of a land certificate was traced, such fact being shown by expert evidence, held not to render it inadmissible as an ancient instrument. *Ward v. Cameron* (Civ. App.) 76 S. W. 240.

Transfer of land certificate with name of grantee left blank held not to cast suspicion on it, so as to prevent it being received in evidence as an ancient instrument. *Id.*

In trespass to try title, transfer of a certificate issued in lieu of a headright held properly admitted in evidence. *Simmonds v. Simmonds*, 35 C. A. 151, 79 S. W. 630.

Maps and plats.—An ancient map is admissible to show boundaries. *Gallon v. Van Wormer* (Civ. App.) 21 S. W. 547.

Ancient plats long and publicly recognized by the public and the parties held admissible as a species of reputation of the location of land. *Finberg v. Gilbert*, 104 T. 539, 141 S. W. 82.

Receipts.—A receipt 30 years old, coming from the file of a court in which it had been introduced in evidence, is competent evidence. *Culmore v. Medlenka* (Civ. App.) 44 S. W. 676.

A receipt showing delivery of a headright certificate held admissible as an ancient instrument, throwing light on its history, and tracing its possession. *Estell v. Kirby* (Civ. App.) 48 S. W. 8.

Grants.—The original of a grant of lots made in April, 1834, executed by an alcalde recited to have been a commissioner, admitted as an ancient instrument. *Jobe v. Ollre*, 80 T. 185, 15 S. W. 1042.

Testimonium executed in 1832 was held admissible as an ancient document. *De La Vega v. League*, 21 S. W. 565, 2 C. A. 252. And see *Von Rosenberg v. Haynes*, 20 S. W. 143, 85 T. 357.

On the issue whether a title offered a vendee was good and marketable, an old grant of Coahuila and Texas held competent to show a defect therein. *Hollifield v. Landrum*, 31 C. A. 187, 71 S. W. 979.

Where the testimony showed that the county clerk's office of a county was the place where original ancient grants of land had been kept and recorded since the day of the republic, and a witness testified that more than 30 years before when he was deputy county clerk, he had found an original grant in the archives of the office, and another witness testified that he got the original grant from the office of the county clerk, and that the county clerk authorized the witness to bring the document into court, the original grant was properly received in evidence, though under Act Dec. 22, 1836 (Hartley's Dig. art. 1786), the commissioner of the general land office was entitled to the custody of the grant, since the fact that such custody was not obtained did not affect the validity of the grant, or render it inadmissible by a party claiming under it. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

After the lapse of 50 years, held, that it would be presumed that a justice of the peace had authority to grant lands in the town of Socorro. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

Letters.—In trespass to try title, a letter written by the transferee of a land certificate held admissible on the question of proper custody of the transfer and as to the filling in of the transfer with name of the transferee. *Ward v. Cameron* (Civ. App.) 76 S. W. 240.

In trespass to try title held error not to admit in evidence a certain letter and other facts tending to show the execution of the same as a genuine ancient document. *Woodward v. Keck* (Civ. App.) 97 S. W. 852.

A letter written for defendant by another to the state land commissioner more than 30 years before the trial held admissible without proof of the authority of the person writing the same to sign defendant's name. *Robertson v. Brothers* (Civ. App.) 139 S. W. 657.

Power of attorney.—Execution of a power of attorney under which a deed more than 30 years old had been executed held to be presumed without proof. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

Bond for title.—A bond for title, 20 years old, which had been recognized as valid by the grantors, is admissible as an ancient instrument. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

A bond for title with a transfer indorsed thereon held not admissible in evidence as an ancient instrument. *Morgan v. Tutt*, 52 C. A. 301, 113 S. W. 958.

In trespass to try title a bond for a reconveyance held not inadmissible in evidence because payment of notes was not shown. *Millwee v. Phelps*, 53 C. A. 195, 115 S. W. 891.

Minutes of association.—The minutes of an Odd Fellows' lodge over 30 years old are admissible in evidence. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

Bounty warrant.—A bounty warranty 46 years old, recognized and acted on for 40 years, found in the general land office and free from suspicion, proves itself. *Shinn v. Hicks*, 68 T. 277, 4 S. W. 486; *Wilson v. Simpson*, 80 T. 279, 16 S. W. 40; *Jobe v. Ollre*, 80 T. 185, 15 S. W. 1042; *Warren v. Frederichs*, 76 T. 647, 13 S. W. 643; *Pasture Co. v. Preston*, 65 T. 448; *Ammons v. Dwyer*, 78 T. 639, 15 S. W. 1049.

Orders.—The judge's signature to an order over 50 years old will be presumed genuine. *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

Wills.—The following language is used in *Ochoa v. Miller*, 59 T. 460: "Where a will appears to be ancient, and comes from the proper custody, and possession has been had, consistent with its terms, for a long period of time, and its probate was impossible or impracticable, the court might in such a case uphold and favor such a long and undisturbed possession, and, to protect a right, perhaps be justified in recognizing its validity and genuineness. * * * This point is not, however, presented in this case, and the decision is limited to the exact points necessary to be determined." See *Murphy v. Welder*, 58 T. 235.

RULE 17. THE EXISTENCE OF A DEED MAY BE PRESUMED FROM POSSESSION UNDER CLAIM OF TITLE CORROBORATED BY OTHER CIRCUMSTANCES

In general.—The existence of a deed was presumed from the following facts: The land in controversy was the property of R., who died in 1861, and under whom the plaintiff claimed by descent. In 1852 S., under whom the defendant claimed, commenced to exercise acts of ownership over the land, by cutting and removing timber therefrom, until 1860, when he inclosed and cultivated it; in 1869 the fence was swept away by a flood, and the land was left uncultivated and uninclosed until 1874, when it was sold to defendant. R. and S. were neighbors for many years. In 1858 R. stated to the defendant, who bought from him other land, part of the same tract, that he had sold the land in controversy to S. S. and his representatives had assessed the land and paid taxes upon it from 1852 until the sale to defendant in 1874. *McDow v. Rabb*, 56 T. 154.

In an action of trespass to try title the defendant claimed as follows: 1. Bounty land warrant issued November 20, 1838, to G. W. Lernoyn. The warrant contained the following clause: "And the said G. W. Lernoyn, by his attorney, T. D. Tompkins is entitled to hold said land, or to sell, alienate, convey and donate the same, and to exercise all rights of ownership over it." 2. Transfer of the same, January 8, 1839, by Tompkins to Holbrook, and by Holbrook to Wright, April 29, 1847. 3. Location by Mitchell for Wright in 1853. 4. Patent to Lernoyn. It was held that Tompkins had prima facie the right to convey, and that the court should have submitted to the jury the question of limitation and stale demand, and also the presumption of acquiescence by Lernoyn in the sale of the certificate, by reason of the lapse of time and other circumstances in the case. *Smith v. Shinn*, 58 T. 1.

On the 3d of October, 1833, a grant of land was made to S. on the application of his attorney, T., who was put in possession of the land. By the terms of the grant the superior title to the land was vested in T. On the 29th of May, 1839, S. conveyed the land to P. by deed, which T. signed as a witness. P. paid taxes on the land, and purchasers claiming under him took possession in 1866, which they have since held. It was held that under these facts the jury might presume conveyance from T. to P. *Manchaca v. Field*, 62 T. 135.

The foundation of prescriptive title is the presumed grant of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such party, no presumption of grant can be made. By the common law a prescriptive right, to prevent an adjacent proprietor from inclosing or building upon his own land, cannot be acquired by the use of an adjoining house, having windows looking out upon his land, and receiving light and air from that direction for a period of 10 years. *Klein v. Gehrung*, 25 T. 232, 78 Am. Dec. 565.

After the lapse of 30 years possession under one who had the written obligation of the former owner for the conveyance of land, which recited that the obligor had no claim, right or title to the land, raises the presumption that the conditions of the obligation to convey had been complied with. A judgment of another state, decreeing specific performance, is conclusive of the fact that the conditions of the contract resting on the obligee had been complied with by him. *Morris v. Hand*, 70 T. 481, 8 S. W. 210.

From long-continued active assertion of ownership, a presumption or inference of a deed held to arise, and from long-continued possession and use a legal presumption of a grant. *Hermann v. Thomas* (Civ. App.) 141 S. W. 574.

Acquiescence of A. in B.'s possession under a claim of title from C. will not support a presumption of a grant from A. to B. *Id.*

RULE 18. A GRANT MAY BE PRESUMED IN SUPPORT OF A JUST AND LEGAL CLAIM, FROM LONG AND UNINTERRUPTED POSSESSION

In general.—Whether the laws in force in 1767 required a confirmation by the viceroy of the grants made at Laredo in that year may be involved in doubt. A confirmation by the viceroy of grants made by the subdelegates at Laredo in 1767 will be presumed after so great a lapse of time, during which title has been openly asserted under such grants and possession maintained. *Railway Co. v. Jarvis*, 69 T. 527, 7 S. W. 210.

Where lands had been severed from the public domain, and plaintiff was in possession, and defendant showed no right, held, that plaintiff was presumed to have acquired the state's title. *Harmon v. Landers* (Civ. App.) 41 S. W. 378.

There may be such long-continued use of the channel of a navigable river for a roadway as to warrant the presumption of a grant from the state of the right to a ford across it. *City of Austin v. Hall* (Civ. App.) 58 S. W. 1038.

An unlocated land certificate is a chattel, long-continued possession of which may support the presumption of a sale. *Lochridge v. Corbett*, 31 C. A. 676, 73 S. W. 96.

Length of possession.—In 1733 or 1734 a grant of land was made by the Spanish authorities to the town of San Fernando, now San Antonio, which was settled in 1717 or 1718. The grant had been in the archives of the town, but had not been seen since 1834. Several witnesses testified as to the existence of the grant and to its contents, and the boundaries were clearly established. In a suit by the city of San Antonio to enjoin the location and survey of the land embraced in the grant, it was held that the existence and contents of the grant were fully and satisfactorily proven. *Lewis v. San Antonio*, 7 T. 288.

Where the defendant and his ancestor possessed and enjoyed a tract of land under a claim of title from 1800 to 1836, the jury may presume an ancient grant. *Paul v. Perez*, 7 T. 338; *Texas Mexican Ry. Co. v. Uribe*, 85 T. 386, 20 S. W. 153.

In 1831 B. settled upon vacant land; in 1838 a headright certificate was issued to him and he located it so far as to include his residence and the adjoining land. The survey was not completed on account of the interference of the closing line with other surveys, and a suit was instituted to determine the rights of the interested parties. This suit was determined and the mandate filed in February, 1849, and in the meantime the certificate and field-notes were lost. On the 20th of July, 1850, a duplicate certificate

was issued and located on the same land, upon which another location under a different certificate had been made on the 16th of July, 1849. In deciding the case it is said that from long possession, continued in this case for more than 20 years, a presumption would be raised in law of a title lost by time and accident. *Morris v. Byers*, 14 T. 278.

In an action of trespass to try title commenced December 7, 1855, the plaintiff had been in possession of the land, paying taxes, etc., from August, 1835, until January, 1853, when she was evicted by the defendant, who claimed under a survey in 1850, and a patent thereon issued March 26, 1855. The plaintiff also claimed the land by the location and survey of a certificate which had not been recommended. An instruction that a grant might be presumed from 15 years' adverse peaceable possession under defined boundaries was held to be erroneous. *Taylor v. Watkins*, 26 T. 688; *Grimes v. Bastrop*, 26 T. 310; *Walker v. Hanks*, 27 T. 535; *Biencourt v. Parker*, 27 T. 558; *Plummer v. Power*, 29 T. 6; *Forest v. Woodall*, 33 T. 363; *Paschal v. Dangerfield*, 37 T. 273; *Turner v. Rogers*, 38 T. 582.

In an action of trespass to try title the plaintiffs relied upon the following facts to support the presumption of a grant: Their ancestor, Norris, was in possession of the land and improvements from 1805 to 1813, when, with other citizens, he left the country on account of its unsafe condition. He returned in 1821 and remained in possession until his death in 1828. After the death of Norris his heirs claimed the land, exercised acts of ownership over it, sold portions of the land and put purchasers in possession, and had themselves, either in person or by tenants, been in possession most of the time since their father's death. The land was known as the Norris claim or grant, was regarded as the property of the heirs of Norris, and in making subsequent locations had been respected until the location made by the defendant, who claimed under a patent dated November 20, 1844. The plaintiff, as a part of his title, read in evidence an application of Norris to the governor, dated April 13, 1810, reciting his purchase of the land from other parties and praying for title and possession; also an order from the political chief, dated April 5, 1824, directing title to be extended as prayed for. It was held that the application of April 13, 1810, repelled the presumption of a previous grant; that a grant could not be presumed from the order of April 5, 1824, as the political chief had no authority to make a grant, and a grant could not be presumed under the colonization law of 1825, as the land was situated within the border leagues, and the consent of the federal executive, which was necessary to make the title effectual, would not be presumed, where the grant itself rested on a presumption. *Yancey v. Norris*, 27 T. 40; *Sulphen v. Norris*, 44 T. 204.

The defendant was in possession of land for more than ten years under a deed, paying taxes thereon, etc. The land was described in the deed as the tract surveyed for Jarboe, and that the purchase money, except \$10, was not to be paid until patent was issued. The evidence showed that the survey was made upon a conditional certificate to Jarboe, and that no corresponding unconditional certificate had ever been issued. The facts repelled the presumption of a grant. *Truehart v. Babcock*, 49 T. 249.

The defendant in an action of trespass to try title relied upon the presumption of a grant from the following facts: On the 26th of July, 1833, a certificate for one-third of a league of land was issued to R., which was never recommended by the traveling board of land commissioners. The records of the county surveyor showed a survey under the certificate November 5, 1839. The certificate and survey were returned to the general land office February 7, 1841, and the survey is delineated on the maps of the proper county in the general land office. The papers cannot be found, and are on the list of missing files. The defendant showed 25 years' possession under a warranty deed from G., the payment of taxes and the making of valuable improvements. The court excluded the foregoing evidence and properly refused to submit to the jury the question as to the presumption of a grant. *Miller v. Brownson*, 50 T. 583.

If there was no evidence tending to show that a grant was actually made, the possession for a century and a quarter under claim of right to fix boundaries furnishes evidence on which to presume a grant. *Von Rosenberg v. Haynes*, 85 T. 357, 20 S. W. 143.

RULE 19. A FACT MAY BE INFERRED FROM THE PROVED EXISTENCE OF A RELEVANT FACT IN THE ABSENCE OF OPPOSING EVIDENCE

In general.—Inference of interest in purchase held not allowable from the fact of some time interest in consideration for the purchase, in the absence of evidence of present interest in such consideration. *Rogers v. Tompkins* (Civ. App.) 87 S. W. 379.

Evidence held to justify an inference that the defect in a turntable alleged was the cause of plaintiff's accident. *Currie v. Missouri, K. & T. Ry. Co. of Texas*, 101 T. 478, 108 S. W. 1167.

Proof need not be made of a fact necessarily resulting from facts proven. *St. Louis Southwestern Ry. Co. of Texas v. Cleland*, 50 C. A. 499, 110 S. W. 122.

An inference can only be drawn from facts. *International & G. N. R. Co. v. Vallejo*, 102 T. 70, 113 S. W. 4.

Proof held not to justify the inference that one had been employed to look after a shipper's horse during transportation. *Houston & T. C. R. Co. v. Parker* (Civ. App.) 138 S. W. 437.

In an action for the death of a switchman, held, that there was evidence from which defendant's negligence might have been inferred. *Houston, E. & W. T. Ry. Co. v. Boone*, 105 T. 188, 146 S. W. 533.

Death.—That one's death was caused by accidental injury may be shown, though he did not inform his physician of the accident. *Travelers' Ins. Co. v. Hunter*, 30 C. A. 489, 70 S. W. 798.

Fraud.—In a suit to set aside a sale of land by an administrator as fraudulent, it was shown that the land had been conveyed by the administrator to the purchaser, and on the next day two-thirds of the land was conveyed back to the administrator. There was no evidence of any money having been paid, or that a note and mortgage had been given. Held, that the jury might have inferred fraud from these circumstances. *Thompson v. Shannon*, 9 T. 536.

Competency of person.—The jury may infer that a person habitually intemperate is unfit to have charge of a railroad train. *Galveston, H. & S. A. Ry. Co. v. Davis* (Civ. App.) 45 S. W. 956.

Motive.—That a section foreman attempted to remove a hand car from a track in front of an approaching train warrants an inference that his motive was to prevent a derailment of the train. *Houston & T. C. R. Co. v. Burnett*, 49 C. A. 244, 108 S. W. 404.

Mailing letters.—Facts held sufficient to warrant a finding that a certain letter was mailed and received by the addressee. *Smith v. F. W. Heitman Co.*, 44 C. A. 353, 98 S. W. 1074.

Health and physical condition.—Telegrams; presumptive evidence of mental anguish resulting from failure to deliver. *Martin v. Telegraph Co.*, 1 C. A. 150, 20 S. W. 860; *Telegraph Co. v. Coffin*, 88 T. 94, 30 S. W. 897; *Telegraph Co. v. Russell* (Civ. App.) 31 S. W. 698; *Telegraph Co. v. Hale*, 11 C. A. 79, 32 S. W. 814; *Telegraph Co. v. Randles* (Civ. App.) 34 S. W. 447.

Mental pain will not be presumed to have arisen from an attack of chills and fever. *Houston, E. & W. T. Ry. Co. v. Reasonover*, 36 C. A. 274, 81 S. W. 329.

Mental suffering cannot be inferred from physical suffering consisting of chills and fever. *Houston, E. & W. T. Ry. Co. v. Simpson* (Civ. App.) 91 S. W. 353.

Where serious physical injury to plaintiff is shown, the jury may infer mental suffering without direct proof thereof. *Id.*

Mental suffering will be implied from illness accompanied by physical pain. *International & G. N. R. Co. v. Johnson*, 43 C. A. 147, 95 S. W. 595.

Mental suffering may be inferred from physical injury without direct proof. *Galveston, H. & S. A. Ry. Co. v. Garrett*, 44 C. A. 406, 98 S. W. 932.

In an action for personal injuries, mental suffering may be inferred from great physical suffering. *Galveston, H. & S. A. Ry. Co. v. Stoy*, 44 C. A. 448, 99 S. W. 135.

Serious and continuing bodily injury will support a finding of mental anguish. *Galveston, H. & S. A. Ry. Co. v. Parish*, 45 C. A. 493, 100 S. W. 1175.

Proof held to authorize the jury to infer that one suing for injuries sustained mental suffering so that damages could be awarded therefor. *Texas Telegraph & Telephone Co. v. Thompson* (Civ. App.) 130 S. W. 705.

In an action for personal injury, evidence held to justify an inference of mental suffering accompanying the continuing physical pain. *Chicago, R. I. & G. Ry. Co. v. Swan* (Civ. App.) 130 S. W. 855.

RULE 20. PAROL OR EXTRINSIC EVIDENCE IS GENERALLY INADMISSIBLE TO CONTRADICT, VARY OR ADD TO THE TERMS OF A WRITTEN INSTRUMENT

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| 1. Judicial records and proceedings. | 37. — Judicial records and proceedings. |
| 2. — In probate court. | 38. — Official records and proceedings. |
| 3. — In justice's court. | 39. — Deeds. |
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| 15. Bills of sale. | 51. — Construction of written instruments. |
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| 19. Contracts in general. | 55. — Bills and notes and indorsement thereof. |
| 20. — Completeness of writing and presumption in relation thereof. | 56. — Contracts of guaranty. |
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| 25. Bills and notes. | 61. Declarations, representations, and expressions of opinion preceding contract. |
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| 29. Contracts of carriage. | 65. — Estoppel or waiver. |
| 30. Release. | 66. — Payment. |
| 31. Memoranda or writing not constituting contract or disposition of property. | |
| 32. Writing incomplete on its face. | |
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| 34. Evidence extrinsic to writing in general. | |
| 35. Sustaining validity of instrument. | |
| 36. Matters not included in writing or for which it does not provide. | |

1. Judicial records and proceedings.—In a suit for the recovery of land claimed by virtue of a purchase at sheriff's sale and sheriff's deed, where the sheriff's return is not in accordance with the deed, parol evidence is admissible to explain and correct the sheriff's return on the execution. *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452.

Where, under a plea of *res adjudicata*, the pleadings and judgment in a former suit are averred and shown, parol evidence is not admissible which tends to vary and contradict the record, and to substitute the opinion and understanding of the witnesses as to the meaning and effect of such former pleadings and judgment in the place and stead of a legal construction thereof by the court. *McGrady v. Monks*, 1 C. A. 611, 20 S. W. 959.

A decree of court based on the written report of a survey cannot be contradicted by parol evidence. *Barnett v. Mahon* (Civ. App.) 31 S. W. 329.

In trespass to try title, a bill of exceptions which had been filed by plaintiff in a case in the federal court, between plaintiff and defendant's predecessor in title, and parol testimony showing what issues were tried in that cause, are inadmissible. *New York & T. Land Co. v. Votaw* (Civ. App.) 52 S. W. 125.

It may be shown by parol that a judgment decided only a single issue, and that the other issues involved were not determined. *American Freehold Land & Mortgage Co. v. Macdonell* (Civ. App.) 54 S. W. 259.

Parol evidence was not admissible to show that a judgment for defendant in trespass to try title did not really adjudicate the question of title. *Swearingen v. Williams*, 28 C. A. 559, 67 S. W. 1061.

Parol evidence held admissible to show that a judgment for C., in a suit by A. against G., was in fact rendered by virtue of G.'s right under an agreement of C. and G. *Jones v. Robb*, 35 C. A. 263, 80 S. W. 395.

On a plea of former adjudication, parol testimony held admissible to prove that pending suit and former one arose from same cause of action. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

In a collateral attack on a default judgment, reciting that defendant, though citation by publication had been legally made on him, failed to appear, parol evidence showing the nonresidence of defendant was inadmissible. *Lutcher v. Allen*, 43 C. A. 102, 95 S. W. 572.

An action to set aside a judgment which is a cloud on title to real property owned by plaintiff held a collateral attack, and evidence to impeach the judgment is not admissible. *Estey & Camp v. Williams* (Civ. App.) 133 S. W. 470.

Evidence that judgment was entered by agreement of parties, and that party awarded certain land had no title thereto, but that the judgment constituted a gift, held improperly excluded as impeaching the judgment. *Stewart v. Profit* (Civ. App.) 146 S. W. 563.

Evidence of an agreement with a lower owner to turn the surplus water of the upper owner into the lower owner's canal was not inadmissible as varying a former decree fixing the water rights of the parties pleaded as *res judicata*, where such decree did not purport to settle that phase of the controversy. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

Where the calls in a partition decree, supported by a map expressly made a part thereof, are unambiguous, extrinsic evidence that the survey occupied some other position was inadmissible. *Rosenthal v. Sun Co.* (Civ. App.) 156 S. W. 513.

2. — **In probate court.**—Parol evidence is not admissible to contradict certified copies of probate records. *Collins v. Bail*, 82 T. 259, 17 S. W. 614, 27 Am. St. Rep. 877; *Houze v. Houze*, 16 T. 603.

3. — **In justice's court.**—Recital in justice's docket of continuance of cause may be shown by evidence aliunde not to apply to certain defendants. *Landa v. Moody* (Civ. App.) 57 S. W. 51.

A justice's court judgment must be interpreted as it is written, and not in the light of the justice's oral testimony as to his intention. *Hightower v. Bennight*, 53 C. A. 120, 115 S. W. 875.

4. — **Affecting jurisdiction.**—Where it does not affirmatively appear from the record that a domestic court of general jurisdiction was without jurisdiction of the person, evidence outside the record is inadmissible in a collateral attack. *Iiams v. Root*, 22 C. A. 413, 55 S. W. 411.

In view of the record in a suit for delinquent taxes, held, that a recital in the judgment was not a recital that one of the owners of the land had been served by publication, and evidence was admissible that he had not been served at all. *State v. Dashiell*, 32 C. A. 454, 74 S. W. 779.

An action to set aside a judgment held a direct attack, in which proof outside the record as to service of process is admissible. *Carpenter v. Anderson*, 33 C. A. 491, 77 S. W. 291.

Extrinsic evidence is not admissible in a collateral proceeding to show that a domestic court of general jurisdiction did not have jurisdiction of the parties against whom a judgment was rendered. *Greenway v. De Young*, 34 C. A. 583, 79 S. W. 603.

In an action on a justice's judgment, the justice held entitled to testify to a remittitur by plaintiff, made to bring the case within the justice's jurisdiction. *Peeples v. Slayden-Kirksey Woolen Mills* (Civ. App.) 90 S. W. 61.

A recital in the judgment of service on a defendant involves absolute verity in a collateral proceeding. *Douglas v. State*, 58 Cr. R. 122, 124 S. W. 933, 137 Am. St. Rep. 930.

Parol evidence that process was never served held not admissible in a collateral attack. *Estey & Camp v. Williams* (Civ. App.) 133 S. W. 470.

A recital in a judgment that defendant was duly cited is conclusive in a collateral proceeding, although in that proceeding the court holds that, by reason of seven years absence, such defendant is presumed dead, and the judgment attacked was rendered during such period of seven years. *Oliver v. Bordner* (Civ. App.) 145 S. W. 656.

On collateral attack on a judgment, a recital of "due service" made in the action cannot be disputed. *Jameson v. O'Neal* (Civ. App.) 145 S. W. 680.

5. **Official records and documents—Plats and surveys.**—Where field notes of a survey were clear and unambiguous, parol evidence held admissible to show that a different survey was in fact made. *Giddings v. Winfree*, 32 C. A. 99, 73 S. W. 1066.

Parol evidence is not admissible to change the lines and corners of grounds as shown by unambiguous field notes. *Jamison v. New York & T. Land Co.* (Civ. App.) 77 S. W. 969.

Where the field notes in a survey call for the corners and lines of surrounding surveys, and contain no inconsistent calls, parol evidence is inadmissible to show that a different survey was actually made to control the calls in the grant. *Gullory v. Allums* (Civ. App.) 147 S. W. 685.

6. — **County records or proceedings.**—An entry on the minutes cannot be varied by parol. *Gano v. Palo Pinto Co.*, 71 T. 99, 8 S. W. 634.

Though the record of the county commissioners' court fails to show that a claim for damages was presented, it may be shown that such claim was in fact presented. *Karnes County v. Nichols* (Civ. App.) 54 S. W. 656.

7. **Corporate records and proceedings.**—In an action against the minority of a church to obtain control of the church property, held proper to permit a witness to state how many persons were present at a certain meeting. *Gipson v. Morris*, 36 C. A. 693, 83 S. W. 226.

8. **Wills.**—If a will was written as intended by the testator, and he knew the contents when he signed it, oral testimony of an understanding outside of it cannot be received to contradict or vary its terms. *Vickery v. Hobbs*, 21 T. 570, 73 Am. Dec. 238.

Parol evidence is not admissible to contradict, add to, or explain a will by proving testatrix's declarations before, at, or after the execution of the will. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

9. **Deeds.**—Recital in a deed from husband to wife held to show a clear intention on his part to convey the land therein described to his wife as her separate property, and parol evidence was not admissible to show that such was not his intention. *Kahn v. Kahn*, 94 T. 114, 58 S. W. 825.

Where, in trespass to try title, a joint deed is shown from the original owner to plaintiff's husband and one of defendant's grantors, held not error to exclude the testimony of a witness that he had seen a deed from such owner to defendant's grantors; the date not being shown. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892.

Parol testimony held inadmissible to establish a claim under a deed to defeat the grantee's attaching creditor's lien. *Paris Grocer Co. v. Burks*, 101 T. 106, 105 S. W. 174.

The delivery and acceptance of a deed binds the grantee according to its terms, whether the grantee understood them or not, and its legal effect cannot ordinarily be varied or limited by parol evidence, except on allegation and proof of mutual mistake or fraud. *Lindly v. Lindly* (Civ. App.) 109 S. W. 467.

A deed cannot be collaterally attacked by the parties to it by evidence showing an intent different from that which its language unmistakably expresses. *Davis v. George*, 104 T. 106, 134 S. W. 326.

10. — **Official deed.**—Where there is no ambiguity on the face of a deed which calls for marked corners found on the ground, held, that the line must run straight between the corners. *Sloan v. King*, 29 C. A. 599, 69 S. W. 541.

11. — **Description of premises.**—Parol evidence held admissible to show that a deed of land for a gross consideration was in reality a sale by the acre. *Chesnut v. Chism*, 20 C. A. 23, 48 S. W. 549.

In an action involving title to land, and not to reform deeds, it is proper for the trial judge to refuse to consider the intention of the grantors in any of the deeds in opposition to the description expressed therein. *Herman v. Dunman* (Civ. App.) 95 S. W. 80.

Parol evidence is inadmissible to correct a call in a deed where it is not offered merely to aid a call found in the field notes. *Hamilton v. Blackburn*, 43 C. A. 153, 95 S. W. 1094.

Parol proof held inadmissible to contradict the terms of a deed as to the property conveyed. *Carter & Donaldson v. Childress* (Civ. App.) 99 S. W. 714.

In an action to have deeds declared in effect a mortgage, it was error to refuse to allow defendant to show by parol that the property intended to be described, and which was in fact the subject-matter of the deed to defendant, was different property from that actually described in the deed. *Openshaw v. Rickmeyer*, 45 C. A. 508, 102 S. W. 467.

Where a deed shows a conveyance of land in bulk, and there is a material error in the quantity of land conveyed, parol evidence to show the shortage and that the land was sold by the acre was only admissible on allegations of fraud, accident, or mistake. *Mosteller v. Astin* (Civ. App.) 129 S. W. 1136.

The description in a deed being definite and certain, parol evidence that other land than that described was intended to be conveyed is not admissible in trespass to try title; it being only in a suit to correct a deed on the ground of fraud or mistake that its terms can be so varied or contradicted. *Yarbrough v. Clarkson* (Civ. App.) 155 S. W. 954.

12. — **Estate or interest conveyed.**—Parol evidence held inadmissible to show operation of quitclaim deed. *Cauble v. Worsham*, 96 T. 86, 70 S. W. 737, 97 Am. St. Rep. 871.

13. — **Reservations.**—Parol evidence is inadmissible to show that a grantor reserved his homestead right in the property conveyed by warranty deed. *Ord v. Waller* (Civ. App.) 107 S. W. 1166.

14. — **Time of taking effect.**—Parol condition as to time of taking effect, attached to delivery of absolute deed, held void. *McClendon v. Brockett*, 32 C. A. 150, 73 S. W. 854.

Evidence that a grantor in a deed conveying land did not intend to give possession of the land until the youngest grantee became of age held inadmissible. *Ford v. Boone*, 32 C. A. 550, 75 S. W. 353.

15. **Bills of sale.**—An agreement in writing conveying certain personal property held plain and unambiguous, excluding parol evidence to vary its terms. *Coverdill v. Seymour*, 94 T. 1, 57 S. W. 37.

Where a written bill of sale purports to convey the entire stock of a hardware company, parol evidence is inadmissible to establish that less than that was intended to be conveyed. *McCullough v. Farmers' & Merchants' Nat. Bank of Abilene* (Civ. App.) 123 S. W. 439.

16. Assignments.—Parol evidence held not admissible to show that a transfer of all interest in a judgment in partition was intended to embrace rents accruing pending appeal and before sale. *Kalteyer v. Wipff* (Civ. App.) 65 S. W. 207.

In an action for personal injuries, held competent for plaintiff to show by parol, in a rebuttal of defendant's evidence, that a transferee of a judgment previously obtained by plaintiff had no interest in the cause of action or judgment. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 40 C. A. 480, 90 S. W. 343.

Parol evidence held inadmissible to add to terms of instrument executed by creditor receiving conveyance to secure indebtedness. *Blake v. Lowry*, 43 C. A. 17, 93 S. W. 521.

17. Leases.—Parol evidence held not admissible to show that the option of a lessee to buy was unconditional. *De Vitt v. Kaufman County*, 27 C. A. 332, 66 S. W. 224.

The terms of a written lease cannot be varied by parol evidence of a prior understanding. *Greenhill v. Hunton* (Civ. App.) 69 S. W. 440.

Parol evidence is admissible to show, in the absence of allegations of fraud or mistake, that a farm was not included in a lease, where the written lease expressly states that entire premises, including the farm, were let. *Suderman-Dolson Co. v. Rogers*, 47 C. A. 67, 104 S. W. 193.

Where plaintiff leased to an adjoining owner all land east of a certain railway, held, the true boundary line, and not the intent of defendant as to the land leased, would govern as to the issue of adverse possession. *Hermann v. McIver*, 51 C. A. 270, 111 S. W. 766.

There being no ambiguity in a lease, and it being one which the statute of frauds requires to be in writing, parol evidence was not admissible to modify its terms. *Beard v. A. A. Gooch & Son* (Civ. App.) 130 S. W. 1022.

18. Mortgages or deeds of trust.—Testimony of the mortgagee and mortgagor held inadmissible to contradict the terms of the mortgage. *Magill v. Brown*, 20 C. A. 662, 50 S. W. 143.

Evidence of a conversation held inadmissible to vary a deed of trust. *Smith v. Texas & N. O. R. Co.* (Civ. App.) 105 S. W. 528.

19. Contracts in general.—In general, parol evidence is not admissible to vary a written contract; but such evidence is admissible to explain an ambiguity, or to explain a writing, when the explanation is necessary, and the evidence is consistent with the writing, and to ascertain the intention of the parties, when doubtful, or to explain the language or terms used. *Deweese v. Lockhart*, 1 T. 535; *Franklin v. Mooney*, 2 T. 452; *Stamper v. Johnson*, 3 T. 1; *Self v. King*, 28 T. 552; *Bender v. Pryor*, 31 T. 341; *Hamman v. Kelgwin*, 39 T. 34; *McCormick v. Lennox*, 1 App. C. C. § 550; *Shaw v. Parvin*, 1 App. C. C. § 366; *Earle v. Marx*, 80 T. 39, 15 S. W. 595; *Kellogg v. Iron City Bank* (Civ. App.) 27 S. W. 897; *Meyers v. Maverick* (Civ. App.) 28 S. W. 716; *Ginnuth v. Blankenship* (Civ. App.) 28 S. W. 828; *Brenneman v. Bush* (Civ. App.) 30 S. W. 699; *Beckham v. Collins*, 54 C. A. 241, 117 S. W. 431.

The rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument obtains equally in courts of law and equity. *Hunt v. White*, 24 T. 643.

When there is no ambiguity in the terms of a written contract, parol evidence is inadmissible; and when the meaning of ambiguous terms has been supplied by parol evidence, the court must judge of the whole document in subordination to its legal sense as thus completed. The contract cannot be varied; its obscure expressions may be explained, but this not for the purpose of moulding, but of developing, the true sense. *First Nat. Bank of Denison v. Randall*, 1 App. C. C. § 971; *Key v. Hickman* (Civ. App.) 149 S. W. 275.

When an agreement is reduced to writing, it is regarded as expressing the final views and conclusions of the parties in reference to the subject of them, and hence new ingredients cannot be added, or its terms varied, by parol evidence of prior or contemporaneous conditions. *Laux v. Glass*, 1 App. C. C. § 1180; *Lanius v. Shuber*, 13 S. W. 614, 77 T. 24; *Bruner v. Strong*, 61 T. 555; *Dallas Nat. Bank v. Davis*, 78 T. 362, 14 S. W. 706; *Henry v. Chapman*, 16 S. W. 543; *McKay v. Overton*, 65 T. 66; *San Antonio Lumber Co. v. Dickey* (Civ. App.) 27 S. W. 958; *Lynch v. Ortleib*, 70 T. 727, 8 S. W. 515; *Rubrecht v. Powers*, 1 C. A. 282, 21 S. W. 318; *Weaver v. City of Gainesville*, 1 C. A. 286, 21 S. W. 317; *Railway Co. v. Silegman* (Civ. App.) 23 S. W. 298; *Railway Co. v. Wilson*, 23 S. W. 282, 4 C. A. 178; *Crystal Mfg. Co. v. San Antonio Brewing Ass'n*, 27 S. W. 210, 8 C. A. 1; *Todd v. Roberts*, 1 C. A. 8, 20 S. W. 722. This rule applies in the absence of fraud, accident or mistake. *Bupp v. O'Connor*, 1 C. A. 328, 21 S. W. 619; *Earle v. Marx*, 80 T. 39, 15 S. W. 595; *Railway Co. v. Wilson*, 23 S. W. 282, 4 C. A. 178; *Crystal Mfg. Co. v. San Antonio Brewing Co.*, 27 S. W. 210, 8 C. A. 1.

Parol evidence is inadmissible to prove an additional stipulation in a contract made by a county adding to or varying the effect of the minutes entry of the contract. *Gano v. Palo Pinto Co.*, 71 T. 99, 8 S. W. 634. See *Polly v. Hopkins*, 74 T. 145, 11 S. W. 1084.

Parts of a parol contract which were omitted when the contract was reduced to writing are inadmissible, where not omitted through fraud, accident, or mistake. *Janes v. Ferd Helm Brewing Co.* (Civ. App.) 44 S. W. 896.

Parol evidence held inadmissible to vary the length of time a contract was to run, clearly expressed therein. *Pasteur Vaccine Co. v. Burkey*, 22 C. A. 232, 54 S. W. 804.

In the absence of fraud or mistake parol evidence held as a general rule not admissible to change the terms of a written contract. *International Land Co. v. Parmer* (Civ. App.) 123 S. W. 196.

Where a written contract is free from ambiguity, and fraud and mistake is not shown, parol evidence of contemporaneous acts or declarations of the parties is inadmissible. *El Paso & S. W. R. Co. v. Eichel & Weikel* (Civ. App.) 130 S. W. 922.

A plain and unequivocal contract cannot be explained or enlarged by parol. *Stidham v. Laurie* (Civ. App.) 133 S. W. 1082.

An instrument held unambiguous, so that, in the absence of fraud, accident, or mutual mistake, it cannot be varied by parol. *Barnes v. Bryce* (Civ. App.) 140 S. W. 240.

Parol evidence as to matters reduced to a written contract is admissible when not in conflict with the writing itself. *Interstate Savings & Trust Co. v. Hornsby* (Civ. App.) 146 S. W. 960.

20. — **Completeness of writing and presumption in relation thereof.**—A complete contract cannot be varied by engrafting an additional consideration. *Texas & P. Coal Co. v. Lawson*, 10 C. A. 491, 31 S. W. 843.

If an element of a transaction is mentioned or covered by a writing, it is assumed that the writing was meant to embrace the whole intention on that element, so that parol evidence is inadmissible to vary it. *Swope v. Liberty County Bank*, 52 C. A. 231, 113 S. W. 976.

21. **Contracts of employment.**—A power of attorney, plain and unambiguous in terms, cannot be explained by parol evidence. *Rogers v. Tompkins* (Civ. App.) 87 S. W. 379.

Parol evidence that employé was to perform duties at a particular store held inadmissible to vary written contract of employment. *Wolf Cigar Stores Co. v. Kramer* (Civ. App.) 89 S. W. 995.

Parol evidence held not objectionable as varying a written contract. *Longworth v. Stevens* (Civ. App.) 145 S. W. 257.

22. **Contracts for buildings and other works.**—Proof of an oral agreement to omit matters provided for in plans and specifications contained in a subsequent written contract is inadmissible. *Thompson v. Fitzgerald & Ray* (Civ. App.) 105 S. W. 334.

23. **Contracts of sale.**—Evidence held properly excluded, as varying a written contract. *Dunovant v. Anderson*, 24 C. A. 517, 59 S. W. 824.

A buyer of goods contracted for by letters between the parties held not entitled, when sued for the price, to show his understanding as to the price. *Fletcher v. Underhill*, 37 C. A. 239, 83 S. W. 726.

24. **Bonds.**—Bond conditioned for the performance of a contract therein set forth held exclusive evidence of the agreement. *Flewellen v. Ft. Bend County*, 17 C. A. 155, 42 S. W. 775.

25. **Bills and notes.**—A. executed to B. a note for the amount of an antecedent account with an understanding that the amount actually due should be adjusted at a future time. Held, that the written obligation cannot be qualified with the verbal understanding. *Saunders v. Brock*, 30 T. 421.

Suit was brought in Comanche county against a resident citizen of Coryell county on an accepted order for money, the order and acceptance being in writing. In answer to a plea in abatement to the jurisdiction, the plaintiff set up a verbal promise to pay in Comanche county. Held, that the place of payment could not be changed by an agreement not in writing. *Bigham v. Talbot*, 51 T. 450.

The unexpressed intention of one of the drawers of a draft at the time it was presented to a bank for discount held inadmissible to change the effect of the transaction with the bank. *Provident Nat. Bank v. C. D. Hartnett Co.*, 45 C. A. 273, 100 S. W. 1024.

Where parties objecting to the introduction of parol evidence to explain a transaction evidenced by notes were not parties to the notes, no question of varying the terms of a written contract by parol evidence was involved. *Jarvis v. Matson*, 52 C. A. 170, 113 S. W. 326.

In an action to foreclose a vendor's lien, where the petition alleged want of consideration for the transfer of the notes from one of plaintiffs to his sons, and that a defendant obtaining possession from them had knowledge of such facts, and that the transfer was for a specific purpose known to defendants, and that they had been used for another purpose, held, that parol evidence that plaintiffs' sons were not in fact the owners in contradiction of the indorsements was admissible. *Givens v. Carter* (Civ. App.) 146 S. W. 623.

26. **Indorsements and transfers of bills or notes.**—Parol evidence is not ordinarily admissible to contradict or change the character of an indorsement on a note. *Givens v. Carter* (Civ. App.) 146 S. W. 623.

Contract implied by the indorsement of a note cannot be contradicted by parol. *First Nat. Bank v. Powell* (Civ. App.) 149 S. W. 1096.

27. **Contracts of guaranty.**—A guarantor's liability cannot be extended by implication, and where there is no ambiguity in the guaranty parol evidence cannot be received to vary or explain. *Wilson v. Childress*, 2 App. C. C. § 427.

28. **Contracts of insurance.**—Recitals in a life policy of payment of dues and receipt therefor may be contradicted by parol. *Laughlin v. Fidelity M. L. Ass'n*, 28 S. W. 411, 8 C. A. 448.

Evidence that insured notified insurer, before issuance of policy, of his intention to take out other insurance, held inadmissible as varying a written contract. *Orient Ins. Co. v. Prather*, 25 C. A. 446, 62 S. W. 89.

In an action on a fire policy, certain evidence as to intent of parties held inadmissible. *Ætna Ins. Co. v. Brannon*, 99 T. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020.

Parol evidence of the transaction between an applicant for a life policy and the soliciting agent of the insurer held competent, in an action for the cancellation of the policy. *Mutual Life Ins. Co. v. Hargus* (Civ. App.) 99 S. W. 580.

29. **Contracts of carriage.**—Contemporaneous parol evidence is not admissible to vary or contradict a bill of lading. *Railway Co. v. Cates*, 15 C. A. 135, 38 S. W. 648.

In the absence of fraud, duress, or mistake in signing the written contract, evidence of circumstances tending to impeach the same held inadmissible. *San Antonio & A. P. Ry. Co. v. Timon*, 45 C. A. 47, 99 S. W. 418.

Proof that a waybill issued by the carrier for the guidance of its employés stipulated delivery at a certain packing house was inadmissible to add that provision to the written contract between carrier and shipper. *International & G. N. R. Co. v. Griffith* (Civ. App.) 103 S. W. 225.

In an action against a carrier for failing to furnish suitable cars for live stock, the shippers held not precluded from showing certain facts on the ground that the testimony would vary the terms of the contract for shipment. *Trout & Newberry v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 111 S. W. 220.

In the absence of an allegation, and proof of fraud, accident, or mistakes in making

the contract, conditions and limitations not contained in a bill of lading cannot be shown. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

30. Release.—A release partakes of the nature of a deed, and is not susceptible of contradiction or variation by parol, unless fraud or mutual mistake be shown. *T. & P. Ry. Co. v. Burke*, 1 App. C. C. § 945.

31. Memoranda or writing not constituting contract or disposition of property.—A railroad employé could testify that he was not given a copy of the rules, though his application for appointment stated that he had read them. *Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Civ. App.) 43 S. W. 1078.

Written memorandum of amount due given debtor by creditor cannot be contradicted by parol testimony. *Gammage v. Walker* (Civ. App.) 46 S. W. 916.

An entry on the books of a bank of a certain amount as a credit on a depositor's account is not conclusive of the bank's liability to the depositor for that amount. *Ander-son v. Walker* (Civ. App.) 49 S. W. 937.

A railroad employé held not precluded, by a stipulation in his application for service as to obstructions, from showing by parol testimony that he did not know of the ob-struction which injured him, though the company relied on such stipulation in giving him employment. *Guif, C. & S. F. Ry. Co. v. Darby*, 28 C. A. 413, 67 S. W. 446.

A letter written by a purchaser pending negotiations for the trade held not to pre-vent his testifying what the agreement as to price was. *Oneal v. Weisman*, 39 C. A. 592, 88 S. W. 290.

32. Writing incomplete on its face.—The note sued on read: \$413, 15-100 gold. Bracket, May 5th, 1875. On demand I promise to pay to the order of B. O. four hundred and thirteen 15-100 with interest. Held, that the omission of the word "dollars" in the body of the note could be supplied by parol evidence. But in this case the omission of the word "dollars" was supplied by the figures and dollar mark at the head of the note, when taken in connection with the written words. *Oppenheimer v. Fritter*, 1 App. C. C. § 372.

The rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument does not apply where it appears that the instru-ment was not intended to be a complete and final settlement of the whole transaction. *Ackerman v. Bundren*, 1 App. C. C. § 1306.

A written contract, executed in connection with a note for the payment of a premium on a policy, held complete, so that parol evidence was not admissible to vary it. *Swope v. Liberty County Bank*, 52 C. A. 281, 113 S. W. 976.

Parol evidence held admissible to show the nature and character of a special contract referred to in an application for insurance. *State Mut. Life Ins. Co. v. Ballard* (Civ. App.) 122 S. W. 267.

33. Writing showing alteration.—Where a contract by which plaintiffs were author-ized to sell defendant's land within a certain time was renewed, and certain changes then made by erasures and interlineations, testimony explaining such changes was competent. *McLane v. Maurer*, 28 C. A. 75, 66 S. W. 693.

34. Evidence extrinsic to writing in general.—The covenants of warranty cannot be varied by parol evidence that the grantee took his chances of getting a title. *Warren v. Clark* (Civ. App.) 24 S. W. 1105.

Declarations by assured that a life insurance policy payable to his estate belonged to his sister were not incompetent as tending to vary the terms of a written instrument. *Lord v. New York Life Ins. Co.*, 27 C. A. 139, 65 S. W. 699.

Witness held competent to testify that report of land commissioners, showing land certificates approved by them, did not give their numbers as they appeared on the cer-tificates themselves. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

A refusal to admit evidence of a mortgagor to prove an understanding as to the pur-pose of the loan with the deceased mortgagee held not error. *Crow v. Kellman* (Civ. App.) 70 S. W. 564.

Certain evidence admitted in action on life policy held not objectionable as an at-tempt to vary the policy by parol. *Washington Life Ins. Co. v. Berwald* (Civ. App.) 72 S. W. 436.

Where conveyances did not disclose that plaintiff, to whom land was conveyed by the vendee immediately after purchase, was in fact the original purchaser, and that the sale was made to the vendee to enable plaintiff to escape personal liability for the price, parol evidence was inadmissible to show such fact. *Moore v. Boyd*, 34 C. A. 408, 79 S. W. 647.

A receipt, signed by an owner of land, held not varied by parol evidence that the purchaser is ready, willing, and able to purchase on the terms stated in the receipt. *Wil-son v. Clark*, 35 C. A. 92, 79 S. W. 649.

In an action for delay of the shipment of cattle, evidence as to plaintiff's intent to ship over another road held not inadmissible as varying a written contract. *Internation-al & G. N. R. Co. v. McGehee* (Civ. App.) 81 S. W. 804.

In an action against a carrier for injuries to plaintiff's wife, testimony of plaintiff as to conversations with defendant's agents held not objectionable as tending to vary terms of contract. *Missouri, K. & T. Ry. Co. of Texas v. Foster* (Civ. App.) 87 S. W. 879.

Certain facts held not to vary the terms of written contract of shipment. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.) 90 S. W. 189.

In an action for breach of a written contract to furnish water for irrigation, evidence as to the cause of such failure held not objectionable as varying the terms of the con-tract. *Gravity Canal Co. v. Sisk*, 43 C. A. 194, 95 S. W. 724.

On an issue in a boundary line dispute as to whether a stream was the east branch of a certain river or a slough, evidence of witness familiar with the location, tending to locate the east branch of the river on the ground, held not objectionable as varying the field notes of a survey calling for the east branch of the river as its western boundary. *Selkirk v. Watkins* (Civ. App.) 105 S. W. 1161.

The fact that letters on file in the general land office had been folded and sealed with sealing wax could be shown by parol without violating the parol evidence rule. *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 75.

Testimony that a lessor advised the lessee that the use to which he intended to put the premises was a legitimate business, when in fact it was contrary to an ordinance, and that he would protect him from any one disturbing him, was not incompetent as varying the terms of the lease by which the lessee agreed not to engage in any illegitimate business. *Altgelt v. Gerbic* (Civ. App.) 149 S. W. 233.

35. Sustaining validity of instrument.—Extraneous evidence is admissible in support of the description of land intended to be conveyed by a memorandum in writing. *Flanagan v. Boggess*, 46 T. 335; *Watson v. Baker*, 71 T. 739, 9 S. W. 867; *Gresham v. Chambers*, 30 T. 544, 16 S. W. 326; *Giddings v. Day*, 84 T. 605, 19 S. W. 682; *Cox v. Rust* (Civ. App.) 29 S. W. 807. See *McKinzie v. Stafford*, 8 C. A. 121, 27 S. W. 790.

Extraneous evidence that original deed contained the seal of the officer taking the acknowledgment, though the record of the deed recited that it contained no seal. *Equitable Mortgage Co. v. Kempner*, 84 T. 102, 19 S. W. 358.

Parol evidence held admissible to show that a husband intended to include land in controversy in making a deed to his wife. *McCrary v. Lutz* (Civ. App.) 62 S. W. 1094.

Parol evidence held admissible to show that a written contract was based on a consideration, though the contract stated no consideration. *Delta County v. Blackburn* (Civ. App.) 90 S. W. 902.

Parol evidence that the seal accompanying a notary public's jurat on an application to purchase state land contained the words "notary public, Hunt county, Tex.," held admissible. *King v. Underwood* (Civ. App.) 112 S. W. 334.

In an action for breach of a land contract, parol evidence held admissible to explain apparent defects in the title as shown by the abstract. *McMillan v. First Nat. Bank*, 56 C. A. 45, 119 S. W. 709.

36. Matters not included in writing or for which it does not provide.—A power of attorney failing to clearly express the consideration and the purpose of its execution, parol proof of facts inducing its execution was admissible. *Ehrenberg v. Baker's Ex'rs* (Civ. App.) 54 S. W. 435.

Extraneous evidence of date of record of deed held admissible. *Riviere v. Wilkens*, 31 C. A. 454, 72 S. W. 608.

37. — Judicial records and proceedings.—Where the judgment contains no recital as to service of citation, parol evidence tending to show that defendant was not served was admissible. *Hambel v. Davis* (Civ. App.) 33 S. W. 251. See *Hambel v. Davis*, 89 T. 256, 34 S. W. 439, 59 Am. St. Rep. 46.

Parol evidence held admissible, on appeal from justice, to show that written motion for new trial bearing no file mark was filed within five days of the trial, to show whether appeal bond was filed in time. *Brooks v. Acker* (Civ. App.) 60 S. W. 800.

In an action based on an execution levy, the officer making the same held entitled to testify that a copy of the execution attached to a justice's deposition was correct and that he made a mistake in the copy filed. *Peeples v. Slayden-Kirksey Woolen Mills* (Civ. App.) 90 S. W. 61.

38. — Official records and proceedings.—Evidence in action on county treasurer's bond held not to contradict auditor's report, which had not been excepted to. *Harper v. Marion County*, 33 C. A. 653, 77 S. W. 1044.

39. — Deeds.—Where a grantor placed the deed in an envelope, indorsed with his name, and the names of the grantees, and delivered the same to a bank, his statement then made to the bank that it was for delivery to the grantees after his death was admissible as against the objection that it varied the terms of the indorsement. *Henry v. Phillips*, 105 T. 459, 151 S. W. 533.

40. — Leases.—One who appears upon the instrument as principal can show that he signed as surety, for the purpose of availing himself of any equitable defense to which as a surety he may be entitled. *Burke v. Cruger*, 8 T. 66, 58 Am. Dec. 102; *Babcock v. Milmo Nat. Bank*, 1 App. C. C. § 819.

Parol evidence held admissible on question as to which lease was silent. *Hammond v. Martin*, 15 C. A. 570, 40 S. W. 347.

41. — Contracts in general.—In a suit for specific performance of a contract to partition land, parol evidence is not admissible to complete the contract where the land is not described, nor the essential terms of the bargain and sale ascertainable from the writing itself. *Sullivan v. Zanderson* (Civ. App.) 42 S. W. 1027.

Facts held to show that written instruments did not embrace the entire contract, rendering parol evidence admissible to prove the oral parts of the agreement. *Davis v. Sisk*, 49 C. A. 193, 108 S. W. 472.

Parol evidence of omitted stipulations of a contract held inadmissible to vary the terms of the contract. *Kansas City Packing Box Co. v. Spies* (Civ. App.) 109 S. W. 432.

Where an entire contract was not placed in writing, the whole contract could be proved by parol testimony. *Allen v. Herrick Hardware Co.*, 55 C. A. 249, 118 S. W. 1157.

Where a contract is partly in writing and partly in parol, proof to establish the parol part does not change, vary, or contradict the writing. *Williams v. Walter A. Wood Moving & Reaping Machine Co.* (Civ. App.) 154 S. W. 366.

42. — Contracts of employment.—Evidence held not to vary terms of contract. *Hoefling v. Dobbin* (Civ. App.) 40 S. W. 53.

Parol evidence to establish agreement to employ plaintiff for life in consideration of written release of claim for damages held admissible under the rule that, where part of the agreement is verbal, that part may be established by parol. *Texas Cent. R. Co. v. Eldredge* (Civ. App.) 155 S. W. 1010.

43. — Contracts of sale.—In an action against a bank and a vendor to recover money deposited by a purchaser, held, that evidence that the vendor was to furnish the purchaser an abstract of title was legitimate, as against the contention that the evidence added to and changed the written contract. *Hunter v. Wallace*, 57 C. A. 1, 121 S. W. 180.

44. — Contracts of carriage.—In an action for injuries to a shipment of live stock, evidence as to agreement to deliver stock at certain stockyards held admissible. *Texas & P. Ry. Co. v. Coggin & Dunaway*, 44 C. A. 423, 99 S. W. 1052.

The ordinary bill of lading without any agreement to deliver within a specified time would not be varied by evidence showing the circumstances relating to the transportation and delivery of the shipment to aid in determining whether delivery was made within a reasonable time. *Missouri, K. & T. R. Co. v. Stark Grain Co.*, 103 T. 542, 131 S. W. 410.

In an action against a connecting carrier for injury to a shipment of horses, evidence of the carrier's knowledge of the final destination of the horses held admissible. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

The ordinary bill of lading without any agreement to deliver within a specified time would not be varied by evidence showing the circumstances relating to the transportation and delivery of the shipment to aid in determining whether delivery was made within a reasonable time. *Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co.*, 103 T. 542, 131 S. W. 410.

45. Parties to instrument or obligation.—A contract in writing appearing on its face to be the undertaking of one party may by parol evidence be shown to be that of another whose name is not signed thereto. *McClintock v. Hughes Bros. Mfg. Co.*, 4 App. C. § 201, 15 S. W. 200.

A note was signed by J., agent, R., and six others. Evidence was properly admitted to show that J. was the agent of a corporation, that he was accustomed to sign for it as such, and that the note was given for the debt of the corporation. *McIlhenny v. Blum*, 68 T. 197, 4 S. W. 367.

Where the name of a corporation, grantee in a deed, is given incorrectly, parol evidence is admissible to show that the deed intended to convey to the corporation in its correct name. That is, the misnomer does not defeat the grant, and parol evidence is admissible to show the grantee intended. *Cobb v. Eryan* (Civ. App.) 97 S. W. 515.

Parol evidence is admissible to identify the parties to a former suit the judgment in which is claimed to be conclusive. *Haines v. West*, 101 T. 226, 105 S. W. 1118, 130 Am. St. Rep. 839.

Testimony explaining deeds introduced in evidence, by showing that the real consideration therefor was paid in property instead of money, and showing who was the real owner of the property, did not vary the deeds, being admissible to explain them. *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899.

Evidence that purported purchaser's name was inserted in contract of sale of land to secure payment to him which had since been made held not admissible. *Bumpass v. Mitchell* (Civ. App.) 129 S. W. 194.

46. Existence of condition or contingency—Deeds.—A condition subsequent cannot be engraved on a deed by parol evidence. *East Line R. R. Co. v. Garrett*, 52 T. 139; *G., H. & S. A. R. R. Co. v. Pfeuffer*, 56 T. 66; *Schmidt v. Brittain* (Civ. App.) 84 S. W. 677; *Selari v. Selari*, 124 S. W. 997.

An absolute deed delivered to the purchaser cannot be affected by parol evidence engraving on it conditions inconsistent with its provisions when no fraud or mistake is shown. *Heffron v. Cunningham*, 76 T. 312, 13 S. W. 259.

As to the admission of evidence to explain recitals in deeds, etc., see *Byars v. Byars*, 11 C. A. 565, 32 S. W. 925.

In absence of fraud or mistake, parol evidence is not admissible to show that a deed absolute on its face was made in reliance on a condition precedent. *Selari v. Selari* (Civ. App.) 124 S. W. 997.

47. — Contracts in general.—In a suit to enforce specific performance of a contract, parol evidence that the contract was executed and delivered on a condition which had not been complied with held competent. *Pope v. Taliaferro*, 51 C. A. 217, 115 S. W. 309.

48. — Contracts of sale.—Evidence that the vendor executed a contract upon condition that it should not become effective until approved by his co-owner held admissible. *Parker v. Naylor* (Civ. App.) 151 S. W. 1096.

In an action between the original parties to a contract for the sale of goods, evidence that it was delivered on condition that it would not become binding, unless the buyer subsequently ordered the goods shipped, was competent, and required a judgment for the buyer. *Meeks v. Holmes Commerce Co.* (Civ. App.) 154 S. W. 365.

49. — Bills and notes.—In a suit by the surety on a note to be discharged, introduction of certain written contracts held not to preclude oral evidence showing conditions on which he signed. *Reeves & Co. v. Jowell* (Civ. App.) 140 S. W. 364.

50. Existence of custom or usage.—Proof of custom is inadmissible to show that a contract was to be performed at a particular place. *Hudson v. Henderson*, 1 App. C. § 353.

An express contract cannot be varied or controlled by evidence of custom; nor is usage admissible to control the legal effect of a state of facts. *Mercantile Banking Co. v. Landa* (Civ. App.) 33 S. W. 681.

Provision that prohibition in policy is notwithstanding any custom "of trade or manufacture" does not preclude proof of domestic custom. *American Cent. Ins. Co. v. Green*, 16 C. A. 531, 41 S. W. 74.

Evidence held inadmissible to show a local custom of banks to rely on the indorsement of drafts drawn on them as satisfactory evidence of their genuineness. *Moody v. First Nat. Bank*, 19 C. A. 278, 46 S. W. 660.

Parol evidence is admissible to prove a custom or rule different from a printed rule governing methods of work of employes. *Galveston, H. & S. A. Ry. Co. v. Collins* (Civ. App.) 57 S. W. 884.

Where a lease does not contain any provision as to the length of time for which it is executed, and no agreement as to such time was made, parol evidence of custom and usage as to time in such cases was admissible. *Brincefield v. Allen*, 25 C. A. 258, 60 S. W. 1010.

In a suit on a fire policy requiring the insured to keep a set of books, evidence of a custom among merchants to keep cash register slips in lieu of books held inadmissible. *Monger & Henry v. Queen Ins. Co. of America*, 44 C. A. 629, 99 S. W. 887.

In an action on a fire policy requiring insured to keep a set of books clearly representing a record of all sales and purchases, evidence that merchants generally, in some

particulars, fail to keep books, and keep records upon slips of paper instead thereof, is inadmissible. *Henry v. Green Ins. Co. of America* (Civ. App.) 103 S. W. 836.

Reasonable and just rules and customs of a certain business held to have been contemplated in making a contract involving that business. *Consolidated Kansas City Smelting & Refining Co. v. Gonzales*, 50 C. A. 79, 109 S. W. 946.

Custom held admissible to add an incident not expressly embraced in a contract. *Bowles v. Driver* (Civ. App.) 112 S. W. 440.

In an action against a railway company for injury to an employé involving a rule of the company, evidence of a customary observation of the rule was not inadmissible as tending to vary the terms of the rule. *Galveston, H. & N. Ry. Co. v. Murphy*, 52 C. A. 420, 114 S. W. 443.

A party to an express contract is not bound by any custom, unless such custom was known to him at the time of the execution of the contract. *Johnson & Moran v. Buchanan*, 54 C. A. 328, 116 S. W. 875.

Evidence of a general custom to deliver animals consigned to Ft. Worth at the stockyards in North Ft. Worth held admissible. *Houston & T. C. R. Co. v. Hill* (Civ. App.) 128 S. W. 445.

A custom held a term of a contract of sale. *Jacobs v. Nussbaum & Scharff* (Civ. App.) 133 S. W. 484.

Where a custom is set up to explain or qualify a contract, it must be shown that it was known to the party sought to be charged with it. *Standard Paint Co. v. San Antonio Hardware Co.* (Civ. App.) 136 S. W. 1150.

In an action by an assignee on a life policy which the insurer claimed was forfeited for failure to pay the last premium, evidence of the insurer's custom to present the premium receipt as a demand for payment, and that it had done so in the case of other policies held by plaintiff on the life of the insured and others, is admissible. *Mutual Life Ins. Co. of New York v. Davis* (Civ. App.) 154 S. W. 1184.

51. — **Construction of written instrument.**—See notes under Rule 22.

52. **Existence or accrual of liability.**—Representation of agent of building and loan company as to the maturity of stock held inadmissible, as contradictory of the contract. *Interstate Building & Loan Ass'n v. Hunter* (Civ. App.) 51 S. W. 530.

53. **Nature and extent of liability.**—Value of property title to which has been warranted in writing may be proved by parol, on breach of warranty. *Harrell v. Broome* (Civ. App.) 50 S. W. 1077.

54. — **Trust deeds.**—Where a deed of trust provided for compound interest, that complainant, one of the subscribers, understood and intended it to secure notes according to their tenor, as bearing simple interest, held inadmissible. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

55. — **Bills and notes and indorsement thereof.**—One of two or more makers of a promissory note may show by parol that he signed as surety. *Bank v. Skidmore* (Civ. App.) 30 S. W. 564, citing *Burke v. Cruger*, 8 T. 69, 58 Am. Dec. 102; *Wybrants v. Lutch*, 24 T. 309; *Pilgrim v. Dykes*, 24 T. 384; *Yeary v. Smith*, 45 T. 56; *Wylie v. Hightower*, 74 T. 307, 11 S. W. 1118.

Parol evidence in action on note held objectionable as varying the terms of the note. *Leavell v. Seale* (Civ. App.) 45 S. W. 171; *Seale v. Leavell*, Id.

The relation of a regular indorser on a note, as the same appears from the note, cannot be changed or contradicted by the payee by parol. *Barringer v. Wilson*, 97 T. 583, 80 S. W. 994.

Parol evidence is not admissible to show that an indorsement of a note was intended to be without recourse. *Behrens v. Kirkgard* (Civ. App.) 143 S. W. 698.

An indorser of a note held entitled to prove by parol that the note in fact belonged to the University of which he was secretary, but was made payable to him, and that his indorsement was merely to transfer title. *Texas Baptist University v. Patton* (Civ. App.) 145 S. W. 1063.

Parol evidence is admissible as between the signers of a note to show the real character of the obligation intended to be assumed by one signing his name on the back of the note unaccompanied by any words expressing the nature of his undertaking. *Erwin v. E. I. Du Pont De Nemours Powder Co.* (Civ. App.) 156 S. W. 1097.

56. — **Contracts of guaranty.**—In an action on a continuing guaranty, evidence as to an understanding between the parties that it was not continuous is inadmissible, as varying the written contract. *Schneider-Davis Co. v. Hart*, 23 C. A. 529, 57 S. W. 903.

57. — **Principal or surety.**—A contract was made between A. of the first part, and B., C. and D. of the second part, by which A. agreed to publish a religious paper, and the parties of the second part agreed to pay him therefor the sum of \$3,000, in quarterly payments. A. brought suit for an amount due on the contract and unpaid. C. and D. answered that they signed the contract as sureties for B., that A., knowing this, had, without their knowledge or consent, given an extension of the time of payment to B., and that they were thereby released. Held, that the answer set up a good defense. *Burke v. Cruger*, 8 T. 66, 58 Am. Dec. 102.

A person signing a note on the back, held entitled to show that he was a surety merely. *Marshall Nat. Bank v. Smith*, 33 C. A. 555, 77 S. W. 237.

Where from a note it appears that one is an indorser, parol evidence to show that he is a surety is inadmissible. *Barringer v. Wilson* (Civ. App.) 81 S. W. 533.

As between the original parties to a transaction, parol evidence that some of the parties were sureties held admissible. *Western Bank & Trust Co. v. Gibbs* (Civ. App.) 96 S. W. 947.

Though all of the signers of a note appear on its face to be principals, it may be shown as between the payee and the signers that one of them signed as surety. *First Nat. Bank v. Rusk Pure Ice Co.* (Civ. App.) 136 S. W. 89.

Parol evidence is admissible to show that one signing a note, followed by the word "surety," is a principal. *Daugherty v. Wiles* (Civ. App.) 156 S. W. 1089.

One who signs his name on the back of a note, unaccompanied by any words expressing the nature of his undertaking, is as to an indorsee before maturity for value, and without notice, a surety, and parol evidence of any lesser obligation is inadmissible. *Erwin v. E. I. Du Pont De Nemours Powder Co.* (Civ. App.) 156 S. W. 1097.

58. **Effect of writing as to persons not parties thereto or privies.**—The rule of evidence that where the parties to a contract have reduced their agreement to writing parol evidence shall not be received to alter or to contradict the written instrument applies to controversies between the parties and to those claiming under them. *Waco Water Co. v. Sanford*, 1 App. C. C. § 196. But strangers have not assented to this contract and therefore are not bound by it. *Hughes v. Sandal*, 25 T. 162. Thus, while the parties to a conveyance cannot impeach it on the ground that it was made for the purpose of defrauding creditors, such creditors are not bound by its recitals. *Danzev v. Smith*, 4 T. 401; *Epperson v. Young*, 8 T. 135; *McClenny v. Floyd*, 10 T. 159; *Wilson v. Trawick*, 10 T. 428; *Hoeser v. Kraeka*, 29 T. 450; *Cameron v. Romele*, 53 T. 238; *Traylor v. Townsend*, 61 T. 144; *Lott v. Kaiser*, 61 T. 665; *Rubrecht v. Powers*, 21 S. W. 318, 1 C. A. 282; *Willis v. Byars*, 21 S. W. 320, 2 C. A. 134; *Bupp v. O'Conner*, 21 S. W. 619, 1 C. A. 326; *San Antonio & A. P. Ry. Co. v. Busch* (Civ. App.) 21 S. W. 164.

The rule that parol testimony is inadmissible to contradict a written instrument applies only to suits between the parties thereto. *Pierce v. Johnson* (Civ. App.) 50 S. W. 610.

Parol testimony held admissible to show that an insurance policy taken out by a warehouseman did not cover property stored with him belonging to another party. *Pittman v. Harris*, 24 C. A. 503, 59 S. W. 1121.

Plaintiff, in trespass to try title, held not bound by recitals in the deed, so that she was entitled to introduce parol testimony to explain the same. *Hart v. Meredith*, 27 C. A. 271, 65 S. W. 507.

Recital in a deed conveying land to a trustee that the payments were made out of the separate funds of the beneficiary held not conclusive, on the ground that it is contractual in its nature; the beneficiary not being party to the deed. *Kahle v. Stone*, 95 T. 106, 65 S. W. 623.

Parol proof that a deed and mortgage were one transaction held admissible against prior judgment creditor of the purchaser, though he had no notice of the transaction. *Masterson v. Burnett*, 27 C. A. 370, 66 S. W. 90.

Owner of land held in privity with one who mortgaged it, so neither owner nor mortgagee can vary terms of mortgage by parol evidence. *W. C. Belcher Land Mortg. Co. v. Norris*, 34 C. A. 111, 78 S. W. 390.

Parol evidence showing that a release by a seller of cattle did not apply to the buyer's right to sue the carrier for injuries to the cattle delivered held admissible. *International & G. N. R. Co. v. Jones*, 41 C. A. 327, 91 S. W. 611.

The right to vary or add to the consideration of a contract by parol is as a general rule confined to the parties to the contract. *Pope v. Taliaferro*, 51 C. A. 217, 115 S. W. 309.

In an action by creditors to subject to an attachment lien a tract which defendant had theretofore conveyed to his mother while insolvent, evidence that, when defendant's mother conveyed to him, there was an oral agreement that he should reconvey unless he built a house thereon and lived near her, held admissible to show good faith in reconveying. *Paris Grocer Co. v. Burks*, 56 C. A. 223, 120 S. W. 552.

One seeking to take benefit under another's contract is bound to the same rule which precludes him from contradicting by parol written evidence thereof. *Vansickle v. Watson*, 103 T. 37, 123 S. W. 112.

59. **Writings collateral to issues in general.**—Parol evidence held admissible to show that a note was given not to secure the maker's debt, but as a bond to secure performance by a third person of a contract between him and plaintiff. *Landrum v. Stewart* (Civ. App.) 111 S. W. 769.

Rule as to parol evidence as applied to deeds, stated. *Davis v. George*, 104 T. 106, 134 S. W. 326.

60. **Evidence for purpose other than varying rights or liabilities dependent upon terms of writing.**—When a deed has been delivered to the grantee, parol evidence is not admissible to show that it was delivered as an escrow. *East Texas Fire Ins. Co. v. Clarke*, 21 S. W. 277, 1 C. A. 238.

Additional stipulations to a written contract not inconsistent therewith may be made by parol. *Strauss v. Gross*, 21 S. W. 305, 2 C. A. 432; *Clark v. Gregory*, 27 S. W. 56, 37 T. 189; *Head v. Cleburne B. & L. Ass'n* (Civ. App.) 25 S. W. 810.

In an action against a carrier, certain testimony on the part of plaintiff held not contradictory of the written contract of shipment. *Texas & P. Ry. Co. v. Stewart*, 43 C. A. 399, 96 S. W. 106.

61. **Declarations, representations, and expressions of opinion preceding contract.**—Declarations, representations and expressions of opinion, which precede, but do not enter into or form a part of, the contract as finally consummated, furnish no ground for the recovery of damages to a party deceived or misled by them; for it is his own folly to rely on them when they are not embodied in and made a part of the contract. *Wooters v. I. & G. N. R. R. Co.*, 54 T. 294.

62. **Showing discharge or performance of obligation—Grounds for admission of extrinsic evidence.**—Evidence held not inadmissible on the ground that it varies the terms of a written contract of insurance agency. *Lea v. Union Cent. Life Ins. Co.*, 17 C. A. 451, 43 S. W. 927.

63. — **Agreement as to performance or enforcement.**—Matters of consideration may be shown by parol evidence. *Norris v. Graham* (Civ. App.) 42 S. W. 575.

In an action on a note, proof of a contemporaneous parol agreement that the payee would credit on the note a certain debt due the maker held inadmissible as varying a written contract. *Balley v. Rockwall County Nat. Bank* (Civ. App.) 61 S. W. 530.

Where reciprocal orders for goods were executed and delivered at the same time, parol evidence was admissible to show that they were intended to show that delivery of goods to one was to operate as a satisfaction for the delivery of goods under the other. *Adams v. Garner* (Civ. App.) 133 S. W. 896.

Certain testimony held admissible to show a subsequent parol agreement as against the objection that it tended to vary the terms of a written agreement. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 137 S. W. 154.

64. — **Discharge without performance.**—It is competent to show by parol that a written contract has been abandoned. *Henry v. Phillips*, 105 T. 459, 151 S. W. 533.

65. — **Estoppel or waiver.**—Where the grantee in a power of attorney mortgages certain property described therein, without authority, a ratification of such mortgage by the grantor may be shown by parol evidence of acts which would operate as an estoppel in pais. *First Nat. Bank v. Hicks*, 24 C. A. 269, 59 S. W. 842.

Permitting oral misrepresentations to operate as an estoppel held not to contradict the language of a deed. *Mars v. Morris*, 48 C. A. 216, 106 S. W. 430.

In an action by the holder of an accepted draft against the drawer, held, that under statutory provisions the plaintiff could not show defendant's waiver by parol evidence. *Seguin Milling & Power Co. v. Guinn* (Civ. App.) 137 S. W. 456.

66. — **Payment.**—Where a note is returned to an indorser stamped "paid" by the bank, it does not prevent an explanation of the circumstances under which it was stamped. *McShan v. Watlington* (Civ. App.) 133 S. W. 722.

RULE 21. CONTEMPORANEOUS WRITTEN AGREEMENTS RELATING TO THE SAME SUBJECT ARE TO BE CONSTRUED TOGETHER, AND SEVERAL DISTINCT STIPULATIONS ARE TO BE CONSTRUED SO AS TO GIVE EFFECT TO ALL. A PRIOR OR CONTEMPORANEOUS PAROL AGREEMENT CONSISTENT WITH AND FORMING A PART OF THE CONTRACT IS TO BE CONSTRUED WITH THE WRITTEN PART THEREOF

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| 1. Connection of contemporaneous writings. | 12. ——— Contracts of suretyship. |
| 2. Construction of writing as a whole. | 13. ——— Contracts of insurance. |
| 3. Prior and contemporaneous collateral parol agreements in general. | 14. ——— Contracts of carriage. |
| 4. ——— Judicial proceedings. | 15. Completeness of writing. |
| 5. ——— Leases. | 16. ——— Leases. |
| 6. ——— Mortgages, security or trust deed. | 17. ——— Contracts of employment. |
| 7. ——— Contracts of employment. | 18. ——— Contracts for buildings and other works. |
| 8. ——— Contracts for buildings and other works. | 19. ——— Contracts of sale. |
| 9. ——— Sale or exchange of real property and deeds. | 20. ——— Contracts of carriage. |
| 10. ——— Sale of personal property. | 21. ——— Releases. |
| 11. ——— Bills and notes or indorsement thereof. | 22. Relation of oral agreement to writing. |
| | 23. ——— Inducement to make writing. |
| | 24. ——— Merger of separate agreements. |

1. Connection of contemporaneous writings.—See, also, notes under Rule 26.

While the two contracts are in their terms independent contracts, expressing no relation to each other, each binding the obligor therein to perform unconditionally, and each at a different time from the other, it is competent for the defendant to show their connection and dependency, and that it would be inequitable for the plaintiff to enforce a specific performance of the first contract as an independent covenant. *Younger v. Welch*, 22 T. 417.

A writing may refer as a part of itself to another contract, written or oral, when the latter may be proved by writing or parol, according to the fact. *Preston v. Breedlove*, 36 T. 96; *Thomas v. Hammond*, 47 T. 42.

A purchase of goods made by L. of G. on credit, the contract in relation thereto being upon four separate sheets of paper; a fifth sheet of paper had on it a writing as follows: "I will be responsible for the amount bought by my brother L.," and signed by the brother of L. The five papers were similar in character and bore the same date. Held, that evidence of the surrounding circumstances was admissible to explain the subject-matter of the several writings and their connection with each other and the intention of the parties. *Looney v. Le Geirse*, 2 App. C. C. § 531.

In negotiations for a loan the borrower gave his note for a sum of money and executed an absolute deed to the agent of the lender for a tract of land. It was held that the two instruments with attendant circumstances evidenced a loan. *Hart v. Eppstein*, 71 T. 752, 10 S. W. 85; *Gray v. Shelby*, 83 T. 405, 18 S. W. 809.

Exclusion from evidence of a collateral written agreement stating the terms of the contract of sale and signed by the salesman of one of the parties, held reversible error. *Brenck v. Eastern Mfg. Co.* (Civ. App.) 61 S. W. 329.

In an action on an insurance policy, a clause attached thereto, and mentioned therein, was improperly excluded. *Hartford Fire Ins. Co. v. Post*, 25 C. A. 428, 62 S. W. 140.

Parol proof held admissible to show a deed and mortgage constituted one transaction. *Masterson v. Burnett*, 27 C. A. 370, 66 S. W. 90.

Contemporaneous writing, modifying a written order for goods, held admissible. *Eastern Mfg. Co. v. Brenck*, 32 C. A. 97, 73 S. W. 538.

Where a contract of sale and certain other contracts were executed on the same day, and formed a part of the same transaction with the notes sued on, they were all admissible in evidence to show the entire transaction. *Kammann v. McCormick* (Civ. App.) 99 S. W. 1147.

2. Construction of writing as a whole.—See notes at end of Title 16.

3. Prior and contemporaneous collateral parol agreements in general.—Parol representations or agreements made at the time of subscriptions for stock in incorporated companies and inconsistent with the written terms of the subscription are inadmissible to vary the terms of the written contract, unless fraud or mistake is pleaded and shown. *Clegg v. Galveston Hotel Co.*, 1 App. C. C. § 621.

All preliminary negotiations, whether written or unwritten, which have led to the execution of a contract, are deemed to have been merged in it, and the writing which consummates the contract must be taken as expressing the views of the parties. While contemporaneous writings may be considered in construing a contract, they cannot be

considered for the purpose of showing that the parties did not agree upon a stipulation which purports to be the final and only contract between the parties. *Milliken v. Callahan Co.*, 69 T. 205, 6 S. W. 681.

Statements made prior to making of contract, providing that it contains all representations between the parties, are inadmissible in evidence. *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.* (Civ. App.) 44 S. W. 929.

Evidence showing circumstances at time of making written contract, not contradicting or varying the same, held admissible. *Id.*

Proof of a parol contemporaneous agreement held inadmissible where contract is unambiguous. *Saunders' Ex'rs v. Weekes* (Civ. App.) 55 S. W. 33.

Where a railroad subscription authorized location of depot at any point within a specified territory, parol evidence was inadmissible in the absence of proof of mistake to establish an agreement to locate it on a specified lot. *Williams v. Dallas, C. & S. W. Ry. Co.*, 43 C. A. 609, 96 S. W. 1099.

In a suit to enforce specific performance of a land contract, parol evidence is inadmissible to supply facts not shown by the written evidence, which were necessary in order to make the contract enforceable. *Dillard v. Sanders* (Civ. App.) 97 S. W. 108.

Testimony held inadmissible, in an action to recover land, to vary the terms of a writing. *Teague v. Ricks*, 45 C. A. 226, 100 S. W. 794.

A contract of employment held not to contain all the terms of the agreement, and hence could be varied by parol evidence. *G. A. Kelly Plow Co. v. London* (Civ. App.) 125 S. W. 974.

Testimony as to contemporaneous parol agreements, which in no manner vary or contradict written contracts, is admissible. *Kostoryz v. Leary* (Civ. App.) 130 S. W. 456.

A contemporaneous parol agreement cannot be set up to vary the terms of a written contract. *Murray Co. v. Putman* (Civ. App.) 130 S. W. 631.

Statement of what is necessary for varying a written contract by a contemporaneous verbal agreement. *Sims v. Shafer* (Civ. App.) 133 S. W. 702.

An escrow agreement held unambiguous, so that parol evidence was not admissible to add to its terms. *Cress v. Holloway* (Civ. App.) 135 S. W. 209.

Parol evidence of consideration of written contract consisting of contemporaneous agreement at variance with contract held inadmissible. *Crooker v. National Phonograph Co.* (Civ. App.) 135 S. W. 647.

An agreement, having been prior to execution of a written subscription, may not be shown by parol to have been part of its consideration, though it might be so shown, had it been contemporaneous with such execution. *Stith v. Graham* (Civ. App.) 146 S. W. 661.

The obligations of both parties being stated in a written subscription, parol evidence of another agreement, not performed, and consequent failure of consideration, is inadmissible. *Id.*

Parol evidence is admissible to show that a part of a consideration of a note given for the price of goods consisted of a parol agreement of the payee to take back certain unsalable goods and credit their invoice price on the note. *Clayton v. Western Nat. Wall Paper Co.* (Civ. App.) 146 S. W. 695.

In the absence of fraud, accident, or mistake, a parol agreement may not be ingrafted on a written contract clear in its terms. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell* (Civ. App.) 153 S. W. 670.

4. — **Judicial proceedings.**—Parol testimony as to the agreement under which a judgment was rendered held not inconsistent with the recital of the judgment. *Jones v. Robb*, 35 C. A. 263, 80 S. W. 395.

5. — **Leases.**—Evidence of contemporaneous oral understanding at the time of taking a lease of county lands, as to a renewal thereof, held inadmissible. *Slaughter v. De Vitt*, 30 C. A. 539, 71 S. W. 616.

Parol evidence held inadmissible to show an agreement between landlord and tenant as to proceeds of sale of premises leased under a written lease. *Boone v. Mierow*, 33 C. A. 295, 76 S. W. 772.

Lessee cannot by verbal reservation limit effect of clause in lease exempting lessor from certain liabilities. *Woodward v. Ft. Worth & D. C. Ry. Co.*, 35 C. A. 14, 79 S. W. 896.

In an action on a lease, certain evidence held inadmissible, because varying the terms of the written contract. *Moore-Cortes Canal Co. v. Gyle*, 36 C. A. 442, 82 S. W. 350.

A provision in a written lease that subletting should not affect the tenant's liability for rent could not be varied by any contemporaneous parol agreement. *Pressler v. Barrera* (Civ. App.) 157 S. W. 435.

6. — **Mortgages, security or trust deed.**—Evidence of prior representations that a mortgagor should be released on sale of the property and assumption of the debt by the purchaser held inadmissible as tending to contradict the written contract in an action to foreclose a mortgage against property so sold. *People's Building, Loan & Savings Ass'n v. Ghio* (Civ. App.) 62 S. W. 560.

Evidence of an oral agreement held not admissible to vary a deed of trust. *Cotulla v. Barlow* (Civ. App.) 115 S. W. 294.

In trespass to try title to land covered by a deed of trust executed to secure a note, where the deed refers to no other indebtedness than that evidenced by the note, and it was not alleged that any other or future advances should be included therein, it could not be shown that it was agreed that other indebtedness should be secured thereby. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

A valid written contract, such as a deed of trust, cannot be varied or contradicted by a parol contemporaneous agreement. *Rudolph v. Price* (Civ. App.) 146 S. W. 1037.

7. — **Contracts of employment.**—Where a contract of employment as written provided for payment of \$333.33 per month, parol evidence is admissible to show that the contract was signed with that payment in to please the employé's wife, and that it was agreed that the employé would return \$400 at the end of the year so as to make the payment \$300 a month, since the contract did not contain all the terms of the agreement. *G. A. Kelley Plow Co. v. London* (Civ. App.) 125 S. W. 974.

8. — **Contracts for buildings and other works.**—A contract for decorating held not subject to variance by parol proof that it was agreed that plaintiff's manager should supervise the work. *Southwestern Telegraph & Telephone Co. v. Paris*, 39 C. A. 424, 87 S. W. 724.

9. — **Sale or exchange of real property and deeds.**—W. and H. entered into a written contract by which W. agreed to convey to H. a tract of land for which H. agreed to pay a certain price. Held, that evidence of a parol agreement, made at the same time, that H. was also to pay to W. an additional consideration, was inadmissible. *Wright v. Hays*, 34 T. 253.

Parol evidence held inadmissible to show that under a deed grantee was entitled to right of way. *Kruegel v. Nitschman*, 15 C. A. 641, 40 S. W. 68.

An action against a grantor for wrongful withholding of possession by one without title cannot be maintained on a parol agreement contemporaneous with the warranty deed. *Voss v. Hoffman* (Civ. App.) 40 S. W. 544.

Parol evidence held admissible to show that mortgagee, on accepting a deed of the mortgaged premises from the mortgagor, understood that the boundaries thereof were in dispute and that it was understood the former was to take only the interest of the latter as it might later be decided. *Colonial & U. S. Mortg. Co. v. Tubbs* (Civ. App.) 45 S. W. 623.

Where owners of adjoining lands settle their conflicting claims as to the boundary by the execution of a deed, such deed cannot be contradicted by evidence of a previous parol agreement. *Lackey v. Bennett* (Civ. App.) 65 S. W. 651.

A grantee in a deed held entitled to show by parol a condition subsequent resting in parol and its nonperformance by the grantee as against his attaching creditor. *Paris Grocer Co. v. Burke* (Civ. App.) 99 S. W. 1135.

That a deed purporting on its face to convey absolutely certain real estate was executed under an agreement that it should not have any effect as a deed may be shown by parol evidence. *Ivy v. Ivy*, 51 C. A. 397, 112 S. W. 110.

A deed, conveying in fee land to a railroad without qualification or limitation on the right of the railroad to enjoy and use the land in any way beneficial to it, may not be restricted by parol evidence of an agreement that the land should be used only for railroad purposes, and that the agreement formed a part of the consideration influencing the conveyance. *Sutor v. International & G. N. R. Co.* (Civ. App.) 125 S. W. 943.

It is presumed that the whole contract of the parties to a contract for the sale and purchase of real estate is embodied in the written instrument, and parol testimony to establish another agreement is inadmissible. *Stidham v. Laurie* (Civ. App.) 133 S. W. 1082.

10. — **Sale of personal property.**—Suit was instituted 10th January, 1861, on the following instrument: "Due J. K. one hundred sheep of the following description, * * * for value received of him this 28th of November, 1860." Held, that under the contract the sheep were to be delivered within a reasonable time, and parol evidence was inadmissible to show an agreement that the sheep were not to be delivered until spring. *Self v. King*, 23 T. 552.

There was a written agreement between the parties that one would buy a specified number of beeves from the other, for an amount to be paid for each beef delivered. The number was delivered with the exception of a few retained at the request of the purchaser. The latter sued for damages for breach of contract, setting up a contemporaneous parol agreement that the price paid for the cattle was so much for them, and so much in consideration that the vendor would use his influence to procure business for the vendee, and send him cattle in the future. The terms of the written contract were plain and unambiguous, and there was no allegation of fraud or mistake. Held, such contemporaneous parol agreement varied the terms of the written instrument, and should have been excluded by the court. *Belcher v. Mulhall*, 57 T. 17.

A parol agreement that part of a sum of money promised to be paid in an obligation in writing could be discharged otherwise than in money is not valid. *Roundtree v. Gilroy*, 57 T. 176.

Parol evidence held inadmissible to vary the terms of a written bill of sale. *McFarland v. McGill*, 16 C. A. 298, 41 S. W. 402.

Parol evidence held inadmissible to contradict written contract. *Evans-Snyder-Buel Co. v. Stribling* (Civ. App.) 45 S. W. 40.

Where defendant contracted in writing to deliver a certain quantity of pecans at a specified place, time and price, evidence that such pecans were to be grown in certain territory would add to the contract, and is inadmissible. *Hopkins v. Woldert Grocery Co.* (Civ. App.) 66 S. W. 63.

A written warranty on the sale of a machine excludes any proof of a different parol one. *J. I. Case Threshing Mach. Co. v. Hall*, 32 C. A. 214, 73 S. W. 835.

Where a contract for the purchase of wagon gears was in writing, and was merely an order to ship wagons, without any special time for shipment noted, evidence that the buyers told the agent to whom the order was given that it was special, and that he had promised to get the wagons to them in about three weeks, was inadmissible as varying the contract. *Fish Bros. Wagon Co. v. G. F. Adams & Co.* (Civ. App.) 146 S. W. 704.

11. — **Bills and notes or indorsement thereof.**—When a bill payable at a day certain is presented for acceptance and dishonored, the payee may sue the drawer immediately, and a plea by the latter, setting up an oral agreement made previous to or contemporaneous with the drawing of the bill that the drawer shall not be liable to pay the amount of the bill until the time stipulated, is bad for the reason that it proposes to vary, by oral evidence, the legal effect of a contract in writing. *Rockmore v. Davenport*, 14 T. 602, 65 Am. Dec. 132. See *Pope v. Graham*, 44 T. 196.

In defense to a suit brought by an indorsee upon a certain promissory note, the defendant pleaded that the note was given for the purchase money of certain lots of land, and that at the time of his purchase of the land there was an outstanding vendor's lien on the same for part of the purchase money, and that it was understood between him and his vendor, the payee in the notes, that the incumbrance should be paid off by the payee before the maturity of the notes, which was not done, and in consequence of which

he, the defendant, was compelled to pay off the same to keep the land from being sold under the execution; that the notes were assigned to the plaintiff after maturity, and with notice of their dishonor, and he asked to have the amount of the vendor's lien deducted from the plaintiff's demand. Held, that a verbal contract collateral to and contemporaneous with the written contract was valid, although it referred to the same subject-matter, and might affect the rights of the parties under the written contract, and that the answer set up a good defense pro tanto. *Preston v. Breedlove*, 36 T. 96.

Suit was brought by G. against R. to recover upon the following instrument in writing: "\$433.33. Due G. G., on demand, four hundred and thirty-three dollars and thirty-three cents for work building stone fence. This July 5, 1879." The defendant answered that prior to the making of the instrument sued on there was a parol agreement by which it was agreed that \$400 of the sum due should be paid with two alternate land certificates, each for 640 acres of land. Held, that a demurrer to the answer was properly sustained. *Roundtree v. Gilroy*, 57 T. 176.

Suit was brought on a note before its maturity, and plaintiff was permitted to prove by parol that it was the understanding of the parties, at the time of the execution of the note, that, upon the happening of a certain event, the note was to become due, and that said event had transpired before the institution of the suit. Held error to admit the evidence. *Floyd v. Brawner*, 1 App. C. C. § 135.

An answer to a suit on two protested drafts, drawn by the defendant, which sets up under oath that at the time they were given it was understood that defendant was not to be held liable upon them, but that plaintiff was to look to another for payment, and that the drafts were intended only as a memoranda or vouchers, presents no defense to the action. *Todd v. Roberts*, 1 C. A. 8, 20 S. W. 722.

In an action on a note, an answer setting up a contemporaneous oral contract held not an attempt to vary by parol the terms of the note. *Henry v. McCardell*, 15 C. A. 497, 40 S. W. 172.

Where there is no ambiguity in notes sued on, or any fraud or mistake alleged, an agreement for a different mode of payment than that expressed cannot be shown. *Davis v. Converse* (Civ. App.) 46 S. W. 910.

The maker of a note may show by parol that as part of the transaction in which the note was given the parties made a collateral agreement, which the payee has breached to the maker's damage. *Hansen v. Yturria* (Civ. App.) 48 S. W. 795.

In an action by a payee against a maker on a note, held that equity would allow the maker to show that the note was not intended as a full settlement between the parties, but that it was agreed that there should be a further settlement, in which the maker should have the benefit of certain credits. *Allen v. Herrick Hardware Co.*, 55 C. A. 249, 118 S. W. 1157.

A verbal agreement between the indorser and indorsee of a note that the former will not be held bound by his indorsement is no defense to an action thereon for the reason that evidence thereof cannot be offered to defeat the action. *Wizig v. Belsert* (Civ. App.) 120 S. W. 954.

Where promissory notes given in payment of bank stock are absolute promises to pay in money, it is not permissible to vary their terms by contemporaneous parol agreements, to the effect that the maker should have the option to satisfy the notes by surrendering the bank stock, and for the same reason a plea of failure of consideration to an assessment on the stock must fail. *Nixon v. First State Bank* (Civ. App.) 127 S. W. 882.

An oral promise by the payee to the surety on a note, when executed, not to enforce its payment against him, does not affect the surety's obligation. *Fambro v. Keith*, 57 C. A. 302, 122 S. W. 40.

In an action on notes, evidence of contemporaneous agreement varying medium and time of payment held inadmissible. *Crooker v. National Phonograph Co.* (Civ. App.) 135 S. W. 647.

In a suit on a note, a plea of a parol agreement by plaintiff held properly stricken. *Long v. Riley* (Civ. App.) 139 S. W. 79.

12. — **Contracts of suretyship.**—A bond given by a claimant of property levied on cannot be varied by showing a parol agreement placing the valuation of the property at a less sum than stated therein. *Bruel v. Leggitt & Meyers Tobacco Co.*, 29 C. A. 405, 68 S. W. 718.

13. — **Contracts of insurance.**—Evidence to show an implied agreement to waive a clause clearly written on the face of a policy of fire insurance, made prior to the issuance of the policy, was held inadmissible to contradict its terms. *Keller v. Liverpool & L. & G. Ins. Co.*, 27 C. A. 102, 65 S. W. 695.

14. — **Contracts of carriage.**—In action for delay in delivering a death message, parol evidence that the message was not to be delivered to the person in whose care it was sent held admissible. *Western Union Tel. Co. v. Bryant*, 35 C. A. 442, 80 S. W. 406.

A written contract held not to prevent the shipper of cattle from showing the terms of an oral contract under which the cattle were loaded and were to be shipped. *McNeill v. Galveston, H. & N. Ry. Co.* (Civ. App.) 86 S. W. 32.

A written contract between a carrier and shipper for the shipment of cattle could not, in the absence of fraud or mistake, be added to by parol evidence of a prior agreement that the cattle should be delivered at a certain packing house. *International & G. N. R. Co. v. Griffith* (Civ. App.) 103 S. W. 225.

15. **Completeness of writing.**—Where it is not alleged or shown that there was fraud or mistake in a written contract, or that it differed from the agreement of the parties, it is error to submit to the jury the question of an oral contract based on conversations between plaintiff and defendant's agent. *Cotton States Bldg. Co. v. Rawlins* (Civ. App.) 62 S. W. 805.

Application stated of rule that, where parties reduce their contracts to writing, the writing is to be taken as embodying all previous negotiations about its terms, which cannot be varied by parol. *Allen v. Herrick Hardware Co.*, 55 C. A. 249, 118 S. W. 1157.

The petition in an action for breach of a contract held not subject to exception in certain respects. *Jef Chaison Townsite Co. v. Beaumont Sawmill Co.* (Civ. App.) 133 S. W. 714.

Oral contract held admissible, where it was but part of a comprehensive, unconflicting whole. *Ross v. Head* (Civ. App.) 145 S. W. 1077.

Where a writing evidencing a contract is not complete, a separate parol agreement as to any matter on which the writing is silent, and not inconsistent with it, may be proved. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell* (Civ. App.) 153 S. W. 670.

Where persons enter into a contract which is entirely verbal and a part only is subsequently reduced to writing, parol evidence as to such part is admissible, not to vary the writing, but to show the original contract in its entirety. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

16. — **Leases.**—Where a lease contained no provision as to the length of time for which the premises were leased, the length of time for which it was executed could be shown by parol. *Brincefield v. Allen*, 25 C. A. 253, 60 S. W. 1010.

17. — **Contracts of employment.**—Testimony held not to vary the terms of a written contract, and hence admissible in a suit on the same. *Jenkins v. Darling* (Civ. App.) 56 S. W. 931.

18. — **Contracts for buildings and other works.**—A contract for excavation, which provides that the contractor shall furnish necessary appliances, that the earth shall be transported to points that have been indicated, for a specified sum per cubic yard, contemplates matters not embodied in the contract, and a parol agreement requiring the owner to furnish cars for the transportation of earth is admissible. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell* (Civ. App.) 153 S. W. 670.

19. — **Contracts of sale.**—Parol evidence as to the size of tank cars to be used in filling a contract for the sale of oil, which did not provide the size of the cars held admissible. *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Civ. App.) 77 S. W. 961.

Where a contract is incomplete within itself, in that it provides that certain information is furnished by the purchaser to the seller after which shipment was to be made, parol evidence is admissible to supplement the contract. *San Jacinto Rice Co. v. A. M. Lockett & Co.* (Civ. App.) 145 S. W. 1046.

20. — **Contracts of carriage.**—In an action for breach of an excursion transportation contract, parol evidence held inadmissible to add a stipulation to the written contract that plaintiff was to be carried to his destination in the same car. *Missouri, K. & T. Ry. Co. of Texas v. Harrison*, 97 T. 611, 80 S. W. 1139.

21. — **Releases.**—Parol evidence held not admissible to show that a promise to give the releasor employment was part of the consideration for a written release. *Rapid Transit Ry. Co. v. Smith*, 93 T. 553, 86 S. W. 322.

22. **Relation of oral agreement to writing.**—Evidence of witness as to terms made on receipt of telegraphic message for delivery held not inadmissible, as tending to vary the terms of the written contract as shown by the message. *Robinson v. Western Union Tel. Co.* (Civ. App.) 43 S. W. 1053.

Where deed conveyed land to be used for school purposes, parol evidence is admissible to show agreement that school house to be erected thereon was not to revert with land on condition broken. *Green v. Gresham*, 21 C. A. 601, 53 S. W. 382.

In an action to recover on a warranty contained in a deed, where the same was not made by defendant, but at his request, held, that parol evidence as to the agreement between plaintiff and defendant was admissible. *Graves v. Pflueger*, 26 C. A. 488, 63 S. W. 651.

Policy of life insurance having been rejected by insured as not complying with the contract, parol evidence of the terms of the contract was admissible. *Pacific Mut. Ins. Co. v. Shaffer*, 30 C. A. 313, 70 S. W. 566.

Where a written contract made no express provision as to times of payments, but certain times might be inferred, a parol agreement fixing the same times may be proved. *Thompson v. Fitzgerald & Ray* (Civ. App.) 105 S. W. 334.

23. — **Inducement to make writing.**—It is said there is no rule which precludes the party from asserting and proving by oral testimony a distinct and valid parol contract, made at the same time and not reduced to writing, which is not in conflict with the provisions of the written contract, and which operated as an inducement to the party to enter into it. *Ackerman v. Bundren*, 1 App. C. C. § 1306.

Parol evidence is admissible to show an independent agreement, made as an inducement to a written contract, notwithstanding the written contract contains no reference to such agreement. *Downey v. Hatter* (Civ. App.) 48 S. W. 32.

A stockholder of a college corporation, who is sued after its insolvency for tuition owing the college, cannot show a parol agreement, contemporaneous with his stock subscription, that the stock should be received in payment of tuition. *Roach v. Burgess* (Civ. App.) 62 S. W. 803.

Where an independent parol agreement has been made as an inducement to the making of a written contract, the oral agreement may be proved and enforced, though not referred to in the written contract. *New York Life Ins. Co. v. Thomas*, 47 C. A. 149, 104 S. W. 1074.

24. — **Merger of separate agreements.**—All preliminary negotiations, whether written or unwritten, which have led to the execution of a contract, are deemed to have been merged in it, and the writing which consummates the contract must be taken as expressing the views of the parties. While contemporaneous writings may be considered, in construing a contract, when they are reciprocally dependent, and the meaning of one cannot be wrought out without considering the other, they cannot be considered for the purpose of showing that the parties did not agree as expressed in the writing. *Milliken v. Callahan Co.*, 69 T. 205, 6 S. W. 681.

An itemized account of material and labor used in the negotiation of a contract is merged in a subsequent written contract, and plaintiff suing for the contract price could not introduce such bill of items unless the defendant, resisting payment, had offered some part of its contents; there being no ambiguity or uncertainty in the written contract, nor fraud or mistake alleged as basis for such testimony. *Alamo Mills Co. v. Hercules Iron Works*, 1 C. A. 683, 22 S. W. 1097.

A contract reduced to writing merges all prior and contemporaneous negotiations, and to the written contract alone can the court refer to determine the rights and obligations of the parties. *Kansas City Packing Box Co. v. Spies* (Civ. App.) 109 S. W. 432.

RULE 22. WHERE THE MEANING OF THE WORDS IN A WRITTEN INSTRUMENT ARE DOUBTFUL, IT MAY BE READ IN THE LIGHT OF SURROUNDING CIRCUMSTANCES, AND PAROL EVIDENCE OF CUSTOM AND USAGE IS ADMISSIBLE TO SHOW ITS MEANING

1. Grounds for admission of extrinsic evidence.
2. Nature of ambiguity or uncertainty in instrument in general.
3. — Deeds.
4. — Contracts in general.
5. — Contracts of sale.
6. — Bills and notes.
7. — Contracts of insurance.
8. — Receipts and releases.
9. Patent ambiguity.
10. Latent ambiguity.
11. Custom controlling construction.
12. — Contradicting, varying or adding to terms of written instrument.
13. Meaning of words, phrases, signs or abbreviations.
14. Relation and application of language to facts in general.
15. Identification of parties.
16. — Personal, official or representative capacity.
17. — Persons having the same name.
18. — Mistake or variance in name.
19. Identification of subject-matter—In conveyances, contracts and writings in general.
20. — Of real property in general.
21. — Application of description to subject-matter.
22. — Property or interest included.
23. — Boundaries.
24. — Sufficiency of description to admit parol evidence.
25. — Reference to other instruments.
26. — In sale of personal property.
27. — Of debt or obligation collateral to security.
28. Showing intent of parties as to subject-matter.
29. — In construction of deeds in general.
30. — In description of property.
31. — In extent or interest conveyed.
32. In reservations or exceptions.
33. Showing purpose of writing.
34. Showing mode of performance of obligation.

1. **Grounds for admission of extrinsic evidence.**—In general, parol evidence is not admissible to vary a written contract; but such evidence is admissible to explain an ambiguity, or to explain a writing, when the explanation is necessary, and the evidence is consistent with the writing, and to ascertain the intention of the parties, when doubtful, or to explain the language or terms used. *Shaw v. Parvin*, 1 App. C. C. § 366, citing *Deweese v. Lockhart*, 1 T. 535; *Franklin v. Mooney*, 2 T. 452; *Stamper v. Johnson*, 3 T. 1; *Self v. King*, 28 T. 552; *Hamman v. Keigwin*, 39 T. 34; *Bender v. Pryor*, 31 T. 341; *McCormick v. Lennox*, 1 App. C. C. § 550; *Meyers v. Maverick* (Civ. App.) 28 S. W. 716; *Ginnuth v. Blankenship* (Civ. App.) 28 S. W. 828; *Brenneman v. Bush* (Civ. App.) 30 S. W. 699; *Kellogg v. Iron City Bank* (Civ. App.) 27 S. W. 897.

When there is no ambiguity in the terms of a written contract, parol evidence is inadmissible; and when the meaning of ambiguous terms has been supplied by parol evidence, the court must judge of the whole document in subordination to its legal sense as thus completed. The contract cannot be varied; its obscure expressions may be explained, but this not for the purpose of moulding, but of developing, the true sense. *First Nat. Bank of Denison v. Randall*, 1 App. C. C. § 974.

As to the construction of wills, see *Moss v. Helsley*, 60 T. 426. Parol evidence is admissible to show the surrounding circumstances of the parties, and of the subject-matter of the contract, when the language of the instrument leaves its meaning doubtful or extrinsic facts in evidence raise a doubt in respect to its application. *Haldeman v. Chambers*, 19 T. 1; *Goldman v. Blum*, 58 T. 630.

Where there is no ambiguity in the language used in the deed, evidence should not be admitted that words were intended to convey a meaning different from that which they ordinarily bear, and which the law, in the connection in which they appear, attaches to them. When the controversy as to construction of words is between the original parties to the instrument, a mutual mistake may be shown. Evidence of a mistake cannot be admitted to affect the rights of a subsequent purchaser for value without notice. *Farley v. Deslonde*, 69 T. 458, 6 S. W. 786.

The records in a cause, including the pleadings, are admissible in evidence to aid the court in construing the judgment, if ambiguous. *Texas Savings-Loan Ass'n v. Banker*, 26 C. A. 107, 61 S. W. 724.

Parol evidence of the circumstances of the testator held admissible to show the intent of the testator, where ambiguously expressed in his will. *Lenz v. Sens*, 27 C. A. 442, 66 S. W. 110.

Evidence held inadmissible upon the issue of whether or not an ordinance prohibiting the running of trains at more than a certain rate of speed applied to a certain part of the city. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 28 C. A. 92, 66 S. W. 588.

A letter being clear and requiring no explanation, evidence as to what the writer's intention was in writing the same was inadmissible. *Robertson v. Warren*, 45 C. A. 584, 100 S. W. 805.

The rule, with reference to mutual standards in the construction of ambiguous words and clauses in contracts is subject to the modification that an unambiguous writing will not be overthrown by resort to parol proof of intent. *West v. Herman*, 47 C. A. 131, 104 S. W. 428.

Where certain instruments, though tending to some extent to show a sale when taken together, were ambiguous on their face without other evidence to show the nature of the transaction, extrinsic evidence was proper to explain the ambiguity. *Brazelton & Johnson v. J. I. Campbell Co.*, 49 C. A. 218, 108 S. W. 770.

Where a will was not ambiguous, extrinsic evidence that testator required plaintiff to execute a will bequeathing the property devised to him by testator to another, after plaintiff's death, held inadmissible. *St. Paul's Sanitarium v. Freeman* (Civ. App.) 111 S. W. 443.

Where a written contract of sale stipulated for delivery as soon as possible, certain evidence held admissible. *Berry Bros. v. Fairbanks, Morse & Co.*, 51 C. A. 558, 112 S. W. 427.

Where the terms of a written contract are indefinite, proof of the surrounding circumstances is admissible. *Id.*

A judgment held ambiguous, so that extrinsic evidence should have been admitted to show its real meaning. *La Brie v. McKim*, 56 C. A. 322, 120 S. W. 1083.

Where a written contract is ambiguous, parol evidence is admissible to show the agreement of the parties. *Schwantowsky v. Dykowsky* (Civ. App.) 132 S. W. 373, 377.

A will being unambiguous, parol testimony is inadmissible to show testatrix's intention. *Cottrell v. Moreman* (Civ. App.) 136 S. W. 124.

Where a contract is unambiguous, parol evidence is not admissible to show the construction placed thereon by the parties. *Moore v. Studebaker Bros. Mfg. Co.* (Civ. App.) 136 S. W. 570.

The court, in construing a will, must ascertain the intention of testator from the terms of the will, if possible, and only in a case of ambiguity can resort be had to extrinsic evidence. *Johnson v. Avery* (Civ. App.) 148 S. W. 1156.

Parol evidence is inadmissible to show the construction placed on an unambiguous written contract by the parties, where the intent may be ascertained therefrom. *Henry v. Phillips*, 105 T. 459, 151 S. W. 533.

Where defendant wrote on his check, "Given in full payment of account for the months of June and July," it became an unambiguous contract which could not be contradicted by showing that it was a full settlement of the balance upon the account for previous months. *Bergman Produce Co. v. Brown* (Civ. App.) 156 S. W. 1102.

2. Nature of ambiguity or uncertainty in instrument in general.—Where the original field notes of a survey are so indefinite that the survey cannot be located therefrom, extrinsic evidence is admissible. *Wilkins v. Clawson*, 37 C. A. 162, 83 S. W. 732.

3. — Deeds.—An ambiguity in a deed shown by extraneous evidence may be explained. *Minor v. Powers* (Civ. App.) 24 S. W. 710.

Parol evidence held admissible to explain an ambiguity arising in applying a description in a deed to the land. *Clark v. Regan* (Civ. App.) 45 S. W. 169.

A description in a deed, in connection with a plat therein contained, construed as not ambiguous, and parol evidence was inadmissible to determine the location of the land conveyed. *Chew v. Zweib*, 29 C. A. 311, 69 S. W. 207.

Testimony of grantee held admissible to explain ambiguity in deed. *St. Louis, S. F. & T. Ry. Co. v. Payne* (Civ. App.) 104 S. W. 1077.

4. — Contracts in general.—Where the parties to a contract have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning. *Reagan v. Bruff*, 49 C. A. 226, 108 S. W. 185.

5. — Contracts of sale.—Parol evidence held incompetent, as contradicting a plain and unambiguous written contract. *Curtis v. Kelley*, 24 C. A. 540, 60 S. W. 265.

Contract held complete and unambiguous, so as not to justify explanation by parol evidence. *Jones v. Hanna*, 24 C. A. 550, 60 S. W. 279.

Contract for sale of corn "on Kansas City weights and grades" held ambiguous, and open to parol construction. *Fort Grain Co. v. Hubby & Gorman*, 35 C. A. 65, 79 S. W. 363.

A clear and unambiguous written agreement to take property "subject to all taxes due thereon" is not subject to construction or explanatory testimony to show an agreement to assume the same. *Toepperwein v. City of San Antonio* (Civ. App.) 124 S. W. 699.

A contract for sale of land and the deed held so ambiguous as to permit evidence of a parol agreement for a survey and an abatement of the price for shortage in quantity. *Schwantowsky v. Dykowsky* (Civ. App.) 132 S. W. 373, 377.

6. — Bills and notes.—Parol evidence held inadmissible as to a buyer's construction of the phrase "one and two years old short-horn heifers." *Harris v. First Nat. Bank* (Civ. App.) 45 S. W. 311.

Terms of a note held sufficiently ambiguous to warrant parol proof of a contract that the note should not bear interest. *Couturie v. Roensch* (Civ. App.) 134 S. W. 413.

Parol evidence is admissible to show that a note due "90 — after date" is due 90 days after date. *Rawls v. Pool* (Civ. App.) 135 S. W. 247.

7. — Contracts of insurance.—Where an application for life insurance provided that no statement made to or by the agent not contained in the application shall be considered as brought to the notice of the company, and that the policy was a "G A D 20 Pay," testimony as to representations by the soliciting agent that the policy would mature in 13 years, after which insured, would be entitled to an annual dividend, was admissible; the quoted expression being ambiguous. *Stengel v. Colorado Nat. Life Assur. Co.* (Civ. App.) 147 S. W. 1193.

8. — Receipts and releases.—A release held not ambiguous, so as to allow a parol evidence that it did not cover certain matters. *Moore v. Missouri, K. & T. Ry. Co. of Texas*, 30 C. A. 266, 69 S. W. 997.

9. Patent ambiguity.—A patent ambiguity renders a provision inoperative and void. *Linney v. Wood*, 66 T. 22, 17 S. W. 244.

Where the description of land in a contract for the sale thereof contained a patent ambiguity, it could not be aided by parol. *Cammack v. Prather* (Civ. App.) 74 S. W. 354.

Power of attorney to sell land held not patently ambiguous in its description of the land. *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 937.

Deed held to show a patent ambiguity which could not be aided by parol evidence other than by showing what land was occupied by person named therein. *Gorham v. Settegast*, 44 C. A. 254, 98 S. W. 665.

A patent ambiguity in a contract cannot be aided by parol evidence, and where the written instrument does not evidence a contract without the aid of parol evidence, it cannot be enforced. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

10. Latent ambiguity.—An error in matter of description causing a latent ambiguity may be corrected by parol proof. *Early v. Sterrett*, 18 T. 113; *Steinbeck v. Stone*, 53 T. 382; *Rogers v. McLaren*, 53 T. 423; *Knowles v. Torbitt*, 53 T. 557. And the question should be submitted to the jury with appropriate instructions as a mixed question of law and fact. *Brown v. Chambers*, 63 T. 131. See Art. 1110.

A latent ambiguity is developed by extraneous evidence and must be explained by such evidence. *Linney v. Wood*, 66 T. 22, 17 S. W. 244.

Latent ambiguities in a contract may be explained by parol evidence. *Eckford v. Berry* (Civ. App.) 27 S. W. 840; *Ellis v. Cochran*, 28 S. W. 243, 8 C. A. 510; *Meyers v. Maverick* (Civ. App.) 28 S. W. 716; *Swank v. Railway Co.*, 23 S. W. 249, 1 C. A. 675; *Railway Co. v. Pittman*, 23 S. W. 318, 4 C. A. 167; *Ford v. Summers* (Civ. App.) 26 S. W. 459; *Strauss v. Gross*, 21 S. W. 305, 2 C. A. 432; *Green v. Barnes*, 9 C. A. 660, 29 S. W. 645; *Barclay v. Stuart*, 23 S. W. 799, 4 C. A. 685; *Myers v. Maverick* (Civ. App.) 27 S. W. 1083.

Parol evidence is admissible to explain or remove a latent ambiguity in the description of the land conveyed by a sheriff's deed. *Frazier v. Waco Bldg. Ass'n*, 25 C. A. 476, 61 S. W. 132.

Evidence in trespass to try title held to show a latent ambiguity in the field notes of a survey, authorizing parol evidence to explain it and fix the boundaries. *Warner v. Sapp* (Civ. App.) 97 S. W. 125.

Deed held to contain latent ambiguity which might be aided by parol testimony. *Gorham v. Settegast*, 44 C. A. 254, 98 S. W. 665.

Omission of the closing call in the description of a deed held a latent ambiguity which could be explained by parol or extrinsic evidence. *Snow v. Gallup*, 57 C. A. 572, 123 S. W. 222.

11. **Custom controlling construction.**—The construction of written instruments cannot be controlled by evidence of custom. *Dewees v. Lockhart*, 1 T. 585; *McKinney v. Fort*, 10 T. 220; *Meaheer v. Lufkin*, 21 T. 383; *Tucker v. Smith*, 68 T. 473, 3 S. W. 671.

Custom and usages of trade are admitted to explain incidental rights of parties appertaining to the particular trade in question, to construe contracts in relation thereto, and to ascertain the meaning of words and expressions therein, etc. *Schaub v. Dallas Brewing Co.*, 80 T. 634, 16 S. W. 429.

Where a bill of lading for the transportation of mules provided for delivery to consignees at Ft. Worth, evidence of a general custom to deliver all stock consigned to such consignees at the stockyards in North Ft. Worth was admissible. *Houston & T. C. R. Co. v. Hill* (Civ. App.) 128 S. W. 445.

A custom set up in explanation of a contract must be a general custom. *Standard Paint Co. v. San Antonio Hardware Co.* (Civ. App.) 136 S. W. 1150.

12. — **Contradicting, varying or adding to terms of written instrument.**—See notes under Rule 20.

13. **Meaning of words, phrases, signs or abbreviations.**—Suit was brought upon a promissory note for \$125, Texas money, at its current price at New Orleans. Held, that parol evidence was admissible to show that Texas treasury notes were intended or their equivalent in par money. *Roberts v. Short*, 1 T. 373.

The intent of the testator must be ascertained from the meaning of the words in the instrument, and from those words alone. *Paul v. Ball*, 31 T. 10. But extrinsic evidence is admissible of such facts and circumstances as will enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the particular facts of the case. *Hunt v. White*, 24 T. 643.

A. sold to B. all the "saw timber" on a certain tract of land. Under the contract B. was about to cut oak timber, and A. applied for an injunction to restrain him on the ground that by "saw timber" at the place where the contract was made, and among the persons engaged in the lumber business, was meant such pine timber as was suitable for manufacture into lumber, and that the words were so used and understood between the parties at the time the contract was made. Held, that evidence of the meaning of the term was admissible. *Kelly v. Robb*, 58 T. 377.

The meaning of words can be shown by custom. *Parks v. O'Connor*, 70 T. 377, 8 S. W. 104; *Dwyer v. City of Brenham*, 70 T. 30, 7 S. W. 598; *Kirk v. Brazos County*, 73 T. 56, 11 S. W. 143.

Custom and usages of trade are admitted to explain incidental rights of parties appertaining to the particular trade in question, to construe contracts in relation thereto, and to ascertain the meaning of words and expressions therein, etc. *Schaub v. Dallas Brewing Co.*, 80 T. 634, 16 S. W. 429.

The meaning of figures in the column of a tax roll set apart for values may be shown by testimony, and the rolls admitted in evidence. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

Where minutes of city council showed the record "received and filed," testimony held inadmissible to show that the expression meant "received and adopted." *City of Dallas v. Beeman*, 18 C. A. 335, 45 S. W. 626.

Evidence that other policies required "itemized inventories" held inadmissible to reduce the meaning of "inventory" to a summary footing of same. *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 19 C. A. 338, 48 S. W. 559.

The words of the residuary clause of a deed, "the balance of any and all property that may be mine at the time of my death," held ambiguous, so that they could be shown, by deeds executed by testatrix at the same time, and as part of the same transaction, to be intended to cover land which she considered to belong to her as sole heir of an intestate. *Packard v. De Miranda* (Civ. App.) 123 S. W. 710.

Under the rule that parol evidence to explain an expression in a contract is admissible where such expression has a technical or special meaning, parol evidence that the expression "shipping instructions" in a contract had a special meaning, and what that meaning was, was admissible. *Higgins Mill & Elevator Co. v. Gossett* (Civ. App.) 125 S. W. 927.

14. **Relation and application of language to facts in general.**—In action against railroad for injuries to servant, certain testimony as to the interpretation of a rule held admissible. *Missouri, K. & T. R. Co. of Texas v. Bodie*, 32 C. A. 168, 74 S. W. 100.

Evidence held inadmissible to show that the residuary clause in a will of one having a life estate with power of appointment referred to the power. *Southern Pine Lumber Co. v. Arnold* (Civ. App.) 139 S. W. 917.

15. **Identification of parties.**—One claiming under a legislative grant may show by parol that it was made on the petition of such claimant. *Odom v. Woodward*, 74 T. 41, 11 S. W. 925.

In a suit to foreclose a vendor's lien, in which defendant pleaded title by limitation, evidence relative to the purchase of the land by defendant's former husband, and her consent thereto, held admissible. *Cavin v. Wichita Valley Townsite Co.*, 36 C. A. 336, 82 S. W. 342.

Where a contract for the sale of land described the vendor as the "estate of F.," parol evidence that by the quoted words was meant not the heirs, legatees, and devisees of F., but those of another person, would be inadmissible, because varying the written instrument. *Morrison v. Hazzard* (Civ. App.) 88 S. W. 385.

In a suit to vacate a judgment rendered against plaintiff on the ground that he was not a party to the action, the attorney for plaintiff in the action in which the judgment was rendered may testify that plaintiff voluntarily made himself a party to the action. *Cage & Crow v. Owens* (Civ. App.) 103 S. W. 1191.

16. — **Personal, official or representative capacity.**—The official character of officers and the meaning of abbreviations attached to their signatures may be shown by parol evidence. *Davis v. Harnbell* (Civ. App.) 24 S. W. 972.

Admissibility of proof that deeds to land executed by the executor's attorney in fact were executed by such attorney merely as agent of the executor. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

Parol evidence is inadmissible to show that the directors of a corporation, who signed a guaranty to a creditor, intended to create only a corporate liability. *Marx v. Luling Co-Op. Ass'n*, 17 C. A. 408, 43 S. W. 596.

Parol evidence is inadmissible to show that a contract made in the name of the principal, and signed in his name by another as agent, was a contract of the latter. *Brackenridge v. Claridge*, 91 T. 527, 44 S. W. 819, 43 L. R. A. 593.

In an action against an alleged firm on notes signed by one of the alleged partners, where the partnership was denied, a supplemental petition, alleging liability on the theory that the signer was agent for the other defendants, held not an attempt to vary by parol the contract expressed by the notes. *Moore v. Williams*, 26 C. A. 142, 62 S. W. 977.

Where a deed did not purport to be for any one except the grantor, and he did not pretend to act for any one except himself, held error to submit to the jury the question of whether the grantor had authority to act for others. *Halliday v. Lambright* (Civ. App.) 68 S. W. 712.

An order for goods, signed by one as president of a voluntary association, held not to show on its face that the president was personally liable, and parol evidence to show to whom credit was extended was admissible. *Southern Badge Co. v. Smith* (Civ. App.) 141 S. W. 185.

One signing a note cannot, in absence of fraud, show that he signed in a representative, and not an individual, capacity, though he places after his name the word "executor." *Abney v. Citizens' Nat. Bank of Hillsboro* (Civ. App.) 152 S. W. 734.

17. — **Persons having the same name.**—Testimony of the secretary of state that the records of his office failed to show the creation of any corporation as named in a deed and partition proceedings was admissible as tending to show that a corporation of a similar name was intended. *Cobb v. Bryan* (Civ. App.) 97 S. W. 513.

18. — **Mistake or variance in name.**—Where the plaintiff, in trespass to try title, claims under an assignment of a lease of school lands and a purchase thereunder, parol evidence is admissible on his behalf that the lease, though issued in the name of "A. Z. Reedy," was in fact issued and delivered to "A. Z. Reeder." *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 703.

Parol evidence held admissible to show that by the name "Willis," as grantee in a deed, "Willie" was intended. *White v. Simonton*, 34 C. A. 464, 79 S. W. 621.

Parol evidence held admissible to identify the real defendant in an action for partition where the name was erroneously stated in the proceedings and judgment. *Cobb v. Bryan* (Civ. App.) 97 S. W. 513.

19. **Identification of subject-matter**—In conveyances, contracts and writings in general.—Error in words of description in a contract may be corrected by parol evidence. *Minor v. Powers* (Civ. App.) 24 S. W. 710.

Where a written transfer of a headright does not sufficiently identify the certificate, it may be identified by parol evidence. *Staley v. Hankla* (Civ. App.) 43 S. W. 20.

A clause in a deed erroneously purporting to state the source of the grantors' title held not to render the deed ambiguous, nor to authorize parol evidence to vary the terms of the grant. *West v. Herman*, 47 C. A. 131, 104 S. W. 428.

Evidence of oral negotiations between the parties to a bond for the making of improvements by a lessee held admissible to show what improvements were intended. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

20. — **Of real property in general.**—In an action for specific performance of a contract for the sale of a tract of land, parts of which were owned by different persons, parol evidence was admissible to show the location of each parcel. *Morrison v. Hazzard*, 99 T. 583, 92 S. W. 33.

Parol evidence may be introduced to identify the subject-matter of a lease which is not definite concerning the land to which it relates. *Cockrell v. Egger* (Civ. App.) 99 S. W. 568.

21. — **Application of description to subject-matter.**—Parol evidence is not admissible to explain a misdescription in a deed by showing that there was but one tract of land granted to the patentee in the county. *Brokel v. McKechnie*, 69 T. 32, 6 S. W. 623.

A patent ambiguity renders a provision inoperative and void. A latent ambiguity is developed by extraneous evidence and must be explained by such evidence. When the language used in a deed to describe the premises conveyed is equivocal, ambiguous or insufficient, the subsequent acts or declarations of the parties, showing the practical construction put upon the words of the description by them, may be resorted to. *Linney v. Wood*, 66 T. 22, 17 S. W. 244. See *Grimes v. Watkins*, 59 T. 133, citing *Masterton v. Goodlett*, 46 T. 402; *Ferguson v. Ferguson*, 27 T. 340.

Where a lumber dealer executed a deed of trust for the benefit of creditors, describing the property transferred as "all my stock of lumber of every class and kind, materials, fixtures, improvements, etc., used in connection with the business," parol

evidence is admissible, in an action by the trustee against an attaching creditor, to show the character of the business and the articles of property used therein, in order to ascertain whether a stock of paints and oils were "materials," within the meaning of the trust deed. *Ellis v. Cochran*, 8 C. A. 510, 28 S. W. 243.

Parol evidence is admissible to explain any ambiguity that may arise from an attempt to apply the description in the deed to land. *Webb v. Frazar* (Civ. App.) 29 S. W. 665; *Tinsley v. Dowell* (Civ. App.) 24 S. W. 928.

Where deeds failed to properly describe the land conveyed, parol evidence held inadmissible to establish the same. *Simpson v. Johnson* (Civ. App.) 44 S. W. 1076.

An instrument executed by the grantee of land held not void for insufficiency of description, parol proof being admissible to supply such description. *Turner v. Cochran* (Civ. App.) 63 S. W. 151.

Where the record of a deed to an undivided interest in a survey of land was defective for failure to describe the land as it was described in the deed, the defect could not be cured by parol. *Henning v. Wren*, 32 C. A. 538, 75 S. W. 905.

Evidence is inadmissible to explain the description in a deed of trust where ambiguity is not alleged. *Smith v. Texas & N. O. R. Co.* (Civ. App.) 105 S. W. 528.

In trespass to try title, parol evidence tending to show the true location of the lot on which depends the description of the land in controversy is admissible. *McKeon v. Roan* (Civ. App.) 106 S. W. 404.

In a suit involving the question whether oil tank cars were included in the description of a mortgage conveying "all other property owned" by the mortgagor, parol evidence is admissible to show the understanding of the parties as to what property was included. *Smith v. Texas & N. O. R. Co.*, 101 T. 405, 108 S. W. 819.

Any ambiguity in a deed involved in trespass to try title as to the starting point of the description could be explained on applying the description to the land to identify it. *Raley v. Magendie* (Civ. App.) 116 S. W. 174.

Admissibility of extrinsic evidence to identify the land sought to be recovered with that described in plaintiff's patent determined. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

Parol evidence is admissible to identify land imperfectly described in a deed. *Wilkerson v. Ward* (Civ. App.) 137 S. W. 158.

22. — Property or Interest Included.—The natural and ordinary meaning of the phrase "interest in lands" includes the entire right held in them, and the conveyance of one's right in land without qualification will be construed to carry with it all the rights of the grantor therein, which cannot be varied or contradicted by parol evidence. *Ragsdale v. May*, 65 T. 255.

Conveyance of all of grantor's unsold lands in a league named may be aided by extraneous evidence of conveyances from grantor of record. *Smith v. Clay* (Civ. App.) 57 S. W. 74.

Extrinsic evidence is admissible to determine whether or not a railroad mortgage of lands to be acquired for railroad purposes included specific lands subsequently acquired. *Aldridge v. Pardee*, 24 C. A. 254, 60 S. W. 789.

Description of property insured in a policy held ambiguous, so that parol evidence was competent to show the property intended to be covered. *Connecticut Fire Ins. Co. v. Hilbrant* (Civ. App.) 73 S. W. 558.

Where an insurance policy was assigned to the purchaser of the property with the company's consent, previous dealings between the company and the vendor, without the knowledge of vendee, held inadmissible against the purchaser to show the property intended to be covered. *Id.*

Parol evidence held admissible to show the quantity of land conveyed by certain deeds. *Larkin v. Trammel*, 47 C. A. 548, 105 S. W. 552.

Parol evidence explaining a contract for the sale, upon commission, of lands held inadmissible. *Rushing v. Mitchell* (Civ. App.) 141 S. W. 329.

23. — Boundaries.—When the held notes in a survey call for the corners and lines of surrounding surveys and contain no inconsistent calls, it is not admissible to show by parol evidence that a different survey was in fact made for the purpose of controlling the calls in the grant. *Anderson v. Stamps*, 19 T. 460; *Converse v. Langshaw*, 81 T. 275, 16 S. W. 1031.

An elm tree was called for in a deed, by which, if the true locality was shown, the western line of the tract conveyed would be easily established, and from this and the northern line the northwest corner accurately determined. The form of the survey, course, distance and area being given, from that corner the true locality of the tract could be easily ascertained. It therefore became necessary to identify that tree, and proof was properly admitted to show that at the time the deed was made, for the purpose of enabling the person who wrote the deed properly to describe the land intended to be conveyed, the grantor pointed out a certain elm tree from which the western line was to run, in direction north and south, at a distance of 150 varas east. *Robinson v. Douthit*, 64 T. 101.

In case of a conflict of calls in a survey contained in a patent, parol testimony is admissible to show where the metes and bounds were actually run and marked on the ground. *Minor v. Kirkland* (Civ. App.) 20 S. W. 932.

In case of an inconsistency in the field notes the testimony of the surveyor is admissible to show the true description. *Schley v. Blum* (Civ. App.) 22 S. W. 264; *Worsham v. Chisum* (Civ. App.) 28 S. W. 905.

Where a deed described a town lot according to a map executed, but not then recorded, parol evidence held admissible to show that no other map except the one referred to had ever been recorded in that county. *Zimpleman v. Stamps*, 21 C. A. 129, 51 S. W. 341.

Evidence that a grantor, when deeding lands, stepped off a certain distance as the land conveyed, was inadmissible, when contradicted by the deed and unsupported by the field notes. *Davidson v. Pickard* (Civ. App.) 56 S. W. 608.

Parol evidence is admissible to explain a latent ambiguity in a call in a deed. *Sloan v. King*, 33 C. A. 537, 77 S. W. 48.

Where a corner is found on the ground having bearings as called for in a patent, and such corner is shown to be a corner of the land as actually surveyed, an inconsistency may be explained by parol. *Guillory v. Allums* (Civ. App.) 147 S. W. 685.

Where the field notes show a latent ambiguity when it is sought to apply the calls to the land, making it necessary to disregard either the north course or the east line of the survey, extrinsic evidence is inadmissible to show what land was intended to be embraced within the survey. *Gilbert v. Finberg* (Civ. App.) 156 S. W. 507.

24. — Sufficiency of description to admit parol evidence.—In trespass to try title, evidence to aid description of deed held admissible. *McCullum v. Buckner's Orphans' Home*, 54 C. A. 348, 117 S. W. 886.

Where a deed had been excluded for want of a sufficient description, the court should not admit parol evidence to describe the location of the land. *Cleveland v. Shaw* (Civ. App.) 119 S. W. 883.

In trespass to try title, though the description in a deed does not of itself show that it related to the lands in controversy, it is admissible if extrinsic evidence identifies the land as relating thereto. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

25. — Reference to other instruments.—A writing may refer as a part of itself to another contract, written or oral, when the latter may be proved by writing or parol, according to the fact. *Preston v. Breedlove*, 36 T. 96; *Thomas v. Hammond*, 47 T. 42.

Extraneous evidence to aid description in deed held inadmissible. *Pierson v. Sanger* (Civ. App.) 51 S. W. 869.

Where a deed made by an assignee in bankruptcy was defective as to the description of the land, it was proper to permit the description to be aided by parol evidence. *James v. Koy* (Civ. App.) 59 S. W. 295.

In an action to foreclose a trust deed, certain evidence identifying a plat referred to in the trust deed held admissible. *Pinckney v. Young* (Civ. App.) 107 S. W. 622.

To identify and render definite the description of land in a registered deed to support title by limitation, resort may be had to an unrecorded district court judgment, distinctly referred to in the deed. *Kimbell v. Powell*, 57 C. A. 57, 121 S. W. 541.

26. — In sale of personal property.—A purchase of goods made by L. of G. on credit, the contract in relation thereto being upon four separate sheets of paper. A fifth sheet of paper had on it a writing as follows: "I will be responsible for the amount bought by my brother, L.," and signed by the brother of L. The five papers were similar in character and bore the same date. Held, that evidence of the surrounding circumstances was admissible to explain the subject-matter of the several writings and their connection with each other and the intention of the parties. *Looney v. Le Geirse*, 2 App. C. C. § 531.

Parol evidence that a bill of sale of standing cotton did not cover a certain part of it held admissible in an action between the vendee and an attaching creditor of the vendor. *Pierce v. Johnson* (Civ. App.) 50 S. W. 610.

Parol evidence held admissible to show that written contract was not intended to pass title to certain articles. *Houston Transfer Co. v. Lee* (Civ. App.) 97 S. W. 842.

Where an administrator sold all the claims and accounts belonging to the estate then "in his hands," such words were open to explanation by parol proof of the claims intended. *Routledge v. Eimendorf*, 54 C. A. 174, 116 S. W. 156.

In determining whether the parties intend by a contract for sale, providing that quantity shall be estimated by the buyer, that his estimate shall be final, it is permissible to look to the subject-matter and the attendant circumstances. *Cudlipp v. C. R. Cummings Export Co.* (Civ. App.) 149 S. W. 444.

27. — Of debt or obligation collateral to security.—Parol evidence held admissible to identify note with that described in a deed of trust. *Thompson v. Cobb*, 95 T. 140, 65 S. W. 1090, 93 Am. St. Rep. 820.

Parol evidence held admissible to show that a mortgage was given to secure plaintiff for becoming a surety on defendant's note. *Boren v. Boren*, 29 C. A. 221, 68 S. W. 184.

A chattel mortgage, in consideration of a debt in a sum stated, "more or less," may be shown to have been given to secure a present debt and future advances. *F. Groos & Co. v. First Nat. Bank* (Civ. App.) 72 S. W. 402.

28. Showing intent of parties as to subject-matter.—It is competent to admit parol evidence to explain a will by showing the situation of the testator, in his relation to persons and things around him, in order that his will may be read by the light of the circumstances in which he was placed at the time of making it; but his intent must be ascertained from the meaning of the words in the instrument alone, and it is not competent by parol evidence to add to the will an independent substantive bequest, and to make it speak upon a subject on which it is altogether silent. Thus, a testator having bequeathed his property to certain slaves belonging to him, the court refused to supply a clause manumitting them, in order to give effect to the bequests. *Hunt v. White*, 24 T. 643.

In general, parol evidence is not admissible to vary a written contract; but such evidence is admissible to explain an ambiguity, or to explain a writing, when the explanation is necessary, and the evidence is consistent with the writing, and to ascertain the intention of the parties, when doubtful, or to explain the language or terms used. *Shaw v. Parvin*, 1 App. C. C. § 366, citing *Deweese v. Lockhart*, 1 T. 535; *Franklin v. Mooney*, 2 T. 452; *Stamper v. Johnson*, 3 T. 1; *Self v. King*, 28 T. 552; *Hamman v. Kelgwin*, 39 T. 34; *Bender v. Pryor*, 31 T. 341; *McCormick v. Lennox*, 1 App. C. C. § 550; *Meyers v. Maverick* (Civ. App.) 28 S. W. 716; *Ginnuth v. Blankenship* (Civ. App.) 28 S. W. 828; *Brenneman v. Bush* (Civ. App.) 30 S. W. 699; *Kellogg v. Iron City Bank* (Civ. App.) 27 S. W. 897.

A purchase of goods made by L. of G. on credit, the contract in relation thereto being upon four separate sheets of paper. A fifth sheet of paper had on it a writing as follows: "I will be responsible for the amount bought by my brother, L.," and signed by the brother of L. The five papers were similar in character and bore the same date. Held, that evidence of the surrounding circumstances was admissible to explain the sub-

ject-matter of the several writings and their connection with each other and the intention of the parties. *Looney v. Le Geirse*, 2 App. C. C. § 531.

The legal effect of the bond cannot be limited by parol evidence that it was only intended to secure that part of the available school fund received from the state. *Burk v. County of Galveston*, 76 T. 267, 13 S. W. 455.

Where assignment of lease was indefinite, testimony of assignor as to lease which was intended was admissible. *Ascarete v. Pfaff*, 34 C. A. 375, 78 S. W. 974.

In an action against railroad for injury to engineer in collision with forward section of his train, amendment to rule held inadmissible to show its meaning. *Quinn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 84 S. W. 395.

In an action against a county for legal services rendered, evidence to explain the meaning of an order of the commissioners' court, and to the effect that it did not contain a certain word, held properly excluded. *Presidio County v. Clarke*, 38 C. A. 320, 85 S. W. 475.

Parol evidence is admissible to show the intent of the parties to a release given to one joint wrongdoer. *El Paso & S. R. Co. v. Darr* (Civ. App.) 93 S. W. 166.

In a suit on a note, and to foreclose a trust deed given to secure the note, certain parol testimony held admissible. *Armstrong v. Wilson* (Civ. App.) 109 S. W. 955.

Notwithstanding the parol evidence rule, parol evidence held admissible to explain a provision in a contract. *American Copying Co. v. Thompson* (Civ. App.) 110 S. W. 777.

Where the evidence of intent of parties in entering a consent partition decree consisting of written memoranda, or records, is couched in plain and unambiguous language, there is no occasion to resort to extraneous facts, and it will be presumed they had in contemplation the legal effect of what was done. *Parks v. Knox* (Civ. App.) 130 S. W. 203.

Parol evidence held inadmissible to show that the parties to a plain contract used language in a sense different from its ordinary meaning. *Moore v. Studebaker Bros. Mfg. Co.* (Civ. App.) 136 S. W. 570.

Parol evidence of the conditions surrounding the execution of a will held admissible. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

Evidence of the undisclosed purpose of an applicant for fire insurance, in returning the policy to the agent with a letter, held inadmissible. *Jefferson Fire Ins. Co. of Philadelphia v. Greenwood* (Civ. App.) 141 S. W. 319.

While the testator's intention must be obtained from the language of the will, proof of the peculiar circumstances surrounding the testator, the condition of his affairs, his attitude toward his natural beneficiaries, etc., is permissible to discover such intent as it is expressed. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

In determining whether the parties intend by a contract for sale, providing that quality shall be estimated by the buyer, that his estimate shall be final, it is permissible to look to the subject-matter and the attendant circumstances. *Cudlipp v. C. R. Cummings Export Co.* (Civ. App.) 149 S. W. 444.

Where a contract provided that plaintiff was contemplating moving his sawmill to a new site and was to give the hauling of the timber at such site to defendant, held, that parol testimony was not admissible to show that it was intended to bind plaintiff to move the mill as contemplated. *Newsome v. Brown* (Civ. App.) 157 S. W. 203.

29. — In construction of deeds in general.—Parol evidence of the attorney who drew a deed as to the grantor's intention held inadmissible, where the language of the deed brought the same within the rule in *Shelley's Case*. *Johnson v. Morton*, 28 C. A. 296, 67 S. W. 790.

When the terms of a grant of a right of way to a railroad company are ambiguous, the surrounding facts and circumstances and the construction placed thereon by the parties may be looked to as an aid to interpretation. *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 36 C. A. 121, 81 S. W. 781.

30. — In description of property.—A conflict between a call of a deed for distance and a call for a railroad right of way may be explained to show the real intent of the parties, and the deed may be enforced accordingly. *Couch v. Texas & P. Ry. Co.* 99 T. 464, 90 S. W. 860.

Where an oil lease was ambiguous as to the amount of land intended to be included, parol evidence was admissible to explain the ambiguity. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

In action for damages for breach of written contract to deliver fat cattle, evidence held admissible as explanatory of how fat the cattle were to be. *Houston Packing Co. v. Griffith* (Civ. App.) 144 S. W. 1139.

31. — In extent or interest conveyed.—When a deed conveys the right, title and interest of the grantor, parol evidence is admissible to show the amount conveyed. *House v. Johnson* (Civ. App.) 36 S. W. 916.

A deed, unambiguous on its face, cannot be shown by parol to have been intended to pass only the grantor's interest in the land as his father's heir, and not that which he took under his father's deed to him, made in fraud of creditors. *Scarborough v. Blount* (Civ. App.) 154 S. W. 312.

32. In reservations or exceptions.—When an express lien is reserved by a vendor in a deed conveying land given by him in part payment for other land conveyed to him, and such express lien is intended by its terms to secure the vendor against all loss and damage that may result from future claims asserted by others to the land received, parol evidence is admissible, in a suit to enforce the lien on account of money expended in defending title, to show that it was understood between the parties when the deed was executed that a third party asserted an adverse title and would sue to enforce it. *Bumpass v. Morrison*, 70 T. 756, 8 S. W. 596.

33. Showing purpose of writing.—See, also, notes under Rule 26.

When the holder of a land certificate executed his power of attorney, authorizing his agent to locate the same, to receive the patent thereon, and to sell and convey the land, it was competent for the defendant, claiming the land under the attorney, to prove by parol testimony that the transaction between the holder of the certificate and his at-

torney was in fact intended to be a sale of the certificate by the former to the latter. *Cox v. Bray*, 28 T. 247.

A. executed to B. a receipt as follows: "I hereby certify that I, the undersigned, have received of M. B. \$290, upon condition that I will execute to him a mortgage upon my property, to continue for one year, provided I shall have three months' notice before payment can be demanded of the said money, and I am not at liberty to pay the same unless the like notice shall have been given to the lender of my intention to pay." Held, that as the agreement contained no specific description of any property upon which it was to operate, it could not be enforced as a lien upon land, and it could not be aided by parol evidence as to the purpose of the parties. *Boehl v. Wadgymer*, 54 T. 589.

Where a headright certificate is transferred, and at the same time a power of attorney to locate the certificate is given the transferee, as agent of the transferor, parol evidence is admissible to show that the transaction was an absolute sale of the certificate. *Staley v. Hankla* (Civ. App.) 43 S. W. 20.

Parol evidence held admissible to explain the intention of partners in making a deed between themselves. *Henderson v. Stith* (Civ. App.) 43 S. W. 566.

Admissibility of parol evidence to explain documents introduced as admissions stated. *Mitchell v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 130 S. W. 735.

34. **Showing mode of performance of obligation.**—A contract between the owner of property and one whom defendant real estate brokers procured to exchange property with the owner held not ambiguous so that plaintiffs could not show by parol that defendants' right to commissions depended upon the consummation of the contract of exchange. *Lewis v. Mansfield Grain & Elevator Co.* (Civ. App.) 121 S. W. 585.

An irrigating contract held not ambiguous so that parol testimony was not admissible. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 137 S. W. 154.

RULE 23. BLANKS IN WRITTEN INSTRUMENTS LEFT FOR NAMES MAY BE FILLED, AND THE TRUE DATES WHEN INCORRECT MAY BE SHOWN

Date of instrument.—Date not included in writing, see notes under Rule 20, ante.

It is competent for the defendant to prove that the date of an indorsement is not the true date, in order to show that the indorser obtained the note after maturity. *Goodson v. Johnson*, 35 T. 622.

A judgment entry of a justice court cannot be contradicted by parol evidence that the judgment was not entered at the time shown by the justice's record. *Irion v. Bexar County*, 26 C. A. 527, 63 S. W. 550.

Where an application for insurance was not dated when delivered to the agent, parol evidence that the agent inserted a date other than that agreed on held not objectionable as varying the written contract. *Pacific Mut. Ins. Co. v. Shaffer*, 30 C. A. 313, 70 S. W. 566.

The true date of a deed may be shown by parol, regardless of the written date therein. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.

In trespass to try title, the court properly permitted defendant to show that a deed, dated a designated date, was not executed until subsequently. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

Where two instruments, executed on the same day, were offered for probate, and there was intrinsic evidence to show which was the later one, extrinsic evidence to prove that fact was inadmissible. *St. Mary's Orphan Asylum of Texas v. Masterson*, 57 C. A. 646, 122 S. W. 587.

Filling blanks.—See notes under Title 16.

It is competent to prove by parol the power to fill blanks in a deed. *Schleicher v. Runge* (Civ. App.) 37 S. W. 982.

RULE 24. PAROL EVIDENCE IS ADMISSIBLE TO CONTRADICT THE RECITAL OF PAYMENT IN A DEED, RECEIPT, OR OTHER INSTRUMENT, AND TO SHOW THE AMOUNT ACTUALLY PAID OR THE REAL CONSIDERATION

Receipts in general.—M. & N., attorneys at law, gave a receipt for a claim taken for collection; the claim became barred in their hands, and suit was brought against them for the amount of the claim, charging them with gross negligence, etc. Held, that it was competent for the defendants to show by parol evidence that the defendants were mere gratuitous bailees, and were released from any liability by their discharge in bankruptcy. *McAdoo v. Lummis*, 43 T. 227.

Receipts are informal and nondepositive writings, and may be modified, explained or impugned by parol. *Haymond v. Friberg*, 1 App. C. C. § 1048.

A receipt may be disputed or impeached, and evidence tending to account for payments received for as entering into indorsed credits is competent to control the receipts. *Watson v. Miller*, 82 T. 279, 17 S. W. 1053.

A receipt is prima facie evidence of the facts recited, and though signed by the party sought to be charged is open to explanation and contradiction by parol evidence. *Brown v. Dennis* (Civ. App.) 30 S. W. 272.

The rule excluding parol or extrinsic evidence to vary or contradict written instruments does not apply to mere receipts not embodying the terms of a contract. *A. B. Patterson & Co. v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 126 S. W. 336.

Receipt in full on compromise, settlement or discharge.—A. sued B. for a balance claimed to be due on account; B. by his answer pleaded a settlement in bar of the action, and offered in evidence a receipt in writing of a sum of money as payment in full. Held, that the receipt was conclusive unless obtained by fraud or mistake. *Adriance v. Crews*, 38 T. 148.

A receipt given by an heir to an executor for a specific amount of money, in full of his share in the estate, is not binding upon the heir as to any residue coming to him. *Cliff v. Wade*, 51 T. 14.

Writing containing matter other than receipt.—A writing which is a receipt in form, but includes the terms of a contract, cannot be altered by parol evidence. *Lanes v. Squyres*, 45 T. 382; *Life Ins. Co. v. Davidge*, 51 T. 244.

A written contract between a father and his children for the settlement of their claims against him for their interests in the community estate of their deceased mother cannot be contradicted by parol evidence. *Taylor v. Taylor* (Civ. App.) 54 S. W. 1039.

What constitutes receipt in general.—A recital in a contract held merely a receipt which can be contradicted by parol. *House v. Holland*, 42 C. A. 502, 94 S. W. 153.

Deeds in general.—A recital in a deed of the payment of the purchase-money is prima facie evidence, but may be contradicted by parol evidence. *Howard v. Davis*, 6 T. 174; *Williams v. Talbot*, 27 T. 159; *Cuney v. Bell*, 34 T. 177; *Gibson v. Fifer*, 21 T. 260; *Glenn v. Mathews*, 44 T. 400; *Eborn v. Cannon*, 32 T. 232.

In an action for current rents under a parol reservation made at the time of a conveyance to defendant's grantor, the latter held entitled to testify to the making of such reservation. *Applegate v. Kilgore* (Civ. App.) 91 S. W. 238.

While an inquiry into the consideration of a deed will always be permitted, the recital of an existing consideration precludes the grantor from disputing generally the fact of consideration. He cannot avoid his deed, which recites a consideration, by proving that he received none. *G., H. & S. A. R. Co. v. Pfeuffer*, 56 T. 66.

The recital of a consideration in a deed is placed upon the footing of a receipt, and like other receipts is capable of being explained or contradicted by other evidence. In this case the recital of a money payment was in the deed. It was proven that no money passed, and that the deed was intended merely to reinvest the title upon a rescission of a prior sale. *Lanier v. Foust*, 81 T. 186, 16 S. W. 994.

It may be shown, that a deed absolute on its face was intended as a mortgage or trust, or that the consideration is not properly stated. *Railway Co. v. Jones*, 82 T. 156, 17 S. W. 534; *Hardie v. Wright*, 83 T. 345, 18 S. W. 615; *Du Bois v. Rooney*, 82 T. 173, 17 S. W. 528. In a proper case, where there is fraud, it may be shown that an absolute deed was intended as a mortgage, or that the consideration was not properly stated. *Railway Co. v. Jones*, 82 T. 156, 17 S. W. 534; *Hardie v. Wright*, 83 T. 345, 18 S. W. 615; *Du Bois v. Rooney*, 82 T. 173, 17 S. W. 528; *Eckford v. Berry*, 87 T. 415, 28 S. W. 937; *Chatham v. Jones*, 69 T. 745, 7 S. W. 600.

Parol evidence held admissible to show the consideration of a deed. *Womack v. Wamble*, 27 S. W. 154, 7 C. A. 273; *Cummings v. Moore*, 27 C. A. 555, 65 S. W. 1113; *Ellis v. Lehman*, 48 C. A. 308, 106 S. W. 453.

Where a deed expresses a pecuniary consideration, parol evidence is admissible to show how said consideration was paid. *Duveneck v. Kutzer*, 17 C. A. 577, 43 S. W. 541.

Parol evidence of different consideration of a deed held inadmissible. *Teague v. Teague*, 31 C. A. 156, 71 S. W. 555.

Where a deed recites the consideration as \$1, parol evidence is admissible to show the real consideration, especially where such deed depends upon and connects itself with another deed reciting a valuable consideration. *Larkin v. Trammel*, 47 C. A. 548, 105 S. W. 552.

Rule as to admissibility of parol evidence to show the real consideration of a deed stated. *Springman v. Hawkins*, 52 C. A. 249, 113 S. W. 966.

In an action by a wife against her husband's executor to set apart a homestead, evidence not contradictory, but explanatory, of recitals in a deed and judgment held admissible. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

The consideration of a deed, in suit to set it aside for inadequacy of consideration, may be shown by matters outside the deed. *Uecker v. Zuercher*, 54 C. A. 289, 118 S. W. 149.

Testimony explaining deeds introduced in evidence, by showing that the real consideration therefor was paid in property instead of money, and showing who was the real owner of the property, did not vary the deeds, being admissible to explain them. *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899.

Recital in a deed of a cash payment held not conclusive. *Singletary v. Goeman* (Civ. App.) 123 S. W. 436.

Plaintiff's effort not being to reform an instrument and as reformed to enforce it, but merely to show that the true consideration was not set forth therein, so that he was entitled to recover certain property as part of the consideration, held that, though pleading a mutual mistake in the contract, he could show the omission of such property from the recited consideration, though it was through his own mistake only. *Syler v. Culp* (Civ. App.) 138 S. W. 175.

Parol evidence held admissible to show the true consideration of a written instrument. *Id.*

Parol evidence that before delivery of the deed the parol contract of sale of the land was modified by reduction of the price below the amount of consideration expressed in the deed is admissible. *Detering v. Boyles* (Civ. App.) 155 S. W. 984.

In an action upon a note given as part of the consideration for a conveyance, held, that the grantee might set up the grantor's breach of a contemporaneous parol agreement as an affirmative defense or counterclaim. *Reid v. Ragland* (Civ. App.) 156 S. W. 920.

Additional consideration for deed.—Where a deed to a city recited the contract between the parties, parol evidence of a further agreement was properly excluded. *Weaver v. City of Gainesville*, 1 C. A. 286, 21 S. W. 317.

Parol evidence is admissible to prove consideration additional to that recited in a deed. *Garrett v. Robinson* (Civ. App.) 43 S. W. 288.

Where a deed recited the consideration as the assumption by the grantee of certain named debts of the grantor, parol evidence is not admissible to show the assumption of certain other additional debts. *Walter v. Dearing* (Civ. App.) 65 S. W. 380.

Under the rule that, where a deed merely recites a money consideration, an additional consideration may be shown by parol, certain additional consideration resting in parol held properly shown. *Tipton v. Tipton*, 47 C. A. 619, 105 S. W. 830.

It is permissible to show that, as an additional consideration for a deed reciting a money consideration only, grantor was to receive rents for her life. *Tipton v. Tipton*, 55 C. A. 192, 118 S. W. 842.

Assumption or payment of debts or Incumbrances.—In an action against decedent's estate to recover an amount alleged as due from decedent as part of the consideration for land, the deed being silent as to the consideration, evidence of one who was not a party to the suit as to declarations by decedent held admissible. *Powell's Estate v. Walker*, 24 C. A. 312, 58 S. W. 838.

Parol evidence is admissible to show that grantee of a deed containing a covenant against incumbrances agreed to assume payment of certain charges against the property. *Johnson v. Elmen*, 94 T. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845.

Parol evidence is admissible to show that the assumption of a vendor's lien was a part consideration for a deed, notwithstanding that it contradicts a covenant against incumbrance. *Johnson v. Elmen*, 24 C. A. 43, 59 S. W. 605, 52 L. R. A. 162, 86 Am. St. Rep. 845.

A stipulation in a deed, whereby the grantee assumed the payment of certain purchase-money notes given to a prior grantor, is not subject to contradiction by parol. *Vansickle v. Watson*, 103 T. 37, 123 S. W. 112.

Acknowledgment of payment in deed.—Parol evidence is admissible to show deed from husband to wife, and reciting consideration, was in fact without consideration, and not intended to vest separate estate in wife. *Kahn v. Kahn* (Civ. App.) 56 S. W. 946.

Where a recital of consideration in a deed was contractual, the parties thereto were estopped from denying it; and hence parol evidence is not admissible to show that the consideration was different from that expressed in the deed. *Kahn v. Kahn*, 94 T. 114, 58 S. W. 825.

Bills of sale.—Parol evidence held admissible to show that a bill of sale and chattel mortgage were given in full payment of a debt, and not for the consideration recited. *Schneider v. Sanders*, 26 C. A. 169, 61 S. W. 727.

Assignments.—Unconditional transfer in writing of notes and accounts as security for indebtedness cannot be shown by parol evidence to have been in consideration of release of sureties upon part of indebtedness secured. *Rotan Grocery Co. v. Martin* (Civ. App.) 57 S. W. 706.

Oral evidence held admissible in an action against guarantors to show consideration for their release. *Martin v. Rotan Grocery Co.* (Civ. App.) 66 S. W. 212.

Where an assignment of a policy was absolute on its face, evidence showing that it was a pledge for a debt held not objectionable as contradicting the recital of the consideration in the assignment. *Clarke v. Adam*, 30 C. A. 66, 69 S. W. 1016.

Leases.—Parol testimony held admissible to show a contract of employment as part consideration of a written lease, notwithstanding the recital therein of a money consideration only. *Suderman-Dolson Co. v. Rogers*, 47 C. A. 67, 104 S. W. 193.

Mortgages and trust deeds.—Parol evidence is admissible to show that a mortgage was given to secure future advances. *Glenn v. Seeley*, 25 C. A. 523, 61 S. W. 959.

Parol evidence held admissible to show real consideration given for a trust deed and notes secured thereby, though the trust deed recited a different consideration. *Street v. Robertson*, 28 C. A. 222, 66 S. W. 1120.

Parol evidence held admissible to show that a recital in a mortgage that it was given to secure a \$430 note was a mistake, and that the note was for \$450. *Boren v. Boren*, 29 C. A. 221, 68 S. W. 184.

No allegation of fraud, accident, or mistake is necessary to warrant the admission of parol evidence to show the consideration for a mortgage. *Id.*

In an action on mortgage note, evidence that a part of the consideration was a contemporaneous parol agreement for an extension without the knowledge of the sureties, held not inadmissible as contradicting a written contract. *Moroney v. Coombes* (Civ. App.) 88 S. W. 430.

Contracts in general.—A. wrote an agreement between himself and B., assuming to do certain things "for no consideration." B. having brought suit on the agreement, A. pleaded that it was without consideration. Held, that it was competent for B. to prove the consideration by parol evidence. *Young v. Young*, 19 T. 504.

Parol evidence held inadmissible as varying a written contract. *McCormick v. Kampmann*, 102 T. 215, 115 S. W. 24.

Where the whole consideration is not expressed in a written contract, parol evidence is admissible to supply the deficiency, but it cannot establish a consideration inconsistent with that expressed. *Pope v. Taliaferro*, 51 C. A. 217, 115 S. W. 309.

In the absence of fraud or mistake, parol evidence is, as a general rule, not admissible to change the terms of a written contract, except that an additional consideration may be shown, unless the consideration is contractual. *International Land Co. v. Farmer* (Civ. App.) 123 S. W. 196.

Where the written contract gave a party the privilege of selling, within a certain time and for a fixed price, the lands of the adverse party, and bound him to pay a specified sum per acre, parol evidence that the promise of the adverse party to procure the extension of a note given by the party to a bank of which the adverse party was president was a part of the consideration, was admissible to prove an added consideration as the contract in effect provided that the party should receive the sum over the fixed price on a sale of the land, and the parol evidence did not show anything inconsistent with the express stipulations. *Id.*

Contracts for buildings and other works.—Evidence of a contemporaneous parol agreement held inadmissible to change the written contract. *Stell v. Hale*, 20 C. A. 39, 48 S. W. 603.

Though a contract for material to be furnished for improvements states a consideration, the true consideration may be proven aliunde. *Banks v. House* (Civ. App.) 50 S. W. 1022.

Parol evidence that material agreed to be furnished by written contract had been delivered before the contract was made held admissible to show a consideration for the contract. *Wilson v. Vick* (Civ. App.) 51 S. W. 45.

Contracts of sale or exchange.—Where a purchaser in a land contract bound himself to “assume” an indebtedness on the land, parol evidence was not admissible to show that the vendor’s release from said indebtedness was to be secured from the payee by the purchaser. *Wright v. United States Mortg. Co.* (Civ. App.) 42 S. W. 789.

Where a contract to buy land did not definitely state the price of a certain part thereof, evidence was admissible to show what the purchasers agreed to pay. *Howell v. Denton* (Civ. App.) 68 S. W. 1002.

Parol evidence is admissible to show the value of property which was the consideration for land to which title failed. *Mayer & Schmidt v. Wooten*, 46 C. A. 327, 102 S. W. 423.

In an action involving an exchange of property, parol testimony held admissible to show the value of the personal property included in the exchange. *Larkin v. Trammel*, 47 C. A. 548, 105 S. W. 552.

In a suit to enforce specific performance of a contract to convey state school land, parol evidence of the consideration of the contract in addition to the consideration expressed therein held admissible. *Pope v. Taliaferro*, 51 C. A. 217, 115 S. W. 309.

A vendor of a farm held entitled to prove a verbal agreement with the vendee prior to the execution of a deed pursuant to a contract of sale, whereby as part of the consideration the vendor was to remain rent free in possession of the farm up to a certain date. *Morehead v. Hering* (Civ. App.) 116 S. W. 164.

Bills and notes and indorsement thereof.—The consideration of a note may be shown by parol without regard to the recital in the instrument. *Branch v. Howard*, 23 S. W. 478, 4 C. A. 271.

The true consideration of a note may be shown by parol evidence. *Elkel v. Randolph*, 25 S. W. 62, 6 C. A. 421.

In an action on a note, an answer setting up a contemporaneous oral contract held not demurrable, as contradictory of a written contract. *Peel v. Giesen*, 21 C. A. 334, 51 S. W. 44.

Where certain notes recited that they were given in part payment for a hearse, etc., parol evidence was admissible as against a purchaser after maturity to show the real consideration. *Kampmann v. McCormick* (Civ. App.) 99 S. W. 1147.

Where defendant indorsed a note secured by a mortgage on certain cattle to a bank, he could not prove by parol that the bank, as part of the consideration, agreed to look after and preserve the mortgaged property. *First Nat. Bank v. Powell* (Civ. App.) 149 S. W. 1096.

Releases.—Parol evidence held admissible to show the real consideration of a release. *Rapid Transit Ry. Co. v. Smith* (Civ. App.) 82 S. W. 788.

Parol agreement to employ plaintiff for life in consideration of written release of claim for damages held provable under the rule that consideration for a contract is provable by parol. *Texas Cent. R. Co. v. Eldredge* (Civ. App.) 155 S. W. 1010.

RULE 25. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A WRITTEN INSTRUMENT IS VOID FOR ILLEGALITY, WANT OR FAILURE OF CONSIDERATION, OR ON ACCOUNT OF FRAUD OR MISTAKE

Grounds for admission of extrinsic evidence.—A party to a contract free from ambiguity cannot avoid its legal effect unless he was misled and deceived in executing it, or the consideration thereof has failed. *Western Mfg. Co. v. Freeman* (Civ. App.) 126 S. W. 924.

Matters affecting validity in general.—It is competent to show by parol evidence that plaintiff did not authorize an averment in the original petition which is at variance with the allegations of an amended petition on which he seeks to recover. *San Antonio & A. P. Ry. Co. v. Brooking* (Civ. App.) 51 S. W. 537.

The rule as to when the terms of a contract are conclusive stated. *Kansas City Packing Box Co. v. Spies* (Civ. App.) 109 S. W. 432.

In an action on a written contract, defendant held entitled to show that he signed the contract sued on, on the faith of the adverse party having made certain changes therein as agreed on, and thereby defeat a recovery. *American Copying Co. v. Thompson* (Civ. App.) 110 S. W. 777.

Parol testimony is admissible upon proper allegations of fraud, accident, or mistake to defeat a written contract, or to show its real terms. *Gough Mill & Gin Co. v. Looney* (Civ. App.) 112 S. W. 782.

Insufficiency or irregularity of execution or delivery.—If the certificate of proof or acknowledgment is in the form prescribed by law, parol evidence is inadmissible to show that the officer making the certificate was not competent to act, on the ground that he was interested in the conveyance, or that he had accepted another office, or that the acknowledgment was not in fact made in a county for which he was commissioned to act. *Titus v. Johnson*, 50 T. 224.

The rule that parol evidence is inadmissible to show that a deed was not intended to pass title, as it purports to do, is not applicable where the issue is as to the execution of the deed. *McCartney v. McCartney*, 93 T. 359, 55 S. W. 310.

In an action by a buyer on a contract of sale exclusion of certain evidence held error. *Floresville Oil & Mfg. Co. v. Texas Refining Co.*, 55 C. A. 78, 118 S. W. 194.

Usury.—Parol evidence held admissible to show the real transaction in an action to cancel instruments securing a usurious loan, where the form of the instrument is alleged to be a mere cover for usury. *People’s Building Loan & Savings Ass’n v. Keller*, 20 C. A. 616, 50 S. W. 183.

In an action to foreclose, where the answer alleges usury, and that the subscription was a scheme to obtain an illegal rate of interest, the borrower may testify to facts showing that the contract was usurious, though such contract is in writing. *Cotton States Bldg. Co. v. Rely* (Civ. App.) 50 S. W. 961.

Where alleged usury consisted in adding interest to the note, which has been paid, parol testimony is admissible to show the amount of interest included in the note. *National Bank of Dangerfield v. Ragland* (Civ. App.) 51 S. W. 661.

Parol evidence held admissible to show contract for usurious interest on note. *Roberts v. Coffin*, 22 C. A. 127, 53 S. W. 597.

Parol evidence showing the true character of a contract is admissible on an issue of usury, though the contract is in writing. *Peightal v. Cotton States Bldg. Co.*, 25 C. A. 390, 61 S. W. 428.

Where a mortgage or written contract providing for the loan of money on security is not upon its face usurious, parol evidence is admissible to show that it is a mere device adopted to conceal a usurious transaction. *Interstate Savings & Trust Co. v. Hornsby* (Civ. App.) 146 S. W. 960.

Want or failure of consideration.—One purchasing goods and executing his note for their value may, at the time, contract by parol that he should not be liable on the note if compelled to surrender the goods under legal process, and if sued on the note he may plead the parol contract and failure of consideration as a defense to it; or if he had paid the note he may recover back the money on the parol contract, if compelled to surrender the goods. *Etter v. Dugan*, 1 U. C. 175.

In a proper case where there is fraud it may be shown that an absolute deed was intended as a mortgage, or that the consideration was not properly stated. *Railway Co. v. Jones*, 82 T. 156, 17 S. W. 534; *Hardie v. Wright*, 83 T. 345, 18 S. W. 615; *Du Bois v. Roonex*, 82 T. 173, 17 S. W. 528; *Eckford v. Berry*, 87 T. 415, 28 S. W. 937; *Chatham v. Jones*, 69 T. 745, 7 S. W. 600.

Parol evidence is admissible to show that a note sued on is without consideration. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

In an action on a note, certain evidence held inadmissible as showing failure of consideration. *Walker v. Tomlinson*, 44 C. A. 446, 98 S. W. 906.

A deed reciting a consideration of \$2,000 may be proved by the declarations of the grantor and by other circumstances to be in reality a deed of gift. *Wolf v. King*, 49 C. A. 41, 107 S. W. 617.

Grantor held not entitled to impeach recitals in deed as to consideration. *Garrison v. Richards* (Civ. App.) 107 S. W. 861.

In an action to enjoin a sale to enforce a deed of trust, securing a note, on the ground that the note was without consideration and was accommodation paper, evidence of the financial condition of the payee and the fact that the note was given to enable him to avoid prosecution was properly excluded; but plaintiff was properly allowed to introduce evidence of a lack of consideration. *Rudolph v. Price* (Civ. App.) 146 S. W. 1037.

The parol evidence rule does not include evidence offered to show want or failure of consideration for an indorsement. *First Nat. Bank v. Powell* (Civ. App.) 149 S. W. 1096.

Evidence of an understanding that a note would not be enforced, or create a liability, was admissible to show that a contract, evidenced by the note, was invalid for want of consideration. *Central Bank & Trust Co. v. Ford* (Civ. App.) 152 S. W. 700.

Mistake.—See, also, notes under Rule 28.

Parol evidence to show facts relieving a party from the obligations of a written contract on the ground of mistake is not objectionable as varying the terms of the contract. *Edwards v. Trinity & B. V. Ry. Co.*, 54 C. A. 334, 118 S. W. 572.

Fraud.—See, also, notes under Rule 28.

Parol evidence is admissible to show fraud leading to the execution of an instrument. *Wright v. United States Mortg. Co.* (Civ. App.) 42 S. W. 789.

All written instruments are subject to attack on the ground of fraud, no matter how certain they are on their face. *American Nat. Bank v. Cruger* (Civ. App.) 44 S. W. 1057.

Written instruments may be contradicted by parol testimony to show fraud. *McCarthy v. Woods* (Civ. App.) 87 S. W. 405.

Evidence held not to raise the issue of fraud in the execution of a written instrument. *Barnes v. Bryce* (Civ. App.) 140 S. W. 240.

— **In deeds.**—Where a deed was unambiguous, an allegation that one of the rights conveyed was fraudulently inserted held insufficient to justify the introduction of parol evidence to change the deed. *Gulf, C. & S. F. Ry. Co. v. Fenn*, 33 C. A. 352, 76 S. W. 597.

In trespass to try title and cancel a deed, held proper to show that the deed, though absolute on its face, was executed in pursuance of an agreement that title should not vest until plaintiff's death, and was on condition that defendant should support plaintiff. *Wilson v. Wilson*, 35 C. A. 192, 79 S. W. 839.

In an action for damages for having procured from plaintiff by fraudulent representations a deed to certain land, testimony of plaintiff that she did not understand the import of the deed she signed held admissible. *Butler v. Anderson* (Civ. App.) 107 S. W. 656.

Parol evidence that a deed by a husband to his wife was executed with intent to defraud creditors held admissible. *Brantley v. Brantley* (Civ. App.) 145 S. W. 1024.

Where a husband claimed a community interest in land conveyed by him to his wife, evidence that the deed was executed with the intent to avoid the collection of any judgment which might be rendered against him in a pending action was admissible to show that the deed was a sham, executed with no intention on the part of either of the parties of passing any title, as against the objection that it varied the terms of a written instrument. *Id.*

— **In leases.**—Where plaintiffs were injured by a defective elevator in defendant's hotel, conducted by its agent under a sham lease, the rule that a written instrument cannot be varied by parol cannot prevent the true relations of the parties being shown. *Oriental Inv. Co. v. Barclay*, 25 C. A. 543, 64 S. W. 80.

— **In contracts in general.**—A written contract may be contradicted when fraud is alleged. *History Co. v. Flint*, 4 App. C. C. § 224, 15 S. W. 912.

Parol evidence held admissible to show fraudulent representations inducing a contract. *Herring v. Mason*, 17 C. A. 559, 43 S. W. 797; *Davis v. Driscoll*, 22 C. A. 14, 54 S. W. 43; *United States Gypsum Co. v. Shields* (Civ. App.) 106 S. W. 724.

In a suit to cancel a contract and deeds made in pursuance thereof, on the ground of fraud, the admission of evidence of representations made before the execution of the contract held not erroneous. *American Cotton Co. v. Collier*, 30 C. A. 105, 69 S. W. 1021.

In an action to cancel certificates, statements of defendant's agent as to their stipu-

lations held admissible to show what induced plaintiff to take them. *Trinity Valley Trust Co. v. Stockwell* (Civ. App.) 81 S. W. 793.

Certain evidence held admissible to show one was induced by fraud to sign a contract. *United States Gypsum Co. v. Shields* (Civ. App.) 106 S. W. 724.

An unambiguous written contract may be impeached by parol on the ground of fraud. *Barclay v. Deyerle*, 53 C. A. 236, 116 S. W. 123.

The rule excluding parol evidence to contradict, vary, or modify written instruments is much relaxed, when fraud is alleged. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

The facts constituting the fraud procuring the execution of a contract may be shown to defeat it, or restrict its operation. *International Land Co. v. Farmer* (Civ. App.) 123 S. W. 196.

A party to a written contract held entitled, under appropriate pleadings, to prove by parol fraudulent representations made by the agent of the adverse party. *Western Mfg. Co. v. Freeman* (Civ. App.) 126 S. W. 924.

Facts held not to show such fraud in the making of a written contract, as to authorize one of the parties to vary it by parol evidence. *Murray Co. v. Putman* (Civ. App.) 130 S. W. 631.

Where a contract is claimed to be void because of a fraud, either party may adduce evidence to show the existence or nonexistence of fraud. *Crockett & Sons v. Anselin* (Civ. App.) 132 S. W. 99.

Parol evidence is admissible to show that a contract reduced to writing was procured by fraud. *Martinez v. Coggin* (Civ. App.) 135 S. W. 699.

— **In contracts of sale.**—Parol evidence is admissible to show misrepresentations as to the quantity of land in a tract which induced the purchase of such tract. *Wuest v. Moehrig*, 24 C. A. 124, 57 S. W. 864.

Parol evidence is admissible to show that a written contract of sale was induced by fraud. *Hallwood Cash Register Co. v. Berry*, 35 C. A. 554, 80 S. W. 857.

In an action for the price of steel bars sold under a written order, parol evidence as to the original contract is admissible to show deception of defendant in signing the order. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Civ. App.) 107 S. W. 651.

Where a real estate broker, who had agreed to sell land at \$40 per acre, at a stipulated commission, fraudulently induced the owner to sign a contract in which the name of the purchaser was in blank, calling for a sale at \$20 per acre, the owner of the land, who was in ignorance of the facts at the time he signed the contract, could prove by parol evidence the fraud of the agent and defeat a recovery. *Murphy v. Earl* (Civ. App.) 150 S. W. 486.

Fraudulent misrepresentations as to quantity in sale of goods under written contract, expressly stating there was no warranty as to quantity, may be shown by parol. *Kirby v. Thurmond* (Civ. App.) 152 S. W. 1099.

— **In bills and notes or indorsement thereof.**—The maker of a note, as between himself and the payee, or assignee after maturity or with notice, may contradict the acknowledgment in a note of value received (*Mercer v. Hall*, 2 T. 284), and may show fraud or illegality of consideration (*Young v. Young*, 19 T. 504).

That a note was obtained by fraud can be shown by parol evidence. *American Nat. Bank of Austin v. Cruger* (Civ. App.) 44 S. W. 1057.

The rule as to the exclusion of parol evidence tending to vary or contradict a writing does not apply to an action to cancel a note for fraudulent representations. *Karner v. Ross*, 43 C. A. 542, 95 S. W. 46.

The parol evidence rule does not include evidence offered to impeach the original or present validity of an indorsement for fraud. *First Nat. Bank v. Powell* (Civ. App.) 149 S. W. 1096.

— **In subscription to corporate stock.**—Parol evidence held admissible to show that subscription to corporate stock was obtained by fraud. *Turner v. Grobe* (Civ. App.) 44 S. W. 898.

— **In releases.**—Evidence that one injured did not understand the contents of a release he executed held admissible. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.) 78 S. W. 32.

Illegality.—The maker of a note, as between himself and the payee, or assignee after maturity or with notice, may contradict the acknowledgment in a note of value received (*Mercer v. Hall*, 2 T. 284), and may show fraud or illegality of consideration (*Young v. Young*, 19 T. 504).

Where written contract did not show that part of the consideration therefor was illegal, parol evidence held admissible to show illegality of such part consideration. *Sanger v. Miller*, 26 C. A. 111, 62 S. W. 425.

Parol evidence is admissible to show that the consideration, or one of the considerations, of a written contract sued on, is illegal. *Smith v. Bowen*, 45 C. A. 222, 100 S. W. 796.

RULE 26. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH A TRUST OR TO SHOW THAT A WRITTEN INSTRUMENT WAS INTENDED AS A MORTGAGE, TRUST OR CONDITIONAL SALE

Mortgage or conditional sale.—Parol evidence is admissible to show that a deed was intended as a mortgage. *Stamper v. Johnson*, 3 T. 1; *Carter v. Carter*, 5 T. 93; *James v. Fulcro*d, 5 T. 512, 55 Am. Dec. 743; *Cuney v. Dupree*, 21 T. 211; *Johnson v. Deloney*, 35 T. 42; *Gibbs v. Penny*, 43 T. 560; *Hudson v. Wilkinson*, 45 T. 444; *Brewster v. Davis*, 56 T. 478; *Davis v. Brewster*, 59 T. 96; *Loving v. Milliken*, 59 T. 423; *Hardie v. Campbell*, 63 T. 296; *Ullman v. Jasper*, 70 T. 446, 7 S. W. 763; *Webb v. Burney*, 70 T. 322, 7 S. W. 841; *Lessing v. Grimland*, 74 T. 239, 11 S. W. 1095; *Lehman v. Chatham Machinery Co.*, 28 C. A. 228, 66 S. W. 796; *Stafford v. Stafford*, 29 C. A. 73, 71 S. W. 984; *Musick v. O'Brien* (Civ. App.) 102 S. W. 453; *Hall v. Jennings*, 104 S. W. 489; *Nagle v. Simmank*, 54 C. A. 432, 116 S. W. 862; *Yates v. Caswell* (Civ. App.) 126 S. W. 914; *Browning v. Currie*, 140 S. W. 479.

When the defendant in trespass to try title under the plea of not guilty gave in evidence an absolute conveyance of the property from the plaintiff it was competent for the

plaintiff to introduce parol testimony to show that the conveyance was in fact a mortgage. *Hannay v. Thompson*, 14 T. 142.

A. conveyed to B. a certain tract of land by a deed in the usual form, reciting a consideration and conveying the title. On the same day A. and B. entered into an agreement by which B. agreed to reconvey the land to A. on certain conditions, and the question was whether the latter instrument was a mortgage or conditional sale. Held that, for the purpose of determining this question, both instruments should be read together in the light of surrounding circumstances. *Ruffler v. Womack*, 30 T. 332. And see *Boatright v. Peck*, 33 T. 68; *Walker v. McDonald*, 49 T. 458; *Alstin v. Cundiff*, 52 T. 453.

It may be shown that a deed absolute on its face was intended as a mortgage or trust, or that the consideration is not properly stated. *Railway Co. v. Jones*, 82 T. 156, 17 S. W. 534; *Hardie v. Wright*, 83 T. 345, 18 S. W. 615; *Du Bois v. Rooney*, 82 T. 173, 17 S. W. 528. In a proper case, where there is fraud, it may be shown that an absolute deed was intended as a mortgage, or that the consideration was not properly stated. *Railway Co. v. Jones*, 82 T. 156, 17 S. W. 534; *Hardie v. Wright*, 83 T. 345, 18 S. W. 615; *Du Bois v. Rooney*, 82 T. 173, 17 S. W. 528; *Eckford v. Berry* (Sup.) 28 S. W. 937; *Chatham v. Jones*, 69 T. 745, 7 S. W. 600.

A deed absolute on its face may be shown by parol evidence to be a mortgage or conditional sale. *Hexter v. Urwitz*, 25 S. W. 1101, 6 C. A. 580.

When grantor in deed absolute may show that it was intended to secure a debt. *Wiggins v. Wiggins*, 16 C. A. 335, 40 S. W. 643.

Parol evidence is admissible to show that a bill of sale absolute on its face was executed to secure the grantee by reason of the grantor having sold other mortgaged property securing such debt. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

Trust.—A parol trust may be ingrafted on a deed absolute on its face. *Neyland v. Bendy*, 69 T. 711, 7 S. W. 497; *Williams v. Emberson*, 22 C. A. 522, 55 S. W. 595.

Parol evidence is admissible to establish a trust. *Burns v. Ross*, 71 T. 516, 9 S. W. 468; *Holland v. Farthing*, 21 S. W. 67, 2 C. A. 155.

That land deeded to one partner belonged to the firm may be shown by parol evidence of facts showing such trust. *Kempner v. Rosenthal*, 81 T. 12, 16 S. W. 639.

Though a deed purports to convey a fee simple, parol evidence is admissible to show an express agreement for a trust. *Holland v. Farthing*, 21 S. W. 67, 2 C. A. 155.

That corporation directed its president to purchase land for it, and that he purchased for himself, taking deed in his own name, making him trustee for the company, may be shown by parol. *Halsell v. Wise County Coal Co.*, 19 C. A. 564, 47 S. W. 1017.

Where the payee of a note is dead, parol evidence is admissible to establish a trust relationship between the payee of the note and certain claimants of the proceeds. *Thompson v. Caruthers*, 92 T. 530, 50 S. W. 331.

A plainly expressed intention in a deed as to the character of the estate conveyed cannot be contradicted by parol evidence, so as to impose a trust on the grantee in regard to such property. *Kahn v. Kahn*, 94 T. 114, 58 S. W. 825.

Parol evidence is admissible to show that a deed was given that the grantee might hold the legal title in trust for the grantor. *Craig v. Harless*, 33 C. A. 257, 76 S. W. 594.

Parol evidence held inadmissible to show that a deed absolute in form was intended to create a trust. *Boyd v. Boyd*, 34 C. A. 57, 78 S. W. 39.

Testimony of wife, as defendant in trespass to try title to land purchased by husband with her money and sold to plaintiff on execution for his debt, that she furnished the money to buy the land certificates, held admissible. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

In a suit by the heir of one of the payees of the principal of notes for partition thereof, parol evidence held admissible to show that the payees of the principal held the same in trust for their mother during her life. *Jones v. Day*, 40 C. A. 158, 88 S. W. 424.

Parol evidence held admissible to prove that a deed absolute on its face was made on a parol trust. *Diffie v. Thompson* (Civ. App.) 90 S. W. 193.

A deed absolute on its face may be shown to be subject to a parol trust. *Whitfield v. Diffie* (Civ. App.) 105 S. W. 324; *Landrum v. Landrum*, 130 S. W. 907.

Where deeds to a wife were executed in fraud of the husband's creditors, he could not show by parol that the deeds were made to the wife to place the land in trust for the community estate. *Shook v. Shook* (Civ. App.) 125 S. W. 638.

Parol evidence is incompetent to show that deed to a wife, reciting that the property is separate estate, was in trust for benefit of community estate, where it is charged such arrangement was to place the property beyond creditors. *Shook v. Shook* (Civ. App.) 145 S. W. 699.

A trust may be created by parol evidence varying the terms of a written instrument. *Williams v. Neill* (Civ. App.) 152 S. W. 693.

RULE 27. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A DEED WAS MADE FOR THE BENEFIT OF ANOTHER NOT NAMED IN IT, OR SOLELY FOR THE BENEFIT OF ONE OF THE PARTIES NAMED THEREIN

Person not named in deed in general.—Parol evidence is admissible to show that a deed was made for the benefit of another not named in it. See *Neill v. Keese*, 5 T. 23, 51 Am. Dec. 746; *McCoy v. Crawford*, 9 T. 355; *Vandever v. Freeman*, 20 T. 333, 70 Am. Dec. 391; *Johnson v. Deloney*, 35 T. 42; *Markham v. Carothers*, 47 T. 21; *Byrnes v. Morris*, 53 T. 213; *Simmons v. Dinsmore*, 56 T. 404; *Kennedy v. Baker*, 59 T. 150; *Parker v. Coop*, 60 T. 111; *Ross v. Kornrumpf*, 64 T. 390.

The presumption in favor of the community, resulting from a deed made to either husband or wife, may be rebutted by proof that it was bought with the separate funds of either. When the deed is made to the wife, it may be shown to be for her benefit, not only from the advance by her of the purchase money, but if the funds be advanced from the separate means of the husband, the presumption of a gift arises, and if from the community fund, it may be proven that the husband intended a gift, and directed the deed to be made in her name. *Dunham v. Chatham*, 21 T. 231, 73 Am. Dec. 238; *Smith v. Strahan*, 16 T. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 T. 389, 70 Am. Dec. 394; *Story v. Marshall*, 24 T. 305, 76 Am. Dec. 106; *Hatchett v. Conner*, 30 T. 104; *Tucker v. Carr*,

39 T. 98. Such a trust cannot be ingrafted on a deed to the prejudice of creditors or purchasers without notice; and the fact that a conveyance is made to a married woman does not put the purchaser upon inquiry. *Cook v. Bremond*, 27 T. 457, 86 Am. Dec. 626; *Flanagan v. Oberthier*, 50 T. 379; *Alstin v. Cundiff*, 52 T. 453; *McDaniel v. Weiss*, 53 T. 257; *Wallace v. Campbell*, 54 T. 87.

A purchaser at an execution sale, under a judgment against the husband, acquires title to the property purchased, if the same was acquired during coverture by deed, though executed to the wife, if the purchaser at such sale had no knowledge that the property was acquired by the separate means of the wife. *Cline v. Upton*, 56 T. 319. But if, at the time of the purchase, such purchaser had notice of the real interest of the wife in the property, and that it had been acquired by her separate means, he would acquire no title, and the fact that a lien on the land had previously been acquired by the record of the judgment would not affect the right of the wife to such land. *Ross v. Kornrumpf*, 64 T. 390.

Gift to husband and wife jointly.—Parol evidence is admissible to show that a gift, joint to the husband and wife, was intended and should operate only as a gift to the wife. *Dunham v. Chatham*, 21 T. 231, 73 Am. Dec. 228.

Resulting trust.—See, also, notes under Rule 26.

When land is purchased on a credit, and a deed made to the purchaser, which is intended by the parties to vest the legal and equitable title in the purchaser, a subsequent payment of the purchase money by a third person does not vest the title in him who pays it, in the absence of written memoranda, signed by the parties, evidencing their intention, and creates no resulting trust, and is within the statute of frauds. *Williams v. County of San Saba*, 59 T. 442.

A resulting trust must exist at the instant the deed is taken and the legal title vests in the grantee. No oral agreement or payment, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself. *Parker v. Coop*, 60 T. 111.

RULE 28. A WRITTEN INSTRUMENT, FAILING THROUGH FRAUD, ACCIDENT OR MISTAKE, EITHER OF MATTER OF LAW OR OF FACT, TO REPRESENT THE TRUE AGREEMENT, OR CONTAINING TERMS CONTRARY TO THE COMMON INTENTION, WILL BE CORRECTED OR REFORMED IN EQUITY

See, also, notes under Art. 1103, §§ 77-82, Art. 4972f, § 22, and under Title 37, for matters of practice and procedure.

Fraud, accident or mistake in general.—In cases of fraud, accident or mistake, equity will admit parol evidence to qualify and correct the terms of written instruments, when the relief is sought between the original parties to the same, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, voluntary grantees or purchasers from them with notice of the facts. *Glisson v. Craig*, 1 App. C. C. § 43, citing *May v. Taylor*, 27 T. 125. See *Glisson v. Craig*, 1 App. C. C. § 44.

A court of equity will only correct such mistakes in a will as are apparent on the face of the instrument. *Hunt v. White*, 24 T. 643.

Equity will relieve against a mistake of a scrivener in preparing a writing by reforming the instrument accordingly on proof thereof. *Glisson v. Craig*, 1 App. C. C. § 44.

Oral testimony not admissible to contradict an instrument which has the appearance of completeness, in the absence of fraud, accident or mistake. *Willis v. Byars*, 21 S. W. 320, 2 C. A. 134.

In an action to foreclose a chattel mortgage on certain machinery placed in a gin mill, it was proper to permit the mortgage to be corrected so as to include an article which was omitted therefrom by mutual mistake, the purchase price of which was included in notes to secure which the mortgage was given, even as against one who held a prior vendor's lien on the mill. *Willis v. Munger Improved Cotton Mach. Mfg. Co.*, 13 C. A. 677, 36 S. W. 1010.

A chattel mortgage on machinery in a gin mill may be reformed, so as to include an article omitted therefrom by mutual mistake, the purchase price of which was included in notes to secure which the mortgage was given. *Willis v. Munger Improved Cotton Mach. Mfg. Co.*, 13 C. A. 677, 36 S. W. 1010.

A written instrument may be reformed on oral proof in case of fraud, accident or mistake, but in case of negligence or inattention relief will not be given. *Clack v. Wood*, 14 C. A. 400, 37 S. W. 188.

In the absence of proof of fraud or accident, a chattel mortgage containing no power of sale cannot be modified so as to authorize a sale by parol evidence that it was intended by the parties that the mortgagor should execute an instrument under which the mortgagee could "make his money" out of the property without going into court, where the mortgagee was present when the instrument was executed by the mortgagor, and took possession of the same without examining it. *Id.*

A mortgagee's agent, in drafting a mortgage, included therein a description of more of the mortgagor's land than it was agreed should be included; and the mortgagor, for the reason that she did not have her spectacles with her, and could not read without them, did not read the same, but executed it in reliance upon the representations of the mortgagee's agent that it included only the land agreed on. Held, that her failure to read the mortgage, under the circumstances, was not such negligence as would deprive her of a right to have the instrument reformed. *Conn v. Hagan*, 93 T. 334, 55 S. W. 323.

Failure of a mortgagor to examine the mortgage is not negligence which will prevent his having it reformed, where he relied on the representations of the mortgagee, to whom its preparation was intrusted, that it described the land agreed to be included. *American Freehold Land Mortg. Co. of London v. Pace*, 23 C. A. 222, 56 S. W. 377.

Equity will correct a mutual mistake in the description in a written instrument by which a man and wife have sought to incumber their homestead. *Silliman v. Taylor*, 35 C. A. 490, 80 S. W. 651.

The fact that an incumbrance has been foreclosed, and the property sold, will not prevent the correction of a mutual mistake in the description in the instrument creating the lien; the foreclosure judgment being set aside, and a new foreclosure ordered. *Id.*

In an action to correct the mistaken description in an instrument creating a mechanic's lien which had been foreclosed, one of the plaintiffs was alleged in the petition to have purchased for the original lienor and his assignees, and to have paid the assignees, and to hold an assignment of the judgment as security against the lienor for repayment. Held sufficient to show privity between such plaintiff and the lienees, enabling him to maintain the action. *Id.*

If a written instrument fails to express the intention of the parties, equity will afford relief, though the failure results from a mistake as to the legal meaning of the language employed. *Zieschang v. Helmke* (Civ. App.) 84 S. W. 436.

Where a predicate is laid therefor in the pleadings, by an allegation of fraud, accident, or mistake, held, parol evidence is admissible to vary, alter, or change the terms of a written instrument. *Syler v. Culp* (Civ. App.) 138 S. W. 175.

The mere omission to read or know the contents of a written instrument does not bar right to a reformation on account of mistake or fraud. *Harry v. Hamilton* (Civ. App.) 154 S. W. 637.

— **Judicial records and proceedings.**—Parol evidence is admissible to show a clerical error in the return to an execution. *Davidson v. Chandler*, 27 C. A. 418, 65 S. W. 1080.

An action to correct a misdescription of a land certificate in administration proceedings, 25 years afterwards, comes too late. *Tevis' Heirs v. Armstrong*, 71 T. 59, 9 S. W. 134.

Parol evidence held not admissible because varying a judgment. *Davis v. Ragland*, 42 C. A. 400, 93 S. W. 1099.

Parol evidence held admissible to show fact of a mistake in condemnation proceedings as a basis for reforming the award and judgment. *Getzender v. Trinity & B. V. Ry. Co.*, 43 C. A. 66, 102 S. W. 161.

— **Official records and proceedings.**—Parol evidence held admissible to show that an election ballot bore incorrect initials of the nominee, through mistake. *Davis v. Harper*, 17 C. A. 88, 42 S. W. 788.

— **Deeds.**—Where there is no ambiguity in the language used in the deed, evidence should not be admitted that words were intended to convey a meaning different from that which they ordinarily bear, and which the law, in the connection in which they appear, attaches to them. When the controversy as to construction of words is between the original parties to the instrument, a mutual mistake may be shown. Evidence of a mistake cannot be admitted to affect the rights of a subsequent purchaser for value without notice. *Farley v. Deslonde*, 69 T. 458, 6 S. W. 786.

Equity will not relieve against mistakes, as to the number of acres in land conveyed by metes and bounds, in the absence of fraud. *Dalton v. Rust*, 22 T. 133.

Where a deed has passed, and the price has been paid for a much larger quantity of land than the tract actually contained, the purchaser's only remedy is by having the deed reformed in equity. *Smith v. Fly*, 24 T. 345, 76 Am. Dec. 109.

Where a grantor knows the contents of a deed and its legal effect, he cannot be relieved from the result on the ground of mistake, or by showing that he intended to convey a different estate from that purported by the deed. *Lott v. Kaiser*, 61 T. 665.

Where both parties to a deed intended that there should be a conveyance of a certain number of acres to satisfy a certain debt, but, by mistake of both, a greater number, of much greater value, is included, correction will be granted, against one who took a deed from the grantee knowing the facts and that correction was to be applied for. *Yarzombeck v. Grier* (Civ. App.) 32 S. W. 236.

A mutual mistake in the description of land conveyed to another may be shown by parol evidence. *Bumpas v. Zachary* (Civ. App.) 34 S. W. 672.

Where a deed of land to a railroad company for depot purposes was not prepared by the company, and, before signing, was modified by the addition of a provision by direction of the grantor, and afterwards delivered to the company, there is no ground on which a court of equity can reform the instrument, at the suit of the grantor, by the addition of further conditions. *Jones v. Flournoy* (Civ. App.) 37 S. W. 236.

Land was purchased for a valuable consideration, and a deed was executed, but through mistake of the draftsman the land was not described. The land was levied on by an execution creditor of the vendor, but with notice of all the facts. Held, that by purchase of the land at the execution sale the equitable right of the original purchaser to have the deed reformed was not defeated. *Milby v. Regan*, 16 C. A. 352, 41 S. W. 372.

Where the evidence shows that the parties to the conveyance intended to convey the south 64 acres of a tract, though in fact conveying the north 64 acres, the conveyance will be reformed. *Lilley v. Equitable Securities Co.* (Civ. App.) 43 S. W. 1082.

For over 50 years claimants under a patent conveying the same amount, but not all the land included in the original certificate and survey, acquiesced in its correctness and validity. In the meantime purchasers acquired rights, under a later patent, in land which the prior patent should have covered, but did not cover, and held the same for over 40 years, until there was no unappropriated land on which to relocate under the certificate on which the later patent was issued. The claimants under the first patent did not disclaim title to any of the land covered by their patent, and the land covered by the later patent did not appear to be more valuable than that covered by the prior patent. Held, that the claimants under the prior patent were not entitled to have it corrected so as to interfere with the claimants under the later patent. *Lubbock v. Binns*, 20 C. A. 407, 50 S. W. 584.

A deed of trust was executed by husband and wife, conveying separate property of the wife, to secure the husband's debt. All statutory requirements were complied with. The deed conveying to the wife described the buildings on the property, but erroneously described the lot numbers; and such error was incorporated in the deed of trust, which described the lots as the property theretofore conveyed to the wife, and gave the dimensions of the property, and date and record of the deed. The property intended to be conveyed was pointed out by the husband, and neither he nor his wife owned other lots in the block described. Thereafter a deed of correction was executed to the wife by her grantors, correctly describing the lot numbers, and reciting the erroneous description in

their former deed. Held that, in the absence of allegation and proof of fraud and collusion, equity would reform such deed. *Avery v. Hunton*, 23 C. A. 353, 56 S. W. 210.

Where a reformation of an absolute deed was sought as preliminary to having the instrument declared to be a mortgage and foreclosed, and it was determined that plaintiff was not entitled to the principal relief, it was not entitled to reformation. *Goodbar & Co. v. Bloom*, 43 C. A. 434, 96 S. W. 657.

In conveyances, the intention of the parties must control in determining what land is actually bought and sold, and, when that intention is clearly shown, any mistake in the description contained in the deed should be corrected, and the same made to conform to the intention of the parties. *Laufer v. Moppins*, 44 C. A. 472, 99 S. W. 109.

Parol evidence to vary a deed held inadmissible, in the absence of pleadings alleging mistake. *Astin v. Mosteller* (Civ. App.) 144 S. W. 701.

In the absence of fraud or mistake in the making of a deed conveying land in fee for a recited consideration, parol evidence is inadmissible to show that the grantor did not intend to convey the premises described to the grantee according to the legal effect of the instrument. *Johnson v. Johnson* (Civ. App.) 147 S. W. 1167.

Parol evidence is admissible to show that by mutual mistake of the parties to a deed land has been omitted which was intended to be conveyed. *Harry v. Hamilton* (Civ. App.) 154 S. W. 637. See, also, notes under Art. 1103, §§ 77-82.

— **Leases.**—Certain evidence of previous parol agreement for rent of lands held admissible to show that certain provisions were omitted from written lease by mistake. *Cage v. Patton*, 41 C. A. 248, 91 S. W. 311.

— **Contracts in general.**—A mistake in a written contract may be shown by parol. *Hilliard v. White* (Civ. App.) 31 S. W. 553.

Where an agreement to pay a sum in gold is reduced to writing, but by mistake the word "gold" is not written in the contract, the instrument may be reformed to correspond with the real contract, and a decree may be rendered thereon accordingly. *Gammage v. Moore*, 42 T. 170.

To warrant reformation of a contract on the ground of an important omission, the mistake and the terms of the contract must be satisfactorily established. *Waco Tap R. Co. v. Shirley*, 45 T. 355.

If parties enter into an agreement, but there is an error in its reduction to writing, through mistake of the tradesmen, so that the agreement omits terms contrary to the common intention of the parties, equity will afford relief by way of reformation. *Glisson v. Craig*, 1 App. C. C. § 42.

A contract providing for the payment of \$26 per month on 13 shares in a building and loan association, "as provided for in the by-laws of the association," which are made a part of the contract, furnishes the evidence of a mutual mistake,—the by-laws providing only for a payment of \$1 per month on each share,—which may be corrected. *Abbott v. International Bldg. & Loan Ass'n*, 86 T. 467, 25 S. W. 620.

Where an agreement is usurious, the fact that it recites that it was given to remove doubts as to the usurious character of a previous agreement between the parties does not authorize a reformation of such subsequent agreement for mutual mistake, so as to obviate its usurious features, in the absence of evidence of mistake in the terms of the agreement; mistake as to its effect being of law only. *Bexar Building & Loan Ass'n v. Seebe* (Civ. App.) 40 S. W. 875.

Where a building and loan association, through its agent, verbally agrees to loan a sum named to a borrower, with interest at the rate of 5 per cent. per annum, and a premium upon said sum at the rate of 5 per cent. per annum, said interest to be paid in monthly and quarterly installments until the amount of the loan is repaid, and to be secured by mortgage on certain lands, and the agent, by false representations, procures from the mortgagor, who is illiterate, and unable to read and write, the execution of papers imposing obligations not contemplated in said verbal agreement, the contract of the parties will be made to conform to the verbal agreement. *Pioneer Savings & Loan Co. v. Baumann* (Civ. App.) 58 S. W. 49.

Where both parties to a written contract are mistaken as to the effect of the writing, and ignorant of its misstatement of their agreement, the failure of one of them to understand, through omission to give sufficient attention to its contents, cannot avail the other equally at fault as a defense against a suit to correct the mistake. *Kelley v. Ward*, 60 S. W. 311, 94 T. 289, affirming (Civ. App.) 58 S. W. 207.

Though equity may grant relief from a mistake in a contract where there is fraud or the mistake is mutual, a contract which the parties intended to make, but did not make, cannot be set up in place of one which they did make, but did not intend to make. *Reagan v. Bruff*, 49 C. A. 226, 108 S. W. 185.

Where a writing embodies the contract actually made, the fact that the parties acted under a mistake of law, equity, or fact will not authorize a reformation. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

Facts held not to show such mistake in the making of a written contract, as to authorize one of the parties to vary it by parol evidence. *Murray Co. v. Putman* (Civ. App.) 130 S. W. 631.

Equity may not reform a contract in advance of its attempted enforcement, except in so far as it may be accomplished in the correction of written instruments relied on as evidence of the agreement. *May v. Cearley* (Civ. App.) 138 S. W. 165.

Though equity will relieve from the effect of terms embodied in a written contract by a mutual mistake, yet mere proof of an antecedent verbal contract in terms variant from the contract reduced to writing, does not show mutual mistake. *Dalton v. Dalton* (Civ. App.) 143 S. W. 241.

An executory contract will neither be enforced nor reformed where a unilateral mistake is shown, since, under such circumstances, the minds of the parties never met; and to reform the contract in accordance with the views of the party who made the mistake would be to make a new contract. *Watson v. Dodson* (Civ. App.) 143 S. W. 329.

An experienced business man signing a contract after looking it over with full opportunity to understand it is not entitled to reformation. *Hart v. Jopling* (Civ. App.) 146 S. W. 1075.

— **Contracts of sale.**—In an action for specific performance of a contract for the sale of land, the vendee was permitted to show the representations of the vendor as to the boundaries of the land, and to have the contract reformed and enforced so as to conform to such representations. *Goff v. Jones*, 70 T. 572, 8 S. W. 525, 8 Am. St. Rep. 619.

— **Contracts of insurance.**—Parol evidence is admissible to show that the insurer or its agent, having knowledge or means of knowledge of the facts, are alone responsible for an omission or improper statement in the application, and made a matter of warranty, and that the insurer is thereby estopped from claiming a forfeiture. *Banking Co. v. Stone*, 49 T. 4. And so where there is a misdescription of the insured property. *Insurance Co. v. Lewis*, 48 T. 622.

In a suit to reform a policy for mistake, parol evidence showing the real agreement, though some weeks prior to its issuance, is admissible. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283. See, also, notes under Art. 4972f, § 22.

RULE 29. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH A SEPARATE ORAL AGREEMENT CONSTITUTING A CONDITION PRECEDENT TO AN OBLIGATION CLAIMED TO ARISE ON A WRITTEN AGREEMENT

Contracts in general.—Several persons signed a subscription paper agreeing to pay designated sums to any person who would build a bridge at a given place named. Held, it was not competent to show by parol evidence that the building of the bridge was to be let out to the lowest bidder. *Cooper v. McCrimmin*, 33 T. 383, 7 Am. Rep. 268.

Contracts of sale and deeds.—Suit was brought upon a written order for goods, and parol evidence was admitted on the part of the defendant that the order was given by him with the understanding and express condition that he reserved the right to countermand the same at any time before the goods were shipped, and that he did so countermand the order. *James v. King*, 2 App. C. C. § 544.

The admission of parol evidence to vary a written instrument held reversible error. *Gale Mfg. Co. v. Finkelstein* (Civ. App.) 59 S. W. 571.

In determining whether a city had complied with the conditions of a deed dedicating land for street purposes, a letter written by the grantor to the city previous to the execution of the deed is inadmissible. *City of Dallas v. Gibbs*, 27 C. A. 275, 65 S. W. 81.

Where a written contract for sale of soda water fountain provided that buyer could not countermand his order, it was error, in an action on the contract, to admit evidence of countermand. *Harris-Hearin Fountain Co. v. Pressler*, 35 C. A. 360, 80 S. W. 664.

A parol agreement by the seller of farm machinery to rebuild the engine, on the faith of which the purchaser executed notes and a chattel mortgage on the machinery, held not an attempt to vary by parol the contract shown by the notes and mortgage. *Mangum v. Buffalo Pitts Co.* (Civ. App.) 131 S. W. 1196.

A written contract to convey a merchantable title, and providing that, to secure performance, each party has deposited a sum to be returned on compliance with the contract, and that, in case of unavoidable delay, a few days additional should be allowed, cannot be varied by parol evidence of an agreement that the question of title should be submitted to a designated attorney whose decision should be binding. *Whitaker v. Willis* (Civ. App.) 146 S. W. 1004.

Bills and notes or indorsement thereof.—In a suit on a note for the purchase-money of real property of minors sold by order of the probate court, a plea setting up a contemporaneous verbal agreement upon valuable consideration inuring to the benefit of the minors, between the guardian and the purchaser, one of the payers of the note, that the payment of the note should not be demanded until one of the minors should marry or arrive at full age, was held bad. *Reid v. Allen*, 18 T. 241.

There was a written agreement between the parties to a note that payment should not be demanded at its maturity if the maker failed to make crops. Suit having been brought on the note on default of payment at maturity, the defendant pleaded in abatement of the action a contemporaneous parol agreement not to sue if the maker of the note failed to make good crops, etc. Held, that the plea was bad. *Smith v. Garrett*, 29 T. 48.

In a suit on a note given for land, a plea setting up a contemporaneous parol agreement that payment depended upon the result of a suit between other parties about the title to the land was held bad. *Bedwell v. Thompson*, 25 T. 245.

E. and W., as partners, were jointly indebted to P. on account; E. executed and delivered the note on which suit was brought in settlement of the account, which was receipted and delivered to him. The note read, "We promise to pay," etc. E. pleaded that he was not liable on the note, because, at the date of its execution, it was agreed that the note was also to be signed by W., and that, unless so signed, its obligations were not to be binding on him. Held, evidence was admissible in support of the answer. *Proctor v. Evans*, 1 App. C. C. § 647.

Parol evidence held inadmissible to vary terms of note. *Ablowich v. Greenville Nat. Bank*, 22 C. A. 272, 54 S. W. 794.

In an action on a note by an assignee after maturity, a witness held entitled to testify that he signed the note under an agreement with the payee that he should not be liable and that the latter would indemnify him against loss. *Citizens' Nat. Bank v. Cammer* (Civ. App.) 86 S. W. 625.

A note in the usual form and payable on demand may not be varied by a parol agreement that it should not be payable, except on the happening of a contingency not mentioned in the note. *Key v. Hickman* (Civ. App.) 149 S. W. 275.

Contracts of suretyship.—Suit was brought against A. and B. on a joint obligation for the payment of money. B. answered that he signed his name to the instrument as surety for A. with the understanding with all the parties to the instrument that T. was also to sign as surety; that it was further understood and agreed between all the parties that if the signature of T. was not procured as a co-surety, the instrument was to be of no force or effect. Held, that the answer set up a good defense. *Loving v. Dixon*, 56 T. 75.

Parol evidence held admissible to show violation of the maker's agreement not to deliver the note until another solvent surety was obtained. *Large v. Parker* (Civ. App.) 56 S. W. 587.

RULE 30. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A WRITTEN AGREEMENT HAS BEEN RESCINDED, MODIFIED, EXTENDED OR WAIVED BY A SUBSEQUENT VALID AGREEMENT

In general.—A new and distinct agreement resting upon a sufficient consideration may be established by parol, as having been entered into as a substitute for the original contract, or the time of performance of such written agreement may be enlarged, or the place of performance changed, or actual performance be actually waived. And so a supplementary agreement in parol, resting on a sufficient consideration, may be proved by parol. *Hogan v. Crawford*, 31 T. 633; *Self v. King*, 28 T. 552.

Parol evidence is admissible to prove a new and distinct agreement upon a new consideration, whether it be a substitute for a prior agreement in writing or in addition to and beyond it. And if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refer to and partially or totally adopt the provisions of the former contract in writing, provided the old agreement be abandoned and rescinded. *Harper v. Kelley*, 1 App. C. C. § 22.

The rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument does not apply where the object of the evidence is to show a separate subsequent valid agreement to rescind, modify, extend or waive the contract, or a provision of it. *Ackerman v. Bundren*, 1 App. C. C. § 1306.

In an action on a contract, evidence to establish a subsequent oral agreement is not error where such agreement is not inconsistent with the written contract. *Strauss v. Gross*, 21 S. W. 305, 2 C. A. 432.

A contract whereby an owner of real estate, in order to induce an agent to accept a stipulated sum for his services in effecting an exchange, agreed to pay him more if the deal proved satisfactory, held provable by parol evidence. *Blair v. Slosson*, 27 C. A. 403, 66 S. W. 112.

A verbal promise, made after execution of a contract, to pay the balance of a sum therein, recited to have been received as consideration for work agreed to be done, part only of the sum having been received, may be proved. *House v. Holland*, 42 C. A. 502, 94 S. W. 153.

Where a verbal contract is a complete novation of a written contract, parol evidence of the verbal contract does not offend against the rule relating to varying terms of a written contract. *Weeks v. Stevens* (Civ. App.) 155 S. W. 667.

Bills and notes.—In an action on a note against a surety, an answer alleging that for a consideration plaintiff had agreed with the person for whose benefit the note was made that such person might pay it in work, etc., and that he had done work of greater value than the amount due on such note, was not objectionable as contradicting the terms of the note. *Lee v. Durham* (Civ. App.) 156 S. W. 1135.

Security.—Evidence of parol modification of written contract held admissible against a stranger, claiming benefit of limitations under contract. *Liner v. J. E. Watkins Land Mortg. Co.*, 29 C. A. 187, 68 S. W. 311.

Contracts for buildings or other works.—An oral agreement of an architect with commissioners to so change plans that they would be satisfactory held admissible, though not in the commissioners' record, it being the architect's agreement. *Gordon v. Denton County* (Civ. App.) 48 S. W. 737.

Contracts of carriage.—Admission of evidence as to conversation with carrier's yardman relative to feeding and watering shipment of cattle held not error as varying the written contract of shipment, since the provision that the shipper would feed and water them could be waived. *Chicago, R. I. & G. Ry. Co. v. Scott* (Civ. App.) 156 S. W. 294.

Extension of time for performance.—Parol evidence held admissible to show that a contract had been renewed, where it provided that it was renewable by mutual consent. *Pasteur Vaccine Co. v. Burkey*, 22 C. A. 232, 54 S. W. 804.

Discharge or performance of obligation.—See notes under Rule 20.

RULE 31. WHEN THE RECORD LEAVES THE FACT IN DOUBT, PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A JUDGMENT WAS NOT RENDERED ON THE MERITS

Presumptions as to judgment.—See notes under Rule 12.

Admissibility of parol evidence.—See notes under Rules 20, 21, 22, and 28.

Validity and conclusiveness of judgment and collateral attack thereon.—See notes under Art. 1994.

See also notes under Introductory (Documentary Evidence), and Rule 33.

RULE 32. A RECITAL IN A DEED BINDS THE PARTIES AND THEIR PRIVIES IN SUITS FOUNDED UPON SUCH INSTRUMENT OR GROWING OUT OF THE TRANSACTION IN WHICH IT IS GIVEN

I. Creation and operation of estoppel in general.

1. Nature and elements in general.
2. Instruments operating as estoppel—Deeds.
3. — Bonds and other obligations.
4. — Defective, inoperative or invalid instruments and transactions.
5. Recitals in deeds and mortgages as grounds of estoppel.

6. Persons to whom estoppel is available.
7. Persons estopped in general.
8. Effect, as against heir, of covenant of ancestor.
9. Grantees or mortgagees.
10. Remote grantees.
11. Persons acting in particular character or capacity.
12. Matters precluded.

II. Estates and rights subsequently acquired.

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| <p>13. Estoppel as to title subsequently acquired in general.</p> <p>14. Instruments operating on title subsequently acquired.</p> <p>15. — Conveyances with covenants.</p> <p>16. — Conveyances without covenants.</p> <p>17. Grounds of estoppel.</p> | <p>18. Persons to whom estoppel is available.</p> <p>19. Persons estopped in general.</p> <p>20. Grantors or mortgagors and privies.</p> <p>21. Estates or rights affected.</p> <p>22. — Title acquired from or adversely to grantee.</p> <p>23. — Title acquired in different right.</p> |
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I. Creation and Operation of Estoppel in General

1. Nature and elements in general.—Where real estate was purchased under a deed of general warranty, and the solvency of the warrantor is not shown, a plea of estoppel by the grantee in an action regarding the boundaries of the land will not be sustained. *Childress County Land & Cattle Co. v. Baker*, 23 C. A. 451, 56 S. W. 756.

2. Instruments operating as estoppel—Deeds.—In trespass to try title plaintiff claimed under a patent issued to him as assignee of Mullen on the 15th of June, 1858. The defendant relied as a defense on ten years' possession since the location of the certificate, and read in evidence the field-notes of the survey of the land made for plaintiff, as assignee of Mullen. Held, that plaintiff was stopped from denying the genuineness of the certificate. *Kimbrow v. Hamilton*, 28 T. 560.

Plaintiff, having previously joined in a warranty deed conveying land to defendants, held estopped from thereafter recovering the same. *Matula v. Lane* (Civ. App.) 56 S. W. 112.

Facts held to show an estoppel by deed. *Jones' Estate v. Neal*, 44 C. A. 412, 98 S. W. 417.

3. — Bonds and other obligations.—In 1849 D. executed to R. a title bond for land, covenanting for a deed whenever a patent issued. Shortly afterwards R. sold the land by a verbal contract to L., who paid a part of the purchase-money. Afterwards R. sued L. for the unpaid balance of the purchase-money before a justice of the peace. L. defended on the statute of frauds, and set up fraud and misrepresentation in the sale. At the trial R. tendered L. a deed in writing, which was accepted by L., who still insisted upon his plea in reconvention, and judgment was rendered in his favor. In 1857 L. brought suit against D., to whom patent had been issued. R. intervened and claimed a rescission of the contract on the ground that the purchase-money had not been paid. Held, that R. was estopped by his title bond from claiming the land against L., and as the judgment of the justice determined that nothing was due him, he was not entitled to a rescission by reason of the non-payment of the balance of the purchase-money. *Lovejoy v. Roberts*, 35 T. 605.

A vendee of land holding under a bond for title, and giving notes for purchase-money, is estopped from denying the title of his grantor unless the contract was obtained by his false and fraudulent representations. *Cook v. Coleman* (Civ. App.) 33 S. W. 756; *Hammers v. Hanrick*, 69 T. 412, 7 S. W. 345; *McKie v. Anderson*, 78 T. 210, 14 S. W. 576. See *Rice v. Railway Co.*, 87 T. 90, 26 S. W. 1047, 47 Am. St. Rep. 72.

4. — Defective, inoperative or invalid instruments and transactions.—A married woman is not estopped by conveyance of land not executed in conformity with law, in the absence of positive fraud or act of concealment or suppression equivalent thereto. *Berry v. Donley*, 26 T. 737; *Eckhardt v. Schlecht*, 29 T. 130; *Fitzgerald v. Turner*, 43 T. 79; *Johnson v. Bryan*, 62 T. 623; *Williams v. Ellingsworth*, 75 T. 480, 12 S. W. 746; *Blagge v. Moore*, 23 S. W. 466, 6 C. A. 359.

A. executed to B. a deed for land in which a blank space was left for the field notes, which were inserted after the delivery of the deed. Afterwards B. sold the land to D. In a controversy between A. and D. in regard to the ownership of the land, A. is estopped from denying the validity of the deed on the ground that the land was not described in it when delivered. *Ragsdale v. Robinson*, 48 T. 379.

A married woman properly executed a deed conveying land, her separate property; it recited a consideration of \$1,500, and the name of the grantee was in blank. The deed was placed by her husband in the hands of an agent to effect a sale, and the land was sold by him for \$1,000, and the money paid to the husband, the wife refusing to receive any part of it. Held, that she was not estopped by the deed from recovering the land from the purchaser, but having remained silent for seven years while the purchaser was improving the property, she was estopped from recovering possession until she paid for the improvements. *Cole v. Bammel*, 62 T. 108.

Though a deed contains an erroneous recital of authority as administratrix from the probate court to make the deed, the widow and heirs are estopped as against the grantee. *Williams v. Hardie*, 85 T. 499, 22 S. W. 399.

Where a father made a deed of real estate to his children, without delivery or intention to pass title, he was not divested of title or estopped to deny its validity, though he placed it on record, and it was made in fraud of a second wife. *Koppelman v. Koppelman*, 94 T. 40, 57 S. W. 570.

A deed held not to pass by estoppel land without its description. *Smith v. Bunch*, 31 C. A. 541, 73 S. W. 559.

Grantor in undelivered deed held not estopped from suing for its cancellation. *Garner v. Risinger*, 35 C. A. 378, 81 S. W. 343.

A deed by the widow of deceased as his legal representative, though under a void decree, held to estop one to claim an interest in the land as her heir. *Cope v. Blount*, 38 C. A. 516, 91 S. W. 615.

Where a married woman is imposed upon by one in whom she has confidence, and induced to sign and acknowledge a deed covering land which she has not bargained to sell, she is not estopped, in an action to set the deed aside, to allege her want of knowledge of what land was covered by the deed. *Oar v. Davis*, 105 T. 479, 151 S. W. 794.

5. **Recitals in deeds and mortgages as grounds of estoppel.**—An agent controlling two judgments against an estate for different parties received a conveyance of land from the administrator in trust to sell and apply the proceeds of sale to their payment. Afterwards a deed was made by the administrator to one of the judgment creditors under order of the probate court, in a proceeding to which said creditor was not a party, which purported to convey other land in full satisfaction of the creditor's judgment. The deed was not delivered to the creditor or accepted by him, but was accepted by the trustee. In a proceeding by this creditor against the administrator and the other judgment creditors to recover an interest in the trust land, it was held that the recitals in the deed not embraced in the trust deed could work no estoppel of his rights under the deed of trust. *Stephenson v. Martin*, 68 T. 483, 3 S. W. 89.

Mortgagors held estopped by recitals in the mortgage to claim the property as a homestead. *Scottish-American Mortg. Co. v. Scripture* (Civ. App.) 40 S. W. 210.

Recital in partition deed held insufficient as an estoppel. *Illg v. Garcia*, 92 T. 251, 47 S. W. 717.

A witness held not estopped, by recitals in a deed executed by him, from testifying to the interest he intended to convey thereby. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 399.

A denial by the grantor of a recital in a deed held not admissible, where the effect of such denial was to render the deed wholly inoperative. *Kahn v. Kahn*, 94 T. 114, 58 S. W. 825.

Where a married woman is imposed upon by one in whom she has confidence, and induced to sign and acknowledge a deed covering land which she has not bargained to sell, she is not estopped, in an action to set the deed aside, to deny her want of knowledge of what land was covered by the deed. *Oar v. Davis*, 105 T. 479, 151 S. W. 794.

Recitals in deeds made by plaintiff as the surviving wife of decedent, sought and made to prevent litigation with adverse claimants, that she was the surviving wife of decedent did not estop the grantees from showing that she was not decedent's surviving wife. *Berger v. Kirby*, 105 T. 611, 153 S. W. 1130.

6. **Persons to whom estoppel is available.**—A plaintiff claimed a tract of land under purchase from a colonist in 1831. The sale was void, and plaintiff relied upon the recitals in several deeds of conveyance of other lands by his grantor to other parties, which recognized the title of plaintiff to the land in controversy, as matter of estoppel against the defendants, who claimed under the heirs of the grantor. It was held that recitals in deeds do not operate as estoppels in favor of strangers to the instrument, but only between parties and privies thereto; and the estoppel only arises in suits founded upon the instrument which contains the recital, or growing out of the transaction in which it is given, and not in other or collateral controversies between the same parties. *Williams v. Chandler*, 25 T. 4.

Defendants in trespass to try title held not estopped to set up a different title from that in the deed under which they claimed, where plaintiffs were not privies thereto. *Lumkins v. Coates* (Civ. App.) 42 S. W. 580.

Where a grantor of land reserved from the land conveyed a certain number of acres, in an action by his heir to recover the same, defendant could not set up an estoppel precluding recovery. *Bartell v. Kelsey* (Civ. App.) 59 S. W. 631.

Where the owner of land conveyed part of same, reserving a certain number of acres previously conveyed or agreed to be conveyed to another, the heir of the other being a stranger to the deed, recital of the agreement did not estop the grantor's heir from asserting his title to the portion reserved. *Id.*

Judgment creditors, levying on land of grantee in a deed, held not to thereby become a privy under parties to deed. *Hart v. Meredith*, 27 C. A. 271, 65 S. W. 507.

Recitals in deed held not to constitute an estoppel as to strangers to the instrument. *Id.*

A call in a deed for the east boundary of the K. survey as the west boundary of the land conveyed would not operate as an estoppel, as against the grantee of any stranger. *McLennan v. Fisher* (Civ. App.) 130 S. W. 598.

7. **Persons estopped in general.**—R., as the attorney of L., negotiated for the purchase of a lot in the name of L., and as his attorney executed a trust deed for a balance due on the purchase money; he paid taxes on the lot as L.'s, insured improvements on the lot in the name of L., and as his attorney executed a deed of trust on the lot for the benefit of M. R. resided on the lot with his family when the deed of trust was executed and until his death. M. bought the property at the sale under the deed of trust made for his benefit, and after the death of R. brought suit against the widow of R. for the recovery of the lot in the ordinary form of an action of trespass to try title. The defendant claimed that the lot had been purchased by her husband, in part with community funds and in part with money derived from the sale of their former homestead, her separate property; she had no knowledge of the condition of the property until after her husband's death; she alleged that the powers of attorney under which her husband claimed to act were forgeries, and claimed the lot as her homestead. Held, the community interest of the wife in the lots was held in privity of estate with her husband's community interest, and, the title of the community being controlled by her husband, she was in this case also estopped in like manner with him. The title to the lot having never been in the community, the extent of the community interest was at most a mere equity or resulting trust, subject to the superior legal or equitable rights of others. The fraudulent acts of the husband would defeat the equitable interest of the community, and thereby defeat the imperfect or dependent homestead right. The case differs widely from one where the homestead is fixed on land to which there is legal title, as in *Eckhardt v. Schlecht*, 29 T. 129. See *Ranney v. Miller*, 51 T. 263.

Recitals in deeds are binding on all parties claiming under them. *Gonzales v. Batts*, 20 C. A. 421, 50 S. W. 403.

While a wife, who executes a mortgage, is not bound by her covenants of warranty of title contained therein, her husband, joining in the mortgage, is bound by his covenants. *Logue v. Atkeson*, 35 C. A. 303, 80 S. W. 137.

A trustee in a trust deed held not estopped to acquire title adverse to a purchaser on foreclosure of the deed by action. *Wm. D. Cleveland & Sons v. Smith* (Civ. App.) 113 S. W. 547.

Recitals in a deed executed by a trustee that it was in pursuance of a deed of trust conferring power on the trustee were not binding on persons who were not privies to the deed of trust. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

In a suit for partition between cotenants, held, that the plaintiffs were not estopped. *Schriver v. Taylor* (Civ. App.) 143 S. W. 231.

Recitals in deeds do not affect the rights of parties who had no connection therewith. *Id.*

Recitals in recorded deeds cannot affect an owner of land if they were not a link in his chain of title, so as to operate as an estoppel against him. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

The recitals in a deed are binding not only on the immediate parties thereto but on all claiming under it. *Unknown Heirs of Criswell v. Robbins* (Civ. App.) 152 S. W. 210.

The trustee in a deed of trust is under no obligation to defend the title of the grantor, and not estopped from purchasing a title adverse to that of the purchaser on foreclosure. *W. D. Cleveland & Sons v. Smith* (Civ. App.) 156 S. W. 247.

8. Effect, as against heir, of covenant of ancestor.—Heirs of an administratrix conveying the lands of her husband held estopped to claim any interest in such lands. *Broocks v. Payne* (Civ. App.) 124 S. W. 463.

Recitals in a power of attorney of the execution of a deed held to estop the attorney to claim title to the land. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

A warranty in a deed only binds the grantor's heirs to the extent of the property received by them from the grantor's estate, and it being insolvent the heirs are not estopped to acquire a title adverse to that conveyed by their ancestor. *W. D. Cleveland & Sons v. Smith* (Civ. App.) 156 S. W. 247.

Paramount title acquired by grantor's heir held not to have inured to the benefit of a grantee under the grantor's covenant of warranty. *Wagner v. Gelselman* (Civ. App.) 156 S. W. 524.

9. Grantees or mortgagees.—By an act passed in 1845 the owners of land in San Patricio county whose lands had not been correctly marked and designated were required to have them resurveyed within two years. The owner of a Spanish grant, after the two years expired, had his land resurveyed in 1848, the corners marked and the resurvey recorded and delineated on the map. In a suit between the vendee of that owner of the grant and a patentee under recent location claiming under patent from the state land outside of the limits of the grant according to the resurvey, but claimed by the vendee to be within the calls of the original grant, held, that the vendee claiming in privity of the estate of the owner of the Spanish grant who marked and recorded his boundaries was estopped from averring as against the subsequent locator that other and different lines than those marked and recorded inclosed the land. *Timon v. Whitehead*, 58 T. 290.

By accepting a deed to correct imperfections in his claim of title, a person becomes estopped from claiming any lands not included in the deed. *Doty v. Barnard*, 92 T. 104, 47 S. W. 712.

Purchaser held not estopped by his deed to deny that there had been a partition of the land among the vendor and others. *Carnes v. Swift* (Civ. App.) 56 S. W. 85.

Recitals in deed to a third person through whom both parties claimed held binding on both parties. *Colville v. Colville* (Civ. App.) 118 S. W. 870.

Acceptance of a quitclaim by the purchaser on foreclosure of a vendor's lien held not to create an estoppel. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

10. Remote grantees.—Defendant, in trespass to try title, was estopped to deny title of one, under whom both parties claimed, as a common source, to the certificate under which the land was located. *Thompson & Tucker Lumber Co. v. Platt* (Civ. App.) 154 S. W. 268.

11. Persons acting in particular character or capacity.—A deed held to estop one to claim against the grantee an interest in the land as heir of one signing and acknowledging it as legal representative. *Cope v. Blount*, 99 T. 431, 90 S. W. 868.

A deed by an administrator under a void order of the probate court held to pass the interest of the administrator in the land by estoppel, though it was insufficient to pass the title of his intestate under Paschal's Dig. art. 1327. *Schnabel v. McNeill* (Civ. App.) 110 S. W. 558.

Where executors conveyed property as belonging to the estate, they were estopped from claiming that any part of it belonged to them personally. *Tomlinson v. H. P. Drought & Co.* (Civ. App.) 127 S. W. 262.

12. Matters precluded.—Acceptance of deed without covenant against Johnson grass held not to prevent showing of false representations that there was no such grass on the land. *Clary v. Myers* (Civ. App.) 40 S. W. 633.

Where grantor includes public lands in his deed, he is estopped to deny that he undertook to convey them. *Hynes v. Packard* (Civ. App.) 44 S. W. 548.

Facts held not to estop a tenant in common, having made partition of only part of land owned by him, under mistake of fact, from asserting a claim to his interest in the balance of the land. *Cartmell v. Chambers* (Civ. App.) 54 S. W. 362.

Vendee, accepting deed reciting certain notes as its consideration, and reserving a vendor's lien therefor, could not show that the notes were given to secure loan. *Walsh v. Ford*, 27 C. A. 573, 66 S. W. 854.

A party conveying land as attorney in fact of the grantor held estopped from thereafter denying that he was such attorney in fact. *Walters v. Bray* (Civ. App.) 70 S. W. 443.

A grantor held estopped by the recitals in her deed to resist the subjection of the land to a lien in plaintiff's favor. *Pinckney v. Young* (Civ. App.) 107 S. W. 622.

A grantee accepting a second deed held estopped from claiming any land not embraced therein. *Poitevent v. Scarborough*, 103 T. 111, 124 S. W. 87.

II. Estates and Rights Subsequently Acquired

13. Estoppel as to title subsequently acquired in general.—A title acquired after the execution of an instrument to "convey" the land held to inure to the grantee's benefit. *Garrett v. McClain*, 18 C. A. 245, 44 S. W. 47.

An administrator's location of land for the heirs being invalid, a subsequent relocation vested the title thereby acquired in the administrator's vendees and their grantees. *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

A purchaser, who relies upon estoppel for an after-acquired title, can have no greater right than has the grantor against whom the estoppel is claimed. *Newton v. Easterwood (Civ. App.)* 154 S. W. 646.

14. **Instruments operating on title subsequently acquired.**—A vendee not only takes the title held by the vendor at the time of sale, but whatever other additional title the vendor, who comes with a warranty, may afterwards acquire inures to his benefit. *Mays v. Lewis*, 4 T. 38.

The deed of a married woman, joined by her husband, does not operate on an after-acquired title. *Morrison v. Balzer*, 35 C. A. 247, 80 S. W. 248.

A mortgage given on community property by an heir having a one-half interest therein attaches to the entire property after the mortgagor has received a conveyance of the widow's interest therein. *American Nat. Bank of Paris v. First Nat. Bank*, 52 C. A. 519, 114 S. W. 176.

Grantor under a deed of trust held estopped to claim that land within the description subsequently obtained by him under partition was not covered by the deed. *Anderson v. Casey-Swasey Co. (Civ. App.)* 120 S. W. 918.

If a deed conveyed "all right, title, and interest" of grantor, he will not be estopped to set up an after-acquired title. *Breen v. Morehead (Civ. App.)* 126 S. W. 650.

In a suit to recover land, a deed of trust held not inadmissible because it antedated the deed under which the mortgagors acquired title. *Smith v. Burgher (Civ. App.)* 136 S. W. 75.

15. — **Conveyances with covenants.**—When a warrantor has purchased a paramount title, it will inure to the benefit of his vendee, who will be liable for the cost of the purchase only. *Denson v. Love*, 58 T. 468; *Trevino v. Cantu*, 61 T. 88; *McClelland v. Moore*, 48 T. 355.

One who has conveyed land by a warranty deed is estopped from setting up an after-acquired title. *Robinson v. Douthitt*, 64 T. 101.

Whenever a valid conveyance having a covenant of warranty is executed, the purchase of a paramount title by the warrantor will inure to the benefit of the warrantee against the warrantor, his heirs, and those claiming under him with notice. *Id.*

A deed with restrictive warranty against all persons claiming under the grantor will convey after-acquired title. *Randolph v. Junker*, 1 C. A. 517, 21 S. W. 551.

A claimant of land, who gave a warranty deed to the other claimant, held not estopped to subsequently acquire title to the land from the state, neither party having had title at the time the deed was given. *Simon v. Stearns*, 17 C. A. 13, 43 S. W. 50.

Where a son conveyed his undivided half interest in his deceased father's property with general warranty, and afterwards purchased his mother's life interest in the property, such interest in the half previously conveyed vests in the purchaser as against the son. *Carnes v. Swift (Civ. App.)* 56 S. W. 85.

An after-acquired title will pass by a deed in fee covenanting against incumbrances and that the grantor has not conveyed away the estate or any right therein. *Scates v. Fohn (Civ. App.)* 59 S. W. 837.

Though a power did not authorize the grantee to make a warranty deed, such deed passed the after-acquired title of the grantor of the power by estoppel. *J. M. Guffey Petroleum Co. v. Hooks*, 47 C. A. 560, 106 S. W. 690.

Covenants of a warranty are held to raise an estoppel to avoid a circuitry of action. *Breen v. Morehead (Civ. App.)* 126 S. W. 650.

A covenant to raise an estoppel need not be a covenant of general warranty, for a special covenant will operate as an estoppel. *Id.*

That a covenant may work an estoppel, it must be in a deed good and valid in law as well as in equity. *Id.*

A quitclaim deed held to contain no special warranty or representations such as would work an estoppel against grantor, so as to prohibit him or his subsequent grantees from claiming under an after-acquired title. *Id.*

An after-acquired title of a grantor conveying by general warranty passes to his grantee by operation of law immediately on his acquiring it. *Id.*

A covenant of general warranty in a deed passes to the covenantee any title to the land subsequently acquired by the covenantor. *Tennison v. Palmer (Civ. App.)* 142 S. W. 948.

For an after-acquired title to pass to a grantee under a warranty of title, it is not necessary that the conveyance should have been upon a valuable consideration. *Morris v. Short (Civ. App.)* 151 S. W. 633.

Where, after conveying land by warranty deed, the grantors acquired title at sheriff's sale under a claim of subrogation under a mortgage previously given by themselves and a deceased brother, such title passed to their vendee, if the judgment under which the sale was made was valid. *Newton v. Easterwood (Civ. App.)* 154 S. W. 646.

A general warranty deed to a one-seventh interest in land owned by a husband and wife, given by one of their seven children on death of the husband, passed the after-acquired title which descended to grantor on death of his mother. *Pritchard v. Fox (Civ. App.)* 154 S. W. 1053.

Where a grantor attempts by warranty deed to convey an estate as heir before the death of his ancestor, the grantee will get, by estoppel, whatever title descends to his grantor after the death of the ancestor. *Zarate v. Villareal (Civ. App.)* 155 S. W. 328.

16. — **Conveyances without covenants.**—Deed executed in 1860 conveying land without warranty. Held, that the grantors were estopped from asserting title to the land conveyed acquired thereafter by descent. *Lindsay v. Freeman*, 83 T. 259, 18 S. W. 727.

An after-acquired title will pass by a deed in fee containing no covenant of warranty. *Scates v. Fohn (Civ. App.)* 59 S. W. 837.

The principle of estoppel may be invoked though grantor's deed is without covenant of warranty, if it purports to convey a particular estate which he afterwards acquires. *Breen v. Morehead (Civ. App.)* 126 S. W. 650.

17. **Grounds of estoppel.**—Where a deed expressly or impliedly falsely represents grantor when conveying was possessed of title which his deed purported to convey, whether he committed a fraud or acted under an honest mistake, he is estopped to deny he has title and cannot set up an after-acquired title. *Breen v. Morehead* (Civ. App.) 126 S. W. 650.

18. **Persons to whom estoppel is available.**—A mortgagee held subrogated to rights of mortgagor to claim an estoppel by deed against former grantor of the land. *Colonial & U. S. Mortg. Co. v. Tubbs* (Civ. App.) 45 S. W. 623.

19. **Persons estopped in general.**—Where an heir received nothing from his ancestor's estate, he was not estopped by the ancestor's warranty binding his heirs to acquire an adverse title to that which the ancestor conveyed. *Wm. D. Cleveland & Sons v. Smith* (Civ. App.) 113 S. W. 547.

An execution creditor held not estopped from relying on a title acquired subsequent to the execution sale. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

A title by estoppel can be urged only against those who were estopped by the facts relied on, and does not extend to one who is not a privy in blood or estate to the persons against whom an estoppel was originally available. *Newton v. Easterwood* (Civ. App.) 154 S. W. 646.

20. **Grantors or mortgagors and privies.**—Where mortgage contained general covenants of warranty, mortgagor's husband, joining therein, held estopped to assert after-acquired title. *Logue v. Atkeson*, 35 C. A. 303, 80 S. W. 137.

A warranty of title in a transfer of a land certificate estopped the grantor's heirs, who inherited from her the tract received in exchange, from denying her right to transfer it, and from setting up title to the land afterward located under the certificate. *Vann v. Denon*, 56 C. A. 220, 120 S. W. 1020.

A mortgagor held not estopped to claim after-acquired title. *Anderson v. Casey-Swasey Co.*, 103 T. 466, 129 S. W. 349.

21. **Estates or rights affected.**—Title acquired by patent held to inure to prior transferee of the land certificate. *Baldwin v. Root*, 90 T. 546, 40 S. W. 3.

22. — **Title acquired from or adversely to grantee.**—One who has conveyed the land of which he is in possession thereby precludes himself from claiming title thereto under the statute of limitation under a deed prior in date to his conveyance. *Voight v. Mackle*, 71 T. 78, 8 S. W. 623.

Where a subsequent purchaser or lienholder is made a defendant in a suit to foreclose a lien, he cannot set up a title acquired by him adverse to that upon which rests the plaintiff's lien and his own subsequent incumbrance sought to be foreclosed by the judgment. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

A grantor is not estopped by his deed from claiming a title by limitation. *Dillard v. Cochran* (Civ. App.) 153 S. W. 662.

23. — **Title acquired in different right.**—Title acquired by vendors, at sheriff's sale under a suit fraudulently prosecuted against their deceased brother's heir, for whom one of them was guardian, held not to pass to their grantee as after-acquired title; the equitable rule of estoppel not applying to land held constructively in trust for another. *Newton v. Easterwood* (Civ. App.) 154 S. W. 646.

RULE 33. THE ADMISSIONS OF A PARTY OR HIS AGENT ARE ADMISSIBLE IN EVIDENCE WHEN OFFERED BY THE ADVERSE PARTY

See, also, notes under Rule 37.

I. Nature, form and incidents in general.

1. Nature and grounds for admission in general.
2. Subject-matter.
3. Interest of party and relation of admission thereto.
4. Capacity of person making admission.
5. Persons to whom made.
6. Mode of making and form in general.
7. — Conversation through telephone.
8. — Admissions as to indebtedness and amount thereof.
9. — Omission of matters from writing.
10. Judicial admissions in general.
11. Pleadings — Admissibility in same proceedings.
12. — Admissibility in subsequent proceedings in general.
13. — Same or different parties.
14. — Pleadings not verified or signed.
15. — Pleadings not filed.
16. — Pleadings superseded, withdrawn or abandoned.
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18. Petitions, affidavits and depositions.
19. Testimony.
20. Offers of compromise or settlement.
21. — What constitutes offer.

22. — Persons by or to whom made.
23. — Admissions made without prejudice.
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26. — Valuation of property for taxation.
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29. — Suppressing testimony.
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38. Privies and former owners in general.
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III. By grantors, former owners or privies—Cont'd.

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44. — After conveyance, but before transfer of possession.
45. Sellers or mortgagors of chattels.
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47. — After transfer or delivery of possession.
48. — After parting with title, but before change of possession.
49. Assignors for benefit of creditors.
50. Donors.
51. Assignors of rights in action in general.
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IV. By agents or other representatives.

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55. Authority at time of admission.
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59. — Scope and extent of agency or employment.
60. — Admissions before or after transaction or event.
61. — Showing agency, authority or employment.

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63. — Officers, agents and employes of insurance companies.
64. — Officers, agents or employes of carriers.
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66. Attorneys.
67. Persons referred to for information.
68. Husband or wife.
69. Partners.
70. Principal or surety.
71. Trustee or beneficiary.
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73. Conspirators and persons acting together.

V. Proof and effect.

74. Preliminary evidence.
75. — Existence and extent of agency or authority.
76. — Existence of conspiracy or common purpose.
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86. — Judicial admissions.

I. Nature, Form and Incidents in General

1. **Nature and grounds for admission in general.**—Admissions of grantee against interest are admissible in evidence in an action seeking to impress the land with a trust. *Mixon v. Miles* (Civ. App.) 46 S. W. 105.

2. **Subject-matter.**—Partnership may be shown by acts or declarations of the parties sought to be charged. *White v. Whaley*, 1 App. C. C. § 102.

3. **Interest of party and relation of admission thereto.**—Statements as to boundaries of land, made by one having no interest therein, are inadmissible against him subsequent to his acquiring title. *Bell v. Preston*, 19 C. A. 375, 47 S. W. 375, 753.

In an action against a railroad for negligently transporting cattle, declarations of one not the shipper's agent held inadmissible. *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Civ. App.) 73 S. W. 540.

4. **Capacity of person making admission.**—Declarations of minors to saloon keeper as to age held admissible, in action on saloon keeper's bond, only to contradict their testimony at trial. *State v. Dittfurth & Friederichs* (Civ. App.) 79 S. W. 52.

5. **Persons to whom made.**—Testimony as to the declarations of the president of a bank touching its financial ability, made to a witness and never made known to the plaintiff, is incompetent against said president. *Baker v. Ashe*, 80 T. 356, 16 S. W. 36.

Letters written by defendant to a third person, tending to establish the truth of plaintiff's claim, are admissible. *Downey v. Taylor* (Civ. App.) 48 S. W. 541.

In an action on a check given in settlement of proceedings against defendant's son for assault, evidence of declarations made by plaintiff to defendant's agent, who negotiated the agreement, held admissible. *McNeese v. Carver*, 40 C. A. 129, 89 S. W. 430.

6. **Mode of making and form in general.**—In an action by an owner of property abutting on a street for injuries caused by the construction and maintenance by a railroad of a tunnel and approaches in the street, a tax rendition by the owner's general manager held admissible to show the value of the property. *Burton Lumber Corp. v. City of Houston*, 45 C. A. 363, 101 S. W. 822.

In an action on open accounts, certain evidence held admissible to establish the correctness of the accounts. *Stadtler v. South Texas Lumber Co.* (Civ. App.) 121 S. W. 1132.

In an action on a benefit certificate proofs of loss including an affidavit of defendant's finance keeper of the tent to which deceased belonged, showing the date of payment of certificate assessments, held admissible. *Knights of Modern Maccabees v. Gillis* (Civ. App.) 125 S. W. 338.

A verbal partition deed held admissible as an admission on the part of plaintiff that defendant had an interest in the property. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

7. — **Conversation through telephone.**—On an issue as to whether a telephone company knew the object of a call, certain evidence held inadmissible. *Merrill v. Southwestern Telegraph & Telephone Co.*, 31 C. A. 614, 73 S. W. 422.

A telephone conversation in which defendant's cashier promised plaintiff bank to return its check for the proceeds of a collection from a bank that had failed after paying

a check drawn on it by worthless drafts held admissible as an admission against interest. *First Nat. Bank v. First Nat. Bank* (Civ. App.) 134 S. W. 831.

8. — **Admissions as to indebtedness and amount thereof.**—Deposit by defendant of money in an action before a justice held an admission of indebtedness. *Low v. Griffin* (Civ. App.) 41 S. W. 73.

Offer of payment by guarantors held competent, as tending to prove an admission of liability. *Rotan Grocery Co. v. Martin* (Civ. App.) 57 S. W. 706.

Settlement between a taxpayer and a city, void because of city's lack of authority, held not evidence against the taxpayer as to the amount due from her. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

9. — **Omission of matters from writing.**—In trespass to try title to land, statement rendered by plaintiff to superintendent of asylum in which her insane husband was confined, as to lands owned by him and plaintiff, held admissible as tending to contradict plaintiff's claim of ownership. *Field v. Field*, 39 C. A. 1, 87 S. W. 726.

10. **Judicial admissions in general.**—Suing on a contract given in restraint of trade held an admission that it was in force up to that time, though contract did not fix the time during which such restraint was to continue. *Mansur & Tebbetts Implement Co. v. Price*, 22 C. A. 616, 55 S. W. 764.

A party will not be permitted to admit a fact as true, and then recover on another state of facts involving its contradiction. *Meade v. Logan* (Civ. App.) 110 S. W. 188.

In an action for assault and battery, evidence of defendant's conviction on a plea of guilty of the same assault before a justice held admissible as an admission. *Sumner v. Kinney* (Civ. App.) 136 S. W. 1192.

Where the holder of notes secured by a chattel mortgage sues the makers of the notes and the payee after his transfer to recover on the notes and to foreclose the mortgage lien, he thereby affirms the genuineness of the notes and the existence of the lien. *Lissner v. Stewart* (Civ. App.) 147 S. W. 610.

A default judgment against a firm after due service of process, in which a person was alleged to be a partner, held admissible as an admission by him that he was a partner. *Miller v. Laughlin* (Civ. App.) 147 S. W. 711.

11. **Pleadings—Admissibility in same proceedings.**—Where general denial is interposed, statements in the answer cannot be used as evidence to sustain the petition. *Hynes v. Packard*, 92 T. 44, 45 S. W. 562.

Allegations in defendant's reconvention or cross-bill may be used by plaintiff as evidence to support his claim, if introduced by him for that purpose. *Lewis v. Crouch* (Civ. App.) 85 S. W. 1009.

Defendant held not entitled to have matters confessed in the supplemental petition treated as evidence in his favor in support of his cross-action, where the supplemental petition contained a general denial. *Banderer v. Gunther Foundry Machine & Supply Co.* (Civ. App.) 87 S. W. 851.

In an action by a servant for injuries, where the defense was that plaintiff was employed by an independent contractor, the original petition, in which plaintiff alleged that he was in the employ of an independent contractor, was admissible in evidence. *William Cameron & Co. v. Realmuto*, 45 C. A. 305, 100 S. W. 194.

The allegation in a trial amendment filed by plaintiffs in partition held not an admission of defendant's exclusive possession of the premises since a specified time in view of the other pleadings. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

A pleading filed by plaintiffs, in which a void deed was set up as the source of M.'s title, held admissible against them as an admission. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

The pleading of defendant railroad company, in its cross-action against its codefendant, a sleeping car company, in an action by a passenger against them for being put off beyond her station, held not to admit negligence and liability for nominal damages to plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Maxwell* (Civ. App.) 130 S. W. 722.

Where a defendant sued on a claim assigned by a contractor alleges that the contractor failed to complete the contract, and that he took over the work and finished it, and had \$874.29 of the contract price left over, and that such amount had been paid to prior assignees of claims of the contractor, and such alleged prior assignments were held not good, he cannot then contend that he owes nothing on the ground that the contractor had breached his contract, and that nothing was due him. *Youngberg v. El Paso Brick Co.* (Civ. App.) 155 S. W. 715.

12. — **Admissibility in subsequent proceedings in general.**—Pleadings in another suit seeking to make a grantor liable on a covenant of warranty in a deed are not admissible to show that the grantee did not regard said grantor as a nominal party merely in making such deed, receiving no consideration therefor. *Edinburgh American Land Mortgage Co. v. Briggs* (Civ. App.) 41 S. W. 1036.

A pleading by defendant in another suit containing relevant admissions held not objectionable because plaintiff did not limit his offer thereof to the parts containing such admissions. *Seligmann v. L. Greif & Bro.* (Civ. App.) 109 S. W. 214.

A pleading held not sufficiently authenticated as the act of a party to warrant its use in another case as an admission. *Michel v. Michel* (Civ. App.) 115 S. W. 353.

On the issue as to whether one signing a contract in the name of a firm was a partner, the admission of pleadings in another suit against the firm as an admission held error. *S. W. Slayden & Co. v. Palmo*, 53 C. A. 227, 117 S. W. 1054.

In an action to recover the value of a mortgaged building which defendants agreed to hold in trust for plaintiffs, purchasers of the equity of redemption, after foreclosing the lien, an answer filed by plaintiffs in a former action against them and defendants, at the instigation of defendants' agent, in which plaintiffs claimed the property, was admissible to show that defendants then recognized plaintiffs' claim, which was before the foreclosure sale. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

13. — **Same or different parties.**—Allegations in petition for breach of promise to marry held admissible as declarations against interest by plaintiff to show that she was not at the time married. *Cuneo v. De Cuneo*, 24 C. A. 436, 59 S. W. 284.

In an action for damages to land by raising the dam of an artificial lake, and overflow therefrom, the pleading in a former suit for similar injuries, not permanent, before the dam was raised, are not competent evidence. *Texas & P. Ry. Co. v. O'Mahoney*, 24 C. A. 631, 60 S. W. 902.

Statements in a pleading are admissible in evidence against the party filing the same. *Wilkins v. Clawson*, 50 C. A. 82, 110 S. W. 103.

Allegations in a petition in another action are inadmissible in evidence against a person not a party to the other action. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 145 S. W. 707.

Where the parties to a former action and the issues therein were different from the parties and issues in the present action, the pleadings and proceedings in the former action were not admissible. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

14. — **Pleadings not verified or signed.**—An abandoned original petition containing admissions on a fact in issue was admissible, though not verified. *Ft. Worth & D. C. Ry. Co. v. Wright*, 27 C. A. 198, 64 S. W. 1001.

Where an action is tried on an amended petition, admissions in original petition held erroneously excluded, though it was not verified. *First Nat. Bank v. Watson* (Civ. App.) 66 S. W. 232.

Abandoned pleadings in an action for injuries to a shipment of cattle held to contain material admissions by plaintiff against interest, sufficient to warrant their admission in evidence. *Texas & P. Ry. Co. v. Coggin*, 33 C. A. 667, 77 S. W. 1053.

In an action for the price of goods sold, a petition by defendant in a suit against a third person held admissible as an admission on the issue whether defendant was liable unless he actually received the goods. *L. Greif & Bro. v. Seligman* (Civ. App.) 82 S. W. 533.

An original petition in plaintiff's divorce suit held admissible to contradict her as to the age of her son in an action for injuries to him. *Pecos & N. T. Ry. Co. v. Blasengame*, 42 C. A. 66, 93 S. W. 137.

15. — **Pleadings not filed.**—An abandoned pleading held admissible in evidence as admissions against interest, though not bearing a file mark. *Orange Rice Mill Co. v. McIlhinney*, 33 C. A. 592, 77 S. W. 428.

16. — **Pleadings superseded, withdrawn or abandoned.**—Abandoned pleadings are incompetent to prove a material fact. If so read, adversary pleadings may be read in explanation. *Medlin v. Wilkins*, 1 C. A. 465, 20 S. W. 1026.

Material admissions contained in an abandoned pleading can be introduced in evidence against the party. *Goodbar Shoe Co. v. Sims* (Civ. App.) 43 S. W. 1065.

Part of an answer contradictory to an amended answer held inadmissible against the pleader. *McGregor v. Sima* (Civ. App.) 44 S. W. 1021.

A party's abandoned pleadings are admissible against him. *Wright v. United States Mortg. Co.* (Civ. App.) 54 S. W. 368.

Party's abandoned pleading held admissible against him. *Jordan v. Young* (Civ. App.) 56 S. W. 762; *Southern Pac. Co. v. Wellington* (Civ. App.) 57 S. W. 856.

Statements in abandoned pleadings are admissible against the party by whom they were filed as admissions, where they are relevant to the issue. *Prouty v. Musquiz* (Civ. App.) 59 S. W. 568.

Facts under which an abandoned original petition by plaintiff was relevant and material evidence stated. *Ft. Worth & D. C. Ry. Co. v. Wright*, 27 C. A. 198, 64 S. W. 1001.

Abandoned pleading of plaintiff held admissible in evidence. *Houston, E. & W. T. Ry. Co. v. De Walt*, 96 T. 121, 70 S. W. 531, 97 Am. St. Rep. 877.

A portion of plaintiff's abandoned petition held admissible in evidence against him. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.) 78 S. W. 32.

To counteract the effect of a statement in an abandoned pleading as an admission, a party must show that he did not know the pleading contained the statement when filed.—*Id.*

If a petition praying specific performance of an oral contract to convey land was amended so as to allege a writing, the abandoned pleading could be used as evidence but is not conclusive. *Miller v. Drought* (Civ. App.) 102 S. W. 145.

Defendants who, in their original answer, relied upon a verbal contract, may by an amended answer abandon the verbal contract, though the former pleading was verified by affidavit, and the abandoned pleading cannot afterwards be considered, except as evidence if offered by defendant. *Colorado Canal Co. v. McFarland & Southwell*, 50 C. A. 92, 109 S. W. 435.

Abandoned pleadings are admissible in evidence against the pleader. *Austin v. Jackson Trust & Sav. Bank* (Civ. App.) 125 S. W. 936.

Admission in original answer referring to original petition held to authorize judgment foreclosing vendor's lien, where the original and amended petition were the same in the matter referred to. *Daniels v. Stewart* (Civ. App.) 132 S. W. 967.

In an action for personal injury, held not improper to admit in evidence defendant's abandoned answer. *Lantry-Sharpe Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 863.

17. — **Defenses stricken out.**—A plea which has been stricken out cannot be received in evidence as an admission against the pleader. *Dunson v. Nacogdoches County*, 37 S. W. 978, 15 Civ. App. 9.

18. **Petitions, affidavits and depositions.**—When bearing upon the identity of a party through whom rights are asserted, his affidavits in conflict with such claim are competent. *McCamant v. Roberts*, 80 T. 316, 15 S. W. 580, 1054.

Admissibility of depositions illegally taken, as admissions of the parties, determined. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.) 44 S. W. 8.

A certified copy of a servant's application for an appeal to the supreme court held admissible to contradict his testimony on the second trial. *Galveston, H. & S. A. Ry. Co. v. Eckles* (Civ. App.) 54 S. W. 651.

In an action on an insurance policy, the premiums on which were paid by assured's wife, who was beneficiary, an affidavit in lieu of cost bond, made by assured previous to

the issuance of the policy, held inadmissible to show his financial condition when the policy was issued. *Mutual Life Ins. Co. v. Mellott* (Civ. App.) 57 S. W. 887.

An application for a continuance, made by plaintiffs through their attorney, containing an admission contradicting plaintiff's testimony, is admissible for that purpose. *W. Scott & Co. v. Woodard*, 39 C. A. 498, 88 S. W. 406.

19. *Testimony*.—Evidence held admissible as admissions of a party. *Munk v. Stanfield* (Civ. App.) 100 S. W. 213.

On an issue as to whether a certain person had authority to bind defendant as his agent, certain evidence held properly admitted. *Thompson v. Mills*, 45 C. A. 642, 101 S. W. 560.

Declarations of a party against his interest are admissible against him, though made by him as a witness upon a prior trial of the case, without laying a predicate such as is required for impeaching a witness, whether such declarations were contrary to his subsequent testimony or not. *Sterling v. De Laune*, 47 C. A. 470, 105 S. W. 1169.

Testimony of a party upon a former trial is admissible as an admission. *Littler v. Dielmann*, 48 C. A. 392, 106 S. W. 1137.

In an action by a vendee against a vendor for rent of a farm, certain evidence held admissible to prove a verbal agreement prior to the execution of the deed whereby vendor was to remain rent free in possession of the farm until a certain date. *Morehead v. Hering*, 53 C. A. 605, 116 S. W. 164.

Where impeaching testimony was also admissible as an admission against interest, the court erred in limiting it to the impeaching purpose. *Knights of Modern Maccabees v. Gillis* (Civ. App.) 125 S. W. 338.

20. *Offers of compromise or settlement*.—Statements made pending negotiations for a compromise are not admissible in evidence. *Darby v. Roberts*, 22 S. W. 529, 3 C. A. 427; *Hand v. Swann*, 21 S. W. 282, 1 C. A. 241; *Telegraph Co. v. Thomas*, 26 S. W. 117, 7 C. A. 105.

Written statement of damages made pending a compromise held inadmissible. *San Antonio & A. P. Ry. Co. v. Stone* (Civ. App.) 60 S. W. 461.

A letter written by the attorney of a tenant to the landlord, stating that the tenant is willing to consider any reasonable proposition of settlement, is not admissible in an action by the landlord against such tenant. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

In an action to recover for timber cut and removed by defendants from plaintiff's land, evidence of statements made to defendant by plaintiff and others after commencing suit as to scaling the timber, held inadmissible. *Wall v. Melton* (Civ. App.) 94 S. W. 358.

Evidence that before action for \$1,000 plaintiff presented a claim for only \$25 for the same matter held admissible as an admission against interest. *Western Union Telegraph Co. v. Stubbs*, 43 C. A. 132, 94 S. W. 1083.

Evidence of a rejected offer of compromise held not admissible. *McKnight v. Milford Gin Co.* (Civ. App.) 99 S. W. 198.

In trespass to try title, admissions held not inadmissible as made pending attempt to compromise prospective suit. *Upson v. Campbell* (Civ. App.) 99 S. W. 1129.

The action of an insurance company causing insured to consult an attorney with a view to the adjustment of a disputed claim under a policy, was not an admission of the validity of the contract. *Security Mut. Life Ins. Co. v. Calvert*, 101 T. 123, 105 S. W. 320.

A letter by a life insurance company to obtain a compromise of the amount due under a policy and prevent litigation held inadmissible against it. *Southwestern Ins. Co. v. Woods Nat. Bank* (Civ. App.) 107 S. W. 114.

Evidence held improperly admitted as evidence of an offer to compromise a controversy. *Floresville Oil & Mfg. Co. v. Texas Refining Co.*, 55 C. A. 78, 118 S. W. 194.

An offer to compromise and settle the claim in controversy cannot be proved. *Gulf, C. & S. F. Ry. Co. v. Bagby* (Civ. App.) 127 S. W. 254.

In an action by a child for personal injuries, evidence of an offer of settlement made by the father was inadmissible, without proof of the father's authority to act for the child. *Wichita Falls Traction Co. v. Adams* (Civ. App.) 146 S. W. 271.

Evidence of negotiations, in an endeavor to secure a compromise of claimed damages, is not admissible in an action on the claim; the negotiations having failed. *Texas Co. v. Strange* (Civ. App.) 154 S. W. 327.

Where plaintiff sued on a contract for services performed and expenses incurred, evidence that he spent two weeks in trying to effect a settlement with defendant was immaterial. *Iowa Mfg. Co. v. Taylor* (Civ. App.) 157 S. W. 171.

21. — *What constitutes offer*.—A written claim for damages against a carrier for injuries to live stock held admissible to contradict plaintiff's statements as a witness on the trial. *Ft. Worth & D. C. Ry. Co. v. Lock*, 30 C. A. 426, 70 S. W. 456.

Proof of tender by real estate broker to other brokers of their share of commissions held not objectionable, as proving offer of compromise. *Blake v. Austin*, 33 C. A. 112, 75 S. W. 571.

Evidence of failure to reply, when a claim of contract to indemnify was made, held admissible to prove the contract; it having no relation to a compromise. *McKnight v. Milford Gin Co.* (Civ. App.) 99 S. W. 198.

In an action for injuries to a servant, a portion of a letter written by him held properly excluded on the ground that the letter constituted an offer of settlement. *St. Louis Southwestern Ry. Co. of Texas v. Kern* (Civ. App.) 100 S. W. 971.

Certain testimony held inadmissible as proving an offer to settle the claim sued on. *Gulf, C. & S. F. Ry. Co. v. Bagby* (Civ. App.) 127 S. W. 254.

Evidence that defendants had offered to pay one-half of the broker's commissions claimed by plaintiff held not in itself, without further showing, objectionable as an offer of compromise. *Pope v. Ansley Realty Co.* (Civ. App.) 135 S. W. 1103.

In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was not admissible to show an offer to compromise. *S. W. Slayden & Co. v. Palmo* (Civ. App.) 151 S. W. 649.

A letter from plaintiff's attorneys to railroad company's agent, stating that they thereby made a claim and gave the company an opportunity to settle the same without

a suit, and further reciting that plaintiff "alleges his damages to be the sum of \$500, which is offered as a compromise," held not to be a technical offer of compromise so as to exclude it from evidence; the \$500 claimed being the full amount of the claim. *Missouri, K. & T. Ry. Co. of Texas v. Sullivan* (Civ. App.) 157 S. W. 193.

22. — **Persons by or to whom made.**—Claim against carrier for damages for negligent injury to live stock held to be competent as an admission of fact. *St. Louis Southwestern Ry. Co. v. Smith* (Civ. App.) 77 S. W. 28.

23. — **Admissions made without prejudice.**—The rule which excludes an offer to compromise a contemplated suit, when made under an express or implied agreement that the conversation shall be without prejudice, is founded in the policy that to admit it in evidence would tend to discourage the settlement of litigation. If the proposition be to pay a sum to buy peace, and if that be not accepted and become a contract, it will be deemed to have been made without prejudice, and is not admissible in evidence. *I. & G. N. R. Co. v. Ragsdale*, 67 T. 24, 2 S. W. 515.

Offer of compromise not acted on held inadmissible against the one making it. *City of San Antonio v. Stevens* (Civ. App.) 126 S. W. 666.

24. **Statements in writing.**—In an action to impress a trust on lands, a subsequent deed of part of the land to alleged trustee held admissible to show his recognition that he did not own the fee. *Mixon v. Miles* (Civ. App.) 46 S. W. 105.

Written application by husband and wife for loan, stating it was not their homestead, held admissible to establish estoppel against claim of homestead. *Bowman v. Rutter* (Civ. App.) 47 S. W. 52.

A deed by a locator, held admissible against one co-owner, claiming that the location was for his co-owner exclusively, as an admission that the locator had owned the certificate under which the former claims. *Estell v. Kirby* (Civ. App.) 48 S. W. 8.

A recital in a duebill given by a railroad subcontractor in lieu of time checks, given to laborers engaged in constructing a railroad, that it reserves the labor liens allowed by law to the person performing the work, is admissible in an action against the subcontractor and the railroad company to enforce such liens, for the purpose of showing that the lien has not been waived. *Texas & N. O. Ry. Co. v. Dorman* (Civ. App.) 62 S. W. 1086.

In an action against a railroad company for the price of ties alleged to have been sold to it, evidence that the cars on which the ties were loaded were marked with defendant's name was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Yale*, 27 C. A. 10, 65 S. W. 57.

In an action against a carrier for damages to cattle, claim presented by plaintiff to defendant, stating amount of loss, held admissible not merely on the question of plaintiff's credibility as witness, but as original evidence of the loss sustained. *Gulf, C. & S. F. Ry. Co. v. Combes & Rector* (Civ. App.) 80 S. W. 1045.

In an action against a city for the flooding of plaintiff's premises by waters diverted into a street, held, that plaintiff was not precluded, by a notice given by him to the city, from relying on the act of the city in diverting the water in the first instance. *City of Houston v. Hutcheson* (Civ. App.) 81 S. W. 86.

In an action for death of a servant on certain oil tanks belonging to another, the contract between the latter and defendant with reference to use of the tanks held irrelevant. *Yellow Pine Oil Co. v. Noble* (Civ. App.) 97 S. W. 332.

In an action for damages resulting from the pollution of a water course, the refusal to admit a release as to prior damages held not error. *Texas & N. O. Ry. Co. v. Moers* (Civ. App.) 97 S. W. 1064.

A folder issued and circulated by a railway company held admissible against it, as in the nature of a declaration against interest. *Southern Pac. Co. v. Allen*, 48 C. A. 66, 106 S. W. 441; *Same v. Godfrey*, 48 C. A. 616, 107 S. W. 1135.

In an action for injuries sustained by a passenger in a street car in a collision between a car and a train, rules of the railroad relative to the management of the train held admissible. *St. Louis, S. F. & T. Ry. Co. v. Wiggins*, 48 C. A. 449, 107 S. W. 899.

Plaintiff's claim presented to defendant, not covering damages for subsequent suffering, held not admissible against plaintiff for the purpose of showing the extent of her injuries and suffering. *St. Louis & S. F. R. Co. v. McAnella* (Civ. App.) 110 S. W. 936.

In an action by a purchaser for specific performance by the vendor, the vendor's signed statement, though not sworn to, held admissible. *Leonard v. King* (Civ. App.) 135 S. W. 742.

In an action for the death of a person struck by a train, evidence as to a rule of the company held inadmissible. *Laeve v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 136 S. W. 1129.

Evidence of a rule of a railroad, requiring signals when an engine in its yards was moved held admissible on the question of negligence, where, when one was passing through an opening in its train, it was closed without warning. *Galveston, H. & S. A. Ry. Co. v. Pingenot* (Civ. App.) 142 S. W. 93.

The fact that railway employé, in his application, acknowledged general notice of obstructions near track held evidence of actual knowledge of such obstructions although the general notice did not relieve the company from liability for injuries. *Kansas City, M. & O. Ry. Co. of Texas v. Barnhart* (Civ. App.) 145 S. W. 1049.

In an action for injuries to a person at a crossing, rules of the road on which the defendant was operating its train held admissible on the question of negligence. *Texas & P. Ry. Co. v. Hilgartner* (Civ. App.) 149 S. W. 1091.

A folder issued and circulated by railroads tending to show that they all belong to one system is admissible in an action brought against them. *Pecos & N. T. Ry. Co. v. Cox* (Civ. App.) 150 S. W. 265.

25. — **Letters.**—In 1851 M. gave to T. a bill of sale and possession of certain personal property, the proceeds of which when sold by T. were to be invested in other property for the benefit of M. In 1852 T. bought a tract of land, taking the deed in his own name. In 1853 T. by deed conveyed the land and the unsold part of the personal property to his wife, reciting a valuable consideration which was not in fact paid. In 1856 T. and wife conveyed all of the land and other property to the minor children of M.

In a suit brought by M. against all the parties named to declare the trust and to set aside the transfers of property, a letter written by T. to M. in 1854 acknowledging the trust was admitted in evidence. *Massey v. Massey*, 20 T. 134.

Suit was brought by a physician against a railway company to recover for professional services rendered to one of its employes. For the purpose of showing that his employment was by authority of the defendant, plaintiff offered to show that a letter had been written by defendant's agent, refusing to settle the claim sued on, because it was excessive. Held, that the evidence was pertinent, but the letter itself was the best evidence of its contents. *Mo. Pac. Ry. Co. v. Rountree*, 2 App. C. C. § 338.

Letters containing admissions by a husband as to the land designated by him as a homestead out of a larger tract were admissible in evidence in a suit to foreclose a deed of trust on other land in the same tract. *McGaughey v. American Nat. Bank*, 41 C. A. 191, 92 S. W. 1003.

Where breach of warranty was pleaded, letters from purchaser to seller, asking him to hold up notes given for the price were admissible to contradict the purchaser's testimony that the machinery sold commenced giving trouble after running only a few days, and broke down almost every day thereafter. *American Laundry Machinery Mfg. Co. v. Belcher* (Civ. App.) 152 S. W. 853.

26. — Valuation of property for taxation.—Original signed assessment lists are admissible against the makers. *Jones v. Cummins*, 17 C. A. 661, 43 S. W. 854.

Where plaintiff had testified that he had accumulated by his practice property worth \$4,000 a year, defendant was not entitled to show that he had rendered his property for taxation at a much smaller sum. *International & G. N. R. Co. v. Goswick* (Civ. App.) 83 S. W. 423.

In proceedings by a railroad to condemn defendant's lot, testimony as to the value at which the lot was rendered for taxes held admissible as an admission on defendant's part. *Hengy v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 109 S. W. 402.

Evidence of plaintiff's valuation of the property for taxation which was less than the value claimed in the action held admissible as an admission against interest. *Gulf, C. & S. F. Ry. Co. v. Koch* (Civ. App.) 144 S. W. 1035.

A rendition for taxes, wherein an animal killed by a railroad company was listed, held admissible as an admission against plaintiff. *Ft. Worth & R. G. Ry. Co. v. Chisholm* (Civ. App.) 146 S. W. 988.

27. Oral statements.—In an action on a lease alleged to have been made by an agent of the lessee, evidence held to show an agency in making the lease. *Autrey v. Linn* (Civ. App.) 138 S. W. 197.

28. Acts or conduct.—Agency may be proved by the acts and declarations of the principal. *Greneaux v. Wheeler*, 6 T. 519; *Latham v. Pledger*, 11 T. 439; *McAlpin v. Ziller*, 17 T. 508; *Chambers v. Hodges*, 23 T. 104. By his subsequent ratification of the agent's acts. *Kempner v. Rosenthal*, 81 T. 12, 16 S. W. 639. See *Meyer v. Smith*, 21 S. W. 995, 3 C. A. 37; *Railway Co. v. Reed* (Civ. App.) 32 S. W. 118; *Henderson v. Railroad Co.*, 17 T. 560, 67 Am. Dec. 675; *T. & P. Ry. Co. v. Nicholson*, 61 T. 491.

That a railway company has repaired its track at the place of an alleged injury, and subsequent thereto, is not admissible as evidence of negligence. *Railway Co. v. Ayres*, 83 T. 268, 18 S. W. 684.

Evidence of improved methods adopted by the company after the accident, and in consequence thereof, is not primarily admissible; but when admitted in rebuttal of the evidence of the opposite party, and the jury are specially instructed as to the purpose for which it has been admitted, such action is not ground for reversal. *International & G. N. Ry. Co. v. Hall*, 1 C. A. 221, 21 S. W. 1024.

The principle that subsequent repairs at the place of an accident are not evidence of negligence at the time thereof does not apply to the removal of a car after an accident alleged to be due to leaving it standing improperly. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

In a suit for the overflow of land caused by the obstruction of a ditch, evidence that on the removal of the obstruction the water receded was not inadmissible as proof of prior negligence by subsequent repairs. *Texas & N. O. R. Co. v. Anderson* (Civ. App.) 61 S. W. 424.

Where defendant railroad company introduced evidence to show that a track obstruction by which an employe was injured was a necessary structure, cross-examination was admissible as to whether the structure was altered after the accident. *Gulf, C. & S. F. Ry. Co. v. Darby*, 28 C. A. 413, 67 S. W. 446.

In an action by a servant for injuries due to the defective rigging of a derrick, evidence that defendant, shortly after the accident, spoke of the improper rigging of the derrick and directed that it be changed, held admissible. *Young v. Hahn* (Civ. App.) 69 S. W. 203.

In an action for damages caused by the construction of a railroad, an offer by the railroad company to grade down the street in front of the property, made some time after the action was instituted, was not admissible. *Pochila v. Calvert, W. & B. V. Ry. Co.*, 31 C. A. 398, 72 S. W. 255.

In an action against a railroad for the destruction of plaintiff's crop by waters flowing onto his lands through a ditch constructed by defendant along the line of its road, evidence of the erection of a dam by defendant after the destruction of the crop held admissible. *Chicago, R. I. & G. Ry. Co. v. Longbottom* (Civ. App.) 80 S. W. 542.

In an action for injuries to a brakeman by derailment at a derailing switch, evidence that after the accident defendant cleared the ground of weeds and grass at that point held inadmissible. *St. Louis Southwestern Ry. Co. of Texas v. Arnold*, 39 C. A. 161, 87 S. W. 173.

In an action for injuries to a passenger in a collision between the car and a train at a crossing, proof that after the accident the street railway company adopted a certain rule held inadmissible. *St. Louis, S. F. & T. Ry. Co. v. Andrews*, 44 C. A. 426, 99 S. W. 871.

In trespass to try title, certain evidence held admissible as an admission by a predecessor in title. *Chew v. Jackson*, 45 C. A. 656, 102 S. W. 427.

Where defendants inherited from their mother a tract which she received from plaintiff in consideration of the transfer of a land certificate, and sold it with knowledge of that fact, they cannot recover the land located thereunder by assailing her right to transfer it, without offering to return the land received by her therefor or its value. *Vann v. Denson*, 56 C. A. 220, 120 S. W. 1020.

An engineer, suing for injuries in a rear-end collision, held entitled to plead a habitual disregard of a rule regulating the operation of trains, with the knowledge of the railroad. *International & G. N. R. Co. v. Brice* (Civ. App.) 126 S. W. 613.

In an employe's action for personal injuries by falling into machinery, evidence held inadmissible that plaintiff's superintendent directed a platform to be built after plaintiff's injuries, in order to prevent others from falling where he fell. *Dallas Oil & Refining Co. v. Carter* (Civ. App.) 134 S. W. 418.

Evidence that after the accident defect in an anvil was remedied was incompetent to show that it could have been remedied, especially where the evidence was indefinite as to what was done and its effect. *Kansas City, M. & O. Ry. Co. of Texas v. Meakin* (Civ. App.) 146 S. W. 1057.

29. — Suppressing testimony.—In an action for personal injury to a servant, that defendant failed to have present at the trial witnesses who were present at the accident can be inquired into as a circumstance tending to show that defendant was negligent. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 101 S. W. 453.

30. — Compromise or settlement.—Proof of settlements with other persons injured in same collision is inadmissible. *Missouri, K. & T. Ry. Co. v. Vance* (Civ. App.) 41 S. W. 167.

Evidence of settlement by defendant with another for injury received at the same time plaintiff was injured held error. *Missouri, K. & T. Ry. Co. v. Keaveney* (Civ. App.) 80 S. W. 387.

In an action for injuries received through being thrown from defendant's automobile, certain evidence held inadmissible as a confession of negligence on defendant's part. *Routledge v. Rambler Automobile Co.* (Civ. App.) 95 S. W. 749.

In an action against a railroad company and a traction company for injuries to a passenger of the latter in a collision, evidence of settlements made with other passengers of the traction company held only admissible as affecting the credibility of its witnesses. *St. Louis, S. F. & T. Ry. Co. v. Knowles*, 44 C. A. 172, 99 S. W. 867.

In an action for personal injury to a servant, it was admissible to show that a witness was injured at the same time plaintiff was, but not that defendant had settled for his injury. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 101 S. W. 453.

Evidence, in an action by a railroad employe for injuries of the amount for which he had settled a similar claim against another railroad company, held inadmissible. *Houston & T. C. R. Co. v. Johnson* (Civ. App.) 113 S. W. 1150.

Policy of railroad company of settling all fire claims held not to render inadmissible proof of such a settlement, in an action by an insurer for a fire loss paid. *Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng.* (Civ. App.) 137 S. W. 401.

In an action for injuries to a servant, defendant may not show a settlement, the result of a compromise by plaintiff with an insurance company on an accident policy. *San Antonio & A. P. Ry. Co. v. Tucker* (Civ. App.) 157 S. W. 175.

31. Acquiescence or silence.—In an action to recover land claimed by defendant under a parol partition, declarations of plaintiff, during a conversation at which all the parties were present, held admissible. *Long v. Long*, 30 C. A. 363, 70 S. W. 587.

In an action against the members of a banking firm as partners, certain evidence held admissible on the issue of partnership. *Hoskins v. Velasco Nat. Bank*, 48 C. A. 246, 107 S. W. 598.

Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to a voluntary demeanor or conduct of the party. *Bass v. Tolbert*, 51 C. A. 437, 112 S. W. 1077.

Where, in an action to recover land, defendant admitted the execution of a written statement reciting that plaintiff was entitled to an interest in the land, the fact that plaintiff, when employing an attorney to write a deed to the interest claimed, said nothing about his having such written statement was immaterial. *Childress v. Tate* (Civ. App.) 148 S. W. 843.

32. — Failure to deny or object to oral statements in general.—In an action against a railroad for injuries to minor from being struck by railroad train, held proper to permit witness to testify as to what a boy had said to the minor as to how the accident occurred, to which the latter assented. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

In an action for breach of a contract to deliver cattle, certain admissions and declarations held admissible. *McKay v. Elder* (Civ. App.) 92 S. W. 268.

Mere silence of a party, when facts are asserted in his presence, does not authorize a presumption of acquiescence, unless the conversation is addressed to him. *Bass v. Tolbert*, 51 C. A. 437, 112 S. W. 1077.

Statements made in the presence of a party, without contradiction by him, held not to be construed as an admission by him of a fact referred to. *Hansen v. Williams* (Civ. App.) 113 S. W. 312.

33. — Necessity that oral statement be heard and understood.—The failure of a party to deny alleged statements is not competent, unless it appears that he heard the statements and understood their meaning. *Cabiness v. Holland* (Civ. App.) 30 S. W. 63.

II. By Parties or Others Interested in Event

34. Parties of record.—The confessions of a party, when not sustained by other evidence, are not admissible. *Sheffield v. Sheffield*, 3 T. 79.

An admission of plaintiff tending to show payment is admissible. *Wells v. Fairbank*, 5 T. 582.

The admissions of a garnishee are admissible in evidence to contradict his answer. *Watson v. Montgomery*, 4 App. C. C. § 74, 16 S. W. 546.

Admissions of party are evidence against him. *Rodriguez v. Espinosa* (Civ. App.) 25 S. W. 669; *Keesey v. Old*, 82 T. 22, 17 S. W. 928.

Statements of some of the heirs that a former partition embraced the land in suit held admissible against them. *Shelburn v. McCrocklin* (Civ. App.) 42 S. W. 329.

Certain evidence held admissible to show that defendant had made some admissions as to liability for commissions to plaintiff. *Fant v. Andrews* (Civ. App.) 46 S. W. 909.

Action held on an open account, so that evidence of plaintiff's declaration that he did not expect anything was admissible. *Schutze v. Von Boeckmann*, 22 C. A. 112, 53 S. W. 836.

In an action on a life insurance policy, written declaration of insured that the policy had not been delivered and that he had not paid the premium, and desired it canceled, was admissible. *Atkins v. New York Life Ins. Co.* (Civ. App.) 62 S. W. 563.

On an issue as to the terms of a cropping contract, a statement by plaintiff to defendant after receiving a draft of the contract held admissible as an admission against interest. *Morgan v. Tims*, 44 C. A. 308, 97 S. W. 832.

Where plaintiff claimed the proceeds of a beneficiary certificate as insured's affianced wife, her declaration that the engagement had been broken was admissible against her. *Grand Lodge Colored Knights of Pythias v. Mackey* (Civ. App.) 104 S. W. 907.

In an action to foreclose a lien given by a married woman on her homestead situated on her separate property, declarations of defendant tending to show abandonment by her husband held admissible on that issue. *Mabry v. Citizens' Lumber Co.*, 47 C. A. 443, 105 S. W. 1156.

Where defendants claim title to land by adverse possession, evidence as to statements made by one of them after they had held possession for sufficient time to complete the bar of the statute was admissible, as tending to show the real nature of their possession. *Whittaker v. Thayer* (Civ. App.) 123 S. W. 1137.

Where a person was a party defendant and also a witness, any statements made previous to the trial which tended to show any of the material facts upon which the plaintiff relied for a recovery, were admissible against him as substantive evidence. *Texarkana Gas & Electric Co. v. Lanier* (Civ. App.) 126 S. W. 67.

In trespass to try title evidence of declarations by plaintiff as to his lack of interest in the land held admissible. *Bender v. Brooks* (Civ. App.) 130 S. W. 653.

The testimony of the attorney for plaintiff suing on an open account as to admissions by defendant of the indebtedness sued on is admissible. *Graves v. Smith* (Civ. App.) 140 S. W. 489.

An admission by plaintiff that he had obtained other insurance contrary to a provision in the policy sued on was competent as original evidence. *Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown* (Civ. App.) 151 S. W. 899.

In an action against a partner for goods sold to the firm, evidence that defendant told plaintiff he was connected with the firm as a partner and obtained credit for the firm was admissible. *Brown v. Brown* (Civ. App.) 155 S. W. 551.

Declarations of defendant to a third person, that the debt would mature in four months after it was incurred, held admissible to support plaintiff's allegations as to the maturity of the debt. *Whitten v. Whitten* (Civ. App.) 157 S. W. 277.

35. — **Nominal and unnecessary parties.**—A wife held not bound by declarations of husband, he being only nominal party to suit. *Thompson v. Johnson* (Civ. App.) 56 S. W. 591.

Where the sole controversy is between plaintiff, as assignee of a contract, and defendant, evidence of admissions made by the assignor should be excluded, though he is a mere formal party to the action. *Hall v. Clountz*, 26 C. A. 348, 63 S. W. 941.

36. **Interest in suit of persons not parties.**—On the question whether A. was the real purchaser of property, or whether B. was the purchaser, and it was taken in A.'s name to protect it from B.'s creditors, statements by B. concerning the purpose of an attempted purchase by him, though made when A. was not present, held admissible under instructions of court relating thereto. *Jones v. Meyer Bros. Drug Co.*, 25 C. A. 234, 61 S. W. 553.

37. **Joint interest.**—In an action to set aside a will for undue influence, evidence of declarations by one legatee, since deceased, is not admissible to affect the interest of the other legatees, where no collusion is shown to have existed. *Helsley v. Moss*, 52 C. A. 57, 113 S. W. 599.

III. By Grantors, Former Owners, or Privies.

38. **Privies and former owners in general.**—The rule against evidence of declarations of a vendor to defeat the vendee's title, applies to other transactions as well as sales, and the declarations of a lender, made after the loan and without the presence or knowledge of the borrower, cannot be introduced to prove that the loan was simulated. *Hinson v. Walker*, 65 T. 103.

Certain declarations of one under whom defendants claimed title by prescription held inadmissible. *Texas & N. O. Ry. Co. v. A. G. & J. C. Broom*, 53 C. A. 78, 114 S. W. 655.

Declarations of one under whom defendants claimed by prescription as to the extent of his claim were admissible, though he was still living. *Id.*

39. **Grantors, vendors or mortgagors of real property.**—A grantor may testify, as against his grantee, that he had actual notice of an adverse title to part of the land at the time he purchased. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

In an action to set aside an alleged fraudulent conveyance of certain land by a husband to his wife, reports made by him to certain commercial agencies, of which the wife had no knowledge, were inadmissible against her. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

In trespass to try title, the exclusion of evidence that plaintiff's grantor attempted to get a third person to execute a deed of the land to him which she refused held not error. *Robertson v. Hefley*, 55 C. A. 368, 118 S. W. 1159.

Admissibility of declarations by a grantor stated. *Rankin v. Rankin* (Civ. App.) 134 S. W. 392.

Where a husband conveyed land to his wife, proof that it was assessed in his name, and that he claimed it, was inadmissible after his death to affect the wife's title and establish a trust. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

Declarations by a grantor before or after the execution of a deed are not competent to prove fraud and undue influence. *Rankin v. Rankin* (Civ. App.) 151 S. W. 527.

In trespass to try title, testimony that a grantor of the land was directed by plaintiff's grantor, who paid the purchase price, to make another through whom defendant claimed, the grantee, and that such grantee would afterwards convey the land to the purchaser, held admissible, where it appeared that the grantee was present and agreed to the arrangement. *Mortimer v. Jackson* (Civ. App.) 155 S. W. 341.

Testimony of statements by defendants' grantor that he had no title to the land in question and was going to quit and abandon his claim is admissible against defendants, being admissions against the grantor's interest. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

40. — **Before conveyance or transfer of possession.**—In 1868 S., an administrator of an estate, sold a tract of land to R. The sale was approved and conveyance duly made. In 1869 S. purchased one-half of the land from R., and formed a partnership with him in farming. At the close of the year they disagreed, and S. conveyed to R. his interest in the land. In 1876 certain creditors of the estate, whose claim had been allowed, brought suit against R. to set aside the sale on various grounds, one of which was that there was collusion between R. and S., who was interested in the purchase, and in support of the last ground plaintiffs offered evidence of the statements of S. during 1869, and while in possession of the land, to the effect that he was equally interested with R. in the land, etc. These statements were not made in the presence of R., and were not admissible against him. *Johnson v. Richardson*, 52 T. 481.

The declarations of a person through whom parties claim title to land, if made while the title was in him, are admissible as evidence against such parties to show the extent of his title and the character of his holding. *Hancock v. Tram Lumber Co.*, 65 T. 225.

In an action by a receiver of a bank to foreclose a mortgage to secure a debt to the bank, the declarations of the mortgagor, after the execution of the notes secured, in the presence of the agent of the receiver, held admissible. *Watts v. Dubois* (Civ. App.) 66 S. W. 698.

41. — **After conveyance or transfer of title in general.**—A declaration or admission of a vendor of land made after he has parted with his title and possession is hearsay, and is not admissible to disparage or impeach the title of his vendee. *Thompson v. Her-ring*, 27 T. 282.

Declarations of a vendor, made after his conveyance of title, are not admissible in disparagement of the title conveyed. *Smith v. McElyea*, 68 T. 70, 3 S. W. 258.

Declarations of a vendor, made after sale without the presence or knowledge of the purchaser, are not admissible to defeat the purchaser's title. *Smith v. James* (Civ. App.) 42 S. W. 792.

Admissions by a grantor that he intended by his deed to convey certain lands to plaintiff, made after a later sale of all his lands to defendant, are insufficient to show mistake in deed. *Hatcher v. Stipe* (Civ. App.) 45 S. W. 329.

Declarations of vendor as to title made after sale held inadmissible against vendee. *Sanger v. Jesse French Plano & Organ Co.*, 21 C. A. 523, 52 S. W. 621.

In an action to recover a piano from a person purchasing from a conditional vendee, notes given plaintiff by such conditional vendee are inadmissible. *Id.*

In a suit to try title, where both parties claimed under a conveyance by an assignee in bankruptcy, held, that a report filed by the assignee was not admissible. *Beall v. Chatham*, 100 T. 371, 99 S. W. 1116.

The recital of a consideration in a subsequent deed by grantor held incompetent to prove the fact of consideration against prior grantee. *Parks v. Worthington*, 101 T. 505, 109 S. W. 909.

Evidence that defendant's grantor in possession after conveyance had surrendered possession to plaintiff held admissible in trespass to try title where defendants relied on limitations. *Pardue v. Whitfield*, 53 C. A. 63, 115 S. W. 306.

On the issue as to the execution of a lost deed, testimony of a witness as to statements made to him by the grantor in such deed is admissible. *Freeman v. Wm. M. Rice Institute* (Civ. App.) 128 S. W. 629.

42. — **Showing nature of conveyance.**—A grantor in a deed cannot give character to his act by declarations made a long time thereafter. *Wallace v. Berry*, 83 T. 328, 18 S. W. 595.

The contemporaneous or subsequent declarations of a party tending to show his purpose in having a deed made to a particular person are admissible against him or any one claiming under him. *Branch v. Makeig*, 28 S. W. 1050, 9 C. A. 399; *Hall v. Hall*, 52 T. 294, 36 Am. Rep. 725; *Haley v. Johnson* (Civ. App.) 28 S. W. 382; *Railway Co. v. Duty* (Civ. App.) 28 S. W. 463.

Declarations of stockholder that conveyance to association was for particular purpose only is inadmissible after he has parted with interest in association. *Long v. Moore*, 19 C. A. 363, 48 S. W. 43.

Evidence of statements, made by a grantor after the execution of absolute deeds, as to the purpose of the deeds, held inadmissible to affect the interests of the grantees. *McKnight v. Reed*, 30 C. A. 204, 71 S. W. 318.

That a grantor subsequent to execution and delivery to a third person in escrow for delivery to the grantee after the grantor's death listed the property for sale could not be proved after the grantor's death as against grantee. *Henry v. Phillips*, 105 T. 459, 151 S. W. 533.

43. — **Showing fraud.**—The rendering for taxation by a husband in his own name of land which he had conveyed to his wife is not evidence against his wife that the conveyance was in trust for his benefit. *O'Neal v. Clymer* (Civ. App.) 61 S. W. 545.

Declaration of grantor that conveyance was fraudulent held admissible, where it was part of a conversation drawn out by grantee claiming title. *Moulton v. Sturgis Nat. Bank* (Civ. App.) 65 S. W. 1114.

44. — After conveyance but before transfer of possession.—Declarations of judgment debtor as to ownership of land after conveyance held inadmissible in a contest between his grantee and judgment creditor for crops thereon. *Stephens v. Johnson* (Civ. App.) 45 S. W. 328.

Declaration of grantor in possession of real estate that conveyance thereof was simulated is admissible against grantee. *Cooper v. Friedman*, 23 C. A. 585, 57 S. W. 581.

45. Sellers or mortgagors of chattels.—The declarations of the grantor of a trust deed in disparagement of the title, not made in the presence of the trustee, are inadmissible in an action against the trustee and the beneficiaries. *Boltz v. Engelke* (Civ. App.) 63 S. W. 899.

A declaration made by a mortgagor of certain cattle to a witness, in the absence of assignees of a mortgage thereon, with reference to the cattle included therein, held inadmissible against such assignees. *Scott v. Llano County Bank*, 99 T. 221, 89 S. W. 749.

In an action against a surety on a debt secured by a mortgage on cattle, a statement made by the mortgagor to one of the assignees of the mortgage at time of a sale of the cattle held admissible. *Id.*

46. — Before transfer or delivery of possession.—The acts and declarations of an insolvent debtor, made before the transfer of his property to the parties claiming in an action for the trial of the right of property, though not in their presence, are admissible to show that the purpose of the sale was to defraud creditors. They would not of course affect the vendees unless they were chargeable with notice of the fraud, but it is not necessary that they should be present when the fraudulent design was formed or expressed by the vendor in order to bring such notice home to them. If brought to their knowledge, either actually or constructively, before their purchase, it is sufficient to vitiate the sale. *McKinnon v. Reliance Lumber Co.*, 63 T. 30.

Where plaintiff had attached property sold by defendant, and in a third person's possession, statements made by defendant before the sale held admissible on the issue of fraudulent intent of defendant. *D'Arrigo v. Texas Produce Co.*, 18 C. A. 41, 44 S. W. 531.

47. — After transfer or delivery of possession.—The declarations of the vendor made after the sale, and without the presence or knowledge of the vendee, cannot be introduced to defeat the vendee's title to the property conveyed. *Grooms v. Rust*, 27 T. 231; *Carlton v. Baldwin*, 27 T. 572; *Thompson v. Herring*, 27 T. 282; *Hinson v. Walker*, 65 T. 103; *Garrahy v. Green*, 32 T. 203; *Walker v. Cole*, 24 S. W. 76, 5 C. A. 179; *Harrison v. Hawley*, 26 S. W. 765, 7 C. A. 308; *Smith v. Dunman*, 29 S. W. 432, 9 C. A. 319; *Hilburn v. Harrell* (Civ. App.) 29 S. W. 925.

In a suit involving the question of fraud in the sale of goods as between the vendee and third parties, the declarations of the vendor, made after their sale and delivery, and when the vendee was not present, are not admissible in evidence as to the question of fraud. *Schmick v. Noel*, 64 T. 406.

The declarations of the grantor after sale are not admissible to impeach the title of the grantee; but the exception to the rule is well established that such declarations are admissible when a prima facie case of combination or conspiracy has been made by the evidence. *Hamburg v. Wood*, 66 T. 168, 18 S. W. 623.

The main issue in the case being fraud vel non in the sale of goods from S. to his brother before the levy of a writ of attachment, held, that the court erred in refusing to permit appellants to prove on cross-examination certain declarations made by one of the parties to the sale, in relation to his brother's connection with the goods, tending to prove that the latter's claim to the goods was fraudulent, even though these declarations were made subsequent to the pretended sale. The burden of proving the fraud rested upon appellants, and they were relying upon circumstantial evidence to prove it. In such cases great latitude is allowed in the admission of evidence, and any fact which affords a fair presumption or inference as to the real object and intention of the parties may be submitted to the jury. *Mayo v. Savoni*, 1 App. C. C. § 217. Citing *Wright v. Linn*, 16 T. 34; *Garahy v. Bayley*, 25 T. Sup. 294.

In a suit involving the priority of liens claimed by the defendants, the admission of one as to a question of indebtedness between themselves was competent, but could not affect the claim of the plaintiff. *Overstreet v. Manning*, 67 T. 657, 4 S. W. 248.

The declarations of a vendor made after the sale by him are not admissible to affect the title to the property sold, in a controversy between third parties. *Boaz v. Schneider*, 69 T. 123, 6 S. W. 402; *Copp v. Swift* (Civ. App.) 26 S. W. 438.

Testimony of a seller held admissible to show that the sale was fraudulent and the buyer's title bad. *Schmitt v. Jacques*, 26 C. A. 125, 62 S. W. 956.

Declarations of a seller, made after the sale, not in the presence of or known to the buyer, held inadmissible to defeat the buyer's title. *Bruce v. Bruce* (Civ. App.) 89 S. W. 435.

The declarations of an assignor of property, subsequent to the assignment, that tend to defeat the assignment, are not admissible in evidence, though the assignor has since died. *Crawford v. Hord*, 40 C. A. 352, 89 S. W. 1097.

48. — After parting with title but before change of possession.—In an action to set aside an alleged fraudulent conveyance from a bankrupt to his wife, the bankruptcy schedules were inadmissible against the wife for any purpose. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

49. Assignors for benefit of creditors.—In May, 1854, S. made an assignment for the benefit of certain creditors. Afterwards an execution on a judgment against S. was levied on the property in possession of the assignee, who applied for an injunction to restrain sale. In support of an allegation by the creditor that the assignment was fraudulent, he offered in evidence a letter written by S. some time after the assignment, disclosing the fact that he had reserved a certain amount in money and notes from the assignment. Held, that the letter was inadmissible. *Carlton v. Baldwin*, 27 T. 572; *Fox & Bro. v. Willis*, 60 T. 373.

50. Donors.—In 1851 A. by deed of gift conveyed to B. certain personal property and delivered possession of the same. A declaration made by A. in 1855 was not admissible in evidence for the purpose of engrafting a trust on the deed. *Grooms v. Rust*, 27 T. 231.

On the 14th of July, 1868, R. conveyed to his wife certain property of which her ownership had ever since been recognized. On the 6th of July, 1874, a writ of attachment sued out against the husband on a debt created October 3, 1872, was levied on the property. The wife claimed the property, and on the trial of the right of property the sheriff testified that R. pointed out the property to him; that he declared the same to be his, but that he had put the property in his wife's name to avoid just such trouble and cases as this. Held, that the evidence, although admitted without objection, was incompetent to impeach the title of the wife to the property. *De Garca v. Galvan*, 55 T. 53.

A husband's declarations in derogation of his wife's title to land by parol gift are inadmissible when made after her rights had accrued. *La Master v. Dickson*, 17 C. A. 473, 43 S. W. 911.

51. Assignors of rights in action in general.—The declarations of an assignor of a claim, made after its transfer to another, cannot be used in evidence against the assignee to invalidate the contract out of which the claim originated. *reed v. Herring*, 37 T. 160.

52. Former holders of bills or notes.—As against a holder after maturity, the admissions of a payee before indorsement are competent evidence to establish defenses against the holder. *Goodson v. Johnson*, 35 T. 622.

The declarations of the payee of a note made after maturity, and while he owns and holds the same, when made against his interest, are admissible against a subsequent assignee. *Wagoner v. Rupy*, 69 T. 700, 7 S. W. 80.

Letter from payee to maker, written after indorsement of note to third person, held inadmissible against him. *Ricker Nat. Bank v. Brown* (Civ. App.) 43 S. W. 909.

53. Testators and intestates.—The issue being whether a decedent had, in his lifetime, made a gift to the defendant of certain notes for which the suit was brought against him by the defendant's administrator, and the defendant having adduced on the trial evidence sufficient to establish the gift, held, that the declarations of the decedent made subsequently to the alleged gift, and tending to show that a gift was not in fact made, were not admissible in evidence. *Griffin v. Stadler*, 35 T. 695.

The declarations of a vendor, made at the time of sale, that a street abutted on one of the lines of the land sold, are admissible to show a dedication of the ground by the ancestor to public use. *Burnett v. Harrington*, 70 T. 213, 7 S. W. 812.

Declarations of a testator admissible against his legatee in a suit relating to the property devised by the will. *Curtis v. Wilson*, 2 C. A. 646, 21 S. W. 787.

Declarations and pleadings of the ancestor, containing admissions, held admissible against plaintiffs suing as heirs for land. *Warner v. Sapp* (Civ. App.) 97 S. W. 125.

In trespass to try title, in which defendants claimed by adverse possession, testimony of a witness that he had a conversation many years before with defendants' predecessor, in which he made no claim to the land in question, may be rejected by the court, though uncontradicted; the predecessor being dead. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

A declaration by the ancestor against his interest, which would be admissible against him, if living, is admissible against his heirs. *Ruedas v. O'Shea* (Civ. App.) 127 S. W. 891.

In trespass to try title, where plaintiffs claimed as heirs of D., contending that D. and Y., who acquired title to the land, were married, and that the land was community property, testimony of a witness that D., who died some years before the suit was brought, told him that he was not married to Y., but claimed the children, and had offered to marry Y., was admissible as a declaration against interest. *Id.*

IV. By Agents or Other Representatives

54. Authority in general.—Evidence of third person's actions and declarations, unconnected with party except by inference of authority from his relation to such person, is inadmissible. *Houston & T. C. R. Co. v. Wallace*, 21 C. A. 394, 53 S. W. 77.

In action on fire policy, declarations concerning the insurance, made by the woman first sent by plaintiff to obtain it, held admissible. *McCarty v. Hartford Fire Ins. Co.*, 33 C. A. 122, 75 S. W. 934.

In an action for services rendered by plaintiff in purchasing certain property for defendant, certain unauthorized statements held inadmissible against defendant. *St. Louis Southwestern Ry. Co. of Texas v. Irvine* (Civ. App.) 89 S. W. 428.

In an action for damages to personal property wrongfully removed from a leased building, the consent of a third person to the removal held immaterial on the issue of actual damages, in the absence of proof that the third person had authority to give such consent. *Temple v. Duran* (Civ. App.) 121 S. W. 253.

In trespass to try title, evidence of statements by one in possession of the land as to plaintiff's title is inadmissible, where it did not appear that he was plaintiff's agent authorized to make such admissions. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

55. Authority at time of admission.—In an action for breach of a contract of sale, held, that the promises of the agent who negotiated the sale are admissible against his principal. *Gaines & Edmiston v. Perry Bros. & Rice* (Civ. App.) 102 S. W. 755.

56. Interest of party or representative.—In an action against a railroad for injuries to minor from his being struck by a railroad train, held error to admit testimony of a witness as to what the minor's parents had told him, when he told them they should keep the minor from jumping on trains. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

In an action by plaintiff to set aside a judgment, obtained against him during his minority, canceling a deed to him, held error to admit evidence as to certain statements made by the grantor's son. *Johnson v. Johnson*, 38 C. A. 385, 85 S. W. 1023.

57. Agents or employes in general.—The statements and admissions of an agent within the scope of his authority are binding on his principal. *M. P. Ry. Co. v. Rountree*, 2 App. C. C. § 389.

The admissions and declarations (*Aultman v. York*, 71 T. 261, 9 S. W. 127) of an agent within the line of his authority (*Labbe v. Corbett*, 69 T. 503, 6 S. W. 808), and as to current transactions, are competent evidence against his principal. *Railway Co. v.*

Gernan, 84 T. 141, 19 S. W. 461; *Western Union Beef Co. v. Kirchevalle* [Civ. App.] 26 S. W. 147; *Railway Co. v. Ragsdale*, 67 T. 24, 2 S. W. 515; *Irvine v. Grady*, 85 T. 120, 19 S. W. 1028).

An admission of an agent as to matters not within his line of duty not admissible in evidence. *Telegraph Co. v. Bennett*, 21 S. W. 699, 1 C. A. 558; *Railway Co. v. Bryan* (Civ. App.) 28 S. W. 98; *Land & Imp. Co. v. Caughlin*, 9 C. A. 340, 29 S. W. 185.

Declarations of an agent in the discharge of his duties are admissible against the principal. *W. U. Beef Co. v. Kirchevalle* (Civ. App.) 26 S. W. 147; *Railway Co. v. Gernan*, 84 T. 141, 19 S. W. 461.

Evidence that a certain person claimed to be defendant's agent, and acted as such, is admissible after the fact of agency has been shown by other evidence. *Loeb v. Crow*, 15 C. A. 537, 40 S. W. 506.

In an action for goods shipped to defendant to be used in constructing his house, evidence that the contractor took the goods from the depot is admissible. *Watson v. Winston* (Civ. App.) 43 S. W. 852.

Where a deed conveys an absolute title, statements by grantee's agent that such property is yet grantor's is admissible in evidence. *Kirby v. National Loan & Investment Co.*, 22 C. A. 257, 54 S. W. 1081.

In action for purchase price of engine, testimony that agent, on making test, stated that it would not be a fair test, held admissible. *Schuwirth v. Thumma* (Civ. App.) 66 S. W. 691.

In an action against a hotel proprietor for appropriating money left by a lodger in his room, evidence as to what defendant's agent told plaintiff about securing a room was admissible. *Salvini v. Legumazabel* (Civ. App.) 68 S. W. 183.

Where a deed was executed by one purporting to act as agent for the owners, the jury, in determining the authority of such agent and the ratification of his acts by such owners, could consider the recitals in such deed, and it would be improper to charge that the deed should have any particular effect. *Kirkpatrick v. Tarlton*, 29 C. A. 276, 69 S. W. 179.

In an action for loss of horses driven from land leased to plaintiff, a statement of defendant's ranch boss held admissible on the issue of defendant's abandonment of his rights as assignee under a former lease. *Waggoner v. Snody*, 36 C. A. 514, 82 S. W. 355.

Admissions and statements of agent do not bind the principal as to third persons until agency is shown. *Higley v. Dennis*, 40 C. A. 133, 88 S. W. 400.

Where a written instrument executed by an agent contains an expression that it is subject to the approval of the company and contains no recital, showing a waiver of that requirement testimony as to declarations of the agent that the instrument was a final and binding contract with the company and did not have to be approved by it is inadmissible. *Waco Mill & Elevator Co. v. Allis-Chalmers Co.*, 49 C. A. 426, 109 S. W. 224.

Statements of the agent, made at the time of the transaction, or as soon thereafter as to come within the rule of the *res gestæ*, are admissible. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

Where there was other evidence tending to show that the person who induced plaintiff to enter defendant's employment was the latter's agent, plaintiff could testify to statements by such person that he was defendant's agent. *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 C. A. 110, 116 S. W. 93.

Expressions made by an agent indicating malice, in the absence of the principal, are inadmissible to show motive of the principal. *Little v. Rich*, 55 C. A. 326, 118 S. W. 1077.

A declaration of an agent held admissible against the principal. *El Paso & S. W. R. Co. v. Elchel & Weikel* (Civ. App.) 130 S. W. 922.

The receiver of a railroad held not estopped to deny his liability for ties, on the ground that his agent had promised to pay for them. *Freeman v. Barry* (Civ. App.) 133 S. W. 748.

Where defendant through his agent purchased an engine from plaintiff's agent, a letter written by the defendant's agent to the agent of the plaintiff held admissible. *Young v. Robinson* (Civ. App.) 135 S. W. 715.

Testimony that broker told witness that defendant had left him to close contract held admissible after evidence of agency. *Gilliland v. Ellison* (Civ. App.) 137 S. W. 168.

Where agency is established, evidence of the acts and declarations of the agent in connection with the subject-matter of the agency is admissible. *Autrey v. Linn* (Civ. App.) 138 S. W. 197.

In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was admissible to disprove an averment in the answer that plaintiff had abandoned his contract. *S. W. Slayden & Co. v. Palmo* (Civ. App.) 151 S. W. 649.

58. — **Statements by subagent or special agent.**—The declarations of a sub-agent appointed by the agent without authority are not binding on the principal. *Goldfrank v. Half* (Civ. App.) 26 S. W. 778.

In an action by a receiver of a bank to foreclose a mortgage to secure a debt to the bank, declarations of a third person, employed by the agent of the receiver to procure the mortgage, to one of the mortgagors, held admissible. *Watts v. Dubois* (Civ. App.) 66 S. W. 698.

A statement of a sub-insurance agent for plaintiff that he would correct the health record of defendant, who had been rejected, after which he should be at liberty to accept the policy, or not, held admissible against plaintiff in a suit on a note for premium on the original policy. *Waggoner v. Burg* (Civ. App.) 147 S. W. 342.

59. — **Scope and extent of agency or employment.**—Where the acts of an agent may be shown to affect his principal, his declarations relating to the act, made while transacting the business, may ordinarily be shown. But the mere fact that an agent was authorized to buy goods for his principal would not authorize the introduction of declarations made by him, unknown to and unauthorized by his principal, to the effect that he, the agent, was the owner of goods then in the store or to be bought. *Hinson v. Walker*, 65 T. 104.

One holding out a person as his agent is bound by his acts within the scope of his apparent authority. *Bank v. Martin*, 70 T. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

See facts showing the connection of an agent with the business of his principal, touching the stock of merchandise seized while in possession of such agent, such as to render the acts and declarations of the agent at and before the levy admissible against his principal in a trial of the right of property in the stock. *Gilmour v. Heinze*, 85 T. 76, 19 S. W. 1075.

Where plaintiff contended that premises held by defendant belonged to a third party a letter to such party from defendant's agent, explaining why he could not pay rent was admissible. *First Nat. Bank v. Bruce* (Civ. App.) 55 S. W. 126.

In an action by the buyer of threshing machinery for breach of warranty, statements of defendant's general agent, while attempting to make the machinery operate properly, held admissible. *Standefer v. Aultman & Taylor Machinery Co.*, 34 C. A. 160, 78 S. W. 552.

The statement of defendant's servant in driving plaintiff's horses from a pasture held not binding on defendant in an action for damages. *Waggoner v. Snody*, 98 T. 512, 85 S. W. 1134.

Declarations and acts of agents having charge of land for the purpose of looking after and renting it held not binding on their principal, so as to defeat his claim of adverse possession. *William Cameron & Co. v. Blackwell* (Civ. App.) 115 S. W. 856.

In an action for the purchase price of a machine, representations of the seller's agent held inadmissible. *Carroll v. Mitchell-Parks Mfg. Co.* (Civ. App.) 128 S. W. 446.

In an action for malicious prosecution, statement by defendant's agent held inadmissible to show motive. *Speer v. Allen* (Civ. App.) 135 S. W. 231.

On an issue as to defendant's employment as plaintiff's gin manager during the off season, evidence of conversations between other employes of plaintiff and defendant's wife held inadmissible. *Guitar v. McGee* (Civ. App.) 139 S. W. 622.

Declarations of seller's agent while repairing machinery sold are binding on the seller and admissible in evidence. *American Laundry Machinery Mfg. Co. v. Belcher* (Civ. App.) 152 S. W. 853.

60. — Admissions before or after transaction or event.—Statements made by one after his agency had ceased, to the prejudice of his former principal, cannot be given in evidence. *Bigham v. Carr*, 21 T. 142.

Statements made by an agent after his agency has ceased are not admissible in evidence except against himself. *Lacoste v. Bexar County*, 28 T. 420.

In an action for injuries sustained by a servant from being struck by a bale of cotton thrown from the building by another servant, held proper to permit plaintiff to testify that defendant's superintendent told him that the servant who threw the bale was a new man, and that he had failed to instruct him as to the proper exercise of his duties. *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847.

In action against carrier for injuries to cattle, affidavit of plaintiff's agent, forwarded to defendant as basis of claim, held admissible against plaintiff as an admission against interest. *Pecos & N. T. Ry. Co. v. Lovelady & Pyron*, 35 C. A. 659, 80 S. W. 867.

In an action for injuries to a passenger, the conductor's statement, made after the injury as to the manner of the injury, held not admissible as an admission. *Galveston Electric Co. v. Dickey* (Civ. App.) 126 S. W. 332.

In an action for damages from fire set by the alleged agents of defendant, evidence of admissions of the agents as to how the fire started, made in the absence of defendant and after the fire, are not admissible where not part of the *res gestæ*. *Ward v. Powell* (Civ. App.) 127 S. W. 851.

In an action for death of plaintiff's wife at a railroad crossing, plaintiff's chauffeur, in giving his testimony at the inquest, was not the plaintiff's agent, and his statements could not be considered as admissions on the part of the plaintiff. *Texas Cent. R. Co. v. Dumas* (Civ. App.) 149 S. W. 543.

Statement of defendant's agent subsequent to plaintiff's injury, and not while the transaction was pending, that plaintiff should not worry about his job, that it was not his fault, and defendant would take care of him was a mere opinion, not admissible against defendant in an action for the injury. *Texas Co. v. Strange* (Civ. App.) 154 S. W. 327.

61. — Showing agency, authority or employment.—As a general rule, the declarations or admissions of one who assumes to be agent of another are not of themselves admissible to prove such agency; when his agency is proved, his representations in relation to acts within the scope of his authority, which are a part of the *res gestæ*, are admissible in evidence against the principal. *Latham v. Pledger*, 11 T. 439; *Wright v. Doherty*, 50 T. 34.

Declarations of agent are inadmissible to prove his agency. *Brady v. Nagle* (Civ. App.) 29 S. W. 943; *McGregor v. Hudson*, 30 S. W. 489; *Bartley v. Rhodes*, 33 S. W. 604; *Dyer v. Winston*, 33 C. A. 412, 77 S. W. 227; *Tabet v. Powell* (Civ. App.) 78 S. W. 997; *Eastland v. Maney*, 36 C. A. 147, 81 S. W. 574.

While as a general rule the declarations or admissions of one who assumes to be an agent for another are not of themselves admissible to prove such agency (*Owen v. N. Y. & T. Land Co.*, 11 C. A. 284, 32 S. W. 189), they are admissible in connection with other facts tending to prove agency, though not of themselves sufficient to establish such agency (*W. & W. Mfg. Co. v. Crossland*, 2 App. C. C. § 80; *F. W. & D. C. R. R. Co. v. Johnson*, 2 App. C. C. § 232; *M. P. Ry. Co. v. Rountree*, 2 App. C. C. § 387).

Evidence that a certain person told plaintiff he was defendant's agent held inadmissible. *Ft. Worth Live-Stock Commission Co. v. Hitson* (Civ. App.) 46 S. W. 915.

The mere statement of a party, placing mortgaged property in the hands of another to be sold, that he did so as an agent of the mortgagees, held insufficient to establish the fact of such agency. *Solinsky v. O'Connor* (Civ. App.) 54 S. W. 935.

The fact of agency cannot be shown by proof of plaintiff's declarations to others in the course of his employment. *Ehrenworth v. Putnam* (Civ. App.) 55 S. W. 190.

A person's direct testimony that he is the agent of another is not objectionable as proving the agency by the declaration of the agent. *American Telegraph & Telephone Co. v. Kersh*, 27 C. A. 127, 66 S. W. 74.

Agency cannot be proved by the acts or declarations of the agent, which are not shown to have been known by the principal. *M. A. Cooper & Co. v. Sawyer*, 31 C. A. 620, 73 S. W. 992.

In an action for damages for breach of warranty in sale of a machine held error to admit declarations of the agent who sold the machine to the effect that he was the state agent for defendant. *Aultman & Taylor Mach. Co. v. Cappleman*, 36 C. A. 523, 81 S. W. 1243.

Agency may not be established by the declarations of an alleged agent. *Higley v. Dennis*, 40 C. A. 133, 88 S. W. 400.

While agency cannot be proved by the declaration of the agent, such declaration held a circumstance, in connection with other facts, to prove agency. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

The acts or statements of an alleged agent are not admissible, in the absence of other evidence to prove the agency. *Madeley v. Kellam* (Civ. App.) 135 S. W. 659.

A letter written by an agent held incompetent to prove the fact of agency. *Young v. Robinson* (Civ. App.) 135 S. W. 715.

The authority in fact exercised by an agent held a matter for consideration in determining the scope of his agency. *Equitable Life Assur. Society of United States v. Ellis* (Civ. App.) 137 S. W. 184.

Declarations and admissions of an agent are not admissible to prove the agency, but are only competent to bind the principal after the agency has been proved. *Gultar v. McGee* (Civ. App.) 139 S. W. 622.

Where the evidence made a prima facie showing of agency, it was not error to admit testimony of agents containing statements as to their agency. *Stringfellow v. Brazelton* (Civ. App.) 142 S. W. 937.

Statements or admissions of an alleged agent held not admissible to establish his authority. *Cannel Coal Co. v. Luna* (Civ. App.) 144 S. W. 721.

The signs and stationery of an alleged agent are not competent to establish agency. *Id.*

Agency cannot be established by the declarations of the agent alone, but they will be considered in connection with other evidence, including proof of like acts ratified by the principal, for the purpose of establishing agency. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

Where alleged agents of railroads were found transacting business where such agents usually are, their statements that they were agents were admissible. *Missouri, K. & T. Ry. Co. v. Brown* (Civ. App.) 155 S. W. 979.

62. Corporate officers, agents and employés.—Admissions of president and general manager of corporation held admissible against it. *Texas Standard Cotton-Oil Co. v. National Cotton-Oil Co.* (Civ. App.) 40 S. W. 159.

Admission of agent of corporation held admissible as part of *res gestæ*. *Cooper Grocer Co. v. Britton* (Civ. App.) 74 S. W. 91.

In an action to recover attached goods, a statement made by plaintiff's credit man to defendant's agent after the attachment held admissible to negative plaintiff's purchase of the goods before the attachment, but inadmissible to sustain the attachment. *Carter-Battle Grocer Co. v. Rushing* (Civ. App.) 85 S. W. 449.

Declarations of the vice president and treasurer of a corporation that he was authorized to sign a note could not be evidence of his authority, unless brought to the notice of and ratified by the corporation. *Dreeben v. First Nat. Bank*, 100 T. 344, 99 S. W. 850.

In an action against a piano company for breaking into plaintiff's home and removing a piano, evidence that defendant's general manager phoned the local agent, stating that a music dealer of plaintiff's town advised the company to look after their piano in the hands of plaintiff, was admissible against the company. *Jesse French Piano & Organ Co. v. Phelps*, 47 C. A. 385, 105 S. W. 225.

In an action to recover the value of ore shipped by plaintiff to defendant and converted by the latter, testimony as to statements made by defendant's employés as to the manner of disposal of the ore held admissible. *Consolidated Kansas City Smelting & Refining Co. v. Gonzales*, 50 C. A. 79, 109 S. W. 946.

In an action against the drawee for the nonpayment of a draft, a statement of an agent of the holder who presented it indorsed by defendant's cashier, was admissible as an admission by defendant. *Milmo Nat. Bank v. Cobbs*, 53 C. A. 1, 115 S. W. 345.

In an action against a telephone company for personal injuries, a statement of the operator at the switch board held binding on the company. *Southern Telegraph & Telephone Co. v. Evans*, 54 C. A. 63, 116 S. W. 418.

The testimony of a witness as to statements alleged to have been made to him by the former chief engineer of a party to the action is inadmissible as hearsay. *Erp v. Raywood Canal & Milling Co.* (Civ. App.) 130 S. W. 897.

Declaration of general manager of a corporation, when an account for goods sold it was presented, that it was just and unpaid held not hearsay, though he could have had no personal knowledge of the sale. *Booker-Jones Oil Co. v. National Refining Co.* (Civ. App.) 131 S. W. 623.

The declarations of a general manager of a corporation concerning its business are admissible in evidence. *Booker-Jones Oil Co. v. National Refining Co.* (Civ. App.) 132 S. W. 815.

In an action for injuries in a collision with an automobile, certain evidence held admissible on the issue of the scope of the employment of the driver of the machine. *Reid Auto Co. v. Gorszczya* (Civ. App.) 144 S. W. 688.

A corporation held not bound by the admissions of its directors, officers, or agents outside their authority. *Cannel Coal Co. v. Luna* (Civ. App.) 144 S. W. 721.

63. — Officers, agents and employés of insurance companies.—Admissions by the local agent in an insurance company, made after the death of the insured, not admissible in evidence. *Laughlin v. Insurance Ass'n*, 8 C. A. 448, 28 S. W. 411.

Evidence of a statement of the agent held admissible, as tending to show that a statement of the value of the property made by insured was not fraudulently made. *Fire Ass'n of Philadelphia v. Jones* (Civ. App.) 40 S. W. 44.

Where facts do not show any limitation on an agent's power, his statements at the time an insurance contract was made held admissible. *Home Forum Ben. Order v. Jones*, 20 C. A. 68, 48 S. W. 219.

Subsequent declarations of local insurance agent issuing policy held inadmissible. *Continental Ins. Co. v. Cummings*, 98 T. 115, 81 S. W. 705.

Declarations by local soliciting agent for accident insurance company held not binding on the company. *North American Acc. Ins. Co. v. Frazer (Civ. App.)* 112 S. W. 812.

64. — **Officers, agents or employes of carriers.**—Evidence of acts and statements of agents and officers of a railroad in regard to the ownership, management, control or construction of the road, if such acts were performed or statements made while such officers or agents were engaged for the company, are admissible in evidence. *Missouri Pac. Ry. Co. v. Owens*, 1 App. C. C. § 390.

In a suit against a railroad company to recover exemplary damages for the perpetration of a willful trespass, the declarations of an employe of the defendant, which indicate his own reckless indifference to consequences regarding the trespass, are not admissible. *Railway Co. v. Telegraph Co.*, 69 T. 277, 5 S. W. 517, 5 Am. St. Rep. 45.

The report of a track-walker to the section boss of a railroad is competent evidence against the company. *Railway Co. v. Lester*, 75 T. 56, 12 S. W. 955.

Action for delay in delivering a telegraphic message. Held, that what the messenger-boy said as to his efforts to find plaintiff was admissible against defendant. *Western Union Tel. Co. v. Bennett*, 1 C. A. 558, 21 S. W. 699.

Statements of an agent of a railroad company, while acting as such, showing its determination not to furnish freight cars to a shipper, are admissible against the company. *Houston, E. & W. T. Ry. Co. v. Campbell*, 91 T. 551, 45 S. W. 2, 43 L. R. A. 225.

Where a hog died because of inattention of a carrier's servants, a statement of the carrier's station agent on being warned of the hog's condition held inadmissible. *Pacific Exp. Co. v. Lothrop*, 20 C. A. 339, 49 S. W. 898.

Where an action is brought against a railroad company, which forms a part of a system of railroads, for delay and negligence in executing a contract for the carriage of stock, statements and representations made by a general agent of the system to induce such shipment are admissible. *Missouri, K. & T. Ry. Co. of Texas v. Wells*, 24 C. A. 304, 58 S. W. 842.

Remarks of telegraph company's sending agent, showing that it was understood that a message was an important death message, held admissible in evidence in an action for failure to deliver same. *Western Union Tel. Co. v. Davis*, 24 C. A. 427, 59 S. W. 46.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the declaration of defendant's engineer held admissible to prove the time the train was due at the connecting point. *San Antonio & A. P. Ry. Co. v. Barnett*, 27 C. A. 498, 66 S. W. 474.

Evidence, in action against telegraph company, of declaration of company's agent, held admissible against objection made. *Western Union Tel. Co. v. Cooper*, 29 C. A. 691, 69 S. W. 427.

In an action for failure to deliver a telegram, a statement by defendant's agent to plaintiff that the telegram had been delivered held admissible as relating to an uncompleted pending transaction. *Western Union Tel. Co. v. Barefoot (Civ. App.)* 74 S. W. 560.

In an action for nondelivery of a telegram, a statement of defendant's agent to plaintiff held admissible to rebut the defense of plaintiff's contributory negligence. *Id.*

In an action against a carrier for injuries to beef cattle, declarations of the conductor of the train, constituting admissions of negligence, held inadmissible against the carrier. *St. Louis, I. M. & S. Ry. Co. v. Carlisle*, 34 C. A. 268, 78 S. W. 553.

In an action for fire set out, statements of the conductor and engineer, not a part of the *res gestæ*, held inadmissible. *Houston & T. C. R. Co. v. Laforge (Civ. App.)* 84 S. W. 1072.

In action against railroad for injuries to employe, testimony as to information received by plaintiff from defendant's engine foreman held admissible. *Galveston, H. & S. A. Ry. Co. v. McAdams*, 37 C. A. 575, 84 S. W. 1076.

In an action for injuries to cattle shipped, a statement of defendant's conductor to plaintiff during the transportation held admissible as an admission against interest. *Missouri, K. & T. Ry. Co. of Texas v. Russell*, 40 C. A. 114, 88 S. W. 379.

Declaration of railroad conductor, made after the occurrence, as to the killing of an animal on a railroad track, held inadmissible against the railroad. *International & G. N. R. Co. v. Carr (Civ. App.)* 91 S. W. 858.

Company making payment for construction of railroad on estimates made by engineer held not entitled to assert that estimates included damages for delay caused by failure of seller of materials to deliver them promptly. *Gorham v. Dallas, C. & S. W. Ry. Co.*, 41 C. A. 615, 95 S. W. 551.

In an action against a carrier for damages to cattle in shipment, a conversation with a brakeman is inadmissible, where he had no authority to make the statement referred to. *St. Louis & S. F. R. Co. v. Frazar*, 43 C. A. 585, 97 S. W. 325.

In an action for injury to plaintiff's wagon, caused by a collision with defendant's train, held, that evidence of admissions by defendant's agent was inadmissible. *Galveston, H. & S. A. Ry. Co. v. Levy*, 45 C. A. 373, 100 S. W. 195.

In an action against initial and terminal carriers for delay in the shipment of cattle, the statement of a person at the place of the delivery of the cattle to an intermediate carrier as to the cause of the delay held inadmissible to bind the initial carrier. *Gulf, C. & S. F. Ry. Co. v. Batte (Civ. App.)* 107 S. W. 632.

Declarations of an employe of a railroad company, made in the performance of his duties, held binding on the company. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

In an action against a carrier for damages to cattle, evidence of certain declarations of the carrier's servant held not admissible. *St. Louis, S. F. & T. Ry. Co. v. Adams*, 55 C. A. 245, 118 S. W. 1155.

In an action against a carrier for damages to cattle, evidence of certain declarations of the carrier's agent held admissible. *Id.*

Evidence of the statement of defendant's foreman as to the condition of its track held admissible in an action by a passenger for injuries caused by derailment of his train. *Galveston, H. & S. A. Ry. Co. v. Norton*, 55 C. A. 478, 119 S. W. 702.

In an action against a carrier for delay in transporting live stock, a declaration by the conductor, made during a delay, held admissible against the carrier. *Missouri, K. & T. Ry. Co. of Texas v. Ramsey* (Civ. App.) 128 S. W. 1184.

In a negligence case, the exclusion of certain evidence held erroneous. *Austin Electric Ry. Co. v. Faust* (Civ. App.) 133 S. W. 449.

Declarations held inadmissible, as not part of the *res gestæ*. *St. Louis Southwestern Ry. Co. of Texas v. Gilbert* (Civ. App.) 136 S. W. 836.

A statement by a section boss held inadmissible as against the railroad company. *Ft. Worth & D. C. Ry. Co. v. Dysart* (Civ. App.) 136 S. W. 1117.

A statement in an expense bill made out by an employé of a railroad company showing the cause of injury to cattle held not admissible in an action against the company for such injuries. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 140 S. W. 368.

The admissibility in evidence of statements of an employé depends on the powers delegated to him. *Id.*

Conversations between a carrier's conductor of a cattle train and a shipper at the time the conductor obtained a 36-hour permit held admissible. *Pecos & N. T. Ry. Co. v. Dinwiddle* (Civ. App.) 146 S. W. 280.

An agreement by telegraph company's agent, while in the performance of his duty, to notify the sender of a message whether it was delivered, and his subsequent statement to the sender that it was delivered, held admissible; the rule as to admissions by agents being inapplicable. *Western Union Telegraph Co. v. Erwin* (Civ. App.) 147 S. W. 607.

In an action by a shipper, evidence of a telephone conversation between the shipper and a person in the carrier's office as to the care of the cattle, objected to on the ground that it did not appear he was the company's agent, held properly admitted, the shipper subsequently calling at the defendant's office, finding the person with whom he had talked, and then talking over the phone with an agent of the defendant. *Kansas City, M. & O. Ry. Co. v. West* (Civ. App.) 149 S. W. 206.

Agreements or concessions by plaintiff's superintendents with reference to another part of its right of way than that in controversy, though a part of the same section, were not admissible in evidence, in trespass to try title between it and another railroad company. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.* (Civ. App.) 151 S. W. 850.

Acts and declarations of a railroad station agent, authorized to contract that the railroad would furnish cars at a certain place and date, with reference to his agreement to do so, are admissible when a controversy arises as to what his agreement was. *Pecos & N. T. Ry. Co. v. Bishop* (Civ. App.) 154 S. W. 305.

In an action for damages to a shipment of cattle, testimony of a witness to a conversation between defendant's agent and plaintiff as to plaintiff's order for cars for a certain date and that the agent exhibited to witness the record showing that plaintiff had ordered the cars for that date, held not inadmissible as hearsay. *Id.*

A notation, by an employé of a carrier on the expense bill: "Eight cows more or less stove up. * * * Some few skinned, apparently by rough handling"—is admissible in an action for injury to the live stock shipment; a predicate being laid by a showing of authority in such employé to make the notation. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 154 S. W. 653.

65. Public officers or agents.—In an action against a city and individual members of a water, light, and power commission for personal injuries to an employé, conversation between the chairman of the commission and his son, who was plaintiff's foreman, held admissible. *City of Austin v. Forbis* (Civ. App.) 86 S. W. 29.

In an action for injuries to a servant, declarations made by the chairman of defendant water and light commission held inadmissible without proof that he was a general agent, authorized to adjust claims, etc. *City of Austin v. Forbis*, 99 T. 234, 89 S. W. 405.

In an action for personal injuries, certain statements of an agent made after the accident held admissible. *City of Austin v. Nuchols*, 42 C. A. 5, 94 S. W. 336.

In trespass to try title by a county to recover school lands, declarations of certain officials against the interest of the county held inadmissible. *Lamar County v. Talley* (Civ. App.) 94 S. W. 1069.

Evidence of the declarations of a county official held inadmissible as against the county. *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

66. Attorneys.—In a suit to set aside a mortgage on land on the ground that it was obtained by duress, evidence as to a statement made by a relative of the mortgagor after a conversation with the mortgagee's attorney, tending to show a purpose on the part of defendant to exercise the duress claimed, held admissible. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1105.

Admissions for purpose of the suit by the attorneys of record held conclusive. *Frey v. Myers* (Civ. App.) 113 S. W. 592.

A letter of plaintiff's attorney held admissible to show that plaintiff was not the real owner of property injured by collision with a street car. *Logre v. Galveston Electric Co.* (Civ. App.) 146 S. W. 303.

Where, at the time a letter written to defendant by plaintiff's attorneys stating that plaintiff's damages were \$500, plaintiff had already suffered a considerable part of his injuries, and his attorneys must have known that he was entitled to compensation for future suffering, the letter was material in a subsequent action by plaintiff for \$30,500 for such injuries. *Missouri, K. & T. Ry. Co. of Texas v. Sullivan* (Civ. App.) 157 S. W. 193.

67. Persons referred to for information.—Statements, made by one engaged in the discharge of the duties of a carrier, held admissible in an action against the carrier. *Missouri, K. & T. Ry. Co. of Texas v. Pettit*, 54 C. A. 358, 117 S. W. 894.

68. Husband or wife.—Statements of the husband concerning the wife's separate property, made when she was not present, are not admissible in evidence against her. *McKay v. Treadwell*, 8 T. 176; *Earle v. Thomas*, 14 T. 533; *Smith v. Redden*, 1 U. C. 360.

When the husband in a suit by the wife is charged with having attempted, in fraud of

her rights and without her consent, to dispose of her homestead, and of seeking by its abandonment to withdraw it from the pale of exemption, his declarations, made in the wife's absence, cannot be given in evidence in his behalf or in that of his vendee, who bought with notice of the wife's claim. *Newman v. Farquhar*, 60 T. 640.

The declarations of the husband not made in the presence of the wife cannot affect her separate interests. *Reddin v. Smith*, 65 T. 26.

A husband's declarations in derogation of his wife's title to land by parol gift are inadmissible when made after her rights accrued. *La Master v. Dickson*, 91 T. 593, 46 S. W. 1.

An attempt by defendant's husband to purchase land of plaintiff claimed by defendant by adverse possession held not to affect her claim, as his right to control her property did not give him power to bind her by any admission. *Texas & N. O. R. Co. v. Speights* (Civ. App.) 59 S. W. 572.

Where a wife joined her husband in a sham deed of the homestead to enable him to borrow money on the notes received for the pretended purchase price, and an innocent purchaser of such notes sued to foreclose the vendor's lien securing them, an affidavit, executed by the husband and by the grantee, that the deed was made in good faith, and admissions to that effect by him, are admissible as against her. *Cooper v. Ford*, 29 C. A. 253, 69 S. W. 487.

Declarations of a husband as to the ownership of cattle, claimed by wife as her separate property, made in her absence, were not binding on her. *Word v. Kennon* (Civ. App.) 75 S. W. 365.

A letter written by defendant's wife to plaintiff held admissible to show a ratification of defendant's previously unauthorized signature to a note executed by his son to plaintiff. *Harmon v. Leberman*, 39 C. A. 251, 87 S. W. 203.

Declarations of a husband in his wife's absence in derogation of her ownership of certain land held inadmissible as against her. *Maffi v. Stephens* (Civ. App.) 93 S. W. 158.

Admissibility of one's declarations affecting property held by his wife, stated. *Rankin v. Rankin* (Civ. App.) 134 S. W. 392.

69. **Partners.**—A. and B., partners, brought suit for the use of A. against G. on his promissory note. On the trial the defendant was properly permitted to read in evidence a statement made by B., after the commencement of the suit, to the effect that defendant was entitled to a credit for a certain amount on the note. This case was distinguished from those which hold that the declaration of the former holder of a chose in action shall not be received to impair or impeach the title or impair the interest of his innocent assignee in a suit by the latter. *Nalle v. Gates*, 20 T. 315. An acknowledgment by one partner, after the dissolution of the partnership, of an antecedent indebtedness, is no evidence against his copartners. *Speake v. White*, 14 T. 364; *White v. Tudor*, 24 T. 639, 76 Am. Dec. 126; *Kendall v. Riley*, 45 T. 20.

Evidence of party's admission of partnership held inadmissible in action on note signed by him in which others were sought to be charged as his partners. *Moore v. Williams*, 31 C. A. 287, 72 S. W. 222.

The act or declaration of an alleged partner, not brought home to the one sought to be charged, or ratified by him, held admissible, in connection with competent evidence of the partnership. *Robinson v. First Nat. Bank* (Civ. App.) 79 S. W. 103.

Declarations of an alleged partnership, made in the absence of one sought to be charged as a partner, held inadmissible. *Robinson v. First Nat. Bank*, 98 T. 184, 82 S. W. 505.

Ex parte declarations of one of two persons sued as partners held admissible to show partnership. *Morris v. Moon* (Civ. App.) 120 S. W. 1063.

In an action on an alleged partnership note, where one defendant denied that he was a partner and alleged that the note was for a loan to his codefendant on his personal credit, evidence of a conversation with the codefendant held admissible on the issue whether the money borrowed by the codefendant was his individual transaction or the transaction of the firm. *Miller v. Laughlin* (Civ. App.) 147 S. W. 711.

70. **Principal or surety.**—In a suit on an administrator's bond against himself and sureties, admissions by the administrator after the administration was closed, though evidence against him, are not evidence against the sureties. *Lacoste v. Bexar County*, 28 T. 420.

In a suit upon a written obligation against a principal and his sureties to recover money alleged to be due thereon, it was held that an admission of the amount due, signed by the principal, was competent evidence against the principal and sureties. *Bates v. Evans*, 2 App. C. C. § 212.

Ordinarily declarations of a principal in an official bond, when not made in the course of his official duty, are not admissible in evidence in a suit against the surety. *Screwmen's Ben. Ass'n v. Smith*, 70 T. 168, 7 S. W. 793.

A quarterly report of occupation taxes collected for the state and county, filed with the county clerk, whether signed or not by the collector, is admissible against him and his sureties as admissions made in course of official business. In absence of any statute requiring such reports, quarterly reports of other taxes collected, made by the collector, are evidence against him and his sureties, and, unrebutted, sufficient to establish their liability. *Mast v. Nacogdoches County*, 71 T. 380, 9 S. W. 267.

Declarations of a defendant, made a party only as surety upon the instrument declared on, are not competent against the other defendants, principals in such bond. *Thurman v. Blankenship*, 79 T. 171, 15 S. W. 387.

In a suit against the sureties of a defaulting officer, the reports of the officer are prima facie and not conclusive evidence against his sureties. *Broad v. City of Paris*, 66 T. 119, 18 S. W. 342.

Admissions of defalcation, made by a treasurer after the expiration of his term of office, are admissible against him, but not against the sureties on his bond. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

Certificate of comptroller, showing amount paid to treasurer, admissible in evidence in action on his official bond. *Id.*

In an action against the creditor and one of the principal debtors to recover for the collusive conversion of a surety's collaterals plaintiff should be permitted to testify that

such debtor promised that such collaterals should not be appropriated. *Bruce v. Laing* (Civ. App.) 64 S. W. 1019.

Declarations of the principal that a debt he had incurred was secured by the guaranty held not admissible against the guarantor. *Opet v. Denzer, Goodhart & Schener* (Civ. App.) 93 S. W. 527.

In an action on a liquor dealer's bond for damages through the sale of liquor to plaintiff's husband, a deposition of the principal on the bond, admitting sales to the husband, held not admissible as against the sureties. *Birkman v. Fahrenthold*, 52 C. A. 335, 114 S. W. 428.

Acts of the principal debtor committed after the making of the guaranty are not binding on the guarantor, where not ratified by him. *Ball-Carden Co. v. Humphrey* (Civ. App.) 154 S. W. 595.

71. Trustee or beneficiary.—Statements made by testatrix's husband, before his decease, that testatrix was insane, held to have been properly excluded on a contested probate of the will, which named the husband as executor, where such statements were not made while he was actually clothed with his trust and acting within the scope of his duties. *Lindsey v. White* (Civ. App.) 61 S. W. 438.

72. Insured or beneficiary.—Declarations of assured, in an action on a life insurance policy, to the effect that he had dropped it, offered with reference to its alleged invalidity on account of a failure to pay the first premium in full, held to have been properly excluded. *Metropolitan Life Ins. Co. v. Bradley* (Civ. App.) 79 S. W. 367.

The act of the court in permitting a witness to explain his testimony by the use of a map received in evidence held not erroneous. *Clevenger v. Blount* (Civ. App.) 114 S. W. 868.

73. Conspirators and persons acting together.—Suit was brought by attachment for the recovery of a debt and to set aside fraudulent conveyances of land made by the debtor. All persons participating in the fraud were made parties to the suit. An admission of one of the defendants was admissible in evidence against all, the proof showing that they had been acting in concert, moved by a common design and identified with each other in interest. *Tuttle v. Turner*, 28 T. 759.

Suit was brought by F. C., a married woman, and her husband, J. C., against A. and B., the makers of the note sued on, and D., the payee who had indorsed the note to plaintiff F. C. The defendants, among other defenses, pleaded that plaintiff had accepted a certain sum in full settlement of the matters in controversy. Plaintiff then filed a supplemental petition making her husband a defendant, and alleged that she was forced to sign the compromise by force, threats and fraud used by her husband and defendants, and traversed defendants' answer. On the trial there was evidence tending to prove a conspiracy between the defendants, A., B. and J. C., her husband, and one H., who was not a party to the suit. Plaintiff was then permitted to prove, over the objections of A. and B., that J. C., on several occasions when neither of the other parties were present, threatened to whip his wife unless she signed the compromise. *Brown v. Chenoworth*, 51 T. 469.

The declarations of the grantor after sale are not admissible to impeach the title of the grantee; but the exception to the rule is well established that such declarations are admissible when a prima facie case of combination or conspiracy has been made by the evidence. *Hamburg v. Wood*, 66 T. 168, 18 S. W. 623.

In an action by junior incumbrancers to set aside a sale made by a senior incumbrancer, on the ground that defendants conspired to procure a fraudulent sale, evidence held properly submitted on the issue of fraud, and to show a defendant's interest and motive. *Hughes v. Waples-Platter Grocer Co.*, 25 C. A. 212, 60 S. W. 981.

The evidence sufficiently establishing an alleged fraudulent conspiracy, declarations made in pursuance thereof by one of the parties are not inadmissible as hearsay. *Id.*

In an action for wrongful attachment, the acts and statements of the vendor who sold the goods to defendant held admissible to prove a conspiracy between defendant and such vendor to defraud the vendor's creditors. *Thompson v. Rosenstein* (Civ. App.) 67 S. W. 439.

In an action on a fire policy, defended on the ground that assured had procured the burning of the property, evidence of plaintiff's declarations, etc., corroborating testimony of co-conspirators, held admissible. *Joy v. Liverpool, London & Globe Ins. Co.*, 32 C. A. 433, 74 S. W. 822.

Evidence of declarations of co-conspirator held inadmissible in plaintiff's favor in action of libel. *Cranfill v. Hayden*, 97 T. 544, 80 S. W. 609.

In a suit by a trustee in bankruptcy to recover property alleged to have been conveyed pursuant to a conspiracy to defraud creditors, testimony is admissible that the bankrupt stated to witness that the property was his, and that he placed it in his wife's name to prevent his creditors from subjecting it to the payment of debts. *Shelley v. Nolen*, 38 C. A. 343, 88 S. W. 524.

Evidence of acts or omissions of a co-conspirator held admissible in a proceeding to remove a county judge for official misconduct in conspiring to defeat school land taxes. *Perry v. State*, 44 C. A. 55, 98 S. W. 411.

Where the evidence prima facie established a conspiracy between certain persons, the acts and statements of any of such persons were admissible in evidence. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

In an action for false imprisonment and malicious prosecution, a letter written by a third person inclosing a capias to the sheriff of another county, and asking for plaintiff's arrest, held inadmissible. *Little v. Rich*, 55 C. A. 326, 118 S. W. 1077.

An admission by a clerk of court that he antedated filing of a statement of facts actually filed out of time does not bind appellant nor an attorney charged to have induced such misconduct. *Howard v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 135 S. W. 707.

Evidence of statements of some of the persons assisting officers in taking away goods seized under a void warrant, made while so assisting, held admissible against others who were so assisting. *Cartwright v. Canode* (Civ. App.) 138 S. W. 792.

Declarations of conspirators held admissible against all. *Longworth v. Stevens* (Civ. App.) 145 S. W. 257.

V. Proof and Effect

74. Preliminary evidence.—Proof held insufficient to show that letters received by defendant were written him by plaintiff. *Stevens v. Equitable Mfg. Co.*, 29 C. A. 168, 87 S. W. 1041.

An admission by a party against his interest in reference to any material matter may be proved, without first laying a predicate for its introduction. *Contreras v. San Antonio Traction Co.* (Civ. App.) 83 S. W. 870.

Statements of a witness in a suppressed deposition held not admissible without a certain predicate. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068, 96 S. W. 760.

Evidence held insufficient to warrant a finding that defendant S. heard the statement of B. to plaintiff, and understood and acquiesced therein. *Bass v. Toibert*, 51 C. A. 437, 112 S. W. 1077.

In an injury action, certain evidence held properly excluded as hearsay. *Austin Electric Ry. Co. v. Faust* (Civ. App.) 133 S. W. 449.

75. — Existence and extent of agency or authority.—Evidence of acts and statements of agents and officers of a railroad in regard to the ownership, management, control or construction of the road, if such acts were performed or statements made while such officers or agents were engaged for the company, are admissible in evidence; but before they are admissible it must be proved by other evidence that they were such officers or agents. *Mo. Pac. Ry. Co. v. Owens*, 1 App. C. C. § 390.

The declarations of a cashier of a bank, as to the financial standing of a merchant, are not evidence against the bank, unless it is shown by virtue of his official position or otherwise it was his duty to make such statements. *Goodbar v. Bank*, 78 T. 461, 14 S. W. 851.

In an action against a telephone company for injuries alleged to have been sustained by a fall over a wire negligently left in a street, proof held sufficient to show that the local manager for the town where the accident occurred was clothed with such authority from defendant as rendered admissible a declaration by him acknowledging that it was defendant's wire. *Texas & P. Telephone Co. v. Prince*, 36 C. A. 462, 82 S. W. 327.

In an action against a carrier for loss of goods, admission of certain letters written by its claim agent to plaintiff held not cause for reversal. *St. Louis Southwestern Ry. Co. v. Texas v. McIntyre*, 36 C. A. 399, 82 S. W. 346.

Where there is prima facie evidence of agency, it is not error to admit the declarations and acts of the agent to prove what was done in the scope of the agency. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

Where there is evidence from which the jury may find agency, the declarations of the agent, made during the agency, in regard to the transaction connected therewith, are admissible. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

In an action for breach of a contract to pay for an elevator building, tanks, etc., where a defense was that certain of the tanks did not hold 1,000 bushels of wheat, as contracted for, a letter entirely in typewriting, containing the initials of defendant's assistant bookkeeper, written on defendant's letterhead, received by plaintiff in due course of mail, which letter stated that defendant had put 1,000 bushels of wheat into one of the tanks, and that it had twisted out of shape, was admissible as an admission of defendant that the tanks held 1,000 bushels, as against an objection that authority to write the letter was not shown. *J. T. Stark Grain Co. v. Harry Bros. Co.*, 57 C. A. 529, 122 S. W. 947.

Before a declaration of an agent is admitted in evidence, it must be shown that such a declaration was within the scope of the agent's authority. *Booker-Jones Oil Co. v. National Refining Co.* (Civ. App.) 132 S. W. 815.

76. — Existence of conspiracy or common purpose.—Declarations of an alleged co-conspirator held inadmissible against a conspirator until the conspiracy is proven. *Ft. Worth Live-Stock Commission Co. v. Hitson* (Civ. App.) 46 S. W. 915.

On issue whether conveyance was in fraud of creditors, certain testimony held improperly excluded. *Moore v. Robinson* (Civ. App.) 75 S. W. 890.

On issue of fraudulent conveyance, certain conversation between creditor and grantor held admissible over objection that it was not binding on grantee. *Id.*

To warrant admissions of declarations of the grantor, made after the sale, tending to show it was in fraud of creditors, prima facie case to defraud must first be established. *Id.*

In action on fire policy, proof held to sufficiently establish a conspiracy to defraud the company to warrant the admission in evidence of the acts and declarations of the conspirators. *McCarty v. Hartford Fire Ins. Co.*, 33 C. A. 122, 75 S. W. 934.

In the absence of proof of conspiracy, libelous statements made by the representative of a company other than the defendant held inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Moses* (Civ. App.) 144 S. W. 1037.

77. Explanation or limitation.—Where plaintiff's application for continuance to re-take certain depositions of unwilling witnesses is supported by letters of notary who took depositions, defendant cannot read the application without the exhibits. *Parlin & Orendorff Co. v. Miller*, 25 C. A. 190, 60 S. W. 881.

In a suit to recover damages to property occasioned by the construction of a railroad in front of it, plaintiff could show that valuations placed on the property in the tax lists in evidence were made by the assessor. *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.*, 97 T. 107, 76 S. W. 441.

A party, explaining the circumstances under which he made the statements proved by the adverse party, is not entitled to give the statements of his attorney in relation to his liability. *Bartley v. Comer* (Civ. App.) 89 S. W. 82.

In condemnation proceedings, where an agreed statement as to what an absent witness would testify was admitted in the trial before the commissioners, on the trial before the county court, evidence by plaintiff's attorney that the agreed statement was only meant for use before the commissioners was properly excluded. *Foley v. Houston Belt & Terminal Ry. Co.*, 50 C. A. 218, 108 S. W. 169, 110 S. W. 96.

In trespass to try title, a lease to plaintiff held admissible to disprove her claim of adverse possession, subject to her right to explain why she signed it. *Mitchell v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 130 S. W. 735.

Plaintiff in trespass to try title was not bound to show fraud, accident, or mistake leading her to execute the lease introduced as an admission against her before being allowed to explain it. *Id.*

78. — **Right to show entire statement or conversation.**—The whole of an admission must be taken together. Thus, if one party is permitted to read in evidence the answer of the adverse party filed in another suit, the latter is entitled to read the remainder of the answer relating to the same subject-matter. *Smith v. Chenault*, 48 T. 455.

Permitting counsel for plaintiff in action on fire insurance policy to read from stenographer's report of former trials certain testimony of plaintiff, and ask plaintiff if it was correct, held not reversible error. *Ætna Ins. Co. v. Eastman* (Civ. App.) 80 S. W. 255.

In an action for injuries to a passenger, plaintiff could testify in rebuttal to the details of a conversation between himself and the conductor about which the latter had testified. *St. Louis Southwestern Ry. Co. of Texas v. Frazier* (Civ. App.) 87 S. W. 400.

79. **Pleadings.**—An abandoned answer held open to explanation and contradiction. *Willey Lodge, No. 21, I. O. O. F., v. City of Paris* (Civ. App.) 81 S. W. 99.

Plaintiff has the right to testify that he did not make statements to his attorneys which justified an allegation in his pleading. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 91 S. W. 355.

Where defendant read in evidence a part of an abandoned pleading of plaintiff which unexplained would have been misleading, it was proper to permit plaintiff to introduce the whole of the paragraph. *Id.*

The party against whom a pleading is offered may show that a statement was inadvertently made, or was not authorized, or was made under a mistake of fact. *Wilkins v. Clawson*, 50 C. A. 82, 110 S. W. 103.

Explanation of a pleading by a party against whom offered may weaken the force of the statement therein, but that is a question for the jury. *Id.*

80. **Construction.**—An admission coupled with a denial of harsh treatment of plaintiff by defendants held not an admission of an allegation that they were responsible for the condition of the cell in which plaintiff was confined. *Bishop v. Lucy* (Civ. App.) 51 S. W. 854.

81. **Conclusiveness and effect.**—The reports of a defaulting officer are prima facie but not conclusive evidence against his sureties. *Broad v. City of Paris*, 66 T. 119, 18 S. W. 342; *Barry v. Screwman's Ass'n*, 67 T. 250, 3 S. W. 261.

Admission by the president of a corporation, to whom its property had been conveyed to pay debts, held to warrant a finding that he had sufficient funds to pay plaintiff's claim. *Carter v. Forbes Lithograph Mfg. Co.*, 22 C. A. 549, 56 S. W. 227.

In an action for medical services, a note executed by defendant to the physician for a part of the amount sued for, and letters and telegrams sent by him to the physician, held admissible in the nature of an admission at variance with a defense relied on. *Swift v. Kelly* (Civ. App.) 133 S. W. 901.

82. — **As to particular facts in general.**—That manufacturers of a pear burner changed the kind of material and form of construction of their cylinders after one of them had exploded held insufficient to establish a want of ordinary care in the manufacture of the exploded cylinder. *Talley v. Beever & Hinds*, 33 C. A. 675, 78 S. W. 23.

Evidence of a son's statements held insufficient to establish his authority to act for his mother in employing plaintiff to make a sale or exchange of land. *Stockton v. Crow* (Civ. App.) 132 S. W. 952.

The facts of the case, and not the dying declaration of one caught between cars when going to a depot, held determinative of the question of negligence and contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Pingent* (Civ. App.) 142 S. W. 93.

A recital in a deed is not sufficient to establish the existence of a deed therein referred to as against those not in privity with the parties to the deed. *Whitman v. Aldrich* (Civ. App.) 157 S. W. 464.

83. — **As to indebtedness.**—Evidence of a director of a college corporation held sufficient as admissions in an action against him for tuition to establish the indebtedness sued on. *Roach v. Burgess* (Civ. App.) 62 S. W. 803.

Evidence of a director and member of the executive committee of a college held admissible, in an action against him by its receiver for tuition, to show the passage of a certain resolution as shown by a copy. *Id.*

84. — **As to title or possession.**—In trespass to try title, defendant's admission that plaintiff has such title as the patent on which he relies calls for held not to preclude the defense that no land passed by the patent. *Hackbarth v. Gordon* (Civ. App.) 120 S. W. 591.

Where persons held adverse possession of land for sufficient time to complete the bar of the statute, statements thereafter made by one of them as to his claim to the land would not divest him of title. *Whittaker v. Thayer* (Civ. App.) 123 S. W. 1137.

Where adverse possession had ripened into title, no admission, made thereafter by the party having such title, as to the nature of her present possession, could affect her title. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

85. — **As to agency.**—Declarations of agent of one carrier held not admissible against connecting carriers. *Missouri, K. & T. Ry. Co. of Texas v. Carpenter*, 52 C. A. 585, 114 S. W. 900.

Testimony of an agent not having general powers as to what rights he regarded a contract of his principal gave held not binding on the principal. *J. I. Case Threshing Mach. Co. v. Wright Hardware Co.* (Civ. App.) 130 S. W. 729.

In an action on a note alleged to have been signed by an agent, under authority from his principal, that the principal contradicted himself on cross-examination held not to amount to a conclusive admission that the agent was authorized to sign as principal in the note. *Connor v. Uvalde Nat. Bank* (Civ. App.) 156 S. W. 1092.

86. — **Judicial admissions.**—Where plaintiff introduces defendant's answer in evidence because of certain admissions contained therein, such fact does not entitle defendant to the damages claimed by him in his answer. *Masterson v. F. W. Heitmann & Co.*, 38 C. A. 476, 87 S. W. 227.

Admission of defendant in an action on a contract for the sale of machinery held not to preclude a recovery for plaintiff's failure to ship the machinery within the time contracted for. *Berry Bros. v. Fairbanks, Morse & Co.*, 51 C. A. 558, 112 S. W. 427.

Admission in original answer referring to original petition held not to authorize judgment foreclosing vendor's lien, where original petition was not offered in evidence. *Daniels v. Stewart* (Civ. App.) 132 S. W. 967.

In an action for assault and battery, an instruction on the admissibility and weight to be given to a judgment convicting defendant of the same assault on a plea of guilty before a justice held correct. *Sumner v. Kinney* (Civ. App.) 136 S. W. 1192.

RULE 34. DECLARATIONS ARE GENERALLY INADMISSIBLE, BUT MAY BE SHOWN AS A PART OF THE RES GESTÆ WHERE MADE BY A PARTY OR BY THIRD PERSONS AT THE TIME WHEN AN ACT IS PERFORMED AND AS PART OF THE TRANSACTION

I. Declarations in general

1. Nature and grounds for admission in general.
2. Making of statement fact in issue.
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I. Declarations in General

1. **Nature and grounds for admission in general.**—Evidence is inadmissible as to the declarations of another unless he is shown to be dead, and if the declarant be living he must be produced in court. *Johns v. Northcutt*, 49 T. 444; *Schwarzhoff v. Necker*, 1 U. C. 325; *Downtain v. Connellee*, 21 S. W. 56, 2 C. A. 95.

The declarations of an agent are inadmissible to establish an agency. *Noel v. Denman*, 76 T. 306, 13 S. W. 318.

Declarations of a husband pending negotiations for purchase of land are admissible against those claiming under him to prove his intentions in having the deed made to his wife and make the land her separate property. *Branch v. Makeig*, 28 S. W. 1050, 9 C. A. 399.

Where the issue is one of identity in a contest between parties claiming under different persons of the same name, it is admissible to show the extent to which each has claimed the subject of controversy. *Nix v. Coie* (Civ. App.) 29 S. W. 561, citing *Hickman v. Gillum*, 66 T. 314, 1 S. W. 339; *McCamant v. Roberts*, 80 T. 325, 15 S. W.

580, 1054; *Hill v. Smith*, 6 C. A. 316, 25 S. W. 1079; *Byers v. Wallace*, 28 S. W. 1056, 87 T. 503. See *Paschal v. Evans* (Civ. App.) 30 S. W. 923.

Evidence of declarations held erroneously excluded. *Harvey v. Harvey* (Civ. App.) 40 S. W. 185.

Declarations made by a contractor's superintendent held admissible for the purpose of fixing the time when a delay in completing a building contract took place. *Watson v. Dewitt County*, 19 C. A. 150, 46 S. W. 1061.

In trespass to try title, declarations of a deceased disinterested party, made 59 years before the trial, held admissible. *Lewis v. Bergess*, 22 C. A. 252, 54 S. W. 609.

The declarations of one holding a vendor's lien on land of a decedent held not admissible in an action by another against decedent's executor to enforce a vendor's lien on other lands of the decedent. *McLane v. Mackey* (Civ. App.) 59 S. W. 944.

Evidence of statements made by deceased that he had been told by a person not named that 87° gasoline was safe where it was stored held properly admitted, in an action against the seller to recover for his death from an explosion. *Waters-Pierce Oil Co. v. Davis*, 24 C. A. 508, 60 S. W. 453.

In an action for breach of a contract authorizing plaintiffs to sell defendant's lands, testimony that another person had said to third parties that he was agent of defendant to sell such lands was incompetent. *McLane v. Maurer*, 28 C. A. 76, 66 S. W. 693, 1108.

Evidence of declarations of the husband of testatrix concerning her will is inadmissible on the question of revocation. *McElroy v. Phink*, 97 T. 147, 76 S. W. 753, 77 S. W. 1025.

Declarations and acts of D., Sr., at the time of the purchase of land deeded to D., held admissible on the question whether D., Sr., or D., Jr., was the real grantee. *Matthews v. E. Eppstein & Co.*, 35 C. A. 515, 80 S. W. 882.

In an action on a check, alleged to have been given in part to secure the dismissal of a criminal prosecution, plaintiff held not entitled to testify that he had been advised by his attorney that he could not do anything about settling such prosecution. *McNeese v. Carver*, 40 C. A. 129, 89 S. W. 430.

Conversations between the agents of defendants held not admissible against plaintiff in an action for conversion. *Trammell & Lane v. J. M. Guffey Petroleum Co.*, 42 C. A. 455, 94 S. W. 104.

Where plaintiff and defendant claimed the proceeds of a beneficiary certificate adversely, declarations made by insured to defendant were inadmissible against plaintiff. *Grand Lodge Colored Knights of Pythias v. Mackey* (Civ. App.) 104 S. W. 907.

In an action by heirs to restrain the sale of property of the estate under a trust deed by the executors, on the ground of want of authority, declarations as to what the executors intended to do with the borrowed money were immaterial, where they had authority to borrow it. *Tomlinson v. H. P. Drought & Co.* (Civ. App.) 127 S. W. 262.

2. Making of statement fact in issue.—In an action by an engineer against a railroad company for injuries, evidence of the station agent as to his instructions from the train dispatcher, which instructions he transmitted to plaintiff, was not objectionable as hearsay. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 91 S. W. 355.

In proceedings to restrain defendant from re-engaging in the photograph business, evidence of plaintiff as to a statement made by defendant to plaintiff's partner held not mere hearsay, but admissible for the jury to determine whether the statement induced plaintiff to act. *Parrish v. Adwell* (Civ. App.) 124 S. W. 441.

3. Statements showing physical or mental condition.—Mental capacity of a person to make a will being contested, acts done or declarations made by him before, at the time of or after the making of the will, tending to throw light upon the condition of his mind at that time, are admissible in evidence. *Brown v. Mitchell*, 26 S. W. 1059, 87 T. 140.

Statement by plaintiff to accident insurance company held inadmissible on question of extent of his injuries in action against city therefor. *City of Willis Point v. Williams*, 26 C. A. 194, 63 S. W. 1038.

In an action against a carrier for the death of plaintiff's wife, held that her declarations were admissible against plaintiff to show her physical condition. *Hardin v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 88 S. W. 440.

Declarations by a grantor after making a deed are not admissible to show the grantor's mental condition at the time of the execution of the deed, unless made so near to that time as to justify the inference that such mental condition existed at that time. *Rankin v. Rankin*, 105 T. 451, 151 S. W. 527.

4. Statements showing intent, motive or nature of act.—Where a tract of land was purchased with the separate property of the husband, and the conveyance was taken in the name of the wife, in a contest between the heirs of the deceased wife and the surviving husband the acts and declarations of the husband before the conveyance and having reference to it, and his subsequent acts corresponding thereto, evidencing his intention respecting it, and the subsequent statements of his wife in so far as they conduced to countervail the prima facie inference deducible from the fact of taking the deed in her name, are admissible to show that the purpose of taking the deed in the name of the wife was to make a gift of the property to her sole and separate use. *Smith v. Strahan*, 25 T. 103.

The issue being whether a party had abandoned his homestead, held, that the declarations of a party before, at the time of and after leaving his home may be given in evidence to establish the intent. But the sworn statements of a party himself, taken in a court of justice, if credible, must settle the question, for he alone has full knowledge of that intent, and his statements can be directly contradicted by no human testimony. *McMillan v. Warner*, 38 T. 410; *Cline v. Upton*, 59 T. 27.

The declarations of third parties made to the plaintiff, which from their nature would naturally have influenced his action in procuring an attachment, are sometimes admissible to show that the writ was not sought to oppress, but was applied for in good faith. *O'Neil v. Willis Point Bank*, 67 T. 36, 2 S. W. 754.

In a suit to rescind a contract of sale of goods alleged to have been purchased with fraudulent intent, brought against the purchaser and his vendee, the declarations of the purchaser made soon after the purchase, which tend to show his fraudulent design and

misrepresentations in the purchase, are admissible in evidence. *Rohrbough v. Leopold*, 68 T. 254, 4 S. W. 460.

Declarations by owner of lot as to his intent to make it a homestead held admissible on the issue of the homestead character of the lot. *Furtner v. Edgewood Distilling Co.*, 16 C. A. 359, 41 S. W. 184.

Where a written contract is on its face free from usury, testimony of a contemporaneous verbal agreement which renders the contract in fact usurious is admissible. *Cotton States Bldg. Co. v. Rawlins* (Civ. App.) 62 S. W. 805.

Certain conversations held admissible on the issue of fraud, in an action by a builder against a property owner for the rejection of certain material. *Brin v. McGregor* (Civ. App.) 64 S. W. 78.

In an action by heirs of a deceased mother for partition of community property, certain declarations of plaintiffs' deceased father held inadmissible. *Clements v. Maury*, 60 C. A. 158, 110 S. W. 185.

5. — **Statements by persons since deceased.**—On an issue as to whether one's ancestor had dedicated land in controversy for a public square, the ancestor's declaration as to the purpose in laying out the square is admissible. *Scott v. Rockwall County* (Civ. App.) 49 S. W. 932.

Statement made by deceased to his mother, showing his intention to support her, constitutes original testimony in an action by her to recover for his death, and is not hearsay. *Houston & T. C. R. Co. v. White* (Civ. App.) 56 S. W. 204.

A declaration of a claimant to a homestead as to his intention to return thereto may be proved after claimant's death on the issue of abandonment. *Keller v. Lindow* (Civ. App.) 133 S. W. 304.

6. — **Statements by persons transferring property.**—A stock of goods was levied on as the property of S., and a claim bond was filed by H. Claimant alleged that the goods were his, but admitted that he had borrowed the money with which they were purchased from S. Held, that it was admissible to prove declarations of S., made prior to the time H. obtained the money from him, tending to show a fraudulent intention on the part of S. to place his means beyond the reach of his creditors. The jury could then determine from the other evidence whether H. had knowledge of such fraudulent purpose. *Hinson v. Walker*, 65 T. 103.

On an issue of fraud vel non, it is pertinent to show that one of the parties to a sale of goods, subsequent to the sale made declarations tending to show that the claim to the goods by another party was fraudulently made. *Mayo v. Savoni*, 1 App. C. C., § 218. Citing *Wright v. Linn*, 16 T. 34; *Garahy v. Bayley*, 25 T. Sup. 294.

The declarations of a deceased vendor, made at the time he parts with possession of a deed, are admissible in evidence, in a suit to which his executor is a party, on an issue as to whether there was then a purpose to deliver the deed in consummation of a sale. His subsequent declarations, made after the registration of the deed, are not admissible. *Steffian v. Bank*, 69 T. 513, 6 S. W. 823.

In trespass to try title, recitals in a deed that the land had been conveyed to the grantor at a former time by a certain person held evidence of the intention of the parties to convey that land by the former deed. *Rankin v. Moore*, 46 C. A. 44, 101 S. W. 1049.

Where land was not occupied as a homestead when a deed of trust was executed thereon, declarations of the husband concerning the homestead character of the land held admissible as bearing on the intent of the parties. *Morris v. Simmons* (Civ. App.) 138 S. W. 800.

7. **Difficulty of producing direct evidence.**—Declarations of a person whose identity was in issue held admissible to prove his identity, where he was shown to be dead. *Morgan v. Butler*, 23 C. A. 470, 56 S. W. 689.

8. **Self-serving declarations in general.**—Self-serving declarations not admissible in evidence in favor of party making them. *Solomon v. Huey*, 1 U. C. 265; *Gilbert v. Odum*, 69 T. 670, 7 S. W. 510; *Herndon v. Davenport*, 75 T. 462, 12 S. W. 1111; *Downey v. Taylor* (Civ. App.) 48 S. W. 541; *City Nat. Bank of Quanah v. Martin-Brown Co.*, Id. 617; *Kershner v. Latimer*, 64 S. W. 237; *Ætna Ins. Co. v. Eastman*, 95 T. 34, 64 S. W. 863; *Donaldson v. Dobbs*, 35 C. A. 439, 80 S. W. 1084; *Ross v. Moskowitz*, 100 T. 434, 100 S. W. 768; *Rabb v. E. H. Goodrich & Son*, 46 C. A. 541, 102 S. W. 910; *Horwitz v. La Roche* (Civ. App.) 107 S. W. 1148; *A. T. Baker & Co. v. De Vitt*, 49 C. A. 607, 110 S. W. 528; *Johnson & Moran v. Buchanan*, 54 C. A. 328, 116 S. W. 875; *Pierce v. Waller* (Civ. App.) 127 S. W. 1077; *Kidd v. McCracken*, 134 S. W. 839.

In an action on a note, evidence held improperly received, as detailing conversations between witnesses and plaintiff in the absence of the defendant. *Halsey v. Bell* (Civ. App.) 62 S. W. 1088.

Statements of certain party held not to show that declarations of plaintiff in an action on an insurance policy were not self-serving. *Ætna Ins. Co. v. Eastman*, 95 T. 34, 64 S. W. 863.

In an action for injuries, owing to a minor having been struck by a railroad car while crossing a path over the tracks, it was not error to exclude the declarations of the minor that he did not know that it was dangerous to stop where he did on the track. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

Certain testimony held not inadmissible as hearsay. *Missouri, K. & T. Ry. Co. of Texas v. Schilling*, 32 C. A. 417, 75 S. W. 64.

Declaration by injured railroad switchman held not self-serving. *Id.*

In an action for injuries, evidence held not objectionable as a whole, as self-serving, hearsay, and a conclusion of the witness. *Chicago, R. I. & T. Ry. Co. v. Williams*, 37 C. A. 198, 83 S. W. 248.

Statements by a party to a litigation, showing knowledge of a deed under which she claimed title, held admissible on the issue of the delivery of the deed. *Davis v. Davis*, 44 C. A. 238, 98 S. W. 198.

In trespass to try title, certain testimony held admissible as against the objection that it was self-serving. *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 75.

In an action against a carrier for loss of goods en route, testimony as to statements by the shipper to the drayman who delivered the goods to the carrier as to what the box

contained should have been excluded as self-serving. *St. Louis Southwestern Ry. Co. of Texas v. Ray* (Civ. App.) 127 S. W. 281.

Defendant surety on a note having testified that he notified plaintiff to sue the principal, testimony of another that the surety told him he had given such notice was not admissible in the absence of impeachment. *McMillion v. First Nat. Bank* (Civ. App.) 145 S. W. 300.

In an action against a railroad company for injuries to a shipment of horses, a witness cannot testify that one of the plaintiffs informed him that the horses were in bad shape. *Galveston, H. & S. A. Ry. Co. v. Young & Webb* (Civ. App.) 148 S. W. 1113.

Evidence that party, after discovering fraud in a contract for the exchange of land, notified the other party and demanded a rescission, held competent to disprove ratification and to show that his testimony was not an afterthought and untrue. *Martin v. Ince* (Civ. App.) 148 S. W. 1178.

While the *cestui que trust* could not give his declarations in evidence to establish a trust in the land in controversy in trespass to try title, he was properly permitted to testify to the facts, though such testimony was self-serving. *Mortimer v. Jackson* (Civ. App.) 155 S. W. 341.

9. — **Statements by partners, joint contractors or codefendants.**—A., administrator of G., brought suit on a note secured by the vendor's lien on land, against M., the maker of the note, S., the surety who had assumed its payment, and W., the owner of the land, asking judgment for the debt and foreclosure of the lien. Pending suit S. died. For the purpose of showing the payment of the debt, W. proved by the administrator that he had agreed to accept claims against the estate as payment. W. then offered to prove by a witness that he had heard S. say that he had bought up claims against the estate of G. to put as a credit on the note sued on. Held, that the evidence was inadmissible. *Willis v. Gay*, 48 T. 463, 26 Am. Rep. 328.

Self-serving declarations of one defendant held not admissible to prejudice the other defendants. *Jackson v. Poteet* (Civ. App.) 89 S. W. 980.

10. — **Statement by debtor as to payment.**—Evidence of declarations of the deceased owner of land that he had paid certain vendor's lien notes thereon is not admissible in a suit to foreclose such lien. *Cole v. Horton* (Civ. App.) 61 S. W. 503.

11. — **Statements as to intent, motive or nature of act.**—In an action for damages for wrongful attachment, the payment of the debt was in issue. Plaintiff stated that he had drawn the money from a bank to make the payment, and had so stated his purpose. It was held that the testimony of the banker in corroboration of his statement was not admissible. *Taliaferro v. Goudelock*, 82 T. 521, 17 S. W. 792.

On an issue whether a business homestead has been abandoned, declarations of the owner held admissible to show his intention to resume business. *Alexander v. Lovitt* (Civ. App.) 67 S. W. 927.

In an action for injuries, statements by injured party to her physician as to how she was injured were not admissible in favor of plaintiff. *Hardin v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 88 S. W. 440.

Declarations of claimants of homestead, as to their intention to return thereto, are admissible on the question of abandonment, though they may be self-serving. *Thigpen v. Russell*, 55 C. A. 211, 118 S. W. 1080.

A declaration of defendant as to his understanding concerning his liability on a lease sued on held self-serving and inadmissible. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

In an action against a street railroad company for injuries sustained in attempting to board a car, testimony of what plaintiff told others as to how she received her injuries held inadmissible. *Houston Electric Co. v. Jones* (Civ. App.) 129 S. W. 863.

Where plaintiff claimed that he had purchased an old building from defendant, C., who was to remove the same, which C. denied, evidence that plaintiff had told the witness prior to such removal that he had purchased the building and asked witness' opinion of its worth was inadmissible as a self-serving declaration. *Ratliff v. Gordon* (Civ. App.) 149 S. W. 196.

In a consolidated action for the probate of a will and to set aside a deed by testatrix and her husband to the proponent, the testimony of proponent's husband as to what he told a third person, not in the presence of the grantor in the deed, as to what the latter meant by a statement held self-serving. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581.

12. — **Statements as to terms or meaning of contract.**—In an action for broker's commission, declarations and statements by plaintiff concerning the sale and what he would be entitled to held self-serving and inadmissible. *Leuschner v. Patrick* (Civ. App.) 103 S. W. 664.

In an action between a purchaser and vendors involving the terms of a verbal contract, there was no error in excluding declarations of vendors, after the deed was prepared for delivery, that the purchaser was to assume and pay off a certain note. *Hudson v. Slate*, 53 C. A. 453, 117 S. W. 469.

In an action for breach of a contract of employment, evidence of self-serving declarations made by plaintiff in declining other employment held inadmissible. *W. A. Arthur Cotton Co. v. Willis* (Civ. App.) 125 S. W. 584.

A self-serving declaration by one party in the absence of the other, as to what he had bought of him, held inadmissible. *Syler v. Culp* (Civ. App.) 138 S. W. 175.

13. — **Statements as to title.**—Evidence of self-serving declarations as to defendant's title to land held not admissible, though plaintiff had given evidence of declarations of defendant contrary to his interest. *Murphy v. Magee* (Civ. App.) 68 S. W. 1002.

Generally self-serving declarations are not admissible in support of title in favor of declarant. *Duren v. Bottoms* (Civ. App.) 129 S. W. 376.

14. — **Time of making statement in general.**—A declaration of an insured made long prior to the issuance of a policy was not inadmissible as self-serving in an action thereon. *Home Benefit Ass'n No. 3 of Coleman County v. Wester* (Civ. App.) 146 S. W. 1022.

15. — **Statements by third persons in general.**—In an action for personal injuries held proper to admit certain evidence as showing that the injuries claimed to have been

caused by the accident did not exist prior thereto. *San Antonio Traction Co. v. Parks* (Civ. App.) 93 S. W. 130.

16. — **Statements by agents.**—In an action on a note, evidence of declarations by plaintiff's vice president held inadmissible as self-serving. *First Nat. Bank v. Pearce* (Civ. App.) 126 S. W. 285.

17. — **Statements by husband or wife.**—In a suit for injury to a wife, held error to permit a witness to testify to her subsequent declaration that she had suffered a miscarriage. *Houston & T. C. R. Co. v. Ritter*, 16 C. A. 482, 41 S. W. 753.

In an action involving an issue of whether a homestead had been abandoned, it was proper to allow defendants to show that defendant's wife told another when they left the state that they intended to return. *Gaar, Scott & Co. v. Burge*, 49 C. A. 599, 110 S. W. 181.

18. — **Statements by grantors, assignors or former owners.**—The declarations of the grantor in a deed conveying land are not admissible to show title. *Masterton v. Jordan* (Civ. App.) 24 S. W. 549.

Heirship of grantors cannot be proved by deeds in which they allege their heirship. *Watkins v. Smith*, 91 T. 589, 45 S. W. 560.

19. — **Statements by persons since deceased in general.**—Declarations of a mother as to the decease of her son, she being his heir, held inadmissible to establish title to land under him. *Lewis v. Bergess*, 22 C. A. 252, 54 S. W. 609.

Declarations of a decedent as to his ancestor's service in the Texas army held admissible. *Kirby v. Boaz* (Civ. App.) 121 S. W. 223.

Where, in an action on a note executed by a client to his attorney for services, the issue was whether the attorney had exercised undue influence in procuring the note, evidence that the client had stated that the attorney had told her that her brother had stolen some of her property, and that she did not see why the attorney should have made such statement unless it was true, and that she had been induced to believe that it was true, was admissible. *Barnes v. McCarthy* (Civ. App.) 132 S. W. 85.

A declaration of a claimant to a homestead as to his intention to return thereto is admissible on the issue of abandonment, though self-serving. *Keller v. Lindow* (Civ. App.) 133 S. W. 304.

Declarations by a deceased heir of relationship adverse to another heir are self-serving declarations. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

20. — **Statements by persons since deceased as to title or possession.**—Declaration of a claimant to land by inheritance that the alleged ancestor had died held inadmissible, as self-serving. *Turner v. Sealock*, 21 C. A. 594, 54 S. W. 358.

In trespass to try title, certain declarations made by a landowner held inadmissible. *Tenzler v. Tyrrell*, 32 C. A. 443, 75 S. W. 57.

Evidence of declarations of a deceased person, under whom defendants claimed title to land in controversy, tending to establish her title, held inadmissible. *Jamison v. Dooley*, 98 T. 206, 82 S. W. 780.

On an issue as to which of two persons of the same name received the bounty warrant for the land in controversy, declarations of a decedent as to his ancestor's service in the Texas army were admissible, it appearing that there was no exciting cause in the way of self-interest; the declarant having no knowledge of his ancestor's death. *Kirby v. Boaz* (Civ. App.) 121 S. W. 223.

Declarations of deceased grantor that he had conveyed certain property to his wife in trust for himself were self-serving and inadmissible alone to establish a trust. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

21. — **Written statements in general.**—In an action for a breach of warranty of title, a patent afterwards acquired by the vendee held not inadmissible as a self-serving declaration of the vendee. *Chesnutt v. Chism*, 20 C. A. 23, 48 S. W. 549.

The verified application of plaintiff to purchase school lands, reciting that he had purchased no other lands of the state, held not sufficient evidence to authorize the court to find such facts as a matter of law in trespass to try title. *Nowlin v. Hall* (Civ. App.) 66 S. W. 851.

A telegram sent by a party to a contract to the adverse party after the breach thereof by the latter held a self-serving declaration and inadmissible in an action by the party for breach of contract. *Texas Brokerage Co. v. John Barkley & Co.*, 49 C. A. 632, 109 S. W. 1001.

A recital in a deed as part of the description held not ground for excluding the deed when offered in evidence. *Houston Oil Co. of Texas v. Kimball* (Civ. App.) 114 S. W. 662.

Recitals in assignments of a land certificate in favor of heirs of a decedent and a recital in a contract and an averment in an affidavit held inadmissible because self-serving. *Duren v. Bottoms* (Civ. App.) 129 S. W. 376.

Written statement prepared by plaintiff held inadmissible in an action for malicious prosecution. *Speer v. Allen* (Civ. App.) 135 S. W. 231.

A written statement by a conductor as to his commission of an act of negligence charged held not admissible as self-serving in an action therefor, where his testimony was not sought to be impeached. *Quigley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 142 S. W. 633.

22. — **Letters.**—Evidence of repudiation of a note the day after its execution is admissible, but not the contents of a letter repudiating it, when they consist of irrelevant and self-serving declarations. *Largent v. Beard* (Civ. App.) 53 S. W. 90.

A letter by plaintiff, written just before trial, and which is self-serving, is inadmissible. *Hockaday v. Wortham*, 22 C. A. 419, 54 S. W. 1094.

Statement of insured's attorney in letter to defendant company held not objectionable, in action on policy, as self-serving declaration. *Ætna Ins. Co. v. Fitze*, 34 C. A. 214, 78 S. W. 370.

A letter from plaintiff to his agent of which defendant was not shown to have had any knowledge or to be connected with or to be in any wise bound by was not competent evidence. *Blair v. Baird*, 43 C. A. 134, 94 S. W. 116.

In an action against an express company to recover on money orders paid on the plaintiff's forged indorsement, plaintiff's letters with his signature written by the alleged forger held admissible over objection that they were self-serving. *Wells Fargo & Co. Express v. Bilkiss* (Civ. App.) 136 S. W. 798.

Argumentative and self-serving declarations in a letter held properly excluded. *Heard v. Clegg* (Civ. App.) 144 S. W. 1145.

Letters written by an attorney to his client after the termination of his services, making a claim for services and disbursements, constitute self-serving declarations and inadmissible in his favor. *Curtsinger v. McGown* (Civ. App.) 149 S. W. 303.

The fact that a letter was written by the purchaser after filing of the suit did not render it inadmissible as self-serving where, when the letter was written, defendant did not know that the suit had been filed. *Texas Machinery & Supply Co. v. Ayers Ice Cream Co.* (Civ. App.) 150 S. W. 750.

23. — Pleadings.—Abandoned pleadings drawn by one not a party, containing self-serving declarations, were properly excluded. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

24. — Affidavits.—Ex parte occupation affidavit by a purchaser of state school lands, filed in the land office, is not admissible to show occupancy, as against a third party claiming title to the land. *Thomson v. Hubbard*, 22 C. A. 101, 53 S. W. 841.

An affidavit, filed to raise the issue of forgery of a deed, is not evidence thereof. *Houston Oil Co. of Texas v. Kimball* (Civ. App.) 114 S. W. 662.

25. Declarations against interest in general.—A declaration of plaintiff that he had sold his interest in the land is not evidence of want of title. *Rogers v. Wallace* (Civ. App.) 28 S. W. 246.

Evidence of declarations favorable to plaintiffs, made by a brother of one under whom they claimed as heirs, held inadmissible, as declaration against interest, where the declarant was also one of the heirs when the declaration was made. *Morgan v. Butler*, 23 C. A. 470, 56 S. W. 689.

Where assured stood in loco parentis to his sister, his declarations as to a gift to her of a policy payable to his estate held admissible as against interest. *Lord v. New York Life Ins. Co.*, 27 C. A. 139, 65 S. W. 699.

A written statement held not admissible as a declaration against interest of the plaintiff, where not written, signed, or sworn to by him. *Quigley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 142 S. W. 633.

26. Declarations of person in possession or control as to title or possession.—An execution against B. was levied on certain property in his possession; C. claimed the property, and on the trial of the right of property proved that he bought the property from D. and had made a conditional sale to B., by which the title was not to vest in him until the property was paid for. The plaintiff in execution offered to prove that D. delivered the property to B. and stated at the time that he sold the same to B., and that B. afterwards in the presence of D. stated that he had bought the property of D., the statement not being denied. Held, that the statement having been made by one in possession of the property while in the act of transferring such possession to another was admissible. *Felman v. Smith*, 20 T. 99.

The makers and payee of a note left it in the hands of a third party, to be kept by him until the happening of a certain event, and then to be delivered to the payee, or, on failure of such event, to be null and void. The event never happened, and the note remained in the depository's hands until his death. The makers being sued by an indorsee, they introduced proof that the indorsement was made after the day of payment specified in the note, and offered to prove declarations of the deceased depository respecting the terms and conditions on which the note was executed and left with him. Held, that the declarations were competent evidence. *Goodson v. Johnson*, 35 T. 622.

In an action of trespass to try title the defendant offered to prove by a number of witnesses who had been neighbors of G., under whom defendant claimed, and of R., under whom plaintiff claimed, repeated declarations of G., while using and cultivating the land, that he had bought it from R. G. and R. were dead at the time of the trial. Held, that the evidence was not admissible. *McDow v. Rabb*, 56 T. 154.

Suit was brought by a city to remove some obstructions from a street, and the issue was whether the defendant had held adverse possession for such a period as to give her title by limitation. The defendant testified that the possession she held was the possession received by her as survivor in estate of her husband, then deceased. A statement by her husband while in possession to the effect that he had fenced the street by permission of the city council, and that he had agreed to open it whenever required, was admitted in evidence to show that his possession was not adverse. *Carter v. Town of La Grange*, 60 T. 636.

In an action of trespass to try title it was admitted that A. was the common source of title; B. claimed title under a judgment and execution sale against A.; C. claimed that he bought the land under an execution against D., who was in possession under a bond for title from A., of a date anterior to the judgment against him; that D. had paid a part of the purchase-money, and C. was entitled to D.'s equities in the land. For the purpose of proving D.'s equities C. offered in evidence the declarations of D. while in possession of the land. Held, that while the declarations of a person in possession of land are admissible to show the character of his possession, they are not admissible for the purpose of showing title. *Mooring v. McBride*, 62 T. 309.

Acts and declarations made by claimants of land, after possession for a sufficient time to bar the owner, are admissible to show that such possession was not adverse. *Bracken v. Jones*, 63 T. 184. See *Lochhausen v. Laughter*, 23 S. W. 513, 4 C. A. 291.

Declarations of persons in possession of land, explanatory of the character of their possession, are admissible in evidence. *Jackson v. Deslonde*, 1 U. C. 674.

Plaintiff in proving title under the limitation of ten years proved the possession of one Nelson, under whose estate she claimed and took possession. The declarations of Nelson that he held under the defendant while in possession were competent. *Hurley v. Lockett*, 72 T. 262, 12 S. W. 212.

Declarations of ancestor admissible to show adverse claim in trespass to try title against legatees. *Curtis v. Wilson*, 21 S. W. 787, 2 C. A. 646.

Declarations of one in possession of land are admissible in explanation of his possession. *Trinity County Lumber Co. v. Pinckard*, 23 S. W. 720, 4 C. A. 671.

The declarations of a party in possession of personal property in disparagement of his title are admissible in evidence against him. *Slocum v. Putnam* (Civ. App.) 25 S. W. 52.

Declarations of a party in his own favor, after attachment of land, as to what he intended to be his homestead, held admissible, under the circumstances. *Gunn v. Wynne* (Civ. App.) 43 S. W. 290.

Evidence that parties had declared that the property was not a part of their homestead and that it did not contribute to its use cannot be introduced to show abandonment, but such declarations might constitute an estoppel. *Howe v. O'Brien* (Civ. App.) 45 S. W. 813.

Where defendants claimed under a lost deed, testimony of acts and declarations of the alleged grantee therein held properly admitted. *Walker v. Pittman*, 18 C. A. 519, 46 S. W. 117.

Declarations of stockholders of academy as to purpose for which land was deeded to academy held inadmissible as declarations of tenants in possession against interest. *Long v. Moore*, 19 C. A. 363, 48 S. W. 43.

That property was purchased with separate means of a husband cannot be proved by evidence of his declarations to that effect. *Siebert v. Lott*, 20 C. A. 191, 49 S. W. 783.

That plaintiffs in trespass to try title did not know of their ancestor's title does not preclude the giving of evidence of the conduct of their predecessors in interest in regard thereto. *Texas Tram & Lumber Co. v. Gwin* (Civ. App.) 52 S. W. 110.

Where land was conveyed to trustees, to hold so long as used for school purposes, and was later abandoned, in action to recover it and enjoin removal of schoolhouse, declarations made to plaintiff's grantor that house would not revert are admissible, as being against interest. *Green v. Gresham*, 21 C. A. 601, 53 S. W. 382.

Declarations of a husband that land certificates and land located by virtue thereof belonged to his wife held admissible in trespass to try title, though his declarations in favor of his own title were inadmissible. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

In a case involving the question of fraudulent conveyance of land held that declarations of debtor and the grantee prior thereto as to the ownership of stock, for which the land had been conveyed to the debtor, were admissible to weaken or strengthen the force of the circumstances as to the treatment of the stock. *San Antonio Brewing Ass'n v. Magoffin* (Civ. App.) 99 S. W. 187.

Recital in a deed and an entry in the grantor's account book held admissible as circumstances bearing on the issue as to whether or not the plaintiffs' ancestors deeded the land to him. *Brewer v. Cochran*, 45 C. A. 179, 99 S. W. 1033.

A letter from a real estate agent to his principal, stating that he had about closed a trade with plaintiffs' ancestors for the purchase of land, held admissible as a circumstance bearing upon the issue as to whether or not the ancestors deeded the land to the principal. *Id.*

Declarations held admissible as evidence of adverse title. *Whittaker v. Thayer*, 48 C. A. 508, 110 S. W. 787.

The weight as evidence of a recital of a conveyance in a deed in plaintiff's chain of title stated. *White v. McCullough*, 56 C. A. 383, 120 S. W. 1093.

Declarations of one in possession of land that he is claiming it as his own are admissible as giving character to his possession, but the declarations are not competent when they do relate to a previous possession. *Campbell v. San Antonio Machine & Supply Co.* (Civ. App.) 133 S. W. 750.

Evidence as to the nature of the ownership of defendant's grantor in trespass to try title held not objectionable as hearsay; it being impossible to secure better evidence on the subject in view of the long lapse of time since the declarations were made. *Conroy v. Sharman* (Civ. App.) 134 S. W. 244.

Where plaintiff's title depended on a conveyance of a headright certificate by the deceased original holder thereof, his declarations that he owned the land and had not sold the certificate were admissible. *Baldwin v. McCullough* (Civ. App.) 146 S. W. 203.

27. Declaration in course of business or performance of duty.—Reports by officers of a fraternal insurance order held admissible to show decedent's standing in the order. *Supreme Lodge, Knights of Honor v. Rampy* (Civ. App.) 45 S. W. 422.

In an action on a benefit certificate, an affidavit made by the financier of the lodge held admissible. *United Moderns v. Pistole*, 38 C. A. 422, 86 S. W. 377.

In an action on a health policy, preliminary reports furnished insurer by a physician are not admissible to show the nature of disease which confined insured. *General Accident Ins. Co. v. Hayes*, 52 C. A. 272, 113 S. W. 990.

28. Declarations of testator respecting will.—See notes under Arts. 3271, 3272.

29. Decedent against interest.—Statements made by testatrix's husband, before his decease, that testatrix was insane, held to have been properly excluded on a probate of the will, contested because of testatrix's mental incapacity, where the husband was not a beneficiary under the will. *Lindsey v. White* (Civ. App.) 61 S. W. 438.

Declarations of a decedent as to being asleep when he was struck by a train held admissible as against interest. *Smith v. International & G. N. R. Co.*, 34 C. A. 209, 78 S. W. 556.

Declarations of a testator held admissible as against interest. *Chew v. Jackson*, 45 C. A. 656, 102 S. W. 427.

A recital in a deed of receipt by grantor shown to be dead, of the purchase money held inadmissible, against those claiming under a prior deed, as a declaration against interest by grantor. *Ryle v. Davidson*, 102 T. 227, 115 S. W. 28.

30. — Disparagement of title.—Declarations held admissible to show, and with other facts did show, that a suit for land the parties to which were dead, and the

records of which were destroyed was brought in the county where the land was situated, and the venue was regularly changed. *Jones v. Robb*, 35 C. A. 263, 80 S. W. 395.

31. — **Statements as to fact or nature of transfer or gift.**—The widow and heirs of A. brought suit against the widow and representatives of B. to recover a tract of land. Plaintiff as evidence of title offered a deed to A. for the land, reciting the payment of the purchase-money by him. The defendant was permitted to engraft a trust on the deed by a declaration by A. in his will that B., his father, had paid two-thirds of the purchase-money and was entitled to the land on payment to his representative of one-third of the purchase-money. *Shepherd v. White*, 10 T. 72; *Id.*, 11 T. 346; *White v. Shepperd*, 16 T. 163.

Declarations of the survivor of the community that the land in suit was included in a parol partition, and had been allotted to claimant, held admissible as against decarant's interest. *Shelburn v. McCrocklin* (Civ. App.) 42 S. W. 329.

In an action on a life policy by one claiming it as a gift from the insured, the declarations of the insured were competent to prove both the gift and the delivery. *Lord v. New York Life Ins. Co.*, 95 T. 216, 66 S. W. 290, 56 L. R. A. 596, 93 Am. St. Rep. 827.

Declaration of the owner of a note that he had given the note to plaintiff held admissible to prove both the gift and the delivery. *Schauer v. Von Schauer* (Civ. App.) 138 S. W. 145.

32. — **Knowledge as to subject-matter.**—Declarations of deceased stockholders of academy as to purpose for which land was deeded to academy held inadmissible against third persons, as declarations of persons since deceased against interest. *Long v. Moore*, 19 C. A. 363, 48 S. W. 43.

33. — **Probate or contest of wills.**—See notes under Arts. 3271, 3272.

34. **Preliminary evidence.**—G. brought suit against B. to recover actual and exemplary damages for the wrongful issuance and levy of a writ of sequestration. Plaintiff, over the objections of defendant, was permitted to prove the declarations of the sheriff at the time he levied the writ of sequestration, that "he was instructed to throw plaintiff's property over the fence." There was no evidence tending to show that B. gave any such instruction, and in the absence of such proof it was error to admit the evidence. *Blum v. Gaines*, 57 T. 135.

35. **Conclusiveness and effect.**—In determining the question as to whose benefit a verbal trust arising on a deed absolute on its face should inure, all the declarations of the grantor, made before the deed was executed, and the acts of all the parties who participated in the transactions which led to the making of the deed, as also the subsequent acts and declarations of the trustee, may be considered. *Smith v. McElyea*, 68 T. 70, 3 S. W. 258.

Declarations of ownership, coupled with possession, are the strongest proof of adverse possession. *Texas & N. O. Ry. Co. v. A. G. & J. C. Broom*, 53 C. A. 78, 114 S. W. 655.

II. *Res Gestæ*

36. **Nature of doctrine in general.**—To be part of the *res gestæ*, the declarations are not required to be precisely concurrent in point of time with the principal transaction, if they spring out of it, tend to explain it, are voluntary and spontaneous, and are made at a time so near as to preclude the idea of deliberate design. *McGowen v. McGowen*, 52 T. 657; *Railway Co. v. Crowder*, 70 T. 222, 7 S. W. 709.

Where the circumstances of the case render it probable that a statement offered as *res gestæ* is the result of premeditation or deliberate design to effect a certain purpose, it should not be received. *Pilkinton v. Railway Co.*, 70 T. 226, 7 S. W. 805. See *Railway Co. v. Crowder*, 70 T. 222, 7 S. W. 709.

Evidence of *res gestæ* admissible. *Railway Co. v. Stone* (Civ. App.) 25 S. W. 808; *McGowen v. McGowen*, 52 T. 657; *Railway Co. v. Anderson*, 82 T. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railway Co. v. Robertson*, 82 T. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; *Railway Co. v. Hall*, 83 T. 675, 19 S. W. 121; *Railway Co. v. Bond*, 2 C. A. 104, 20 S. W. 930. Not admissible, when. *Railway Co. v. Crowder*, 70 T. 222, 7 S. W. 709; *Pilkinton v. Railway Co.*, 70 T. 226, 7 S. W. 805.

Declarations so closely connected with the main transaction as to throw light upon its character are admissible in evidence. *Railway Co. v. Pierce*, 7 C. A. 597, 25 S. W. 1053; *Railway Co. v. Anderson*, 82 T. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Sargent v. Carnes*, 84 T. 156, 19 S. W. 378.

The fact that statements might also have been admissible to impeach testimony in a deposition did not render them inadmissible as part of the *res gestæ*. *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

37. **Facts forming part of same transaction.**—Suit was brought by B., assignee of a negotiable instrument executed by B. to O., for the payment of a sum of money. The defense was that the note was given for the purpose of securing future advances to a mercantile firm of which B., O. and another were members, and that it was assigned to plaintiff under such circumstances as to destroy its negotiability, that he had a knowledge of all the facts, and received it in payment of an antecedent individual debt of O. to himself. In order to show the purpose for which the note had been executed, the defendant offered in evidence letters, memoranda and calculations bearing date about the time of the execution of the note. Held, that they were admissible as part of the *res gestæ*. *Goldman v. Blum*, 58 T. 630.

An unsigned order sheet containing a description of goods to be used in the construction of defendant's house, which was made out by plaintiff at the time of a verbal transaction regarding the delivery of the goods, held part of the *res gestæ*. *Watson v. Winston* (Civ. App.) 43 S. W. 852.

Evidence as to the speed of a train is admissible as part of the *res gestæ*, on the question of negligence, where plaintiff was struck by the train at a crossing. *Galveston, H. & S. A. Ry. Co. v. Eaton* (Civ. App.) 44 S. W. 562.

On an issue whether a location inured to the benefit of the owner of an undivided half of the headright certificate, the locator's deed of the land held admissible, as showing the history of the certificate. *Estell v. Kirby* (Civ. App.) 43 S. W. 2.

On proceedings to probate a lost will, held proper to admit testimony that the will was drawn because of the loss of a former one, and that testatrix had told witness, who drew the will, to make it like the former one. *McElroy v. Phink* (Civ. App.) 74 S. W. 61.

In an action for injuries to plaintiff's wife in collision with an automobile, evidence of injuries sustained, held admissible as part of the *res gestæ*, though such damages were not claimed in the petition. *Posener v. Harvey* (Civ. App.) 125 S. W. 356.

A railway brakeman suing for injuries received in a collision, having claimed that he was thrown 25 feet, the company could show that no other persons on the train were injured, and what effect the collision had on them. *Gulf, C. & S. F. Ry. Co. v. Dooley* (Civ. App.) 131 S. W. 831.

Certain evidence held admissible as part of the history of the transaction. *Young v. Robinson* (Civ. App.) 135 S. W. 715.

Evidence in an action for injury to cattle in transit through rough treatment, that other cattle in the same shipment were killed held admissible as part of the *res gestæ*. *Ft. Worth & R. G. Ry. Co. v. Montgomery* (Civ. App.) 141 S. W. 813.

In an action to reform a deed as to the property conveyed, abstracts of title held to constitute such contemporaneous data as rendered them admissible on the question of what property the grantors intended to convey. *Harry v. Hamilton* (Civ. App.) 154 S. W. 637.

In an action for criminal conversation, where it was brought out on cross-examination that plaintiff signed a statement exonerating his wife and defendant for the purpose of stopping a criminal prosecution, evidence that he signed it at another's suggestion, who told him that it would be proper to swear to a lie to protect his family, is admissible as *res gestæ*. *Swearingen v. Bray* (Civ. App.) 157 S. W. 953.

38. Acts and statements accompanying or connected with transaction or event.—Suit was brought by A. against the executrix of B. to recover the amount of a note placed by plaintiff in the hands of B., an attorney-at-law, for collection. The defense was that B. had sold the note by the consent of A. for less than its face, and had accounted for the amount due A. There was some evidence tending to show a knowledge and ratification of the sale by A. M., a witness for defendant, testified that he proposed to B. to buy the note; that B. stated that he had authority to dispose of the note, but as the offer was at a discount he preferred seeing A., and explaining the condition of the debt before he would make the trade. Afterwards B. informed the witness that he had seen A., who accepted his offer. Held, that the evidence of M. as to B.'s statement was properly admitted. *Boone v. Thompson*, 17 T. 605.

The declarations of the wife at or about the time of an apparent abandonment of her husband, and explanatory of her acts, are admissible in evidence in her behalf as part of the *res gestæ*. *McGowen v. McGowen*, 52 T. 657.

Suit was brought by the heirs of a decedent against a surviving administrator and two sets of sureties on the bond of the administrators, and there was a question as to which set of sureties was liable, and to what extent. A witness testified that on two or three trials between the heirs of the estate, with a view to partition, the deceased administrator was a party, and testified that he had in his possession money and notes amounting to a certain sum. Another witness testified that he had made out, under the direction of the deceased administrator, exhibits to be filed in the probate court, showing the condition of the estate. Held, that such declarations were admissible as part of the *res gestæ*. *Keowne v. Love*, 65 T. 152.

The declarations of a surveyor made when surveying a tract of land as to distances then measured by him from designated objects are admissible as part of the *res gestæ*. *Russell v. Hunnicutt*, 70 T. 657, 8 S. W. 500.

The opinions of physicians expressed at the time they were examining a patient, with reference to his condition in a case of poisoning by morphine, are in the nature of *res gestæ* and admissible on the issue whether it was a case of accident or intentional suicide. *Insurance Co. v. Tillman*, 84 T. 31, 19 S. W. 294.

Where proof shows the deposit of notes with an attorney, statements as to the purpose for which they were deposited, made at the time and by the person depositing them, are not hearsay, but are verbal acts. *Smith v. Bank*, 1 C. A. 115, 20 S. W. 1119.

Declarations admissible in evidence as distinguished from hearsay must be contemporaneous with the main fact and so connected with it as to illustrate its character. Declarations not part of the *res gestæ* are not admissible in this action. *Huth v. Huth*, 10 C. A. 184, 30 S. W. 240; *Railway Co. v. Pierce*, 7 C. A. 597, 25 S. W. 1052.

Declarations of a party to a suit for divorce in explanation of her abandonment by her husband are inadmissible as *res gestæ* in absence of proof of the existence of the main fact to which they relate. *Huth v. Huth*, 10 C. A. 184, 30 S. W. 240. Declarations of a party not part of the *res gestæ* are not admissible in evidence. *Railway Co. v. Saunders* (Civ. App.) 26 S. W. 128; *Railway Co. v. Stone* (Civ. App.) 25 S. W. 808; *Railway Co. v. Bruce* (Civ. App.) 24 S. W. 927. See *Railway Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210; *Railway Co. v. Ross*, 11 C. A. 201, 32 S. W. 730.

The declarations of a by-stander, wholly disconnected with the transaction, are not admissible as part of the *res gestæ*. *Wilkins v. Ferrill*, 10 C. A. 231, 30 S. W. 450; *Eddy v. Lowry* (Civ. App.) 24 S. W. 1076.

Certain testimony held *res gestæ*. *Gresham v. Harcourt*, 33 C. A. 196, 75 S. W. 808. Statement of subscribing witness of will alleged to be a forgery, when delivering instrument to justice of the peace, held admissible in probate proceedings as part of *res gestæ*. *Dolan v. Meehan* (Civ. App.) 80 S. W. 99.

A statement which constituted part of the *res gestæ* could be testified to by the person who made it. *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 133.

To be admissible as part of the *res gestæ*, declarations should be spontaneous, and made so soon after the principal transaction as to preclude the idea of deliberate design. *Malone v. Texas & P. Ry. Co.*, 49 C. A. 398, 109 S. W. 430.

A purchaser's declarations and instructions to his son as his agent, and his repudiation of the deed and directions for its return, held admissible as verbal acts, and not objectionable as hearsay. *Hudson v. Slate*, 53 C. A. 453, 117 S. W. 469.

A statement held a part of the *res gestæ*. *Reid Auto Co. v. Gorsczya* (Civ. App.) 144 S. W. 688.

In an action against an express company for damages to fish shipped, evidence that, while witness and another were re-icing fish at a railroad station, such other removed the top from the fish barrels, and said, "The fish don't need any ice," was not admissible as *res gestæ*, being hearsay. *Wells Fargo & Co. Express v. Gentry* (Civ. App.) 154 S. W. 363.

39. — **By agents or employés.**—Whenever the act of an agent is admissible in evidence, his statements relative to the act, and made while doing it, are also admissible as part of the *res gestæ*. *Tuttle v. Turner*, 28 T. 759.

Declaration of person in charge of certain property before seizure and execution, as to his employment, held admissible in favor of his employer. *Jones v. Hess* (Civ. App.) 48 S. W. 46.

In an action against a carrier for unreasonable delay in the delivery of a shipment of cattle, the declaration of the conductor held a part of the *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Stanfield Bros.*, 40 C. A. 385, 90 S. W. 517.

In an action on building contract, evidence of statements by workmen as to interference by owner held admissible as part of *res gestæ*. *Neblett v. McGraw & Brewer*, 41 C. A. 239, 91 S. W. 309.

Statement by an insurance agent on delivering a policy that it was all right and would stand in any court held admissible on the issue of complainant's negligence in failing to read the policy when it was delivered. *Ætna Ins. Co. v. Brannon* (Civ. App.) 91 S. W. 614.

Declarations of a cotenant signing a contract for the sale of the land, for himself and his co-owner, that he had authority to sign such co-owner's name, held admissible against the cotenant as *res gestæ*, and against his co-owner in the event the jury determined the issue of the tenant's agency in the vendee's favor. *Naylor v. Parker* (Civ. App.) 139 S. W. 93.

40. — **Writings.**—Original entries in memorandum book by agent of payee of note, showing receipt of balance due, held admissible as *res gestæ*. *Henry v. Bounds* (Civ. App.) 46 S. W. 120.

Letters written by the maker of a note, instructing his agent to make a tender of notes in payment thereof, held not admissible, in an action on the note, as a part of the *res gestæ*. *Ellis v. Randle*, 24 C. A. 475, 60 S. W. 462.

In an action against a carrier for injury to cattle in transit, certain telegram held admissible in evidence as *res gestæ*. *Texas & P. Ry. Co. v. Scoggin & Brown*, 40 C. A. 526, 90 S. W. 521.

In a suit by a shipper of cattle for damages, an objection to the account of sales of the cattle read in evidence that the evidence showed the same was made up from data furnished by salesmen and weighmasters, the correctness of which was not proven, was not tenable, where witnesses who actually weighed the cattle testified to their weights, and the reports of the weights and prices realized, made to the bookkeeper of the company selling the same, all appeared to have been contemporaneous with the transactions to which they related, and so were a part of the *res gestæ*. *Missouri, K. & T. Ry. Co. v. Gober* (Civ. App.) 125 S. W. 383.

An entry of a memorandum in a book by an employé of a contract held not admissible as part of the *res gestæ*. *Luttrell v. Parry* (Civ. App.) 129 S. W. 865.

41. — **Motive and intent in general.**—In an action against a telegraph company for the refusal to receive a message for transmission, the language of the agent at the time of refusing to receive the message was admissible on the issue of the motive. *Western Union Telegraph Co. v. Simmons* (Civ. App.) 93 S. W. 686.

42. — **Ownership or possession of property.**—In a suit for the partition of a league of land between the owners in common, the defendants alleged that the land was partitioned many years before by the owners, and that the partition line then established had ever since been acquiesced in by those interested. In support of the answer the defendants were permitted to prove the declarations of the surveyor when running the line, to the effect that he was making the survey to establish the dividing line between the upper and lower halves of the league, for the parties and by their request, as they were dissatisfied with a division line made three years before. *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612.

Acts and declarations of person presenting note for collection as to ownership of the note are admissible as a part of the *res gestæ*. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 145 S. W. 707.

Remark of mortgagor, made at the time of execution and delivery of chattel mortgage, that he had promised to give it as an inducement to the other party whose name was on the note to sign with him was admissible as *res gestæ*. *Dunlap v. Broyles* (Civ. App.) 146 S. W. 578.

43. — **Existence or nature of contract and relation of parties.**—Where a release is sought to be avoided for mistake, acts and conversions of the parties during the negotiations for the release held admissible. *McCarty v. Houston & T. C. R. Co.*, 21 C. A. 568, 54 S. W. 421.

In an action for failure of an express company to promptly deliver a shipment, evidence as to conversations with the drivers who received the goods held admissible as *res gestæ*. *Pacific Express Co. v. Needham* (Civ. App.) 94 S. W. 1070.

In an action on notes due March 10, 1910, claimed to have been indorsed to plaintiff bank after maturity, a letter dated March 7, 1910, from it to another bank, stating that it purchased the note on such other bank's recommendation, dated April 9, 1909, was admissible. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 152 S. W. 646.

44. — **Sale or conveyance.**—A creditor bought the stock of an insolvent debtor. The statements of the debtor at the time of the sale of the use to which he intended to apply the proceeds were held admissible in evidence as a part of the *res gestæ*. *Sanger Bros. v. Colbert*, 84 T. 668, 19 S. W. 863.

Witness' "opinion" of his former testimony held admissible as his best recollection. *Wright v. Solomon* (Civ. App.) 46 S. W. 58.

Where it was attempted to establish an alleged lost deed, evidence that the scrivener, on delivering the paper to the grantor for execution, stated that it was a deed, held admissible to show that the paper was in fact a deed, if not as *res gestæ*. *Simpson Bank v. Smith*, 52 C. A. 349, 114 S. W. 445.

45. — **Torts in general.**—Words and acts of others, part of the *res gestæ*, admissible to disprove negligence. *Railway Co. v. Duty* (Civ. App.) 28 S. W. 463.

A declaration held a part of the *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Luther*, 40 C. A. 517, 90 S. W. 44.

In trover for cattle, in which plaintiff claimed exemplary damages, testimony by plaintiff as to a difficulty which occurred at the time the cattle were taken was admissible as part of the *res gestæ*. *Boardman v. Woodward* (Civ. App.) 118 S. W. 550.

46. — **Personal injuries.**—In an action against a railway company for damages resulting from a collision of cars, it was held competent to prove as a part of the *res gestæ* that another passenger was injured by the effect of the collision. Evidence of the acts and declarations of other persons in the same peril are competent as part of the *res gestæ*, and also as evidence of what was deemed prudent by those thus exposed. Mr. Wharton says: "What has been said as to the admissibility of independent acts as a basis from which good faith may be inferred applies with peculiar force to the admission of such facts when there is a contest whether prudence or diligence was exercised by a particular person at a particular time. For instance, on a question as to whether an engineer, in the management of a train at a collision, acted prudently, there is no doubt that it would be admissible to prove the cries of by-standers, without producing such by-standers." In his work on carriers of passengers, the rule is stated by Mr. Thompson thus: In an action for damages received in a railroad collision, where there is a question as to the negligence of the plaintiff, evidence may be given of the conduct and exclamations of other passengers, in order to show how the circumstances of danger impressed every one, and to vindicate the plaintiff from the charge of rash conduct and imprudence from undue alarm. Such general conduct, given with the exclamations involuntarily made by the passengers, in consequence of the appearance of imminent peril, may be regarded as a part of the *res gestæ* for this purpose. *Fort Worth & D. C. R. Co. v. Stingle*, 2 App. C. C. § 704.

Circumstance attending the act charged as negligence held admissible to characterize such act. *International & G. N. R. Co. v. Downing*, 16 C. A. 643, 41 S. W. 190.

In an action for injuries received in a crossing accident, a remark of defendant's employé was held not a part of the *res gestæ*. *San Antonio & A. P. Ry. Co. v. Belt* (Civ. App.) 46 S. W. 374.

A conversation held admissible because the evidence warranted the jury in finding, in spite of the passenger's denial, that it was in his presence. *Ebert v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 49 S. W. 1105.

Declaration of engineer, on his attention being called to runaway horse, after he had blown whistle, held part of *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Milner*, 28 C. A. 86, 66 S. W. 574.

The real issue being whether a fire was built in a depot, testimony of a person that he heard the depot agent tell a boy to go to a car and get some coal, and saw him give the boy a key to unlock the car where the coal was, is admissible as part of the *res gestæ*. *St. Louis Southwestern Ry. Co. of Texas v. Patterson* (Civ. App.) 73 S. W. 987.

In action against carrier, evidence that while carrier's servants were carrying plaintiff's daughter to baggage car a stranger told them not to put her in the baggage car held admissible as *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Coopwood* (Civ. App.) 96 S. W. 102.

In an action for the death of an employé engaged in putting fuel oil in an engine tender, by slipping on a greasy fuel box lid in descending from the tender, testimony that decedent was slow and awkward in filling the tender, and the engineer told him to hurry, and that he was delaying the engine, was admissible as *res gestæ*. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

47. — **Injury to or loss of property.**—Certain evidence as to the cause of a railroad's delay in transporting plaintiff's cattle held hearsay, and not part of the *res gestæ*. *Southern Kansas Ry. Co. of Texas v. Crump*, 32 C. A. 223, 74 S. W. 335.

In an action for loss of plaintiff's horses, evidence of a statement of one of defendant's employés held admissible as *res gestæ*. *Wagoner v. Snody*, 36 C. A. 514, 82 S. W. 355.

Declarations of defendant's employés made just after the fire in question was started, and while it was still raging, held admissible as *res gestæ*. *Paraffine Oil Co. v. Berry* (Civ. App.) 93 S. W. 1089.

In an action against a railroad for negligently transporting plaintiff's cattle, oral evidence of a verbal contract of shipment held inadmissible under the pleadings. *Gulf, C. & S. F. Ry. Co. v. Batte* (Civ. App.) 94 S. W. 345.

In an action against a railroad for negligently transporting plaintiff's cattle, a statement made by a brakeman as to the cause of the delay held admissible. *Id.*

A statement by a bystander made during the progress of a fire communicated to plaintiff's property by oil which escaped from defendant's oil tank as to the cause of the ignition of the oil was not admissible for defendant as a part of the *res gestæ*. *Texas & N. O. R. Co. v. Bellar*, 51 C. A. 154, 112 S. W. 323.

In an action against a railroad company for injuries to cattle by rough handling in transit, a conversation between plaintiff and the conductor during transit, in which plaintiff complained and told the conductor that the cattle were being handled roughly, was admissible. *Missouri, K. & T. Ry. Co. v. Ross & Phelan* (Civ. App.) 123 S. W. 231.

In a suit by a shipper of cattle for damages, held, that an objection to an account of sales of the cattle, read in evidence, was untenable, where witnesses who actually weighed the cattle testified to their weights, and the reports to the bookkeeper of the weights and prices realized, all appeared contemporaneous with the transactions to which they related, and so were part of the *res gestæ*. *Missouri, K. & T. Ry. Co. v. Gober* (Civ. App.) 125 S. W. 383.

48. — **Fraud.**—In an action assailing a mortgage for fraud, evidence held admissible to show mortgagor's motives, and as a part of the *res gestæ*. *Wright v. Solomon* (Civ. App.) 46 S. W. 58.

Declarations by a grantor, made at the time of the execution of a deed, showing fraud and undue influence, are competent as a part of the *res gestæ*. *Rankin v. Rankin*, 105 T. 451, 151 S. W. 527.

49. Acts and statements before transaction or event.—In a suit for damages for the wrongful seizure of property under a writ of attachment, the issue was whether the sale of the property in question had been made to defraud creditors. A., who had made the sale, was asked by the party impeaching the sale on the ground of fraud the following question: For what purpose did you tell C., in a conversation with him some time before the sale was made, that you wanted to make said sale? Held, that the declarations of the vendor to a third party at a time considerably antedating the transaction, as to his motives, was not a part of the *res gestæ*, and were not admissible in evidence. *Weaver v. Ashcroft*, 50 T. 427.

In a suit for damages against a railroad company for false and fraudulent representations by the company's agents, inducing the plaintiff to convey to the company valuable property, the statements made by certain directors were held inadmissible in the absence of evidence that they were made by them when performing an act authorized by the company so as to make them a part of the *res gestæ*. *East Line R. R. Co. v. Garrett*, 52 T. 133.

In an action against a railway company for damages on account of personal injuries caused by the negligence of the defendant, it was alleged that the train was run at a very high rate of speed, that the road-bed and track were old and much worn, and that the wreck in consequence ensued. The plaintiff in testifying, while detailing the facts within his knowledge, repeated an exclamation made at the time, of a fellow traveler, as to the short period consumed in passing between certain points. Held, the statement was admissible in evidence. *Mo. Pac. Ry. Co. v. Collier*, 62 T. 318.

In an action on a policy of insurance against loss by fire, the defendant claimed that the building insured fell, not as the result of the fire, but from other causes, and that by the conditions of the policy the contract of insurance thereby determined. The plaintiff, in support of the theory that the fall of the building was caused by the fire, introduced a witness who testified that after the building had fallen, and before she and her family were extricated, she exclaimed that they would all be burned up. Held, that the witness was but stating her surroundings, what she saw, and the impressions thereby made upon her mind. The defendant, in order to prove the condition of the house before the fire, offered to prove by a witness that he had heard D., who lost her life in the disaster, speak of the cracks in the walls of the building and of the falling off of the plaster, so that she had to be continually sweeping, defendant having previously proven that D. was chambermaid at the time of the destruction of the building, and that it was a part of her business to sweep the hotel. Held, that the declarations of D., made at some time anterior to the burning of the house, had no such relation to the issue to be proved in this case by reason of there being declarations contemporaneous with the main fact to be proved, or for any other reason, as would make such declarations *res gestæ*. If the inquiry was why she did a certain act, or why she was at a given place at a certain time, then her declarations made at the time would have been illustrative of her act, and would have constituted *res gestæ*. *Continental Ins. Co. v. Pruit*, 65 T. 125.

Declaration of bystander as to train entering crossing without stopping held admissible as part of the *res gestæ* in action for injuries by collision at such crossing. *Missouri, K. & T. Ry. Co. v. Vance* (Civ. App.) 41 S. W. 167.

Plaintiff's declaration, on examining a deed to him, to a third person with whom it had been left, held admissible as *res gestæ*. *Smith v. T. M. Richardson Lumber Co.*, 92 T. 448, 49 S. W. 574.

In an action against a telegraph company for damages, owing to defendant's lines having been fraudulently tapped and a message sent to plaintiff authorizing the bank to cash a draft for a swindler, a conversation between the president of plaintiff and the swindler held properly admitted as part of the *res gestæ*. *Western Union Tel. Co. v. Uvalde Nat. Bank* (Civ. App.) 72 S. W. 232.

In action for negligent failure to properly transmit telegram apprising plaintiff of the death of his father, certain statements of the father, shortly before his death, held inadmissible. *Western Union Tel. Co. v. Jackson*, 35 C. A. 419, 80 S. W. 649.

Remarks of a street car conductor held to be a part of the *res gestæ*, in an action for injuries received in a collision between a street car and a railway train. *Northern Texas Traction Co. v. Caldwell*, 44 C. A. 374, 99 S. W. 869.

Declarations of a husband to his wife when he purchased, or when he was making, improvements on certain property claimed by her as a homestead, held admissible as *res gestæ* to show the husband's intention. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

In an action against a railway company for injury to a brakeman run over by cars while attempting to cross a track, all the circumstances relating to his acts and purpose at the time of the accident were proper for the jury to consider in determining whether another in the same circumstances would have acted as plaintiff did; the weight of such evidence being for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Cleland*, 50 C. A. 499, 110 S. W. 122.

Certain evidence by a real estate broker held admissible as *res gestæ*. *Mitchell v. Crossett* (Civ. App.) 143 S. W. 965.

50. Acts and statements after transaction or event.—The declarations of a third party relative to the facts connected with an accident resulting in damage to plaintiff, who sues to recover damages, when made ten minutes after the accident by the narrator, who was present with the plaintiff when the damage was inflicted, are not admissible as part of the *res gestæ*. *Railway Co. v. Moore*, 69 T. 157, 6 S. W. 631; *Railway Co. v. Southwick* (Civ. App.) 30 S. W. 592.

The declarations of a deceased vendor, made at the time he parts with possession of a deed, are admissible in evidence, in a suit to which his executor is a party, on an issue as to whether there was then a purpose to deliver the deed in consummation of a sale. His subsequent declarations, made after the registration of the deed, are not admissible as part of the *res gestæ*. *Steffian v. Bank*, 69 T. 513, 6 S. W. 823.

After a railroad disaster, the conversations of by-standers and declarations by the

servants of the railroad company, narrating the cause and circumstances of the disaster, and made within an hour or two after the wreck, are not *res gestæ*. *Railway Co. v. Ivy*, 71 T. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758.

Evidence as to an interview between the plaintiff and an agent of the defendant on the day subsequent to the publication of a libel, not admissible in evidence as part of the *res gestæ*. *Belo & Co. v. Fuller*, 84 T. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

Immediately after plaintiff was injured, one who had gone to his relief remarked "that it was imprudent for plaintiff to pass under the trestle on his wagon." This was properly excluded; it was not *res gestæ*. *G., C. & S. F. Ry. Co. v. Montgomery*, 85 T. 64, 19 S. W. 1015.

Conversations between the witness, a banker, and his cashier, relative to the amount of money paid the witness by defendant, occurring several hours after the payment was made, and not in the presence of the defendant, are hearsay and not admissible as *res gestæ*. *Dwyer v. Bassett*, 1 C. A. 513, 21 S. W. 621.

Declarations of conductor, shortly after railroad accident, that the brakes would not work, held part of the *res gestæ*. *Missouri, K. & T. Ry. Co. v. Vance* (Civ. App.) 41 S. W. 167.

Declaration of conductor immediately after accident in which plaintiff was injured, as to what transpired during the accident, held admissible. *Houston, E. & W. T. Ry. Co. v. Norris* (Civ. App.) 41 S. W. 708.

Entries in the field book of a surveyor, not made at the time the survey was made, and having no relation to what was done when it was located, are not admissible as part of the *res gestæ*. *Cable v. Jackson*, 16 C. A. 579, 42 S. W. 136.

Evidence of declarations held inadmissible as a part of *res gestæ* when it does not clearly appear that they were spoken by plaintiff. *City Railway Co. v. Wiggins* (Civ. App.) 52 S. W. 577.

Evidence held properly excluded as calling for a conclusion of a witness. *Id.*

Statements of an engineer after an accident held admissible as a part of the *res gestæ*. *International & G. N. R. Co. v. Bryant* (Civ. App.) 54 S. W. 364.

An engineer's statement that employé's injuries were the result of the brakeman's negligence, made about five minutes after the engineer had gone to the place of the injury and returned to the engine, was inadmissible as *res gestæ*. *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

A brakeman's statement, made five minutes after, that he knew the employé had been in a place where he was injured, but thought he had gone away, was admissible as *res gestæ*. *Id.*

In an action against a railroad company for injury claimed to have resulted from the negligent operation of a train, testimony as to statements relating to the accident, made by the fireman or engineer within six minutes thereafter, is admissible. *San Antonio & A. P. Ry. Co. v. Gray*, 95 T. 424, 67 S. W. 763.

In an action for personal injuries by a traveler, due to his horse stepping into a hole in a bridge over a culvert at a railway crossing, evidence of the declarations of the trainmen on a train passing about 15 minutes after the accident that some one had put a timber on the track was not a part of the *res gestæ*, but mere hearsay. *Denison & P. S. Ry. Co. v. Foster*, 28 C. A. 578, 68 S. W. 299.

Certain statement by passenger, ejected from train, held not *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Tarwater*, 33 C. A. 116, 75 S. W. 937.

Evidence that immediately after plaintiff was injured he was taken by defendant's servants to the train and carried to a station was admissible as *res gestæ*. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In an action for injuries, a declaration by defendant's servant about two minutes after the injury, by which he stated to another, "those women out there claim to be scalded," held admissible as *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Tullis*, 41 C. A. 219, 91 S. W. 317.

Declarations by defendant's employés four or five days after a fire in question that they started the same to protect defendant's oil tank held inadmissible as *res gestæ*. *Paraffine Oil Co. v. Berry* (Civ. App.) 93 S. W. 1089.

In an action for personal injuries, declarations of an agent made soon after the accident held admissible as part of the *res gestæ* as statements spontaneously made without design. *City of Austin v. Nuchols*, 42 C. A. 5, 94 S. W. 336.

In an action against a carrier for damages to a shipment, certain evidence held admissible as part of the *res gestæ*. *St. Louis & S. F. R. Co. v. Watkins*, 45 C. A. 321, 100 S. W. 162.

Where a railway employé was injured while assisting colaborers to put a hand car on the track, remarks made just after the accident by the foreman, who did not see it, were not *res gestæ*, but purely hearsay. *St. Louis Southwestern Ry. Co. of Texas v. Brisco*, 42 C. A. 321, 100 S. W. 989.

A statement by a locomotive engineer a half hour after he had run his train over and killed a person, made several miles from the point where the injury occurred, was not admissible as part of the *res gestæ*. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442.

In an action against a railway company for the death of a fireman caused by being thrown from the running board of an engine by a jar in coupling, his statement to the engineer 15 or 20 seconds after the accident held admissible as part of the *res gestæ*. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 C. A. 381, 107 S. W. 374.

In an action for injuries to a shipment of cattle, certain testimony held admissible as part of the *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Batte* (Civ. App.) 107 S. W. 632.

In an action by a passenger for the misconduct of the conductor, consisting of insulting language, the statement of a fellow passenger, who had heard the conductor's language, made to the passenger after the termination of the dispute, that it was a shame for a man to have to take anything like that, and that the passenger ought to have slapped the conductor, was inadmissible as the opinion of a stranger to the occurrence, and not a part of the *res gestæ*. *Texas & N. O. R. Co. v. Marshall*, 57 C. A. 538, 122 S. W. 946.

Transactions occurring more than a year after the entry of a consent judgment held too remote to be considered as a part of the *res gestæ* in determining the intent of parties. *Parks v. Knox* (Civ. App.) 130 S. W. 203.

Certain evidence as to statements by a station agent that he had been robbed held admissible as *res gestæ* in an action for malicious prosecution. *Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Civ. App.) 134 S. W. 736.

A declaration held admissible as a part of the *res gestæ*. *Citizens' Ry. Co. v. Farley* (Civ. App.) 136 S. W. 94.

Statements held admissible as a part of the *res gestæ*. *Davidson v. Lee* (Civ. App.) 139 S. W. 904.

Declarations of defendant, alleged to have assumed payment of the note sued on, made immediately after the making of the alleged contract of assumption, expressing an intention not to assume the note, is not admissible as *res gestæ*, where made at a different place than that at which the contract was made. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 145 S. W. 722.

In an action for personal injuries, evidence of expressions as to pain by the person injured is admissible. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

In an action for wrongful death by accident at a railroad crossing, testimony given at the inquest was not admissible as a part of the *res gestæ*. *Texas Cent. R. Co. v. Dumas* (Civ. App.) 149 S. W. 543.

51. Acts and statements of person sick or injured.—Words and exclamations tending to throw light on a transaction are admissible, but exclamations showing physical pain or grief are not admissible. *Railway Co. v. Anderson*, 82 T. 519, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railway Co. v. Crowder*, 70 T. 226, 7 S. W. 709; *Railway Co. v. Finley* (Civ. App.) 32 S. W. 51.

In an action for personal injuries, testimony that witness saw plaintiff a few days after the accident, and that he was limping, is competent. *City Railway Co. v. Wiggins* (Civ. App.) 52 S. W. 577.

Expressions of pain and suffering made at the time of such pain and suffering are *res gestæ* and admissible, and need not be *res gestæ* with the original injury. Plaintiff's statement to witness as to how the accident occurred is clearly inadmissible. *Railway Co. v. Gill* (Civ. App.) 55 S. W. 386.

In an action for personal injuries, a statement made by plaintiff within a few minutes after the accident held admissible as a part of the *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Willoughby* (Civ. App.) 81 S. W. 829.

Testimony of plaintiff that, after the collision with the train on which he was a passenger, he got on his feet as soon as he could, and stamped them, trying to get rid of the nervousness and trembling feeling he had, was admissible as *res gestæ*, and served to explain his statement that when he got on his feet he felt no pain, but was just as nervous as could be. *Missouri, R. & T. Ry. Co. v. Johnson* (Civ. App.) 126 S. W. 672.

Certain declarations held admissible in evidence as *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 135 S. W. 1076.

52. — Statements as to cause of injury.—The day after an injury was sustained by a minor in his foot, from which he died, the father (who sued a municipal corporation for damages) examined a projecting bolt in the curbing of a sidewalk, in consequence of what his son told him as to the cause of his injury, and found drops of blood on it; the father stated this in evidence, and also that the boy was with witness when he examined the bolt, and went there to look at it in consequence of what had occurred between him and his son. Held, that the testimony was not part of the *res gestæ*, and was inadmissible. Immediately after the injury was sustained, the child, weeping from the pain, narrated to his mother the cause of his injury. Held, that the declaration of the child, made under such circumstances, was part of the *res gestæ* and admissible. *City of Galveston v. Barbour*, 62 T. 172, 50 Am. Rep. 519.

Where deceased was run over by an engine, what he said while he was still under the wheels as to the cause of the accident was properly admitted as part of the *res gestæ*. *Missouri Pac. Ry. Co. v. Bond*, 20 S. W. 930, 2 C. A. 104.

Statements of deceased as to the manner of the accident, made immediately thereafter, held admissible. *Houston & T. C. R. Co. v. Weaver* (Civ. App.) 41 S. W. 846.

Declarations of the deceased, made some minutes after he was injured, in response to inquiries made by a witness, are admissible as part of the *res gestæ*. *Houston & T. C. R. Co. v. Loeffler* (Civ. App.) 51 S. W. 536.

An injured person's statement as to how the accident occurred held inadmissible. *St. Louis & S. W. Ry. Co. of Texas v. Gill* (Civ. App.) 55 S. W. 386.

Declarations by one injured as to cause of accident, made several hours thereafter, held admissible as *res gestæ*; the injured party having been unconscious during the interval. *Missouri, K. & T. Ry. Co. of Texas v. Moore*, 24 C. A. 489, 59 S. W. 282.

In an action for death by wrongful act, the statements of deceased, made immediately after the accident are admissible as *res gestæ*. *Galveston, H. & S. A. Ry. Co. v. Davis*, 27 C. A. 279, 65 S. W. 217.

Statements made by plaintiff, several hours after he was injured by a train, held not part of the *res gestæ*. *McCowen v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 73 S. W. 46.

Certain declarations of injured railroad switchman held admissible as *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Schilling*, 32 C. A. 417, 75 S. W. 64.

In action for servant's injuries, certain statements of servant held *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 35 C. A. 584, 80 S. W. 852.

In an action for injuries to a passenger, certain declarations of plaintiff held admissible as *res gestæ*. *International & G. N. R. Co. v. Hugen*, 45 C. A. 326, 100 S. W. 1000.

In an action by a servant for injuries through negligence, certain evidence held properly admitted as *res gestæ*. *St. Louis Southwestern Ry. Co. of Texas v. Schuier*, 46 C. A. 356, 102 S. W. 783.

In an action against a railroad for injuries through negligence, certain evidence held admissible as *res gestæ*. *Paris & G. N. Ry. Co. v. Calvin* (Civ. App.) 103 S. W. 428.

Witness who was the first person to arrive at the place where plaintiff had been injured by a train got there about 10 or 12 minutes after the accident and was the first to interview him. During the time between the accident and his arrival plaintiff was suffering great pain, and was in such condition of mind that he hardly knew what he was doing. Held, that plaintiff's statements made to the witness were admissible as

part of the *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 50 C. A. 134, 109 S. W. 1126.

Plaintiff, while working in a field near defendant's track, was struck by a flying spike and injured. Witness C. was plowing some 300 yards from plaintiff at the time, and got to him four or five minutes thereafter. Plaintiff was then standing up with his hand on his side and looked as though he was suffering. Held, that plaintiff's declarations to C., made at that time, concerning the manner of his injury, were admissible as *res gestæ*. *Blackshear v. Trinity & B. V. Ry. Co.* (Civ. App.) 131 S. W. 854.

53. — **Statements as to and expressions of personal injury or suffering.**—The expressions of persons afflicted with bodily pain or illness relative to their health and sensations are, in their nature, original evidence, such expressions being originally the natural consequence and outward indication of co-existing suffering. Such declarations, if made to a medical man, are of greater weight as evidence; but if made to other persons, they are not, on that account, to be rejected. *Rogers v. Crain*, 30 T. 284.

In a suit against a railway company for injury, which plaintiff alleged he received while a passenger, from the negligent and wrongful management of its trains, his expressions indicating pain, uttered after the alleged injury, are admissible in evidence as a part of the *res gestæ*. *H. & T. C. R. R. Co. v. Shafer*, 54 T. 641.

In an action for trespass *vi et armis*, the declarations of the plaintiff, made to a medical man, in answer to inquiries as to his physical condition after the alleged injury, are admissible in evidence, though the physician may not have been employed as such. So, also, are his declarations, under like circumstances, as to his sensations and sufferings from the violence inflicted. But the declarations of the injured party, made under like circumstances, but not at the time of receiving the injury, as to the person by whom and the weapon with which the injury was inflicted, would be inadmissible. *Newman v. Dodson*, 61 T. 91; *Railway Co. v. Shafer*, 54 T. 648; *Railway Co. v. Barron*, 78 T. 421, 14 S. W. 698; *Railway Co. v. Sanders* (Civ. App.) 33 S. W. 245.

On the trial of an action for damages for bodily injury suffered by plaintiff in a railroad wreck, it is competent to prove the declarations of the plaintiff, made at the place and soon after the wreck, indicating bodily pain and suffering. *Railway Co. v. Barron*, 78 T. 421, 14 S. W. 698.

In an action for injuries resulting in death, evidence that deceased complained of his wounds from the time of the accident to his death is admissible on the issue whether the injuries caused his death. *International & G. N. R. Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210.

Statement by person injured as to pain held inadmissible as hearsay. *Tyler S. E. Ry. Co. v. Wheeler* (Civ. App.) 41 S. W. 517.

Testimony that plaintiff, the night she was injured, said that she tasted blood, held admissible. *Texas & P. Ry. Co. v. Lee*, 21 C. A. 174, 51 S. W. 351, 57 S. W. 573.

Exclamations of pain, made by injured person after retiring to his bed at night, held admissible in an action to recover for his injuries. *Jackson v. Missouri, K. & T. Ry. Co. of Texas*, 23 C. A. 319, 55 S. W. 376.

Statements of bodily feeling are part of the *res gestæ*, if made at the time of the pain or suffering. *St. Louis & S. W. Ry. Co. of Texas v. Gill* (Civ. App.) 55 S. W. 386.

In an action for injuries, the expressions of the injured party, complaining of suffering after the accident, are admissible as *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

Exclamation made by plaintiff in presence of the dead body of her son, and immediately on seeing it, held admissible as part of the *res gestæ* of injured feelings, in an action against a telegraph company for failure to deliver message stating that the son was mortally wounded. *Western Union Tel. Co. v. Davis*, 24 C. A. 427, 59 S. W. 46.

In an action for injuries, evidence that plaintiff told witness he could not work any more shortly after the injury, held inadmissible as *res gestæ*. *St. Louis S. W. Ry. Co. of Texas v. Brown*, 30 C. A. 57, 69 S. W. 1010.

The voluntary expressions of present pain, induced by the sufferings of a passenger, held admissible in an action for injuries. *Arrington v. Texas & P. Ry. Co.* (Civ. App.) 70 S. W. 551.

In an action against a railroad company for negligent death, declarations of deceased that he was hurt, and as to the location of the injury, made at the time he was hurt, were admissible as *res gestæ*. *Hicks v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 71 S. W. 322.

In an action against a railway for injuries, an exclamation, made by the party injured on regaining consciousness, held admissible as part of the *res gestæ*. *Ft. Worth & D. C. Ry. Co. v. Partin*, 33 C. A. 173, 76 S. W. 236.

Statements held to be expressions of present pain and suffering, and so admissible as original evidence. *International & G. N. R. Co. v. Cain*, 35 C. A. 529, 80 S. W. 571.

In an action for death, it is not error to permit a witness to testify that he met the decedent several hours after the accident, and that decedent "was complaining very badly of his neck and back hurting him, and seemed to be suffering very much." *St. Louis Southwestern Ry. Co. v. Burke*, 36 C. A. 222, 81 S. W. 774.

Evidence that 15 minutes after the accident, plaintiff was sitting on the side of defendant's track, groaning and complaining, and seemed to be in pain, held admissible. *Chicago, R. I. & T. Ry. Co. v. Williams*, 37 C. A. 198, 83 S. W. 248.

Testimony of lay witnesses to expressions of present pain made by an injured person held admissible. *Texas Cent. R. Co. v. Powell*, 38 C. A. 157, 86 S. W. 21.

Testimony of an injured person that he is hurt "in or about the groins" is the expression of present physical pain, and admissible as *res gestæ*. *Id.*

An injured person's statements as to the pain he suffers, made three or four weeks after the injury, are admissible. *St. Louis Southwestern Ry. Co. of Texas v. Haynes* (Civ. App.) 86 S. W. 934.

In an action for personal injuries to a passenger evidence of existing pain held admissible. *St. Louis & S. F. R. Co. v. Boyer*, 44 C. A. 311, 97 S. W. 1070.

In an action for personal injuries sustained in a railway collision, certain testimony

held admissible as a part of the *res gestæ*. *St. Louis Southwestern Ry. Co. of Texas v. Coats* (Civ. App.) 103 S. W. 662.

Rule stated as to when the descriptive statements of a sick or injured person are admissible in evidence. *Runnells v. Pecos & N. T. Ry. Co.*, 49 C. A. 150, 107 S. W. 647.

In an action for injuries to a passenger, his statements to third persons that he was hurt made immediately after the accident held admissible as a part of the *res gestæ*. *Id.*

An objection to a question to a witness held properly sustained as not calling for a part of the *res gestæ*. *Id.*

Exclamations or complaints which are spontaneous manifestations of distress or pain or suffering are admissible as original evidence as *res gestæ*, and may be testified to by any person in whose presence they are uttered. *Id.*

In an action for personal injuries, expressions of pain by plaintiff seven or eight minutes after the accident occurred held admissible, as tending to show bodily condition. *St. Louis Southwestern Ry. Co. of Texas v. Garber* (Civ. App.) 108 S. W. 742.

In an action by a beneficiary of a member of an accident insurance association, certain declarations by the member after injury held inadmissible as a part of the *res gestæ*. *Travelers' Protective Ass'n of America v. Roth* (Civ. App.) 108 S. W. 1039.

Complaints of suffering made the day after the injury held admissible as a statement accompanying and explaining a present physical condition. *South Texas Telephone Co. v. Tabb*, 52 C. A. 213, 114 S. W. 448.

In an action for personal injuries, certain testimony held admissible as declarations of present suffering. *St. Louis Southwestern Ry. Co. of Texas v. Norvell* (Civ. App.) 115 S. W. 861.

When the bodily or mental feelings of an individual is a material issue in a case, the expression of such feelings made at the times in question is admissible as original evidence. *Texas Cent. R. Co. v. Wheeler*, 52 C. A. 603, 116 S. W. 83.

In an action for injuries to a passenger, a physician's testimony held admissible in explanation of plaintiff's symptoms. *Missouri, K. & T. Ry. Co. of Texas v. Dalton*, 56 C. A. 82, 120 S. W. 240.

In a personal injury action, witnesses may testify that after the accident they heard plaintiff complain that his back, etc., hurt him so that he could not turn over; such testimony being admissible as expressions of existing pain. *Houston & T. C. R. Co. v. Parnell*, 56 C. A. 265, 120 S. W. 951.

In a personal injury action, testimony of plaintiff's wife, in answer to a question when she last observed that plaintiff had fever from use of his injured hand, that "he claims when he goes out and gets hot and does any kind of work, he says he feels like he has fever, inward fever," was admissible. *International & G. N. R. Co. v. Lane* (Civ. App.) 127 S. W. 1066.

Evidence that, after the injury, plaintiff complained of pain and was very nervous, was admissible when the pain or suffering complained of was contemporaneous with the declaration; it not being necessary that it be also *res gestæ* of the original injury. *Trinity & B. V. Ry. Co. v. Carpenter* (Civ. App.) 132 S. W. 837.

In a personal injury action, declarations by plaintiff shortly after the accident held properly admitted. *Houston & T. C. R. Co. v. Thompson* (Civ. App.) 138 S. W. 1066.

In an action against a railway company for breach of contract to carry a dead body, testimony held admissible to show plaintiff's mental suffering, etc. *Missouri, K. & T. Ry. Co. of Texas v. Linton* (Civ. App.) 141 S. W. 129.

In a personal injury action, witnesses held properly permitted to testify to declarations made by plaintiff as to existing pain, though he was then insane. *Knox v. Robbins* (Civ. App.) 151 S. W. 1134.

The exclamations of a person libeled on first hearing the libelous article read are admissible as a part of the *res gestæ*. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 157 S. W. 224.

An exclamation of pain made by one injured on pressure being applied on his spine by a physician examining him is admissible on the question of his injuries. *St. Louis Southwestern Ry. Co. of Texas v. Pruitt* (Civ. App.) 157 S. W. 236.

54. — Statements to physicians.—Inquiries by medical men, and the answers to them, are evidence to show the state of health of the individual, and it is admissible from the very nature of the thing. When the object is to show the condition of the health of a person, it is competent to prove how he looked, how he acted and of what he complained. *Rogers v. Crain*, 30 T. 234.

Plaintiff's statements to his physician as to subjective symptoms are admissible. *Gulf, C. & S. F. Ry. Co. v. Brown*, 16 C. A. 93, 40 S. W. 608.

Statement of plaintiff in respect to the pain, made to a physician examining him for purpose of testifying as an expert, held inadmissible. *Tyler S. E. Ry. Co. v. Wheeler* (Civ. App.) 41 S. W. 517.

Evidence of complaints by plaintiff to his physician when examining him held admissible as part of the *res gestæ*. *Wheeler v. Tyler S. E. Ry. Co.*, 91 T. 356, 43 S. W. 876.

Testimony of physician that plaintiff had told him of his symptoms and pains at the time of his injury held competent. *Missouri, K. & T. Ry. Co. of Texas v. Rose*, 19 C. A. 470, 49 S. W. 133.

In an action for injuries, evidence of a physician, making an examination for the purpose of testifying in the case, as to statements by plaintiff of past pain suffered, was improperly received. *St. Louis S. W. Ry. Co. of Texas v. Martin*, 26 C. A. 231, 63 S. W. 1089.

In an action for injuries, evidence of the declarations of plaintiff as to pain suffered held admissible to rebut defendant's testimony that he did not complain. *Id.*

A physician's testimony to complaints of suffering by plaintiff while examining him professionally is admissible, over objection that it was hearsay; such complaints being *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 67 S. W. 769.

In an action for personal injury, admission of statements made by the injured person to her physician should be confined to involuntary expressions of present pain. *Texas State Fair v. Marti*, 30 C. A. 132, 69 S. W. 432.

Where, in an action for death, questions were asked of the physician who attended decedent, for the purpose of getting the history of the case, with the view of treatment,

he might give answers made to him by the decedent as to pain and suffering. *St. Louis Southwestern Ry. Co. v. Burke*, 36 C. A. 222, 81 S. W. 774.

In an action for injuries to a servant, a statement by the servant to a physician as to how he got hurt was inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 82 S. W. 787.

Certain testimony of a physician as to communications made to him by plaintiff held admissible, unless such communications were made merely to enable the physician to form an opinion favorable to plaintiff. *St. Louis Southwestern Ry. Co. v. Demsey*, 40 C. A. 398, 89 S. W. 786.

In an action for personal injuries, the statement of the person injured to her physician as to what hurt her the worst held competent. *Dublin Gas & Electric Co. v. Frazier*, 46 C. A. 288, 103 S. W. 197.

Statements by a person injured to a physician held not rendered inadmissible by lapse of time between accident and their making. *El Paso & S. W. R. Co. v. Polk*, 49 C. A. 269, 108 S. W. 761.

Statement by a person injured in a railroad collision made to physician held not inadmissible in absence of certain showing. *Id.*

In a personal injury action, physicians who examined plaintiff as a basis for expert testimony, one of them being the attending physician, could testify to plaintiff's exclamations and wincing showing pain, when certain points along his spine were pressed; those points having been subjected to repeated tests. *Ft. Worth & D. C. Ry. Co. v. Hays* (Civ. App.) 131 S. W. 416.

RULE 35. HEARSAY IS GENERALLY INADMISSIBLE, BUT IT IS COMPETENT EVIDENCE TO PROVE PEDIGREE, RELATIONSHIP, MARRIAGE, DEATH, AGE AND BOUNDARIES

I. Admissibility of hearsay evidence in general.

1. Nature of hearsay evidence and admissibility in general.
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18. Writings.
19. — Letters and telegrams.
20. — Records.
21. — Reports.
22. — Books and other publications.
23. — Certificates and affidavits.
24. — Pleadings.
25. — Recitals in instruments.

26. Evidence founded on hearsay.
27. — Reputation as to persons.
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29. — Repute as to facts in general.
30. — Ownership.
31. Impeachment of witness by hearsay evidence.

II. Pedigree, relationship, marriage, death, age and boundaries.

32. In general.
33. Family records.
34. General and family reputation.
35. Declarations by members of family.
36. — By deceased members.
37. — Necessity that declarant be dead.
38. — Relationship to family.
39. — Time of making declaration.
40. — Relation of declaration to controversy.
41. — Mode and form of declaration.
42. Declarations as to boundaries.
43. — Self-serving declarations.
44. — Declarations by third persons in general.
45. — Declarations by former owners.
46. — Declarations by deceased persons in general.
47. — Deceased surveyors.
48. — Deceased former owners.
49. — General reputation.

I. Admissibility of Hearsay Evidence in General

1. Nature of hearsay evidence and admissibility in general.—Evidence held inadmissible as hearsay. *Cleveland v. Higginbotham* (Civ. App.) 41 S. W. 404; *Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines*, 92 S. W. 40; *Southern Kansas Ry. Co. of Texas v. Cox*, 47 C. A. 84, 103 S. W. 1122; *Milwee v. Phelps*, 53 C. A. 195, 115 S. W. 891; *International & G. N. R. Co. v. Lane* (Civ. App.) 127 S. W. 1066.

A bookkeeper held to have sufficient knowledge to testify, as against an objection that his testimony was hearsay, that improvements were placed on land and paid for by his employer. *Smith v. James* (Civ. App.) 42 S. W. 792.

Where, in the nature of things, facts testified to could have been known to the witness, the court could not assume that they were not known, and exclude the testimony as hearsay. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

Where the point in issue was whether a conveyance was for a valuable consideration, admission of hearsay evidence that a consideration was paid was prejudicial error. *Flash v. Herndon* (Civ. App.) 44 S. W. 608.

On the sole issue as to whether an instrument was intended as a mortgage or a deed, evidence of the husband (grantor) that he told his wife (grantor) before the instrument

was executed that it was to be made as a security for debt, held inadmissible as hearsay. *Andrews v. Bonham*, 19 C. A. 179, 46 S. W. 902.

Evidence in action against a carrier for injury to goods while in transportation held not hearsay. *Ft. Worth & D. C. Ry. Co. v. Harlan* (Civ. App.) 62 S. W. 971.

In an action to recover assets of a former firm by one of the partners, an objection to his testifying as to the terms of the dissolution, on the ground that it was hearsay, held properly overruled. *First Nat. Bank v. Watson* (Civ. App.) 66 S. W. 232.

An agreement that hearsay testimony might be introduced in consideration of the abandonment of a proceeding to perpetuate testimony held not contrary to public policy. *Thompson v. Ft. Worth & R. G. Ry. Co.*, 31 C. A. 533, 73 S. W. 29.

In an action for injuries to one owing to his having been struck by a railroad train, held proper to admit testimony that witness, who had made a plat of the place, had been shown the place by those who were present, and to permit them to testify that they had shown the place. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

Testimony of witness, in action on policy, that he said to plaintiff, "I told him, 'Yes, he did,' for I told him to do so," regarding plaintiff's statement to witness, after loss, that he did not know that he had to notify defendant's agent of taking out of other insurance, held admissible. *Ætna Ins. Co. v. Eastman* (Civ. App.) 80 S. W. 255.

In an action against telegraph company for negligence in failing to deliver a message tendering plaintiffs an option, testimony that they had an option, not in writing, held not hearsay. *Western Union Tel. Co. v. L. Hirsch* (Civ. App.) 84 S. W. 394.

On trial of a plea in abatement, based on defendant's alleged residence, evidence of plaintiff as to the efforts to ascertain defendants' residence held not objectionable as hearsay. *Wiley v. Shivel*, 37 C. A. 605, 84 S. W. 1100.

In an action against railroads for damages to plaintiff's cattle resulting from delay in transportation, certain testimony held not hearsay. *Red River, T. & S. Ry. Co. v. Eastin & Knox*, 39 C. A. 579, 88 S. W. 530.

In an action to recover damages for the failure of defendant company to deliver a message directed to plaintiff's brother, advising him that their mother was dying, and requesting him to come at once, testimony of the brother as to the state of feeling existing between the mother and plaintiff held admissible and not hearsay. *Western Union Telegraph Co. v. Bell* (Civ. App.) 90 S. W. 714.

In an action for broker's commissions, evidence of what witness told the purchaser that the seller told him held inadmissible as hearsay. *Ross v. Moskowitz* (Civ. App.) 95 S. W. 86.

Certain evidence held not objectionable as hearsay. *Kirby Lumber Co. v. Chambers*, 41 C. A. 632, 95 S. W. 607.

In an action against a carrier for conversion of certain corn, certain evidence held not objectionable as hearsay. *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 42 C. A. 125, 95 S. W. 656.

It is not competent for a physician to testify that he had told a passenger suing for injuries that the ailment complained of had not been caused by the hardships of her trip. *Texas & N. O. R. Co. v. Harrington*, 44 C. A. 386, 98 S. W. 653.

In an action for injuries to cattle by a carrier's delay in furnishing cars, plaintiff's statement that he ordered the cars through R. held not hearsay. *San Antonio & A. P. Ry. Co. v. Timon*, 45 C. A. 47, 99 S. W. 418.

Evidence as to what a person holding a conversation over the telephone told witness was said by the person at the other end of the line is hearsay. *Texas & P. Ry. Co. v. Felker*, 44 C. A. 420, 99 S. W. 439.

In an action for sickness caused by stagnant water, testimony that others had typhoid fever, based on hearsay, was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Craft* (Civ. App.) 102 S. W. 170.

In a suit to enforce a parol trust, certain testimony held not objectionable as hearsay. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

In an action for property and the value of the use thereof, certain evidence held not objectionable as hearsay. *Sparks v. De Bord* (Civ. App.) 110 S. W. 757.

In an action on a liquor dealer's bond for damages, through the sale of liquor, to plaintiff's husband, certain testimony held not inadmissible as hearsay. *Birkman v. Fahrenthold*, 52 C. A. 335, 114 S. W. 428.

In a suit for a balance due on a sale, proof that defendant stated to his partner, who was interested, that there would be a lawsuit, or trouble about it, and he would give him one-half of what he could beat defendant out of, held not to be hearsay. *Hamilton v. Dismukes*, 53 C. A. 129, 115 S. W. 1181.

Evidence of plaintiff's complaint of pain and soreness in his back held not objectionable as hearsay. *Pecos & N. T. R. Co. v. Coffman*, 56 C. A. 472, 121 S. W. 218.

In an action for injuries to a passenger, evidence by a witness that the person injured had told her that she had attempted to commit abortion on herself would be hearsay. *El Paso & N. E. Ry. Co. v. Landon* (Civ. App.) 124 S. W. 744.

A second deposition taken by defendant held to show that the testimony of the witness taken by plaintiff's deposition was hearsay. *Oltmanns Bros. v. Poland* (Civ. App.) 142 S. W. 653.

Where, in an action for injuries to live stock, the evidence showed that the cattle arrived at the point of destination at 6:50 a. m., and that they were turned over to a commission merchant about 8 o'clock a. m., the testimony of a salesman of the commission merchant as to the condition of the stock at time of arrival, accompanied by statement that he first saw the stock about 8 o'clock, was not objectionable as hearsay. *Pecos & N. T. Ry. Co. v. Brooks* (Civ. App.) 145 S. W. 649.

Where, in an action for injuries to a servant, the master claimed that the servant was injured in a wrestle with a third person, the testimony of a timekeeper that he had made statements to a roadmaster of the master about the wrestle and the result was properly excluded as hearsay. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

In an action on an open verified account, evidence by a member of the defendant firm that the firm bought goods for which it overpaid by a check, which was applied by plaintiff to individual debts of the firm's predecessor, without its knowledge or consent, held not hearsay. *Rotan Grocery Co. v. Tatum* (Civ. App.) 149 S. W. 342.

In an action for wrongful death by an accident at a railroad crossing, a statement made at the inquest was objectionable as hearsay. *Texas Cent. R. Co. v. Dumas* (Civ. App.) 149 S. W. 543.

Testimony of an assayer as to a statement, made by him as to the result of an assay, in presence of plaintiff and of the vendors' agent, held not hearsay. *Kleine Bros. v. Gidcomb* (Civ. App.) 152 S. W. 462.

It was error to admit hearsay evidence of a defendant where he was in default, and the only effect thereof would be to bind his codefendant, who was not a party to the conversation. *Wilkinson v. Bradford* (Civ. App.) 154 S. W. 691.

In an action against a telephone company to recover for injuries to a horse caused by a wire left in the highway by the company, it is error to permit a witness whose statements are not binding on the company to testify as to what he told the owner of the horse. *Southwestern Telegraph & Telephone Co. v. Thompson* (Civ. App.) 157 S. W. 1185.

2. Hearsay evidence of opinions in general.—The declarations of a surveyor, who is dead, which were made at a time when he was attempting a survey of a tract of land not originally surveyed by him, of which he had no previous knowledge, and which relate to his opinion regarding the identification of corners and lines of the survey, are not admissible in evidence. *Russell v. Hunnicutt*, 70 T. 657, 8 S. W. 500.

In an action on contract to employ plaintiff for life in consideration of his release of a claim for personal injuries, evidence as to an opinion given by defendant's attorneys relative to defendant's liability for the injuries held hearsay and inadmissible. *Texas Cent. R. Co. v. Eldredge* (Civ. App.) 155 S. W. 1010.

3. Oral statements by persons other than parties or witnesses.—In a suit between parties, which involved the good faith in a matter connected with said suit by a third party, who was not a party to the record, the declarations of such third party to another, neither party to the suit being present, are hearsay, and not admissible in evidence. *Fox v. Willis*, 60 T. 373.

Evidence that the testimony of a witness on a former trial was the same as on the pending trial is hearsay and inadmissible, no attack having been made upon the witness as testifying differently. *Hunter v. Lanius*, 82 T. 677, 18 S. W. 201.

Declarations by a married woman that her husband had abandoned her and that they lived apart are not evidence of that fact. *Blum v. Goff* (Civ. App.) 29 S. W. 1110.

Evidence of a conversation had with third person in party's absence held hearsay. *Lewis v. Bell* (Civ. App.) 40 S. W. 747.

Evidence of a contractor that he had been instructed to do a certain act by defendant held hearsay. *Texas Cent. R. Co. v. Wills* (Civ. App.) 41 S. W. 848.

Statement by constable to claimant of property after levy thereon held hearsay and inadmissible. *Goldberg v. Bussey* (Civ. App.) 47 S. W. 49.

Certain evidence held hearsay. *Davis v. Beall*, 21 C. A. 183, 50 S. W. 1086; *Western Union Tel. Co. v. Burgess* (Civ. App.) 56 S. W. 237; *Davis v. Sisk*, 49 C. A. 193, 108 S. W. 472; *Gulf, C. & S. F. R. Co. v. Farmer*, 102 T. 235, 115 S. W. 260; *Milwee v. Phelps*, 53 C. A. 195, 115 S. W. 891; *Missouri, K. & T. R. Co. of Texas v. Williams* (Civ. App.) 183 S. W. 499; *Same v. Groseclose*, 134 S. W. 736; *Ikland v. Ikland*, 139 S. W. 925.

Statements made by an employé held hearsay as against the employer. *Gulf, C. & S. F. Ry. Co. v. McMurrrough*, 41 C. A. 216, 91 S. W. 320.

In an action for injuries to a passenger, evidence by plaintiff's mother that plaintiff was offered certain employment by telephone before her injury, was admissible over objection that it was hearsay, where the witness was called up by telephone by the person making the offer. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.) 96 S. W. 653.

In action for injuries to infant at railroad crossing, statement of plaintiff's father that the place where plaintiff got hurt was not at a crossing held inadmissible. *Gulf, C. & S. F. Ry. Co. v. Garrett* (Civ. App.) 99 S. W. 162.

In an action for negligent death, certain testimony held not competent as original testimony. *International & G. N. R. Co. v. Howell* (Civ. App.) 105 S. W. 560.

Conversations between defendant and another, in the absence of plaintiffs or their agents, held inadmissible. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

Certain testimony of a witness, in an action against a telegraph company for delay in delivering a message, held inadmissible as hearsay. *Western Union Telegraph Co. v. Douglass* (Civ. App.) 124 S. W. 488.

In trespass to try title, where defendant claims under a trust deed and a parol sale, testimony as to statements by plaintiff's grantor held hearsay and inadmissible. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

In an action by an assignee of a part of the purchase price for land contracted to be sold, certain testimony held inadmissible as against the purchaser. *Dibrell v. Fisher* (Civ. App.) 126 S. W. 905.

In an action for breach of contract to sell and deliver goods under a contract made by a third person, certain evidence held inadmissible as hearsay. *Pierce v. Waller* (Civ. App.) 127 S. W. 1077.

Statements by a purchaser to a broker employed to procure a purchaser held inadmissible against the owner as hearsay. *Arnold v. Johnson* (Civ. App.) 128 S. W. 1186.

Certain testimony held not objectionable as hearsay. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 133 S. W. 499.

Declaration of a third person in defendant's absence held inadmissible against him. *Petty v. Jordan-Spencer Co.* (Civ. App.) 135 S. W. 227.

Testimony as to what an outsider told defendant was properly excluded as being hearsay. *Smith v. Burgher* (Civ. App.) 136 S. W. 75.

Testimony as to what a telephone company's foreman said to one who requested him to remove a cable spool from the street is inadmissible as hearsay. *Southwestern Telegraph & Telephone Co. v. Doolittle* (Civ. App.) 138 S. W. 415.

The testimony of a seller of cattle as to what a depot agent had told him and the buyer as to an examination by the cattle inspector held hearsay and inadmissible. *O'Brien v. Von Lienen* (Civ. App.) 149 S. W. 723.

Statements made by J. to a witness explaining his failure to testify on a prior trial held hearsay. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

In an action on a bond, evidence of a conversation between the surety and the obligor as to the obligee, had in the absence of the obligee, held inadmissible as hearsay. *White Sewing Mach. Co. v. Wingo* (Civ. App.) 152 S. W. 187.

4. — **Bodily and mental conditions.**—Opinions, see ante.

In an action for death, evidence of decedent's attending physician as to a declaration made by deceased with reference to her injury held inadmissible as hearsay. *International & G. N. R. Co. v. Boykin*, 32 C. A. 72, 74 S. W. 93.

In an action against a railroad for personal injuries received by a person in alighting from a train, letter from medical witness to plaintiff's counsel, referring to the cause of the injury, held competent. *Missouri, K. & T. Ry. Co. of Texas v. Criswell*, 34 C. A. 278, 78 S. W. 388.

Testimony, in an action against a railroad for personal injuries received by a passenger in alighting from a train, as to what a physician said after an examination of the person injured, is hearsay. *Id.*

Testimony of a witness as to statements made by one injured by a fall held inadmissible as hearsay. *Roth v. Travelers' Protective Ass'n of America*, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

5. — **Writings, contracts, agreements and transactions.**—M. sued R. for the wrongful seizure of his goods under a writ of attachment against H., and the issue was whether the transfer of goods by H. to M. was in fraud of creditors. The goods in controversy were in possession of P. H., who was a witness for the defendant, was asked to state all he knew concerning the transaction between H., M. and F. in reference to said stock of goods. Among other matters stated by the witness, he said: "I afterwards found out that F. had written to R., one of my creditors, that I was insolvent, and they had better come up immediately and protect their interests. This was when P. held the goods for me and F. was trying to get a deduction. About two or three days after this the attachment was run on my stock." Held, that the source of information not having been stated, the testimony was hearsay, and properly excluded. *Rosenthal v. Middlebrook*, 63 T. 333.

In an action by the heirs of the wife to recover land conveyed by the husband, his declarations that he had bought and paid for the land were relevant to show an equitable title. But they could have been excluded if the objection that it was hearsay had been made. *McDonough v. Jefferson County*, 79 T. 535, 15 S. W. 490.

Evidence of statements of county judge that he had approved a bond is admissible to impeach his testimony, but not as affirmative evidence against the sureties. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

Testimony of witnesses that they heard members of a grantee's family say a conveyance to him was a gift, is hearsay. *Mahon v. Barnett* (Civ. App.) 45 S. W. 24.

Conversation by deceased guardian held not admissible in action against surviving guardian to restrain execution of judgment obtained by them. *Davis v. Beall*, 21 C. A. 183, 50 S. W. 1086.

Proof of declarations of depository to grantee held not admissible to show delivery of deed. *Merchants' Ins. Co. v. Nowlin* (Civ. App.) 56 S. W. 198.

Testimony of a railway agent as to the contents of a bill of lading which had come into his hands held not hearsay. *Missouri, K. & T. Ry. Co. of Texas v. Dilworth*, 95 T. 327, 67 S. W. 88.

On proceedings for the probate of a lost will, certain evidence to the effect that testatrix's husband had told a witness that testatrix had burned up the will held properly excluded. *McElroy v. Phink* (Civ. App.) 74 S. W. 61.

A statement by a contractor to the sureties in his bond held hearsay. *Thompson v. Chaffee*, 39 C. A. 567, 89 S. W. 285.

In an action on mutual benefit certificate, evidence of officer of association as to knowledge of other officers with respect to delivery of certificate held inadmissible. *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 C. A. 29, 90 S. W. 921.

Testimony that paper offered in evidence was copied from record pointed out by land commissioner held inadmissible as hearsay. *Smithers v. Lowrance* (Civ. App.) 91 S. W. 606.

Testimony identifying a copy of a contract was properly excluded where the answer of the witness to another question showed that she did not know except by hearsay that it was in fact a copy. *Walker v. Dickey*, 44 C. A. 110, 98 S. W. 658.

Certain testimony held hearsay as to the grantee in a deed, and not binding on him. *Whitfield v. Diffe* (Civ. App.) 105 S. W. 324.

In an action by the holder of a draft against the drawee, it was error to permit plaintiff to testify to statements made to him by a third person; such statements being hearsay and not binding on defendant. *Milmo Nat. Bank v. Cobbs*, 53 C. A. 1, 115 S. W. 345.

In a suit for failure to furnish cars, held, that a witness was properly allowed to testify as to the contents of reports to the state railroad commission as against objection that his testimony was hearsay. *Chicago, R. I. & G. Ry. Co. v. Risley Bros. & Co.*, 55 C. A. 66, 119 S. W. 897.

In an action to set aside a deed as having been procured through the fraudulent representation, evidence of admissions by plaintiff's agent held inadmissible; no facts having been shown to make statements by plaintiff's agent admissible against him. *Peters v. Strauss* (Civ. App.) 132 S. W. 956.

Evidence that witness' wife told him that she never signed a deed, and as to what witness told his wife as to what he understood was included in the deed, was hearsay. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

A statement, made by the sender of a telegram to witness, that in sending the telegram he had followed instructions given, held hearsay. *Western Union Telegraph Co. v. Ray* (Civ. App.) 147 S. W. 1194.

It was error to permit a witness to testify to the contents of a letter which was not itself admissible in evidence, as not binding the other party. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.* (Civ. App.) 151 S. W. 850.

In trespass to try title, where defendants relied upon a lost deed, testimony of statements by a third person as to the description of the land included in the deed is inadmissible as hearsay. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

6. — **Ownership and possession.**—A. sued his daughter B. for certain personal property. B. claimed the property by gift from her grandfather, and a witness, over the objection of plaintiff, testified that he had heard plaintiff's father say many years before that he had given the property to defendant. It was not shown that plaintiff derived title from his father, or that his father ever had it in his possession. Held, that the evidence was hearsay and inadmissible. *Thurmond v. Trammell*, 22 T. 257.

A declaration or admission of a vendor of land made after he has parted with his title and possession is hearsay, and is not admissible to disparage or impeach the title of his vendee. *Thompson v. Herring*, 27 T. 282.

In an action of trespass to try title, the defendant, who was a pre-emptor of land previously appropriated, testified as to certain conversations he had with the county surveyor and commissioner of the general land office on the subject of his pre-emption claim. In reversing the judgment on other grounds, the court say: "This evidence seems to be hearsay; if the testimony is admissible, the officers would seem to be the proper witnesses." *Thompson v. Cornstock*, 59 T. 318.

The plaintiff claimed title to cattle for the seizure of which damages were sought under G. A. and wife, H. A. It was incompetent to admit declarations of H. A. that she did not claim the cattle, and that they belonged to plaintiff; the declarations were not made in the presence of any of the parties in interest. *Rankin v. Bell*, 85 T. 28, 19 S. W. 874.

Declarations of the husband as to the interest of his wife in her separate property are hearsay and inadmissible in evidence. *Owen v. N. Y. & T. Land Co.*, 11 C. A. 284, 32 S. W. 189.

Declarations of defendant as to ownership of fund in dispute held not admissible against the garnishee and the claimant of the fund. *Smith v. Merchants' & Planters' Nat. Bank* (Civ. App.) 40 S. W. 1038.

Certain evidence held inadmissible as hearsay. *Johnston v. Hamby*, 24 C. A. 398, 59 S. W. 1124; *Allen v. Anderson & Anderson* (Civ. App.) 96 S. W. 54.

Where, in an action against a railway company for injury to an employé resulting from a defective handhold, the testimony of a witness that he examined the car, and describing its condition, should not be excluded, as hearsay, because it was not shown how he learned the identity of the car. *Galveston, H. & S. A. Ry. Co. v. Jones*, 29 C. A. 214, 68 S. W. 190.

Question to a witness in trespass to try title held not objectionable. *Rice v. Melott*, 32 C. A. 426, 74 S. W. 935.

In trespass to try title, certain evidence on the issue of whether the person purchasing the land in controversy resided on her home section held hearsay. *Bell v. Bates*, 36 C. A. 233, 81 S. W. 551.

It was error to permit a witness to testify that a certain certificate located on the land in controversy had been given to her husband and was his separate property, where she was testifying to what her husband had told her. *Stephens v. Herron* (Civ. App.) 88 S. W. 849.

Testimony as to statements of one of defendants held inadmissible as hearsay. *Jackson v. Poteet* (Civ. App.) 89 S. W. 980.

The testimony of a witness that the children of a person told the witness that their mother claimed title to land was hearsay. *Carlisle v. Gibbs*, 44 C. A. 189, 98 S. W. 192.

In an action where plaintiff claimed land under an alleged deed from his mother, testimony of a witness that certain persons had told him that plaintiff had testified in an action by plaintiff's sister involving the same deed that he (plaintiff) did not claim anything under the deed is hearsay and inadmissible. *Walker v. Erwin*, 47 C. A. 637, 106 S. W. 164.

Actual possession by a tenant to establish adverse possession cannot be shown by the declaration of the tenant acknowledging the tenancy. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

Evidence that a witness had investigated defendants' claim to the land in controversy, and had told them they could not recover the land, held inadmissible. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

The testimony of a witness that the children of a person told the witness that their mother claimed the land in controversy was inadmissible as hearsay. *Carlisle v. Gibbs*, 57 C. A. 592, 123 S. W. 216.

In trespass to try title, where defendant claims under a trust deed and parol sale, testimony that the owner who deeded it to plaintiffs stated to them that defendant was looking after the property, that there was no incumbrance on it, and that he had not made a deed of it was hearsay and inadmissible. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

Defendant's testimony of what another said not in plaintiffs' presence, offered to contradict their testimony as to their title, held hearsay. *Ericksen v. McWhorter* (Civ. App.) 143 S. W. 245.

Statements by a judgment debtor as to his ownership of property claimed by a third person held not binding on the third person. *Marrett v. Herrington* (Civ. App.) 145 S. W. 254.

In trespass to try title, where plaintiffs admitted defendants' right to compensation for improvements made in good faith, evidence of statements by a third person to defendants' predecessor in interest as to the nature of defendants' title is properly excluded, being admissible only to show defendants' good faith. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

7. — **Value and price.**—Showing sales or quotations, see post.

In a suit for damages resulting from the loss by a common carrier of a family portrait, a son of plaintiff's deceased husband testified as to the value of the paintings. On cross-examination it was developed that he had no personal knowledge of the cost, but had learned it from his father and traditions in the family. Held, that the testimony was hearsay, and the court should have sustained the motion to exclude it. *H. & T. C. R. R. Co. v. Burke*, 55 T. 323, 40 Am. Rep. 808.

What a witness heard appraisers say as to the value of merchandise is hearsay and inadmissible. *Half v. Goldfrank* (Civ. App.) 49 S. W. 1095.

Testimony of plaintiff that he was told by a man in that business, whose name witness did not remember, that he would repaint the bed for a certain price, was hearsay. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.) 71 S. W. 314.

Testimony of market value of cattle at a certain place, based on information received from others, is hearsay and incompetent. *Texas & P. Ry. Co. v. Arnett*, 40 C. A. 76, 88 S. W. 448.

In an action against a carrier for injuries to a shipment of cattle, certain testimony as to the prices brought by the cattle held incompetent. *Texas & P. Ry. Co. v. Leggett*, 44 C. A. 296, 99 S. W. 176.

In an action by an indorsee, testimony of banker that he was told that drafts purchased by the indorsee were in payment for the notes sued on held hearsay and inadmissible to establish the payment of a valuable consideration by the indorsee. *Carrollton Press Brick Co. v. Davis* (Civ. App.) 155 S. W. 1046.

8. — **Indebtedness.**—In trespass to try title, in which defendant claimed under a deed from an independent executrix, to pay the debts of testator, declarations of the executrix as to the existence of debts at the time of the sale, made after the sale, are inadmissible as hearsay. *Haring v. Shelton*, 103 T. 10, 122 S. W. 13, affirming (Civ. App.) 114 S. W. 339.

9. — **Cause.**—Declarations of an injured party, made to a medical man in an answer to inquiries, but not at the time of receiving the injury, as to the person by whom and the weapon with which the injury was inflicted, would be hearsay and inadmissible. *Newman v. Dodson*, 61 T. 91.

Evidence as to statements of operator sending message as to the reason the receiving operator did not deliver it held inadmissible, as hearsay. *Western Union Tel. Co. v. Wofford* (Civ. App.) 42 S. W. 119.

In an action against a railroad company for injuries to a shipment of horses, certain evidence held inadmissible as hearsay. *Ft. Worth & D. C. Ry. Co. v. Snyder & Duree*, 40 C. A. 345, 89 S. W. 1119.

In an action against a railroad company for destruction of property by fire communicated by oil leaking from a tank on defendant's right of way, statements made by a person during the progress of the fire as to the cause of the ignition of the oil were hearsay, and inadmissible in behalf of defendants. *Texas & N. O. R. Co. v. Bellar*, 51 C. A. 154, 112 S. W. 323.

10. — **Due care and nature of act.**—What the messenger said to the manager after he delivered a telegram at the wrong place is not admissible in an action against the company for such negligence. *Western Union Tel. Co. v. Sweetman*, 19 C. A. 435, 47 S. W. 676.

On an issue whether cars were overloaded with cattle by the shipper, evidence that the carrier's agents told him that he was overloading the cars is hearsay and inadmissible. *Houston & T. C. R. Co. v. Wilson* (Civ. App.) 50 S. W. 156.

In an action against several defendants for wrongful death of an employé, a statement as to what one of defendant's agents said to decedent on employing him held properly excluded. *Behrens v. Brice*, 52 C. A. 221, 113 S. W. 782.

In a suit against a railroad for negligence in providing an injured employé with medical attention, certain testimony of plaintiff in regard to what a third person had told him defendant's local agent had said, in relation to plaintiff's being carried by train to the place where defendant's local agent resided, held to be hearsay. *Missouri, K. & T. Ry. Co. of Texas v. Graves*, 57 C. A. 395, 122 S. W. 458.

In an action for injury to an employé in the derailment of a logging train, testimony that plaintiff's coemployé told witness after the wreck that they had orders not to ride on the train was properly excluded, as being hearsay. *Knox v. Robbins* (Civ. App.) 151 S. W. 1134.

11. — **Condition or sufficiency of things.**—A statement as to the condition of the walls of a house, and as to what was done in completing the house after the contractor was discharged, made to a third person by a workman employed by such contractor, is hearsay, and not admissible in favor of the contractor in a suit against the owner. *Gonzales College v. McHugh*, 26 T. 677.

In an action by a switchman for injuries sustained by stumbling over ground switch at night, held error to permit plaintiff to testify that certain person had warned him of other switches; it not appearing that the person warning him was an officer or agent of defendant. *Galveston, H. & S. A. Ry. Co. v. English* (Civ. App.) 59 S. W. 626.

Testimony as to the condition of cattle on their arrival at market held not improper as hearsay. *Trout & Newberry v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 111 S. W. 220.

In an action against a carrier for injuries to goods, plaintiff held improperly permitted to reproduce statements made to him by the prospective buyer of the goods concerning their damaged condition. *Gulf, C. & S. F. Ry. Co. v. Coulter* (Civ. App.) 139 S. W. 16.

In an action for damage to cattle en route by rough handling, evidence that the conductor told the brakeman to tell the engineer to stop handling the train roughly held not admissible. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 140 S. W. 368.

Where defendant claimed a breach of warranty in the sale of a pump, evidence of declarations of bystanders that it took too much steam held inadmissible. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 147 S. W. 717.

12. — **Weight, amount and quality.**—Certain testimony held not hearsay. *Gresham v. Harcourt*, 33 C. A. 196, 75 S. W. 808; *Moore v. Robinson* (Civ. App.) 75 S. W. 890.

That a witness, testifying to the weight of certain cattle, stated that his yard man weighed the cattle, held insufficient to show that his testimony was hearsay. *Texas & P. Ry. Co. v. Daugherty & Voliva*, 33 C. A. 267, 76 S. W. 605.

Testimony as to the weight of coal held inadmissible as hearsay. *St. Louis Southwestern Ry. Co. of Texas v. McLeod* (Civ. App.) 115 S. W. 85.

Testimony of a witness as to the weight of a car load of freight held not hearsay. *Eastern Texas R. Co. v. Daniel & Burton* (Civ. App.) 133 S. W. 506.

13. — **Representative character and relationship.**—The issue being whether A. and B. were partners, a statement made by A. that B. was his partner, not made in the presence of B., is not evidence against the latter. *Cleveland v. Duggan*, 2 App. C. C. § 85.

In an action for services, evidence of statement of certain person held inadmissible. *St. Louis Southwestern Ry. Co. of Texas v. Irvine* (Civ. App.) 89 S. W. 428.

14. — **Identity.**—Plaintiffs, as heirs of G. W. Lernoyn, sued to recover a tract of land patented to G. W. Lernoyn on a bounty land warrant issued to him in 1838. For the purpose of identifying the Lernoyn whose heirs brought the suit with the Lernoyn to whom the land was patented, one of the plaintiffs testified that he had frequently heard his father say that he had served in the war of 1836. Held, that the testimony was hearsay and inadmissible. *Smith v. Shinn*, 58 T. 1.

Evidence as to statement made by a third person, to whose identity the witness was unable to testify, except by hearsay, held incompetent. *Wells Fargo & Co.'s Express v. Waites* (Civ. App.) 60 S. W. 582.

15. — **Residence.**—On an issue in an election contest as to the qualifications of a voter, testimony relating to the voter's residence was properly excluded, where it appeared that it was based on hearsay. *Linger v. Balfour* (Civ. App.) 149 S. W. 795.

16. — **Statements of persons available as witnesses.**—A. sued B. for the seizure and conversion of certain goods. B. answered, claiming the goods by virtue of seizure and sale of the goods as the property of S. The issue was whether the goods had been transferred by S. to A. in good faith before the levy of the attachment. For the purpose of showing the good faith of the sale by S. to plaintiff, a witness was permitted to relate to the jury the subject of conversations by him at different times with S., A. and another in the absence of the defendant and after the accrual of his claim against S. The conversations related to and were intended to explain the transaction and sale charged by the defendant to have been fraudulent. Held, that the evidence was inadmissible. *Tucker v. Hamlin*, 60 T. 171.

17. — **Statements by persons since deceased.**—Plaintiff employed a private surveyor to survey a tract of land, to ascertain its boundaries. This surveyor had not made the original survey, nor was he present when it was made. During his work he made numerous declarations, to persons who were present and assisting him, of his opinion as to identity of lines and corners. Held, that these declarations were merely hearsay, though the surveyor had died before the trial. *Russell v. Hunnicutt*, 70 T. 657, 8 S. W. 500.

Evidence held admissible, and not hearsay, in an action by parents against a railroad for wrongful death of their son, defendant's employé. *Atchison, T. & S. F. Ry. Co. v. Van Belle*, 26 C. A. 511, 64 S. W. 397.

In an action against a railroad company for death alleged to have been caused by the lurching of the train on which deceased was a passenger, declarations of deceased made some time after the accident held hearsay and inadmissible. *Hicks v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 71 S. W. 322.

A declaration by the deceased assignor of a certificate of land issued by the state, made after the death of the assignee, that the assignment was in trust or only conveyed an undivided interest in the certificate, is inadmissible as hearsay, and self-serving, in a suit by parties claiming under the assignor against parties claiming under the assignee, but a declaration that the assignor claimed to be the owner was admissible. *Carlisle v. Gibbs*, 57 C. A. 592, 123 S. W. 216.

18. **Writings.**—Showing contents of writings, see ante.

A letter head of one corporation held inadmissible against another, to prove that the same person is an officer in both. *Ricker Nat. Bank v. Brown* (Civ. App.) 43 S. W. 909.

In an action against a railroad company for injuries to a shipment of cattle, certain evidence held hearsay. *Ft. Worth & R. G. Ry. Co. v. Cauble*, 41 C. A. 348, 91 S. W. 244.

In an action against a carrier for damages to a shipment of cattle owing to delay in transportation, the testimony of a witness as to the schedule time of the railroad was not objectionable as hearsay. *Gulf, C. & S. F. Ry. Co. v. Funk*, 42 C. A. 490, 92 S. W. 1032.

The admission of an unsworn and ex parte written statement on a material point is error. *Fletcher v. First Nat. Bank* (Civ. App.) 126 S. W. 936.

Admission of evidence, in an action against carriers for misdelivering live stock, held not error. *Southern Kansas Ry. Co. of Texas v. Lockhart* (Civ. App.) 141 S. W. 127.

A written statement, made by a conductor as to his commission of an act of negligence charged, held not admissible as hearsay in an action therefor, where his testimony was not sought to be impeached. *Quigley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 142 S. W. 633.

In an action against a railroad company for the killing of an animal on its tracks, a statement, signed by the persons who sold the animal to plaintiff, that they considered him worth more than \$475, was inadmissible as hearsay. *Ft. Worth & R. G. Ry. Co. v. Chisholm* (Civ. App.) 146 S. W. 988.

19. — **Letters and telegrams.**—In an action against a carrier for negligence in the transportation of cattle, whereby they lost weight in transit, a telegram to plaintiff stating the loss in weight was incompetent. *International & G. N. R. Co. v. Startz*, 97 T. 167, 77 S. W. 1.

Statement of insured's attorney in letter to the defendant company held not objectionable in action on policy, as hearsay. *Ætna Ins. Co. v. Fitze*, 34 C. A. 214, 78 S. W. 370.

In an action against a telegraph company for breach of contract to furnish market reports, letters and telegrams received from a commission company held hearsay and inadmissible. *Western Union Telegraph Co. v. Bradford*, 41 C. A. 281, 91 S. W. 818.

Statement in a letter held hearsay as to one not a party thereto. *Houston & T. C. R. Co. v. Mayes*, 44 C. A. 31, 97 S. W. 318.

A letter written by a third person to the maker of a note sued on asking him to take up certain other notes at a discount held hearsay, and inadmissible to show insolvency. *Texas Baptist University v. Patton* (Civ. App.) 145 S. W. 1063.

On the issue of whether plaintiff in selling defendant's policies made false rep-

representations to the purchasers, their letters to defendant are hearsay. *Mutual Life Ins. Co. of New York v. Hodnette* (Civ. App.) 147 S. W. 615.

In an action on a premium note given to an insurance agent, a letter written by the secretary of the company, informing the insured that the premium had not been paid, was inadmissible as hearsay. *Newman v. Norris Implement Co.* (Civ. App.) 147 S. W. 725.

In an action for the value of land traded by plaintiff for a stock of merchandise, based on the fraudulent representations of defendant inducing the trade, a statement in a letter written by plaintiff's president to defendant after the trade was effected held inadmissible as hearsay. *Biard & Scales v. Tyler Building & Loan Ass'n* (Civ. App.) 147 S. W. 1168.

Letters passing between defendant's officials, relating to the land in controversy, are not admissible in trespass to try title, not binding plaintiff. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.* (Civ. App.) 151 S. W. 850.

20. — **Records.**—In a suit against a tax collector a county ledger is not admissible in evidence against the defendant. *Webb County v. Gonzales*, 69 T. 455, 6 S. W. 781.

Copy of order for land grant held inadmissible to show when grantee came to state. *Batcheller v. Besancon*, 19 C. A. 137, 47 S. W. 296.

On an issue as to the weight of certain cattle, the testimony of a witness, from records which he was obliged to consult to answer the questions, was incompetent. *Texas & P. Ry. Co. v. Leggett* (Civ. App.) 86 S. W. 1066.

In an action for injuries from fire claimed to have been set by sparks from passing locomotives, it was error to allow the agent at the station near the burned property to read from records made by the conductors of freight trains showing the time their trains passed the station on the day of the fire, where these records were not made in the presence of the agent, where he stated that he had no personal knowledge of their correctness, and it did not appear that the testimony of the persons who made the records could not have been obtained. *Cathey v. Missouri, K. & T. R. Co. of Texas* (Civ. App.) 124 S. W. 217.

In an action against a railroad for damages to plaintiff's shipment of poultry by failure to properly ice the car, testimony that defendant's records showed that the car was iced en route was inadmissible as hearsay, witness having no personal knowledge of the correctness of the entries and there being no testimony that the books in which they were found were correctly kept. *A. B. Patterson & Co. v. Gulf, C. & S. F. R. Co.* (Civ. App.) 126 S. W. 336.

The testimony of a witness, not based on his personal knowledge of the facts, but on records kept and information given by another, is inadmissible as hearsay. *Postal Telegraph-Cable Co. v. S. A. Pace Grocery Co.* (Civ. App.) 126 S. W. 1172.

A baptismal record held inadmissible to show age. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

21. — **Reports.**—A. sued B. on a contract for the delivery of saw-logs, the only controversy being as to the amount delivered. The contract stipulated that A., or one S., was to measure the logs, which should be taken and accepted as the true measurement. The measurement was made by the employes of A., who reported to the book-keeper, from which a report was delivered to B. A. had no other knowledge of the measurement than that furnished by the reports of his employes. Held, that the testimony of A. was hearsay, and inadmissible. *Olive v. Hester*, 63 T. 190.

Report of insured's physician to insurer, a fraternal order, held inadmissible in a claim by beneficiary. *Supreme Lodge, Knights of Honor, v. Rampy* (Civ. App.) 45 S. W. 422.

Report by engineer as to cause of accident held inadmissible as hearsay. *San Antonio & A. P. Ry. Co. v. Manning*, 20 C. A. 504, 50 S. W. 177.

Testimony as to the quantity of land cultivated by a tenant, based on the report of a surveyor, is inadmissible. *Majors v. Goodrich* (Civ. App.) 54 S. W. 919.

In action against railroad for damages to employe by reason of incompetence of surgeon employed in the company's hospital, a newspaper account of the proceedings of the state board of medical examiners held inadmissible. *Poling v. San Antonio & A. P. Ry. Co.*, 32 C. A. 487, 75 S. W. 69.

In an action against carrier for breach of contract to furnish cars, testimony as to weight of cattle, based on account sales, held inadmissible. *International & G. N. R. Co. v. Startz*, 97 T. 167, 77 S. W. 1; *Texas & P. R. Co. v. W. Scott & Co.* (Civ. App.) 86 S. W. 1065.

On an issue as to the weight of cattle and the price at which they sold, in an action against a railroad for delay in shipment, account rendered the owner by the selling agent held admissible. *Texas & P. Ry. Co. v. Birdwell* (Civ. App.) 86 S. W. 1067; *Same v. Henderson*, Id.

In libel for charging plaintiff with smuggling, the report of the government officer who investigated the case was inadmissible as evidence of the facts stated therein, being hearsay. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

In an action for injuries from fire set by sparks from passing locomotives, held proper to allow the train dispatcher to testify from information on his "train sheet" as to certain matters. *Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 124 S. W. 217.

Testimony of a witness as to weights, based entirely on accounts of sales, held hearsay. *Eastern Texas R. Co. v. Daniel & Burton* (Civ. App.) 133 S. W. 506.

22. — **Books and other publications.**—Evidence to establish falsity of representations of defendant in purchase of goods held not hearsay. *Hall v. Hargadine-McKittrick Dry-Goods Co.*, 23 C. A. 149, 55 S. W. 747.

In an action for failure to promptly deliver a telegram, certain evidence held hearsay and inadmissible. *Western Union Tel. Co. v. Lovely*, 29 C. A. 584, 69 S. W. 128.

In an action on a sworn account, evidence of plaintiff's secretary and general manager that the account was made from the books of the company, which were correctly kept, held not objectionable as hearsay. *Pelican Lumber Co. v. Johnson*, 44 C. A. 6, 98 S. W. 207.

A physician held properly permitted to testify as to a life expectancy, over objections that his testimony was hearsay. *Ft. Worth & D. C. Ry. Co. v. Spear* (Civ. App.) 107 S. W. 613.

Medical books are not admissible in evidence to prove the opinions therein, nor may the opinions contained therein be presented to the jury by quoting from the books, and having a medical witness testify as to whether he agrees with them, and, if not, in what respect he differs from them. *Gulf, C. & S. F. Ry. Co. v. Farmer* (Civ. App.) 108 S. W. 729.

The testimony of a witness based on what he had read in journals is inadmissible as hearsay. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 420, 110 S. W. 978.

23. — **Certificates and affidavits.**—An affidavit of the insured as to the cause of a fire, and ownership and value of the property destroyed, which was part of the proof of loss, held admissible to show that proper proof of loss was made. *Fire Ass'n of Philadelphia v. McNerney* (Civ. App.) 54 S. W. 1053.

Statements made by a state treasurer of information received from the commissioner of the land office relating thereto is not evidence of applications to purchase school lands. *Smith v. Russell*, 23 C. A. 554, 56 S. W. 687.

An ex parte affidavit of a third person, with which plaintiffs were in no way connected was not admissible in evidence against them. *Halliday v. Lambright*, 29 C. A. 226, 68 S. W. 712.

In a suit involving the priority of two assignments of a fund, an affidavit of the assignor that he had not given one of the assignments was not admissible in evidence. *Henke & Pillot v. Keller*, 50 C. A. 533, 110 S. W. 783.

An affidavit by a witness in support of a motion to suppress his deposition was properly excluded as being hearsay. *Rice v. Ragan* (Civ. App.) 129 S. W. 1148.

24. — **Pleadings.**—It is error to admit in a party's behalf hearsay allegations in his application in the case made at a former term. *Jordan v. Young* (Civ. App.) 56 S. W. 762.

A document which would have served as original evidence of what a petition was, if the petition had been lost, cannot be classed as hearsay evidence. *Blair v. Boyd* (Civ. App.) 129 S. W. 870.

25. — **Recitals in instruments.**—Admissibility and effect of documentary evidence in general, see Introductory, ante.

Estoppel, see Rule 32.

Recitals in executor's deed held hearsay as against testator's estate. *League v. Williamson*, 33 C. A. 647, 77 S. W. 435.

26. **Evidence founded on hearsay.**—A statement of a witness based upon information received from some source held hearsay. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

27. — **Reputation as to persons.**—Partnership may not be shown by general reputation, common rumor, or the opinion or belief of a witness founded on hearsay. *White v. Whaley*, 1 App. C. C. § 103; *Cleveland v. Duggan*, 2 App. C. C. § 86.

Common repute is incompetent to prove a partnership. *Emberson v. McKenna*, 4 App. C. C. § 95, 16 S. W. 419.

Insanity cannot be proven by general reputation. *McLane v. Elder* (Civ. App.) 23 S. W. 757; *Ellis v. State*, 33 Cr. R. 86, 24 S. W. 894; *First Nat. Bank v. McGinty*, 29 C. A. 539, 69 S. W. 495.

Agency cannot be proven by general understanding among business men. *McGregor v. Hudson* (Civ. App.) 30 S. W. 489.

Hearsay evidence cannot establish agency. *Ft. Worth Live-Stock Commission Co. v. Hitson* (Civ. App.) 46 S. W. 915.

In an action against street railway for injuries to a passenger, certain evidence on the issue as to whether the passenger was ruptured prior to the accident held properly excluded. *Pelly v. Denison & S. Ry. Co.* (Civ. App.) 78 S. W. 542.

In an action for injuries, the fact that plaintiff was a prostitute could not be proved by evidence of general reputation. *St. Louis & S. F. R. Co. v. Smith*, 34 C. A. 612, 79 S. W. 340.

The condition of insured's health when she applied to become a member of a beneficial order cannot be shown by general reputation. *Home Circle Soc. No. 1 v. Shelton* (Civ. App.) 81 S. W. 84.

On an issue as to identity of the grantee in bounty warrant, evidence as to reputation concerning alleged grantee's military service held admissible. *Allen v. Halsted*, 39 C. A. 324, 87 S. W. 754.

The fact that a grantor of land was a white woman instead of a negress may be proved by general reputation, when in issue. *Stewart v. Profit* (Civ. App.) 146 S. W. 563.

In an action for injury to an employé claimed to have rendered him insane, testimony for defendant that before the accident "everybody talked about" plaintiff's insanity held properly excluded. *Knox v. Robbins* (Civ. App.) 151 S. W. 1134.

28. — **Market value shown by sales or market quotations.**—Oral statements in general, see ante. Similar facts and transactions, see Rule 6, ante.

Market value of live-stock can be shown by market reports or by a broker. *Railway Co. v. Maddox*, 12 S. W. 815, 75 T. 300; *Western Commission Co. v. Hart* (Sup.) 20 S. W. 131; *Railway Co. v. Patterson*, 24 S. W. 349, 5 C. A. 523; *Railway Co. v. Donovan* (Civ. App.) 23 S. W. 735; *Id.* 25 S. W. 10, 86 T. 378; *Railway Co. v. Daggett* (Civ. App.) 27 S. W. 188.

An opinion as to the value of personal property, based on the statements of persons supposed to be judges thereof, is hearsay and inadmissible. *Goldfrank v. Half*, 26 S. W. 778; *Railway Co. v. Burke*, 55 T. 323, 40 Am. Rep. 808; *Olive v. Hester*, 63 T. 190; *Rosenthal v. Middlebrook*, 63 T. 333.

Testimony as to the price which certain cattle brought, derived from accounts of sales made, held inadmissible, as hearsay. *Gulf, C. & S. F. Ry. Co. v. Baugh* (Civ. App.) 42 S. W. 245.

Testimony as to the market value of poultry at a certain time and place, based on knowledge derived from quotations sent out by commission merchants at the same time, and from the same place, is competent. *Texas Cent. R. Co. v. Fisher*, 18 C. A. 78, 43 S. W. 584.

Testimony as to condition of market from knowledge gained by witness from market reports is admissible. *Chicago, R. I. & T. R. Co. v. Halsell* (Civ. App.) 81 S. W. 1241; *Texas & P. Ry. Co. v. W. Scott & Co.*, 86 S. W. 1065; *Galveston, H. & S. A. Ry. Co. v. Karrer*, 109 S. W. 440; *St. Louis & S. F. R. Co. v. Lane*, 118 S. W. 847.

What a witness hears others say as to the market price of property held hearsay and inadmissible. *Texas & P. Ry. Co. v. Crowley* (Civ. App.) 86 S. W. 342.

In an action for damages for delay in shipment of cattle, testimony as to market value, derived from information received from salesmen of commission houses, was hearsay; but testimony based on information obtained from newspaper market reports was properly admitted. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 39 C. A. 129, 86 S. W. 938.

Testimony of a witness as to sales in Europe from information by telegrams and letters from a representative of witness held hearsay. *Kirby Lumber Co. v. C. R. Cummings & Co.*, 39 C. A. 220, 87 S. W. 231.

Evidence as to the value of cattle in a certain section, as ascertained by inquiry from cattle raisers in that country, held hearsay. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 99 T. 343, 89 S. W. 968; *Same v. Brown & Williamson*, 99 T. 349, 89 S. W. 971; *Same v. Zimmerman*, *Id.*

A letter and telegram of plaintiff's agent at the point of destination of certain cattle shipped, held incompetent to prove the market value of the cattle at the time stated therein. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 43 C. A. 549, 96 S. W. 1087.

A witness held not competent to testify as to the condition of the market from information based merely on private letters, telegrams, or other advices, such as circular letters sent out by a commission company. *Texas & P. Ry. Co. v. Slaton* (Civ. App.) 102 S. W. 156.

In an action involving the value of live stock, certain evidence held admissible. *Bulard v. Stewart*, 46 C. A. 49, 102 S. W. 174.

Evidence of isolated sales or offers to sell were not admissible on an issue of the market value of personal property. *Hammond v. Decker*, 46 C. A. 232, 102 S. W. 453.

Where a witness was qualified to testify as to the market by reason of having read the market reports, his testimony was competent, though he also had the same information from other sources. *Southern Kansas Ry. Co. of Texas v. Bennett*, 46 C. A. 379, 103 S. W. 1115.

In an action for damages to cattle by defendant's negligent delay in transporting them to the point of sale, there being other evidence of the market value of the cattle on the day they were sold, plaintiff could testify as to what the cattle actually brought when sold. *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 49 C. A. 304, 103 S. W. 1027.

In a suit for the negligent handling of a shipment of cattle, accounts of sale thereof held not hearsay, and properly admitted to show the correct weights and prices at their destination. *St. Louis & S. F. R. Co. v. Lane* (Civ. App.) 118 S. W. 847.

Plaintiff's testimony as to price for which cattle sold should have been excluded as hearsay, when based solely upon accounts of sales rendered him by commission merchants. *St. Louis & S. F. R. Co. v. Dean* (Civ. App.) 152 S. W. 527.

29. — **Repute as to facts in general.**—General reputation inadmissible to show that an animal was diseased. *Nations v. Love* (Civ. App.) 26 S. W. 237.

Testimony of service in a certain army cannot be shown by hearsay evidence. *Sargent v. Lawrence*, 16 C. A. 540, 40 S. W. 1075.

In an action to recover timber cut and removed by defendants from plaintiff's land, an expert witness held properly permitted on cross-examination to testify as to a custom in estimating logs. *Wall v. Melton* (Civ. App.) 94 S. W. 368.

Evidence that a witness had heard of wrecks at a railroad curve, where the wreck in question occurred held objectionable as hearsay. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

A general custom set up in explanation of a contract must be shown by direct testimony, and not by opinion or reputation. *Standard Paint Co. v. San Antonio Hardware Co.* (Civ. App.) 136 S. W. 1150.

30. — **Ownership.**—In trespass to try title, certain testimony held properly admitted as evidence of reputation as to title in the neighborhood. *Rice v. Melott*, 32 C. A. 426, 74 S. W. 935.

Evidence of common knowledge held admissible on the question of knowledge of an insurance agent issuing a policy as to ownership. *Continental Ins. Co. v. Cummings*, 98 T. 115, 81 S. W. 705.

General reputation as to the ownership of property is admissible on the issue of waiver of misrepresentations in relation thereto, to prove the knowledge of the agent issuing the policy. *Continental Ins. Co. v. Cummings* (Civ. App.) 95 S. W. 48.

In trespass to try title, proof of general notoriety as to the claim of a person to the land held admissible. *Carlisle v. Gibbs*, 44 C. A. 189, 98 S. W. 192.

In trespass to try title, evidence that it was the general reputation in the neighborhood that plaintiff's predecessor in title owned the land held admissible. *Carlisle v. Gibbs*, 57 C. A. 592, 123 S. W. 216.

31. **Impeachment of witness by hearsay evidence.**—See notes under Rule 1, ante.

II. *Pedigree, Relationship, Marriage, Death, Age and Boundaries*

32. **In general.**—Relationship and pedigree may be proved by hearsay evidence. *Louder v. Schluter*, 78 T. 105, 14 S. W. 205; *Fowler v. Simpson*, 79 T. 614, 15 S. W. 682, 23 Am. St. Rep. 370; *De Leon v. McMurray*, 23 S. W. 1038, 5 C. A. 280; *Byers v. Wallace*, 28 S. W. 1056, 87 T. 503; *Sullivan v. Solis* (Civ. App.) 114 S. W. 456.

Hearsay evidence is admissible to prove pedigree, age and death. Evidence of time or place of residence, or death, is admissible for the purpose of identification. *De Leon v. McMurray*, 23 S. W. 1038, 5 C. A. 280; *Brown v. Lazarus*, 25 S. W. 71, 5 C. A. 81;

Insurance Co. v. Blodgett, 27 S. W. 286, 8 C. A. 45; Byers v. Wallace, 28 S. W. 1056, 87 T. 503; Wallace v. Howard (Civ. App.) 30 S. W. 711; French v. McGinnis, 21 S. W. 941, 3 C. A. 86; Nixon v. Wichita L. & L. Co., 84 T. 408, 19 S. W. 560; Louder v. Schluter, 78 T. 103, 14 S. W. 205, 207; Paden v. Briscoe, 81 T. 563, 17 S. W. 42.

A statement of the time of the death of a person made within a few minutes thereafter is admissible as hearsay. W. U. Tel. Co. v. Neel (Civ. App.) 25 S. W. 661. See Hanna v. Hanna, 21 S. W. 720, 3 C. A. 51; Railway Co. v. Robertson, 82 T. 657, 17 S. W. 1041, 27 Am. St. Rep. 929.

Descent and heirship may be shown by hearsay. Byers v. Wallace, 28 S. W. 1056, 87 T. 503.

Death may be proved by hearsay evidence. Turner v. Sealock, 21 C. A. 594, 54 S. W. 358.

Where, in a prosecution for rape, the prosecutrix states that she knows her age, it is competent for her to testify thereto. Lewis v. State (Cr. App.) 64 S. W. 240.

Proof of death may be made by hearsay, when emanating from one whose interest is not to be subserved by the declaration. York v. Hilger (Civ. App.) 84 S. W. 1117.

Matters of pedigree such as family history may be proved by hearsay testimony, and other facts, not entirely matters of pedigree, may be so intimately connected with pedigree as to permit their proof by the same character of testimony. Wall v. Lubbock, 52 C. A. 405, 118 S. W. 886.

After the lapse of a long period of time, death may be proven by hearsay. McDoel v. Jordan (Civ. App.) 151 S. W. 1178.

33. **Family records.**—Entries in the family Bible are admissible to show pedigree when there is no better evidence. Smith v. Greer, 10 C. A. 252, 30 S. W. 1108.

In trespass to try title, in which it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, the family Bible of plaintiff's remote grantor, identified by his son, was admissible to show that such remote grantor was the son of the original patentee. Wren v. Howland, 33 C. A. 87, 75 S. W. 894.

In trespass to try title, where it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, a deed wherein such remote grantor stated that he was the son of the original patentee, and the only heir with the exception of his mother, was properly admitted. *Id.*

34. **General and family reputation.**—In an action of trespass to try title, P. claimed the land in controversy under a deed from B. to W., a power of attorney from W. to G., dated February 24, 1838, and a deed by G. under the power, dated May 17, 1849. The defense was that W. died before the execution of the deed, and to prove this issue witnesses testified that they knew a man by the name of W. in New Orleans and Texas in 1839; that in 1837 or 1838 B. conveyed to him a tract of land; that they had not seen or heard of him since 1839, except from general rumor and report that he had died seven or eight years before the execution of the deed by G. Held, that the evidence was competent. Primm v. Stewart, 7 T. 178.

Death may be proved by general reputation in the community. Railway Co. v. Richard (Civ. App.) 27 S. W. 920.

Evidence of declarations of deceased, and of the general understanding in the community, held admissible on the questions of identity and heirship. Hintze v. Krabben-schmidt (Civ. App.) 44 S. W. 38.

A witness, having testified that he was cousin to a certain party, was qualified to testify to matters of family repute, without his relationship being established by other testimony. Smith v. Kenney (Civ. App.) 54 S. W. 801.

Evidence of general reputation held admissible to prove marriage. Cuneo v. De Cuneo, 24 C. A. 436, 59 S. W. 284.

Where, in seeking to establish a gift of a life insurance policy to a sister, it was shown that he stood in loco parentis to her, testimony of an aunt as to the death of their father was held admissible as a matter of family history. Lord v. New York Life Ins. Co., 27 C. A. 139, 65 S. W. 699.

The testimony of a witness that he supposed certain persons to be his nephews and nieces held incompetent. Keith v. Keith, 39 C. A. 363, 87 S. W. 384.

Testimony of a witness that according to the family history her deceased grandfather came to Texas at or about a particular time was competent to prove that fact. Keck v. Woodward, 53 C. A. 267, 116 S. W. 75.

Where a witness testified that he first became acquainted with the family of a person about sixty years ago, and that the family consisted of a woman, son, and daughter, he could testify that it was generally understood at the time in that community that the person was dead, and that the woman was recognized as a widow. Wall v. Lubbock, 52 C. A. 405, 118 S. W. 886.

Where a witness was the husband of the granddaughter of a person, he could testify as a member of the family to the family history, including the death and time of death of that person, though he did not state that he obtained his information from deceased members of the family. *Id.*

In cases of necessity, evidence of reputation may be given by persons not members of the family to establish a marriage. Schwingle v. Keifer (Civ. App.) 135 S. W. 194.

Every person acquainted with the parties to an alleged marriage and the repute they have in the community may testify as to the reputation of marriage vel non. *Id.*

Where plaintiff, a Mexican, claimed to be the common-law wife of decedent, and sought to prove the same by evidence of reputation, the court did not err in refusing to confine such proof of evidence of reputation among Mexicans. *Id.*

On the issue of the paternity of witness' husband, certain evidence held admissible. Wless v. Hall (Civ. App.) 135 S. W. 384.

On the issue whether a certain child was born alive, testimony of a neighbor that it was generally understood that the child was born dead held admissible. *Id.*

In an action to recover land which plaintiff claimed by devise, where there was testimony that the witness knew the testator in 1862 and understood that he died during the war, such being the report, the word "war" must be understood as the war between the states, and "report" as meaning common rumor. McDoel v. Jordan (Civ. App.) 151 S. W. 1178.

Proof of marriage may be made by evidence of common repute and public recognition by the parties thereto, including their declarations. *Jordan v. Johnson* (Civ. App.) 155 S. W. 1194.

35. Declarations by members of family.—When pedigree is shown prima facie, declarations of the claimant are admissible. *Brown v. Lazarus*, 25 S. W. 71, 5 C. A. 81.

Self-serving declarations as to pedigree inadmissible in evidence. *Byers v. Wallace*, 87 T. 503, 28 S. W. 1056; *Id.*, 29 S. W. 760, 87 T. 503.

Hearsay evidence to prove pedigree must be based on information derived from deceased relatives or family history of the party. *Nunn v. Mayne*, 30 S. W. 479, 9 C. A. 366.

Hearsay evidence based on "talking with the family," and "reports of his relatives," not admitted in absence of other details. *Wallace v. Howard* (Civ. App.) 30 S. W. 711.

Declarations of an alleged grantee in a patent that he had acquired property in Texas held admissible in an action by the heirs of the petitioner to prove his identity. *Schott v. Pellerim* (Civ. App.) 43 S. W. 944.

Evidence of declarations of members of a family, who acquired a land grant as being the heirs of a certain soldier, that they were his heirs, held not inadmissible as hearsay. *Sheppard v. Avery*, 28 C. A. 479, 69 S. W. 82.

In trespass to try title, declarations made by the mother of the plaintiff's remote grantor as to his pedigree held admissible. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

Statement by defendant to witness that she was not married held hearsay on the issue of defendant's coverture. *Sweeney v. Taylor Bros.*, 41 C. A. 365, 92 S. W. 442.

Declarations of a deceased father as to when his son was born held evidence of the fact. *Mutual Reserve Life Ins. Co. v. Jay* (Civ. App.) 101 S. W. 545.

Where a person's sister had no recollection of the time or place of her brother's birth, and testified only as to her recollection of what she had been told and from her memory of a record she had seen said to have been made by her mother, the truth or authenticity of which she knew nothing, her testimony did not render inadmissible evidence of the declarations of her father, since deceased, as to his son's age and place of birth, but could only affect its weight. *Mutual Reserve Life Ins. Co. v. Jay*, 50 C. A. 165, 109 S. W. 1116.

Declarations of the parties to an alleged marriage as to the existence thereof which are spontaneous and not self-serving held admissible. *Schwingle v. Keifer* (Civ. App.) 135 S. W. 194.

Questions of pedigree, such as marriages, births, and deaths constituting family history, may be shown by declarations of members of the family. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

Where plaintiff, claiming an interest in property of decedent, did not claim to have been married to him under a license, her statement that she had married decedent, if admissible, did not tend to prove a marriage by contract. *Berger v. Kirby*, 105 T. 611, 153 S. W. 1130.

36. — By deceased members.—Proof of declarations as to deaths, births, and marriages, before beginning of controversy, by person since deceased, held admissible. *Gorham v. Settegast*, 44 C. A. 254, 98 S. W. 665.

A witness having derived her information concerning G. from witness' mother, who was G.'s sister and was dead at the time witness testified, held entitled to state the date of G.'s death and the names of his full brothers and sisters. *Kirby v. Hayden*, 44 C. A. 207, 99 S. W. 746.

Declarations of deceased members of a family regarding its history are admissible in evidence. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

Declarations by a decedent as to pedigree should not be admitted in evidence, when the same facts may be shown by the testimony of living witnesses. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

37. — Necessity that decedent be dead.—Statements by a living third person concerning himself are hearsay, and not admissible on a question of identity. *Nehring v. McMurrain* (Civ. App.) 46 S. W. 369.

Where a witness testified to matters of family repute, the rule that, before declarations are admissible, it must be shown that the decedent is dead, has no application. *Smith v. Kenney* (Civ. App.) 54 S. W. 801.

On the trial of the issue whether a person not heard from for seven years is dead, evidence of declarations concerning place of birth and family connections held admissible, though the decedent is not dead. *Nehring v. McMurrain*, 94 T. 45, 57 S. W. 943.

In an action of trespass to try title, certain evidence, held admissible to show the death of plaintiff's remote grantor, as a predicate for the introduction of a deed containing a declaration by him as to his pedigree. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

To make declarations of an heir admissible as to his pedigree, decedent must be dead at the time of the trial. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

38. — Relationship to family.—Declarations of a deceased person are admissible to prove matters of family history, etc., on an issue as to the title to land, although it is not first shown that decedent was related either by blood or marriage to the person who died seised; it is sufficient if he be related to the alleged heir. *Overby v. Johnston*, 42 C. A. 348, 94 S. W. 131.

39. — Time of making declaration.—Declarations relating to identity, not made ante litem motam, are inadmissible. *Schott v. Pellerim* (Civ. App.) 43 S. W. 944; *Wolf v. Wilhelm*, 146 S. W. 216.

In an action involving the issue whether a person not heard from for seven years is dead, evidence of declarations made after the action was brought held inadmissible. *Nehring v. McMurrain*, 94 T. 45, 57 S. W. 943.

In an action on a policy of life insurance, evidence of declarations of insured's father since deceased, as to the date and place of insured's birth, made at the time of application for the policy, held not inadmissible as made post litem motam. *Mutual Reserve Life Ins. Co. v. Jay*, 50 C. A. 165, 109 S. W. 1116.

40. — Relation of declaration to controversy.—Declarations of a witness in another suit with reference to pedigree held admissible. *Kirby v. Boaz*, 41 C. A. 282, 91 S. W. 642.

Declarations of a witness in another suit as to pedigree, based alone on the declarations of his father, since deceased, which were self-serving, held inadmissible. *Id.*

Declarations as to pedigree of a person since deceased, made after controversy arose, held inadmissible. *Id.*

Testimony as to pedigree was properly admitted, where it was based, not only on self-serving declarations of a decedent, but also on declarations of his wife, who had no interest, and on the family Bible and the family portrait. *Kirby v. Boaz* (Civ. App.) 121 S. W. 223.

41. — **Mode and form of declaration.**—In trespass to try title, in which defendants denied that plaintiff's remote grantor was the son of the original patentee of the land, the pleadings in a suit for divorce by the wife of such original patentee, in which she prayed for the custody of a minor child, who was afterwards plaintiff's remote grantor, were admissible in evidence. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

Written declarations of a decedent as to his pedigree are admissible to prove his identity and lineage. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

An affidavit of a deceased heir as to his family history may be admitted in evidence as well as oral declarations as to pedigree. *Id.*

42. **Declarations as to boundaries.**—The field-notes of contemporaneous adjoining surveys are admissible as hearsay to locate a disputed boundary. *Cottingham v. Seward* (Civ. App.) 25 S. W. 797.

The fact that surveys appearing on a map were made by H., and the map itself by a third person, does not render the map inadmissible, as hearsay or secondary evidence, in a suit to establish boundaries between the surveys. *Fulcher v. White* (Civ. App.) 59 S. W. 628.

On issue as to true location of boundary line, certain testimony held admissible as showing how, when, and under what circumstances witness gained his knowledge of a certain alleged line that he had testified about. *Hornberger v. Giddings*, 31 C. A. 283, 71 S. W. 989.

In action to recover land, deeds executed by defendants held admissible as declarations against interest relating to boundaries. *Davis v. Mills* (Civ. App.) 133 S. W. 1064.

43. — **Self-serving declarations.**—In a suit to determine boundary, surveyors, in detailing the result of experimental surveys by way of introduction, may state that defendant pointed out the beginning corners, and identified them as corners claimed by him. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

44. — **Declarations by third persons in general.**—The defendant claimed title to the land in controversy by limitation. It was proven that C. had been living on the land, and his declarations while in possession were admitted in evidence to show that he held under the defendant. *Harnage v. Berry*, 43 T. 567.

A witness testified that a surveyor had pointed out a corner in dispute, but it did not appear that he knew its locality. The declarations of the surveyor and opinion of the witness touching the identity of the corner were not admissible in evidence. *Titterington v. Trees*, 78 T. 567, 14 S. W. 692.

Declarations of a surveyor, not contemporaneous with the actual survey, are not admissible. *Clay County L. & C. Co. v. Montague County*, 28 S. W. 704, 8 C. A. 575.

Declarations respecting a disputed boundary line, made by a foreman of plaintiff's vendor, held admissible. *Vogt v. Geyer* (Civ. App.) 48 S. W. 1100.

The declaration of a person, who was not shown to be the owner of the land, or to be in a position to know the corner of a survey, that a certain tree was the river corner of the survey, is inadmissible in a suit to determine a boundary. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

On an issue of boundary, certain testimony of surveyor as to line pointed out to him by another held admissible. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

In trespass to try title to land claimed by defendant city under an alleged dedication of it as a street, evidence of a petition of citizens to the city council asking for the removal of a fence on the land was irrelevant and improperly admitted against defendant's objection. *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

In a suit to establish a boundary, it is error to permit a third person whose land is within the county survey to state that he only claims to a particular line. *Runkle v. Smith*, 52 C. A. 186, 114 S. W. 865.

A surveyor's testimony as to the location of a boundary line held not objectionable as hearsay. *St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co.*, 53 C. A. 125, 115 S. W. 648.

45. — **Declarations by former owners.**—The name of the grantee in a grant of land was borne by two persons, both long dead. Plaintiff claimed under one, and defendant under the other. Testimony was admissible to show that one of these persons claimed the land and exercised acts of ownership over it for a number of years. *Hickman v. Gillum*, 66 T. 314, 1 S. W. 339.

Declaration of past owner of land as to boundaries held admissible. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

In a boundary suit, the declarations of a remote vendor of the property in question made at the time of the conveyance as to the boundary in dispute are admissible evidence. *Bollinger v. McMinn*, 47 C. A. 89, 104 S. W. 1079.

In trespass to try title evidence of a conversation between the prior owner of the lot in controversy and his wife regarding the boundary line of the lot is hearsay and inadmissible. *McKeon v. Roan* (Civ. App.) 106 S. W. 404.

In trespass to try title involving the identification of a deed description, held, that plaintiff could show that the common grantor pointed out to his grantee the tract sued for. *Raley v. Magendie* (Civ. App.) 116 S. W. 174.

On an issue as to the location of a boundary, evidence of declarations as to the removal of the line by the common source of title held admissible. *Caruthers v. Hadley* (Civ. App.) 134 S. W. 757.

46. — **Declarations by deceased persons in general.**—On questions of boundaries the declarations of deceased persons who were in a situation to possess information on the subject and were not interested are admissible in evidence, even when the declarations

were not part of the original *res gestæ*. *Stroud v. Springfield*, 28 T. 649; *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612; *Weider v. Carroll*, 29 T. 317; *Evans v. Hurt*, 34 T. 111; *Hurt v. Evans*, 49 T. 311.

The declarations of a commissioner who acted as such in making a partition of land may, after his death, be given in evidence in regard to the location on the ground of a line established by him in making such partition. *Coleman v. Smith*, 55 T. 254.

The declarations of deceased parties who were disinterested, and in position to know the true location of the lines of a survey made upon the ground, and in view of the objects identified by them, are admissible to establish boundary. *Tucker v. Smith*, 68 T. 473, 3 S. W. 671; *Russell v. Hunnicutt*, 70 T. 657, 8 S. W. 500.

Touching the locality of an ancient boundary line, the testimony of a deceased witness at a former trial may be proved, although such testimony gave the declarations of a party then dead, made many years before, when the line, then ancient, was pointed out to the witness. *Medlin v. Wilkens*, 1 C. A. 465, 20 S. W. 1026.

47. — **Deceased surveyors.**—The declarations of a surveyor who is dead, which were made at a time when he was attempting a survey of a tract of land not originally surveyed by him, of which he had no previous knowledge, and which relate to his opinion regarding the identification of corners and lines of the survey, are not admissible in evidence. His declarations as to distances then measured by him from designated objects are admissible. *Russell v. Hunnicutt*, 70 T. 657, 8 S. W. 500; *Thacker v. Wilson* (Civ. App.) 122 S. W. 938.

The declaration of a surveyor, since deceased, in a position to know the fact which the declaration concerns, is admissible. *Beal v. Asberry* (Sup.) 20 S. W. 115; *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64; *Simpson v. De Ramirez*, 50 C. A. 25, 110 S. W. 149.

Where a survey made by a deceased surveyor calls for the east line of another survey as one of the boundaries of the tract surveyed, other surveys made by the same surveyor at about the same time, and locating such east line, are admissible as declarations to show where such line is located, whether such other surveys are legal or not. *Cottingham v. Seward* (Civ. App.) 25 S. W. 797.

Declarations of a deceased surveyor, made when he was making a survey different from the one in controversy, held not admissible to identify the corners and lines of the latter. *Cable v. Jackson*, 16 C. A. 579, 42 S. W. 136.

The declaration of a surveyor since deceased may be expressed in field notes of a junior survey. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

A declaration of a surveyor, since deceased, must, to have effect as evidence of a boundary, possess the elements of certainty. *Id.*

Evidence of declarations by a surveyor since deceased held inadmissible because hearsay. *Thacker v. Wilson* (Civ. App.) 122 S. W. 938.

48. — **Deceased former owners.**—Where an owner of land in a survey, the boundary of which is in dispute, is dead, a witness assisting in the survey may state that, in remarking his boundaries, such owner claimed a corner in dispute as one of his corners. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

In an action involving the position of a survey, defendant held entitled to show a declaration by the deceased patentee of the survey as to the location of its corners. *Simpson v. De Ramirez*, 50 C. A. 25, 110 S. W. 149.

49. — **General reputation.**—General reputation in regard to the boundary of an ancient survey, which had been the subject of note and comment in the neighborhood, is admissible in evidence. *Clark v. Hills*, 67 T. 141, 2 S. W. 356.

It was competent for witnesses to testify to locality of boundary lines or corners from reputation, and from declarations by their ancestors, witnesses' knowledge extending over thirty years. So of occupation by tenants upon any part of the grant, holding under it. *Von Rosenberg v. Haynes*, 85 T. 357, 20 S. W. 143.

In a suit to determine a boundary, a witness may state that an old stake pointed out to him by defendant was generally reputed to be the corner of the survey in dispute. *Matthews v. Thatcher*, 33 C. A. 133, 76 S. W. 61.

Evidence of general repute and recognition of the location of a boundary line of a survey is admissible on the issue of such location. *Goodson v. Pitzgerald*, 40 C. A. 619, 90 S. W. 898.

Evidence of reputation, so far as it definitely exists, is admissible to prove the location of private boundaries. *Thacker v. Wilson* (Civ. App.) 122 S. W. 938.

RULE 36. ON QUESTIONS OF SCIENCE OR SKILL OR TRADE, PERSONS OF SKILL OR POSSESSING PECULIAR KNOWLEDGE IN THOSE DEPARTMENTS ARE ALLOWED TO GIVE THEIR OPINIONS IN EVIDENCE

1. Mere conclusions generally not admissible.

1. In general.
2. Conversations in general.
3. Conversations concerning contracts.
4. Knowledge of other person.
5. Motive and intent.
6. Ability to see or hear.
7. Knowledge of witnesses.
8. Personal identity and characteristics.
9. Bodily appearance or condition.
- 9½. Mental condition or capacity.
10. Pecuniary condition.
11. Due care and proper conduct.
12. Customs and usages.

13. Nature, condition and relation of objects.
14. Value.
15. Distance.
16. Time.
17. Cause and effect.
- 17½. Performance or breach of contract.
18. Title and ownership.
19. Contractual relation.
20. Construction and effect of contracts or instruments.
21. Agency in general.
22. Partnership.
23. Abandonment.
24. Residence of voter.
25. Indebtedness.
26. Damages.
- 27, 28. Marriage.

II. Subject of opinions of nonexperts.

29. Subjects in general.
30. Matters directly in issue.
31. — Damages.
32. — Performance or breach of contract.
33. — Due care and proper conduct.
34. — Mental condition or capacity.
35. — Nature, condition and relation of objects.
36. — Value.
37. — Cause and effect.
38. Inferences or impressions from collective facts.
39. Special knowledge as to subject-matter.
40. — Personal identity and age.
41. — Bodily condition.
42. — Mental condition or capacity.
43. — Quantity.
44. — Due care and proper conduct in general.
45. — Railroadings.
46. — Speed.
47. — Distance.
48. — Dangerous character of work.
49. — Cause and effect.
50. — Pecuniary condition.
51. — Handwriting.
52. — Nature, condition and relation of objects.
53. — Value in general.
54. — Value of services.
55. — Value of real property.
56. — Value of personal property.
57. — Damages.
58. Agency.
59. Motive or intent.
60. Ownership.
61. Construction of writing.
62. Personal identity and characteristics.
63. Age.
64. Bodily appearance or condition.
65. Nature or extent of personal injuries.
66. Mental condition or capacity.
67. Handwriting.
68. Due care and proper conduct.
- 68½. Custom or usage.
69. Nature, condition and relation of objects.
70. Quantity.
71. Value.
72. — Services.
73. — Real property.
74. — Personal property.
75. Space or distance.
76. Time.
77. Rate of speed.
78. Cause and effect.
79. Damages.
80. — Injuries to property.
81. — Breach of contract.

III. Subjects of expert testimony.

82. Matters of opinion or facts.
83. Matters directly in issue.
84. Matters of common knowledge or observation.
85. Matters involving scientific or other special knowledge in general.
86. Bodily condition.
87. Mental condition or capacity.
88. Handwriting.
89. Due care and proper conduct in general.

90. Construction and repair of structures, machinery and appliances.
91. Management and operation of vehicles, machinery and appliances.
92. Conduct of business.
93. Laws of other states or countries.
94. Construction of written instruments.
95. Nature, condition and relation of objects.
96. Quantity or capacity.
97. Value.
98. Cause and effect.
99. — Injuries to the person.
100. — Injuries to property.
101. Damages.

IV. Competency of experts.

102. Necessity of qualification.
103. Knowledge, experience and skill in general.
104. Bodily and mental condition.
105. Due care and proper conduct in general.
106. Machinery and mechanical devices and appliances.
107. Construction and operation of railroads.
108. Conduct of business, custom or usage.
109. Physical facts.
110. Value.
111. Damages.
112. Cause and effect.

V. Examination of nonexperts.

113. Determination of question of competency.
114. Examination in general.
115. — Facts forming basis of opinion.
116. — Cross-examination and re-examination.

VI. Examination of experts.

117. Preliminary evidence as to competency.
118. Determination of question of competency.
119. Mode of examination in general.
120. Questions and answers based on personal knowledge of expert.
121. Questions and answers based on facts testified to by expert.
122. Questions and answers based on testimony of others.
123. Hypothetical questions and answers.
124. — Form and sufficiency of questions.
125. — Scope and sufficiency of answers.
126. Facts forming basis of opinion.
127. References to authorities on subject.
128. Experiments and results thereof.
129. Cross-examination and re-examination.
130. Contradiction.

VII. Comparison of handwriting.

131. Competency of expert.
- 132, 133. Standard of comparison.
134. Examination of expert.

VIII. Effect of opinion evidence.

135. Opinions of witnesses in general.
136. Testimony of experts.
137. Conflict with other evidence.

I. Mere Conclusions Generally Not Admissible

1. **In general.**—An opinion of a witness upon matter involving a mixed question of law and fact is not admissible in evidence. *Railway Co. v. Hall*, 78 T. 169, 14 S. W. 259. Recollection and opinion of witness as to past transactions competent when. *Harris v. Nations*, 79 T. 409, 15 S. W. 262.

Opinions of witnesses not admissible to show a legal conclusion. *League v. Henecke* (Civ. App.) 26 S. W. 729; *W. U. T. Co. v. Hearn*, 26 S. W. 478, 7 C. A. 67; *Railway Co. v. Shearer*, 21 S. W. 133, 1 C. A. 343; *Railway Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210; *Railway Co. v. Richart* (Civ. App.) 27 S. W. 918; *Railway Co. v. Croskell*, 25 S. W. 486, 6 C. A. 160; *Railway Co. v. Wesch*, 85 T. 593, 22 S. W. 957.

A witness testified that there was no conflict between certain surveys. Held, that this was a matter of opinion and inadmissible. *Bugbee Land & Cattle Co. v. Brents* (Civ. App.) 31 S. W. 695.

Questions as to whether insured had anything to do with the burning of the building insured, held not objectionable, as calling for an opinion. *Fire Ass'n of Philadelphia v. Jones* (Civ. App.) 40 S. W. 44.

The testimony, "Finding the bond in this condition makes me think it may have been presented to me for approval and rejected," is inadmissible, as being only an opinion. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

Testimony of a witness that he "thought" that he had told the foreman of his inexperience is to be taken to be testimony as to what witness remembered. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 43 S. W. 536.

Testimony that defendant's obstruction gave plaintiff egress only over private property held not inadmissible as a conclusion of the witness. *Denison & P. S. Ry. Co. v. O'Maley*, 18 C. A. 200, 45 S. W. 225.

Evidence consisting of conclusions and inferences of witness is inadmissible. *P. J. Willis & Bro. v. Sims' Heirs* (Civ. App.) 57 S. W. 325.

Where an abstract purports to be certified by register of deeds, his testimony that he made no such abstract is a statement of fact, and not a conclusion. *Paul v. Chenault* (Civ. App.) 59 S. W. 579.

Evidence held not objectionable as calling for opinion of a witness. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 59 S. W. 930.

Objection to testimony that "it appears that the original file, * * * with contents, were abstracted from the general land office," on the ground that witness was not stating a fact, but the appearance of a fact, held untenable under the circumstances. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

In an action for injuries to an electric lineman, evidence that plaintiff believed he was working for defendant, D. Electric Company, and its receiver, and that he had never been told he was not working for such company, held admissible. *Dallas Electric Co. v. Mitchell*, 33 C. A. 424, 76 S. W. 935.

Testimony held not to be a conclusion of the witness. *Ætna Ins. Co. v. Fitze*, 34 C. A. 214, 73 S. W. 370; *St. Louis Southwestern Ry. Co. of Texas v. Wright* (Civ. App.) 84 S. W. 270; *Clark v. Wilson*, 41 C. A. 450, 91 S. W. 627; *Smith v. International & G. N. R. Co.*, 45 C. A. 81, 99 S. W. 564; *San Antonio Traction Co. v. Flory*, 45 C. A. 233, 100 S. W. 200; *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.) 106 S. W. 194; *Sexton Rice & Irrigation Co. v. Sexton*, 48 C. A. 190, 106 S. W. 728; *Missouri, K. & T. Ry. Co. of Texas v. Hollan*, 49 C. A. 55, 107 S. W. 642; *El Paso Electric Ry. Co. v. Ruckman*, 49 C. A. 25, 107 S. W. 1158; *Gulf, C. & S. F. Ry. Co. v. Kimble*, 49 C. A. 622, 109 S. W. 234; *Kirby v. Blake*, 53 C. A. 173, 115 S. W. 674; *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 75; *Southern Telegraph & Telephone Co. v. Evans*, 54 C. A. 63, 116 S. W. 418; *James v. San Antonio & A. P. Ry. Co.*, 53 C. A. 603, 116 S. W. 642; *Gulf Cooperage Co. v. Abernathy*, 54 C. A. 137, 116 S. W. 869; *Houston & T. C. R. Co. v. Johnson* (Civ. App.) 118 S. W. 1150; *Merriman v. Bialack*, 57 C. A. 270, 122 S. W. 403; *J. T. Stark Grain Co. v. Harry Bros. Co.*, 57 C. A. 529, 122 S. W. 947; *Houston & T. C. R. Co. v. Lee* (Civ. App.) 123 S. W. 154; *San Antonio Traction Co. v. Higdon*, 123 S. W. 732; *Ft. Worth & D. C. Ry. Co. v. Arthur*, 124 S. W. 213; *Galveston, H. & S. A. Ry. Co. v. Noelke*, 125 S. W. 969; *Kincheloe Irrigating Co. v. Hahn Bros. & Co.*, 132 S. W. 78; *Mexican Cent. Ry. Co. v. Rodriguez*, 133 S. W. 690; *Bybee v. Embree-McLean Carriage Co.*, 135 S. W. 203; *Freeman v. Cleary*, 136 S. W. 521; *Schauer v. Von Schauer*, 138 S. W. 145; *Ripley v. Wenzel*, 139 S. W. 897; *Stuart v. Calahan*, 142 S. W. 60; *Olcott v. Squires*, 144 S. W. 314.

In an action for injuries to a car inspector, evidence that it was the duty of switchmen, in making up trains, to couple the cars and set the air brakes for the protection of inspectors, held not objectionable as a conclusion. *St. Louis Southwestern Ry. Co. of Texas v. Rea* (Civ. App.) 84 S. W. 428.

Evidence as to what plaintiff would have done, had he heard the whistle of defendant's engine, which struck him as he was walking on defendant's track, was not objectionable as a conclusion. *International & G. N. Ry. Co. v. Davis* (Civ. App.) 84 S. W. 669.

Testimony held to be a conclusion of the witness. *Dupree & McCutchan v. Texas & P. Ry. Co.* (Civ. App.) 96 S. W. 647; *Chew v. Jackson*, 45 C. A. 656, 102 S. W. 427; *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Civ. App.) 110 S. W. 99; *Gate City Roller Rink Co. v. McGuire*, 112 S. W. 436; *Houston & T. C. R. Co. v. Johnson*, 118 S. W. 1150; *Ft. Worth & R. G. Ry. Co. v. Conner*, 131 S. W. 1135; *Houston & T. C. Ry. Co. v. Lee*, 104 T. 82, 133 S. W. 868; *Storrie v. Ft. Worth Stockyards Co.* (Civ. App.) 143 S. W. 286.

In an action for injuries to an employé, caused by a defective appliance, the testimony of a witness that he supposed that the employé had used the appliance ever since he commenced work was inadmissible. *Houston & T. C. R. Co. v. Patrick*, 50 C. A. 491, 109 S. W. 1097.

A witness should not be permitted to give an opinion which would, if believed, determine the matters of law as well as the facts involved. *Williams v. Livingston*, 52 C. A. 275, 113 S. W. 786.

It is error to permit a party to testify to statements of a third person involving a conclusion of the latter as well as of the witness. *Milmo Nat. Bank v. Cobbs*, 53 C. A. 1, 115 S. W. 345.

Statements of witnesses testifying to injuries sustained to a shipment of live stock, held not objectionable as the conclusions of the witnesses. *St. Louis Southwestern Ry. Co. of Texas v. Allen* (Civ. App.) 117 S. W. 923.

Testimony of railroadmen as to stopping of trains in railroad yards held not to be statements of a conclusion, but of a fact. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 56 C. A. 246, 120 S. W. 553.

A blue print of survey introduced with the testimony of the surveyor is not objectionable as the conclusions of the witness. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

In a suit against a carrier for delay of a shipment of cattle, plaintiff's testimony that the average or ordinary running time of a cattle train was from 15 to 20 miles an hour, held a statement of fact, and not a conclusion. *Missouri, K. & T. Ry. Co. v. Gober* (Civ. App.) 125 S. W. 383.

A question in a death action by a mother as to whether she expected any assistance from decedent in the future, had he lived, held improperly allowed, as calling for witness' surmise. *International & G. N. R. Co. v. White*, 103 T. 567, 131 S. W. 811.

Where rice collected as rent was hauled away on defendant's wagons, placed in its warehouse, and marked by defendant's employes with its initials, a witness knowing such fact could testify that the rice was delivered to defendant. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

Evidence of the manager of a drawee bank that checks presented by a collecting agent would not have been paid in cash if cash had been demanded held not objectionable as an opinion. *First Nat. Bank v. First Nat. Bank* (Civ. App.) 134 S. W. 831.

Under Act April 18, 1905 (Acts 29th Leg. c. 160), requiring every shipper of intoxicating liquors to a point within prohibition territory to place on the package the names of the consignor and consignee, and the words "intoxicating liquors," evidence in a prosecution for pursuing the occupation of selling liquors in prohibition territory by a driver of an express wagon that he hauled for accused packages marked intoxicating liquors from the express office to the place where accused did business was not objectionable as opinion evidence because the witness had no personal knowledge of the contents of the packages. *Stephens v. State*, 63 Cr. R. 382, 139 S. W. 1141.

In an action for the wrongful seizure by defendant of plaintiff's goods, testimony of an officer assisting defendant held properly excluded as a conclusion. *Souther v. Hunt* (Civ. App.) 141 S. W. 359.

Evidence as to whether two suits were for the same cause of action held not opinion evidence. *Allen v. Burr's Ferry, B. & C. Ry. Co.* (Civ. App.) 143 S. W. 1185.

Where, in an action for death by the negligent operation of an automobile on the highway, the witness had testified fully to the circumstances under which he was occupying and using defendant's automobile at the time of the accident, a question asked him on cross-examination as to whether he had "borrowed" the automobile was properly excluded, as calling for a conclusion. *Riley v. Fisher* (Civ. App.) 146 S. W. 581.

Testimony that the seed rice was obtained from, and half the crop was delivered to, defendant's corporation, is not objectionable as a conclusion of witness, but a statement of facts known, or that might have been known, to witness. *Kincheloe Irr. Co. v. Hahn Bros. & Co.*, 105 T. 231, 146 S. W. 1187.

2. Conversations in general.—In libel, a question which sought to elicit the witness' conclusion from a conversation had with plaintiff was properly excluded. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

A witness may testify to the substance of a conversation, though he cannot recall the precise words or details, and he may give his impression of what it was, though he cannot speak with certainty, and can only recall portions. *Leland v. Chamberlin*, 56 C. A. 256, 120 S. W. 1040.

3. Conversations concerning contracts.—In an action for goods and money delivered to defendant's employe, and claimed to have been so charged for defendant's convenience, the admission of testimony as to the witness' understanding of how the account was to run is error. *Shaw v. Gilmer* (Civ. App.) 66 S. W. 679.

Evidence of a broker that he had a distinct understanding with the seller of oil that tank cars to contain the same should be of the capacity of 135 barrels held not objectionable as a conclusion. *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Civ. App.) 77 S. W. 961.

4. Knowledge of other person.—Testimony that a brakeman, injured while uncoupling cars, had had opportunity to know the condition of the track at that point, held inadmissible, without a showing that witness personally knew what such opportunity had been. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.) 42 S. W. 255.

In an action for the death of a car inspector by being struck by a switch target, evidence that he was familiar with the yard, and knew the location and proximity of the switch stand to the track, held properly excluded. *International & G. N. R. Co. v. Bearden*, 31 C. A. 58, 71 S. W. 558.

The statement of a witness that a railway company's agent saw the children accompanying plaintiff before he gave them the tickets is the statement of a fact. *International & G. N. R. Co. v. Anchonda*, 33 C. A. 24, 75 S. W. 557.

Evidence that a man could not acquire knowledge of the handling of iron rails by working around railroad yards, held inadmissible as a conclusion in an action for injuries to a servant while carrying a rail. *Bonn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 82 S. W. 808.

In an action on a mutual benefit certificate, evidence of an officer of the benefit association as to knowledge of the other officers of the defendant with respect to the health of the insured was inadmissible as a conclusion of the witness. *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 C. A. 29, 90 S. W. 921.

Evidence that plaintiff was walking near defendant's track on or towards S. street in the city was not objectionable as a conclusion of the witness. *International & G. N. R. Co. v. Morin*, 53 C. A. 531, 116 S. W. 656.

Testimony of a witness as to whether or not a party signing a deposition understood the same, held not objectionable as consisting of conclusions. *Sarro v. Bell* (Civ. App.) 126 S. W. 24.

5. Motive and Intent.—In an action by a corporation to set aside a decree foreclosing a vendor's lien, the former secretary and vice president could testify that they had no intent to defraud the corporation in waiving service of citation in foreclosure. *Fox v. Robbins* (Civ. App.) 70 S. W. 597.

Where issue is raised as to the intentions of the grantor in certain deeds, the admission of testimony as to what witnesses understood his purpose and intention to be is error. *McKnight v. Reed*, 30 C. A. 204, 71 S. W. 318.

A part of a witness' answer in testifying to a conversation held properly stricken out because he was thereby permitted to give his opinion as to what was on the minds of parties thereto. *Leland v. Chamberlin*, 56 C. A. 256, 120 S. W. 1040.

In a suit for specific performance plaintiff's answer to questions relating to his intention held inadmissible. *Leonard v. King* (Civ. App.) 135 S. W. 742.

A question to a witness, whether they were cutting wood so as to take all of it, or leaving some of it, was not objectionable as calling for an opinion of the witness. *Sauer v. Veltmann* (Civ. App.) 149 S. W. 706. See notes under Introductory, §§ 3-10.

6. Ability to see or hear.—Opinion of a witness as to whether one could be identified at the distance at which prosecutor claimed he saw defendant held inadmissible, where the circumstances on which it was based were not shown to be the same as in the case at bar. *Pridmore v. State* (Cr. App.) 44 S. W. 177.

Although witness was not acquainted with the particular engine on which deceased was standing, held, that he was competent to testify that the engineer could have seen deceased by leaning out of the cab. *Terrell v. Russell*, 16 C. A. 573, 42 S. W. 129.

In an action for injuries to a street car passenger in a collision with a railroad train at a crossing, it was competent for witnesses to state that they could have heard the bell or whistle of the engine. *St. Louis, S. F. & T. Ry. Co. v. Knowles*, 44 C. A. 172, 99 S. W. 867.

A question whether or not it would be possible for a man standing 30 feet from a crossing, as the witness had stood, and listening for the train, not to hear it as it approached, held objectionable, as calling for an opinion. *Northern Texas Traction Co. v. Caldwell*, 44 C. A. 374, 99 S. W. 869.

In an action for injuries, a street car passenger testified that plaintiff was about to alight, when the car started and plaintiff said "wait," but the conductor could not hear him," it was error to strike out the words "but the conductor could not hear him." *El Paso Electric Ry. Co. v. Boer* (Civ. App.) 108 S. W. 199.

In an action for injuries to a servant, evidence as to whether the light from a lantern was sufficient to enable him to distinguish objects in the place where he was injured was not objectionable as calling for a conclusion or opinion. *Missouri, K. & T. Ry. Co. of Texas v. Steele*, 50 C. A. 634, 110 S. W. 171.

7. Knowledge of witnesses.—See *Rice v. Melott*, 32 C. A. 426, 74 S. W. 935; *Kirby Lumber Co. v. Chambers*, 41 C. A. 632, 95 S. W. 607.

Evidence in trespass to try title held improperly excluded, as involving a conclusion of the witness. *Barrett v. Eastham*, 28 C. A. 189, 67 S. W. 198.

In trespass to try title, a question to plaintiff as to whether he had ever known of any one claiming the land, until the claim in suit, was not objectionable as irrelevant, immaterial, hearsay, and calling for the opinion of the witness. *Boston v. McMenamy*, 29 C. A. 272, 68 S. W. 201.

8. Personal identity and characteristics.—In trespass to try title evidence of wife that husband was paralyzed held admissible as a question of fact, and not a conclusion. *Abee v. Bargas* (Civ. App.) 65 S. W. 489.

Witness, who is acquainted with a party, and knows what his occupation has been, may be allowed to testify that he did not have any experience in stopping hand cars with brakes. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 43 S. W. 536.

Evidence that plaintiff in an action for injuries was "a hard-working woman" was not objectionable as a conclusion. *St. Louis & S. F. R. Co. v. Smith*, 34 C. A. 612, 79 S. W. 340.

In an action for injuries to a servant, owing to his having been struck by a bale of cotton thrown from a building by another servant, testimony of the foreman that he regarded the servant who threw the bale as a reliable one was admissible. *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847.

Evidence that plaintiff's fellow servant was careless, ignorant, slow, unsatisfactory, and unreliable held not objectionable as a conclusion. *Consolidated Kansas City Smelting & Refining Co. v. Taylor*, 48 C. A. 605, 107 S. W. 889.

The testimony of a witness that a person was an honest man is inadmissible as the opinion of the witness. *Davidson v. Ryle* (Sup.) 124 S. W. 616.

A question whether a construction company was not a distinct corporation from a town-site company, answered by stating that it was the "parent company of the two," was not objectionable as calling for a conclusion of a mixed question of fact and law and for a condition which could not legally exist. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.* (Civ. App.) 153 S. W. 680.

9. Bodily appearance or condition.—See *St. Louis S. W. Ry. Co. of Texas v. Ball*, 28 C. A. 287, 66 S. W. 879; *Chicago, R. I. & T. Ry. Co. v. Williams*, 37 C. A. 198, 83 S. W. 248.

In an action against a master for personal injuries, certain evidence by plaintiff as to the result of the injuries held not objectionable as stating conclusions. *St. Louis Southwestern Ry. Co. of Texas v. McDowell* (Civ. App.) 73 S. W. 974.

In an action against a railroad company for injuries to plaintiff's decedent, testimony by a witness that he was in the company of the decedent a few hours after the accident, and that decedent "appeared to be suffering," was not subject to objection as a conclusion or an opinion. *St. Louis Southwestern Ry. Co. v. Burke*, 36 C. A. 222, 81 S. W. 774.

Testimony held not the mere conclusion of plaintiff as to the nature and extent of his injuries. *Galveston, H. & S. A. Ry. Co. v. Holyfield* (Civ. App.) 91 S. W. 353.

In an action for personal injuries, testimony by a nonexpert that plaintiff while at a certain place "was ill" held admissible. *St. Louis & S. F. R. Co. v. Boyer*, 44 C. A. 311, 97 S. W. 1070.

In action for personal injuries, evidence held admissible as being testimony as to appearance of person injured and not an expression of witness' opinion. *Id.*

Statements as to physical condition of the witness' wife in action for injuries to her as passenger held not opinion evidence. *St. Louis Southwestern Ry. Co. of Texas v. Lowe* (Civ. App.) 97 S. W. 1087.

Nonexpert opinion as to the condition of plaintiff's health held admissible. *Cunningham v. Neal*, 49 C. A. 613, 109 S. W. 455.

Evidence concerning plaintiff's physical condition derived from witness' observation held a statement of facts, and not objectionable as opinion. *Id.*

A statement by a witness as to the condition of one injured by a fall held admissible as statement of facts. *Roth v. Travelers' Protective Ass'n of America*, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

A statement by a witness that one injured by a fall "was on a gradual decline" is inadmissible, being merely an opinion. *Id.*

A statement by a witness that a person injured "did not step any more like he had" is inadmissible, being merely an opinion. *Id.*

Questions asked witness as to the condition of one injured held not objectionable as calling for conclusions of the witness. *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 53 C. A. 547, 116 S. W. 423.

Plaintiff's statement that she believed she was injured for life held not objectionable as an opinion. *Weatherford, M. W. & N. W. Ry. Co. v. White*, 55 C. A. 32, 118 S. W. 799.

Evidence that prior to the accident plaintiff was well, but that afterwards he had an impediment in his walk, held not objectionable as a conclusion. *Pecos & N. T. R. Co. v. Coffman*, 56 C. A. 472, 121 S. W. 218.

Evidence of a witness, who had observed plaintiff before and after his injury, that, subsequent thereto, he saw plaintiff try to do certain work, which he failed to accomplish, held not objectionable. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

A witness as to a personal injury, testifying from actual knowledge derived from personal observation, was properly allowed, in answer to a question whether or not the injured person was still suffering therefrom, to state that she was, and that she had a cramping and numbness in her limbs. *Ft. Worth & D. C. Ry. Co. v. Morrison* (Civ. App.) 129 S. W. 1159.

Evidence that plaintiff suffered more pain at the birth of a child shortly after her injury than at the birth of her other children was not objectionable as the witness' conclusion. *Trinity & B. V. Ry. Co. v. Carpenter* (Civ. App.) 132 S. W. 837.

A plaintiff suing for personal injuries, although not an expert, may testify that with his eyes in their present condition he could not pass a physical examination for section foreman. *Chicago, R. I. & G. Ry. Co. v. Evans* (Civ. App.) 143 S. W. 966.

A switchman suing for personal injuries may testify that his injuries have unfitted him for performing the duties of a switchman. *Missouri, K. & T. Ry. Co. of Texas v. Reno* (Civ. App.) 146 S. W. 207.

9½. **Mental condition or capacity.**—See *Koppe v. Koppe*, 57 C. A. 204, 122 S. W. 68.

In an action for the death of a boy, run over by a railroad train, held error to permit witnesses to testify that he did not have sufficient intelligence to appreciate that, if he sat down on the track while tired, he might go to sleep. *St. Louis Southwestern Ry. Co. of Texas v. Shiflet*, 37 C. A. 541, 84 S. W. 247.

In a will contest, the question whether testator controlled his wife or was controlled by the wife called for a conclusion. *Franklin v. Boone*, 39 C. A. 597, 88 S. W. 262.

In an action by a mother against a railroad for mental suffering caused by defendant's delay in shipping her the dead body of her son, the question asked plaintiff's daughter as to whether she noticed the effect the failure to ship the remains of her brother had upon the acts and upon the mind and conduct of her mother held improper. *Missouri, K. & T. Ry. Co. of Texas v. Linton* (Civ. App.) 109 S. W. 942.

Testimony of witnesses that a plaintiff did not in their opinion have sufficient mental capacity to fully understand a transaction in question held inadmissible as involving a legal conclusion. *Koppe v. Koppe*, 57 C. A. 204, 122 S. W. 68.

Testimony that plaintiff was weak of mind and had no appreciation of the value of money or property held not objectionable as being an opinion involving a legal conclusion. *Id.*

A witness having shown knowledge as to one's mental condition may state that condition as a fact. *Rankin v. Rankin* (Civ. App.) 134 S. W. 392.

In an action for slander in charging plaintiff with larceny of jewelry, testimony of plaintiff that defendant became angry because plaintiff did not purchase jewelry after looking over defendant's stock was properly stricken out as a conclusion. *Day v. Becker* (Civ. App.) 145 S. W. 1197.

10. **Pecuniary condition.**—Oral evidence that personality of estate is sufficient to pay debts is objectionable as opinion evidence. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

The opinion of a witness as to what constitutes the insolvency of a loan association is inadmissible. *Pioneer Savings & Loan Co. v. Peck*, 20 C. A. 111, 49 S. W. 160.

A witness who had knowledge of defendant's financial condition held not to give a mere conclusion in stating that defendant "had nothing." *Davis v. Davis*, 20 C. A. 310, 49 S. W. 726.

11. **Due care and proper conduct.**—See *Terrell v. Russell*, 16 C. A. 573, 42 S. W. 129; *International & G. N. R. Co. v. Newburn* (Civ. App.) 58 S. W. 542; *Ft. Worth & D. C. Ry. Co. v. Harlan*, 62 S. W. 971; *St. Louis S. W. Ry. Co. of Texas v. Byers*, 70 S. W. 558; *Dallas Electric Co. v. Mitchell*, 33 C. A. 424, 76 S. W. 935; *Von Diest v. San Antonio Traction Co.*, 33 C. A. 577, 77 S. W. 632.

In personal injury case, opinion evidence as to how railroad track could be made safest held admissible as pertinent to the inquiry whether proper care had been exercised to provide a track reasonably safe. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.) 42 S. W. 255.

Testimony of a nonexpert that a person need not go between two piles of lumber to get out a piece caught between them held improper, as calling for an opinion. *Mayton v. Sonnefield* (Civ. App.) 48 S. W. 608.

Testimony that engineers of defendant had superintendence of firemen, and as to the reasonable rate of speed of a freight train, held not objectionable, as conclusions. *Galveston, H. & S. A. Ry. Co. v. Ford*, 22 C. A. 131, 54 S. W. 37.

Where employé was injured in the making up of a train, it was error to allow the trainmen to testify that it was made up "carefully and cautiously." *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

In an action for injuries to a servant, a question put to him on cross-examination held improper, as calling for his conclusion as to whether he assumed the risk. *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847.

In an action for injuries to a passenger, question asked of conductor as to duty of brakeman held not to call for a conclusion, and the answer should have been permitted. *Long v. Red River, T. & S. Ry. Co.* (Civ. App.) 85 S. W. 1048.

Evidence that before starting along defendant's right of way plaintiff "looked carefully" held not objectionable as a conclusion. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In an action for death of a servant, caused by falling from a car, testimony that at the time of the accident the horses attached to the car were going full speed was admissible, and not objectionable as an expression of opinion. *Id.*

Testimony "that the motorman tried to stop the car" held objectionable, as being merely the opinion or conclusion of the witness. *San Antonio Traction Co. v. Kumpf* (Civ. App.) 99 S. W. 863.

A question asked a street railway conductor as to when it would become apparent that there was danger of a collision held objectionable, as calling for an opinion. *Northern Texas Traction Co. v. Caldwell*, 44 C. A. 374, 99 S. W. 869.

Where plaintiff was injured while unloading an oil tank car, evidence as to how a witness would have acted under similar circumstances and as to how a man of ordinary prudence would have acted held objectionable. *Gulf, W. T. & P. Ry. Co. v. Wittnebert* (Civ. App.) 104 S. W. 424.

Evidence that witness told defendant's roadmaster that an inspector, who was claimed to have inspected the road at the point of the accident shortly prior thereto, was too inexperienced to take care of the curve at that point, held inadmissible. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

In an action for personal injuries sustained by a person while crossing the track, plaintiff's opinion that he was expected to go over a private crossing rather than the regular crossing held admissible. *Cowans v. Ft. Worth & D. C. Ry. Co.*, 49 C. A. 463, 109 S. W. 403.

In an action against a railroad for the death of a person struck by a train, held competent for the engineer to state that the bell was ringing, based on his habit of ringing it. *Texas & P. Ry. Co. v. Crump*, 102 T. 277, 115 S. W. 26.

In an action against a telegraph company for failure to transmit a message, evidence that plaintiff had sent messages from the place in question, and that they could be sent quickly, held properly admitted. *Western Union Telegraph Co. v. Henderson* (Civ. App.) 131 S. W. 1153.

In an action against a railroad company for mistreating a passenger in threatening to eject her, it was proper to show by the conductor what he would have done if plaintiff's fare had not been paid. *Missouri, K. & T. Ry. Co. v. Carlisle* (Civ. App.) 145 S. W. 653.

Evidence that a carrier's failure to furnish facilities for watering cattle at the stock pens before shipment was due to an unavoidable accident was a mere conclusion of the witness. *Trinity & B. V. Ry. Co. v. Crawford* (Civ. App.) 146 S. W. 329.

A question asked a railroad conductor, whether it was dangerous to back a train in a place where people went without taking precautions to prevent injuring them, called for a matter of fact and not a conclusion of the witness. *Freeman v. Moreman* (Civ. App.) 146 S. W. 1045.

Testimony that, in the witness' opinion, the mine where plaintiff was injured was operated in compliance with the state mining laws was properly excluded. *Consumers' Lignite Co. v. Hubner* (Civ. App.) 154 S. W. 249.

Testimony that the entries and driveways of the mine where plaintiff was injured were in a safe condition, being a conclusion of the witness, was properly excluded. *Id.*

The answer of the witness who accompanied a shipment of cattle for a part of the way that, with one exception, he had never seen a train handled so roughly or so much jerking, stated rough handling as a fact. *Pecos & N. T. Ry. Co. v. Bishop* (Civ. App.) 154 S. W. 305.

12. Customs and usages.—See *Galveston, H. & S. A. Ry. Co. v. Collins*, 31 C. A. 70, 71 S. W. 560.

Evidence that, as the train by which plaintiff was struck approached, it was making less noise than usual, held not objectionable as a conclusion. *International & G. N. R. Co. v. Villareal*, 36 C. A. 532, 82 S. W. 1063.

Testimony that it was a common thing for passengers to ride on defendant's freight trains held not an expression of opinion. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.) 40 S. W. 631.

Witness' statement that he was using a revolving saw in "the usual and customary manner" was a statement of fact and not of opinion. *Texas & N. O. R. Co. v. Geiger*, 55 C. A. 1, 118 S. W. 179.

One's testimony that his books were kept according to the usual business system in similar enterprises is not a mere conclusion. *German Fire Ins. Co. of Peoria v. Walker* (Civ. App.) 146 S. W. 606.

13. Nature, condition and relation of objects.—Evidence of a steep grade at a certain place on the railroad, and of a sudden reverse curve, are not matters of opinion, but facts. *Galveston, H. & S. A. Ry. Co. v. Ford*, 22 C. A. 131, 54 S. W. 37.

Evidence as to where travelers were expected to cross a defective bridge, and wheth-

er it was in good condition on a certain day, held inadmissible, as mere opinion. *City of Marshall v. McAllister*, 22 C. A. 214, 54 S. W. 1068.

Nonexpert witness, unfamiliar with character and construction of a bridge, held incompetent to express opinion as to its strength and safety. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.) 55 S. W. 517.

In an action against a city for a defective walk, evidence by a nonexpert as to its construction held objectionable as conclusion. *Lentz v. City of Dallas*, 96 T. 258, 72 S. W. 59.

In an action for injuries to an electric lineman, a question as to whether the condition of a cut-off box would indicate that the current was cut off held not objectionable as calling for an opinion. *Dallas Electric Co. v. Mitchell*, 33 C. A. 424, 76 S. W. 935.

In an action for injuries to a brakeman by reason of a defective handhold, evidence of witnesses, who had examined the handhold after the accident, that it had pulled out of the wood, held not objectionable as a conclusion. *International & G. N. R. Co. v. Greedy*, 36 C. A. 536, 82 S. W. 1061.

In an action for damages from trespass by defendant's stock, held proper to refuse to permit plaintiff to testify that his fence was sufficient to keep out all kinds of cattle. *Moore v. Pierson* (Civ. App.) 93 S. W. 1007.

In an action for negligence causing death, it was proper to allow a witness to testify whether there was room for deceased to sit on the frame of a car without sitting on a plank, from which he fell when he was killed. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

Evidence of a nonexpert witness that a railroad curve at which an accident occurred was dangerous was objectionable as an opinion. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

Opinion of a nonexpert witness based upon appearances surrounding a body that there had been an attempt made to tie up the wounds with a piece of cloth torn from decedent's shirt held admissible. *Metropolitan Life Ins. Co. v. Wagner*, 50 C. A. 233, 109 S. W. 1120.

Evidence that certain railroad tracks at the point where plaintiff was injured were in a city street held not objectionable as a conclusion of the witness. *International & G. N. R. Co. v. Morin*, 53 C. A. 531, 116 S. W. 656.

Whether wood was cut clean held objectionable, as calling for a conclusion of the witness. *Sauer v. Veitmann* (Civ. App.) 149 S. W. 706.

In a buyer's action for defects in a traction engine purchased, testimony of engineers, who had had charge of the engine, that it was absolutely new, and had not been run enough to injure it, was a statement of facts and not opinion. *Lind v. Reeves & Co.* (Civ. App.) 154 S. W. 262.

14. Value.—In a damage suit for the wrongful levying of an attachment, plaintiff can prove his business capacity, good credit, amount of liabilities, capital in business and profits. The value of his credit is a conclusion to be drawn from these facts by the jury, and plaintiff cannot testify what it was worth to him. *Kauffman v. Babcock*, 67 T. 241, 2 S. W. 878.

In an action for injuries to cattle shipped, plaintiff held competent to testify as to the market value of the cattle. *St. Louis Southwestern Ry. Co. of Texas v. Barnes* (Civ. App.) 72 S. W. 1041.

In action against railroad for injuries to live stock, testimony as to value of horses in "good condition" held not objectionable as a conclusion. *Texas & P. Ry. Co. v. White*, 35 C. A. 521, 80 S. W. 641.

In an action for injuries, a blacksmith's testimony that the value of plaintiff's labor "would average five dollars a day" was proper. *City of Dallas v. Muncton*, 37 C. A. 112, 83 S. W. 431.

The statement of a qualified witness as to the market value of land is a statement of fact, and is admissible. *St. Louis Southwestern Ry. Co. v. Terhune* (Civ. App.) 94 S. W. 381.

In an action for injuries, it was proper for plaintiff to state what avocation he could have followed before he was injured. *St. Louis, S. F. & T. Ry. Co. v. Knowles*, 44 C. A. 172, 99 S. W. 867.

In a shipper's action for injuries to live stock, a question asked an experienced cattleman, familiar with such shipments, as to the market value of the cattle at their destination if handled with reasonable care in the ordinary way, was not objectionable as calling for a conclusion as to what was reasonable care. *Kansas City, M. & O. Ry. Co. v. West* (Civ. App.) 149 S. W. 206.

A question as to what, in the witness' opinion, the horses would have been worth at destination on arrival, if transported within a reasonable time and without injury, held objectionable as calling for the witness' conclusion upon a mixed question of law and fact. *Texas & P. Ry. Co. v. McIntyre & Hampton* (Civ. App.) 152 S. W. 1103.

In an action against an irrigation company for loss of a crop from failure to furnish water, testimony of a witness that there was a market at the nearest shipping point was not objectionable as a conclusion of the witness. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

15. Distance.—Testimony of plaintiff that the distance from the car step to the ground was too great for safety was not objectionable as an expression of opinion. *International & G. N. R. Co. v. Clark* (Civ. App.) 71 S. W. 587.

In an action for death of a person while lying on defendant's railroad track, evidence as to the distance within which witnesses had seen trains similar to that by which decedent was struck stop at the place in question was admissible. *Texas & P. Ry. Co. v. Brannon*, 43 C. A. 531, 96 S. W. 1095.

16. Time.—See *Houston & T. C. R. Co. v. Rippetoe* (Civ. App.) 64 S. W. 1016; *Pecos & N. T. Ry. Co. v. Evans-Snider-Buel Co.*, 42 C. A. 60, 93 S. W. 1024.

Where a passenger who had not procured a ticket sues for injuries sustained in attempting to board a moving train, he may state that, if the agent had been in the office when he applied for a ticket, he would have had time to catch the train before it moved,

as bearing on the question whether he was denied an opportunity of getting a ticket. *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 94 T. 242, 59 S. W. 874, 55 L. R. A. 497.

In an action for injuries by a collision with a hand car, held proper to exclude an opinion that plaintiff had time to get out of the way of the car. *Chicago, R. I. & T. Ry. Co. v. Long*, 26 C. A. 601, 65 S. W. 832.

In an action by a shipper against a carrier, testimony of the time within which cars were furnished plaintiff was a reasonable time was properly excluded as involving a conclusion. *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 42 C. A. 60, 93 S. W. 1024.

Evidence that plaintiff made the trip to reach his father before the latter's death as quickly as he could held inadmissible. *Western Union Telegraph Co. v. Smith*, 52 C. A. 107, 113 S. W. 766.

In an action for delay in transporting cattle, the shipper was incompetent to testify as to what would be a reasonable run with cattle from one point to another. *Texas & P. Ry. Co. v. Goldsmith & Garrett (Civ. App.)* 118 S. W. 1146.

In an action against carriers for delay in shipping fruit, shippers of fruit between the points in question were properly allowed to testify to the usual time required to make the shipment to an intermediate point on the route, and as to their experience as to the time required for the whole shipment. *Kemendo v. Fruit Dispatch Co. (Civ. App.)* 131 S. W. 73.

In an action against a telegraph company for damages from delay in delivering a telegram, preventing plaintiff from attending her brother's funeral, plaintiff was held properly allowed to testify as to the time the train left the receiving station on the evening she would have gone home, if the telegram had been promptly delivered. *Western Union Telegraph Co. v. Harris (Civ. App.)* 132 S. W. 876.

17. Cause and effect.—See *Elliott v. Ferguson*, 37 C. A. 40, 83 S. W. 56; *Texas & P. Ry. Co. v. Warner*, 42 C. A. 280, 93 S. W. 489.

It is not error to permit a witness to testify that there was no connection between plaintiff's hurt and a switch, where such testimony is a statement of fact, and not a conclusion. *San Antonio & A. P. Ry. Co. v. Brooking (Civ. App.)* 51 S. W. 537.

In action against a railway company for setting fire to plaintiff's barn, testimony that there was no opportunity for the barn to catch fire, except from defendant's engine, was admissible. *Texas & P. Ry. Co. v. Woodruff (Civ. App.)* 63 S. W. 905.

In action against railway company for negligently permitting rubbish on right of way to take fire, whereby plaintiff's barn was burned, evidence of prior fires, set in same rubbish was admissible. *Id.*

Testimony of an engineer that his injuries incapacitated him for that business held not a mere conclusion, but a statement of fact. *Southern Kansas Ry. Co. of Texas v. Sage (Civ. App.)* 80 S. W. 1038.

In an action for personal injuries, plaintiff was properly allowed to testify as to the extent that his ability to work had been affected. *Texas & P. Ry. Co. v. Watts*, 36 C. A. 29, 81 S. W. 326.

In a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiffs' lands, permitting counsel to detail history of typhoid fever epidemic to medical witness held error. *Elliott v. Ferguson*, 37 C. A. 40, 83 S. W. 56.

In a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiffs' lands, exclusion of testimony of medical expert held error. *Id.*

A question as to whether a jerk of a log train would be sufficient to throw a brakeman, riding on a bumper of one of the cars, from the train if he was not warned, held objectionable as calling for an opinion. *Gulf, B. & K. C. Ry. Co. v. Harrison (Civ. App.)* 104 S. W. 399.

Witnesses who saw one fall may give their opinion whether it was accidental or voluntary. *Gulf, C. & S. F. Ry. Co. v. Davis (Civ. App.)* 139 S. W. 674.

Plaintiff's testimony that the horses were scared by the knocking and bumping together of the cars held not objectionable as opinion evidence. *St. Louis Southwestern Ry. Co. of Texas v. Smith (Civ. App.)* 153 S. W. 391.

17½. Performance or breach of contract.—D. employed M. to purchase a tract of land at a sheriff sale under an execution and judgment in favor of D. One of the questions in the case was whether D. had refused to approve the purchase made by M. A witness having stated that he knew that D. had not abandoned the purchase because of his conduct in relation thereto, etc., the evidence was properly excluded, as being merely an expression of the opinion of the witness. *Byrnes v. Morris*, 53 T. 213.

It was error to permit plaintiff to answer whether he had not done everything required of him by the contract between him and defendant. *Taylor v. McFatter (Civ. App.)* 109 S. W. 395.

A nonexpert witness in a contractor's suit for compensation may not give his opinion as to the character of the work done on defendant's building. *Taub v. Woodruff (Civ. App.)* 134 S. W. 750.

18. Title and ownership.—See *Scott v. Witt (Civ. App.)* 41 S. W. 401.

It is error to permit a witness to testify that he never owned title to land, when the title is the matter in controversy. Title, or absence of title, is a conclusion of law to be determined from facts. *Gilbert v. Odum*, 69 T. 670, 7 S. W. 510.

Mere opinion of counsel that there was defect in title is not competent proof thereof. *Brackenridge v. Claridge*, 91 T. 527, 44 S. W. 819, 43 L. R. A. 593.

A question as to who was the owner of certain property held objectionable, as asking for a conclusion of law. *Gonzales v. Adoue (Civ. App.)* 56 S. W. 543.

In trespass to try title, testimony that defendants' ancestor always claimed the land in suit held competent. *Field v. Field*, 39 C. A. 1, 87 S. W. 726.

The impression or knowledge of individuals as to the ownership of property is not admissible on the issue of waiver of misrepresentations in relation thereto, to prove the knowledge of the agent issuing the policy. *Continental Ins. Co. v. Cummings (Civ. App.)* 95 S. W. 48.

In a suit by a wife in which the husband joined to enjoin the sale of the wife's land under execution against the husband, the testimony of the wife that she owned the property held not inadmissible as a conclusion of the witness. *Texas Brewing Co. v. Bisso*, 60 C. A. 119, 109 S. W. 270.

Ownership of property is a fact to which one may testify, unless the whole issue of the case depends upon its ownership, so that plaintiff could testify that she owned certain notes. *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899.

Evidence as to ownership of land held properly excluded as the conclusion of the witness. *Hackbarth v. Gordon* (Civ. App.) 120 S. W. 591.

In trespass to try title, testimony by an attorney that he investigated plaintiff's title, and declined to institute suit for recovery of the land, was immaterial and irrelevant, being a mere expression of opinion as to the validity of plaintiff's claim. *Merriman v. Black*, 57 C. A. 270, 122 S. W. 403.

In an action on a note claimed to have been indorsed to plaintiff after maturity, evidence that the notes were "owned" by plaintiff since a certain date, and at that time were sent to another bank, was properly excluded as a conclusion. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 152 S. W. 646.

19. **Contractual relation.**—A statement by a witness held objectionable as a conclusion of the witness as to contractual relation. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

Plaintiff, in order to rebut evidence that a witness was an independent contractor of defendant, was permitted by the testimony of such witness to show that he was a foreman for defendant. Held, that such evidence was not opinion evidence, and was properly admitted, being a fact witness would know. *Southern Cotton-Oil Co. v. Wallace*, 23 C. A. 12, 54 S. W. 638.

In an action against carriers for injury to a live stock shipment, plaintiff's testimony that he received no consideration for executing the contract of shipment held proper. *Missouri, K. & T. Ry. Co. of Texas v. Rich*, 51 C. A. 312, 112 S. W. 114.

Evidence of one of the plaintiffs that his firm sold the land in controversy to the land company on a specified date held inadmissible as a conclusion. *Pope v. Ansley Realty Co.* (Civ. App.) 135 S. W. 1103.

20. **Construction and effect of contracts or instruments.**—The opinion or conclusion of a witness as to the legal effect of a written contract given in evidence is not admissible. See example. *Railway Co. v. Shearer*, 1 C. A. 343, 21 S. W. 133.

Opinions as to meaning of words not technical inadmissible. *Ginnuth v. Blankenship & Blake Co.* (Civ. App.) 28 S. W. 828.

Under plea of usury, oral evidence as to how the monthly payments on the mortgage debt were to be applied held competent to show the usury, though the mortgage was in writing. *Southern Home Building & Loan Ass'n v. Winans*, 24 C. A. 544, 60 S. W. 825.

In an action on a life policy, it is not error to receive the testimony of the president of the company that a premium was not paid at the time required, over objection that the answer stated a conclusion. *Ash v. Fidelity Mut. Life Ass'n*, 26 C. A. 501, 63 S. W. 944.

Testimony that deed of trust was intended to cover improvements to property held mere opinion of witness. *Martin v. Texas Briquette & Coal Co.* (Civ. App.) 77 S. W. 651.

Where a deed sought to be vacated was claimed to have been improperly withdrawn from the depository, his statement that it, with other papers, was subject to the call and control of the grantor, held not objectionable as opinion. *Gatt v. Shive* (Civ. App.) 82 S. W. 303.

In a suit to reform a policy and to recover thereon as reformed, evidence that when the policy was delivered the agent told plaintiffs that the policy was all right, and would stand in any court, held not objectionable as a conclusion of the agent. *Ætna Ins. Co. v. Brannon* (Civ. App.) 91 S. W. 614.

On an issue as to whether witness had sold certain personal property, her testimony that she "sold it" was incompetent as a statement of a legal conclusion. *Rea v. P. E. Schow & Bros.*, 42 C. A. 600, 93 S. W. 706.

Testimony that estimates on contract between railway company and contractors included damages for delay in furnishing materials held inadmissible as conclusion of witness. *Gorham v. Dallas, C. & S. W. Ry. Co.*, 41 C. A. 615, 95 S. W. 551.

Under issue whether a deed absolute in form, executed by husband and wife, was subject to parol trust, certain testimony of the wife as to her understanding of the transaction held not open to certain objection in view of her other testimony. *Whitfield v. Diffe* (Civ. App.) 105 S. W. 324.

A question whether articles contained in an inventory were insured, by a policy sued on, held not objectionable as violating the rule prohibiting testimony as to a matter involving mixed law and fact. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

On the issue whether a deed of a homestead was an absolute deed or a mortgage, the testimony of the intention of a party to the transaction held competent. *Browning v. Currie* (Civ. App.) 140 S. W. 479.

On an issue in trespass to try title as to whether witness and his grantor had been fraudulently induced to execute a warranty, instead of a quitclaim, deed to D., evidence that witness considered that D. was a benefactor of certain heirs and that the deed to D. was virtually to such heirs, was properly excluded. *Hume v. Darsey* (Civ. App.) 154 S. W. 255.

On an issue as to whether it was intended by the intervening defendants to execute a quitclaim, instead of a warranty, deed to D., evidence of a witness, who was present, that he understood the deed was to be a quitclaim held properly excluded. *Id.*

21. **Agency in general.**—On an issue of a wife's agency for her husband, a question who, according to witness' dealings with them, was running the business, calls for his conclusion. *Arndt v. Boyd* (Civ. App.) 48 S. W. 771.

A statement of a witness that E. was the agent of defendant held inadmissible, as proving agency by a conclusion of the witness. *Southern Home Building & Loan Ass'n v. Winans*, 24 C. A. 544, 60 S. W. 825.

The testimony of a witness that he represented another in a transaction is properly excluded, as a mere conclusion. *Arnold v. Johnson* (Civ. App.) 128 S. W. 1186.

Testimony that brokers represented defendants in transaction with plaintiff held not error. *Gilliland v. Ellison* (Civ. App.) 137 S. W. 168.

Testimony that B., in contract with witness, represented defendant, is not objectionable as a conclusion, B.'s agency being conceded, and the question being whether he acted for defendant or another. *Kincheloe Irr. Co. v. Hahn Bros. & Co.*, 105 T. 231, 146 S. W. 1187.

In an action for death of a servant, testimony that deceased was manager of a cotton gin held properly refused as a conclusion of the witness. *Guitar v. Randel* (Civ. App.) 147 S. W. 642.

Where the issue was whether a third person was the agent of defendant or the agent of plaintiff, the testimony of the third person as to what party he acted for was objectionable, as calling for a conclusion on a mixed question of law and fact. *Sackville v. Storey* (Civ. App.) 149 S. W. 239.

In a servant's action for personal injuries, testimony that the work at which he was engaged was under the direction of one Y., defendant's bridge foreman, was admissible. *Marshall & E. T. Ry. Co. v. Blackburn* (Civ. App.) 155 S. W. 626.

22. Partnership.—A statement of a witness that he was led by conversations with defendant to believe that defendant and plaintiff were handling his cotton together, so that although he had already promised it to plaintiff he sold it to defendant, held not inadmissible as a conclusion of the witness in an action involving the existence of a partnership for the purchase of cotton. *Dupuy v. Dawson* (Civ. App.) 147 S. W. 698.

23. Abandonment.—Where it was claimed that plaintiff abandoned school land awarded to him, evidence that he left intending to return was admissible despite objection that it was a conclusion. *Anthony v. Ball* (Civ. App.) 146 S. W. 612.

24. Residence of voter.—On an issue in an election contest as to the residence of a voter, testimony that a certain house was his home since a specified date was properly excluded as a conclusion of the witness. *Linger v. Balfour* (Civ. App.) 149 S. W. 795; on an issue in an election contest as to the residence of a voter whose right to vote was denied, testimony as to where he had lived since a specified time, where his headquarters were during that time, and as to where he considered his home to be since that time, was properly excluded as calling for a conclusion of mixed questions of law and fact. *Id.* On an issue in an election contest as to whether a particular voter resided in the state on January 1st, so as to make him liable for poll tax, his testimony that he and his wife did nothing toward establishing a home in the state until about the middle of January was not objectionable as a conclusion. *Id.*

25. Indebtedness.—In an action on an open verified account, evidence by a member of the defendant firm that the firm bought goods, for which it overpaid by a check, which was applied by plaintiff to individual debts of the firm's predecessor, without its knowledge or consent held not objectionable as an opinion. *Rotan Grocery Co. v. Tatum* (Civ. App.) 149 S. W. 342.

The testimony of the manager of a mercantile company that such company was indebted to the plaintiff in a certain sum was not a statement of an opinion, but of fact. *Danner v. Walker-Smith Co.* (Civ. App.) 154 S. W. 295.

In an action for the price of coal, where the buyer under his general denial was entitled to prove payment, his evidence that he had paid in full was not opinion evidence, but called for a statement of fact. *Richard Cocke & Co. v. Big Muddy Coal & Iron Co.* (Civ. App.) 155 S. W. 1019.

26. Damages.—Error to admit opinions of witnesses as to how much cattle were damaged by standing in cold and muddy pens awaiting transportation. *Gulf, C. & S. F. Ry. Co. v. Wright*, 21 S. W. 80, 1 C. A. 402.

Testimony of a witness as to the difference in value of property before and after building a railroad held properly excluded, as calling for a conclusion. *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.* (Civ. App.) 72 S. W. 1038.

Testimony of defendant as to what rice ought to have netted him if milled and sold at proper time held inadmissible as conclusion. *El Campo Rice Milling Co. v. Montgomery* (Civ. App.) 95 S. W. 1102.

Evidence that a garnishment suit had damaged defendant several times the amount involved held inadmissible as a conclusion. *Pegues Mercantile Co. v. Brown* (Civ. App.) 145 S. W. 280.

A question to plaintiff, suing for breach of contract as to what the amount of his damages is, is objectionable as calling for a conclusion. *Patterson v. McMinn* (Civ. App.) 152 S. W. 223.

27, 28. Marriage.—On an issue of marriage vel non, it was error to permit a witness to testify that she would probably have heard that decedent was living with plaintiff as his wife if such had been the fact. *Schwingle v. Keifer* (Civ. App.) 135 S. W. 194.

On an issue of marriage by contract or reputation, plaintiff's testimony that she married decedent was properly excluded as being a mere conclusion. *Berger v. Kirby*, 105 T. 611, 153 S. W. 1130.

II. Subjects of Opinions of Nonexperts

29. Subjects in general.—See *Texas & P. Ry. Co. v. Jones* (Civ. App.) 124 S. W. 194.

A witness testified that a surveyor had pointed out a corner in dispute, but it did not appear that he knew its locality. The declarations of the surveyor and opinion of the witness touching the identity of the corner were not admissible in evidence. *Titterington v. Trees*, 78 T. 567, 14 S. W. 692.

Testimony as to whom a certain person was looking at held admissible, within the rule allowing witnesses to state appearances. *Gulf, C. & S. F. Ry. Co. v. Miller*, 35 C. A. 116, 79 S. W. 1109.

In an action for injuries to a sawmill operative, nonexpert witnesses to an experiment subsequently conducted by the general manager of the factory, who was an expert, held entitled to testify that, when the saw by which plaintiff was injured caught opposite the operator, it did not throw the timber as claimed by plaintiff. *Krueger v. Brenham Furniture Mfg. Co.*, 38 C. A. 398, 85 S. W. 1156.

Where a witness in an election contest testified that he heard no one electioneering or any conversations in the room, but that if loud electioneering had taken place he would have heard it, there was no error in refusing to allow him to state his opinion as to wheth-

er he probably would have noticed electioneering, if any had taken place. *Pease v. State* (Civ. App.) 155 S. W. 657.

30. Matters directly in issue.—The opinion of a witness that an act is fraudulent is not admissible. *Hurlburt v. Boas*, 23 S. W. 446, 4 C. A. 371; *Rountree v. Walker*, 46 T. 200; *Burnham v. Walker*, 1 App. C. C. § 902.

Evidence as to intent and understanding as to property conveyed by deed held inadmissible. *Burrows v. Rust* (Civ. App.) 44 S. W. 1019.

In an action against a railroad for negligence in furnishing insufficient pens at the shipping point for the accommodation of plaintiff's cattle, the admission of certain evidence held error as invading the province of the jury. *Texas & P. Ry. Co. v. Slator* (Civ. App.) 102 S. W. 156.

A certain opinion of a witness held not admissible in a will contest as relating to the ultimate question before the jury. *Hart v. Hart* (Civ. App.) 110 S. W. 91.

An opinion of a witness as to the insufficiency of the light in the place where plaintiff was injured to enable plaintiff to have distinguished objects was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Steele*, 50 C. A. 634, 110 S. W. 171.

Plaintiff held properly allowed to testify that a certain person represented defendant in executing the lease for breach of which plaintiff sued. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

In an action for commissions for procuring a purchaser, the testimony of the purchaser that the broker was the procuring cause held inadmissible. *Grogan v. Odell* (Civ. App.) 141 S. W. 169.

In an action for libel, the opinion of witnesses as to the effect the article had on plaintiff's reputation and standing in the community was inadmissible. *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302.

On an issue in an election contest as to the residence of a voter, testimony that a certain house was his home since a specified date was properly excluded as involving mixed questions of law and fact. *Linger v. Balfour* (Civ. App.) 149 S. W. 795.

In an action against a railway company to enjoin construction of a fence along the line of a lot abutting upon the company's right of way, testimony that the fence would obstruct the view of plaintiff's property was not inadmissible as constituting a conclusion of the witness and an invasion of the jury's province. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

In an action for injuries to a shipment of live stock, a question to a witness as to what would be a reasonable time to transport the car of stock was an invasion of the province of the jury. *Kansas City, M. & O. Ry. Co. of Texas v. Beckham* (Civ. App.) 152 S. W. 228.

In an action for slander, the jury, and not the witnesses, are to draw the conclusion as to what was intended by ordinary words used; and it was not error to withdraw testimony as to what meaning witnesses thought certain well-known common words conveyed. *Lehmann v. Medack* (Civ. App.) 152 S. W. 438.

On the question whether a car checker was required to ride trains in the performance of his duties, he being hurt while boarding one, testimony that he thought it was his duty to ride cars was properly excluded as tending to substitute his opinion for the finding of the jury. *Houston Belt & Terminal Ry. Co. v. Stephens* (Civ. App.) 155 S. W. 703.

31. — Damages.—As to what is the effect of a given kind of treatment upon an animal, either in reducing or increasing its weight, or in injuring or benefiting its appearance, is a proper matter of opinion to be stated by witness to the jury; but as to whether these several items constitute the legal damage in a given case, and the amount of such damage, the jury must determine under proper instructions from the court. *Railway Co. v. Wright*, 1 C. A. 402, 21 S. W. 80.

In an action against carriers for injuries to a shipment of cotton, opinion evidence held properly excluded, as invading the province of the jury. *Bath v. Houston & T. C. Ry. Co.*, 34 C. A. 234, 78 S. W. 993.

Testimony as to the extent of damage caused by the pollution of a stream held properly refused as bearing upon an issue to be determined by the jury. *Boyd v. Schreiner* (Civ. App.) 116 S. W. 100. •

32. — Performance or breach of contract.—Testimony of a witness that an electric light plant was erected in accordance with the contract, and that he had operated it, and found it to be in satisfactory running order, is incompetent, as calling for the conclusion of witness. *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.*, 23 C. A. 328, 57 S. W. 575.

33. — Due care and proper conduct.—The opinion of a witness as to whether an act is negligent is not admissible. *Railway Co. v. Burnett*, 3 App. C. C. § 236; *Rand v. Johns*, 4 App. C. C. § 203, 15 S. W. 200; *I. & G. N. R. Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210; *Railway Co. v. Armstrong*, 23 S. W. 236, 4 C. A. 146; *Railway Co. v. Croskell*, 25 S. W. 486, 6 C. A. 160; *Same v. Miller*, 8 C. A. 241, 27 S. W. 905; *International & G. N. R. Co. v. Garcia*, 54 C. A. 59, 117 S. W. 206.

A witness who is not an expert should not be allowed to state that a train could have been stopped in time to avoid an accident if it had been running slower. *International & G. N. R. Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210.

A question which calls for the opinion of the witness as to whether defendant used ordinary care in keeping its track in repair is properly excluded. *Railway Co. v. Thompson*, 21 S. W. 138, 2 C. A. 170.

Whether train stopped at station long enough for plaintiff to alight held an issue of fact for the jury to which witnesses cannot testify. *Texas & P. Ry. Co. v. Lee*, 21 C. A. 174, 51 S. W. 351.

In an action for an injury to a child received on a turntable, a witness cannot state that the child was old enough to see and avoid the danger, as such opinion is the issue for the jury. *San Antonio & A. P. Ry. Co. v. Morgan*, 24 C. A. 58, 58 S. W. 544.

In an action against a railroad for injuries to minor, held not error to refuse to permit plaintiff to ask his mother if she knew whether he understood the danger of going around trains. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

In action for injuries to alighting passenger, permitting plaintiff to testify that, had the train moved in the usual way, he could have gotten off safely, held error. *Texas Southern R. Co. v. Long*, 35 C. A. 339, 80 S. W. 114.

The question as to whether a rule established by a railway company as to work trains flagging regular trains was a safe one was for the jury. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

In an action against a railroad for damages to cattle, it was error to permit a witness to testify that the bad condition of the cattle on arrival at their destination was due to improper transportation. *Texas & P. Ry. Co. v. Felker*, 40 C. A. 604, 90 S. W. 530.

In an action for death of a passenger, an answer of the conductor of the train in a deposition that the train stopped at the station a sufficient length of time for passengers to alight and board the same held properly excluded. *Houston & T. C. R. Co. v. Schuttee* (Civ. App.) 91 S. W. 806.

In an action for injuries to a female passenger while alighting from a street car, the opinion of a street car conductor as to the necessity of assisting women to alight held properly excluded. *San Antonio Traction Co. v. Flory*, 45 C. A. 233, 100 S. W. 200.

In an action for delay in the transportation of live stock, the opinion of a witness held inadmissible as invading the province of the jury. *St. Louis & S. F. Ry. Co. v. May*, 53 C. A. 257, 115 S. W. 900.

In an action by an engine watcher for personal injuries, testimony of a witness as to plaintiff's duties before going under the engine at the time of his injury held objectionable, on the ground that it was a conclusion for the jury's determination. *Southern Kansas Ry. Co. of Texas v. McSwain*, 55 C. A. 317, 118 S. W. 874.

Testimony of railroadmen as to the stopping of trains in railroad yards held admissible as against the objection that it was the opinion and conclusion of the witnesses on a question to be decided by the jury. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 56 C. A. 246, 120 S. W. 553.

In an action for injuries to an employé while repairing an engine on a track, the opinion of a witness held inadmissible because the jury could determine the facts from the evidence. *Houston & T. C. R. Co. v. Hanks* (Civ. App.) 124 S. W. 136.

In an action against a railroad for injuries to stock in transportation, a witness was incompetent to express an opinion as to the reasonable market value of one of the animals if it had reached the destination with only such injuries as ordinarily occur after a reasonable and ordinary run; the issue as to whether or not the run was a reasonable one being one of negligence for the jury. *Texas & P. R. Co. v. Jones* (Civ. App.) 124 S. W. 194.

In an action for death of an employé, the admission of testimony as to whether he would have been likely to do a certain act after being warned held error. *Freeman v. Taylor* (Civ. App.) 125 S. W. 613.

In an action for injuries to a telegraph lineman, evidence that it was not dangerous for a lineman to go on a pole and use a safety belt on construction work after he had heard the foreman say it was all right held inadmissible. *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155.

In an action for damages to a shipment of cattle, testimony that the cars were handled with care was properly excluded as stating an opinion and conclusion on a mixed question of law and fact, of which the jury were the triers. *Pecos & N. T. Ry. Co. v. Bishop* (Civ. App.) 154 S. W. 305.

It is not proper for a witness, in an action for damages caused by delay in a shipment of live stock, to give his opinion as to what is a reasonable time for the shipment. *Texas & P. Ry. Co. v. Tomlinson* (Civ. App.) 157 S. W. 278.

In an action against a carrier for delay in transporting a shipment of live stock, it was error to permit a witness to testify as to what would be a reasonable time for the transportation of such a shipment. *Texas & P. Ry. Co. v. Crowder* (Civ. App.) 157 S. W. 281.

34. — **Mental condition or capacity.**—Opinion testimony as to the sufficiency of a child's intelligence to appreciate the danger of going onto a street car track without looking for a car held inadmissible. *Citizens' Ry. Co. v. Robertson*, 41 C. A. 324, 91 S. W. 609.

An opinion that decedent did not have sufficient mind to execute a deed or to know its effect or value held improperly received. *Williams v. Livingston*, 52 C. A. 275, 113 S. W. 786.

35. — **Nature, condition and relation of objects.**—Where the evidence shows the condition of the approach to a railway track, an opinion of a witness as to whether a wagon could safely turn around on the approach should not be admitted. *Railway Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210.

36. — **Value.**—In a damage suit for the wrongful levying of an attachment, plaintiff can prove his business capacity, good credit, amount of liabilities, capital in business and profits. The value of his credit is a conclusion to be drawn from these facts by the jury, and plaintiff cannot testify as to what it was worth to him. *Kauffman v. Babcock*, 67 T. 241, 2 S. W. 378.

Certain testimony as to market value held not objectionable as invading the province of the jury. *Chicago, R. I. & G. Ry. Co. v. Jones* (Civ. App.) 118 S. W. 759.

37. — **Cause and effect.**—Where, in an action for injuries to an employé of a car wheel company while repairing an engine on its track, separated by a barrier from the part of the track on which a railroad operated cars, caused by a car running against the barrier and striking it so as to move the engine, the distance of the engine from the barrier and the other facts proved enabled the jury to determine whether the engine was far enough back not to have been reached by the drawhead of the car, a question whether the movement of the car would have caused the injury if the engine had been far enough back not to have been reached by the drawhead of the car called for an opinion, concerning which a witness could not testify. *Houston & T. C. R. Co. v. Hanks* (Civ. App.) 124 S. W. 136.

38. **Inferences or impressions from collective facts.**—Opinion of witness on facts detailed by him to the jury is not admissible in evidence. *Railway Co. v. Scott*, 1 C. A. 1, 20 S. W. 725.

Evidence of a fact based upon the impression and belief of a witness is competent. *Wells v. Burts*, 22 S. W. 419, 3 C. A. 430.

Evidence which is the mere conclusion of the witness, based on other facts of which she claimed to have knowledge, is incompetent. *Oakes v. Prather* (Civ. App.) 81 S. W. 557.

A statement of a witness based on information deduced from the witness' knowledge of the character of an agent's employment held incompetent. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

Testimony of a witness as to his conclusions or impressions from books of account or papers not produced is inadmissible. *Cobb v. Bryan* (Civ. App.) 97 S. W. 513.

A nonexpert witness should state the facts and leave conclusions to the jury. *Bond v. International & G. N. R. Co.*, 55 C. A. 119, 118 S. W. 867.

Where there is a conflict between the parties to a suit as to whether or not a conveyance is an absolute deed or a trust conveyance, the testimony as to the substance of the conversation between the parties at the time of the transaction and the impression of a witness derived therefrom as to the intention of the parties is admissible. *Le-land v. Chamberlin*, 56 C. A. 256, 120 S. W. 1040.

In an action for the burning of plaintiff's barn, evidence of witnesses who had examined the burned area that they concluded that the fire burned from defendant's railroad toward plaintiff's barn held admissible. *Houston & T. C. R. Co. v. Ellis* (Civ. App.) 134 S. W. 246.

Where injuries are received while moving car wheels from a box car, testimony that witness knew there was a depression in the car floor "from wheels going down and running," and that "as the wheels approached * * * they came very fast * * * and struck a low place and increased the speed," was admissible, though a conclusion, being based on the results of observations as to facts. *Freeman v. Grashel* (Civ. App.) 145 S. W. 695.

39. Special knowledge as to subject-matter.—The opinion of a witness must be based on knowledge or evidence of facts. *Railway Co. v. Garteiser*, 29 S. W. 939, 9 C. A. 456; *Railway Co. v. Calhoun* (Civ. App.) 24 S. W. 362; *Railway Co. v. Daniels*, 28 S. W. 548, 9 C. A. 253; *Railway Co. v. Haskell*, 23 S. W. 546, 4 C. A. 550; *Railway Co. v. Duelm* (Civ. App.) 23 S. W. 596; *Campbell v. Warner* (Civ. App.) 24 S. W. 703; *Mutual Life Ins. Co. v. Hayward* (Civ. App.) 27 S. W. 36; *Railway Co. v. Startz* (Civ. App.) 27 S. W. 759.

In action against railroad for damages to employé by reason of the incompetence of a surgeon employed in the company's hospital, evidence that a witness did not consider the surgeon well versed in the science of medicine held immaterial. *Poling v. San Antonio & A. P. Ry. Co.*, 32 C. A. 487, 75 S. W. 69.

Witness held incompetent to testify in action for damages to property from railway's occupancy of a neighboring street. *Eastern Texas Ry. Co. v. Scurlock*, 97 T. 305, 78 S. W. 490.

In an action for damages to cattle through failure to properly supply them with water while pasturing them under a contract, the testimony of a witness as to the prospects of fattening the cattle in the locality in question held not objectionable. *Tuttle v. Robert Moody & Son* (Civ. App.) 94 S. W. 134.

The testimony of a witness held admissible as against the objection that he had no primary knowledge of the subject concerning which he testified. *Western Union Telegraph Co. v. O'Fiel*, 47 C. A. 40, 104 S. W. 406.

The fact that a witness may possess greater knowledge as to the existence of facts entering into an inquiry than the jury does not render his conclusion upon a mixed question of law and fact admissible. *Houston & T. C. R. Co. v. Roberts*, 101 T. 418, 108 S. W. 808.

Where a witness by his own admissions on the stand shows that he knows nothing about the matter as to which he is asked by a party introducing him to give his opinion, refusal to permit him to give his opinion is proper. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365.

Witness held qualified to testify as an expert as to the size of chinquapin trees. *Cochran v. Casey* (Civ. App.) 128 S. W. 1145.

A witness held sufficiently qualified to give his opinion as to whether a hotel could be rented. *Peters v. Strauss* (Civ. App.) 132 S. W. 956.

A witness who had merely had a talk with another at a certain house was not entitled to testify that such house was the home of such other. *Grigsby v. Reib* (Civ. App.) 139 S. W. 1027.

Opinions of nonexpert witnesses who had testified as to the facts on which the opinions were based held admissible in an action for damages. *American Const. Co. v. Caswell* (Civ. App.) 141 S. W. 1013.

40. — Personal identity and age.—Opinions as to age of deceased, in action for his death, held admissible. *St. Louis S. W. Ry. Co. of Texas v. Bowles*, 32 C. A. 118, 72 S. W. 451.

41. — Bodily condition.—In an action by a husband for injuries to his wife, he may testify from his actual knowledge, derived from personal observation as to the effect on the wife of her efforts to work, without qualifying as an expert. *Chicago, R. I. & T. Ry. Co. v. Jones*, 39 C. A. 480, 88 S. W. 445.

A witness, who had known plaintiff for several years, though not a physician or expert, could testify that he did not seem healthy after he was injured. *Missouri, K. & T. Ry. Co. of Texas v. Farris* (Civ. App.) 124 S. W. 497.

In a personal injury action, certain witnesses held competent to testify as to the condition of plaintiff's health before the accident. *Gulf, C. & S. F. Ry. Co. v. Williams* (Civ. App.) 136 S. W. 527.

42. — Mental condition or capacity.—Evidence of mental and physical condition of one injured, by one who had known him a long time, held admissible. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.) 78 S. W. 32.

Wife's opinion concerning her husband's mental capacity held admissible in connection with facts on which it is based. *Id.*

In trespass to try title to land, a witness held qualified to express an opinion as to mental condition of plaintiff's ward at a certain time. *Field v. Field*, 39 C. A. 1, 87 S. W. 726.

The existence of the condition of drunkenness or insanity can only be proved by opinion of witnesses, and their opinion is not admissible unless they are experts or have had a opportunity to form an opinion from observation. *Daniel v. Modern Woodmen of America*, 53 C. A. 570, 118 S. W. 211.

Admission of opinions of witnesses as to insanity of a testator held not to be error in view of testimony as to their acquaintance with him. *White v. Holmes* (Civ. App.) 129 S. W. 874.

On an issue of undue influence over decedent inducing a deed, opinions as to her mental condition and as to whether she was easily influenced held properly admitted. *Rankin v. Rankin* (Civ. App.) 134 S. W. 392.

A nonexpert witness held entitled to testify that a person was unconscious at one time and conscious at a subsequent time. *Missouri, K. & T. Ry. Co. of Texas v. Coker* (Civ. App.) 143 S. W. 218.

A subscribing witness to a will is competent to state that testator was rational and knew what he was doing when he signed the will. *McDonald's Estate v. McDonald* (Civ. App.) 150 S. W. 593.

43. — **Quantity.**—A witness, shown to have cut wood and to have been present when wood was cut, and to have seen how it turned out, was qualified to give his opinion as to how much wood there was left on the land. *Sauer v. Veitmann* (Civ. App.) 149 S. W. 706.

44. — **Due care and proper conduct in general.**—In an action alleged to have been occasioned by complainant's horse throwing her vehicle into a stream adjacent to a street, which was caused by defendant's failure to erect suitable barriers, a witness cannot give his opinion, based solely on the horse's action at the time of the accident, as to whether such horse was a suitable one for a lady to drive. *City of San Antonio v. Porter*, 24 C. A. 444, 59 S. W. 922.

In an action for damages to cattle by defendant's negligent delay in transportation, plaintiff held qualified to give an opinion as to what would be a reasonable time in which to ship the cattle to their destination. *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 49 C. A. 304, 108 S. W. 1027.

A shipper of cattle from the North through Texas to Mexico held competent to testify that the cars had the appearance of having been disinfected before the cattle were placed in them. *International & G. N. R. Co. v. McCullough* (Civ. App.) 118 S. W. 558.

Witnesses stating that they had ridden in automobiles many times and could tell from observation whether a party was able to handle an automobile, and that they had observed the handling of an automobile by a boy whose negligence was alleged to have caused the death of plaintiff's decedent and had ridden with him, were properly permitted to state that the boy was a careful driver and able to handle a machine, and in their opinion on the day of the accident was a careful driver of the automobile, and knew how to handle it. *Riley v. Fisher* (Civ. App.) 146 S. W. 581.

A shipper of goods though having no knowledge of the mechanism of an engine and never having worked on a railroad, may testify that a train could have been stopped within 20 feet, where he had seen a great deal of switching, had himself stopped engines on signal and had opportunity in so doing to note the time required to stop, and had lived a great number of years at a junction of two railroads in view of the operations of the trains. *Freeman v. Moreman* (Civ. App.) 146 S. W. 1045.

Where a witness was a car repairer for nine successive years, and for four or five years had used the ladder plaintiff was using when injured, he had knowledge of the facts sufficient to render admissible his testimony as to whether spikes at the bottom of the ladder were necessary. *Missouri, K. & T. Ry. Co. of Texas v. Hedric* (Civ. App.) 154 S. W. 633.

45. — **Railroading.**—Railroad men, acquainted with construction of frogs and switches, held competent to give opinions to as the relative safety of blocked and unblocked switches. *Galveston, H. & S. A. Ry. Co. v. Hughes*, 22 C. A. 134, 54 S. W. 264.

In an action against a railroad company for injuries to an employé caused by a defective handhold, wherein there was evidence tending to show that the car had been cornered, a nonexpert witness held not shown to be competent to testify as to whether the car could have been thus cornered without injuring the handhold. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.) 68 S. W. 556.

46. — **Speed.**—In an action for injuries sustained by plaintiff on his jumping from a moving train, held competent for him to testify that the train was not going very fast when he jumped off, and that he thought he could get off safely. *Texas & P. Ry. Co. v. Crockett*, 27 C. A. 463, 66 S. W. 114.

A shipper of cattle, held sufficiently qualified to state the usual time required for cattle trains to run from a Texas station to St. Louis. *International & G. N. R. Co. v. McGehee* (Civ. App.) 81 S. W. 804.

In an action against a carrier for delay in a shipment, a witness held competent to testify as to the reasonable time required to transport cattle between the points in question. *Texas & N. O. Ry. Co. v. Walker*, 43 C. A. 278, 95 S. W. 743.

One held competent to testify as to the average rate of speed of a train carrying cattle. *Missouri, K. & T. Ry. Co. of Texas v. Pettit*, 54 C. A. 358, 117 S. W. 894.

47. — **Distance.**—A witness held competent to testify to his opinion as to distance between certain points on a railroad. *San Antonio & A. P. Ry. Co. v. Griffith* (Civ. App.) 70 S. W. 438.

48. — **Dangerous character of work.**—In an action for the death of plaintiff's minor son while working in a cotton hullhouse, alleged to have been caused by defendant's failure to warn decedent of the danger, witnesses experienced in handling hulls could testify that the work in the hullhouse was dangerous. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 129 S. W. 852.

49. — **Cause and effect.**—On an issue whether a bridge across a stream had been so unskillfully constructed as to cause the waters of the stream to overflow, unskilled

witnesses familiar with the bridge structure and the facts connected with the overflow were permitted to give their opinion as to whether the bridge, on account of being improperly constructed, caused the damage, and to state in that connection the facts within their knowledge. *I. & G. N. Ry. Co. v. Klaus*, 64 T. 293.

Nonexpert witnesses, acquainted with the land and with usual rainfalls, were properly permitted to testify in an action for damages to land by an overflow caused by obstruction of waterway. *Taylor v. San Antonio & A. P. R. Co.*, 36 C. A. 658, 83 S. W. 738.

Witnesses held not qualified to give their opinions as to effect of obstructions on natural flow of water of a stream. *Gulf, C. & S. F. Ry. Co. v. Harbison* (Civ. App.) 88 S. W. 452; *Same v. Wetherly* (Civ. App.) 88 S. W. 456; *Same v. Oates* (Civ. App.) 88 S. W. 457.

A witness held competent to testify to the effect jerks of the train had on cattle transported. *Missouri, K. & T. Ry. Co. of Texas v. Pettit*, 54 C. A. 358, 117 S. W. 894.

One held competent to testify as to the effect a delay in the shipment of cattle would have on their salable appearance. *Id.*

A switchman of several years' experience is competent to give an opinion as to how far the impact of a coupling under specified conditions, will knock a car. *Missouri, K. & T. Ry. Co. of Texas v. Reno* (Civ. App.) 146 S. W. 207.

50. — **Pecuniary condition.**—In an action for fraudulent representations whereby plaintiff was induced to purchase corporate stock, certain cross-examination of an expert witness held proper. *Collins v. Chipman*, 41 C. A. 563, 95 S. W. 666.

In an action for fraudulent representations inducing plaintiff to buy corporate stock, a certain person held a competent witness by whom to prove that at the time plaintiff purchased his stock the corporation did not have sufficient assets to authorize representations made by defendant. *Id.*

51. — **Handwriting.**—Writing proven how. *Williams v. Deen*, 24 S. W. 536, 5 C. A. 576.

A witness who had seen defendant write could express his opinion as to the genuineness of defendant's signature to the note in issue. *Miller v. Burgess* (Civ. App.) 136 S. W. 1174.

52. — **Nature, condition and relation of objects.**—Witness held incompetent to testify as to the capacity of a culvert. *Missouri, K. & T. Ry. Co. of Texas v. Huddleston* (Civ. App.) 81 S. W. 64.

53. — **Value in general.**—A witness' statement that he testifies from his knowledge does not qualify him to testify to value. *Gulf, W. T. & P. Ry. Co. v. Staton* (Civ. App.) 49 S. W. 277.

54. — **Value of services.**—In an action for the death of plaintiff's wife, held proper to permit the husband to testify that he considered his wife's services in the care of his household, etc., as worth a certain sum. *Chicago, R. I. & G. Ry. Co. v. Groner*, 43 C. A. 264, 95 S. W. 1118.

In an injury action, plaintiff, who was an experienced farmer and knew the value of farm labor, could testify as to the proximate value of his services on a farm. *International & G. N. R. Co. v. Lane* (Civ. App.) 127 S. W. 1066.

In an action for injuries, plaintiff could testify that in her opinion her services as housekeeper were worth \$24 or \$25 per month. *St. Louis Southwestern Ry. Co. of Texas v. Horne* (Civ. App.) 130 S. W. 1025.

55. — **Value of real property.**—It was error to permit a witness who had not examined the improvements in question to testify as to the value thereof. *Houston & T. C. R. Co. v. Smith* (Civ. App.) 46 S. W. 1046.

Where plaintiff alleged that improvements on land were worth a certain sum, and no objection was made as to defendant's qualifications, it was not error to allow him to testify as to their value. *Shelton v. Willis*, 23 C. A. 547, 58 S. W. 176.

Witnesses, admitting ignorance of market value of land, may not testify how much its market value is depreciated by a railroad. *Chicago, R. I. & T. Ry. Co. v. Douglass*, 33 C. A. 262, 76 S. W. 449.

Testimony of witness as to value of land for the use to which defendant put it held admissible. *Cluck v. Houston & T. C. R. Co.*, 34 C. A. 452, 79 S. W. 80.

A witness, who did not know what lands with peach orchards had been or could be sold for in a neighborhood, was not competent to express an opinion as to the value of such lands. *Texas & N. O. R. Co. v. Smith*, 35 C. A. 351, 80 S. W. 247.

The testimony of a witness as to the value of property damaged by the construction of a railroad may be disregarded where he shows a disinclination to say outright that he had any knowledge of the market value of the property. *Eastern Texas R. Co. v. Eddings*, 51 C. A. 166, 111 S. W. 777.

A witness held competent to testify as to the reasonable market value of land immediately before and after a fire destroying the timber and grass. *Missouri, K. & T. Ry. Co. of Texas v. Neiser*, 54 C. A. 460, 118 S. W. 166.

Market value is largely a matter of opinion; and a witness acquainted with the market value of property at a particular place is competent to state his opinion. *Chicago, R. I. & G. Ry. Co. v. Jones* (Civ. App.) 118 S. W. 759.

A witness held competent to testify as to the value of a building destroyed by fire. *Ft. Worth & D. C. Ry. Co. v. Arthur* (Civ. App.) 124 S. W. 213.

Plaintiff, though not a real estate expert, held competent to testify as to depreciation in the value of her property. *International & G. N. R. Co. v. Beil* (Civ. App.) 130 S. W. 634.

A witness held not competent to testify as to value of land in condemnation proceedings. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick* (Civ. App.) 147 S. W. 730.

Witnesses were qualified to give an opinion as to the market value of a farm, where they had lived on adjoining farms for from 10 to 25 years, or had lived upon the farm in question and cultivated it for a number of years, and knew the value of the land in the vicinity and what it sold for. *Childress v. Tate* (Civ. App.) 148 S. W. 843.

A witness who was familiar with the location of property, and had had some dealings in real estate in a city where it was located, and was acquainted with values, was qualified to testify to the value of the particular property. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1063.

Where a witness states that he knows the market value of land in controversy, he was competent to testify as to such value. *Davis v. Fain* (Civ. App.) 152 S. W. 218.

In an action for damages for breach of a contract whereby plaintiff alleged that he lost the benefits of an exchange for land in R. county, held, that a witness for plaintiff did not disclose a knowledge of such facts as would entitle him to give opinion as to the value of such land. *Rotan Grocery Co. v. Jackson* (Civ. App.) 153 S. W. 687.

A witness who testified that he did not know the value of certain lots was not competent to give an opinion thereon. *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 156 S. W. 261.

A witness, who stated on direct examination that he knew the market value of property, and who was not cross-examined as to his knowledge, was properly permitted to testify to market value. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 156 S. W. 267.

A witness may testify as to the value of land sought to be condemned if he possesses sufficient knowledge to enable him to arrive at an intelligent opinion of the value of the land, based on familiarity with the land, knowledge of its quality and uses, prices of other land of a similar nature in the same locality, etc. *Byrd Irr. Co. v. Smyth* (Civ. App.) 157 S. W. 260.

A civil engineer, who had lived in the vicinity of land sought to be condemned for seven years, had been over it, had platted it, and knew its market value, was properly permitted to give his opinion as to such value. *Id.*

When a witness has stated that he knows the market value of land sought to be condemned, he has prima facie qualified himself to state such value. *Id.*

56. — Value of personal property.—Evidence held not sufficient to sustain the amount of damages awarded for the excavation and conversion of sand from the premises of plaintiff. *Texas & N. O. R. Co. v. White*, 25 C. A. 278, 62 S. W. 133.

Where the evidence of a witness as to the market value of sand converted shows that he is but repeating the statement of another, and does not show that he is qualified to testify to such value, the admission of his evidence is error. *Id.*

A witness in an action against a railroad company for damages to cattle received during carriage held competent to testify as to what caused the condition in which they arrived at destination. *San Antonio & A. P. Ry. Co. v. Barnett*, 27 C. A. 498, 66 S. W. 474.

Facts in an action against a carrier for damages to cattle shipped held to show that it was error to permit a witness to give his opinion as to the market value. *Missouri, K. & T. Ry. Co. of Texas v. Dllworth*, 95 T. 327, 67 S. W. 88.

A witness stating that she knew the value of personal property injured held not disqualified by her further statement that she knew the value from the price paid. *Houston, E. & W. T. Ry. Co. v. Charwaine*, 30 C. A. 633, 71 S. W. 401.

In an action against a carrier for damages to a shipment of live stock, held error to permit a witness to give his estimate as to the market value at the place of destination. *Missouri, K. & T. Ry. Co. of Texas v. Allen*, 39 C. A. 236, 87 S. W. 168.

Certain testimony held inadmissible on an issue as to the value of cattle at their destination. *Texas & P. Ry. Co. v. Sherrod*, 99 T. 382, 89 S. W. 956.

In an action against a railroad for damages to cattle, the admission of testimony of witnesses, who had not seen the cattle prior to shipment, as to their market value at their destination was not error. *Texas & P. Ry. Co. v. Felker*, 40 C. A. 604, 90 S. W. 530.

In an action against a railroad for killing a cow, a witness held competent to testify as to value of cow. *Texarkana & Ft. S. Ry. Co. v. Bell* (Civ. App.) 101 S. W. 1167.

A witness held competent to testify to the market value of horses. *Ft. Worth & R. G. Ry. Co. v. Hickox* (Civ. App.) 103 S. W. 202.

A witness held competent to testify to the value of a diamond which he had sold to plaintiff, though he had forgotten its weight. *Pullman Co. v. Vanderhoeven*, 48 C. A. 414, 107 S. W. 147.

Testimony held admissible as some evidence of market value and also of reasonable value. *Houston & T. C. R. Co. v. Tisdale* (Civ. App.) 109 S. W. 413.

One who had been a salesman at stockyards for 10 years, and who was engaged in such business, was competent to testify as to the market price of cattle at such yards. *Missouri, K. & T. Ry. Co. of Texas v. Pettit*, 54 C. A. 358, 117 S. W. 894.

A witness held competent to testify as to the value for hay of grass destroyed by fire. *Missouri, K. & T. Ry. Co. of Texas v. Neiser*, 54 C. A. 460, 118 S. W. 166.

A witness held incompetent to testify as to the market value of certain mules at a specified time and place. *Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton*, 54 C. A. 593, 118 S. W. 628.

The opinion of a witness as to the market value of horses held proper. *Chicago, R. I. & G. Ry. Co. v. Jones* (Civ. App.) 118 S. W. 759.

A witness held qualified to testify as to the value of secondhand feathers at a certain time and place. *Chicago, R. I. & G. Ry. Co. v. Clark* (Civ. App.) 129 S. W. 186.

A witness held not qualified to testify as to the value of certain articles. *Lengelet v. Piper* (Civ. App.) 133 S. W. 480.

An owner of certain billiard tables and fixtures held incompetent to testify to their value when new, where his sole information was obtained from a salesman of such goods. *Gulf, C. & S. F. Ry. Co. v. Coulter* (Civ. App.) 139 S. W. 16.

One who has raised, bought, and sold horses in a county for a number of years, and who knows the market value thereof, is competent to testify to such value, though he has not sold and has no knowledge of a sale of a horse similar to the one in question. *Moore v. St. Louis, S. F. & T. Ry. Co.* (Civ. App.) 146 S. W. 1070.

Where a witness, not an expert as to the value of pumping machinery, did not testify that he knew the value of the pump in controversy, he should not be permitted to testify to its value. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 147 S. W. 717.

Where it appeared that the market value of cattle at K. was the same as that at destination, a witness, who based his testimony upon his knowledge of their value at K., could testify as to what the cattle were worth at destination. *Kansas City, M. & O. Ry. Co. of Texas v. Whittington & Sweeney* (Civ. App.) 153 S. W. 689.

A witness who positively testifies that he knows the value of household and kitchen furniture is competent to testify to actual value. *Pecos & N. T. R. Co. v. Porter* (Civ. App.) 156 S. W. 267.

57. — **Damages.**—In action for injuries by construction of railroad, a witness acquainted with the market value before and after may testify as to the difference therein. *Denison & P. S. Ry. Co. v. Scholz* (Civ. App.) 44 S. W. 560.

Cross-examination of a property owner, testifying to the sum to which the value of the property has been reduced by the proximity of a nuisance, as to whether he will take that for it and as to what he will take, is proper. *Eastern Texas Ry. Co. v. Scurlock*, 97 T. 305, 78 S. W. 490.

In an action against a carrier for shrinkage in cattle due to delay and rough handling, the shipper held properly permitted to testify that the cattle brought a certain amount less per head than they would have brought if transported in a reasonable time and with reasonable care. *Fort Worth & D. C. Ry. Co. v. Richards* (Civ. App.) 105 S. W. 236.

In an action for damage to cattle by defendant's delay in transporting them to market, plaintiff was qualified to testify as to the difference between what the cattle brought and what they would have brought if sold when they should have arrived, even though he was not at the place of sale on one of the days covered by his estimate. *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 49 C. A. 304, 108 S. W. 1027.

In an action for damages to grazing lands from herding scabby sheep thereon, and consuming and polluting water and injuring tanks, held that, where there was no market value of the grass, water consumed and polluted, or injury to the tanks, plaintiff, who was in the sheep business, could testify to the reasonable value of the water and damage to the lands through herding the scabby sheep at the tanks. *Tippett v. Corder* (Civ. App.) 117 S. W. 186.

Plaintiff, who lived on her premises, could better determine the character and extent of the annoyance and discomfort caused her by the flow of oil down a ravine near her premises, than her neighbors or witnesses passing along the street near her residence. *Houston & T. C. R. Co. v. Crook*, 56 C. A. 28, 120 S. W. 594.

On statements of a witness that he saw plaintiff's cattle while awaiting shipment, and accompanied the shipment, and that he had 16 years' experience handling cattle, held, that he was competent to state that cattle shrank about 50 pounds per head from the time he first saw them waiting shipment until they reached destination. *Pecos & N. T. Ry. Co. v. Bishop* (Civ. App.) 154 S. W. 305.

58. **Agency.**—The opinion of an agent of a loan company that a certain person was not an agent of such company is not admissible. *Edinburgh American Land Mortg. Co. v. Briggs* (Civ. App.) 41 S. W. 1036.

59. **Motive or Intent.**—Opinion as to the motive or intention of another inadmissible. *Insurance Co. v. Hayward* (Civ. App.) 27 S. W. 36; *Hurlbut v. Boaz*, 23 S. W. 446, 4 C. A. 371.

60. **Ownership.**—Ownership of property must be shown by the facts constituting it. *Railway Co. v. Shearer*, 21 S. W. 133, 1 C. A. 343; *Telegraph Co. v. Hearne*, 26 S. W. 478, 7 C. A. 67; *League v. Henecke* (Civ. App.) 26 S. W. 729.

Opinions of witnesses that defendants acted towards the land as a reasonable man would towards his own land, and indicated that they claimed the land as their own, are not admissible. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

61. **Construction of writing.**—The legal effect of a lost deed cannot be shown by the opinion of a witness, although a long time has elapsed since the matters to which it relates occurred. *Shifflet v. Morell*, 68 T. 382, 4 S. W. 343.

Construction of writings is a question for the jury, and opinions of a witness inadmissible. *Thomson-Houston Electric Co. v. Berg*, 10 C. A. 200, 30 S. W. 454.

62. **Personal identity and characteristics.**—The identity of a person cannot be shown by the opinion of a witness. *McCamant v. Roberts*, 80 T. 316, 15 S. W. 580, 1054. See *Howard v. Russell*, 75 T. 171, 12 S. W. 525.

In an action for death of deceased while walking on defendant's railroad track, evidence that it was witness' opinion that deceased was one of two men he saw walking on the track shortly before deceased was killed held admissible. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 99 T. 160, 88 S. W. 192.

The belief or opinion of a witness to the effect that certain other persons would swear to the truth was not admissible. *Hardin v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 88 S. W. 440.

63. **Age.**—The age, appearance, etc., of a minor may be shown by the evidence of witnesses who had seen him. *McGuire v. State*, 4 App. C. C. § 229, 15 S. W. 917; *Hays v. Railway Co.*, 70 T. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

64. **Bodily appearance or condition.**—The age, appearance, etc., of a minor may be shown by the evidence of witnesses who have seen him. *McGuire v. State*, 4 App. C. C. § 229, 15 S. W. 917; *Hays v. Railway Co.*, 70 T. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

In an action for injuries, a nonexpert witness held entitled to testify concerning plaintiff's health before and after the injury. *G. A. Duerler Mfg. Co. v. Eichhorn*, 44 C. A. 638, 99 S. W. 715.

In an action for personal injuries opinion evidence as to physical suffering of plaintiff held admissible. *St. Louis Southwestern Ry. Co. of Texas v. Schuler*, 46 C. A. 356, 102 S. W. 783.

In an action for injuries to plaintiff's wife, it was proper to allow plaintiff to testify to her physical suffering. *Texas & N. O. R. Co. v. Clippenger*, 47 C. A. 510, 106 S. W. 155.

In a personal injury action held proper to permit plaintiff's wife to testify as to plaintiff's physical condition after his injury. *Missouri, K. & T. Ry. Co. of Texas v. Hibbitts*, 49 C. A. 419, 109 S. W. 228.

In a personal injury action the father of the person injured could testify that her health was good and her disposition was bright and cheerful before the accident, and that the reverse had been true since that time; the testimony not being expert testimony. *Pullman Co. v. Hoyle*, 52 C. A. 534, 115 S. W. 315.

In a personal injury action, nonexpert witnesses who had known plaintiff before the

accident, and had observed him since, could testify that he had not been able to perform physical labor since he was injured. *Houston & T. C. R. Co. v. Parnell*, 56 C. A. 265, 120 S. W. 951.

A husband suing for a personal injury to his wife held authorized to testify, though not an expert, that his wife's limbs are paralyzed. *International & G. N. R. Co. v. Sandlin*, 57 C. A. 151, 122 S. W. 60.

A witness may give his opinion as to whether one suing for a personal injury seemed to be suffering at the time of the accident. *Gulf, C. & S. F. Ry. Co. v. Wafer* (Civ. App.) 130 S. W. 712.

In an action for personal injuries, a witness may properly state that plaintiff was not able to go to his meals. *St. Louis Southwestern Ry. Co. of Texas v. Pruitt* (Civ. App.) 157 S. W. 236.

65. **Nature or extent of personal injuries.**—The plaintiff and his brother were properly permitted to testify that plaintiff could not see and hear, nor turn his head, as well as before the accident. *Chicago, R. I. & T. Ry. Co. v. Long*, 26 C. A. 601, 65 S. W. 882.

In an action for injuries, a nonexpert witness held entitled to testify that plaintiff appeared to be worse than at the time of the accident. *St. Louis S. W. Ry. Co. of Texas v. Brown*, 30 C. A. 57, 69 S. W. 1010.

In an action for injuries, a nonexpert witness held entitled to testify that plaintiff limped, appeared to be crippled, and was unable to work. *Id.*

In an action for injuries to a servant, it was error to permit a witness to testify that, while working after the accident, plaintiff was complaining all the time, and that he finally had to quit work. *Wells, Fargo & Co. Express v. Boyle*, 39 C. A. 365, 87 S. W. 164.

In an action for injuries, held error to permit a witness to testify that plaintiff had not been able to do much since the accident. *Id.*

In an action for injuries to plaintiff while walking along defendant's railroad track, plaintiff held entitled to testify concerning his sense of hearing, which he claimed was impaired by the accident. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In an action for injuries, it was proper to admit the testimony of a nonexpert witness that plaintiff did not appear "to be 50 per cent. as good a man" as he was before the accident. *St. Louis & S. F. R. Co. v. Smith* (Civ. App.) 90 S. W. 926.

In an action for injuries, testimony of plaintiff that in his opinion his capacity for earning a livelihood had been depreciated one-half held admissible in evidence. *Houston & T. C. R. Co. v. Fanning*, 40 C. A. 422, 91 S. W. 344.

In an action for injuries to a passenger, evidence as to the appearance of plaintiff after the accident, as to whether or not he seemed to be suffering, etc., held admissible. *Mullen v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 92 S. W. 1000.

Testimony that certain horses compared favorably with others held admissible. *Texas & P. Ry. Co. v. Stewart*, 43 C. A. 399, 96 S. W. 106.

Under the rule that a nonexpert witness may give his opinion on questions of apparent conditions of the body or mind, a husband suing for a personal injury to his wife may testify, though he is not an expert, that his wife suffers greatly, and that her lower limbs are in a paralyzed condition. *International & G. N. R. Co. v. Sandlin*, 57 C. A. 151, 122 S. W. 60.

66. **Mental condition or capacity.**—Non-professional persons are allowed to state their opinions as to the sanity of a person, as the result of their observations, in connection with the facts observed upon which the opinion is based. *Rogers v. Crain*, 30 T. 284; *Holcomb v. State*, 41 T. 125; *Garrison v. Blanton*, 48 T. 299. See *Hickman v. State*, 38 T. 190; *Haney v. Clark*, 65 T. 93; *Ellis v. State*, 33 Cr. R. 86, 24 S. W. 894.

An opinion as to the competency of a witness to testify inadmissible when. *Howard v. Russell*, 75 T. 171, 12 S. W. 525.

The opinion of one who was present when a will was signed and witnessed the appearance, heard the conversation, and can state the condition of the testator at the time, is admissible on the question of mental capacity. *Brown v. Mitchell*, 75 T. 9, 12 S. W. 606.

On an issue as to the contributory negligence of an infant intestate, opinions as to his discretion were admissible in evidence to show his capability of contributory negligence. *St. Louis & S. W. Ry. Co. of Texas v. Shifflet* (Civ. App.) 56 S. W. 697.

It is not competent for a nonexpert witness to give his opinion as to the mental capacity of a grantor to appreciate and understand contracts. *Mills v. Cook* (Civ. App.) 57 S. W. 81.

In a will contest, the opinion of a witness that testator was not capable of self-control or self-government was incompetent. *Franklin v. Boone*, 39 C. A. 597, 88 S. W. 262.

Witnesses who know and have testified to facts bearing on an issue as to one's sanity may give an opinion as to such person's sanity, founded upon their knowledge. *Kaack v. Stanton*, 51 C. A. 495, 112 S. W. 702.

In an action to set aside a deed from plaintiff to his stepmother for alleged advantage taken of him by her, while she was occupying a relation of trust, where it was not sought to avoid the contract upon the grounds of mental incapacity, but allegations in the petition of mental weakness, ignorance, and want of business capacity were only auxiliary to the allegation that he trusted his stepmother to protect his interests, which trust was largely superinduced by his mental unfitness for the conduct of large business transactions, and that the trust had been taken advantage of by his stepmother in the transaction complained of, testimony of witnesses that they had known plaintiff for a long time, had often seen him and conversed with him, and that some of them had known of trades made by him, and that from their knowledge, thus obtained, he was in their opinion weak-minded, and had no appreciation of the value of money or property, was admissible. *Koppe v. Koppe*, 57 C. A. 204, 122 S. W. 68.

One's mental status held subject to proof by nonprofessional testimony. *Missouri, K. & T. Ry. Co. of Texas v. Linton* (Civ. App.) 141 S. W. 129.

On the probate of a will, executed in July, of one who died in December, a witness

who met testator in November held properly permitted to give opinion that testator entertained an insane delusion toward his wife, which arose about three weeks before the execution of the will. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

67. **Handwriting.**—Handwriting may be proved by one having knowledge of the handwriting. *Shinn v. Hicks*, 68 T. 277, 4 S. W. 486.

Writing proven how. *Williams v. Deen*, 24 S. W. 536, 5 C. A. 575.

68. **Due care and proper conduct.**—Opinion evidence as to contributory negligence admissible. *McCray v. Galveston*, 89 T. 168, 34 S. W. 95.

A witness may testify as to the competency of an engineer by stating that he was careless and unskillful in operating his engine. *Terrell v. Russell*, 16 C. A. 573, 42 S. W. 129.

Question of a witness, "Was it not apparent to one of ordinary prudence?" held improper, as calling for an opinion. *Mayton v. Sonnefeld* (Civ. App.) 48 S. W. 608.

In action for injury received while coupling cars, held proper to permit witness to testify that plaintiff, before making the coupling, should have seen that the switching foreman, to whom he had given the signal that approaching cars should move more slowly, had received the same. *Missouri, K. & T. Ry. of Texas v. Baker* (Civ. App.) 58 S. W. 964.

In an action against a railway company for refusing a ticket, witnesses may testify whether the conductor, on refusing the ticket, was polite and courteous, or otherwise, though the question calls for their opinion. *Rutherford v. St. Louis S. W. Ry. Co.*, 28 C. A. 625, 67 S. W. 161.

A witness' opinion that a train stopped long enough to permit all passengers to alight at a station held inadmissible. *San Antonio & A. P. Ry. Co. v. Jackson*, 38 C. A. 201, 85 S. W. 445.

In an action for injuries to a section foreman, evidence that the curve in the track where the accident occurred was not such as required the sending ahead of a flagman held admissible. *Gulf, C. & S. F. Ry. Co. v. Winter*, 38 C. A. 8, 85 S. W. 477.

In an action for damages for burning grass, opinion of the person tending the fire as to the danger to be anticipated held inadmissible in evidence. *Dunn v. Newberry* (Civ. App.) 86 S. W. 626.

In an action for damages for burning grass, evidence of defendant that he did not think there was any danger in leaving the fire held proper. *Id.*

In an action against a carrier for death of a mule, a witness, who was experienced in loading animals and who loaded the mule, should have been permitted to have expressed his opinion as to whether the mule was properly loaded and tied, and whether the opening left in the door of the car provided sufficient ventilation. *International & G. N. R. Co. v. Nowaski*, 48 C. A. 144, 106 S. W. 437.

In an action for delay in transportation of live stock, certain testimony of witness held inadmissible as the witness' opinion on a mixed question of law and fact. *Houston & T. C. R. Co. v. Roberts*, 101 T. 418, 108 S. W. 808.

A question, asking a witness in effect whether decedent was guilty of negligence, held objectionable as calling for a conclusion. *Walker v. Texas & N. O. R. Co.*, 51 C. A. 391, 112 S. W. 430.

A qualified witness may testify, in an action for injuries to a shipment of cattle, as to what is the usual, customary, or ordinary run, or as to proper time or manner of doing things. *Missouri, K. & T. Ry. Co. v. Brown* (Civ. App.) 155 S. W. 979.

68½. **Custom or usage.**—Where the powers of a railroad station agent rested on usage, held error to allow a witness to state his opinion that certain acts were within his duty. *Lipscomb v. Houston & T. C. Ry. Co.*, 95 T. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

Conductors of defendant's street cars held incompetent to testify as to the customary location of negro signs in the cars. *San Antonio Traction Co. v. Lambkin* (Civ. App.) 99 S. W. 574.

A general custom set up in explanation of a contract must be shown by direct testimony, and not by opinion or reputation. *Standard Paint Co. v. San Antonio Hardware Co.* (Civ. App.) 136 S. W. 1150.

In an action for injuries to cattle by rough handling en route, it was proper to permit a witness of experience to testify that the cattle were handled rougher than usual. *Gulf, C. & S. F. Ry. Co. v. Ideus* (Civ. App.) 157 S. W. 173.

69. **Nature, condition and relation of objects.**—The opinion of a witness as to the condition of a railway, whether the track is safe or not, is admissible in connection with the facts upon which the opinion is founded. *Railway Co. v. Jarrard*, 65 T. 560; *Railway Co. v. Parr* (Civ. App.) 26 S. W. 861; *Railway Co. v. Locker*, 78 T. 279, 14 S. W. 611; *Railway Co. v. Richards*, 83 T. 203, 18 S. W. 611.

A witness, a brakeman on a railroad, may state the condition of a car and his opinion as to whether it was defective. *Railway Co. v. Colbert* (Civ. App.) 31 S. W. 332.

A witness need not be an expert to testify to marks on trees purporting to relate to a survey. *Vogt v. Geyer* (Civ. App.) 48 S. W. 1100.

Testimony of experienced railroad man that fireman on inside of curve would have better view of track than engineer on opposite side held competent. *Galveston, H. & S. A. Ry. Co. v. Clark*, 21 C. A. 167, 51 S. W. 276.

A witness need not have expert knowledge to testify that there was a steep grade on a railroad track and a sharp reverse curve. *Galveston, H. & S. A. Ry. Co. v. Ford*, 22 C. A. 161, 54 S. W. 37.

It was not error to refuse to permit a witness to state as an expert that the cars of the freight train, with which the passenger train on which plaintiff was injured collided, appeared to be clear of the track, since the question was not one of expert testimony. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

In an action against a railroad for killing a mule, testimony of witness that the place was dangerous held improper. *Southern Kansas Ry. Co. of Texas v. Cooper*, 32 C. A. 592, 75 S. W. 328.

Testimony that "barrel heads showed to have been staved inwards by heavy blows from the outside" held not a conclusion of the witness. *International & G. N. R. Co. v. H. P. Drought & Co.* (Civ. App.) 100 S. W. 1011.

Testimony that barrels seemed to be in good condition, and that leakage of molasses appeared to be from fermentation, held not to be a conclusion of the witness. *Id.*

70. Quantity.—In an action against a railroad company for so constructing its embankment as to retard the waters of a stream, evidence that, given the same amount of rainfall, witnesses had observed no greater overflow about half a mile above the embankment, near plaintiffs' land, after it had been constructed than before, held admissible. *Moss v. Gulf, C. & S. F. Ry. Co.*, 46 C. A. 463, 103 S. W. 221.

71. Value.—Opinion as to value admissible, but it must appear that the witness is in possession of such information as will enable him to form an intelligent opinion. *Railway Co. v. Maddox*, 75 T. 300, 12 S. W. 815.

Market value may be shown by a witness familiar with the market reports, price lists and trade journals covering the given period. *Railway Co. v. Donovan (Civ. App.)* 23 S. W. 735.

Opinion evidence as to values admissible. *Railway Co. v. Rheiner (Civ. App.)* 25 S. W. 971; *Railway Co. v. Calhoun (Civ. App.)* 24 S. W. 362; *Railway Co. v. Hurd (Civ. App.)* 24 S. W. 995; *Hurlbut v. Boaz*, 23 S. W. 446, 4 C. A. 371; *Railway Co. v. Wilson*, 24 S. W. 686, 3 C. A. 583; *Railway Co. v. Cocreham*, 10 C. A. 166, 30 S. W. 1118.

Opinions of qualified persons held competent as evidence of value. *Ft. Worth Compress Co. v. Chicago, R. I. & T. Ry. Co.*, 18 C. A. 622, 45 S. W. 967.

Opinions of witnesses held competent as to value of plaintiff's grass when destroyed by fire, where there was no market value for grass situated as plaintiff's was. *Ft. Worth & R. G. Ry. Co. v. Harrold*, 45 C. A. 362, 101 S. W. 266.

72. — Services.—In an action for injuries, it was not error to permit plaintiff to state what his time would have been reasonably worth, since the accident, if he had been in his usual health. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

Opinion of the husband as to the value of his wife's services is inadmissible in an action by him to recover for personal injuries sustained by her. *Chicago, R. I. & T. Ry. Co. v. Armes*, 32 C. A. 32, 74 S. W. 77.

A witness held not required to be an expert to testify to what he knows the price of farm labor to be. *North Texas Const. Co. v. Bostick (Civ. App.)* 80 S. W. 109.

73. — Real property.—It is competent to allow a witness to give his opinion as to the value of the use and occupation of a tract of land, the witness being familiar with the facts, although there was no market value known to said witness for like property. *G., C. & S. F. Ry. Co. v. Dunman*, 85 T. 176, 19 S. W. 1073.

In an action to set aside an execution sale for irregularities, evidence that certain discrepancies in the description of the land in plaintiffs' deed would in the opinion of the witness have affected the price for which the land was sold held properly rejected. *Guy v. Edmundson (Civ. App.)* 135 S. W. 615.

In an action involving the value of land, testimony of witnesses, shown to be qualified to give such an opinion, that the land was not suitable for cultivation, was properly admitted. *Martin v. Ince (Civ. App.)* 143 S. W. 1173.

74. — Personal property.—The rental value of property is its market value; if there is no market value, it is to be ascertained by proof of facts affecting the question and the opinion of witnesses. *G., C. & S. F. Ry. Co. v. Maetze*, 2 App. C. C. § 636.

A witness was asked: "Do you believe that plaintiff's demand for recompense for total loss of \$1,000 on insurance policies is based upon a just, honest and fair valuation of the property destroyed?" He answered, "I most positively do not," and then gave in a general way his reasons for the opinion. His opinion was not admissible as evidence. *Insurance Co. v. Starr*, 71 T. 733, 12 S. W. 45.

When an article of common use has no market value, its actual value may be shown by opinion of those producing it. *Railway Co. v. Searight*, 8 C. A. 593, 28 S. W. 39.

In action for value of animal killed, information obtained by plaintiff from persons acquainted with animals of the class killed as to value held admissible. *Gulf, C. & S. F. Ry. Co. v. Wedel (Civ. App.)* 42 S. W. 1030.

Where complete destruction of the property is claimed, evidence of value may be given by nonexpert witnesses. *Galveston, H. & S. A. Ry. Co. v. Serafina (Civ. App.)* 45 S. W. 614.

A witness held incompetent to testify to the value of a stock of merchandise, he having stated that he only valued a part thereof and disclaimed any recollection of the valuations. *Half v. Goldfrank (Civ. App.)* 49 S. W. 1095.

In an action for wrongful attachment, it was not error to allow defendant to testify as to the value of the attached goods; he having shown himself qualified to so testify. *Cline v. Hackbarth*, 30 C. A. 591, 71 S. W. 48.

The value of stock may be proved by opinion; but whether or not there is market for injured stock, in the injured condition, is not provable by opinion evidence. *Texas & P. Ry. Co. v. Meeks (Civ. App.)* 74 S. W. 329.

In action for destruction of barn and contents, held proper for witness to give estimates as to value of grain destroyed. *St. Louis Southwestern Ry. Co. v. Crabb (Civ. App.)* 80 S. W. 408.

In an action for value of shipment of vehicles, evidence as to their value new and second-hand held not objectionable as invading the province of the jury. *Texas & P. Ry. Co. v. Wilson's Hack Line*, 46 C. A. 38, 101 S. W. 1042.

In an action against a carrier for delay in transporting cattle, certain testimony held objectionable as the opinion of the witnesses on a mixed question of law and fact. *Gulf, C. & S. F. Ry. Co. v. Kimble*, 49 C. A. 622, 109 S. W. 234.

Evidence as to market value of horses if they had been transported within a reasonable time and with ordinary care held improper as involving an opinion or conclusion. *Houston & T. C. Ry. Co. v. Davis*, 50 C. A. 74, 109 S. W. 422.

Plaintiff's testimony as to value to him of goods held improper proof of their value. *Galveston, H. & S. A. Ry. Co. v. Giles (Civ. App.)* 126 S. W. 282.

Witnesses held qualified to testify as to the value of a Shetland pony at a particular time. *Freeman v. Taylor (Civ. App.)* 130 S. W. 733.

In an action for injuries to a horse, testimony of plaintiff as to the amount the services of the horse would have been worth to him while unfit for use was competent,

where he stated that he paid the same amount as hire for another horse. *Powell v. Hill* (Civ. App.) 152 S. W. 1125.

75. Space or distance.—The opinion of a witness as to time, space, or distance is admissible. *International & G. N. R. Co. v. Satterwhite*, 19 C. A. 170, 47 S. W. 41.

That hole in sidewalk was big enough for witness' foot to go in held a fact of which he might testify, without being an expert. *City of San Antonio v. Talerico* (Civ. App.) 78 S. W. 28.

76. Time.—A witness may state how long it would take a team to cross a railway track from the beginning of the approach. *Railway Co. v. Kuehn*, 21 S. W. 58, 2 C. A. 210.

In an action for damages to live stock by delay in transit, expert witnesses may testify what would constitute a reasonable time for the transit in question. *Texas & P. Ry. Co. v. Ellerd*, 38 C. A. 596, 87 S. W. 362.

There was no error in not permitting a witness to answer a question whether in this case the shipment of cattle was not gotten over the road as soon as possible under the circumstances. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 44 C. A. 480, 99 S. W. 152.

A person held incompetent to give his opinion as to what is the usual time required for the transportation of a shipment of cattle. *Gulf, C. & S. F. Ry. Co. v. Kimble*, 49 C. A. 622, 109 S. W. 234.

A witness in an action for negligent delay in transportation by a carrier may not give his opinion as to what would be a reasonable time. *St. Louis, I. M. & S. Ry. Co. v. Smith* (Civ. App.) 135 S. W. 597.

In an action for negligent delay in the transportation of live stock, a question asked a witness held to call for an opinion on a mixed question of law and fact. *Kansas City, M. & O. Ry. Co. of Texas v. Bigham* (Civ. App.) 138 S. W. 432.

77. Rate of speed.—The opinion of the driver of a hose cart as to a safe rate of speed is admissible, his experience being shown. *Railway Co. v. Richard* (Civ. App.) 27 S. W. 918.

Nonexperts may testify to the rate of speed a train was moving at when passing a certain crossing. *Galveston, H. & S. A. Ry. Co. v. Sullivan* (Civ. App.) 42 S. W. 568.

A witness need not be an expert in order to testify that a train was running fast. *Galveston, H. & S. A. Ry. Co. v. Huebner* (Civ. App.) 42 S. W. 1021.

In an action by a passenger for injuries, it was not error to permit a witness to state his opinion as to the speed of the train on the night of the collision. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

78. Cause and effect.—As to what is the effect of a given kind of treatment upon an animal, either in reducing or increasing its weight, or in injuring or benefiting its appearance, is a proper matter of opinion to be stated by witness to the jury; but as to whether these several items constitute the legal damage in a given case, and the amount of such damage, the jury must determine under proper instructions from the court. *Railway Co. v. Wright*, 1 C. A. 402, 21 S. W. 80.

Opinion as to the cause of an overflow of water in a running stream. *Railway Co. v. Haskell*, 23 S. W. 546, 4 C. A. 550.

A statement by a servant, in an action against a master for injuries alleged to have been caused by the master's failure to furnish light, that the servant would not have been injured if there had been more light, held a mere opinion, and inadmissible. *Hilje v. Hettich*, 95 T. 321, 67 S. W. 90.

Witnesses held competent to testify that certain flood washed away railway embankment. *Missouri, K. & T. Ry. Co. of Texas v. McGregor* (Civ. App.) 68 S. W. 711.

Testimony, if an opinion, held unobjectionable; witness having shown himself qualified to testify on that issue, and detailing the facts. *Southern Kansas Ry. Co. of Texas v. Sage* (Civ. App.) 80 S. W. 1038.

In action for injury to passenger, admissibility of testimony of eyewitness as to cause of passenger's fall held not affected, because a conclusion of witness. *McCabe v. San Antonio Traction Co.*, 39 C. A. 614, 88 S. W. 387.

Conclusions or opinions of common observers held admissible under exception to general rule. *Id.*

Testimony that the fires must have been started in a certain way held improper without a statement of the facts on which witness bases his conclusion. *D. H. Fleming & Son v. Pullen* (Civ. App.) 97 S. W. 109.

In an action for personal injuries resulting from being thrown from a carriage in a runaway, it was competent for a witness who saw the accident to state that a loose wire across the street caused the horses to run away. *Dublin Gas & Electric Co. v. Frazier*, 46 C. A. 288, 103 S. W. 197.

Opinion of nonexpert witness that wounds on a body seemed to have been inflicted by a penknife held admissible. *Metropolitan Life Ins. Co. v. Wagner*, 50 C. A. 233, 109 S. W. 1120.

In an action for damages to animals during transportation, a witness could testify as to the extent of loss, and as to what in his opinion was the cause of their condition. *Gulf, C. & S. F. Ry. Co. v. Rogers* (Civ. App.) 113 S. W. 583.

Defendant railroad company's superintendent of traffic may testify that a delay in the shipment of live stock was occasioned by the necessity of holding the freight train for a passenger train, which had the right of way. *Missouri, K. & T. Ry. Co. of Texas v. Howell* (Civ. App.) 126 S. W. 899.

79. Damages.—The opinion of a witness is not admissible to prove that a party has been damaged by the suing out of a writ of sequestration or attachment, or the amount of such damage. *Clardy v. Callicoate*, 24 T. 170; *Thompson v. Miller*, 1 App. C. C. § 1109.

Amount of damages cannot be shown by opinions of witnesses. *Hoskins v. Huling*, 2 App. C. C. § 162; *Turner v. Strange*, 56 T. 141.

Injury resulting from seizing goods of a merchant must be proved directly, and not by opinion of witness. *Middlebrook v. Zapp*, 79 T. 321, 15 S. W. 258.

Opinions of witness as to damages admissible in case of delay of carrier in forwarding baggage. *Railway Co. v. Vancil*, 21 S. W. 303, 2 C. A. 427.

80. — Injuries to property.—Without a ruling to that effect, the rule as to the opinions of witnesses as to damage to land is stated as follows: The general rule in this

state is, that the opinions of witnesses as to damages are not admissible. This general rule, however, is not applicable to cases of condemnation of land for railroad purposes; in such cases the law is stated as follows: The opinions of witnesses, conversant with the value of the land taken, are admissible to prove such value; and where part only is taken, to prove the value of the whole before the taking, and the value of what remains after the taking. Such witnesses are competent, not strictly as experts, having peculiar skill or scientific attainments, but as persons having particular knowledge of facts in issue. Telephone Co. v. Forke, 2 App. C. C. § 365.

Testimony of a witness as to his estimate of plaintiff's loss, as an expert, who had not seen the goods and did not know their value, held properly rejected. Missouri, K. & T. Ry. Co. of Texas v. Davidson, 25 C. A. 134, 60 S. W. 278.

In an action against a railroad for injuries caused by flooding plaintiff's land, it was not error to allow witness who had not qualified as an expert to testify as to the value of the land before and after the floods. Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134.

Where a railroad was sued for injuries to health and property caused by flooding plaintiff's land, evidence of the general effect on the health of the neighborhood was admissible. *Id.*

Opinions of witnesses as to damage per head to market value of cattle from ill treatment, which is the true measure of damages, held admissible. Gulf, C. & S. F. Ry. Co. v. Leatherwood, 29 C. A. 507, 69 S. W. 119.

In an action against a railroad for the destruction of plaintiff's crops, owing to the diversion of water onto his land through a ditch constructed by defendant along the line of its road, testimony as to what amount of cotton the land would have produced, had it not been overflowed, held competent. Chicago, R. I. & G. Ry. Co. v. Longbottom (Civ. App.) 80 S. W. 542.

Expert testimony as to the amount of damage to cattle held admissible. Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank, 36 C. A. 293, 81 S. W. 1050.

In an action against a railroad for failure to maintain cattle guards where the road entered plaintiff's premises, testimony of plaintiff as to what it would cost him in his estimation to employ men to drive his cattle across defendant's right of way held admissible. Missouri, K. & T. Ry. Co. of Texas v. Wetz, 38 C. A. 563, 87 S. W. 373.

On an issue as to the amount of deterioration in the value of houses, fences, and other improvements, opinion evidence held competent. Sydney Webb & Co. v. Daggett, 39 C. A. 390, 87 S. W. 743.

In an action against a railroad for negligently subjecting land to overflow, held proper to permit a witness to testify to the amount of cotton which the land would produce per acre. Chicago, R. I. & G. Ry. Co. v. Seale (Civ. App.) 89 S. W. 997.

In an action against a railroad for negligently subjecting land to overflow, motion to exclude testimony as to the reasonable rental value of the land held properly overruled. *Id.*

Opinions of witnesses as to extent to which property has been damaged by the establishment of road across land held incompetent. Bell County v. Flint (Civ. App.) 91 S. W. 329.

Evidence as to the amount of loss in an action against a carrier, for damages resulting from negligence in transporting a shipment of cattle, held not an opinion of the witness. Texas & P. Ry. Co. v. Henson, 56 C. A. 468, 121 S. W. 1127.

In an action for damages by the overflow of water from a ditch, held, that a witness may not state his opinion that the farm has been damaged in a certain sum. International & G. N. R. Co. v. Fickey (Civ. App.) 125 S. W. 327.

The extent of the damage to land from water standing thereon until the land had baked, caked, and soured was not a matter of general knowledge, and was provable only by witnesses who had had experience with lands subjected to the same or similar conditions. Texas & N. O. R. Co. v. Norman (Civ. App.) 153 S. W. 1184.

81. — **Breach of contract.**—Evidence held insufficient to show damages for breach of warranty in sale of refrigerator. C. H. Dean Co. v. Standifer, 37 C. A. 181, 83 S. W. 230.

III. Subjects of Expert Testimony

82. **Matters of opinion or facts.**—An expert may give his opinion on a state of facts pertaining to his art or science, and the jury must then decide whether his assumption of facts was correct, but he cannot give his opinions as to his conclusions from facts testified about in conflicting testimony. If his opinion is desired regarding the effect of certain facts in producing results, it must be obtained by stating a hypothetical case. Armendaiz v. Stillman, 67 T. 458, 3 S. W. 678.

An expert cannot give an opinion as to the motive or intent with which an act was done. Half v. Curtis, 68 T. 640, 5 S. W. 451.

Expert and opinion evidence admissible, when. Austin Rapid Transit Ry. Co. v. Groethe (Civ. App.) 31 S. W. 197.

A physician may testify that plaintiff, whom he examined for the purpose of testifying in the case, "was confined to his bed, and unable to walk without aid." Missouri, K. & T. Ry. Co. of Texas v. Wright, 19 C. A. 47, 47 S. W. 56.

On an issue of the location of a boundary, expert testimony of surveyors as to the manner in which it should be located is inadmissible. Fulcher v. White (Civ. App.) 48 S. W. 831.

Testimony held not objectionable as a conclusion of the witness. Schuwirth v. Thumma (Civ. App.) 66 S. W. 691; International & G. N. R. Co. v. Collins, 33 C. A. 58, 75 S. W. 814; Pullman Co. v. Norton (Civ. App.) 91 S. W. 841.

Facts held sufficient to qualify plaintiff as an expert to testify whether a defect in a brakestaff could have been discovered by proper inspection. International & G. N. R. Co. v. Collins, 33 C. A. 58, 75 S. W. 814.

The court did not err in refusing to permit an expert to testify that plaintiff reduced a hernia as one familiar with the operation. Houston Electric Co. v. Faroux (Civ. App.) 125 S. W. 922.

83. **Matters directly in issue.**—Question to expert as to whether the furnishing of a ledger and a journal would be a substantial compliance with the contract requiring a set of books to be kept under insurance policy held properly excluded. *German Ins. Co. v. Pearlstone*, 18 C. A. 706, 45 S. W. 832.

Witness is competent to testify as to condition of footboard on switch engine when evidence shows that its condition was same when witness examined it as it was on day of accident. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.) 47 S. W. 1050.

Witness testifying as expert may give his opinion upon every issue on trial. *Id.*

Opinions of expert railroad men as to plaintiff's negligence in going between cars under the circumstances held inadmissible. *St. Louis & S. F. R. Co. v. Nelson*, 20 C. A. 536, 49 S. W. 710.

In an action by a switchman for injuries sustained by stumbling over a ground switch at night, held error to admit testimony of a witness as to whether switch would have been safer with a light thereon; such not being a proper subject for expert testimony. *Galveston, H. & S. A. Ry. Co. v. English* (Civ. App.) 59 S. W. 626.

On the probate of a will, contested because of the testatrix's mental incapacity, where testatrix's insane antipathy to her husband was proved, expert evidence as to her acting intelligently with reference to her husband held not to violate the rule that experts cannot testify as to the capacity of the deceased to do the very thing in issue. *Lindsey v. White* (Civ. App.) 61 S. W. 438.

Expert evidence that defendant's employé was incompetent was admissible on an issue as to whether his incompetency was known to defendant, or could have been discovered with reasonable care. *International & G. N. R. Co. v. Jackson*, 25 C. A. 619, 62 S. W. 91.

In an action for personal injuries, an opinion by an expert that the condition of plaintiff's lungs was due to some injury inflicted from the outside was admissible. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 62 S. W. 808.

Deed considered, and held, that it was error, in a boundary dispute, to receive the opinion of certain surveyors that the boundary line should be run by course and distance, and should not follow the meander line of a certain stream. *Griffin v. Barbee*, 29 C. A. 325, 68 S. W. 698.

In an action for injuries, the admission of the testimony of a physician that the injury received by plaintiff would cause the condition he was in held not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Hawk*, 30 C. A. 142, 69 S. W. 1037.

In an action against railroad for injury to engineer, admission of certain expert testimony held error. *Quinn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 84 S. W. 395.

Where an expert bookkeeper, in a suit for the settlement of the accounts of a firm, testified to what the firm books showed, it was not error to prevent him from stating whether or not the partner or co-partner was debtor or creditor of the firm. *Morgan v. Barber* (Civ. App.) 99 S. W. 730.

In an action for death of a servant of a railroad company, certain evidence held not proper subject for expert testimony. *Houston, E. & W. T. Ry. Co. v. McHale*, 105 S. W. 1149, 47 C. A. 360.

It was improper to allow an expert to testify as to whether decedent had mind enough to comprehend the legal effect of a deed. *Williams v. Livingston*, 113 S. W. 786, 52 C. A. 275.

Mental capacity to "transact business" is not a proper subject for expert testimony. *Id.*

Certain opinion evidence as to the location of a boundary line held inadmissible as invading the province of the jury. *Goodson v. Fitzgerald*, 115 S. W. 50, 52 C. A. 329.

Questions to an expert witness held not to call for an opinion based on conflicting evidence, and hence not to invade the province of the jury. *St. Louis Southwestern Ry. Co. of Texas v. Taylor* (Civ. App.) 123 S. W. 714.

That the opinion of an expert witness embraced one of the issues did not make his testimony inadmissible. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737.

Testimony of witness qualified as expert as to condition of boiler which exploded, injuring plaintiff, held admissible as against objection made. *Houston & T. C. R. Co. v. Haberlin*, 133 S. W. 873, 104 T. 50.

In an action for breach of contract to hire a car load of mules, the capacity of the mules in question to do work of the kind for which they were hired was a proper matter for expert opinion. *Big Valley Irr. Co. v. Hughes* (Civ. App.) 146 S. W. 715.

Testimony of a physician that a physical condition was produced by a foreign body working out through the muscle was not improper as an invasion of the province of the jury. *Gulf, W. T. & P. Ry. Co. v. Abbott* (Civ. App.) 146 S. W. 1078.

In an action against a carrier for failure to furnish cars for the transportation of cattle and for injury to the cattle caused by delay and rough handling during transportation, the testimony of a competent witness as to the amount of the depreciation in the market value of the cattle caused thereby was admissible as against the objection that the testimony infringed on the right of the jury to determine the question. *St. Louis, B. & M. Ry. Co. v. Wood Bros.* (Civ. App.) 147 S. W. 283.

84. **Matters of common knowledge or observation.**—The question of increased risk, in a suit on a policy of fire insurance, is one for the jury, and experts are not permitted to state their conclusions upon facts which involve no peculiar science or information, but are within the common knowledge of men. *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

When an inquiry relates to a matter that may be understood as well by one rational mind as by another, and without special training or experience, the testimony of experts is not admissible. *Shelley v. City of Austin*, 74 T. 608, 12 S. W. 753; *Railway Co. v. Scott*, 1 C. A. 1, 20 S. W. 725.

Whether or not a brand on a cow is a "picked brand" is a matter of common observation, and need not be proved by experts. *Clark v. State* (Cr. App.) 43 S. W. 522.

85. **Matters involving scientific or other special knowledge in general.**—Duration of life may be shown by experts in the business of life insurance. The jury can find upon this issue upon proof of party's age and physical condition. *Railway Co. v. Compton*, 75 T. 667, 13 S. W. 667; *Railway Co. v. Thompson*, 75 T. 501, 12 S. W. 742.

The rule that, on questions of science or skill or trade, persons of skill in those particular departments are allowed to give their opinions in evidence, is confined to cases in which, from the very nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment. *Cooper v. State*, 23 T. 331; *Turner v. Strange*, 56 T. 141.

Exclusion of testimony of expert parliamentarians, who witnessed certain convention proceedings, that such proceedings were in accordance with the rules and regulations as understood and adopted by such convention, held error. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

The proper method of stacking flour in 50-pound sacks is a subject of expert testimony. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

An expert may testify to a person's life expectancy. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.) 106 S. W. 194.

In matters of science, art, or special occupations, where persons inexperienced therein would be unable to reach a proper conclusion from the mere statement of facts, the opinions and conclusions of an expert may be given. *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Civ. App.) 110 S. W. 99.

In trespass to try title, an expert surveyor, who testified that he had for years observed marks on trees and could distinguish between old and new marks, and had observed a great many marks 50 and 60 years old, could testify that a mark on a certain tree appeared to be old as other marks 50 and 60 years old; the comparative age of the marks on the trees being susceptible of determination only by expert testimony. *Cochran v. Casey* (Civ. App.) 123 S. W. 1145.

Testimony of a physician as to the effect of decaying meat upon the surrounding air, and upon any one breathing it, is admissible. *A. Cohen & Co. v. Rittimann* (Civ. App.) 139 S. W. 59.

In an action for injuries to a shipment of mules, testimony of one familiar with the business that it is usual in the transportation of a car load of young mules that some of them will be skinned somewhat was admissible. *Kansas City, M. & O. Ry. Co. of Texas v. Beckham* (Civ. App.) 152 S. W. 223.

Testimony of a witness qualified as an expert as to whether if the mules had been placed in a proper pasture they would have entirely recovered within a few weeks from injurious effects of the trip was admissible. *Id.*

Where the facts which were placed before the jury were such that it could form its own opinion as to them as well as an expert witness, opinion evidence was not admissible thereon. *San Antonio Brewing Ass'n v. Wolfshohl* (Civ. App.) 155 S. W. 644.

86. Bodily condition.—The opinion of a medical man is evidence per se upon the state of a person's health, and the grounds of his opinion, which may partly be the answers of the patient to his inquiries, are admissible collaterally in evidence to support and explain his opinion. *Rogers v. Crain*, 30 T. 284.

An expert may testify as to his opinion as to the condition of the person, the nature, cause, curableness, probable continuance and probable result of the injury, and the mode and effect of medical treatment. If the witness speaks from personal examination, he should state the facts upon which he bases his opinion. He may state as a part of the facts on which his opinion is founded statements which the sufferer made of his own condition to the witness for the purpose of receiving his professional advice; but narratives of past facts are not admissible, unless made in such close connection with the facts as to form a part of the res gestæ. *Ft. Worth & D. C. R. R. Co. v. Stingle*, 2 App. C. C. § 705.

Opinions of physicians as to the nature of personal injuries and their probable effect is admissible. *Railway Co. v. Ewing*, 7 C. A. 8, 26 S. W. 638.

Evidence of appearance of gunshot wounds is inadmissible where witness did not show that he was an expert. *Mitchell v. State*, 38 Cr. R. 170, 41 S. W. 816.

A physician who had examined plaintiff may testify as an expert that plaintiff could not very well have feigned his injuries, and could not have stood an operation which was performed, without chloroform. *Missouri, K. & T. Ry. Co. of Texas v. Wright*, 19 C. A. 47, 47 S. W. 56.

In an action for injuries, plaintiff's attending physician held entitled to testify that plaintiff was not simulating the absence of pain; he having previously testified that she had no feeling in her limbs. *McGrew v. St. Louis, S. F. & T. Ry. Co.*, 32 C. A. 265, 74 S. W. 816.

Where insured stated that he had not consulted a physician as to his health within five years, evidence of a physician that granulated eyelids, for which insured had consulted a physician within that time, was not a condition of health, held admissible. *Brock v. United Moderns*, 36 C. A. 12, 81 S. W. 340.

In an action against a carrier for injuries to cattle shipped, expert evidence as to the condition of the cattle when transported, the effect of delay and rough treatment, and what was a reasonable time for transfer held admissible. *Chicago, R. I. & T. Ry. Co. v. Carroll*, 36 C. A. 359, 81 S. W. 1020.

In an action for personal injuries, an opinion by a physician that they were produced by traumatism was not objectionable as invading the province of the jury. *Galveston, H. & S. A. Ry. Co. v. Cherry*, 44 C. A. 344, 98 S. W. 898.

In an action for personal injuries, it was competent for a physician acquainted with the nature and character of the injury to give his opinion that the injured party could not have used her limbs or ankle without the aid of crutches sooner than she did. *Galveston, H. & H. R. Co. v. Alberti*, 47 C. A. 32, 103 S. W. 699.

In a personal injury action, a physician testifying as an expert held properly permitted to testify that nature may be deemed to have done all that it will toward healing an injury which has caused suffering for seven years. *Gulf, W. T. & P. Ry. Co. v. Abbott* (Civ. App.) 146 S. W. 1078.

87. Mental condition or capacity.—The opinion of an expert as to the sanity of a person is admissible in evidence. *Figg v. State*, 43 T. 108.

88. Handwriting.—Handwriting may be proved by experts. *Wagoner v. Ruply*, 69 T. 700, 7 S. W. 80.

The fact that an expert, testifying as to whether an alleged signature is traced, is unfamiliar with the handwriting of the purported author thereof, does not render him incompetent. *Dolan v. Meehan* (Civ. App.) 80 S. W. 99.

Whether an alleged signature is a traced signature or not is a subject of expert testimony. *Id.*

89. Due care and proper conduct in general.—Expert in shipping cattle could testify as to necessity for feeding them at certain point. *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Civ. App.) 73 S. W. 540.

Expert testimony as to a foreman's competency is admissible in an action to recover for injuries due to the negligence of the foreman. *El Paso & S. W. Ry. Co. v. Smith*, 60 C. A. 10, 108 S. W. 988.

The position which a switchman should occupy to avoid an accident at a crossing when certain movements of the train are being made is a subject for the opinion of an experienced railroad man. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 56 C. A. 282, 119 S. W. 1154.

While expert testimony is admissible to prove the character of treatment which should be given a patient, or the probable effect of the lack thereof, the opinion of an expert as to whether another physician should or should not have gone to a patient under particular circumstances is inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Graves*, 122 S. W. 458, 57 C. A. 395.

Expert knowledge is not necessary to testify whether a crop of rice was sufficiently watered to make it properly grow. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

In an action for the death of a brakeman from falling under the wheels of the rear car of a train he had flagged, held, on the testimony, that the opinion of an experienced brakeman on that train that deceased could not have safely communicated his signals from the ground was admissible. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

90. Construction and repair of structures, machinery and appliances.—A railway track was constructed so that sand from time to time at a public crossing was washed upon the track, making it unsafe. It was competent to allow witnesses qualifying as experts to testify that the road crossing was not properly constructed, or to the readiness with which the sand washed upon the track could be seen, and the chances of stopping the engine after the same had been seen. *Railway Co. v. Johnston*, 78 T. 536, 15 S. W. 104.

Conclusions of an expert in building and repairing railroad cars held admissible as expert testimony. *Jones v. Shaw*, 16 C. A. 290, 41 S. W. 690.

Where plaintiff testified that a car he was climbing on when he was hurt was a medium sized coal car, it was proper for a competent witness to testify to the width of that kind of a car. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

Men experienced in constructing telegraph lines may testify that men with whom they have worked were incompetent. *Postal Tel. Cable Co. v. Coote* (Civ. App.) 57 S. W. 912.

In an action against a railway company for the death of a brakeman, admission of an expert's opinion as to the condition of the track held not error, where he afterwards detailed the facts on which his conclusion rested. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

In an action against a railroad company and a telegraph company for injury caused by a wire crossing a highway, held not error to receive the testimony of expert as to the usual height of wires over highways. *Houston & T. C. R. Co. v. Hopson* (Civ. App.) 67 S. W. 458.

In an action for injuries alleged to have been caused by a defective angle cock in an air brake, certain question held a proper subject for expert testimony. *International & G. N. R. Co. v. Mills* (Civ. App.) 78 S. W. 11.

In an action for injuries to a servant, held proper to permit expert testimony of the dangerous character of the machine, where it is of a complex nature. *Gammel-Statesman Pub. Co. v. Monfort* (Civ. App.) 81 S. W. 1029.

In an action for injuries to a servant, caused by a dangerous machine, held proper for an expert to state why an inexperienced person should not have been placed in charge of such machine. *Id.*

One qualified as an expert may give his opinion as to the efficiency of a spark arrester used by a railroad in its engine. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 40 C. A. 480, 90 S. W. 343.

In an action for death caused by a telephone wire breaking and falling across another wire charged with a dangerous current, testimony of an electrical expert as to the existence of methods to prevent upper wires from falling upon lower ones held admissible as preliminary proof. *Citizens' Telephone Co. v. Thomas*, 45 C. A. 20, 99 S. W. 879.

Expert testimony respecting defective handholds in railway car ladders held not objectionable. *San Antonio & A. P. Ry. Co. v. Beauchamp*, 54 C. A. 123, 116 S. W. 1163.

Expert testimony held admissible in an action against a railway company for injury caused by a defective handhold in a car ladder. *Id.*

Whether it is feasible for a railroad to establish a grade crossing over its tracks at a particular place is a subject for expert testimony. *Gulf, C. & S. F. Ry. Co. v. City of Belton*, 57 C. A. 460, 122 S. W. 413.

In an action for breach of contracts to pay for an elevator building, tanks, etc., a witness of large experience in the construction of such structures could express an opinion that the building, etc., were constructed in accordance with the contracts. *J. T. Stark Grain Co. v. Harry Bros. Co.*, 57 C. A. 529, 122 S. W. 947.

An expert witness held entitled to give an opinion as to the quality of lumber used in a house. *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683.

Testimony of expert as to construction of tunnel held admissible in connection with facts on which opinions were based. *Early & Clement Grain Co. v. City of Waco* (Civ. App.) 137 S. W. 431.

Whether a loose stirrup on a box car would be dangerous when the cars were in motion is a proper subject of expert testimony. *St. Louis Southwestern Ry. Co. of Texas v. Neef* (Civ. App.) 138 S. W. 1168.

Certain expert testimony held admissible in an action for damages to business from a contractor's obstruction of a street. *American Const. Co. v. Caswell* (Civ. App.) 141 S. W. 1013.

An expert witness may give his opinion as to the proper construction of a telephone line at the point of intersection with an electric light wire, to the effect that there should be a clearance of at least five feet. *Southwestern Telegraph & Telephone Co. v. Luckie* (Civ. App.) 153 S. W. 1158.

91. Management and operation of vehicles, machinery and appliances.—An expert was properly allowed to testify that, from the records kept of the daily products of an ice machine, the machine had been abused and injured by its use. *Alamo Mills Co. v. Hercules Iron Works*, 1 C. A. 683, 22 S. W. 1007.

Expert testimony as to ability of person on hand car to hear train approaching held admissible. *Houston & T. C. R. Co. v. Rodican*, 15 C. A. 556, 40 S. W. 535.

Opinion of expert, as to whether it was as necessary that defendant have track walker in its freight yard on Sunday as on any other day, is admissible. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.) 47 S. W. 1050.

Opinion of expert in operation of railroads, as to whether track walker was necessary, is admissible. *Id.*

Expert evidence held admissible to show the manner of operating a hand car. *International & G. N. R. Co. v. Martinez* (Civ. App.) 57 S. W. 689.

Expert testimony held not admissible to show that a party could safely drive to one side of a crossing, which was blocked by a hand car, in passing over the railroad. *Locke v. International & G. N. R. Co.*, 25 C. A. 145, 60 S. W. 314.

Admission of the testimony of plaintiff, in an action by a locomotive engineer for injuries received in a collision, to explain the meaning of the phrase "having his train under control," as used in a certain rule, held not erroneous. *Texas & N. O. R. Co. v. Mortensen*, 27 C. A. 106, 66 S. W. 99.

Question of the effect of a train striking a man standing or lying upon a railway track held the proper subject of expert testimony. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 28 C. A. 92, 66 S. W. 588.

An experienced section foreman's testimony that, if his signal had been observed, the hand car would have been stopped and accident averted, held admissible. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.) 78 S. W. 32.

In action for death of railroad employé, testimony by expert as to how far he could see object on track while operating engine held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 35 C. A. 584, 80 S. W. 852.

Expert evidence that a delay of two hours in the movement of cattle by a connecting carrier was not unreasonable held admissible in an action for damages from such delay. *Chicago, R. I. & T. Ry. Co. v. Kapp*, 37 C. A. 203, 83 S. W. 233.

It is competent for an experienced railroad man to testify as to whether or not a street car can be stopped in a shorter space than a steam locomotive or a number of cars. *Northern Texas Traction Co. v. Caldwell*, 44 C. A. 374, 99 S. W. 869.

Whether or not in certain circumstances a locomotive required steam to start it or would move on the release of the brakes is a fact properly provable by expert testimony. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 C. A. 381, 107 S. W. 374.

In an action for injuries to an engineer in a rear-end collision at a station, certain testimony of the engineer and of the conductor of his train and of the conductor of the forward train held admissible. *International & G. N. R. Co. v. Brice* (Civ. App.) 126 S. W. 613.

An engineer, suing a railroad for injuries in a collision, held entitled to testify whether he had his engine under control within the meaning of the rules of the railroad regulating the operation of trains. *Id.*

In an action against a railway company for wrongful death, where the effect of a hand car in wrecking a train came in issue, evidence by an experienced engineer held not to be speculative. *Gulf, C. & S. F. Ry. Co. v. Brooks* (Civ. App.) 132 S. W. 95.

Plaintiff qualifying as an expert may testify that in moving an engine up to a caboose to make a coupling the engine should be under complete control. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

Whether, in the operation of an electric light plant, a ground having come on the line and a lineman having unsuccessfully searched two or three hours for it, but it still being known to be on, it would be proper to turn the electricity on is a subject of expert testimony. *Cleburne Electric & Gas Co. v. McCoy* (Civ. App.) 149 S. W. 534.

92. Conduct of business.—Evidence of bookkeeper as to what official account should contain held properly excluded as manifestly futile. *Coe v. Nash* (Civ. App.) 40 S. W. 235.

Testimony of experts as to customary rate of exchange held admissible. *D. Sullivan & Co. v. Owens* (Civ. App.) 90 S. W. 690.

In an action to recover for timber cut and removed by defendants from plaintiff's land, an expert witness held properly permitted to testify that a certain scale was the one in general use. *Wall v. Melton* (Civ. App.) 94 S. W. 358.

In an action to recover the value of timber cut and removed by defendant, expert testimony held admissible to prove inaccuracy of plaintiff's measurement of the timber. *Id.*

93. Laws of other states or countries.—Where suit is brought in this state on a contract made in a foreign country, the testimony of one (a lawyer) skilled in such laws is admissible in proof of said laws and their application to the contract sued on for the purpose of determining the validity of the contract. It will be for the jury to determine, when such testimony is admitted, the law and its meaning, of the foreign country and its effect on the contract sued on in determining its validity or invalidity. *Sierra Madre Const. Co. v. Brick* (Civ. App.) 55 S. W. 521.

94. Construction of written instruments.—Expert testimony held inadmissible to determine the meaning of a written contract. *Smith v. Jefferson County*, 16 C. A. 251, 41 S. W. 148.

It is not error to allow a physician to explain that medical treatment does not include unusual surgical operations. *Bonart v. Lee* (Civ. App.) 46 S. W. 906.

The explanation of conductors of trains in collision as to the meaning of their orders held not error. *Galveston, H. & S. A. Ry. Co. v. Robinett* (Civ. App.) 54 S. W. 263.

It is not error, in an action on a life certificate, to exclude evidence of a witness' construction of an article in defendant's constitution. *National Fraternity v. Karnes*, 24 C. A. 607, 60 S. W. 576.

In trespass to try title, expert surveyor held properly permitted to testify whether property described in petition is embraced within that described in deeds. *Camp v. League* (Civ. App.) 92 S. W. 1062.

95. Nature, condition and relation of objects.—In an action for injuries to plaintiff's cattle, refusal to permit plaintiff to testify that in his opinion the fence inclosing his cattle was sufficient to turn cattle of ordinary disposition with reference to breaking fences held error. *Trammell v. Turner* (Civ. App.) 82 S. W. 325.

Opinion of surveyor as to correspondence of calls of meanderings introduced in evidence held inadmissible. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

Expert testimony held admissible in an action for injury caused by an explosion resulting from the drawing of gasoline from tanks near a furnace. *Waters-Pierce Oil Co. v. Snell*, 47 C. A. 413, 106 S. W. 170.

In an action for the value of copper ore shipped by plaintiff to defendant and converted by the latter, plaintiff held entitled as an expert to state the approximate percentage of copper in the ore. *Consolidated Kansas City Smelting & Refining Co. v. Gonzales*, 50 C. A. 79, 109 S. W. 946.

In an action for injury to cabbages in transit, testimony of a witness that yellow leaves on cabbages indicate decay should not be received until such witness qualifies as an expert. *International & G. N. R. Co. v. Welbourne* (Civ. App.) 113 S. W. 780.

An engineer, who qualifies as an expert on engines, may give his opinion as to whether an engine with which he is familiar is new. *Lind v. Reeves & Co.* (Civ. App.) 154 S. W. 262.

96. Quantity or capacity.—In an action against a railway company for a refusal to receive and ship lumber, it was held that it was not error to permit a witness to give his opinion as to the number of feet of lumber offered to be shipped without having ascertained the exact number of feet by actual measurement, it appearing that the witness was an expert. *T. & P. Ry. Co. v. Hays*, 2 App. C. C. § 392.

An opinion of a physician that "a layman could not tell the difference between a quarter and an eighth of a grain of a drug if he was not accustomed to handling it" is admissible in evidence. *Life Ins. Co. v. Tilman*, 84 T. 31, 19 S. W. 294.

Estimate as to number of cattle in a stock running loose on a range which had never all been rounded up may be given by one familiar with the stock and their range. *Cabaness v. Holland*, 19 C. A. 383, 47 S. W. 379.

In an action against connecting carriers for injuries to cattle shipped, a qualified witness held entitled to give his estimate of the weight and shrinkage of the cattle. *St. Louis, I. M. & S. Ry. Co. v. Dodson* (Civ. App.) 97 S. W. 523.

97. Value.—In an action against a carrier for loss of goods, evidence of experts held sufficient to establish the extent of loss. *Texas & P. Ry. Co. v. Townsend* (Civ. App.) 106 S. W. 760.

An expert may show that a disc plow, which was in a building at the time of its destruction by fire, was of no value after the fire. *Ft. Worth & D. C. Ry. Co. v. Arthur* (Civ. App.) 124 S. W. 213.

Mode of proving market value at a place where there is no market for the articles in question, stated. *Gulf, C. & S. F. Ry. Co. v. Peacock* (Civ. App.) 123 S. W. 463.

In an action for damages to cattle by delay and rough handling, an expert cattle salesman in the market to which the cattle were sent was entitled to give his opinion with reference to the loss in weight and stale appearance of the delayed shipment and the consequent effect on the market value. *Gulf, C. & S. F. Ry. Co. v. Ideus* (Civ. App.) 157 S. W. 173.

98. Cause and effect.—Cause of explosion of locomotive is proper subject of expert testimony. *Missouri, K. & T. Ry. Co. of Texas v. Sherman* (Civ. App.) 53 S. W. 386.

On an issue as to the cause of a railroad wreck, held error not to permit a witness to testify that he had examined the wreck and could find no cause. *Southern Kansas Ry. Co. of Texas v. Sage*, 43 C. A. 38, 94 S. W. 1074.

Ordinarily even an expert witness cannot state what in his opinion might possibly ensue from a given state of facts, but is confined to those things which are reasonably probable. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922.

99. — Injuries to the person.—It is competent to prove by a surgeon and physician who had attended plaintiff that he had made a recent examination, and to state his condition as affected by the injuries and their probable future effect upon the health and strength of plaintiff. To prove future consequences of bodily injuries it is only necessary to show reasonable probability of the occurrence of future ill effects therefrom. *Railroad Co. v. Harriett*, 80 T. 73, 15 S. W. 556.

The opinion of a medical man that his patient died of a disease, the character of which he stated, is admissible in evidence, although he had not seen the patient for two weeks before her death. *Rogers v. Crain*, 30 T. 284.

A physician shown to be an expert may give in evidence his opinion whether a still-born child could have been born alive if he had received medical assistance in time. *Telegraph Co. v. Cooper*, 71 T. 507, 9 S. W. 598, 1 L. R. A. 783, 10 Am. St. Rep. 772.

Opinions of physicians as to the nature of personal injuries and their probable effect is admissible. *Railway Co. v. Ewing*, 7 C. A. 8, 26 S. W. 638.

In a suit for injuries by a boiler explosion, the testimony of physician that plaintiff's injuries were the result of a shock or external violence is admissible. *Tyler S. E. Ry. Co. v. Wheeler* (Civ. App.) 41 S. W. 517.

Expert witness may express an opinion as to the character of the injury suffered. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 43 S. W. 536.

On cross-examination of expert witness he may be asked hypothetical questions pertinent to the issue, though the facts assumed have not been testified to. *Missouri, K. & T. Ry. Co. v. Johnson* (Civ. App.) 49 S. W. 265.

Testimony of an expert held admissible on question in action to recover for personal injuries. *Id.*

The attending physician of a person injured in a railroad-crossing accident may give his opinion as to what caused the injury. *St. Louis S. W. Ry. Co. of Texas v. Laws* (Civ. App.) 61 S. W. 498.

Expert testimony of physician as to plaintiff's life expectancy after injury held not objectionable because a conclusion. *Houston Electric Co. v. McDade*, 34 C. A. 497, 79 S. W. 100.

In an action for injuries, a physician testifying as an expert was entitled to express his opinion as to whether plaintiff's injuries were slight or serious. *St. Louis, Southwestern Ry. Co. of Texas v. Rea* (Civ. App.) 84 S. W. 428.

In an action for injuries, the opinion of a physician, based on the fact that plaintiff seemed to be in good health, as to whether his brain was in any way affected by the injury, was competent. *Chicago, R. I. & M. Ry. Co. v. Harton*, 40 C. A. 235, 88 S. W. 857.

In an action for injuries, plaintiff's medical witness could testify as to what effect confinement in a schoolroom for a number of years would have had upon the plaintiff in producing her then condition. *Dallas Consolidated Electric St. Ry. Co. v. Black*, 40 C. A. 415, 89 S. W. 1087.

A medical expert may testify in a personal injury action that in his opinion the injury indicates permanency. *Missouri, K. & T. Ry. Co. of Texas v. Lynch*, 40 C. A. 543, 90 S. W. 511.

Testimony of an expert that the conditions named by him and shown by the evidence would produce pain held competent. *Western Union Telegraph Co. v. Stubbs*, 43 C. A. 132, 94 S. W. 1083.

In an action for injury to plaintiff's hearing, a physician held competent to give his opinion on a particular subject. *Hickey v. Texas & P. Ry. Co.* (Civ. App.) 95 S. W. 763.

In an action for injuries to plaintiff's wife, a physician held properly permitted to testify as to what he thought caused the wife's condition. *Gulf, C. & S. F. Ry. Co. v. Booth* (Civ. App.) 97 S. W. 128.

In an action for personal injuries, expert testimony is admissible to show that plaintiff's nervous condition is a result of such injuries. *Galveston, H. & S. A. Ry. Co. v. Stoy*, 44 C. A. 448, 99 S. W. 135.

In an action for injuries to a servant, question to expert witness as to the possibility of epilepsy resulting from the injury, held improper. *Galveston, H. & S. A. Ry. Co. v. Powers*, 101 T. 161, 105 S. W. 491.

Expert testimony that a decedent committed suicide held not admissible in an action on a life insurance policy, where the question of suicide was the only issue to be tried by the jury. *Metropolitan Life Ins. Co. v. Wagner*, 50 C. A. 233, 109 S. W. 1120.

A surgeon having examined the wounds and a knife found near a body may give his professional opinion, not only as to the kind of instrument used in inflicting the wounds, but that they were or could have been made with the knife found open by the body. *Id.*

A physician qualifying as an expert in a personal injury action could give an opinion as to the condition of the injured person's health and as to the probable result of her illness. *Pullman Co. v. Hoyle*, 52 C. A. 534, 115 S. W. 315.

In an action for the unlawful killing of decedent, the opinion of an expert as to whether a pistol ball striking a body at a certain point would pass through the body or lodge therein held properly excluded. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

In an action for personal injury, held, that there was no error in admitting certain testimony of a practicing physician giving opinion evidence. *St. Louis Southwestern Ry. Co. of Texas v. Taylor* (Civ. App.) 123 S. W. 714.

A physician may testify as an expert, in an answer to a hypothetical question that from the facts stated, in his opinion, the condition of the party could or would result from such facts. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

An opinion of a physician in a personal injury action based on a hypothetical question is admissible to connect the cause and the proximate results of the injury. *Gulf, W. T. & P. Ry. Co. v. Abbott* (Civ. App.) 146 S. W. 1078.

In a personal injury action, a physician testifying as an expert held properly permitted to state that a certain kind of accident might cause serious injury to the pelvic organs. *Id.*

100. — **Injuries to property.**—The question as to the possibility of a certain dam causing an overflow held a proper subject for expert testimony. *Texas & P. Ry. Co. v. Cochrane*, 29 C. A. 383, 69 S. W. 984.

In action against railroad for damages to cattle, witness held competent to testify as to cause of damage. *St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co.* (Civ. App.) 76 S. W. 947.

In an action against carriers for injuries to cotton shipped, experts held entitled to testify that in their opinion the cotton had been damaged by fresh and not by salt water. *Houston & T. C. R. Co. v. Bath*, 40 C. A. 270, 90 S. W. 55.

Expert testimony held admissible on the issue whether premises had, by reason of a fire, become "unfit for occupancy" for the purpose for which they were leased, so as to terminate the lease. *Meyer Bros. Drug Co. v. Madden, Graham & Co.*, 45 C. A. 74, 99 S. W. 723.

An expert may testify that cattle suffering from splenic fever were infected by having been placed in infected pens and there kept over night, on it appearing that the fever developed a few days later. *International & G. N. R. Co. v. McCullough* (Civ. App.) 118 S. W. 553.

In an action for damages to plaintiff's land from an overflow of waters of a creek, resulting from the erection of an embankment by defendant, testimony of an expert engineer, to the effect that plaintiff's land would have been affected by the waters in the manner complained of, regardless of the construction of the railroad, was admissible. *Gurley v. San Antonio & A. P. Ry. Co.* (Civ. App.) 124 S. W. 502.

Opinion of expert as to what should have been the percentage of loss to a shipment of cattle, if handled in the usual way, held admissible. *True Bros. v. St. Louis, B. & M. Ry. Co.* (Civ. App.) 143 S. W. 298.

Men of experience in the cattle business, qualified to know the effect of dipping cattle in arsenic solution, may give their opinion as to the effect of such dipping of cattle after being given certain feed. *Texas & P. Ry. Co. v. Good* (Civ. App.) 151 S. W. 617.

101. **Damages.**—In an action for injuries, held error to permit a physician who did not base his opinion on mortality tables to state the life expectancy of plaintiff before his injury. *Chicago, R. I. & T. Ry. Co. v. Long*, 26 C. A. 601, 65 S. W. 882.

On an issue as to the damages for a carrier's failure to seasonably unload cattle at their destination, expert evidence as to the loss sustained if they had been seasonably delivered held admissible. *Galveston, H. & S. A. Ry. Co. v. Botts* (Civ. App.) 70 S. W. 113.

In an action for injuries to bees shipped, plaintiff held competent to testify as to the extent of the loss. *International & G. N. R. Co. v. Aten* (Civ. App.) 81 S. W. 346.

The extent of the damage done to wet agricultural lands by pasturing a number of cattle upon them was a proper subject for expert testimony. *Tandy v. Fowler* (Civ. App.) 150 S. W. 481.

IV. Competency of Experts

102. **Necessity of qualification.**—Opinion of a witness held properly refused where the witness was not shown to be qualified to express an opinion. *Young v. Watson* (Civ. App.) 140 S. W. 840.

103. **Knowledge, experience and skill in general.**—Expert testimony defined. *Nations v. Love* (Civ. App.) 26 S. W. 232; *Railway Co. v. Wilson*, 24 S. W. 686, 3 C. A. 583; *Railway Co. v. Thompson*, 21 S. W. 137, 2 C. A. 170; *Railway Co. v. Cocreham*, 30 S. W. 1118, 10 C. A. 166; *Railway Co. v. Peay*, 26 S. W. 763, 7 C. A. 400; *Harris v. Schuttler* (Civ. App.) 24 S. W. 989; *Railway Co. v. Richart* (Civ. App.) 27 S. W. 918; *Ginnuth v. Blankenship & Blake Co.* (Civ. App.) 28 S. W. 828; *Railway Co. v. Briggs*, 23 S. W. 503, 4 C. A. 515; *Railway Co. v. Polk* (Civ. App.) 28 S. W. 353.

Where plaintiff was qualified to testify as an expert, the fact that he was a party to the suit did not disqualify him. *Standefer v. Aultman & Taylor Machinery Co.*, 34 C. A. 160, 78 S. W. 552.

In an action against a railroad for damages to cattle, witness held competent to testify that the cattle were not afflicted with dry murrain. *Ft. Worth & D. C. Ry. Co. v. Hagler*, 38 C. A. 52, 84 S. W. 692.

Witness held qualified to testify as an expert as to whether plaintiff's injuries rendered him physically not acceptable as a locomotive fireman. *Chicago, R. I. & P. Ry. Co. v. Hiltibrand*, 44 C. A. 614, 99 S. W. 707.

On an issue as to plaintiff's competency as a petroleum refiner, experts in the business who had been intimately associated with plaintiff and had seen him work were entitled to give their opinion as to his competency. *United Oil & Refining Co. v. Grey*, 47 C. A. 10, 102 S. W. 934.

A witness held to have qualified himself to testify concerning the incompetency of plaintiff's helper on a drill press, though the witness had not himself worked with the helper on such press. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 43 C. A. 605, 107 S. W. 889.

A witness is not disqualified as an expert to testify as to the competency of a foreman because he had only nine days in which to acquire the knowledge of the foreman's competency. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 938.

A live stock commission merchant held qualified to give an expert opinion as to how much cattle shrunk between their arrival at market and their sale. *Trout & Newberry v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 111 S. W. 220.

Witness shown to possess certain qualifications, and to be acquainted with the subject-matter, held properly permitted to give his opinion that the manner in which a railroad embankment was constructed was not good engineering. *Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Civ. App.) 112 S. W. 783.

One who had cultivated rice for three years, and stated that he knew a good rice crop from a poor one, was qualified to testify that certain land would have yielded a certain number of bags an acre had it been properly watered. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

A witness, who had been engaged all his life in cutting and hauling wood, was qualified to give his opinion as to how much wood remained uncut on a tract of land. *Sauer v. Veltmann* (Civ. App.) 149 S. W. 706.

A miner and assayer employed as assayer by a mining company and by defendants held prima facie competent to testify for plaintiff as an expert assayer. *Kleine Bros. v. Gidcomb* (Civ. App.) 152 S. W. 462.

Where plaintiff stated that he was able from experience to tell how much more feed was required to take care of horses during severe weather without the protection of stable tents, and the facts upon which such opinion was based, his opinion on that question was admissible. *Pecos & N. T. Ry. Co. v. Maxwell* (Civ. App.) 156 S. W. 548.

104. **Bodily and mental condition.**—In an action for injuries to a passenger, testimony of an expert witness that he would conclude certain facts from the way that plaintiff was bandaged, though he did not remove the bandage, held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Dalton*, 56 C. A. 82, 120 S. W. 240.

A physician in general practice who has studied a particular disease is qualified to testify concerning it, though he had not made such disease a specialty and had never treated a person therefor, his want of experience going only to the weight of his testimony. *Pecos & N. T. Ry. Co. v. Coffman*, 56 C. A. 472, 121 S. W. 218.

Refusal to permit a medical expert to testify to an opinion as to whether plaintiff was suffering from a particular disease held an abuse of discretion. *Id.*

A witness, not a medical graduate, held qualified to testify as to the condition of plaintiff's legs after they were injured. *Missouri, K. & T. Ry. Co. of Texas v. Farris* (Civ. App.) 124 S. W. 497.

In a personal injury action, it was not error to permit a practicing physician who had treated plaintiff to express an opinion and make a prognosis as to plaintiff's condition. *Gulf, C. & S. F. Ry. Co. v. Williams* (Civ. App.) 136 S. W. 527.

A person with 10 years' experience in selling stock at a market and 15 years' experience in handling cattle generally at the market is competent as an expert to testify

that a shipment of stock was not in good condition. *Pecos & N. T. Ry. Co. v. Brooks* (Civ. App.) 145 S. W. 649.

A witness who has been buying and selling cattle for nine years has had experience in observing and inspecting cattle with scabbies, and who believes he can tell cattle so inflected and who states that he saw the cattle in controversy, held competent to give his opinion as to whether they were free from the disease. *O'Brien v. Von Liene* (Civ. App.) 149 S. W. 723.

One who has been engaged as a cattle salesman for 10 years and who has handled and fed cattle for many years, and who had shipped a great many cattle, is qualified as an expert as to what certain cattle should have gained in weight. *Pecos & N. T. Ry. Co. v. Cox* (Civ. App.) 150 S. W. 265.

Experienced cattlemen who had frequently observed cattle affected with blackleg held qualified to testify that only young cattle are ever affected by such disease. *Gulf, C. & S. F. Ry. Co. v. Brock* (Civ. App.) 150 S. W. 488.

105. **Due care and proper conduct in general.**—In an action against a telegraph company for error in transmitting a message, certain testimony held competent on the issue whether it used ordinary care to employ skillful operators. *Postal Telegraph-Cable Co. v. S. A. Pace Grocery Co.* (Civ. App.) 126 S. W. 1172.

Cattlemen, who for a number of years had been engaged in shipping and marketing stock to a given point, are competent to testify as experts as to the necessity of feeding and watering cattle at a given point. *St. Louis & S. F. Ry. Co. v. Knox* (Civ. App.) 151 S. W. 902.

106. **Machinery and mechanical devices and appliances.**—In an action for breach of warranty in the sale of threshing machinery, plaintiff held competent to testify as an expert that the machinery was old when delivered. *Standefer v. Aultman & Taylor Machinery Co.*, 34 C. A. 160, 73 S. W. 552.

Witnesses, in an action against a railway company for the death of a pedestrian at a street crossing, held competent to give their opinion as to within what distance the train could have been stopped. *Galveston, H. & S. A. Ry. Co. v. Murray* (Civ. App.) 99 S. W. 144.

A witness having 25 years' experience in the operation of drilling machines held competent to testify as to what mode of operation was the more dangerous. *Chicago, R. I. & G. Ry. Co. v. Denton* (Civ. App.) 101 S. W. 452.

A locomotive engineer of more than 40 years' experience is competent to testify as to the best method of preventing the escape of sparks from locomotives. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 420, 110 S. W. 978.

An employé suing for a personal injury caused by the slipping of a pinch bar held entitled to testify as to his belief that the bar was defective. *Gulf, C. & S. F. Ry. Co. v. Ford* (Civ. App.) 143 S. W. 943.

A person who had worked as car repairer, and who was familiar with the winding devices on ballast cars, was not competent to give his opinion as to the number of chains that would have to break before anything would happen to cause the wrench used to wind up the chain to wind up the doors of the car to slip. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

Where a witness had been a car repairer for nine successive years, and for four or five years had used the ladder plaintiff was using when injured, he was competent as an expert to testify as to whether spikes at the bottom of the ladder were necessary. *Missouri, K. & T. Ry. Co. of Texas v. Hedric* (Civ. App.) 154 S. W. 633.

Where plaintiff, injured by catching his hand in spools over which he was guiding a rope, had never seen another machine of the kind, and testified that he had never thought of a guard until after the accident, it was error to admit his evidence that there should have been a cover over the spool and a lever to guide the rope. *San Antonio Brewing Ass'n v. Wolfshohl* (Civ. App.) 155 S. W. 644.

107. **Construction and operation of railroads.**—A lawyer who had at one time been a claim agent for a railroad company held not competent to testify as an expert as to the speed at which a certain train could be run with safety. *Ft. Worth & D. C. Ry. Co. v. Thompson*, 21 S. W. 137, 2 C. A. 170.

One in service of railroads for 10 years held competent to testify that an engineer "would pull a train down hill just as fast as he could turn a wheel." *Galveston, H. & S. A. Ry. Co. v. Davis* (Civ. App.) 45 S. W. 956.

One who has had long service in the railroad business in various capacities is competent to give an opinion as to whether or not a track was safe. *San Antonio & A. P. Ry. Co. v. Brooking* (Civ. App.) 51 S. W. 537.

In an action against a railroad company for injuries to an employé caused by a defective handhold, a witness who had been a railroad man for 10 years held competent to give an expert opinion as to whether a "cornering" of the car would have caused the defect in the handhold. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.) 68 S. W. 566.

In action against railroad for damages from fire communicated by spark, a witness held competent to testify as an expert as to whether locomotive was properly handled. *Texas Southern Ry. Co. v. Hart*, 32 C. A. 212, 73 S. W. 833.

In action against railroad for damages from fire communicated by spark, held, that question to fireman was not improper on the ground that engineer could have answered it. *Id.*

A witness held competent to testify as to the manner in which a string of cabooses should have been switched. *St. Louis & S. F. Ry. Co. v. Smith* (Civ. App.) 90 S. W. 926.

In an action for injuries to plaintiff's wife by being scalded by hot water and steam emitted from defendant's locomotive, witnesses held qualified as experts to testify to the action of a locomotive blow-off and injector in throwing off hot water and steam. *Gulf, C. & S. F. Ry. Co. v. Tullis*, 41 C. A. 219, 91 S. W. 317.

Civil engineer held sufficiently qualified to testify as an expert to the sufficiency of openings in a railroad embankment to carry away water. *Gulf, C. & S. F. Ry. Co. v. Wynne* (Civ. App.) 91 S. W. 823.

In an action against a railroad for injuries to a passenger, a witness held qualified to testify as to the force with which a coupling of cars was made. *Mullen v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 92 S. W. 1000.

A locomotive engineer of 17 years' experience held competent to testify as an expert as to the dangers of a peculiar coupling of an engine. *Texas & N. O. R. Co. v. McCoy*, 54 C. A. 278, 117 S. W. 446.

A civil engineer of 18 years' experience in the construction of railroads, including the grading of tracks at crossings, who is familiar with a particular crossing and who testifies to the physical conditions surrounding it, is competent to give his opinion as to whether it is feasible to establish a grade crossing. *Gulf, C. & S. F. Ry. Co. v. City of Belton*, 57 C. A. 460, 122 S. W. 413.

In an action against carriers for breach of contract to furnish cars for shipment of stock resulting in damage during transportation, the exclusion of certain evidence as to the operation of the trains, held not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Golson* (Civ. App.) 133 S. W. 456.

One having practical experience in the handling of trains is competent to testify that it is the duty of the switch train foreman to send out a flagman to protect a switch engine on the main track from an approaching train. *Galveston, H. & S. A. Ry. Co. v. Sample* (Civ. App.) 145 S. W. 1057.

The court held to have properly permitted a shipper to testify as to what was a good ordinary run for a cattle train from a point in Texas to Kansas City; he testifying on the basis of other shipments made by him. *Pecos & N. T. Ry. Co. v. Meyer* (Civ. App.) 155 S. W. 309.

108. Conduct of business, custom or usage.—Witness held not competent to testify to custom concerning earnest money in sales of realty throughout the United States. *Edwards v. Davidson* (Civ. App.) 79 S. W. 48.

A teacher of 15 years' experience in the state may testify unqualifiedly that it is the custom to hire teachers at a certain time of the year, over objection that he has not qualified as an expert. *Peacock v. Coltrane*, 44 C. A. 530, 99 S. W. 107.

In an action against a railroad company for delay in shipping cattle, a witness held properly allowed to testify as to the usual time for transporting cattle between the points in question. *Missouri, K. & T. Ry. Co. v. Scoggin & Dupree*, 57 C. A. 349, 123 S. W. 229; *Same v. Birdwell* (Civ. App.) 123 S. W. 232; *Same v. Henderson, Id.*; *Missouri, K. & T. Ry. Co. of Texas v. Lovelady, Id.*

109. Physical facts.—A witness aged 65 years, whose principal occupation had been that of a sailor, and who was acquainted with the locality, was properly allowed to answer the question, "With a wind 60 miles an hour, what would have been the size of the waves in that immediate vicinity?" the testimony being pertinent. *Hfrey v. Railway Co.*, 76 T. 63, 13 S. W. 165.

A physician, who has no knowledge as to the effect of electricity on the human system except from books, and is not an expert, held not competent to give an opinion thereon. *Wehner v. Lagerfelt*, 27 C. A. 520, 66 S. W. 221.

In trespass to try title, testimony of a surveyor that meanderings would fit only one particular part of stream held admissible. *Camp v. League* (Civ. App.) 92 S. W. 1062.

In an action against carriers for breach of contract to furnish cars for shipment of stock resulting in damage during transportation, the exclusion of certain evidence as to the condition of the stock held not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Golson* (Civ. App.) 133 S. W. 456.

A witness held not to be qualified to give an opinion as to the amount of timber taken from a tract of land. *Callen v. Collins* (Civ. App.) 135 S. W. 651.

An expert held competent to testify that the bone can be distinguished from the flesh in an X-ray photograph. *Missouri, K. & T. Ry. Co. of Texas v. Coker* (Civ. App.) 143 S. W. 218.

On statements of a witness as to his experience in scaling timber and as to his examination of the timber on land in controversy, held, that he was competent to give an opinion as to the amount of timber taken therefrom. *Callen v. Collins* (Civ. App.) 154 S. W. 673.

110. Value.—A witness who testified that he had been in the hardware business for a number of years, and knew the value of a stock like the one in question, was qualified to testify as to its value. *Belknap v. Groover* (Civ. App.) 56 S. W. 249.

A physician held not qualified to testify as to the customary compensation of a professional nurse. *Cameron Mill & Elevator Co. v. Anderson*, 34 C. A. 229, 78 S. W. 971.

Witness held qualified to testify as to market value of rice. *El Campo Rice Milling Co. v. Montgomery* (Civ. App.) 95 S. W. 1102.

A witness held not to show his competency to testify as to the market value of property at a certain market. *Pecos & N. T. Ry. Co. v. Hughes*, 44 C. A. 135, 98 S. W. 410.

A witness held not qualified to testify as an expert as to the reasonable value of physician's services. *Missouri, K. & T. Ry. Co. of Texas v. Craig*, 44 C. A. 583, 98 S. W. 907.

Experienced cattleman held properly permitted to give opinion as to loss in weight of cattle because of delay in shipment and reshipment. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 44 C. A. 480, 99 S. W. 152.

Experienced cattleman held properly permitted to give opinion as to what cattle would have sold for on a certain date. *Id.*

Carriage dealers and repairers, shown to have sufficient knowledge of the cost and value of second-hand vehicles, were competent to testify as experts in an action against a carrier for the loss of a shipment of second-hand vehicles. *Texas & P. Ry. Co. v. Wilson's Hack Line*, 46 C. A. 38, 101 S. W. 1042.

In an action for damage to plaintiff's cattle by defendant's negligent delay in transit, plaintiff held qualified to give an opinion as to the cattle depreciated in value by such delays. *St. Louis, I. M. & S. Ry. Co. v. Boshear* (Civ. App.) 108 S. W. 1032.

In condemnation proceedings by a street railway to acquire property, a witness held to be qualified to testify as an expert to the improved value of the property taken. *Foley v. Houston Belt & Terminal Ry. Co.*, 50 C. A. 218, 108 S. W. 169, 110 S. W. 96.

In an action against a carrier for injury to a shipment of horses, witnesses held competent to testify as to the reasonable value of the horses had they arrived at the point of destination in a reasonably good condition. *Gulf, C. & S. F. Ry. Co. v. Cunningham*, 51 C. A. 368, 113 S. W. 767.

A witness otherwise qualified may testify as to the value of mules described to him which he had never seen. *Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton*, 54 C. A. 593, 118 S. W. 628.

An expert witness as to the value of cattle held competent to testify to the value of the cattle on their arrival at destination in an injured condition, and in the condition they would have been in had they not been injured. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737.

Salvage merchants of many years' experience held competent to testify to the market value of typewriters in the condition they were immediately after being caught in a flood. *St. Louis & S. F. Ry. Co. v. Ewing* (Civ. App.) 126 S. W. 625.

Sustaining an objection to evidence as to the value of a machine held not erroneous; the witness not being shown to be qualified to speak as to its value. *Carroll v. Mitchell-Parks Mfg. Co.* (Civ. App.) 128 S. W. 446.

In a real estate broker's action for commissions, evidence by other real estate brokers as to the value of the services held admissible, notwithstanding witnesses' lack of experience in the real estate business in the city where the services were rendered. *Floore v. J. T. Burgher & Co.* (Civ. App.) 128 S. W. 1152.

Witnesses held competent to testify as to market value of cattle. *Missouri, K. & T. Ry. Co. of Texas v. Moss* (Civ. App.) 135 S. W. 626.

A witness held sufficiently qualified to testify to the market value of cattle at their destination. *Galveston, H. & S. A. Ry. Co. v. Saunders* (Civ. App.) 141 S. W. 829.

A witness, having testified positively that he knew the market value of apples at T., held properly permitted to testify concerning such value. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 141 S. W. 1020.

In an action to recover damages for loss of apples packed and sold in bushel boxes, evidence of witnesses as to value held not objectionable, in that they testified to retail as distinguished from wholesale value. *Id.*

Witness with 20 years' experience in handling and selling cattle and 12 years' experience in market where the cattle in question were sold, who saw the cattle involved and knew the condition of the market, is qualified to testify as to price which shipment would have brought in good condition. *Pecos & N. T. Ry. Co. v. Gray* (Civ. App.) 145 S. W. 728.

A witness who has spent his life in the cattle business, knowing the effect on cattle of placing them in pens and keeping them there from 24 to 30 hours without food or water, and who is familiar with the market value of cattle, and who knows the condition of a shipment detained in pens, is competent to testify as to the amount of depreciation in the market value of cattle caused by delay of transportation and confinement in pens. *St. Louis, B. & M. Ry. Co. v. Wood Bros.* (Civ. App.) 147 S. W. 283.

A witness who stated that he was in the land and abstract business, and had been a county surveyor for a number of years, and knew the land inquired about and had run some of its lines, and that he had been engaged in buying and selling land in the county in which the land was situated, and also that he was farming several hundred acres, was competent to testify as to the value of the land inquired about. *Hagestein v. Blaschke* (Civ. App.) 149 S. W. 718.

Where a witness qualified as to the cash market value of property, a building on which was destroyed by fire, the fact that the cost and utility of the premises was also considered by him, when testifying, would not affect his qualifications to testify. *Missouri, K. & T. Ry. Co. of Texas v. Murray* (Civ. App.) 150 S. W. 217.

On testimony that witness knew the location of the land in controversy, and had a correct idea of what constituted market value, and knowledge of the timber market in that locality at the time, although he did not remember any sales at that particular time, held that he was competent to testify as to the market value of timber taken therefrom. *Callen v. Collins* (Civ. App.) 154 S. W. 673.

In a suit to restrain the collection of taxes on bank stock assessed at a higher rate than other property in the county, witnesses competent to testify to the market value of land in the county may testify to land values over objection that opinions were not admissible. *Porter v. Langley* (Civ. App.) 155 S. W. 1042.

111. Damages.—Testimony as to depreciation in market value of cattle, caused by delay in furnishing cars for shipment, held erroneously admitted, in absence of showing of witness' knowledge of market value. *Chicago, R. I. & G. Ry. Co. v. Kapp* (Civ. App.) 117 S. W. 904.

One qualified as a dealer in live stock held competent to estimate the amount of the depreciation in value of a live stock shipment. *St. Louis Southwestern Ry. Co. of Texas v. Allen* (Civ. App.) 117 S. W. 923.

One who has been engaged in the live stock business for nearly 11 years, and who is engaged in receiving and selling stock for another at a stock market, is competent to testify as to the loss to a shipment of cattle from a delay in the transportation. *Galveston, H. & S. A. Ry. Co. v. Cobb & McCrory Co.* (Civ. App.) 126 S. W. 63.

An experienced cattleman, familiar with the condition of his cattle when shipped and when delivered and knowing the market prices at destination, was qualified to testify that the stale appearance of the cattle on account of their being shrunken and looking badly reduced the price 55 to 60 cents per hundred. *Pecos & N. T. Ry. Co. v. Meyer* (Civ. App.) 155 S. W. 309.

112. Cause and effect.—Opinion evidence of witnesses as to the cause of death of cattle seen by them before shipment, but not thereafter, held properly excluded in an action against a carrier for damages due to delay in providing cars. *International & G. N. R. Co. v. True*, 23 C. A. 523, 57 S. W. 977.

Expert witness held qualified to testify as to the extent of the deterioration in the value of cotton seed through delay in transportation, etc. *San Antonio & A. P. Ry. Co. v. Josey* (Civ. App.) 71 S. W. 606.

A physician held competent to give his opinion as to probable duration of plaintiff's injuries. *San Antonio & A. P. Ry. Co. v. Moore*, 31 C. A. 371, 72 S. W. 226.

A witness held competent to testify as to the proper method of loading a car with lumber. *Southern Pac. Co. v. Godfrey*, 48 C. A. 616, 107 S. W. 1135.

Expert cattlemen, who had seen cattle in their injured condition upon arrival at destination, were competent to testify as to how many of the cattle, if any, were so injured as to cause their death. *Galveston, H. & S. A. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 737.

One having long experience in electrical work held not competent to give his opinion as to whether one could be permanently injured by a shock of electricity not manifesting itself by a mark on the body. *Denison Light & Power Co. v. Patton* (Civ. App.) 135 S. W. 1040.

Testimony held to qualify one as an expert to give his opinion as to what should have been the percentage of loss to a shipment of cattle if handled in the usual way. *True Bros. v. St. Louis, B. & M. Ry.* (Civ. App.) 143 S. W. 298.

Farmers not clearly shown to be qualified to testify as to the effect on future prospectiveness of pasturing wet lands were properly denied the right to testify as experts on such matter. *Tandy v. Fowler* (Civ. App.) 150 S. W. 481.

Cattlemen, who for a number of years had been engaged in shipping and marketing stock to a given point, are competent to testify as experts as to whether depreciation in value of cattle was due to rough handling and delay. *St. Louis & S. F. Ry. Co. v. Knox* (Civ. App.) 151 S. W. 902.

V. Examination of Nonexperts

113. **Determination of question of competency.**—The determination of the court as to whether expert or opinion evidence is admissible in the case held reviewable only for gross abuse of discretion. *Meyer Bros. Drug Co. v. Madden, Graham & Co.*, 45 C. A. 74, 99 S. W. 723.

Whether a witness has such knowledge of the facts as to make his opinion of value is in a great measure at the discretion of the trial court. *Missouri, K. & T. Ry. Co. of Texas v. Hedric* (Civ. App.) 154 S. W. 633.

Evidence held to show that plaintiff did not know the market value of real property involved so as to be competent to give opinion on its value. *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 156 S. W. 261.

What is sufficient to qualify a witness to give his opinion concerning the value of land is largely within the discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly shown to have been abused. *Byrd Irr. Co. v. Smyth* (Civ. App.) 157 S. W. 260.

114. **Examination in general.**—Where a witness stated that he valued a stock of merchandise as it lay in the store, it will be inferred that his valuation was in bulk. *Half v. Goldfrank* (Civ. App.) 49 S. W. 1095.

Evidence held not objectionable as being based on a hypothetical question. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 59 S. W. 930.

In a proceeding to condemn land for a railroad right of way, where a witness who was shown to be competent to testify as to the value was asked what, in his opinion, was the market value of the land in the neighborhood per acre, it was error to sustain an objection to the question as calling for the "cash" market value. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 429, 68 S. W. 745.

In an action for damages to property caused by the maintenance of a nuisance incident to the construction and operation of a railroad, opinion evidence as to depreciation of market value of property held admissible. *St. Louis, S. F. & T. Ry. Co. v. Payne*, 47 C. A. 194, 104 S. W. 1077.

115. — **Facts forming basis of opinion.**—It is competent for a witness to give his opinion as to one's mental capacity to make a will after having testified to the facts upon which that opinion is predicated. *Garrison v. Blanton*, 48 T. 301; *Cockrill v. Cox*, 65 T. 669; *Brown v. Mitchell*, 75 T. 9, 12 S. W. 606.

Opinions of nonexperts admissible in connection with a statement of the facts. *Railway Co. v. Daniels*, 23 S. W. 548, 9 C. A. 253; *Railway Co. v. John*, 29 S. W. 558, 9 C. A. 342; *Railway Co. v. Parr* (Civ. App.) 26 S. W. 861; *Railway Co. v. Wesch* (Civ. App.) 21 S. W. 62; *Id.*, 22 S. W. 957, 85 T. 593; *Prather v. McClelland* (Civ. App.) 26 S. W. 657; *Railway Co. v. Wilson*, 3 C. A. 583, 24 S. W. 686.

The opinion of a witness must be based on knowledge or evidence of facts. *Railway Co. v. Garteiser*, 29 S. W. 939, 9 C. A. 456; *Railway Co. v. Calhoun* (Civ. App.) 24 S. W. 362; *Railway Co. v. Daniels*, 28 S. W. 548, 9 C. A. 253; *Railway Co. v. Haskell*, 23 S. W. 546, 4 C. A. 550; *Railway Co. v. Duelm* (Civ. App.) 23 S. W. 596; *Campbell v. Warner* (Civ. App.) 24 S. W. 703; *Mutual Life Ins. Co. v. Hayward* (Civ. App.) 27 S. W. 36; *Railway Co. v. Startz* (Civ. App.) 27 S. W. 759.

On an issue as to the solvency of an association at a particular time, a witness cannot give his opinion, gathered from the records, books, and interviews, where the facts he discovered are not disclosed. *Pioneer Savings & Loan Co. v. Peck*, 20 C. A. 111, 49 S. W. 160.

Where the witnesses had detailed to the jury the facts on which they based their opinions, the opinions of nonexperts as to the deceased's mental condition were properly received in evidence. *Missouri, K. & T. Ry. Co. of Texas v. Brantley*, 26 C. A. 11, 62 S. W. 94.

A witness in an action against a railroad company for damages to cattle received during carriage held competent to testify as to the condition in which they would have been if they had been properly cared for, although he had not seen the cattle when shipped or en route. *San Antonio & A. P. Ry. Co. v. Barnett*, 27 C. A. 498, 66 S. W. 474.

On the trial of an owner's appeal from the award for land condemned for a railroad, evidence of witnesses as to the value of the land, arrived at by comparison with the values of similar property, held admissible. *Calvert W. & B. V. Ry. Co. v. Smith* (Civ. App.) 68 S. W. 63.

One can give his opinion as to the insanity of a person only on the facts within his knowledge or as testified to in the case. *First Nat. Bank v. McGinty*, 29 C. A. 539, 69 S. W. 495.

That expert admitted that property whose value was sought to be shown would not probably have brought more than stated sum held only to affect weight of his previous testimony. *J. B. Watkins Land Mortg. Co. v. Campbell*, 93 T. 372, 84 S. W. 424.

The effect of improvements to be made to property cannot be considered in estimating its value before the improvements have been made. *Id.*

Before a witness can state an opinion as to the value of property, qualification to do so must be shown. *Id.*

Certain testimony held incompetent, as being the mere opinion of witness. *St. Louis Southwestern Ry. Co. v. Demsey*, 40 C. A. 398, 89 S. W. 786.

Nonexpert witnesses may state opinions and conclusions after detailing the facts on which they are based. *Hart v. Hart* (Civ. App.) 110 S. W. 91.

In an action against a carrier for delay and rough handling of a shipment of cattle, certain testimony held inadmissible in the absence of a proper basis for the opinion of the witness. *Texas & P. Ry. Co. v. Stewart*, 52 C. A. 514, 114 S. W. 413.

The opinion of a witness, who states the facts upon which it is based, is admissible, though he is not an expert. *St. Louis & S. F. R. Co. v. Sizemore*, 53 C. A. 491, 116 S. W. 403.

A witness cannot testify as to the value of an article, based on information derived from an unidentified and undescribed catalogue. *Galveston, H. & S. A. Ry. Co. v. Hillman* (Civ. App.) 113 S. W. 153.

A question held not objectionable on the ground that the hypothesis on which it was based was not supported by the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Chilton*, 52 C. A. 516, 118 S. W. 779.

In an action to set aside a deed as fraudulent, testimony of witnesses as to plaintiff's mental incapacity held not incompetent because the witnesses failed to state specifically the acts upon which their opinions were based. *Koppe v. Koppe*, 57 C. A. 204, 122 S. W. 68.

Plaintiff's testimony as to market value of his burned grass held admissible. *Texas Cent. R. Co. v. Qualls* (Civ. App.) 124 S. W. 140.

Plaintiff's testimony, in an action for damage to clothing and other dry goods, as to their value to him, without stating any facts on which the jury might base its judgment as to their value, was inadmissible. *Galveston, H. & S. A. Ry. Co. v. Giles* (Civ. App.) 126 S. W. 282.

The testimony of witnesses that grass destroyed by fire had a market value held competent. *Texas & P. Ry. Co. v. Owen* (Civ. App.) 128 S. W. 1139.

A nonexpert witness held not entitled to give an opinion concerning a building operation. *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683.

A nonexpert witness may give his opinion upon facts stated by him, which show that he is possessed of sufficient information to form an intelligent opinion. *American Const. Co. v. Davis* (Civ. App.) 141 S. W. 1013.

Witnesses could not testify as nonexperts where the facts upon which their testimony was based were not given. *Tandy v. Fowler* (Civ. App.) 150 S. W. 481.

Nonexpert witnesses, other than the subscribing witnesses, who merely state that they had opportunity to know the facts on which they base an opinion, may testify that a testatrix was of sound mind, without stating the facts on which their opinion is based. *Thornton v. McReynolds* (Civ. App.) 156 S. W. 1144.

Subscribing witnesses to a will may testify that they are of the opinion that the testatrix was of sound mind, without giving the facts on which they base their opinion. *Id.*

116. — **Cross-examination and re-examination.**—To show that one's opinion that cattle were depreciated by sickness \$10 per head was not correct, and thus to impeach the reliability of his judgment, he may be asked what price he sold them for 40 or 50 days later. *Houston Cotton Oil Co. v. Trammell*, 96 T. 598, 74 S. W. 899.

In condemnation proceedings by a railroad held proper on cross-examination to require witnesses to state the effect of the condemnation on the different parts into which the tract was segregated by certain railroads and highways. *Panhandle & G. Ry. Co. v. Kirby*, 42 C. A. 340, 94 S. W. 173.

In an action for a private nuisance, a witness giving his opinion on direct examination held properly asked on cross-examination for his opinion on the true facts. *Sherman Gas & Electric Co. v. Belden* (Civ. App.) 115 S. W. 897.

Where a witness testified on direct examination as to the value of property converted, the sustaining of objections on cross-examination, asked to test his accuracy and truthfulness and to show his credibility, was reversible error. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 156 S. W. 267.

VI. Examination of Experts

117. **Preliminary evidence as to competency.**—A statement of an expert witness that he believes he is capable of expressing an opinion on the matter in issue is a sufficient expression of his opinion as to his own competency. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 983.

In an action to recover for defendant's negligent delay in transporting cattle, witnesses held qualified to state the usual time of transportation between the point of shipment and the market. *St. Louis, I. M. & S. Ry. Co. v. Boshear* (Civ. App.) 108 S. W. 1032.

It may be presumed that an employé of defendant irrigation company in charge of the distribution of water for irrigation had sufficient knowledge to know whether rice land was obtaining sufficient water, and defendant should not attack his competency to so testify. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

Evidence held admissible to qualify a witness to give his opinion as to what should have been the percentage of loss to a shipment of cattle if handled in the usual way. *True Bros. v. St. Louis, B. & M. Ry. Co.* (Civ. App.) 143 S. W. 298.

In an action for death of an employé, refusal to permit a witness to give his opinion held proper, in the absence of a predicate. *Guitar v. Randel* (Civ. App.) 147 S. W. 642.

118. Determination of question of competency.—Questions to one introduced as an expert propounded by the adversary, and which go to his credibility, are not proper on a cross-examination of the witness when being examined before the presiding judge as to his qualifications as an expert. *Smith v. Caswell*, 67 T. 567, 4 S. W. 848.

Whether a witness was qualified to testify as an expert is within the discretion of the trial court, which will not be disturbed unless a gross abuse appears. *Texas & P. Ry. Co. v. Warner*, 42 C. A. 280, 93 S. W. 489.

Whether a witness has qualified as an expert is for the determination of the trial court, and its action will not ordinarily be reviewed unless an abuse of its discretion is shown. *Dallas Consol. Electric St. Ry. Co. v. English*, 42 C. A. 393, 93 S. W. 1096.

The determination of the court as to qualification of experts held reviewable only on a showing of gross abuse of discretion. *Meyer Bros. Drug Co. v. Madden, Graham & Co.*, 45 C. A. 74, 99 S. W. 723.

That the answer of an expert to a hypothetical question may decide the question at issue before the jury held no ground of objection to the question and answer. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.) 99 S. W. 884.

The ruling of the court that a witness had qualified himself to give an opinion as an expert is within its discretion, and will not be disturbed unless abused. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

Question as to the qualification of an expert witness is primarily for the trial court. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

The discretion of the trial court in determining whether a witness offered as an expert possesses sufficient knowledge held reviewable only in a case of an abuse. *Southern Telegraph & Telephone Co. v. Evans*, 54 C. A. 63, 116 S. W. 418.

The competency of a witness to testify as an expert is not determined by the estimate which he places upon himself, but by that which his answers show should be placed on him. *Id.*

Exercise of the trial court's discretion in determining the competency of an expert will not be reviewed unless abused. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 141 S. W. 1020.

The discretion of the trial court in determining the competency of an expert witness will not be disturbed except in case of abuse. *Cleburne Electric & Gas Co. v. McCoy* (Civ. App.) 149 S. W. 534.

The trial court's determination as to the competency of an expert witness will not be reviewed unless gross abuse of discretion appears. *Missouri, K. & T. Ry. Co. of Texas v. Hedric* (Civ. App.) 154 S. W. 633.

119. Mode of examination in general.—It is ordinarily permissible to ask an expert witness a leading question when his opinion is sought upon a matter about which by reason of his professional knowledge he has peculiar information. *Galveston, H. & S. A. Ry. Co. v. Powers* (Civ. App.) 101 S. W. 250.

In a suit to enjoin the Railroad Commission from enforcing rates a question asked a member thereof as an expert held not objectionable. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737.

120. Questions and answers based on personal knowledge of expert.—The opinion of a witness as to the competency of an engineer, whom he had known only the day before his death, is inadmissible. *Railway Co. v. Scott*, 68 T. 694, 5 S. W. 501.

The opinion of an expert as to the sanity of the testator may be based upon a hypothetical case warranted by the testimony. *Prather v. McClelland*, 76 T. 574, 13 S. W. 543; *Id.* (Civ. App.) 26 S. W. 657.

A physician called to testify to the state of health and physical condition of an injured party may relate, as the basis of his opinion, the patient's declarations as to her exposure and following illness and its symptoms. *Pullman Co. v. Smith*, 79 T. 463, 14 S. W. 993, 13 L. R. A. 215, 23 Am. St. Rep. 356; *Railway Co. v. Ayres*, 83 T. 268, 18 S. W. 684.

When a witness is to be examined as an expert, the facts shown by the evidence must be stated to him as the basis for a hypothetical question. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.) 42 S. W. 255.

A physician called to examine an injured person may state what was told him of the case on which he based his opinion. *St. Louis S. W. Ry. Co. v. Freedman*, 18 C. A. 553, 46 S. W. 101.

Answer of a physician that he believed plaintiff's injuries to have been caused by violence held not objectionable as resting on hearsay. *Galveston, H. & S. A. Ry. Co. v. Baumgarten*, 31 C. A. 253, 72 S. W. 78.

In an action for injuries, a hypothetical question asked of a physician held not objectionable, as not sufficiently specific and as assuming facts not sustained by the evidence. *Id.*

Where an expert is personally acquainted with the material facts in issue, questions relating thereto are not required to be based upon a hypothetical state of facts. *A. Cohen & Co. v. Rittmann* (Civ. App.) 139 S. W. 59.

121. Questions and answers based on facts testified to by expert.—In an action against a railroad for personal injuries received by a passenger in alighting from a train, opinion of witness as to the cause of the injury held competent. *Missouri, K. & T. Ry. Co. of Texas v. Criswell*, 34 C. A. 278, 78 S. W. 388.

A contention that an answer to a hypothetical question contained a hypothesis that did not exist held unavailing. *St. Louis & S. F. R. Co. v. Kiser* (Civ. App.) 136 S. W. 852. Testimony of a physician based upon a personal examination of plaintiff is not hearsay. *Id.*

An opinion of a physician held admissible, though a conclusion of the witness. *Id.*

122. Questions and answers based on testimony of others.—In an action by a passenger for injuries, it was not error to refuse to allow a physician to review the testimony of plaintiff, and then give his opinion as to its reasonableness or correctness. *Gulf, C. & S. F. Ry. Co. v. Bell*, 24 C. A. 579, 58 S. W. 614.

Where there was no conflict as to the facts, an expert witness was properly asked the question, "Assuming the testimony given to be true, to what would you attribute the injuries of E.?" *Sherman, S. & S. Ry. Co. v. Eaves*, 25 C. A. 409, 61 S. W. 550.

In an action for injuries, held proper to permit plaintiff's counsel to ask a physician to explain the cause of plaintiff's symptoms, basing his opinion on testimony heard on the trial. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.) 81 S. W. 571.

In an action for injuries, held, that answer of medical expert to a certain question as to plaintiff's injuries was not objectionable. *Id.*

In an action for personal injuries held not error to exclude a question asked a doctor as to whether he concurred in a supposed opinion of another doctor as to the extent of the injury. *Galveston, H. & H. R. Co. v. Alberti*, 47 C. A. 32, 103 S. W. 699.

An expert held entitled to give his opinion as to the value of the material in a building based on a detailed statement of the dimensions of the building, and the character and kind of the lumber contained therein. *Ft. Worth & D. C. Ry. Co. v. Arthur* (Civ. App.) 124 S. W. 213.

123. Hypothetical questions and answers.—An expert can give his opinion on a state of facts pertaining to his art or science which he might assume to be true, and the court and jury must then decide whether his assumption of facts was correct. But he cannot give his opinion as an expert as to his conclusion from facts testified about in conflicting testimony, the existence or nonexistence of which should be determined by the court or jury, and not by the expert. If his opinion was desired as an expert regarding the effect of given facts in producing results, it should be sought by stating a hypothetical case. *Armendiaz v. Stillman*, 67 T. 458, 3 S. W. 678.

Witness who had never seen a stock of goods held competent to testify as to its value. *Reynolds v. Weinman* (Civ. App.) 40 S. W. 560.

Hypothetical questions are not necessary where the evidence shows but one state of facts, about which there is no conflict. *Sherman, S. & S. Ry. Co. v. Eaves*, 25 C. A. 409, 61 S. W. 550.

The allowance of a question hypothesized on facts slightly different from those subsequently shown as a foundation for the question held not error. *Rice v. Dewberry* (Civ. App.) 93 S. W. 715.

It is not necessary that the hypothetical facts on which an expert bases his opinion as to the existence of a fact sought to be established should be uncontroverted, but is sufficient if there is evidence from which the jury might find the supposed facts. *Collins v. Chipman*, 41 C. A. 563, 95 S. W. 666.

It is improper to permit a witness to be asked a hypothetical question not supported by evidence. *Gulf, C. & S. F. Ry. Co. v. Craft* (Civ. App.) 102 S. W. 170.

There must be evidence to support facts assumed in a hypothetical question. *Texas Midland R. R. v. Ritchey*, 108 S. W. 732, 49 C. A. 409.

124. — Form and sufficiency of questions.—Hypothetical question submitted to expert need not embrace all the testimony on the subject. *Burt v. State*, 38 Cr. R. 397, 43 S. W. 344, 39 L. R. A. 309, 330.

Questions asked an expert, which called for opinions based on facts too remote to make them material, were properly disallowed. *Mutual Life Ins. Co. v. Mellott* (Civ. App.) 57 S. W. 887.

In an action for injuries to a passenger, a question asked a medical witness as to symptoms of a person injured in a manner like plaintiff held objectionable, as leading. *International & G. N. R. Co. v. Bibolet*, 24 C. A. 4, 57 S. W. 974.

In an action for injuries to a passenger, a question asked a medical witness as to recovery of person injured held objectionable, as leading. *Id.*

A hypothetical question to an expert witness is not objectionable, because calling for an answer drawing deductions from the facts and bearing on a fact in issue for the injury. *International & G. N. R. Co. v. Mills*, 34 C. A. 127, 78 S. W. 11.

Expert testimony as to the probable result of the failure to replace a womb after childbirth held unauthorized by the evidence, in an action for injuries to plaintiff's wife. *Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Civ. App.) 78 S. W. 558.

A hypothetical question in an action for injuries, containing as a part of the history the fact that plaintiff had a lawsuit pending, etc., held properly disallowed. *International & G. N. R. Co. v. Goswick* (Civ. App.) 83 S. W. 423.

A hypothetical question asked of certain physicians, in an action for injuries, containing as an element that plaintiff had a case pending in court, etc., at the time of his examination, at which he made certain declarations, held properly disallowed. *International & G. N. R. Co. v. Goswick*, 98 T. 477, 85 S. W. 785.

A hypothetical question should not exclude facts necessary to render the answer of value to the jury. *El Paso Electric Ry. Co. v. Bolgiano* (Civ. App.) 109 S. W. 388.

A hypothetical question to an expert held properly refused because of the omission of a fact in evidence which might have affected his answer. *De Hoyos v. Galveston, H. & S. A. Ry. Co.*, 52 C. A. 543, 115 S. W. 75.

A hypothetical question not supported by the evidence is properly excluded. *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 C. A. 110, 116 S. W. 93.

Rule governing assumption of facts as a basis for hypothetical questions, stated. *Galveston, H. & S. A. Ry. Co. v. Powers*, 54 C. A. 168, 117 S. W. 459.

A question to an expert witness held to be argumentative. *Houston & T. C. R. Co. v. Johnson* (Civ. App.) 118 S. W. 1150.

A hypothetical question assuming a fact not proved held improper. *Pecos & N. T. R. Co. v. Coffman*, 56 C. A. 472, 121 S. W. 218.

In an action for death of a switchman, a hypothetical question held not objectionable as not based on the evidence. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

A hypothetical question to a witness, which is based on facts not shown by the evidence, is erroneous. *Galveston, H. & S. A. Ry. Co. v. Noelke* (Civ. App.) 125 S. W. 969.

A hypothetical question propounded to a witness should embrace sufficient facts to enable him to give an intelligent answer. *Missouri, K. & T. Ry. Co. of Texas v. Golson* (Civ. App.) 133 S. W. 456.

A hypothetical question held improper for assuming a fact not shown by the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 133 S. W. 499.

In a personal injury action, a hypothetical question to a physician as to the nature of the injury held based on matters legitimately drawn from plaintiff's testimony. *Gulf, W. T. & P. Ry. Co. v. Abbott* (Civ. App.) 116 S. W. 1078.

All the facts assumed by a hypothetical question need not have been testified to; it being sufficient if the party expects to show them, or if it appears that afterwards proof in regard to such facts is made. *Id.*

A hypothetical question on a question of physical condition may be based upon conflicting testimony. *Id.*

It was error to permit witnesses to answer hypothetical questions, where the evidence failed to sustain the hypothesis. *St. Louis & S. F. R. Co. v. Dean* (Civ. App.) 152 S. W. 527.

A hypothetical question was not improper because it did not embrace precisely the language of the evidence, where it gave substantially what the evidence showed. *Trinity & B. V. Ry. Co. v. McCune* (Civ. App.) 154 S. W. 237.

In an action for the death of a brakeman, held, on the facts in evidence, that a hypothetical question assuming that deceased, while flagging trains, should notify the trainmen was proper. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

125. — Scope and sufficiency of answers.—An answer to a hypothetical question is properly excluded where one of the facts on which the hypothesis is based is not shown to exist. *Hicks v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 71 S. W. 322.

An expert asked a hypothetical question may not give an answer based partly on his understanding of the evidence, and not solely on the facts supposed in the question. *Hicks v. Galveston, H. & S. A. Ry. Co.*, 96 T. 355, 72 S. W. 835.

In an action for injuries to a passenger by derailment of the train, evidence of defendant's roadmaster that passenger train can be safely run over a track submerged with water held properly excluded. *Chicago, R. I. & P. Ry. Co. v. Cain*, 37 C. A. 531, 84 S. W. 682.

A witness' opinion, in answer to a hypothetical question respecting a personal injury, held not objectionable as invading the jury's province. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.) 115 S. W. 57.

A witness' answer to a hypothetical question that a particular blow would probably injure the sciatic nerve was not objectionable as being speculative, and cured a preceding answer objectionable on that ground. *Id.*

The evidence need not be precisely the same as the facts incorporated in a hypothetical question to an expert; it being sufficient if it is substantially the same. *Kemendo v. Fruit Dispatch Co.* (Civ. App.) 131 S. W. 73.

It is not improper to allow an expert witness, in giving an opinion in answer to a hypothetical question, to make an explanation of the reasons on which he bases his conclusion, unless he introduces matters not within the purview of the question. *Gulf, W. T. & P. Ry. Co. v. Abbott* (Civ. App.) 146 S. W. 1078.

126. Facts forming basis of opinion.—In an action for injuries to locomotive engineer, testimony of physician as to plaintiff's incapacity after the injury to perform duties of an engineer held properly admitted. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365.

Witnesses giving opinion as to probable loss in a shipment of cattle if handled in the usual way held entitled to testify to condition of cattle in later shipments. *True Bros. v. St. Louis, B. & M. Ry. Co.* (Civ. App.) 143 S. W. 298.

In an action against a carrier for injuries to a race horse during transportation, a witness testifying to the value of the horse held properly permitted to base his estimate on the races the horse had won. *Galveston, H. & S. A. Ry. Co. v. Crippen* (Civ. App.) 147 S. W. 361.

127. References to authorities on subject.—Physicians may testify as to matters the knowledge of which they have learned from the study of standard medical works. *For-dyce v. Moore* (Civ. App.) 22 S. W. 235.

In a suit against a railroad for negligence in providing medical attention for an employé, injured in the knee, a physician testifying for plaintiff was permitted, after stating that a compound comminuted fracture not receiving proper attention for a period of 15 hours would be a great deal more likely, if not practically certain, to become infected, and by reason of the weakened condition of the patient render him more easily a prey to septic germs, and that these germs multiply rapidly in a proper soil like blood and serum, and to further state "so that from a single germ, according to Koch, in 24 hours more than 8,000,000 would develop. They divide themselves by fission once every hour." Held, that this testimony was hearsay; the witness' statement not purporting to be an expression of his own opinion or knowledge of the subject on which he was speaking, but that of the person Koch. *Missouri, K. & T. Ry. Co. of Texas v. Graves*, 57 C. A. 395, 122 S. W. 458.

A witness may give his opinion on the market value of stock based on daily market reports. *Texas & P. Ry. Co. v. Isenhower* (Civ. App.) 131 S. W. 297.

128. Experiments and results thereof.—Evidence of an expert, obtained from experiments made by others at his request, but not in his presence, held not admissible. *Texas Brewing Co. v. Walters* (Civ. App.) 43 S. W. 548.

Where a plaintiff complains of anæsthetic spots on his body, a physician may testify that he stuck pins into such portions of his body and he did not flinch. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 67 S. W. 769.

129. Cross-examination and re-examination.—It is not proper to ask a physician, on cross-examination, whether it is not a fact that all the authorities lay down a certain rule, where he has not referred to any book or authority in such a way as to make it admissible to contradict him. *Galveston, H. & S. A. Ry. Co. v. Hanway* (Civ. App.) 57 S. W. 695.

In an action by an employé for injuries through negligence, defendant held entitled to show by plaintiff's medical witness that his original diagnosis of the injuries was incompatible with subsequent developments. *Chicago, R. I. & M. Ry. Co. v. Harton*, 40 C. A. 235, 88 S. W. 857.

Evidence in an action for injuries to a passenger while boarding a train held admissible on cross-examination of a physician who had given an opinion as an expert witness on a hypothetical question. *Galveston, H. & S. A. Ry. Co. v. Fink*, 44 C. A. 544, 99 S. W. 204.

In an action for death of a servant, a physician held entitled to testify that in his opinion intestate died from inhaling paint fumes. *Houston & T. C. R. Co. v. Rutland*, 45 C. A. 621, 101 S. W. 529.

In an action for alleged injuries resulting from the derailment of a car, where physicians had testified that they failed to find any injury to plaintiff as a result of the derailment, their testimony that if plaintiff's liver had been injured, they could not have discovered that fact from any external signs or from palpitation, held admissible in test of their ability to accurately determine from the examination they made whether she had been internally injured as claimed by her. *Houston & T. C. R. Co. v. Lindsey*, 51 C. A. 67, 110 S. W. 995.

On cross-examination of expert held extracts from medical works may be incorporated in questions. *Gulf, C. & S. F. R. Co. v. Farmer*, 102 T. 235, 115 S. W. 260.

In an action for injuries to a passenger, held proper, on the cross-examination of an expert witness, to bring out the fact that neurasthenia could exist without any objective symptoms being present. *Missouri, K. & T. Ry. Co. of Texas v. Dalton*, 56 C. A. 82, 120 S. W. 240.

In a personal injury action certain testimony of an expert medical witness held competent to test his skill and accuracy. *Missouri, K. & T. Ry. Co. of Texas v. Farris* (Civ. App.) 126 S. W. 1174.

In a personal injury action it was error to refuse to permit defendant to refer to and use books written by standard medicine authorities in cross-examining plaintiff's medical expert. *Gulf, C. & S. F. Ry. Co. v. Dooley* (Civ. App.) 131 S. W. 831.

A street railway company, sued for personal injury, held entitled to make a stated showing to rebut any inference that a testifying medical expert favored it. *Metropolitan St. Ry. Co. v. Houghton* (Civ. App.) 134 S. W. 422.

Where a witness for defendant, in an action against carriers for injuries to live stock during shipment, testified that the stock would be in better condition if delayed and fed and watered, a hypothetical question on cross-examination as to his preference between having animals shipped directly in a stated number of hours and having them delayed for food and water, and his answer that he would rather have a direct transportation, held not admissible to impeach his testimony. *Galveston, H. & S. A. Ry. Co. v. Young & Webb* (Civ. App.) 148 S. W. 1113.

In an action against a railroad company for damages for injuries to a female plaintiff, certain questions to an expert held proper to test his skill and knowledge. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922.

130. Contradiction.—Where plaintiff, in action for personal injuries, exhibits his wounds to the court, and physicians testify that he could not wear artificial legs, defendant is entitled to examination by experts of its own selection. *Chicago, R. I. & T. Ry. Co. v. Langston*, 19 C. A. 568, 47 S. W. 1027.

In an action for personal injuries, where plaintiff exhibited her wounds to the jury, held, that defendant is entitled to examination by its own experts. *Chicago, R. I. & T. Ry. Co. v. Langston*, 19 C. A. 568, 48 S. W. 610.

Where plaintiff in an action for personal injuries has exhibited them to the jury, and physicians have testified in relation to them, defendant is entitled to have an examination by experts of its own selection. *Chicago, R. I. & T. Ry. Co. v. Langston*, 92 T. 709, 51 S. W. 331.

In an action for injuries by being struck by a train, a rule of the defendant held admissible to show the qualifications of an alleged expert witness, though it was not claimed that the train by which plaintiff was struck violated such rule. *Missouri, K. & T. Ry. Co. of Texas v. Owens* (Civ. App.) 75 S. W. 579.

A medical expert, who testified that plaintiff was permanently paralyzed, could not be discredited by proving that he had given similar testimony as to the condition of the plaintiff in another case, and that that plaintiff did not prove to be permanently paralyzed. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

In an action on a benefit certificate, in which physicians testified for defendant that when they operated on insured they found some evidence of womb trouble, testimony of insured's husband that such physicians never advised him of such trouble held admissible as bearing on the weight to be given the testimony of the physicians. *Modern Brotherhood of America v. Chandler* (Civ. App.) 146 S. W. 626.

VII. Comparison of Handwriting

131. Competency of expert.—Witness held to have such knowledge of handwriting as to be competent as expert. *Bratt v. State*, 38 Cr. R. 121, 41 S. W. 622.

A witness, by inspection and handling of papers, may become sufficiently acquainted with the handwriting of the persons writing them to testify in relation thereto, without ever having seen them write. *Stone v. Moore* (Civ. App.) 48 S. W. 1097.

A witness held competent to testify that transfer written on back of land certificate was in same handwriting as certain letters received at land office. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

132, 133. Standard of comparison.—Rule as to proof of signature by comparison of handwriting. See *Cook v. Bank* (Civ. App.) 33 S. W. 998.

An instrument which is irrelevant to the issues held inadmissible as a basis for comparison of handwriting. *Sheppard v. Love* (Civ. App.) 71 S. W. 67.

134. Examination of expert.—On an issue as to which of two deeds was genuine, an expert can testify that they were not executed by the same person. *Bell v. Hutchings* (Civ. App.) 41 S. W. 200.

Where a genuine signature in the handwriting of a grantor in a deed is established, an expert may testify as to whether or not the deed is in the same handwriting. *Whitaker v. Thayer*, 38 C. A. 537, 86 S. W. 364.

VIII. Effect of Opinion Evidence

135. **Opinions of witnesses in general.**—In a suit for damages the plaintiff stated in a general way that he was damaged \$100. The evidence in detail failed to establish more than \$40 damage, but the jury returned a verdict for \$75. Held, that the verdict was not supported by the evidence. *I. & G. N. Ry. Co. v. Phillips*, 63 T. 590.

In an action for damages the plaintiff stated that he had been damaged \$50, but did not state the facts upon which this estimate was made. Held, that the evidence was too uncertain and unsatisfactory to warrant a verdict for damages. *Hoskins v. Hulling*, 2 App. C. C. § 162.

If the finding of a fact by the court trying a cause is predicated upon the mere opinion of a witness, and the party against whom the fact is found fails to cross-examine the witness to ascertain on what basis of facts the opinion is given, it will on appeal be deemed conclusive. *Burrow v. Zapp*, 69 T. 474, 6 S. W. 783.

Mere opinion of a witness that a delay urged as a counterclaim to a garnishee's liability was about six months held not sufficient to support a judgment for six months' delay. *Scott v. Texas Const. Co. (Civ. App.)* 55 S. W. 37.

In an action against a carrier for negligence and delay in transporting a shipment of mules, the testimony of a witness that the reasonable market value of such mules at the point of destination in the condition they would have been in was from \$50 to \$60 was not sufficient proof of the value of the mules or the damages sustained. *Texas & P. Ry. Co. v. Crowder (Civ. App.)* 157 S. W. 281.

136. **Testimony of experts.**—Expert opinions as means of proof do not conclusively establish or disprove an alleged matter of fact submitted to investigation. *Southern Kansas Ry. Co. of Texas v. West (Civ. App.)* 102 S. W. 1174.

Expert opinions as to the speed of a locomotive when derailed held not conclusive upon a jury. *Galveston, H. & S. A. Ry. Co. v. Gillespie*, 48 C. A. 56, 106 S. W. 707.

Testimony of a secondhand dealer held not to prove the market value of secondhand goods. *Souther v. Hunt (Civ. App.)* 141 S. W. 359.

That a physician who gave expert testimony was originally called to treat plaintiff in error for the purpose of testifying relates to his credibility only, and not to the probative force of his testimony. *St. Louis Southwestern Ry. Co. of Texas v. Horne*, 105 T. 135, 145 S. W. 1186.

A physician's testimony that a month after the accident he found a bruised place on plaintiff, and an internal ailment which would naturally have resulted from the bruise, was sufficient to sustain a finding that an internal ailment resulted from the accident. *Id.*

137. **Conflict with other evidence.**—In a suit on a promissory note, evidence of one expert as to genuineness of surety's signature was not sufficient to support finding for plaintiff, when another expert and the surety testified it was not genuine. *Talbot v. Dillard*, 22 C. A. 360, 54 S. W. 406.

Evidence held to warrant a finding that the transfer of a land certificate was not forged. *Ward v. Cameron (Civ. App.)* 76 S. W. 240.

RULE 37. A PARTY IS ESTOPPED FROM DENYING A FACT WHICH HE HAS DIRECTLY AND WILLFULLY, BY HIS WORDS OR CONDUCT, INDUCED ANOTHER TO BELIEVE, AND TO ACT ON THE BELIEF SO AS TO ALTER HIS OWN PREVIOUS CONDITION, AND WHO WOULD BE PREJUDICED IF THE ADMISSION OF THE FACT WAS RETRACTED

See, also, notes under particular titles.

I. Nature and essentials of equitable estoppel in general.

1. Nature and elements of estoppel in pais.
2. Intent.
3. Knowledge of facts.
4. Reliance on adverse party.
5. Acts done or omitted, and change of position.
6. Benefit to person against whom estoppel is asserted.
7. Prejudice to person setting up estoppel.
8. Default or wrongful act of person setting up estoppel.
9. Estoppel against estoppel.
10. Estoppel against public, government or public officers.
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II. Grounds of estoppel.

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- 38. — Existence and extent of liens and claims.
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- 40. — Validity of bills or notes.
- 41. — Relying and acting on representations.
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- 44. — Contracts.
- 45. — Accounts or settlements.
- 46. Assent to or participation in judicial proceedings.
- 47. — Partition proceedings.
- 48. Acceptance of benefits.
- 49. — Contracts.
- 50. — Sale and conveyance or mortgage of property.
- 51. Permitting improvement or expenditures—Erection of buildings.
- 52. — Construction of railroad.
- 53. — Improvements and expenditures by purchasers of land.

- 54. — Knowledge of facts.
- 55. Permitting sale or mortgage of property.
- 56. — Public or judicial sale.
- 57. Silence.
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- 58½. Particular matters.

III. Persons affected.

- 59. Persons to whom estoppel is available.
- 60. Persons estopped.
- 61. — Purchasers from person creating estoppel.
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- 62½. Estoppel of wife to claim separate property.

IV. Matters precluded.

- 63. Title or claim to property.
- 64. Rights and liabilities under contracts.
- 65. Remedies.
- 66. Availability at law.

I. Nature and Essentials of Equitable Estoppel in General

1. Nature and elements of estoppel in pais.—Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is precluded both at law and in equity from asserting the right which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract or of remedy. It must have reference to a present or past state of things; if it refers to a future state of things, it is a mere expression of intention or opinion, or is to be governed by the laws of contract. *Edwards v. Dickson*, 66 T. 613, 2 S. W. 718.

Estoppel in pais defined. *El Paso & S. W. R. Co. v. Eichel & Welkel* (Civ. App.) 130 S. W. 922.

2. Intent.—That defendant, who conveyed property to another, who in turn conveyed to defendant's wife, intended the conveyance to his wife to state that it should be her separate property held not to estop him from claiming that he did not intend to give her the property, but conveyed it to her to avoid claims of creditors. *Du Perier v. Du Perier* (Civ. App.) 126 S. W. 10.

In trespass to try title, a charge on estoppel, making intent to have defendant act on statements made a requisite, held improper. *Bender v. Brooks* (Civ. App.) 130 S. W. 653.

3. Knowledge of facts.—A. sold an animal to B., and afterwards sold the same animal to C., B. being present and asserting no claim thereto. B. testified that at the time of the sale he did not know that the animal sold to C. was the same animal sold to himself, and it was held that he was not estopped from recovering the animal from C. *Wright v. Bonta*, 19 T. 385.

If a doubt exists between parties as to their rights, and both have the same knowledge or means of knowledge of facts involving such rights, and there is no fraud, misrepresentation or concealment, a compromise made between them will be enforced, although the final issue may be different from that anticipated and would not have been decreed by a court. *Gilliam v. Alford*, 69 T. 267, 6 S. W. 757.

Where defendant bank claimed that plaintiff was estopped from recovering money misapplied by his cashier, the failure of the court to condition such estoppel on defendant's ignorance of the cashier's authority held not error. *Iron City Nat. Bank v. Fifth Nat. Bank*, 31 C. A. 308, 71 S. W. 612.

Defendant, having obtained an extension of a note to secure the price of certain hose with knowledge that a portion thereof failed to comply with a warranty, held estopped in an action on the note extended to plead a breach of warranty as a defense. *Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Civ. App.) 95 S. W. 1131.

If a buyer accepts materials which are patently defective, it is estopped from denying that they are not of the character bargained for. *Gorham v. Dallas, C. & S. W. Ry. Co.* (Civ. App.) 106 S. W. 930.

One held not estopped from claiming damages for the timber cut on his land, because his agent had pointed out to defendant the lines within which the timber could be cut. *Clevenger v. Blount*, 103 T. 27, 122 S. W. 529.

In trespass to try title, a charge on estoppel, making actual knowledge of the truth of statements made a requisite, held improper. *Bender v. Brooks* (Civ. App.) 130 S. W. 653.

In order for a person to ratify a land sale contract executed by his co-owner, it is essential that he agree to same with knowledge of its material terms. *Parker v. Naylor* (Civ. App.) 151 S. W. 1096.

4. Reliance on adverse party.—Conduct which does not mislead held not to work an estoppel. *Roach v. Springer* (Civ. App.) 75 S. W. 933.

One who by his acts knowingly induces another to assume burdens he would not otherwise have undertaken is estopped from doing acts to the prejudice of the latter, and inconsistent with the acts relied on by him. *Woods v. Lowrance*, 49 C. A. 542, 109 S. W. 418.

To establish an equitable estoppel, it must appear that another relied in good faith on representations made, and was led to change his position for the worse. *Kopperl v. Standard Distilling Co.* (Civ. App.) 119 S. W. 1159.

A lessee held not estopped to claim rent after the sublessee's removal. *Goldman v. Broyles* (Civ. App.) 141 S. W. 233.

An adjoining owner held not estopped by an invalid parol agreement from claiming her title as against purchaser, who did not rely on the agreement. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

5. Acts done or omitted, and change of position.—A., having a judgment against B., and an execution on land of B., employed C. to attend the sheriff's sale and buy the land in for A. C., having attended the sale and purchased the land, some time afterwards procured from the sheriff a deed to himself under which he claimed the land adversely to A. Afterwards A. procured a sale of the same land under an execution on his judgment, at which he became the purchaser. Held, that A. was not thereby estopped from claiming the benefit of the purchase made by C. at the first sale, although the fact might be used as evidence of A.'s abandonment of the contract made with C., subject to explanation by the evidence. *Byrnes v. Morris*, 53 T. 214.

An estoppel rests upon actual or constructive fraud. The action of a land-owner in fencing and claiming to a fixed point on the line of his survey will not estop him from claiming that the line be extended, when his action has not caused others to alter their position regarding the property; and the establishment of his claim in connection with acts done by him would not operate as a fraud on any one. *Tucker v. Smith*, 68 T. 473; 3 S. W. 671.

A declaration, though untrue, cannot operate as an estoppel if the person to whom it is made is not induced by it to do something which he was not under legal obligation to do. *Railway Co. v. Gordon*, 70 T. 80, 7 S. W. 695.

One held not estopped by conduct, where another was not induced thereby to do the act complained of. *Missouri, K. & T. Ry. Co. of Texas v. Dennis* (Civ. App.) 84 S. W. 860.

It is the essence of an estoppel that the person claiming its benefit was induced thereby to do the things he did. *Cowans v. Ft. Worth & D. C. Ry. Co.*, 49 C. A. 463, 109 S. W. 403.

Estoppel cannot be invoked to protect a person from the legal consequences of his act or omission, where such act or omission was in no wise induced by the act or omission of the other party relied on as constituting the estoppel. *Head v. Pacific Express Co.* (Civ. App.) 126 S. W. 682.

To constitute an estoppel in pais, the matters claimed to constitute an estoppel must have in some material respect influenced the conduct of the other party. *Gose v. Coryell* (Civ. App.) 125 S. W. 1164.

Plaintiff held not to have changed his position by reason of taking certain personal property, and was therefore not entitled to claim that defendant was estopped to deny that the firm, and not an individual partner, owned the property. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

6. Benefit to person against whom estoppel is asserted.—A cotenant, not having received any benefit from a contract for the sale of the property, held not estopped to deny that his cotenant had authority to bind him by the contract. *Naylor v. Parker* (Civ. App.) 139 S. W. 93.

7. Prejudice to person setting up estoppel.—To render available an estoppel, the one invoking it must establish that, unless the same is allowed, injustice will result. *Blackburn v. Delta County*, 48 C. A. 370, 107 S. W. 80.

A partner fraudulently induced to enter a partnership held not estopped to deny liability on a note given for indebtedness of the former firm by his partner without his consent, where the extension of time for payment allowed by the note was not shown to have caused the creditor injury. *Beene & Trotter v. Rotan Grocery Co.*, 50 C. A. 448, 110 S. W. 162.

There can be no estoppel, unless some one has been caused to act to his injury or hurt by the party sought to be estopped. *Franklin v. Texas Savings & Real Estate Inv. Ass'n* (Civ. App.) 119 S. W. 1166.

Evidence held to show that the payee of notes to which the maker had forged the name of another as co-maker suffered no pecuniary loss from delay of the person whose name was forged in notifying the payee of the forgery. *Stockyards Nat. Bank v. Smith* (Civ. App.) 125 S. W. 454.

Attorneys held not estopped by answer alleging that a conveyance was upon a contingency as against a subsequent purchaser who did not rely thereon and who paid nothing of value for his conveyance. *Morris v. Short* (Civ. App.) 151 S. W. 633.

If defendant railroad company was not misled or induced to prejudicially alter its position by an order purporting to remove a minor's disabilities, the minor would not be estopped from asserting its invalidity because he had, by his father's permission, appropriated the proceeds of his own labor for some time. *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

8. Default or wrongful act of person setting up estoppel.—A party to a collusive or fraudulent proceeding cannot be heard to complain of its fraudulent nature on his own failure to profit by the transaction. *Dilley v. Jasper Lumber Co.* (Civ. App.) 114 S. W. 878.

A grantee who obtained his deed by fraud cannot rely on an estoppel against the grantor to deny his title, based on her silence while he was making improvements. *Chambers v. Wyatt* (Civ. App.) 151 S. W. 864.

9. Estoppel against estoppel.—A mortgagee having foreclosed, sequestered, and replevied the property, in an action on the replevy bond he cannot plead, by way of estoppel, the mortgagor's prior agreement to permit private sale of the goods. *Cameron v. Hinton*, 92 T. 492, 49 S. W. 1047.

10. Estoppel against public, government or public officers.—The doctrine of estoppel does not ordinarily apply to a state as it does to an individual. The only exception to the rule is in those cases in which the act sought to be made binding was done in her

sovereign capacity by legislative action or resolution. Thus, University league No. 2 was located and surveyed in 1839, and the Tucker survey in 1841. The north line of University league and south line of Tucker league was a common boundary between the two. In 1854 N., the county surveyor, at the request of the owner of the Tucker league, ran off the same and established its south boundary line—not the true line, but within the University league and south of its north boundary line. In 1856 M., county surveyor, under the act of the legislature of August 30, 1856, subdivided University league into tracts of one hundred and sixty acres. He commenced on south side of league and worked north, and surveyed and recognized as its north line a line corresponding with the south line of the Tucker league as established by him in 1854; and this line was generally recognized in the neighborhood as the true division line between the University league and the Tucker survey. The state afterwards sold off the league in accordance with the subdivisions made by N. Subsequently it was ascertained that the north line of the Tucker survey as recognized by the surveyor was not the true line, and B., then county surveyor, was ordered by the proper state authority to subdivide that portion of the University league lying between the line originally recognized by N., and the true line in fact, which embraced the land in controversy, the same having been bought from the state by H. Before this mistake was ascertained S. had also bought the land in controversy as a part of the Tucker survey, having reference to the lines as they were then supposed to exist, and paid a valuable consideration therefor. In a contest between these two claims it was held that the purchaser from the state was not estopped by the action of the county surveyor. *Saunders v. Hart*, 57 T. 8.

The fact that the state accepted in payment of loans warrants issued by it in violation of the constitution held not to preclude it from denying the validity of the warrants. *Houston & T. C. R. Co. v. State* (Civ. App.) 41 S. W. 157.

A county held estopped from claiming part of lands conveyed with reference to a survey made by it, on the ground that said survey was erroneous. *Colonial & U. S. Mortg. Co. v. Tubbs* (Civ. App.) 45 S. W. 623.

When the commissioner of the land office has no authority to dispose of school lands, he could do no act which would estop the state and a person claiming thereunder from claiming title to such lands. *Childress County Land & Cattle Co. v. Baker*, 23 C. A. 451, 56 S. W. 756.

The state held not estopped by an act of an officer in the exercise of a power not delegated to him. *Carothers v. Rogan*, 96 T. 113, 70 S. W. 18.

A city having permitted a county to occupy and improve with costly buildings land dedicated as a municipal square held estopped to claim the property as against the county. *City of Victoria v. Victoria County* (Civ. App.) 94 S. W. 368.

The fact that the commissioner of the general land office adopted a survey made by the owners of a grant under the confirmation act of 1852 to the extent of delineating the same on a map did not estop the state from thereafter claiming that the survey was incorrect. *Sullivan v. State*, 41 C. A. 89, 95 S. W. 645.

The fact that a party seeking to purchase certain school land was led by the act of the state land commissioner to make a mistake which caused him to lose the chance to purchase the land does not act as an estoppel against the state. *Hamilton v. Gouddy*, 46 C. A. 506, 103 S. W. 1117.

Where the commissioners' court without authority contracted with the county clerk to pay him a certain sum for work in indexing the records in his office and paid him therefor, the county is not estopped to deny the validity of the contract or recover the amount paid. *Tarrant County v. Rogers* (Civ. App.) 125 S. W. 592.

Right of city by virtue of estoppel to use of county building stated. *City of Victoria v. Victoria County*, 103 T. 477, 129 S. W. 593.

State and county officers held not estopped from proceeding against a liquor dealer criminally for doing business under a void license. *Lane v. Schultz & Buss* (Civ. App.) 146 S. W. 1009.

10½. Pleading.—See notes under Art. 1827, § 107; Art. 1910, § 48.

II. Grounds of Estoppel

11. Inconsistency of conduct and claims in general.—The heirs at law are not estopped from averring the minority of the testator and consequent nullity of his will by having dealt with and treated him as of full age and capable of acting *sui juris*. *Moore v. Moore*, 23 T. 637.

In a suit instituted against a railroad to recover the penalty for an overcharge on freight from A. to M., it having been proven that defendant had at all times charged for seventy-one miles as the correct distance, held, that it was estopped from denying that as the true distance. *I. & G. N. R. R. Co. v. Pichard*, 1 App. C. C. § 435.

When a railroad company receives articles for transportation as baggage, its agent knowing at the time that such articles are not properly baggage, the company is estopped from denying the fact to be as admitted. *T. & P. Ry. Co. v. Capps*, 2 App. C. C. § 34.

The form upon which a telegram was written contained a condition that a claim for damages should be presented within thirty days after sending the message. Within thirty days after delivering the message, the sender by letter notified the superintendent of the company that the message had not been delivered, and claimed \$200 damages. The receipt of the letter was acknowledged and the statement made that the claim was being investigated, and as soon as the investigation was completed the sender should be informed of the decision of the company. Held, that in a suit for damages afterwards brought the company was estopped from denying the sufficiency of the notice. *W. U. T. Co. v. Pells*, 2 App. C. C. § 44.

The declarations of a ward made to his guardian before attaining his majority that he would soon be twenty-one years old, and that he would, after attaining his majority, allow the guardian credit for goods purchased of him, is not binding on the ward after he attains his majority, either as a contract or by way of estoppel. *Jones v. Parker*, 67 T. 76, 3 S. W. 222.

Claimant in sequestration held estopped to assert that his title was not involved in the suit. *Barton v. Stroud-Gibson Grocer Co.* (Civ. App.) 40 S. W. 1050.

One who sought to have a road opened held not estopped, after the proceedings had resulted unfavorably, to show that he had a private right of way at the same point. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

Where a bank to which cotton had been pledged for advances entered a credit to the buyer from the pledgor under a mistake as to the price, it was not estopped to deny the buyer's right to deduct a portion of the price in settlement of a previous debt of the pledgor. *First Nat. Bank v. C. A. Andrews & Co.* (Civ. App.) 77 S. W. 956.

That a buyer paid a part of the price, and sold the goods to another for an increased price, did not estop him to set up a breach of warranty, in an action by the seller for the price. *C. H. Dean Co. v. Standifer*, 37 C. A. 181, 83 S. W. 230.

In a suit by the buyer to rescind a contract of sale for fraud of the seller, the fact that plaintiff was himself guilty of fraud does not preclude relief. *Blair v. Baird*, 43 C. A. 134, 94 S. W. 116.

One held estopped by his course from denying title to land. *Lodwick Lumber Co. v. Taylor* (Civ. App.) 99 S. W. 192.

A party is estopped from escaping liability where he causes another to lose some right or vantage ground by his acts, words, or conduct. *Milmo Nat. Bank v. Cobbs*, 53 C. A. 1, 115 S. W. 345.

An heir, who acted as joint administrator with another, held estopped from claiming any damages against the latter because of the inadequacy of the price received for property of the estate. *Moore v. Woodson*, 53 C. A. 588, 116 S. W. 608.

An owner is not estopped by conduct from denying liability for lumber bought by a contractor and used in rebuilding the owner's residence, merely because he and the contractor, without notifying the materialman, agree upon a plan of the house differing from the plan under which the materialman agreed with the contractor to furnish the lumber. *Marks v. Jones* (Civ. App.) 154 S. W. 618.

12. Assumption of capacity or authority.—In a suit against the collector of taxes and his sureties for the recovery of money collected by him and not paid over, it was held that he and his sureties were estopped from denying his official character. *Burnett v. Henderson*, 21 T. 588.

The alteration of an official bond by the commissioners' court, by erasing therefrom the name of one of the sureties, without the consent of the remaining sureties, will discharge all of the sureties, but the principal who afterwards performed official duties is estopped from denying the validity of the bond. *Wilbarger County v. Bean*, 3 App. C. C. §§ 17, 18.

In a suit on the official bond of a tax collector, the signatures of the collector, and of the sureties to the bond, estop them from denying his official character. *King v. Governor Ireland*, 68 T. 682, 5 S. W. 499.

13. Assertion of title or right in general.—Persons claiming title to property under a petitioner for a road across the same will be bound by his acts regarding the same. *Grace v. Walker*, 95 T. 39, 64 S. W. 930.

14. Possession or acts of ownership under title or claim.—One who acquires possession of land from a tenant and holds only under him is estopped from denying the landlord's title. *Swan v. Busby*, 24 S. W. 303, 5 C. A. 63. See *Welder v. McComb*, 30 S. W. 822, 10 C. A. 85; *Dodge v. Phelan*, 21 S. W. 309, 2 C. A. 441.

15. Claim or position in judicial proceedings.—Parties actively urging the appointment of a commissioner and thereafter recognizing his authority are estopped by his acts. *Grande v. Chaves*, 15 T. 550; *Ryan v. Maxey*, 43 T. 192.

A party having sued for and recovered money as guardian of a minor is estopped from disclaiming the character in which he acted to avoid the payment to the party entitled to it. *Portis v. Cummings*, 21 T. 265.

In 1870 J., after the death of his wife, gave certain property to each of his children, and executed to his youngest daughter, M., a deed for forty acres of land. This deed was not placed on record, and shortly after its execution J. conveyed the land to others, who had notice of the conveyance, for \$1,000, of which \$600 was loaned in M.'s name. In 1871 M., still a minor, married, and she and her husband immediately instituted suit for the land. Two days after this suit M. and her husband brought suit for the money loaned, and declared their willingness, in case of recovery, to account therefor. Held, that they were not estopped from prosecuting their suit for the land and recovering the same. *Thomas v. Groesbeck*, 40 T. 530.

One of two minors died leaving a large estate incumbered by debts incurred by their guardian. The heirs of the deceased minor applied for partition, which was resisted by the guardian insisting that he should be kept harmless from debts he had incurred on account of the deceased. The heirs then united in an application to the probate court for sale of lands to pay the debts and for partition of the remainder, and the court so ordered. Held, that the married women participating in the proceedings were concluded by the sale under the order. *Ryan v. Maxey*, 43 T. 192.

A wife held estopped to deny validity of deed to her separate estate after suing to recover the price. *Scales v. Johnson* (Civ. App.) 41 S. W. 828.

A principal held estopped to claim that his agent's cause of action had not accrued, where he offered to pay what was due and pleaded limitations. *Cotton v. Rand* (Civ. App.) 51 S. W. 55.

Plaintiff, whose judgment for personal injuries was reversed because evidence was insufficient to show that a certain person was a vice principal of his employer, held not estopped from amending his petition so as to allege that his complaint was made to another, who was a vice principal. *Galveston, H. & S. A. Ry. Co. v. Eckles*, 25 C. A. 179, 60 S. W. 830.

A certain proceeding held not to estop the heirs of an owner of land from claiming the land as against a purchaser at an execution sale. *Lutcher v. Allen*, 43 C. A. 102, 95 S. W. 572.

In an action for a master's fraud in representing that he was carrying accident insurance for his employes, the servant could not recover both the deductions made from

his wages to be used as premiums and the amount of insurance purchasable with such deductions. *Williams v. Detroit Oil & Cotton Co.*, 52 C. A. 243, 114 S. W. 167.

16. — **Claim inconsistent with previous claim or position in general.**—A. sued B. to subject a tract of land, a part of a larger tract, to payment of a pro rata share of the purchase money for the entire tract. B. claimed that A. was estopped from recovering on the ground that suit had been previously brought to enforce the vendor's lien against the owner of the other part of the original tract, that the owner of this tract was not made a party thereto because the land had been sold by the original vendee, and A., the plaintiff in the suit, had stated that the balance of the land was sufficient to pay the entire debt, these facts having been communicated to B. before his purchase. Held, the evidence was insufficient to establish an estoppel. *Peters v. Clements*, 52 T. 140.

In a suit by children for damages to real estate, the separate property of their deceased mother, the father joined as next friend of one of the heirs. Held, that he would be estopped from thereafter asserting claim for damages for the same act to his life estate in one-third of the land. *Lee v. Turner*, 71 T. 264, 9 S. W. 149.

An administrator is estopped to deny that there was a sale, where he has procured a judgment for the purchase price, and foreclosure of vendor's lien. *Miller v. Anders*, 21 C. A. 72, 51 S. W. 897.

Filing and allowance of a claim against decedent's estate, on payment of which a mortgagee was to convey the mortgaged lands to the estate, did not estop him from asserting his lien on such lands where claim was not paid. *Sutherland v. Elmendorf*, 24 C. A. 137, 57 S. W. 890.

Consignor, electing to hold other parties liable for loss of shipment, held to have thereby released carrier. *Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co.*, 32 C. A. 93, 74 S. W. 567.

That a widow, acting as independent executrix of her husband's estate, allowed a claim against it, held not to estop her from subsequently claiming priority of her widow's allowance, subsequently made, after the administration had been changed to an administration under the order of the court. *Kling v. Battaglia*, 38 C. A. 28, 84 S. W. 839.

An administratrix with the will annexed held not estopped to claim payment of her year's allowance from the proceeds of property covered by a deed of trust by joining with the creditor in a petition for the sale thereof. *Id.*

17. — **Claim inconsistent with contract or title previously asserted.**—Defendant held not estopped, under the evidence, from maintaining that \$200 owing him from an insurance company was exempt. *Fife v. Netherlands Fire Ins. Co.* (Civ. App.) 61 S. W. 160.

18. — **Defense or objection inconsistent with previous claim or position in general.**—Where the parties in trespass to try title, claim through a common source, the defendant is not thereby estopped from showing a superior outstanding title in a third party. *Koenigheim v. Miles*, 67 T. 113, 2 S. W. 81.

Plaintiffs in partition held not estopped to deny a person's title by reading his will in evidence to show that all parties claimed from a common source. *Siebert v. Lott*, 20 C. A. 191, 49 S. W. 783.

Defendants, who bring in a third person as a party, held not entitled to complain of the court's action in settling that person's rights. *Ellis v. National Exch. Bank*, 38 C. A. 619, 86 S. W. 776.

A defendant by pleading non est factum to a written contract sued on, and setting up a verbal contract antecedent thereto, is not estopped to abandon such pleas, and rely upon the written contract by a subsequent amended answer. *Colorado Canal Co. v. McFarland & Southwell*, 50 C. A. 92, 109 S. W. 435.

One accused of fraudulently disposing of mortgaged property having admitted that he received possession of the property by agreeing to give a mortgage thereon, and that he did execute and deliver the mortgage, should not be permitted to show that, in fact, he did not do so. *Loggins v. State* (Civ. App.) 149 S. W. 170.

19. — **Position inconsistent with previous assertion of title in another in general.**—The heirs of L. brought suit against three defendants to recover a league of land granted to their ancestor as a colonist in April, 1833. The defendants pleaded, among other matters, that plaintiffs' ancestor was an alien, that plaintiffs were alien enemies, that the land had been forfeited by an abandonment of the country, etc. The defendants also claimed the land by purchase at administration sale and under tax titles. The court say: The title of the plaintiff was sufficiently proved. The defendants had acknowledged it, and had asserted its existence and validity in various ways. The defendant H. had made it the subject of administration in the probate court; the defendant I. had purchased and claimed title under it. They had given in evidence, and claimed under their several tax titles and administrators' deeds, which were based upon and recited the plaintiff's title. Having thus acknowledged and asserted it in their pleadings and evidence, they could not be permitted afterwards to contest its validity. *Hardy v. De Leon*, 5 T. 211.

After the death of the husband certain property was inventoried as community property, but afterwards, on application of the widow, an order was made by the probate court correcting the inventory in this respect. On final settlement the property was partitioned as community property, and the widow inventoried the part decreed to her children as a part of their estate. Held, that she was not estopped from recovering the property so inventoried as her separate property, her conduct not having been fraudulent in its purpose or unjust in its results. *Dunham v. Chatham*, 21 T. 231, 73 Am. Dec. 228.

A widow, appointed administratrix of her husband's estate, inventoried certain property. Afterwards, she and her second husband were appointed administrators of the estate and returned another inventory, omitting the property first mentioned. In a suit by the children of the first marriage for the recovery of the property, it was held that she was not estopped from asserting her title to the property, and it was not necessary for her to allege that in returning the first inventory she acted in ignorance of her rights. *Little v. Birdwell*, 21 T. 597, 73 Am. Dec. 242.

The plaintiffs claimed a league of land by virtue of their sole heirship of Louisa, the only child and sole heir of Sideck, the grantee. The defendant was administratrix

of Teal, who claimed one-half of the land by donation from Sideck, and the remainder as his heir by adoption. Teal had administered upon the estate of Sideck, and had inventoried the land in controversy as the property of the estate. Held, that Teal was not thereby estopped from claiming the land in his own right. *Teal v. Sevier*, 26 T. 516.

A., having bought certain land at sheriff's sale as the property of B., brought suit against him for the land and for partition. C., the son of B., intervened, claiming the land by purchase from the father. Plaintiff replied that the sale by B. to C. was in fraud of creditors and void as to plaintiff, whereupon C. amended his pleadings and claimed a part of the land by inheritance from his mother. Held, that he was not estopped from so claiming. *Collins v. Box*, 40 T. 191.

By treating an owner of lands as the sole owner thereof, in proceedings to open a road, a county was estopped to deny his title by claiming that the same land had been previously condemned and taken. *Northington v. Taylor County (Civ. App.)* 62 S. W. 936.

20. — **By levy of attachment or execution.**—In a suit brought to set aside an execution sale of land, the defendant who acquired title and possession by such sale is estopped from denying the validity of the title down to the person under whom he claims. *Pearson v. Flanagan*, 52 T. 266.

Plaintiff attaching property held under trust deed estopped to complain that the trust deed was not enforced. *Sanger v. Harris (Civ. App.)* 42 S. W. 645.

One who sold goods to one member of a firm, not knowing of the partnership, held not estopped, by suing such member alone, from asserting that no title passed by an assignment of the goods by such partner. *Davis v. Bingham (Civ. App.)* 46 S. W. 840.

A mortgagee's administrator, having procured a decree foreclosing a mortgage for purchase money against the mortgagor's estate, and obtained a sale of the property on execution, held estopped to thereafter assert that the proceedings were ineffectual to pass title to the purchaser. *Flack v. Braman*, 45 C. A. 473, 101 S. W. 537.

21. — **Pleadings.**—Plaintiff held not estopped by an allegation in his pleadings as to the time when a certain law took effect. *Purcell v. Texas & P. Ry. Co. (Civ. App.)* 43 S. W. 836.

Allegations in a petition to enforce an indorser's liability held not to estop plaintiff from insisting on validity of notes. *Norton v. Wochler*, 31 C. A. 522, 72 S. W. 1025.

Certain answer held not to estop the original owner or his heirs from claiming title. *Carlisle v. Gibbs*, 44 C. A. 189, 98 S. W. 192.

An inadvertent error in a pleader held not to work an estoppel against the pleader. *Morse's Heirs v. Williams (Civ. App.)* 142 S. W. 1186.

Allegations in a petition held to estop plaintiff when made by her attorney without her knowledge. *Lovenberg v. Mellen (Civ. App.)* 144 S. W. 317.

22. — **Stipulations.**—A party who has signed and filed a stipulation in a cause that a judgment may be entered against him by a district court cannot question its jurisdiction. *Phelps v. Norman (Civ. App.)* 55 S. W. 978.

Where it was stipulated that at the time of plaintiff's application to purchase land it was subject to sale, a contention that if defendant did not have title under his application he was entitled to possession under an unexpired lease will not be sustained. *Dupree v. Duke*, 30 C. A. 360, 70 S. W. 561.

23. **Failure to assert title or right.**—The lands purchased by a husband before marriage are set apart to his widow as a homestead, and that no claim is presented for her interest in the improvements placed thereon by community funds, does not estop her from asserting such claim. *Hillen v. Williams*, 25 C. A. 268, 60 S. W. 997.

Evidence held to show that a grantee of land was misled by acts and conduct of grantor's husband into believing that he had no interest in the land, and hence the husband was estopped from thereafter claiming such interest. *Stewart v. Profit (Civ. App.)* 146 S. W. 563.

A party cannot have an injunction, where he has acquiesced in the act sought to be enjoined by recognizing it, with full knowledge, or means of knowledge, of his rights, or by acting in a manner inconsistent with its repudiation, or by permitting the other party to deal with the subject-matter under the belief that it has been recognized without objection. *Reitzer v. Medina Valley Irrigation Co. (Civ. App.)* 153 S. W. 380.

24. **Disclaimer.**—When the defendant disclaims as to all the land sued for except a part which he designates by metes and bounds, as to which he pleads not guilty, and on the trial it is shown that the deed under which the plaintiff claims all the land is a forgery, the disclaimer constitutes an estoppel of record, and the plaintiff will be entitled as against such defendants to a judgment for the land to which the disclaimer applies, and the defendants to a judgment for the land claimed by them. *Dodge v. Richardson*, 70 T. 209, 8 S. W. 30.

A statement by plaintiff that he did not own land in controversy, made through a lapse of memory, which did not influence defendants in purchasing the land from another, held not to estop plaintiff from claiming the land. *Waggoner v. Dodson*, 96 T. 415, 73 S. W. 517.

A disclaimer by a defendant, in a suit for land, held not to estop him, in a subsequent suit by a third party, from asserting the defense of limitations. *Webb v. Cole*, 56 C. A. 185, 120 S. W. 945.

A person held estopped to assert an interest in land by statements disaffirming any interest therein. *Bender v. Brooks (Civ. App.)* 130 S. W. 653.

A broker held not estopped from claiming commissions on a sale. *Grogan v. Odell (Civ. App.)* 141 S. W. 169.

25. **Clothing another with apparent title or authority—Agency.**—The recognition of a certain person as an agent held not to estop the principal from denying that such person was his agent on a subsequent occasion. *Owens v. Hughes (Civ. App.)* 71 S. W. 783.

In an action on a contract made by an agent, against both the agent and his principal, the principal was not estopped to object that the agent exceeded his authority in making the contract, by his failure to object to the admission of the contract in evidence. *Tabet v. Powell (Civ. App.)* 78 S. W. 997.

Having by the creation of an agency bestowed on the agent a certain character, the principal is estopped to assert as against third persons that he did not intend to give the agent so much authority. *Birge-Forbes Co. v. St. Louis & S. F. R. Co.*, 53 C. A. 55, 115 S. W. 333.

26. — **Real property.**—Defendant, who had acknowledged that another had title to land held estopped to deny it. *Hitchler v. Boyles*, 21 C. A. 230, 51 S. W. 648.

Where a grantee holding under an unrecorded deed consents that grantor mortgage property, he is estopped from denying validity of mortgage. *Allen v. Exchange Nat. Bank*, 21 C. A. 450, 52 S. W. 575.

Affidavit that one transferring a land certificate was the only heir of the patentee held to work an estoppel against affiant. *Ward v. Cameron* (Civ. App.) 76 S. W. 240.

Where heirs procure sale of decedent's land, their title passes by estoppel. *Whitaker v. Thayer*, 38 C. A. 537, 86 S. W. 364.

Quitclaim deed by cestui que trust and her husband to the trustee held not to estop the cestui que trust from thereafter claiming an equitable interest in the property. *Snouffer v. Heisig* (Civ. App.) 130 S. W. 912.

27. — **Personal property.**—A mortgagor held estopped to deny the mortgagee's power to sell the property to satisfy the debt, where he had asserted the existence of such power to one who purchased at the sale in reliance thereon. *Clack v. Wood* (Civ. App.) 46 S. W. 1132.

In conversion by a seller against a mortgagee of the buyer, the question of the intent of the seller in making a statement to the mortgagee that the mortgage was all right held immaterial. *C. E. Slayton & Co. v. Horsey* (Civ. App.) 91 S. W. 799.

Where the owner of goods placed them in possession of another and allowed him to hold himself out as their owner, and a third person took a mortgage on the goods, the actual owner held estopped to dispute the possessor's apparent title. *B. F. Avery & Sons v. Collins* (Civ. App.) 131 S. W. 426.

28. — **Relying and acting on apparent title or authority.**—Where a principal invests an agent with apparent authority, he is liable to one dealing with the agent in reliance thereon, who has no notice of private instructions limiting such apparent authority. *Conn v. Hagan*, 93 T. 334, 55 S. W. 323.

An owner of personal property investing another with the apparent ownership is estopped to claim title to the property after the party in possession has secured advances from a third person, who believes the title to be in the apparent owner. *Kempner v. Thompson*, 45 C. A. 267, 100 S. W. 351.

29. **Dealing with person asserting title or exercising authority.**—Acceptance by married woman of deed conveying her own property to her for life, remainder to her children, held not to divest her of her title to such property. *White v. Simonton*, 34 C. A. 464, 79 S. W. 621.

A person accepting an unauthorized contract from an agent held estopped to claim that the agent was authorized to make another contract and that he is only asserting the same rights as such other contract would have conferred, and hence no harm had been done. *Connor v. Uvalde Nat. Bank* (Civ. App.) 156 S. W. 1092.

30. **Contracts.**—A minor is not estopped by any agreement made by her guardian in relation to the partition of real estate which has not been sanctioned by a court of competent jurisdiction. *Rainey v. Chambers*, 56 T. 17.

When the purchaser of personal property, under an executory contract for its sale and delivery, inspected it before receiving, he is estopped, as to patent defects, from denying that it was of the character bargained for, and this though he may have received it under protest. *Parks v. O'Connor*, 70 T. 377, 8 S. W. 104.

A purchaser held estopped to plead failure of consideration in an action on notes given for price. *Thomas Mfg. Co. v. Griffin*, 16 C. A. 188, 40 S. W. 755.

Where plaintiff prosecuted defendants for unlawfully selling liquor to his minor son, and defendants pleaded guilty and paid their fine in reliance on plaintiff's promise that, if they would do so, he would not sue them civilly, plaintiff was not estopped from bringing a civil suit. *Lucas v. Johnson* (Civ. App.) 64 S. W. 823.

On an issue of damages for breach of a contract to deliver patented motors, defendant held not estopped to claim damages for failure to deliver the balance contracted for by having given notes for those delivered. *Sun Mfg. Co. v. Egbert & Guthrie*, 37 C. A. 512, 84 S. W. 667.

Sender of a telegraph message held not precluded from showing that the receiving company or its agent was the agent of another company. *Western Union Telegraph Co. v. Craven* (Civ. App.) 95 S. W. 633.

A grantee who had received a check as full payment for land conveyed to him by one whose title was defective by reason of a prior recorded but not properly acknowledged deed held not entitled to repudiate the payment, and to reassert his claim to the land. *Abernathy v. Pickett*, 57 C. A. 552, 122 S. W. 579.

A payee of a note held estopped from asserting that he did not know that the signers on the note were sureties only. *Jackson v. Rollins* (Civ. App.) 128 S. W. 681.

31. — **Recognition of rights.**—Defendants, by recognizing plaintiff's right to an option on county land, when they entered into an agreement with plaintiff for its purchase from the county, held thereafter estopped from denying the validity of the option. *Eliard v. Cox*, 52 C. A. 60, 114 S. W. 410.

32. — **Contracts relating to real estate.**—Grantors of a homestead held estopped to assert that a note received from grantee, reserving a vendor's lien, did not create a lien. *Breneman v. Mayer*, 24 C. A. 164, 53 S. W. 725.

Vendee in a conveyance, having given a note reserving a vendor's lien, held estopped to assert invalidity of lien. *Id.*

Sale with warranty of street railroad property by stockholders held to estop them from afterwards setting up title secured by them through a prior lien. *Parker v. Citizens' Ry. Co.*, 43 C. A. 168, 95 S. W. 38.

A lessee held not estopped from insisting that a barn was included in the property leased to him. *Goodhue v. Hawkins* (Civ. App.) 133 S. W. 288.

33. — **Relying or acting on contract.**—Grantors of a lien contract, defectively acknowledged, held not estopped to assert the invalidity as against a third person subrogated to the rights of the original lienor. *Workman's Mut. Aid Ass'n v. Monroe* (Civ. App.) 53 S. W. 1029.

An agreement by the holder of a note to extend time of payment, though not based on any consideration, may estop him from exercising an option to declare the note due, where the maker was induced to relax his efforts to procure money which he could otherwise have procured. *Corbett v. Sweeney* (Civ. App.) 151 S. W. 858.

34. **Official acts.**—To establish a title in the heirs of an allottee of land by estoppel as against a commissioner in partition, held, that it must be shown that the commissioner held title to the land allotted, that the heirs were ignorant of the true status of the title, and were by this conduct induced to alter their position with reference to their property rights. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

35. **Requests.**—A. received patents in his own name for land in which B. had an equal interest. In 1852 A. and B. made a verbal partition of the lands described in the patents, by which the lands in controversy were set apart to B. Afterwards B. made a verbal partition of the lands among his children, giving the land in controversy to C. and D., and other lands to E. and F. At that time A. had become insane, and B. induced the children of A. to make quitclaim deeds to the several children of himself in accordance with his verbal gift. No consideration was paid for the conveyance. At the date of this deed F. was a minor, was not present and had no knowledge of the transaction. In 1870 C. married G., and in 1873 died without issue, having given his interest in the land in controversy to his wife. D. died intestate without issue. E. died leaving H., his widow, and a daughter, J. B. after the death of his three sons, C., D. and E., conveyed the land in controversy to F., with the avowed purpose to defeat the claim of G. Held, that B. was not estopped from asserting that the conveyance made at his request by the children of A. passed no title, nor was he estopped by his verbal gift and partition among his children from afterwards conveying the land, as they had not been put in possession, nor had they, relying on such title, expended money or otherwise changed their position. *Perrin v. Perrin*, 62 T. 477.

Where a person has acted or refrained from acting in a particular manner on the request of another, the latter is estopped to take any position inconsistent with his request to the other's prejudice. *Sour Lake Co. v. Jackson* (Civ. App.) 130 S. W. 662.

A grantee held estopped from claiming that there had been a breach of warranty. *Id.*

36. **Representations.**—Land pointed out by the grantor as a part of the tract conveyed will pass by estoppel. *Meade v. Boone* (Civ. App.) 35 S. W. 483; *Meade v. Warring* (Civ. App.) 35 S. W. 308; *Meade v. Jones*, 13 C. A. 320, 35 S. W. 310.

Declaration of attaching creditors' attorney, at dismissal of claimant's suit, that he intended to do nothing further held not to estop a suit on claimant's bond. *Deware v. Wichita Val. Mill & Elevator Co.*, 17 C. A. 394, 43 S. W. 1047.

Declarations of parties that property was not a part of their homestead and that it did not contribute to its use might constitute an estoppel. *Howe v. O'Brien* (Civ. App.) 45 S. W. 813.

Where a taxpayer renders several lots in bulk, he is thereafter estopped from claiming that an assessment against them in bulk was illegal. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

In order to estop a married woman from asserting the insufficiency of the certificate of her acknowledgment to a deed, it is essential that she be guilty of some positive act of fraud or of concealment or suppression which will be equivalent thereto. *Kopke v. Votaw* (Civ. App.) 95 S. W. 15.

Where a person with knowledge of the truth makes a false representation of a material fact to a person ignorant of the truth under circumstances reasonably calculated to induce the other person, acting in good faith, and exercising due care, to act thereon, and he acts upon it, the person making the representation is estopped from asserting the truth. *Walker v. Erwin*, 47 C. A. 637, 106 S. W. 164.

A false statement held not one on which an estoppel might be predicated. *Ragley-McWilliams Lumber Co. v. Hare* (Civ. App.) 130 S. W. 864.

37. — **Ownership of property.**—A married man, who induces a creditor to accept a conveyance of his homestead in payment of a debt by a statement that he had no wife, is estopped from setting up the invalidity of the conveyance on the ground that he was then a married man. *Schwarz v. National Bank of Texas*, 67 T. 217, 2 S. W. 865.

One held not estopped by statements from asserting title to land. *Watkins v. Watkins* (Civ. App.) 119 S. W. 145.

Declarations of the owners of a homestead held not to destroy its homestead character. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

38. — **Existence and extent of liens and claims.**—A firm held estopped as against a third person by representations of bookkeeper to claim lien against tenant for store account, but not estopped to claim lien for land. *Cadenhead v. Rogers & Bro.* (Civ. App.) 96 S. W. 952.

39. — **As to financial standing.**—A written certificate by a bank, stating that the county treasurer had a certain credit balance, held not conclusive of the bank's liability to the county. *Anderson v. Walker* (Civ. App.) 49 S. W. 937.

Where the county treasurer had defaulted, it was held insufficient to estop the bank to show that by its action the county was prevented from prosecuting the treasurer; no loss to the county resulting. *Id.*

It was insufficient to estop the bank to show that the treasurer was prevented from being removed or from qualifying as his own successor, no loss resulting. *Id.*

Nor would the bank be estopped where it was not shown that the treasurer and his sureties were insolvent. *Id.*

To entitle a county to interpose an estoppel against a bank to deny that the treasurer had a certain credit balance, the bank's representation must have been made to an officer having control of the county finances, and authorized to take action to protect them. *Anderson v. Walker*, 93 T. 119, 53 S. W. 821.

40. — **Validity of bills or notes.**—Maker of vendor's lien note, who requests another to take it up, and hold it, cannot object to his title, though the agent of the payee had no authority to indorse it. *Henry v. Bounds* (Civ. App.) 46 S. W. 120.

41. — **Relying and acting on representations.**—In an action for the value of a car of corn shipped by defendant to a third person on plaintiff's order, but shipped so that the third person obtained it without first making payment, plaintiff held not entitled to recover on the theory of an estoppel. *Smith v. Landa*, 45 C. A. 446, 101 S. W. 470.

42. **Admissions and receipts.**—In a suit for the hire of personal property, the plaintiff sought to establish a life estate therein by the admissions of one of the defendants, a married woman, who held the same under a deed of gift in which there was no reservation of the life estate in favor of plaintiff. Held, that a married woman was not estopped by bare declarations or admissions, when no one had been in any manner injured thereby, or had acted upon them. *Grooms v. Rust*, 27 T. 231.

A., having received from an executor a certain sum of money due him as a legatee, gave a receipt therefor as being in full of his interest in the estate. Held, that he was not thereby estopped from claiming any additional sum to which he was entitled on final settlement. *Clift v. Wade*, 51 T. 14.

Executrix, returning property in inventory as belonging to estate, held not estopped from claiming title thereto under deed from testator. *Huff v. Maroney*, 23 C. A. 465, 56 S. W. 754.

43. **Assent to or ratification of acts of others in general.**—The owner of a league of land employed a surveyor to resurvey and mark the old lines on which the original marks had become obscure, but in doing the work the surveyor made a new line which conflicted with the original survey. Subsequently the owner had a new survey made in which the original line was followed. Afterwards the land between the two lines was located as vacant land, and a patent issued therefor. It was held that the owner of the league was not estopped from claiming the land lying between the old and new lines. *Love v. Barber*, 17 T. 312.

Two joint patentees executed and recorded a deed of partition between themselves; afterwards, some question arising as to the validity of their patent, a new patent was obtained. Thirty-six years after recording the deed of partition, and twenty-five years after the issuance of the second patent, the heirs of one of the patentees brought suit for partition. Held, that the issuance of the second patent did not work a revocation of the partition, and the fact of plaintiffs having sold to defendants a portion of the land claimed by plaintiffs under the deed of partition estopped them from asserting a right inconsistent with that deed. *Brackenridge v. Howth*, 64 T. 190.

When a railroad company had for several years recognized and maintained a road crossing over its line of railway as a crossing for the public, it was estopped from denying that it was a public road. *T. & P. Ry. Co. v. Anderson*, 2 App. C. C. § 204.

A. and B. were partners engaged in the purchase of cattle in Mississippi to be shipped to Texas and sold. A. made a purchase of cattle at a higher price than he was authorized to pay, shipped the same to B., who with full knowledge of the facts sold the cattle at a loss, which he claimed should be paid by A. Held, that B. was not estopped by the receipt and sale of the cattle, which was necessary to prevent a greater loss and to provide means for paying for them, from claiming that the loss should be borne by A. *Gill v. Wilson*, 2 App. C. C. §§ 380, 381.

Where owners of property subject to a lien sell it, and in the sale make provision for its settlement, the purchasers cannot dispute its validity. *Michigan Savings & Loan Ass'n v. Attebery*, 16 C. A. 222, 42 S. W. 569.

Failure to repudiate act of cashier held not to amount to estoppel. *Iron City Nat. Bank v. Fifth Nat. Bank* (Civ. App.) 47 S. W. 533.

Principals held to have ratified a conveyance by their attorney in fact, by partitioning among themselves lands received in consideration therefor. *Smith v. Cantrel* (Civ. App.) 50 S. W. 1081.

One doing business under a transferred liquor license held estopped to deny the authority of the agent of the former owner to make the transfer. *Faulkner v. Cassidy*, 39 C. A. 415, 87 S. W. 904.

In an action for damages for an unlawful search, plaintiff held not precluded from recovering damages by having consented to be searched after he was illegally arrested. *Regan v. Harkey*, 40 C. A. 16, 87 S. W. 1164.

One cannot recover damages for an act in which he actively participated without fraud or misrepresentation. *Moore v. Woodson*, 53 C. A. 588, 116 S. W. 608.

The beneficiary in a testamentary trust held not estopped to complain of the management of the estate. *Nagle v. Von Rosenberg*, 55 C. A. 354, 119 S. W. 706.

To affect one by acquiescence in the language or conduct of another, the acquiescing party must fully know the conduct or understand the language, so that his acquiescence amounts to voluntary conduct. *Harris Millinery Co. v. Bryan* (Civ. App.) 125 S. W. 999.

Where a cotenant, without authority, signed his cotenant's name to an option contract for the sale of the property, the latter, on being informed, was not bound to repudiate the sale or notify the purchaser of his cotenant's lack of authority on pain of being presumed to have ratified the contract. *Naylor v. Parker* (Civ. App.) 139 S. W. 93.

A parol ratification of an agent's unauthorized sale of land must be sufficient to constitute an equitable estoppel. *Clark & Boice Lumber Co. v. Duncan* (Civ. App.) 143 S. W. 644.

44. — **Contracts.**—A. employed B. as a traveling salesman, it being stipulated that he should make regular written reports, and that a failure on his part operated as a forfeiture of his salary. B. failed to make reports, but was continued by A. in his employment, and after such failure to report was known A. received verbal report from him and sent him out again under the same contract. In an action by B. for his salary, held, that A. was estopped from setting up the breach of contract. *Clegg v. Gee*, 2 App. C. C. § 543.

Father, consenting to dangerous employment of minor son, can nevertheless recover for injuries resulting from employer's negligence. *Texas & P. Ry. Co. v. Putman* (Civ. App.) 63 S. W. 910.

Plaintiff, knowing of the employment of his minor son, held not entitled to recover for injuries from negligence of fellow servant. *Texas & P. Ry. Co. v. Hervey* (Civ. App.) 89 S. W. 1095.

Plaintiff's consent to the employment of her minor son at work in which he was inexperienced, which proximately resulted in his injury, held a bar to plaintiff's recovery therefor. *Pecos & N. T. Ry. Co. v. Blasengame*, 42 C. A. 66, 93 S. W. 187.

Buyer's ordering shipment of goods purchased after receipt of letter from sellers, held not acquiescence in new terms suggested by sellers. *J. B. Brennan & Son v. Dansby & Dansby*, 43 C. A. 7, 95 S. W. 700.

The owner of land held to have ratified his agent's act in employing a broker to sell it so as to make himself liable for commissions. *Dockery v. Maple* (Civ. App.) 125 S. W. 631.

Delay of a person whose name was forged on a note in notifying the payee held not to estop him from asserting a forgery in an action against him on the note. *Stockyards Nat. Bank v. Smith* (Civ. App.) 128 S. W. 454.

45. — **Accounts or settlements.**—If one accepts and records a deed, which was taken in settlement of accounts by one who assumed to act as his agent, after being notified of the same, he is bound by the terms of the settlement made. *Prather v. Wilkins*, 68 T. 187, 4 S. W. 252.

46. **Assent to or participation in judicial proceedings.**—Where a husband attempts to use the privilege of a decree of divorce to uphold a settlement made with the wife, he cannot thereafter complain of its invalidity. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

Where an administrator's sale of land belonging to the estate was invalid, that the heirs received and disposed of the remainder of the estate, without protest, did not estop them from afterward asserting the invalidity of the sale. *Wilkin v. Geo. W. Owens & Bros.*, 102 T. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 132 Am. St. Rep. 867.

47. — **Partition proceedings.**—Suit was brought by Scoby to set aside the will of his grandfather, for an account against the executors of the will, and a recovery of a portion of the estate which inured to him as forced heir. The defendants claimed that plaintiff was estopped from contesting the will by having accepted a legacy bequeathed him in the will, and by having acquiesced in the partition and distribution of the estate under its directions. It was proven that \$1,200 given to plaintiff by the will was paid to him in Tennessee just after he reached majority. The bulk of the testator's property was in Texas, and plaintiff did not appear to have known its value or the laws of Texas by which its distribution was governed. Held, that he was not estopped by receiving the legacy or by the partition of the estate from contesting the will. *Scoby v. Sweatt*, 28 T. 713.

A., a widower with seven children, married B., removed to Texas in 1835 and acquired the property in controversy. A. died in 1841, leaving surviving his wife, B., two children by her, to wit, E., who afterwards died, and G., and also the children of his first marriage. B., after the death of A., married and died, leaving one child, L., by her second marriage. In 1841 administration was granted on the estate of A., which consisted wholly of community property of A. and B. There were no debts and no sale made of any property. In 1848, by order of the probate court, a partition was made of the estate of A., and the entire property inventoried was divided among the nine heirs of A., giving to each one-ninth of the same, and ignoring the rights of L., the child of B. by the second marriage, who as her heir was entitled to three-eighths of the entire estate. G. was entitled to three-eighths as heir of his mother, and one-eighteenth as heir of his father, instead of which he received two-eighths of the whole. L. was named in the petition for distribution filed by the administrator as entitled to a distributive share of the estate, but was not in any way made a party to the proceeding, and her rights as above stated were ignored. L. and G. were minors under fourteen years of age when the partition was made. G. accepted the land allotted to him and afterwards sold it, referring to the partition as his source of title. Afterwards G. and L. brought suit against the other distributees and purchasers from them for their distributive share of the land as heirs of their mother. Held, that plaintiffs were not estopped from recovering by the facts above stated. *Caruth v. Grigsby*, 57 T. 259; *Grigsby v. May*, 57 T. 255; *Thompson v. Cragg*, 24 T. 582.

Evidence held insufficient to estop an intestate's heirs, by their acquiescence, from claiming a part of their estate conveyed under a void decree of partition. *McCarty v. Merry* (Civ. App.) 59 S. W. 304.

All of the heirs of land in controversy having joined in a partition, and accepted their allotments without objection, held that the grantees of one of them could not object thereto. *Dutton & Rutherford v. Wright & Vaughn*, 38 C. A. 372, 85 S. W. 1025.

The fact that heirs entitled to an interest in land as remaindermen accepted the proceeds of a partition of the estate held not to preclude them from claiming the remainder. *Schnabel v. McNeill* (Civ. App.) 110 S. W. 558.

Plaintiffs having acquiesced in the parol partition, and having occupied the portion allotted them for over twenty years after discovering an error therein, held bound thereby, and estopped to claim a right to another distribution. *Stephens v. Turley* (Civ. App.) 131 S. W. 848.

Whether a partition of land by act of parties was binding on an heir whose portion was covered in whole or in part by an older survey dependent on whether at the time he knew the extent of the conflict between his ancestors' land certificate and the older survey. *Reed v. Robertson* (Civ. App.) 150 S. W. 306.

48. **Acceptance of benefits.**—An administrator re-established by suit a land certificate which had been rejected by the traveling board of land commissioners, and which, but for his action, must have been lost to the estate, and afterwards he sold the certificate under order of the probate court for the payment of claims against the estate. The heir of the intestate instituted suit to recover from the purchaser the land acquired by him under the certificate, alleging that the probate court, by which the administrator was appointed, had not jurisdiction to grant administration on the estate; that the letters of administration were procured by a fraudulent combination between the administrator and the purchaser of the certificate; that there was fraud in the sale of the certificate, or in the procurement of the order of sale therefor, and in consequence that the sale of the certificate was void. Held, that the heir was estopped from denying the capacity of the ad-

ministrator, but was not estopped from proving fraud in the sale. *Giddings v. Steele*, 28 T. 734, 91 Am. Dec. 336.

Devisee accepting property under will held estopped to contest its provisions. *Pryor v. Pendleton*, 92 T. 384, 49 S. W. 212.

Acceptance of benefits of services of a person employed by an agent without authority held not a ratification. *Swayne v. Union Mut. Life Ins. Co.* (Civ. App.) 49 S. W. 518.

A principal retaining benefits of his agent's unauthorized transactions after discovery thereof is not liable, where he cannot reject them. *Id.*

Where a party has accepted and appropriated lands set apart to him by commissioners appointed to make partition, he is estopped from complaining of the partition. *Robb v. Robb* (Civ. App.) 62 S. W. 125.

Retention and use of an article after discovery of the fraud by which the sale was induced do not prevent a recovery of the damages resulting therefrom. *Hallwood Cash Register Co. v. Berry*, 36 C. A. 554, 80 S. W. 857.

One who has been fraudulently induced to purchase a machine, but who retains and uses it after discovery of the fraud, waives his right to rescind. *Id.*

Minor heirs, having actively joined in procuring a partition sale of a homestead, held estopped while retaining the benefits to contest the purchaser's equitable title though the court was without jurisdiction to order the sale. *Murphy v. Sisters of the Incarnate Word of San Antonio*, 43 C. A. 638, 97 S. W. 135.

A principal by retaining and using a check sent in payment of a settlement made with his agent held to ratify the agent's act. *Stetson-Preston Co. v. H. S. Dodson & Co.* (Civ. App.) 103 S. W. 685.

A purchaser of property held not estopped to recover possession of the property from tenants by having cashed a check for rent in advance. *Thomason v. Oates*, 46 C. A. 383, 103 S. W. 1114.

Acceptance by a principal of the proceeds of a settlement made by an agent with knowledge held a ratification of the agent's act. *Mayfield Woolen Mills v. Long* (Civ. App.) 119 S. W. 908.

Where a landowner authorized an attorney in fact to sell the land for cash, and after a sale partly upon credit receives and retains the cash proceeds, that is all that is necessary to constitute a ratification of the sale by him. *Horst v. Lightfoot*, 103 T. 643, 132 S. W. 761.

A purchase of lumber by M. from plaintiff being on his own account, in fulfillment of his contract to furnish lumber to defendant, held, there was no acting by him as agent of defendant, of which her receiving and use of the lumber would be a ratification, so as to make her liable to plaintiff therefor. *Lavernia Lumber Co. v. Pikos* (Civ. App.) 135 S. W. 607.

The fact that a principal accepted notes executed by its collector and indorsed by its debtor in satisfaction of the indebtedness held not to bind him by the collector's agreement to reconvey to the debtor within a certain time, unless he had notice of such agreement at the time he accepted the notes. *Rotan Grocery Co. v. Jackson* (Civ. App.) 153 S. W. 687.

A principal cannot enjoy the benefits arising from a repudiated agency without also assuming the burdens imposed thereby. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

49. — **Contracts.**—A married woman conveyed a tract of land, her separate property, by a deed which was not properly acknowledged, and received the purchase money, which she expended in making improvements on her separate property. Held, that her heirs were not estopped from recovering the land, but the deed might serve as a basis for a claim for the value of improvements made in good faith. *Johnson v. Bryan*, 62 T. 623, citing *Berry v. Donley*, 26 T. 745.

A party defrauded cannot retain the benefits of the contract and escape its obligations. *Caldwell v. Dutton*, 20 C. A. 369, 49 S. W. 723.

A partner in an insolvent firm, whose property is conveyed to a trustee for creditors, is estopped to question the authority of the trustee to convey the property to satisfy the debts, after assenting by his acts to the conveyance. *Williams v. Meyer* (Civ. App.) 64 S. W. 66.

Seller of an irrigation pump held precluded, in an action on the contract of sale, from denying the construction placed on the contract by the buyer and acquiesced in by him. *Masterson v. Heitmann & Co.*, 33 C. A. 464, 77 S. W. 983.

Contract of agent on behalf of his principal, which accepted the benefit thereof, held ratified by the principal, so as to render it liable thereon. *Evans-Snyder-Buel Co. v. Hilje* (Civ. App.) 83 S. W. 208.

Bona fide purchasers of land from agent acting under defective power of attorney held entitled, under doctrine of estoppel, to hold the land as against prior vendees of the equitable owner. *Lewright v. Davis* (Civ. App.) 115 S. W. 599.

50. — **Sale and conveyance or mortgage of property.**—A sale of land was made by virtue of an order of the probate court that was void. It was shown in defense, in an action of trespass to try title brought by the heirs of the decedent, that the administrator by whom the sale was made held a power of attorney from the heirs to sell, and that they had received the proceeds of the sale. Held, that they were estopped from recovering the land. *Grande v. Chaves*, 15 T. 550.

F. sold certain land, the property of his wife, for a negro woman; the wife was willing to it, and desired it to be done for the specific object of getting the woman to wait on her, and she continued to be willing to it to the time of her death; she also had the service of the woman in the family from the time of the trade as long as she lived, and knew that those who held the land were living on, improving, and using it as their own, during all which time she was a married woman. Held, that such facts were not sufficient to pass the title to the land from her, or to estop her heirs from setting up claim to it. *Fitzgerald v. Turner*, 43 T. 79.

Plaintiffs brought suit to recover the community interest of their mother in land sold by their father after her death. The defendants with other defenses pleaded the following matters by way of estoppel: The defendant after the purchase of the land had at the re-

quest of his vendor paid accounts for clothing for plaintiffs amounting to \$60 or \$70; at the request of his vendor paid two installments of the premium upon a life policy taken out by him for the benefit of his children, and after the father's death his children had received \$2,500 on the policy. The land sold was worth from \$1,000 to \$1,200. Held, there was no estoppel. *Bell v. Schwartz*, 56 T. 353.

A mutual mistake in the calls of the deed conveying land in excess of that bargained for cannot be corrected at the suit of the vendor, when, after the discovery of the mistake, he has received payment of the purchase-money for the land thus conveyed, and yielded possession thereof to the vendee. *Wittbecker v. Walters*, 69 T. 470, 6 S. W. 788.

One whose interest in land is conveyed by his parent during his minority, for which other property is received by the parent in exchange, and who, after reaching his majority, with a full knowledge of his rights, receives from his parent a part of such property, cannot recover the land so conveyed. *Nanny v. Allen*, 77 T. 240, 13 S. W. 989.

That a purchaser of cattle, after discovery of the seller's fraud, instructed his agent to sell the cattle, which, however, was not done, does not show a waiver of the fraud. *Cabanness v. Holland*, 19 C. A. 383, 47 S. W. 379.

Building and loan association cannot disclaim agency of one procuring execution of mortgage after accepting benefits. *Pioneer Savings & Loan Co. v. Baumann* (Civ. App.) 58 S. W. 49.

A principal, whose agent, without authority, employs a broker to sell her lands, is not rendered liable for the compensation of the broker by selling the land to a purchaser found by him. *Williams v. Moore*, 24 C. A. 402, 58 S. W. 953.

If an article sold on a warranty of quality is wholly worthless, a retention of it does not preclude the purchaser from recovering for a breach of the warranty. *Ash v. Beck* (Civ. App.) 68 S. W. 53.

Sale of land by deceased and receipt of the purchase money by his legal representatives held to give the purchaser a title superior to that of deceased's heir. *Cope v. Blount*, 38 C. A. 516, 91 S. W. 615.

Children of testatrix held not estopped to bring suit to set aside will by acceptance of deeds of property involved. *Holland v. Coutts*, 100 T. 232, 98 S. W. 236.

A person taking the benefit of a contract of sale made by another as agent held bound by the terms thereof. *H. Goldschmidt & Co. v. Wagner* (Civ. App.) 99 S. W. 737.

A seller who retains the purchase price for goods sold by an agent confirms the sale and ratifies the terms thereof. *Id.*

In trespass to try title to land located under a land certificate which was traded to plaintiff for another tract by defendants' mother after her husband's death, evidence that defendants afterward joined in a conveyance of the tract received by their mother held admissible as tending to estop them from denying her right to transfer the certificate. *Vann v. Denson*, 56 C. A. 220, 120 S. W. 1020.

51. **Permitting Improvements or expenditures—Erection of buildings.**—Abutting owner held not estopped to sue to abate nuisance by erection of buildings in street, though he made no formal protest while they were being erected. *Richardson v. Lone Star Salt Co.* (Civ. App.) 49 S. W. 647.

City held estopped to recover possession of building erected by county on city's land or possession of the land, or to require removal of the building. *City of Victoria v. Victoria County*, 103 T. 447, 128 S. W. 109, 129 S. W. 593.

The fact that a person moves into proximity to a nuisance after it has been begun and its business carried on will not preclude him from a recovery of damages arising therefrom. *A. Cohen & Co. v. Rittmann* (Civ. App.) 139 S. W. 59.

52. — **Construction of railroad.**—Where a railroad company established a yard after the building of plaintiff's house, the fact that the main track was there when plaintiff built does not estop him from claiming damages for subsequent injuries. *Missouri, K. & T. Ry. Co. of Texas v. Passons* (Civ. App.) 154 S. W. 239.

53. — **Improvements and expenditures by purchasers of land.**—On the 7th of April, 1856, the wife of plaintiff wrote to defendant offering to sell him a part of their homestead on certain conditions. In June, 1858, defendant went into possession and made valuable improvements. In an action of trespass to try title plaintiff recovered judgment for the premises, and the defendant recovered the value of the improvements made by him, to be paid before a writ of possession should issue. Held, that plaintiff was not estopped from recovering immediate possession of the premises, leaving the defendant to pursue the proper remedy to recover the value of his improvements. *Eckhardt v. Schlecht*, 29 T. 129.

An express parol agreement by the owners of contiguous lands as to their boundary line will be recognized as binding between such persons. *Houston v. Sneed*, 15 T. 310; *George v. Thomas*, 16 T. 89, 67 Am. Dec. 612. Such an agreement may be implied from the acts and long acquiescence of parties, which should be enforced when a failure to enforce it would result in injuries to subsequent purchasers, who have bought relying upon acts open to their observation, and indicating the true boundary as recognized by those from whom they purchased and contiguous owners; and as between original owners who have acquiesced in a common boundary, whereby one of them has been induced to make permanent and valuable improvements which he would not otherwise have made on land afterwards in controversy, the same should be enforced. *Hefner v. Downing*, 57 T. 576.

A married woman properly executed a deed conveying land, her separate property. It recited a consideration of \$1,500, and the name of the grantee was in blank. The deed was placed by her husband in the hands of an agent to effect a sale, and the land was sold by him for \$1,000, and the money paid to the husband, the wife refusing to receive any part of it. Held, that she was not estopped by the deed from recovering the land from the purchaser; but having remained silent for seven years, while the purchaser was improving the property, she was estopped from recovering possession until she paid for the improvements. *Cole v. Bammel*, 62 T. 108.

A married woman conveyed a tract of land, her separate property, by a deed which was not properly acknowledged, and received the purchase money, which she expended in making improvements on her separate property. Held, that her heirs were not estopped from recovering the land, but the deed might serve as a basis for a claim

for the value of improvements made in good faith. *Johnson v. Bryan*, 62 T. 623, citing *Berry v. Donley*, 26 T. 745.

54. — **Knowledge of facts.**—Where a city and county acted with equal knowledge of facts, city held not estopped to claim title to the land of which county took possession under an agreement. *City of Victoria v. Victoria County*, 103 T. 477, 128 S. W. 109, 129 S. W. 593.

That plaintiff railroad company did not object when defendant's track was laid across the land in controversy did not create an estoppel against plaintiff, if plaintiff's officials did not know at the time that it owned the land. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.* (Civ. App.) 151 S. W. 850.

55. **Permitting sale or mortgage of property.**—A judgment creditor assented to a conveyance by the judgment debtor of certain land embraced in the lien of the judgment, to a trustee to pay certain debts, including his own, and attended the sale under the deed of trust, making no objection thereto, but favoring the sale. Held, that he was estopped from contesting the validity of the trust, or asserting the lien of his judgment against the purchaser at the trust sale; and such judgment creditor having afterwards purchased the same land under execution on his judgment and sold it to another who had notice of the previous sale, the last purchaser was in no better condition than his vendor. *Luter v. Rose*, 20 T. 639.

Plaintiffs brought suit to recover the community interest of their mother in land located by virtue of the headright certificate issued to their father during marriage and sold by him after the death of their mother. The defendants, among other matters, relied upon an estoppel by reason of plaintiffs having been present at the time of the sale and making no objections thereto. The defendant at the time of his purchase had full knowledge of the rights of plaintiffs. Held, that there was no estoppel. If the real owner permit a third person to purchase property without notice of his claim from the apparent owner, he will be estopped from asserting the title against such innocent and bona fide purchaser. *Burleson v. Burleson*, 28 T. 383.

In 1857 B. sold to S. a tract of land on deferred payments secured by the vendor's lien. In 1862, all the purchase money being due, B. demanded payment; S. told him that he had no money, but could sell the land for Confederate notes, which he would do if B. would receive that money in payment of the notes. To this B. answered that he would receive Confederate money, and desired S. to sell the land. About four weeks afterwards S. sold the land and tendered the money to B., who refused to receive it. In 1866 B. brought suit against S., recovered a judgment against him for the debt and foreclosure of his vendor's lien, and afterwards purchased the land under an order of sale issued on his judgment. The vendee of S. was not a party to the suit. In 1869 B. brought suit for the land against J., who purchased from S. Held, that B. was estopped from claiming the land. *Johnson v. Byler*, 38 T. 606.

An owner of property in his actual possession held not estopped by his silence from asserting title thereto as against a purchaser thereof. *Stanger v. Dorsey*, 22 C. A. 573, 55 S. W. 129.

One in possession, or claiming under a registered deed, is not estopped to claim title against one whom he did not notify of his title. *Pierce v. Texas Rice Development Co.*, 52 C. A. 205, 114 S. W. 857.

Contract between law firm and person representing himself as agent of person having the legal title held inoperative as to the legal title, but as conveying an equitable interest by way of estoppel as against the equitable owner. *Lewright v. Davis* (Civ. App.) 115 S. W. 599.

B.'s signing as witness a deed by G. to C. held not to estop B.'s heirs from claiming the land, unless C.'s vendees were influenced in their purchase by B. having witnessed G.'s deed. *Roberts v. Coleman* (Civ. App.) 138 S. W. 1120.

Creditor who had acquiesced in the debtor's sale of his entire stock held estopped to hold the buyer for conversion. *First State Bank of Teague v. Walter & Hafner Jewelry Co.* (Civ. App.) 144 S. W. 708.

56. — **Public or judicial sale.**—In 1853 R. and wife sold to L. a tract of land and executed a bond for title therefor. L. paid a portion of the purchase money and died in 1854. Administration was granted on L.'s estate, and in 1855 R. and wife filed their petition in the court alleging that L. was indebted to them for the balance of the purchase money, and procured an order of sale under which the land was sold and purchased by D. In 1857 D. brought suit for the land against R. and wife, who defended on the ground (among others) that the land was the separate property of the wife, who had never acknowledged the sale in the manner required by law. Held, that she was estopped from denying the validity of the administration sale. *Dalton v. Rust*, 22 T. 133.

On the 7th of August, 1831, a grant of land was made to Wm. Chase, as a colonist. At the time of the grant Chase was married to Eliza Page Chase, who died in 1833, leaving two children by a former marriage, to wit, J. W. Page and S. P. Page. J. W. Page died in 1854, leaving S. P. Page his only heir. William Chase, after the death of his wife Eliza, married a second wife, named Mary, and he died in Brazoria county in 1843. His widow, Mary, returned an inventory of his estate, on which was the league of land in controversy. One of the appraisers was J. W. Page. Afterwards Mary married Bayes, who joined her in the administration, and they afterwards returned an inventory including the land in controversy. In 1848 the land was sold by order of the probate court, S. P. Page being present at the sale. It also appeared that in 1833 J. W. Page was administrator of his mother's estate, and was also guardian of his brother. The land in controversy was not inventoried as a part of his mother's estate. In a suit by S. P. Page for his mother's interest in the land against the purchaser at the administrator's sale, it was held that plaintiff was not estopped from recovering the land by reason of the facts above stated, it not appearing that he knew of his rights in the premises, or that the purchaser at the sale was influenced by his action. *Page v. Arnim*, 29 T. 53.

A. owner of land, conveyed it to B. by deed August 3, 1862. A judgment had been rendered against A. in 1860, which was supposed by all the parties to be a lien on the

land, but which in fact was not. A. died in 1869, and administration was duly granted on his estate. At the March term, 1870, of the county court, the plaintiff in the judgment filed his petition for the sale of the land, a sale was ordered and he became the purchaser. In 1869 D., who desired to purchase the land, went to see B. in reference thereto, and was told by B. that the land had been sold in satisfaction of the judgment against his vendor, and when told that such sale had not been made said he was satisfied that it would be made unless he paid off the judgment, and he preferred to keep his money and let the land go. Thereafter D. bought the land from the plaintiff in the judgment, taking a bond for title. Before D. made all of his payments B. tried to induce him to abandon his purchase on certain conditions, which D. refused to accept. In an action by B. to recover the land from D., it was held that he was estopped from claiming it. *Mayer v. Ramsey*, 46 T. 371.

A., the guardian of his minor son, used money belonging to him in the purchase of land, taking the title in his own name. Afterward B. was appointed guardian in place of A., who had died, and presented a money demand against A.'s estate for the money of the ward so used, and the land in question was sold under order of the court to pay this and other debts. Held, that the minor was estopped by the action of his guardian from recovering the land. *Clayton v. McKinnon*, 54 T. 206.

One whose land is sold at tax sale without serving the statutory notice held not estopped to ask that the sale be set aside. *Bean v. City of Brownwood*, 91 T. 684, 45 S. W. 897.

A person, not a party to the action, consenting to a decree conveying certain lands, held not estopped, on purchasing the lands at execution sale, from recovering them from parties claiming under the decree. *Gulf City Trust Co. v. Hartley*, 20 C. A. 180, 49 S. W. 902.

57. **Silence.**—A minor who executes a deed, remaining silent as to her age, is not estopped by a statement made by another party in her presence which she does not contradict. In a suit to recover property conveyed by such deed, she is not bound to restore the purchase money received by a third party and which never came into her possession. *Vogelsang v. Null*, 67 T. 465, 3 S. W. 451.

One held not estopped by failure to deny a certain statement. *Powers v. McKnight* (Civ. App.) 73 S. W. 549.

Estoppel to claim title by silence supposes that the title is in the person estopped. *Pierce v. Texas Rice Development Co.*, 52 C. A. 205, 114 S. W. 857.

If one remains silent when it is his duty to speak, he will not be heard to speak thereafter to the injury of one who was induced to act on the faith of his silence; but, if no duty to speak exists, no rights can be lost or acquired by silence. *Id.*

Mere silence held not to prove ratification of agent's unauthorized act. *Lightfoot v. Horst* (Civ. App.) 122 S. W. 606.

An estoppel involves the idea that a person has failed to speak when it was his duty to speak, so that he will not be allowed to speak when he desires so to do. *Dudley v. Strain* (Civ. App.) 130 S. W. 778.

58. **Negligence.**—It is the duty of a depositor in a bank to know whether his account is correct or not, and promptly to report a forgery when detected. Should he negligently fail to make the examination and consequent discovery (when he could have discovered it), he will not be permitted to deny the genuineness of the checks, provided the bank be prejudiced by his failure. *Schwarz v. National Bank*, 67 T. 217, 2 S. W. 865; *Weinstein v. Bank*, 69 T. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Where plaintiff bank neglected to examine defendant's monthly statement, which showed a defalcation of plaintiff's cashier, plaintiff was estopped from thereafter recovering the funds. *Iron City Nat. Bank v. Fifth Nat. Bank*, 31 C. A. 308, 71 S. W. 612.

Failure of child to sue for partition of homestead while occupied by surviving wife held not to estop her from suing thereafter. *McAnulty v. Ellison* (Civ. App.) 71 S. W. 670.

58½. **Particular matters.**—Questions for jury, Art. 1971, § 80; instructions, Art. 1971, § 289; to claim new trial, Art. 2019, § 42; to allege error, Art. 2078, § 40; foreign receivers, Art. 2133, § 7; to assert invalidity of execution sale, Art. 3784, § 9; to claim homestead, Art. 3786, § 36; to assert invalidity of conveyance of homestead, Art. 1115, and Art. 3786, § 47; to claim separate property, Art. 4621, § 26; to assert rights under insurance contracts, Art. 4972, §§ 20, 70-86, 98; to assert usury, Art. 4980, § 27; tenant to deny landlord's title, Art. 5491, § 9; to sue for rent, Art. 5491, § 39; to object to chattel mortgage, Art. 5662, § 12; to rely on limitations, Art. 5714, § 5; and other specific matters.

III. Persons Affected

59. **Persons to whom estoppel is available.**—The burden is on an appellant to show reversible error, and the appellee is not bound to contest the points raised on the appeal. *Gulf, C. & S. F. Ry. Co. v. Blanchard* (Civ. App.) 73 S. W. 88.

If a grantee of land acquires title by estoppel, such title passes to his grantee on conveyance of the land. *Pierce v. Texas Rice Development Co.*, 52 C. A. 205, 114 S. W. 857.

Any act by plaintiff, pursuant to an agreement between itself and another railroad company, could not be taken advantage of as an estoppel by defendant railroad company, which was not a party thereto. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.* (Civ. App.) 151 S. W. 850.

60. **Persons estopped.**—In October, 1872, P. and wife moved away from their homestead in the country and occupied a place in a town rented by them. In December, 1872, P. conveyed their homestead by a deed of trust to secure the payment of a loan. After the maturity of the loan and before a sale under the trust deed letters from the creditor to the husband were answered by the wife, promising to pay the debt and fully recognizing the rights of the creditor under the trust deed. In November, 1873, P. and wife moved back on the mortgaged land, and signed an acknowledgment indorsed upon the trust deed, as follows: This is to certify that we this day move upon the place within described, by the permission of W. & B., and will hold possession only on their

account. W. & B. were the creditors secured by the deed of trust, and at a sale under the trust deed in 1874 purchased the land. After the sale P. and wife acquired another homestead and sold their first homestead mentioned in the deed of trust to T. Held, that T. was not estopped from showing that the deed of trust was inoperative by reason of the property having been the homestead of P. and wife at the date of its execution. *Thomas v. Williams*, 50 T. 269.

Heirs of intestate held not estopped to claim lands conveyed by void deeds because administrators recovered judgments for the purchase money. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

Heirs held estopped to deny title acquired under a contract between a third person and the administrator. *Halbert v. De Bode*, 15 C. A. 615, 40 S. W. 1011.

Strangers to a contract held not bound by recitals therein as to alleged acts of a third person under whom they claim. *Id.*

In trespass to try title a plaintiff, claiming under a subsequent deed of gift from defendant's grantor, held bound by representations which would estop the grantor. *Mars v. Morris*, 48 C. A. 216, 106 S. W. 430.

Where a tenant in common is estopped from doing a particular act on the premises as against the owner of adjacent premises, the tenant, neither alone nor in conjunction with the co-tenant, will be permitted to act contrary thereto. *Woods v. Lowrance*, 49 C. A. 542, 109 S. W. 418.

Allegations or recitals in pleadings in a suit to which parties in the case at bar were not parties cannot bind them. *Schrivver v. Taylor* (Civ. App.) 143 S. W. 231.

61. — **Purchasers from person creating estoppel.**—A judgment creditor assented to a conveyance by the judgment debtor of certain land embraced in the lien of the judgment to a trustee to pay certain debts, including his own, and attended the sale under the deed of trust, making no objection thereto, but favoring the sale. Held, that he was estopped from contesting the validity of the trust, or asserting the lien of his judgment against the purchaser at the trust sale; and such judgment creditor having afterwards purchased the same land under execution on his judgment, and sold it to another who had notice of the previous sale, the last purchaser was in no better condition than his vendor. *Luter v. Rose*, 20 T. 639.

On the 23d of January, 1878, A. held a note of B., payable one day after date and secured by deed of trust duly recorded. In the fall of 1878 or 1879 C. and others were negotiating with B. for the purchase of the land, in which negotiations A. took an active part. In answer to a question whether there were any liens upon the property, A. answered that they had all been discharged, and that B. held the releases, which should be recorded, and the purchase was then made. On the 3d of June, 1881, the note was indorsed by A. to plaintiff. In a suit brought October 20, 1882, for the balance due on the note and for foreclosure of the lien, it was held that plaintiff was estopped from enforcement of the lien. *Fielding v. Du Bose*, 63 T. 631.

A purchaser of certain land subject to an easement created by a contract of record held not estopped by a statement made by his grantor to the owner of the dominant tenement. *Metcalf v. Faucher* (Civ. App.) 99 S. W. 1038.

62. — **Heirs of person creating estoppel.**—Where the holder of the legal title is estopped from denying a trust in land, the estoppel may on his death be invoked against his heirs. *Smalley v. Paine* (Civ. App.) 130 S. W. 739.

62½. **Estoppel of wife to claim separate property.**—See notes under Art. 4621.

IV. Matters Precluded

63. **Title or claim to property.**—An estoppel against certain heirs' right to object to the equitable title to certain land acquired by a purchaser in partition held to operate against the heirs' claim to their mother's interest in the property as well as to the interest of their father. *Murphy v. Sisters of the Incarnate Word of San Antonio*, 43 C. A. 638, 97 S. W. 135.

A defendant held entitled to no interest in certain land in view of an estoppel by a partition by act of certain parties through whom he claimed. *Berryman v. Biddle*, 48 C. A. 624, 107 S. W. 922.

64. **Rights and liabilities under contracts.**—On the 26th of May, 1881, A. executed to B. a note for \$666.66 and two other notes, amounting in the aggregate to \$2,000. The notes were given for timber growing on certain lands claimed by B. Immediately after the date of the note A. entered on the lands and cut timber thereon. The first note fell due in eight months from its date and was paid at its maturity; a payment was also made on another of the notes. In August, 1883, one of the notes having been lost, A. gave another note in its place. Shortly after, this suit was brought, and A. pleaded a want of consideration, that B. was not the owner of the land, that the contract was procured by fraudulent representation, etc. Held that A. was estopped from setting up this defense. *Warner v. Munsheimer*, 2 App. C. C. 395.

Extent of estoppel of a buyer, receiving part of cattle contracted for with knowledge of defects, to deny that the remaining portion was defective, stated. *Wigglesworth v. Uvalde Live Stock Co.* (Civ. App.) 126 S. W. 1180.

Where a materialman agrees with a contractor to furnish lumber in accordance with certain plans, and the plans are changed, unknown to him, so as to require more lumber, the owner can be held liable because of estoppel by conduct only for the value of the additional lumber required. *Marks v. Jones* (Civ. App.) 154 S. W. 618.

65. **Remedies.**—A quitclaim by the heir to community property sold by the surviving spouse held not to estop the heir to sue on the community bond for her share of the community estate. *Graham v. Miller*, 26 C. A. 5, 62 S. W. 113.

66. **Availability at law.**—An estoppel may be relied on in a court of law as well as in equity. *Knowles v. Northern Texas Traction Co.* (Civ. App.) 121 S. W. 232.

Art. 3688. [2300] [2246] Color or interest does not disqualify.—No person shall be incompetent to testify on account of color, nor be-

cause he is a party to a suit or proceeding or interested in the issue tried. [Act May 19, 1871, p. 108. P. D. 6826.]

Cited, *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

Competency of witnesses in general.—See notes under Art. 3687.

Parties of record.—Where persons having no interest in the suit were joined as defendants to incapacitate them as parties, their evidence in behalf of defendant was properly admitted. *McRae v. Poor* (Civ. App.) 48 S. W. 47.

A plaintiff in a personal injury case is not disqualified by reason of interest from testifying in his own behalf, and the fact that his testimony is self-serving does not render it incompetent. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

Interest of party or other person.—A party to a negotiable instrument is a competent witness to show its invalidity. *Parsons v. Phipps*, 4 T. 341; *Hillebrant v. Ashworth*, 18 T. 307.

The grantee in a written instrument is a competent witness to prove its execution. *Lang v. Dougherty*, 74 T. 226, 12 S. W. 29.

The provisions of Arts. 3688-3690 apply to the probate of wills. Legatees who are not subscribing witnesses can testify to execution of will. *Gamble v. Butchee*, 30 S. W. 861, 87 T. 643.

In an action by a church corporation to recover certain land which defendant claimed by adverse possession through her testator, members of the church held not so interested as to disqualify them to testify to conversations had with testator in his lifetime. *Crosby v. First Presbyterian Church of El Paso*, 45 C. A. 111, 99 S. W. 584.

The testimony of an agent in an action by a third person against the principal as to the extent of his agency is admissible on such issue. *Rainey v. Kemp*, 54 C. A. 486, 118 S. W. 630.

An agent held properly allowed to testify as to the extent of his authority. *Bybee v. Embree-McLean Carriage Co.* (Civ. App.) 135 S. W. 203.

An agent is competent to testify to the agency and its extent. *Autrey v. Linn* (Civ. App.) 138 S. W. 197.

An agent may testify as to the extent and nature of his authority. *Cannel Coal Co. v. Luna* (Civ. App.) 144 S. W. 721.

Transfer, release or extinguishment of interest.—Evidence of plaintiffs, who conveyed and disclaimed, to evade the rule incapacitating parties as witnesses, held inadmissible in behalf of plaintiffs. *McRae v. Poor* (Civ. App.) 48 S. W. 47.

Art. 3689. [2301] [2247] Husband or wife not disqualified, except, etc.—The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife.

Marriage.—One claiming a part of a decedent's estate, on the ground that she was decedent's common-law wife, was incompetent to testify on the question. *Schwingle v. Keifer*, 105 T. 609, 153 S. W. 1132.

Fraudulent acts of husband.—In a suit by the wife, her husband having refused to join, she was permitted to testify as to the fraudulent acts of her husband. *Edwards v. Dismukes*, 53 T. 605.

Interest.—The husband, plaintiff in a suit to recover the separate property of the wife, is, under Art. 3688, a competent witness. *Turnley v. Texas B. & I. Co.*, 54 T. 451. It was also held that the husband or wife was a competent witness in a suit in which they were joint parties, and in regard to a matter in which they had a joint interest. *Cameron v. Fay*, 55 T. 58; *McKay v. Treadwell*, 8 T. 176; *Cairrell v. Higgs*, 1 U. C. 56.

On the issue whether a deed absolute in form, executed by husband and wife, is subject to a parol trust, the wife, testifying in support of the trust, held an interested witness. *Whitfield v. Duffie* (Civ. App.) 105 S. W. 324.

Confidential communications.—As to confidential communications, see *Mitchell v. Mitchell*, 80 T. 101, 15 S. W. 705.

In an action by a woman against her former husband, her testimony that she had contracted a venereal disease from him during the existence of the marital relation held admissible. *King v. Sassaman* (Civ. App.) 64 S. W. 937.

A husband, who had married a second time and conveyed to his second wife community property of the first marriage, might testify that, prior to the conveyance, he told her about the existence and interest of the children of the first marriage. *Eddy v. Bosley*, 34 C. A. 116, 78 S. W. 565.

Statements made by the husband to the wife at the time he purchases, or when he is having improvements made upon property, declarative of his intention in making the purchase or improvements, are admissible as *res gestæ* for the purpose of showing his intention, in a case where his intention is a legitimate subject of inquiry, and the wife can testify in her own behalf as to such declarations. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 145.

Letters written by husband in his lifetime to his wife complaining of her lack of sincere affection for him, and of her conduct to his mother, held confidential communications, and inadmissible in aid of her contest of her husband's will. *Lanham v. Lanham*, 105 T. 91, 145 S. W. 336.

Confidential communications between husband and wife embrace all information coming to a husband or wife in consequence or by reason of the existence of the marriage relation. *Id.*

Confidential communications between husband and wife are excluded even after the relation has been dissolved by death or otherwise. *Id.*

On an issue as to an insane delusion on the part of testator toward his wife at the time of his mother's death, testimony that, while traveling to the funeral, he sat behind

her and gazed at her held not to relate to a confidential communication between husband and wife. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

A conversation between husband and wife concerning her property rights and his admission to a wrongful transfer of her separate personalty are not privileged, within Art. 3689, making confidential communications between husband and wife privileged, and the wife suing for the property may testify to such conversations. *First Bank of Springtown v. Hill* (Civ. App.) 151 S. W. 652.

Under Art. 3689, providing that the husband or wife of a party to a suit, or who is interested in the issue, shall not be competent to testify as to confidential communications, communications between husband and wife in the presence of third persons are not generally confidential. *Id.*

Waiver of objection.—Where defendant, a widow, testified first on cross-examination to a parol conveyance of certain land in controversy from her husband, it was competent for her, on redirect examination, to repeat, explain, or qualify her previous testimony as against an objection that she was incompetent to testify with reference to such matter, through the objection might have been good originally. *Reyes v. Escalera* (Civ. App.) 131 S. W. 627.

Art. 3690. [2302] [2248] In actions by or against executors, etc., certain testimony not allowed.—In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent. [*Id.* P. D. 6827.]

Cited, Phillips v. Henry (Civ. App.) 124 S. W. 184; *Miller v. Odom*, 152 S. W. 1185.

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| 1. Construction of act. | 23. — Party as to whom person deceased acted in representative or fiduciary relation. |
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| 3. — Representative capacity or title or interest of party. | 25. Subject-matter of testimony — What constitutes transaction in general. |
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| 22. — Survivor of joint parties to contract or other transaction. | |

1. Construction of act.—The exception to the general rule that no person shall be incompetent to testify because he is a party to a suit or proceeding or interested in the issue tried, which denies the right of an heir or legal representative of a decedent to testify as to any transaction or statement by decedent in an action by or against the heirs or legal representatives arising out of any transaction with decedent, unless called by the opposite party, will not be extended by judicial construction. *Simon v. Middleton*, 51 C. A. 531, 112 S. W. 441.

2. Actions in which testimony is excluded.—In a bill of review brought by the ward to revise the account of a guardian, either party is a competent witness in regard to the transactions between each other. *Jones v. Parker*, 67 T. 76, 3 S. W. 222.

In a suit by the widow and children for damages against parties charged to have unlawfully taken the life of the deceased husband and father, the defendants are competent witnesses. *Wallace v. Stevens*, 74 T. 559, 12 S. W. 283.

3. — **Representative capacity or title or interest of party.**—Plaintiff in action held not to sue as heir, nor defendants to claim title of inheritance, so as to render them incompetent to testify as to transaction with a decedent. *Crenshaw v. Harris*, 16 C. A. 263, 41 S. W. 391.

The exceptions excluding certain parties from testifying on account of interest will not be extended by implication. A plaintiff may be admitted to testify to declarations of a deceased partner of the defendant where suit had been brought against the firm and one of the parties died pending the suit, and his representatives were not made parties. *Roberts v. Yarboro*, 41 T. 449.

In a suit against executors and another, to fix a liability against both, a defendant cannot be called by his codefendant, the executor, touching matters inhibited in the statute. *Alexander v. Lewis*, 47 T. 481.

After his father's death a son was sued for land given him by his father by parol contract, followed by possession and valuable improvements. The defendant was a competent witness to prove the transaction, he not claiming as heir or legal representative. *Wooters v. Hale*, 83 T. 563, 19 S. W. 134.

In an action by widow and minor children, where widow sues in her own right, defendant, as to her, can testify as to transactions with her deceased husband. *Harris v. Warlick* (Civ. App.) 42 S. W. 356.

Evidence of personal transactions between the heir suing on a community bond and the deceased spouse held not within the statute as to transactions with deceased persons, the sureties not being sued as heirs or legal representatives. *Graham v. Miller*, 26 C. A. 5, 62 S. W. 113.

Where one sues in his individual right as well as in his representative capacity, a witness can testify under this article, but the court should instruct the jury not to consider the answer in so far as it affects the official capacity (that is the estate which he represents) of the party to the suit. *Field v. Field*, 39 C. A. 1, 87 S. W. 728.

Under this article a surviving partner, suing for the benefit of the firm, is not a "legal representative" of the deceased partner. *Shivel & Stewart v. Greer Bros.* (Civ. App.) 123 S. W. 207.

In partition wherein defendant claimed under a deed which plaintiffs alleged was executed only to enable defendant to qualify for office, defendant's offer to prove by himself and wife what was said and done by himself and his mother, the grantor, at the time of the deed, was excluded as a statement by and a transaction with his deceased ancestor affecting property involved in suit. Held error, as defendant was not claiming as heir, but under the deed the assault on which he could repel by his testimony the same as if he had been no kin to grantor. *Ivy v. Ivy* (Civ. App.) 128 S. W. 682.

Where defendant and her husband executed a deed of community property to plaintiff, and the husband, dying, devised his half of the remaining community property to defendant, and plaintiff sued to reform the instrument, alleging that certain property was omitted by mutual mistake, the suit was not against defendant as heir or legal representative of the decedent. *Harry v. Hamilton* (Civ. App.) 154 S. W. 637.

4. — **Possibility of judgment for or against party in particular capacity or right.**—When a defendant is not sued in his capacity as executor, and where judgment cannot be rendered against him as such between the heirs of the deceased, but between the heirs of his devisee this article does not apply. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 399.

Though defendant was executrix and heir of P. and sole beneficiary under his will, yet the action being against her personally, and it being alleged that, as trustee for plaintiffs, P. invested money belonging to them in property taking the title in his own name, and that he never repudiated the trust, and that defendant has taken possession of the property, and has refused to deliver it to them, and the will not having purported to dispose of the trust property, the provision of this article that in actions by or against executors, "in which judgment may be rendered for or against them as such," neither party may testify to a transaction with or statement by deceased, and that this shall apply to an action by or against heirs of a decedent, arising out of any transaction with him, does not apply, so as to render plaintiffs incompetent to testify to conversations and transactions with P. *Tennison v. Palmer* (Civ. App.) 142 S. W. 948.

5. — **Probate or contest of will.**—Persons interested under a will are competent witnesses to prove its execution. *Martin v. McAdams*, 27 S. W. 255, 87 T. 225. See *Lewis v. Aylett*, 45 T. 190; *Watts v. Holland*, 56 T. 54; *Shilling v. Shilling* (Civ. App.) 35 S. W. 420; *Paddock v. Lewis*, 35 S. W. 320, 13 C. A. 265. The terms of this article will not be extended so as to embrace devisees or legatees. *Newton v. Newton*, 77 T. 508, 14 S. W. 157; *Ingersol v. McWillie*, 30 S. W. 58, 9 C. A. 543; *Caffey's Exrs v. Caffey*, 35 S. W. 738, 12 C. A. 616.

In a suit to contest the probate of a will a daughter of the testator is not forbidden by this statute, to testify as to a conversation between her and her father whose will she is seeking to destroy. The suit is not one arising out of transaction of the deceased with the daughter. *Simon v. Middleton*, 51 C. A. 531, 112 S. W. 446.

6. — **Determination of construction of grant.**—This article applies only in suits in which the cause of action or defense asserted grows out of a transaction with the deceased and does not apply in suits involving the identity of the grantee of a land certificate. *Keck v. Woodward*, 53 C. A. 267, 116 S. W. 79.

7. **Persons whose testimony is excluded in general.**—In a purchaser's action against the executor of a deceased vendor for equitable relief from a sale induced by fraud, the testimony of a third person, not a party to the suit, and not claiming under the deceased, was not inadmissible under this article. *Hagelstein v. Blaschke* (Civ. App.) 149 S. W. 718.

8. **Parties whose testimony is excluded.**—A party to a suit claiming under a parol gift from her deceased father is incompetent to prove the transaction through which she claims. She is also incompetent to testify to the same transaction in behalf of her co-claimants under the same alleged gift. *James v. James*, 81 T. 373, 16 S. W. 1087.

A party plaintiff as next friend of a minor is within this article. *Ellis v. Stewart* (Civ. App.) 24 S. W. 585.

In a suit by an executor on a note given to testator, held, that a defendant could not testify as to a transaction with testator, though he admitted his indebtedness, and the only issues were with the other parties to the note. *Coffin v. Loomis* (Civ. App.) 41 S. W. 511.

Where a trustee sues for conversion of the trust estate, and the beneficiaries are made parties by defendant, held, they could not be asked, as witnesses, to testify as to transactions with or statements by the deceased grantor of the trust. *Herring v. Patten*, 18 C. A. 147, 44 S. W. 50.

Defendant cannot testify as to a transaction between himself and plaintiff's intestate. *Baugh v. Geiselman*, 23 C. A. 143, 55 S. W. 615.

In a suit to break a will, persons who wish the will broken, but will not join the plaintiff in the suit, and are necessarily made parties defendant, are opposite parties within the meaning of this statute. *Sanders v. Kirbie*, 94 T. 564, 63 S. W. 626.

Principals on a bond who are properly made parties to the suit, will not be permitted to testify as to a transaction between their principal and deceased in a suit against the administrator and heirs of the deceased. *Haberzettle v. Dearing* (Civ. App.) 80 S. W. 540.

In a trespass to try title suit brought by the administratrix and heirs of deceased, a defendant cannot testify as to transactions with the deceased unless called by the opposite party. *Rogers v. Tompkins* (Civ. App.) 87 S. W. 382.

A party cannot testify as to acts of the deceased and himself, nor as to transactions between them. *Edelstein v. Brown*, 100 T. 403, 100 S. W. 129, 123 Am. St. Rep. 816.

This article does not prevent a surety on a claim bond given by decedent for the purpose of trying right of property from testifying in an action by decedent's administrator to set aside a default judgment on the bond that a short time before the property was levied on he heard decedent declare that the property belonged to him; the surety being a party to the judgment sought to be vacated, but not to the suit in which the testimony was given. *Barker v. Johnson* (Civ. App.) 154 S. W. 609.

Under the express provisions of this article plaintiff, in an action against the executor and heirs of a decedent, could not testify in her own behalf relative to a verbal agreement with decedent. *Boiders v. Dooley* (Civ. App.) 154 S. W. 614.

9. — **Nominal or unnecessary parties.**—One having no interest in common with parties calling him as a witness, and who though nominally a party to the suit has no interest in the result, is competent to testify as to statements and admissions against his interest at the time they were made by a deceased person in possession of property in litigation against those holding under him as heirs, legatees, etc. *Oury v. Saunders*, 77 T. 278, 13 S. W. 1030.

Where the wife of a deceased maker of a contract was a party, though not a proper or necessary party, to the action, held, that plaintiff was not precluded from testifying to statements of deceased in regard to the contract in controversy. *Kahler v. Carruthers*, 18 C. A. 216, 46 S. W. 160.

In an action in the husband's name against an executor to recover on behalf of the community estate for services rendered testator, the wife is a real party to the suit, and cannot testify to transactions by herself or her husband with decedent, unless called by the opposite party. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

Under this article a husband joining his wife in a suit to establish an express trust brought against the children of the deceased holder of the legal title is not competent to testify as to declarations made by the deceased holder as to his holding the land in trust. *Smalley v. Paine* (Civ. App.) 130 S. W. 739.

Where, pending a suit between G. and the heirs of a decedent, the heirs convey, without warranty, all their interest in the suit to L., and L. intervenes, the heirs being thus rendered merely nominal parties, the disqualification of G., under this article ceased, and may not be restored by withdrawal of L. *Gurley v. Hanric's Heirs* (Civ. App.) 139 S. W. 721.

10. — **Legatee, devisee, heir or distributee.**—This article does not apply in an action against legatees (*Curtis v. Wilson*, 2 C. A. 646, 21 S. W. 787) or devisees or an heir who is a party, when called by the opposite party (*Mitchell v. Mitchell*, 80 T. 101, 15 S. W. 705).

A plaintiff suing an executor on an account against his testator held incompetent to testify in his own behalf to transactions with decedent. *Garrett v. Garrett* (Civ. App.) 47 S. W. 76.

In trespass to try title by heirs of one who had given a title bond against those claiming under the bond declarations made by the obligor to one of the plaintiffs were properly excluded. *Tenzler v. Tyrell*, 32 C. A. 443, 75 S. W. 57.

In a suit by an administrator against heirs for money belonging to estate, a defendant cannot testify as to transactions with deceased. *Manchester v. Bursey*, 41 C. A. 271, 91 S. W. 817.

An heir claiming against a deed from decedent to his wife cannot be permitted to testify concerning a conversation in which decedent declared that when he died his property would go to his side. *Davis v. Davis*, 44 C. A. 238, 98 S. W. 199.

Plaintiff in a suit against an executor cannot testify as to statements or absence of statements made by one under whom he claims as heir in a conversation with the testator of defendant. *Tison v. Gass*, 46 C. A. 163, 102 S. W. 754.

Plaintiff, in foreclosure held not disqualified to testify by reason of being an heir and representative of the deceased mortgagee. *Blair v. Breeding*, 57 C. A. 147, 121 S. W. 869.

That plaintiffs are claiming as heirs of a decedent, other than the one whose statements they seek to prove, in no wise makes this article applicable, where otherwise inapplicable. *Tennison v. Palmer* (Civ. App.) 142 S. W. 948.

In trespass to try title, by one not an administrator, to recover land originally patented by defendant's father, in which defendant claimed as heir and legatee of his father, evidence by defendant as to transactions and conversations with his father were not rendered inadmissible by this article. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

Under this article one who was a party to probate proceedings only as devisee and

not as heir or representative could testify to declarations by testator that he had cut out part of his will. *Schnable v. Henderson* (Civ. App.) 152 S. W. 231.

11. — **Surviving spouse.**—In a suit by heirs against wife of deceased husband, she cannot testify as to what he told her after they were married, concerning his property. *Gilroy v. Richards*, 26 C. A. 355, 63 S. W. 665.

A wife, who has a community interest in the subject-matter of the suit, is debarred as a witness under this statute although she is not a party to the suit. *Hedges v. Williams* (Civ. App.) 64 S. W. 77, 78.

When the wife is a party to a suit between the heirs of her deceased husband, she cannot testify as to statements made by him to her, if she would be affected by a judgment for costs. *McKnight v. Reed*, 30 C. A. 204, 71 S. W. 318.

A husband gave a mortgage on land which was foreclosed and land bought by his creditor. In suit by creditor in trespass to try title against the heirs of his deceased wife to which suit he is a party, he cannot testify as to transaction with his deceased wife, by which it is sought to be shown that the land was the separate property of said wife. *Barrett v. Eastman Bros.* (Civ. App.) 86 S. W. 1058.

In a suit against a wife and children of a deceased person involving title to community property of the wife and the deceased husband, this statute does not apply to statements of deceased offered in behalf of the wife (because she owns absolutely in her own right one-half of the property), when she is not sued as executrix or administratrix, nor is asserting any right to the property as heir of her deceased husband, nor is administering the estate as surviving wife. *Evans v. Scott* (Civ. App.) 97 S. W. 117.

Where a wife is party to suit together with children of deceased husband, and she claims half interest in the land involved in her own right, transactions with a deceased person may be proved as to her interest but not as to interest of the heirs of her husband, who are parties to the suit. *Edwards v. White* (Civ. App.) 120 S. W. 916.

In an action on a benefit certificate, in which it was claimed by the insurance company that a check of \$5.20, which they had sent deceased in full of his claim for sickness, was never returned, the wife may not, under this article, testify as to statement by the husband on receiving the check. *Royal Fraternal Union v. Stahl* (Civ. App.) 126 S. W. 920.

Under this article a wife seeking to recover on a mutual benefit certificate issued to her deceased husband, under an agreement that she should have the money on the certificate provided she paid the assessments, may testify as to the agreement as against the insurance order and a third person claiming as beneficiary. *Eatman v. Eatman* (Civ. App.) 135 S. W. 165.

An action by one as surviving widow and sole heir of her deceased husband, though she be entitled to half the property sued for as survivor, is within this article, so that defendants may not testify to payments made to deceased. *Spencer v. Schell* (Civ. App.) 142 S. W. 111.

12. — **Partners.**—The plaintiff alleges existence of partnership between White and Rascoe (during latter's lifetime). Defendant White admits partnership. Mrs. Rascoe, executrix, denies it. The plaintiff and defendant White are not opposite parties so as to allow latter to testify under this article concerning transactions with deceased. *Rascoe v. Walker-Smith Co.*, 98 T. 565, 86 S. W. 729.

13. — **Disclaimer or other discharge of interest.**—A defendant who, in a suit for real estate brought by an administrator, disclaims all interest, is a competent witness to acts and conversations of the decedent affecting the title. *Eastham v. Roundtree*, 56 T. 110; *Markham v. Carothers*, 47 T. 21.

Plaintiffs sued for land in their right as heirs, making M. and other parties defendants. His codefendants also impleaded M. on his warranties to them. M. filed a disclaimer in the suit, but this did not render him competent to testify for the other defendants as to transactions by him with the deceased ancestors of plaintiffs, constituting a defense to the action. *Bennett v. Land & Cattle Co.*, 1 C. A. 321, 21 S. W. 126.

A disclaiming defendant in trespass to try title is not a party, within this article. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 399.

Where by an amended petition an original party plaintiff is omitted, and he files a disclaimer of any interest in the suit, he may testify as to conversations with the testator of defendant executors. *Oaks v. West* (Civ. App.) 64 S. W. 1033.

Where one files a disclaimer and is dismissed, it would seem that this article does not apply and he can be called as a witness. But conceding that the disclaimer does not remove one as a party, still the inhibition does not apply when the cause of action does not arise out of a transaction with a person since deceased. *Barrett v. Eastman*, 28 C. A. 189, 67 S. W. 200.

In an action to recover a lot and rents as damages, testimony of a defendant who had executed a replevin bond making himself liable for such rents, but who had filed a general denial and also a disclaimer of any interest in the property, was inadmissible as to any transaction between himself and decedent relative to the property. *Williams v. Neill* (Civ. App.) 152 S. W. 693.

14. **Interest in subject-matter as disqualifying witness.**—This article does not apply to an interested witness who is not a party. *Gilder v. Brenham*, 67 T. 345, 3 S. W. 309; *Howard v. Galbraith* (Civ. App.) 30 S. W. 689.

The fact that a person is a devisee or legatee does not of itself disqualify him as a witness. *Bradshaw v. Roberts* (Civ. App.) 52 S. W. 574.

15. — **Relationship of witness to party or person interested.**—In an action by an executor to set aside a deed made by his deceased to defendant, the daughter of the defendant who is not a party to the action is not prohibited by this article from testifying in behalf of defendant as to statements made by the deceased. *Armstrong v. Burt* (Civ. App.) 138 S. W. 172.

16. — **Agent of party interested.**—This article cannot be extended so as to include within its terms the agent of a party to a suit against executors, even though the transaction sought to be established was done entirely by the deceased and such agent. *Saunders' Ex'rs v. Weeks* (Civ. App.) 55 S. W. 33.

Where a mother delivered notes to her husband as trustee to collect and pay the proceeds to certain of their children, he was competent to testify, after her death, as to her statements when creating the gifts and establishing the trust. *Jarrell v. Crow*, 30 C. A. 629, 71 S. W. 397.

17. — **Manager of corporation.**—The general manager of a corporation is not a party within the meaning of the above article and is not precluded from testifying, etc. *Colonial & U. S. Mortgage Co. v. Thedford*, 21 C. A. 254, 51 S. W. 263.

18. — **Surviving party to contract or other transaction.**—Testimony of a partner held admissible to support a claim of ownership. *Lumpkin v. Montgomery* (Civ. App.) 25 S. W. 661.

A decedent's partner can testify in a suit by the heir of the deceased against a person claiming land under a deed of trust sale of the partnership property. *Barnett v. Houston*, 18 C. A. 134, 44 S. W. 689.

In a suit by the widow for her community interest in property that belonged to a partnership of which her husband was a partner, the living partner, who is a party to the suit, is not precluded from testifying as to transactions with or statements by the decedent. *Wilmurth v. Tompkins*, 22 C. A. 87, 53 S. W. 833.

When the heirs sue on a contract made by the defendant with deceased, defendant cannot testify as to any transaction which he had with deceased. *Pennybacker v. Hazlewood*, 26 C. A. 183, 61 S. W. 154.

19. — **Husband or wife of party or other person excluded from testifying.**—The wife, although not a party to proceedings between her husband and the representatives of a deceased party, is not a competent witness to testify to transactions between her husband and the deceased concerning matters in which she has a community interest with her husband. *Simpson v. Brotherton*, 62 T. 170.

Suit was brought by S., a married woman, and her children by her first husband, against the widow and children of R., deceased. The husband of S., from whom she was separated but not divorced, testified as to certain conversations with R. Held, that the evidence was improperly admitted. *Reddin v. Smith*, 65 T. 26.

The husband of a party to a suit comes within the terms of the statute. *Hicks v. Hicks* (Civ. App.) 26 S. W. 227.

Evidence of statements by deceased to his wife and plaintiff held incompetent, though the wife was not a party to the suit. *Anglin v. Barlow* (Civ. App.) 45 S. W. 827.

In a contest between plaintiff (a wife) and an executor over money deposited in a bank in the joint names of plaintiff and testator, alleged by plaintiff to be her separate property, neither the plaintiff nor her husband can testify about a transaction had with deceased. *Tompkins v. McGinn* (Civ. App.) 85 S. W. 453.

In an action in the husband's name against an executor to recover on behalf of the community estate for services rendered testator, the wife is a real party in interest, and cannot testify to transactions by herself or her husband with decedent, unless called by the opposite party. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

20. — **Termination or extinguishment of interest.**—An independent executor can voluntarily resign as affecting his qualification as a witness. *Rankin v. Rankin* (Civ. App.) 134 S. W. 392.

One who parted with all his interest in certain lands before suit was filed is not incompetent, under this article. *Buckley v. Runge* (Civ. App.) 136 S. W. 533.

21. **Parties as against whom testimony is excluded.**—In an action against heirs made parties and defending by special guardian, the testimony of plaintiff as to any transaction with or statement by the original defendant is inadmissible. *McCampbell v. Henderson*, 50 T. 601. A party to a suit against heirs claiming property through their deceased ancestor cannot testify as to statements made to him by the decedent, or to transactions between the decedent and himself, or to such statements to or transactions between deceased and third persons; and this although occurring at a time when the witness had no interest in such statements or transactions. *Parks v. Caudle*, 58 T. 216.

In a suit by an heir or devisee the parties may testify without restriction. *Newton v. Newton*, 77 T. 508, 14 S. W. 157.

Where land was conveyed to a son by his parents and he obtained divorce from his wife and died, in a suit by the wife against the parents for partition the testimony of the parents that the deed was without consideration and was never delivered was admissible. *Crenshaw v. Harris*, 16 C. A. 263, 41 S. W. 391.

Where a residuary legatee sues the widow of the testator to set aside as a fraud on him, a deed made by her conveying property in which it is claimed that she has only a life estate, she can testify in behalf of her grantee, that she paid for the property with her separate money. The provisions of this article do not apply in an action by a legatee. *Gibony v. Hutcheson*, 20 C. A. 581, 50 S. W. 648.

The above article does not apply to an action against executors who are trustees for legatees in the will of a decedent. *Clark v. Clark*, 21 C. A. 371, 51 S. W. 337.

In a suit against heirs of the deceased to set aside a deed executed by plaintiff to deceased, testimony as to statements made by deceased to plaintiff at the time the deed was executed is not admissible. *Lewis v. Whitworth* (Civ. App.) 54 S. W. 1077.

Defendant to suit by guardian of minor heir of decedent held not competent witness as to transactions with such decedent. *Bridge v. Carter*, 33 C. A. 591, 77 S. W. 245.

The statute against a party testifying to transactions with testator held to prohibit it only as against his heirs and legal representatives, and not as against his legatees and devisees. *Emerson v. Scott*, 39 C. A. 65, 87 S. W. 369.

Where husband sues as heir of deceased wife for partition of notes in which his wife was one of the principals, a defendant cannot testify in his own behalf as to an agreement of the deceased wife that principals of notes were to be paid to one of defendants. *Jones v. Day* (Civ. App.) 88 S. W. 426.

The statute prohibiting a party from testifying to statements of a deceased person does not apply to actions by or against corporations. *San Antonio Light Pub. Co. v. Moore*, 46 C. A. 259, 101 S. W. 867.

Where plaintiff died between time of filing suit and the trial and his heirs were made parties plaintiff, evidence of conversations between the deceased and defendant are inadmissible. *Duncan v. Jouett* (Civ. App.) 111 S. W. 981.

A surviving partner, suing for the benefit of the firm, is not a "legal representative" of the deceased partner. *Shivel & Stewart v. Greer Bros.* (Civ. App.) 123 S. W. 207.

In trespass to try title by heirs of the deceased ancestor under whom defendant claimed, the defendant is incompetent to testify to statements made to him by the deceased ancestor. *Dickey v. Forrester* (Civ. App.) 148 S. W. 1181.

22. — **Survivor of joint parties to contract or other transaction.**—The plaintiff was permitted to testify as to transactions between himself and the surviving partner, although the testimony might result in establishing a contract with a firm of which one partner was dead. *Bennett v. Frary*, 55 T. 145.

In an action by a surviving partner who is also executor of the decedent, the defendant cannot testify as to the statements of the decedent. *Stuart v. Altman*, 28 S. W. 461, 8 C. A. 657.

23. — **Party as to whom person deceased acted in representative or fiduciary relation.**—H., deceased, held the legal title to one-half of a tract of land in trust for S. In a suit by the heirs of H. against parties claiming under a deed from the widow and children of S., deceased, the widow of S. can testify respecting the ownership of her deceased husband. *Lumkins v. Coates* (Civ. App.) 42 S. W. 580.

Under this article, testimony of plaintiff as to statements made by one acting as agent of defendant's intestate is not competent against the agent's heirs who are defendants. *Mounger v. Daugherty* (Civ. App.) 138 S. W. 1070.

24. — **Principal of agent deceased or incompetent.**—Certain evidence by a widow in relation to transactions with her deceased husband held to be admissible. *Davis v. Weathered* (Civ. App.) 43 S. W. 21.

25. **Subject-matter of testimony—What constitutes transaction in general.**—A party may testify to his want of knowledge of certain facts, it not appearing that such want of knowledge depended on any statement of the decedent. *Mast v. Tibbles*, 60 T. 301.

A party was not permitted to testify in reference to an alleged overcharge in an account against him that he had called the attention of a deceased person to it, the executor of such decedent being a party to the suit. *Eastham v. Randolph*, 3 App. C. C. § 118.

This article does not prohibit a witness from testifying to things which are independent of the act or transaction on the part of the deceased; in other words, if the witness could testify that he at one time had in his possession a note which purported to be signed by the deceased and which note had subsequently been lost by him, such fact was certainly a fact independent of any act on the part of or transaction with the defendant, but such statement cannot be used as evidence of the fact that the deceased had accepted such note, that being the issue in the case. *Choate v. Huff*, 4 App. C. C. § 281, 18 S. W. 87.

One who, being party to a suit, claims title to land by deed from a deceased mother, in a suit where the plaintiff's title is a sheriff's deed, under execution sale to satisfy a judgment against a deceased father, is competent to testify from his own knowledge that the title to the property conveyed to his father before judgment was in fact paid for with the separate means of his mother. *Harris v. Seinsheimer*, 67 T. 356, 3 S. W. 307.

Defendant was properly permitted to testify, over the objections of plaintiff, as to facts tending to show that the land in controversy was his homestead in April, 1880, which was the time of the execution of a mortgage from him to plaintiff's testator. *Moores v. Wills*, 69 T. 109, 5 S. W. 675.

The declarations of a deceased vendor, made at the time he parts with possession of a deed, are admissible in evidence, in a suit to which his executor is a party, on an issue as to whether there was then a purpose to deliver the deed in consummation of a sale. His subsequent declarations, made after the registration of the deed, are not admissible. This article, on which objection thereto was based, does not apply to such a case. *Steffan v. Bank*, 69 T. 513, 6 S. W. 823.

Where pending suit a party becomes insane, the adverse party cannot testify as to conversations or transactions with him, but may state what he did. *Hamilton v. Starr* (Civ. App.) 27 S. W. 587.

A party may testify as to his own acts. *Britton v. Tischmacher* (Civ. App.) 31 S. W. 241; *Wagner v. Isensee*, 11 C. A. 491, 33 S. W. 155.

In a suit by an executor, evidence of conversations between defendants, tending to prove a transaction with testator, held incompetent. *Coffin v. Loomis* (Civ. App.) 41 S. W. 511.

A widow and executrix held competent to testify that she bought property claimed by a legatee of her husband in her own right. *Gibony v. Hutcheson*, 20 C. A. 581, 50 S. W. 648.

An heir, in an action against his father's executors to recover an interest in his mother's community estate, held precluded from testifying as to his intention in executing a release of such interest to his father, by this article. *Williams v. Emberson*, 22 C. A. 522, 55 S. W. 595.

A creditor, in an action to subject the property of his debtor conveyed to the debtor's wife, held competent to testify to the entire transaction, though both the debtor and his wife were deceased. *Gonzales v. Adoue* (Civ. App.) 56 S. W. 543.

To permit a witness to state that the execution debtor owned the property in controversy at the time of the levy held error. *Cullers v. Gray* (Civ. App.) 57 S. W. 305.

Evidence by a party to a suit relating to a transaction with a decedent held inadmissible, under this article. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 252.

In an action against administrator on note of his intestate, certain evidence held not incompetent as concerning a transaction with deceased. *Adam v. Sanger* (Civ. App.) 77 S. W. 954.

Where the testimony is not a "statement by" the deceased, and does not show "any transaction" with the deceased, but refers to the conduct of the deceased and the party to the suit towards each other, and it does not show that the witnesses received their knowledge of the facts about which they testify from the deceased, it is not inadmissible under this article. *Edelstein v. Brown* (Civ. App.) 95 S. W. 1128.

Where it appeared that the wife after the death of the husband had executed a deed to part of the community land to her daughter, in a suit by other heirs for partition,

the only issue being as to the right of the wife to convey more than her community share, there was no error in permitting the daughter to testify as to the delivery of the deed to her by her deceased mother. *Jennings v. Borton*, 44 C. A. 280, 98 S. W. 446.

Defendant was sued by executors of Mrs. Johnson, sister of defendant, on a note. It was permissible for him to prove that he and one of the makers of another note went to the deceased to induce her to accept the note as a credit on the note sued on, though he could not testify as to what she said. He could explain why he and the maker went to see his sister. This testimony did not contravene this article. *Huff v. Powell*, 48 C. A. 582, 107 S. W. 365, 366.

Under the statute, a person suing as the heir of a grantee to recover land cannot testify as to declarations of the grantee that the deed, though reciting a consideration of \$2,000, was in fact a deed of gift to her. *Wolf v. King*, 49 C. A. 41, 107 S. W. 617.

In a suit by son of deceased and former wife against the surviving wife for partition of community property, it was not error to permit the wife to testify, without being called by the opposite party, that the money which other witnesses testified had been given her by her deceased husband was used in paying for their home place, and the balance was deposited in bank to her own credit; and that she had no means of obtaining money, other than the money her husband gave her. The case was tried without a jury and the court stated that he would confine the testimony to the money that other witnesses saw the deceased husband give the wife and would not consider it from any other standpoint. *Wooden v. Wooden* (Civ. App.) 116 S. W. 629.

The exclusion of evidence in partition, as a statement by and a transaction with a deceased ancestor affecting property involved, held error. *Ivy v. Ivy* (Civ. App.) 128 S. W. 682.

Certain testimony held objectionable as concerning a transaction with a decedent. *Jordan v. Massey* (Civ. App.) 134 S. W. 804.

Under this article one cannot testify to a marriage with decedent, where that is an issue against an administrator. *Berger v. Kirby* (Civ. App.) 135 S. W. 1122.

On an issue whether a will was the result of an insane delusion, conceived by testator toward his wife at the time of his mother's death, evidence that, while traveling to the funeral, testator sat behind his wife and "gazed" at her held admissible. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

In an action by a broker for commissions for a sale of land, in which defendant's executrix was substituted upon his death, the issues being as to whether plaintiff was employed, or whether decedent rendered himself liable on an implied contract, testimony by plaintiff as to the details of a trip made by himself and the deceased, in which a strong box belonging to deceased was opened, and an abstract taken out and, after being taken to the courthouse, returned to the plaintiff, related to a transaction with decedent, and was inadmissible. *Heath v. Moore* (Civ. App.) 146 S. W. 709.

A widow contesting the probate of a will of her deceased husband on the ground of fraud, undue influence, and testamentary incapacity may testify to the amount of property and money owned by her at her marriage, and that she had sold her property and loaned her husband money, as against the objection that such testimony was inadmissible as relating to transactions between herself and the deceased husband. *McDonald's Estate v. McDonald* (Civ. App.) 150 S. W. 593.

In an action to recover a lot and the rents thereon, held, that testimony of one of the defendants relating solely to what decedent did with reference to a deed executed by defendant, and to a transaction between defendant and a third person, was not incompetent as a transaction with the decedent. *Williams v. Neill* (Civ. App.) 152 S. W. 693.

Under the provision of this article, disqualifying a party to testify against an administrator to transactions with a decedent, one cannot testify to a marriage with decedent, where that is an issue against the administrator. *Berger v. Kirby*, 106 T. 611, 153 S. W. 1130.

26. — Occupancy of land and delivery of property.—The plaintiff may testify in a suit against an administrator as to the value of the rents, the length of time deceased had possession and the means taken to oust her. *Killfoil v. Moore* (Civ. App.) 45 S. W. 1024.

In an action by an executor on a note made by defendants to decedent in payment of bar fixtures purchased by two of defendants, testimony by defendants that certain of the property purchased was never received, and that no credit was given defendants for the value thereof, and that the notes were given after part of the property was delivered, was incompetent under this article, because relating to a transaction with plaintiff's testator. *Lengelet v. Piper* (Civ. App.) 133 S. W. 480.

27. — Contracts.—A party to the suit may testify as to what he himself has done under and by virtue of a contract with the intestate. *Potter v. Wheat*, 53 T. 401.

In action against administrator for intestate's board, plaintiff held incompetent to testify as to the agreement. *Bartlingck v. Harriman*, 16 C. A. 462, 41 S. W. 884.

Testimony was held not competent as evidence of a "transaction with, or a statement by," a decedent, prohibited by Art. 3690. *Walker v. Pittman*, 18 C. A. 519, 46 S. W. 117.

Defendant cannot testify that he did not sign a written instrument indorsed at the time stated therein, where the other party thereto is dead. *Hazlewood v. Pennybacker* (Civ. App.) 50 S. W. 199.

The absence of any sworn pleading denying the execution of a written contract declared on will not entitle plaintiff, upon proof that the contract is lost, to testify as to its contents, in an action against the heirs of the other contracting party. *Ehrenworth v. Putnam* (Civ. App.) 55 S. W. 190.

The grantee of a decedent can testify to the contents of a lost deed in a suit between the grantee and the heirs of a grantor. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 401.

Evidence that two of the three makers of a note signed as sureties held improperly admitted in an action thereon by the guardian of heirs of the deceased payee. *Neitch v. Hillmann*, 29 C. A. 544, 69 S. W. 494.

In an action on a bond against the principal and the representatives of a deceased surety, the principal was a competent witness to testify that such deceased surety told him that he would remain on the bond. *United States Fidelity & Guaranty Co. v. Fos-sati* (Civ. App.) 81 S. W. 1038.

28. — **Services and value thereof.**—The testimony of a physician in a suit against an administrator for pay for his services, as to treating and prescribing for deceased is inadmissible under this article. *Garwood v. Schlichenmair*, 25 C. A. 176, 60 S. W. 574.

In an action against an executrix, plaintiff's testimony to services rendered and the value thereof held not objectionable as involving transactions with decedent. *Buckler v. Kneezell* (Civ. App.) 91 S. W. 367.

In an action in the husband's name against an executor to recover for services rendered testator, in which plaintiff's wife was in effect a party, the recovery being for the community estate, the wife testified that she rendered services for testator by milking, cooking, and performing other housework, and that her husband would take testator every place he wanted to go, and waited on him all over the place in tending to the stock, etc., and plaintiff testified that he cut wood, fed the cattle, put up the hay, etc., harnessed the buggy, and carried testator almost every place there was anything to see to, and that when he moved to testator's farm he took with him corn and pork and other provisions, and the corn was fed to his and testator's horses, and the other supplies, as well as groceries bought by plaintiff, were eaten by him and testator. Held, that the witness' testimony that her husband took testator every place he wanted to go, and waited on him all over the place in feeding, etc., and carried him almost every place there was anything to see to, as well as plaintiff's testimony that groceries purchased by him were used by testator, was as to "transactions" with testator, and not admissible, but the other testimony was admissible. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

29. — **Partnership transactions.**—A widow held competent to testify to affairs of a late firm composed of the deceased husband and others. *Gordon v. McCall*, 20 C. A. 283, 48 S. W. 1111.

30. — **Payment or transmission of money.**—In a suit by an administrator against the assignee of a note made by the intestate, to cancel the same on the ground of payment, the holder is not permitted to testify that the note has not been paid. *Johnson v. Lockhart*, 16 C. A. 32, 40 S. W. 640.

In an action on a note by administrator, evidence as to a payment held inadmissible, as relating to transactions with a deceased person. *Neitch v. Hillmann*, 29 C. A. 544, 69 S. W. 494.

Plaintiff sued administrator for land or in alternative to recover on notes given for purchase money of same, and to foreclose vendor's lien thereon. Defendant pleaded payment. There was evidence sufficient to show that notes had been paid. Plaintiff could not testify that he had never received from deceased money on the notes sued on. The evidence was intended doubtless, to show that the money was received from deceased on other debts due plaintiff by deceased, and that none was paid on the notes. This evidence is prohibited by this article. *Abbott v. Stiff* (Civ. App.) 81 S. W. 563.

31. — **Physical condition and mental capacity.**—On the issue as to whether a will was the result of an insane delusion, conceived by testator towards his wife about the time of his mother's death, testimony of the wife that, while traveling to the mother's funeral on a train, the testator sat several seats behind his wife, and that every time she looked back at him he was "gazing" at her, was not inadmissible as being a "transaction" or "communication" with the testator. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

32. — **Transactions between persons other than witnesses and persons subsequently deceased or incompetent.**—A party to a suit against heirs claiming property through their deceased ancestor is precluded not only from testifying as to statements made to him by deceased, and to transactions between deceased and himself, but also as to any such statements or to transactions between the deceased and third persons; and this, although occurring at a time when the witness had no interest in such statements or transactions. *Parks v. Caudle*, 58 T. 216.

Wife held competent to testify that a deed to her deceased husband from his deceased mother was a gift. *Mahon v. Barnett* (Civ. App.) 45 S. W. 24.

Proof of statements made by deceased to his wife and to plaintiff cannot be proven in a suit by the administrator. *Anglin v. Barlow* (Civ. App.) 45 S. W. 827.

Where mortgage notes were given to plaintiff's husband, since deceased, in payment for a restaurant, sold while plaintiff and decedent were husband and wife, so that the notes and mortgage were presumably community property, and plaintiff sues, as owner of one-half of the community, to foreclose, proof by her of the execution of the mortgage was not subject to the objection that she was disqualified by reason of being an heir and representative of her deceased husband. *Blair v. Breeding*, 57 C. A. 147, 121 S. W. 869.

In an administrator's action to recover real property and rents thereon, testimony of one of the defendants showing that he had never delivered a deed to decedent, that a codefendant had paid the purchase money for the property, and that the deed to decedent was delivered to such third party did not relate to transactions by defendant with decedent, but solely to what decedent himself did as to the deed and to a transaction between defendant and his codefendant, and hence was competent. *Williams v. Neill* (Civ. App.) 152 S. W. 693.

33. — **Transactions or communications between witness and agent competent to testify.**—Testimony in regard to a conversation had with a guardian of a ward since deceased is not objectionable, when given by the party calling him, when it does not relate to any transaction with or statement by the ward. *Davis v. Beall* (Civ. App.) 50 S. W. 1086.

This article does not prevent a party suing on a contract made with an agent of a decedent from testifying to the transaction, where the agent is not incapacitated from testifying. *Smith v. Olivarri* (Civ. App.) 127 S. W. 235.

This article cannot be extended so as to exclude testimony of plaintiff in a suit against an administrator as to statements made to him by the agent of the intestate

relative to the sale shown by intestate's deed. *Mounger v. Daugherty* (Civ. App.) 138 S. W. 1070.

34. — **Admissions or other statements by person subsequently deceased.**—Competency of witness as to transaction with decedent determined. *Lumkins v. Coates* (Civ. App.) 42 S. W. 580.

On an issue of title, the warrantor of defendants is not incompetent to testify to declarations of plaintiff's ancestor, through whom they claim as heirs. *Parker v. Nusbaumer*, 21 C. A. 180, 50 S. W. 646.

Where one claims under sale of land by trustee, it is inadmissible for him to state that the beneficiary since deceased requested the trustee to sell the land to pay the debt. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 253.

The statute prohibits either party from testifying "as to any transaction with," as well as to any "statement" by, the testator or intestate. *Sachse v. Loeb*, 45 C. A. 536, 101 S. W. 451.

35. — **Communications or Instruments in writing.**—A defendant is not a competent witness to prove the loss and contents of a receipt alleged to have been given by the plaintiff's intestate (*Garrison v. King's Administrator*, 35 T. 183) or the loss of a deed (*Howard v. Galbraith* [Civ. App.] 30 S. W. 689).

A defendant in an action by an executor cannot prove the contents of a letter written by him to the deceased to show his acceptance of a deed made by the deceased. *Blackman v. Shierman*, 21 C. A. 517, 51 S. W. 886.

Where one sues the executors of his father's estate he cannot testify as to the purpose and intention of an instrument executed by him to his father during the latter's lifetime. *Williams v. Emberson*, 22 C. A. 522, 55 S. W. 601.

Letters written by a deceased person were not inadmissible in evidence under this article, it applying only to oral declarations. *Hagelstein v. Blaschke* (Civ. App.) 149 S. W. 718.

36. — **Books of account.**—The statute cannot be avoided by reducing evidence to writing in the form of books. *Hedges v. Williams*, 26 C. A. 551, 64 S. W. 77.

In an action by an administrator of a cestui que trust for an accounting, the trustee's book of account was inadmissible, where he was required to prove its correctness by his own evidence. *Watson v. Dodson* (Civ. App.) 143 S. W. 329.

37. **Nature and effect of testimony.**—The admission of the testimony of parties as to transactions with plaintiff's intestate is not reversible error, another witness whose competency is not questioned having testified to the same facts. *Staley v. Hankla* (Civ. App.) 43 S. W. 20.

Where the defendant in a suit by an administrator against him is allowed to testify as to a transaction which he had with the deceased relative to the subject-matter of the suit, the case will be reversed, the claim that the judgment is supported by the uncontradicted and unimpeached evidence of other witnesses, not being so conclusively established as to render the ruling harmless, although the case was tried by the court without a jury. *Baugh v. Geiselman*, 23 C. A. 143, 55 S. W. 615.

The testimony of a witness as to the deceased signing a note as surety is prohibited by this article, but as there was no testimony to show that deceased signed the note other than as surety the testimony was harmless. *Coutlett v. U. S. Mortg. Co.* (Civ. App.) 60 S. W. 819, 820.

In trespass to try title continued in the name of plaintiff's executor after her death against defendant's heirs and legal representatives, they were not prejudiced by the court permitting the executor to testify that in a casual conversation with his testatrix he heard her say something about the land in controversy, heard her talk about "her farm down there," and never heard her say anything about its belonging to her alleged cotenant, over an objection that it was a violation of this article. *Yealock v. Yealock* (Civ. App.) 141 S. W. 842.

38. **Effect of admission of evidence on behalf of adverse party.**—When a plaintiff has died after his depositions have been taken, and the suit is prosecuted by his executor, the defendant may testify as to the acts and declarations of the testator about which plaintiff had testified by deposition read in evidence. *Runnels v. Belden*, 51 T. 48.

One against whom a judgment had been rendered on service of process by publication applied within proper time for a new trial, and obtained it, but after the former plaintiff's death, whose wife, as executrix, was made defendant. The deceased plaintiff had testified on the former trial, and his evidence was properly admitted on the second trial, although the defendant, who had been cited by publication, was not actually present in person or by counsel. Such evidence being admitted, the adverse party was also a competent witness. *O'Neill v. Brown*, 61 T. 34.

A defendant cannot introduce the depositions of the deceased plaintiff on file among the papers of the cause and then testify as to the transactions with the deceased mentioned in such depositions. *Ivy v. Bondies* (Civ. App.) 44 S. W. 916.

The admission of plaintiff's testimony as to a transaction, objected to on the ground that it was a statement of a transaction with a deceased person, held not reversible error where the same facts were established by defendants. *Clarke v. Adam*, 30 C. A. 66, 69 S. W. 1016.

In an action against an executor for services rendered testator in which defendant's witness testified to a conversation with plaintiff, testimony by plaintiff which merely gave a different version of such conversation was admissible. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

39. **Rebuttal of evidence on behalf of adverse party.**—An administrator sued a distributee of an estate for money alleged to be assets, and in the defendant's possession. Another distributee testified, in behalf of the plaintiff, to admissions by the defendant of his possession of the money. Held, that defendant was a competent witness in his own behalf to deny having made such admissions. *Garner v. Cleveland*, 35 T. 74.

In an action against an executor for services to testator, in which defendant's witness testified to a conversation with plaintiff, in which plaintiff stated the terms of his contract with testator and the latter's compliance therewith, testimony by plaintiff

which merely gave a different version of such conversation with the witness, but did not refer to a different conversation with him, was admissible. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

Evidence of a transaction with a decedent held inadmissible, notwithstanding evidence brought out by the adverse party. *Austin v. Rupe* (Civ. App.) 141 S. W. 547.

40. **Effect of calling or examination as witness by adverse party.**—In an action against legatees, held not erroneous to permit defendants to testify as to conversations with testator when they were called by plaintiff. *Clark v. Clark*, 21 C. A. 371, 51 S. W. 337.

Where plaintiff sues an executor on his testator's note, he is a competent witness when called by the defendant. *Scott v. Menly* (Civ. App.) 105 S. W. 55; *McKeon v. Roan* (Civ. App.) 106 S. W. 406.

Plaintiffs, as heirs of Louis Stahl, in a suit against Maria Stahl, surviving widow, took her *ex parte* deposition, which on their motion was quashed for misconduct in making her answers. Under the circumstances plaintiffs did not "call" Maria as a witness, so as to deprive them of the right to object to her testifying to statements of her deceased husband. *Grieb v. Stahl*, 101 T. 306, 107 S. W. 41.

Where plaintiff, on cross-examination, questioned defendant as to certain transactions by his deceased father, plaintiff cannot complain that defendant's testimony on direct examination relating to the same transactions was incompetent as being testimony by an heir relating to the transactions of a decedent. *Edwards v. White* (Civ. App.) 120 S. W. 914.

In an action on an instrument, certifying that defendant had received specified sums of money to loan for plaintiff's intestate, and that he had advanced to her specified sums, leaving a balance due her, the administrator asked defendant whether the instrument was in his handwriting, to which he answered it was. Thereupon defendant's counsel offered to prove that defendant had made a mistake in the instrument, and that he should have credited himself with a certain additional sum, which evidence was excluded as relating to a transaction between decedent and defendant. Held that, notwithstanding the instrument was a "transaction with decedent" within this article, yet defendant, having been called by the administrator to testify to a part of the transaction, should have been permitted to testify to the whole of it. *Watson v. Dodson*, 57 C. A. 32, 121 S. W. 209.

Where a widow was cross-examined as to a transaction with her husband, it was competent for her, on redirect examination, to repeat or explain or qualify her testimony as against an objection that she was incompetent so to testify. *Reyes v. Escalera* (Civ. App.) 131 S. W. 627.

41. **Objections to admissibility, and exclusion.**—When evidence has been given under this article, and its inadmissibility appears on cross-examination, it should be excluded. *Branch v. Makeig*, 28 S. W. 1050, 9 C. A. 399.

An objection made in the assignment of error that certain testimony was a statement by a deceased person and prohibited by this article cannot be considered on appeal when the objection was not made in the trial court. *Boston v. McMenemy*, 29 C. A. 272, 68 S. W. 203.

An objection to all of the testimony of a witness will be disregarded where a part of it is admissible. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

42. **Determination as to admissibility.**—In an action against an executor for services rendered testator, in which defendant's witness testified to a conversation with plaintiff, whether plaintiff's testimony that he had no such conversation with the witness but made other and different statements to him referred to a different conversation than that testified to by the witness held for the trial court's determination under the circumstances. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

Art. 3691. [2303] [2249] Religious opinions, etc., do not disqualify.—No person shall be incompetent to testify on account of his religious opinions, or for want of any religious belief. [Const., art. 1, sec. 5.]

Form of oath.—See notes under Art. 9.

Art. 3692. [2304] [2250] Printed statutes evidence, when.—The printed statute books of this state, of the United States, of the District of Columbia, or of any state or territory of the United States, or of any foreign government purporting to have been printed under the authority thereof, shall be received as evidence of the acts and resolutions therein contained. [Act May 13, 1846. P. D. 3712.]

Application in general.—When a code or statutes of another state have been published by authority, and purport to have been so published, a reprint of such book is admissible in evidence, without other evidence of its sanction by the government of the state. *Ellis v. Wiley*, 17 T. 134.

The printed statute book of another state is admissible in evidence when properly authenticated. *Texas Express Co. v. Beissner*, 1 App. C. C. § 572; *Manhattan Life Ins. Co. v. Fields* (Civ. App.) 26 S. W. 280. This includes only books purporting to have been printed by state authority, and does not embrace private or unofficial publications. *Martin v. Payne*, 11 T. 292.

A publication, made by statute of a territory presumptive evidence of the laws of that territory, is admissible in evidence in this state to prove a statute of the territory. *Beard v. State*, 47 Cr. R. 183, 83 S. W. 824.

A pamphlet held not to purport to have been printed under authority of another state, so as to be admissible as evidence of its laws. *Northwestern Nat. Life Ins. Co. v. Blasingame*, 38 C. A. 402, 85 S. W. 819.

The decisions of the supreme court of a state are not admissible to prove the laws of that state. Proof is to be made by the introduction of the statute books of the state. *A., T. & S. F. Ry. Co. v. Smythe*, 55 C. A. 557, 119 S. W. 896.

Mode of authentication.—The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, may be authenticated by having the seals of such state, territory or country affixed thereto. R. S. U. S. § 905; *Moseby v. Burrow*, 52 T. 396. This does not preclude the states from establishing other modes of authentication or proof. *Martin v. Payne*, 11 T. 292.

The certificate of the secretary of state of another state attached to what purports to be a copy of a legislative act of this state, and authenticated by the great seal of state, which declares that the copy is "an exact transcript of an act of the general assembly," etc., "as the same appears of record on page 180 of the official published acts of that year, now in my office," was properly admitted in evidence to prove the legislative act. *Harvey v. Cummings*, 68 T. 599, 5 S. W. 513.

To recognize printed "regulations of railroads in and for the republic of Mexico" as the laws of Mexico, they must purport to have been printed under the authority thereof. *Mexico Nat. Ry. Co. v. Ware* (Civ. App.) 60 S. W. 344.

Presumptions.—See notes under Art. 3687, Rule 12, §§ 27, 28, 73.

Where on appeal it appeared that the court admitted the statutes of another state in evidence, it will be presumed, where the bill of exceptions does not show the contrary, that the volume was published by authority of such other state, and was admissible under this article. *Blethen v. Bonner* (Civ. App.) 52 S. W. 571.

Construction of laws.—See notes under Title 81, Chapter 3.

Opinion evidence as to foreign laws.—See notes under Art. 3687, Rule 36, § 93.

Art. 3693. [2305] [2251] Certified copies of acts, etc., evidence.
—A certified copy under the hand and seal of the secretary of state of this state, of any act or resolution contained in any of such printed statute books deposited in his office, or of any law or bill, public or private, deposited in his office in accordance with law, shall be received as evidence thereof. [Id.]

Charter of corporation.—In an action against a railroad company for breach of a construction contract, a copy of the company's charter certified to by the secretary of the territory which granted it was properly admitted in evidence. *El Paso & S. W. R. Co. v. Harris & Liebman* (Civ. App.) 110 S. W. 145.

Judicial notice.—See notes under Art. 3687, Rule 15.

Best and secondary evidence.—See notes under Art. 3687, Rules 9–11.

Art. 3694. [2306] [2252] Copies of records of public officers and courts to be prima facie evidence.—Copies of the records of all public officers and courts of this state, certified to under the hand, and seal of there be one, of the lawful possessor of such records, shall be admitted as evidence in all cases where the records themselves would be admissible; translated copies of all records in the land office, certified to under the hand of the translator, and the commissioner of the general land office, attested with the seal of said office, shall be prima facie evidence in all cases where the original records would be evidence. [Id. P. D. 3715.]

See, also, notes under Arts. 82, 3696.

Cited, *Edwards v. Smith* (Civ. App.) 137 S. W. 1161.

Documents of record in general.—Certified copies of the record of officers of district and county surveyors are admissible to show by what certificate a given survey was made. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

Only such documents as are required or permitted by law to be filed in a public office, so as to constitute them archives or records, can be proved by certified copy. *Southwestern Surety Ins. Co. v. Anderson*, 155 S. W. 1176.

Legal proceedings in general.—The record of legal proceedings competent evidence. *Morris v. Gaines*, 82 T. 255, 17 S. W. 538.

Records of clerk of court.—Certificate of clerk of court held sufficient to make a transcript of proceedings in a certain estate admissible in evidence. *O'Connor v. Vineyard* (Civ. App.) 43 S. W. 55.

The district clerk can give a certified copy of entry in notarial record deposited in his office, and such copy is admissible in evidence. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 401.

A certificate of the clerk of a county court that at a certain time he had indexed a certain judgment record is not competent evidence of such indexing. *Lindsey v. State*, 27 C. A. 540, 66 S. W. 332.

A county clerk's certificate of the record of an abstract of a judgment was not inadmissible in evidence because the page of the record of the judgment was not given therein. *Weinert v. Simmang*, 29 C. A. 435, 68 S. W. 1011.

Article 1748, authorizes clerks of the county court to appoint deputies, and requires such deputation to be recorded in the office of the clerk and deposited with the clerk of the district court; while articles 3687–3713 authorize such record, and copies thereof, to be introduced in evidence. Article 2287 declares that each justice of the peace shall be ex officio notary public; articles 9–14 authorizing such officials to administer oaths and take affidavits. Held that, where a county clerk testified that he had appointed another as deputy, but that the deputation had been mislaid, a record of such deputation, which was acknowledged before a justice of the peace, is admissible in evidence. *Smith v. State* (Cr. App.) 156 S. W. 645.

Probate record.—The records of courts of probate come within the provisions of this statute. *Houze v. Houze*, 16 T. 600; *Abercrombie v. Stillman*, 77 T. 589, 14 S. W. 196.

Certified copies of probate records, including inventories, etc., are admissible in evidence. *Collins v. Ball*, 82 T. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

Seal.—The clerk's certificate to copies of records of the district court must be authenticated by the seal of the district court. *McCarty v. Burtis*, 22 S. W. 422, 3 C. A. 439.

Order of commissioners' court.—In prosecutions under local option law it is proper to admit certified copies of the order of the commissioners' court. *Johnson v. State* (Cr. App.) 55 S. W. 968.

Pleadings.—Admissibility of pleadings in general, see notes under Art. 3687.

Certified copies of pleadings in the courts of Texas, under the hand and seal of the custodians of the records of the courts in which the pleadings were filed, are admissible in evidence under this statute. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 899.

Judgment.—It is not an objection to the copy of a judgment that the transcript does not show that the court by which the judgment was rendered convened, and that a judge presided, or that it did not have the signature of the presiding judge, or that it failed to show that the minutes of the court of the term at which the judgment was rendered had been signed by the judge. *Mitchusson v. Wadsworth*, 1 App. C. C. § 976.

A copy of a judgment which did not show on its face by what court it was rendered had attached to it a certificate of the clerk of a court that it was a copy of an order of court "as the same appears of record in my office in records of court minutes." Held sufficient. *King v. Duke* (Civ. App.) 31 S. W. 335; *Halbert v. Carroll* (Civ. App.) 25 S. W. 1102; *National Bank v. Bryan*, 12 C. A. 673, 34 S. W. 451.

A judgment of a justice of the peace, certified to by the officers of the circuit court is not admissible. *I. B. Rosenthal Millinery Co. v. Lennox* (Civ. App.) 50 S. W. 401.

Article 3700 applies exclusively to instruments between private parties, such as deeds, bills of sale, deeds of trust, etc., and a divorce decree contained in the minutes of the same court in which accused was being tried for murder was admissible under this article without the judgment or a copy having been filed with the record in such prosecution and notice given to accused. *Clayton v. State* (Cr. App.) 149 S. W. 119.

In an action to cancel a conveyance on the ground of the grantor's insanity, a document purporting to be a judgment of the county court duly certified by the clerk thereof as a correct copy of the order entered in the lunacy case held admissible. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

Records of land office.—A translated copy of a Spanish title in the general land office, certified by the translator, is admissible upon the certificate of the commissioner that the person making the aforesaid certificate is a Spanish translator. *Spillars v. Curry*, 10 T. 143; *Swift v. Herrera*, 9 T. 263.

Certified copy from the general land office of a grant of land issued in 1835, admissible in evidence without accounting for the testimonio. *Shepard v. Harrison*, 54 T. 96; *Van Sickle v. Catlett*, 75 T. 404, 13 S. W. 31.

The translation of an archive in the general land office, made by the Spanish translator and attached to his deposition as an exhibit, with his certificate of its correctness, is admissible in evidence, in connection with his testimony, showing his ability to read and write the Spanish language, and that he attached the exhibit as a translation of the archive Spanish paper. *Houston v. Blythe*, 60 T. 506.

The archives in the general land office showing the proceedings of the board of land commissioners are competent to show to whom and upon what proof headright certificates were granted. *McNeal v. O'Connor*, 79 T. 227, 14 S. W. 1058.

An order from the grantee of a land certificate to the clerk of the county land board, dated February 25, 1838, directing the disposition to be made of the certificate, is not an archive of which a certified copy can be given. *Lott v. King*, 79 T. 292, 15 S. W. 231.

Documents evidencing acts of officers of the Spanish government in making grants of land, in the adjustment of boundaries of lands granted, ascertainment of unappropriated lands and like matters pertaining to the lands on the east side of the Rio Grande, and being archives at Gerrero, and properly reported and filed in the general land office, are archives therein. *Downing v. Diaz*, 80 T. 436, 16 S. W. 49.

The records of patents in the general land office stand in the same position and have equal dignity and the same effect as the original patent delivered to the grantees, and a certified copy of such a patent from those records is primary evidence of its issue. *Ney v. Mumme*, 66 T. 268, 17 S. W. 407. The certified copy of a will as evidence is of equal dignity with the original. *Hickman v. Gillum*, 66 T. 314, 1 S. W. 339.

An old map in the general land office designating lots at the seat of government is a record of that office. *Travis County v. Christian* (Civ. App.) 21 S. W. 119.

Copies of transfers on land certificates filed in the general land office are admissible. *Halbert v. Carroll* (Civ. App.) 25 S. W. 1102.

The voluntary affidavit of a county surveyor, acting unofficially, as to the location of lines of old surveys, filed in the general land office, does not become an archive, so that it can be authenticated by the commissioner, and become thereby admissible as declarations of the affiant when dead. *Daniels v. Fitzhugh*, 13 C. A. 300, 35 S. W. 33.

Indorsements on a certified copy of a land certificate, being certified as correct copies of the indorsements on the original, are admissible. *Pendleton v. Shaw*, 18 C. A. 439, 44 S. W. 1002.

Certified copy from general land office of original grant, reciting that map of land is attached, but containing no map nor accounting for its absence, is sufficient, when surveyor's field notes referred to in grant as part of description fully identify land. *Hooks v. Colley*, 22 C. A. 1, 53 S. W. 56.

In an action concerning public school lands, the original list of classified and appraised lands in the county, sent to the county clerk by the commissioner of the general land office, held admissible. *Thompson v. Autry* (Civ. App.) 57 S. W. 47.

In an action involving a conflict between surveys of state lands, a map compiled and published by the land office was admissible to identify the location of the surveys. *Barrow v. Gridley*, 25 C. A. 13, 59 S. W. 913.

In an action involving a conflict between state surveys, the affidavit of the surveyor, explanatory of his field notes and filed in the land office, was not admissible as a public record. *Id.*

In trespass to try title to school lands, certified copy of classification and appraisal held admissible. *McBane v. Angle*, 29 C. A. 594, 69 S. W. 433.

Where a power of attorney with reference to the sale of lands was recorded in a county in which none of the land was situated, a copy of the record filed in the land office did not become an archive of that office. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

A certified copy of waiver of lease on file in the general land office which was neither acknowledged nor had been recorded was admissible in evidence, because it was a paper required or permitted to be filed in the general land office. *Trevey v. Lowrie*, 33 C. A. 606, 78 S. W. 19.

A copy of the records in the land office if proved by a competent witness, even though not connected with the land office, to be a true copy is admissible in evidence. It need not be a certified copy. *Smithers v. Lowrance*, 35 C. A. 25, 79 S. W. 1089.

The fact that transfers of school land had become archives of the general land office held sufficient to authorize the introduction of certified copies thereof in evidence. *Tolleson v. Wagner*, 35 C. A. 577, 80 S. W. 846.

Examined copies of appraisal and classification records in the general land office held admissible in evidence. *Smithers v. Lowrance*, 100 T. 77, 93 S. W. 1064.

In an action for the recovery of school land, lease thereof held admissible in evidence. *Trimble v. Burroughs*, 41 C. A. 554, 95 S. W. 614.

A notice card sent by the land commissioner to a purchaser of land that his application has been accepted is not a document or certificate certified and attested in the manner required by law and is not admissible in evidence. *Slaughter v. Cooper* (Civ. App.) 107 S. W. 898.

Copies of documents which were archives of the general land office held properly admitted in evidence. *Keith v. Guedry* (Civ. App.) 114 S. W. 392.

Copies of letters of the land commissioner, preserved in the ordinary way, are copies of records of the land office. *McKee v. West*, 55 C. A. 460, 118 S. W. 1135.

In an action by a vendee against his vendor to recover a payment made on land, the sale of which to defendant by the state was claimed to have been forfeited, a certified copy of an award by the commissioner of the land office to a third party made subsequent to the sale by defendant to plaintiff held admissible, and to raise the presumption that the first sale had been forfeited before the second was made. *Slaughter v. Cooper*, 56 C. A. 169, 121 S. W. 173.

In view of Arts. 82 and 3696, held, that sketches and plats made in the general land office from maps of H. county were admissible under this article in a boundary line dispute concerning land located therein, though the maps were not made contemporaneously with the date of location of the different surveys. *Myers v. Moody* (Civ. App.) 122 S. W. 920.

An indorsement made on an original grant of land on file in the general land office held an archive of the office, rendering a certified copy of the indorsement admissible in evidence. *Davidson v. Ryle*, 103 T. 209, 124 S. W. 616, 125 S. W. 881.

In view of Arts. 3695 and 3696, held, that a certified copy from the general land office of memoranda made upon the file wrapper, covering the papers relating to a certain land certificate and survey, and showing the various steps taken by the land commissioner as to the issuance of the certificate, survey, and patent, was admissible in evidence in trespass to try title, so far as material and relevant; but a certified copy from the general land office of a letter from the transferee of a certificate to the land commissioner, inclosing surveys and the deed of transfer, and referring to the execution of a transfer by another, was not admissible under this article, not being an archive of the land office. *Allen v. Clearman* (Civ. App.) 128 S. W. 1140.

Deed.—A certified copy of a deed, the authentication of which is insufficient to entitle it to registration, is inadmissible, because the thing copied is not a record of a public officer. *Heintz v. Thayer*, 92 T. 658, 50 S. W. 929.

A deed improperly acknowledged and transcribed on the records can be proven as at common law, but not by a certified copy. *Heintz v. Thayer*, 92 T. 658, 51 S. W. 640.

Notarial record.—The authority of district clerk to give certified copy of notarial record deposited in his office, and the admissibility in evidence of such copy is clear. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 401.

Examined copy.—Every (public) document which a party has the right to inspect may be proved by a duly authenticated copy, and where proof is by a copy, an examined copy duly made and sworn to by any competent witness is always admissible. *Smithers v. Lowrance*, 35 C. A. 25, 79 S. W. 1088.

Statement of facts.—A statement of facts filed in the clerk's office is not a record of his office such as he can authenticate a copy of for use in an appellate court. The law provides that the original statement of facts and not a copy must be sent up with the transcript. *Royal Ins. Co. v. Texas & G. Ry. Co.* (Civ. App.) 115 S. W. 126.

Filed papers.—Where transfers of leases are filed in the land office without being acknowledged or recorded in the county where the land lies, which the law authorizes to be done, they become records of the office and certified copies of them are admissible in evidence. *McKee v. West*, 55 C. A. 460, 118 S. W. 1136.

Admissibility in federal court.—The federal courts do not require the certificate of a judge of a state court that the attestation of the clerk thereof is in due form. *Edwards v. Smith* (Civ. App.) 137 S. W. 1161.

Charter of corporation.—Under this article and Art. 3696, a certified copy of a certificate of authority issued by the secretary of state to an amusement company is properly received in evidence, in all cases in which the original is admissible. *Gould v. State*, 61 Cr. R. 195, 134 S. W. 695.

In an action for the price of goods, where defendant claimed that he had agreed with the seller to transfer the goods to the C. Company, a copartnership, and offered testimony that it was still a copartnership, the certified copy of the charter of the company and the affidavits of its incorporators were admissible to show that it was not a partnership, but a corporation. *Holt & Smith v. Texas Moline Plow Co.* (Civ. App.) 150 S. W. 215.

Bonds.—In view of Art. 3710, held that, in the absence of an affidavit denying the execution of a supersedeas bond filed in another county, in an action for breach thereof,

the original bond was admissible in evidence, and plaintiff was not required to prove it by a certified copy under this article. *Garrett v. Grisham* (Civ. App.) 156 S. W. 505.
Certified copy of chattel mortgage.—See notes under Art. 5657.

Art. 3695. [2307] [2252a] Record of surveys, evidence.—The county surveyor of the several counties of this state shall record in a well-bound book all the surveys in the county or district for which he was elected, with plats thereof that he may make, whether private or official; and certified copies of such record, under the official signature of the surveyor, may be used in evidence in any of the courts of this state. [Acts 1880, p. 70.]

Surveys.—Record of survey and field notes made under a headright held admissible, in trespass to try title, in aid of ancient instrument conveying headright. *Yeary v. Crenshaw*, 30 C. A. 399, 70 S. W. 579.

A certified copy of a resurvey made by the district surveyor of a county is admissible in evidence as a surveyor is required to keep copies of all surveys and plats in his office. *Sullivan v. Soils*, 52 C. A. 464, 114 S. W. 461.

In view of this article and Art. 3694, held, that a certified copy from the general land office of memoranda made upon the file wrapper, covering the papers relating to a certain land certificate and survey, and showing the various steps taken by the land commissioner as to the issuance of the certificate, survey, and patent, was admissible in evidence in trespass to try title, so far as material and relevant; but a certified copy from the general land office of a letter from the transferee of a certificate to the land commissioner, inclosing surveys and the deed of transfer, and referring to the execution of a transfer by another, was not admissible under Art. 3694, not being an archive of the land office. *Allen v. Clearman* (Civ. App.) 128 S. W. 1140.

Art. 3696. [2308] [2253] Copies and certificates from certain officers are evidence.—It shall be the duty of the secretary of state, attorney general, commissioner of the general land office, comptroller, treasurer, adjutant general, commissioner of agriculture, commissioner of insurance and banking, and state librarian, to furnish any person who may apply for the same with a copy of any paper, document or record in their respective offices, and also to give certificates, attested by the seal of their respective offices, certifying to any fact or facts contained in the papers, documents or records of their offices, to any person applying for the same; and the same shall be received in evidence in all cases in which the originals would be evidence. [Act March 20, 1848. P. D. 3806.]

Application of article.—See, also, notes under Arts. 82, 3694.

This article applies only to such papers as are required or permitted by law to be filed in the several offices therein named. *Rogers v. Pettus*, 80 T. 425, 15 S. W. 1093.

Commissioner of land office.—A certificate of the commissioner of the general land office was offered in evidence stating that there was on file in his office a duly authenticated transfer of a bounty warrant, gave names, description of certificate, etc. Held, that the transfer of a land certificate could not be shown in this manner. *Smithwick v. Andrews*, 24 T. 488. See *Howard v. McKenzie*, 54 T. 170, 189.

A certified copy of the records of the general land office is higher evidence than the testimony of the commissioner as to their contents. *Stafford v. King*, 30 T. 257, 94 Am. Dec. 304; *Meyer v. Hale* (Civ. App.) 23 S. W. 990.

The certificate must be confined to a statement of the facts contained in the records, and cannot state what has not been done in the general land office, or state a conclusion from certain assumed premises. *Buford v. Bostick*, 58 T. 63; *West v. El Campo L. Co.* (Civ. App.) 32 S. W. 424.

A certified copy of a land certificate, made by the commissioner of the general land office, the originals being on file in his office, as a link in the chain of title to a survey of land which has been properly returned to that office is admissible in evidence. *Holmes v. Anderson*, 59 T. 481; *Hanrick v. Cavanaugh*, 60 T. 1; *Eakin v. Shumaker*, 12 T. 51.

Certificate of the land office commissioner, not a copy of any paper recorded in the office nor a statement of fact contained in any such paper, is not admissible. *Fisher v. Ullmann*, 22 S. W. 523, 3 C. A. 322.

A certificate of the land commissioner that the sections were classified as "dry grazing land and appraised at one dollar per acre under act of 1897 on March 23, 1899, and placed on the market the same day by Geo. W. Finger, commissioner of the general land office, state of Texas," is sufficient to prove prima facie that the commissioner of the general land office has had reclassified and reapproved the sections and had notified the county clerk of the proper county in writing, of such action, as the law required him to do. *White v. Pyron* (Civ. App.) 62 S. W. 83.

Certificate of land commissioner as to condition of title to certain land held inadmissible in evidence in trespass to try title. *Hamilton v. McAuley*, 27 C. A. 256, 65 S. W. 205.

If a paper has become an archive of the land commissioner's office under Art. 5447, the commissioner is authorized to give copy thereof which is receivable with like effect as would have been the original. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 704, 705.

In trespass to try title to land patented by the state, a certified copy of the patentee's receipt for the payment held not objectionable as constituting no evidence of right to the land. *Robles v. Cooksey* (Civ. App.) 70 S. W. 584.

A certified copy by the commissioner of the general land office of a certified copy of

a judgment of the district court rendered in favor of one against others for title and possession of section of school land is admissible in evidence, as being a paper relating to sales of land records of the general land office. *Trevey v. Lowrie*, 33 C. A. 606, 78 S. W. 18.

One of the material issues on the trial was whether appellee was an actual settler on his home section at time of the award to him of the section in controversy. The certificate of the land commissioner to the effect that the required proof of three years' occupancy had been filed in the land office and that the same was deemed "sufficient" was inadmissible in evidence, because the appellant's application to purchase had been made prior to such proof and the issuance of the certificate, and he was not concluded by the certificate on the issue of appellee's actual settlement. *White v. Watson*, 34 C. A. 169, 78 S. W. 237.

In trespass to try title, in which plaintiff claimed under a transfer of a headright certificate, a certified copy of an affidavit by a stranger to the action that he was the owner of the certificate held inadmissible. *Simmonds v. Simmonds*, 35 C. A. 151, 79 S. W. 630.

A declaration canceling a lease under the hand and seal of the land commissioner and filed in his office is a "paper document or record" in the land office under this article. *Bradford v. Brown*, 37 C. A. 323, 84 S. W. 392.

In trespass to try title to certain land, held error to admit in evidence a part of a list of school lands certified by the commissioner of general land office, without admitting the whole list. *Knapp v. Patterson*, 99 T. 400, 90 S. W. 163.

This article never intended to make a copy of a letter finding its way into the land office evidence against the person whose name is signed to it, on the mere certificate of the commissioner that such letter is on file in his office, when the original itself, if offered, would not be admissible without proof that it had been written by the person whose name is signed to it. *Flynt v. Taylor* (Civ. App.) 91 S. W. 865.

Certificate of the commissioner of general land office as to classification of section of school land as grazing land, held admissible in evidence. *Smithers v. Lowrance*, 100 T. 77, 93 S. W. 1064.

A certified copy of a letter relating to land matters, the original of which the commissioner is required to keep on file as a record or archive of the land office, is properly admissible in evidence. *Trimble v. Burroughs*, 41 C. A. 554, 95 S. W. 615.

A certificate of the commissioner of the general land office, from which it does not appear that the fact that a map was made from actual surveys is shown by any record in the land office, held not admissible as evidence of that fact. *Wilkins v. Clawson*, 50 C. A. 82, 110 S. W. 103.

Under this article and Arts. 82 and 3694, held, that sketches and plats made in the general land office from maps of H. county were admissible in a boundary line dispute concerning land located therein, though the maps were not made contemporaneously with the date of location of the different surveys. *Myers v. Moody* (Civ. App.) 122 S. W. 920.

In trespass to try title, a certified copy of a letter held admissible as a circumstance tending to show the transfer of a certificate covering the land in controversy from the patentee to another, through whom defendants claimed. *Id.*

In view of this article and Arts. 3694 and 3695, held, that a certified copy from the general land office of memoranda made upon the file wrapper, covering the papers relating to a certain land certificate and survey, and showing the various steps taken by the land commissioner as to the issuance of the certificate, survey, and patent, was admissible in evidence in trespass to try title, so far as material and relevant; but a certified copy from the general land office of a letter from the transferee of a certificate to the land commissioner, inclosing surveys and the deed of transfer, and referring to the execution of a transfer by another, was not admissible under Art. 3694, not being an archive of the land office. *Allen v. Clearman* (Civ. App.) 128 S. W. 1140.

A land office map, which appeared to be an archive of the land office and which was relevant, was not subject to the objections that it was res inter alios acta, not proven to be correct, nor how made, or from what data. *Haile v. Johnson* (Civ. App.) 133 S. W. 1088.

The purposes of this article are to require the commissioner of the general land office to certify to the correctness of records and to certify to facts contained in the records, and a certificate stating facts as within the knowledge of the commissioner gained from some other source than the records of his office and embracing his conclusions from an examination of the records is inadmissible, but a certificate disclosing facts contained in the records of his office is admissible. *Talley v. Lamar County*, 104 T. 295, 137 S. W. 1125.

In view of *Sayles'* Civ. St. 1897, art. 4124, held, that a letter of a claimant of land under a certificate, protesting against the floating of the certificate on other land so far as it affected the land located and awarded to him, but not objecting to the floating of the balance of the certificate, constituted an "archive" of the land commissioner's office so that a certified copy of the same was admissible as provided by this article. *Robertson v. Brothers* (Civ. App.) 139 S. W. 657.

A certified copy of an affidavit and other instruments, on which a duplicate headright certificate was issued by the land department, held inadmissible to show the loss of the original and that the affiant was the owner thereof at the time the proceedings were taken. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

Copy from copy.—Under ordinary circumstances, and under former decisions, copies taken from copies are inadmissible. But in view of more than a century's possession and continuous assertion of title under claim of right, such as the originals of the copies would evidence, the admission of such remote copies cannot be regarded as error. *Von Rosenberg v. Haynes*, 85 T. 357, 20 S. W. 143.

Ex parte certificate.—An ex parte certificate as to facts not existing is not admissible in evidence. *Myers v. Jones*, 23 S. W. 562, 4 C. A. 330.

What constitutes fact.—An opinion of the commissioner of the general land office

as to the validity of a grant on file in that office is not a fact which can be certified under this article. *Gaither v. Hanrick*, 69 T. 92, 6 S. W. 619.

Comptroller of state.—A certificate from the comptroller of the state showing what property of a citizen was rendered for taxes for specified years, "as shown by the records" of a county named in the certificate, is one which he is authorized to make, and is admissible in evidence to prove the facts so certified to. *Holmes v. Coryell*, 58 T. 680.

The comptroller's certificate of the value of the property in a county taken from the assessment rolls thereof which are required to be filed in his office is admissible to prove the assessed value of the different parts of the county in a suit by the parent county brought to fix the liability of a county which has been carved out of the parent county for certain outstanding bonded indebtedness of the parent county. *Brewster County v. Presidio County*, 19 C. A. 638, 48 S. W. 213.

In trespass to try title, the comptroller's certificate showing rendition of the land for taxes to defendants, and that it was not rendered by plaintiff or those under whom she claims, is admissible to prove ownership. *Hirsch v. Patton*, 49 C. A. 499, 108 S. W. 1015.

Redemption certificates from the office of the comptroller of the state, duly authenticated, purporting to show the amount of costs paid, were admissible in evidence under this article and Art. 3708. *Tyner & Knudson v. Tom* (Civ. App.) 132 S. W. 850.

State treasurer.—A certificate of the state treasurer which in substance states that the records of his office show that the land commissioner had deposited in his office a certain draft as payment in full for certain public land in A. county for account of O. H. T. and showing application of money is admissible under this article. *Robles v. Cooksey* (Civ. App.) 70 S. W. 586.

The statement of a county treasurer, kept in the office of the state treasurer, and certified by him to be correct, is admissible in evidence. *Harper v. Marlon County*, 33 C. A. 653, 77 S. W. 1044.

Certified copy from state treasurer's office of notice from general land commissioner to state treasurer of cancellation of lease of school land held inadmissible in evidence. *Trimble v. Burroughs*, 41 C. A. 554, 95 S. W. 614.

A certified copy of a record of the state treasurer's office is admissible in evidence as original, where the original instrument itself would be admissible. *Zettlemeyer v. Shuler*, 52 C. A. 648, 115 S. W. 79.

Adjutant general.—A certified copy by the adjutant general of an instrument on file in his office purporting to be the muster roll of Fannin's command is admissible under this article in connection with other evidence, as tending to show that one under whom title is claimed was the man whose name appears on said muster roll. *Allen v. Halstead*, 39 C. A. 324, 87 S. W. 756.

Secretary of state.—A sworn copy of the records in the office of the secretary of state, showing a forfeiture of the franchise of a corporation, is sufficient to prove the facts. *Smith v. Briggs-Weaver Machinery Co.* (Civ. App.) 132 S. W. 954.

Under this article and Art. 3694, a certified copy of a certificate of authority issued by the secretary of state to an amusement company is properly received in evidence, in all cases in which the original is admissible. *Gould v. State*, 61 Cr. R. 195, 134 S. W. 695.

Commissioner of insurance and banking.—A bond of defendant, insuring the risk of a surety on the bond of a foreign insurance company, filed in the insurance department to enable such insurance company to do business in Texas, held a mere common-law obligation not required by law to be filed in that department, and hence could not be proved by a certified copy thereof. *Southwestern Surety Ins. Co. v. Anderson*, 155 S. W. 1176.

Art. 3697. [2309] [2254] Notarial acts and copies thereof are evidence.—All declarations and protests made, and acknowledgments taken, by notaries public, and certified copies of their records and official papers, shall be received as evidence of the facts therein stated in all the courts of this state. [Act June 24, 1876, p. 30, sec. 9. P. D. 4697.]

Certification by county clerk.—See Art. 6013.

Copies of records.—A notarial copy of a conveyance of land in Texas, and made before a notary public in Louisiana in accordance with the form and mode usual in that state, the original being entered in the notary's book and signed by the parties and the notary, although proved and recorded in the county where the land lies, is not admissible as a recorded instrument. *Frost v. Wolf*, 77 T. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

An act of sale for land in Texas granted April 13, 1835, was made January 5, 1837, in Louisiana. The conveyance having been attacked for forgery, two copies of the instrument, made February 6, 1837, and June 14, 1886, were produced in evidence, the latter as an authenticated copy and as an examined copy of a record of a public officer of another state. It was shown that the notary before whom the act of sale was made and the witnesses were dead. The act of sale was found in a book of record kept according to the laws of that state. The copy made in 1837 corresponded with the original. This copy was recorded in Jefferson county September 10, 1851. The second copy was certified by the notary in charge of the original book, and it was compared with the original and proved to be correct by witnesses knowing all the signatures to the act except that of the grantor. It was held that both copies were competent evidence. *Smith v. Gillum*, 80 T. 120, 15 S. W. 794.

A notary's record is competent to show that a lost deed was signed and acknowledged. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 399.

Certificate.—Notary public's certificate evidence sufficient to fix the liability of an indorser, etc. *Munzeshelmer v. Allen*, 3 App. C. C. § 55.

The caption of a notarial certificate recited that he was a notary of the county of R. The signature and seal showed that he was a notary of B. county. It was held that

the latter controlled, and the registration in the proper county was valid. *Alexander v. Houghton*, 26 S. W. 937, 86 T. 702.

Art. 3698. [2310] [2255] In suits against delinquent officers, transcript from comptroller's office is evidence.—In suits by the state against any officer or agent thereof, on account of any delinquency or failure to pay to the state any money, a transcript from the papers, books, records and proceedings of the office of comptroller of public accounts, purporting to contain a true statement of accounts between the state and such party, authenticated under the seal of said office, shall be admitted as prima facie evidence; and the court trying the cause may thereupon render judgment accordingly; and all copies of bonds, contracts or other papers relating to, or connected with, any account between the state and an individual, sued as aforesaid, when certified by the comptroller of public accounts to be true copies of the originals on file in said office, and authenticated under the seal of said office, may be annexed to such transcript and shall be entitled to the same degree of credit that would be due to the original papers if produced and proved in court; but, when such suit is brought upon a bond or other written instrument, and the defendant shall by plea under oath deny the execution of such instrument, the court shall require the production and proof thereof. [Act Feb. 8, 1861, p. 14. P. D. 3704.]

Art. 3699. [2311] [2256] Copies of certain instruments prior to 1837 are evidence.—Copies of all conveyances and other instruments of writing between private individuals, which were filed in the office of any alcalde or judge in Texas previous to the first Monday in February, 1837, shall be admissible in evidence, and shall have the same force and effect as the originals thereof; provided, such copies are certified under the hand and official seal of the officer with whom the originals are now deposited. [Act May 13, 1846, p. 363, sec. 91. P. D. 3717.]

Time of recording.—An act of sale of one league of land was passed before the alcalde of the municipality of Austin in 1832, with three assisting witnesses. In August, 1837, the execution of the instrument was proven by one of the subscribing witnesses, and the signature of another of the subscribing witnesses was also proven. The county clerk of Austin county in 1851 certified to the correctness of copy of the foregoing deed on file in his office, and that he was the proper keeper of conveyances and other instruments of writing between private individuals which were filed in the office of the alcalde or judge of Austin's first colony. Held, that the copy was admissible in evidence. *Hubert v. Bartlett*, 9 T. 97.

A deed executed before a judge of the first instance on the 25th of October, 1834, was recorded on the 2d of June, 1841, without having been proven for record. Held, that a copy from the record was not admissible in evidence. *Holliday v. Cromwell*, 26 T. 188.

The signature of instrumental witnesses is not essential to the authenticity of an instrument conveying land, executed September 1, 1830. *Martin v. Parker*, 26 T. 253.

Power of attorney.—A power of attorney executed in Mexico in 1833 before a notary, held duly proven by the following testimony: 1. A certified copy of the act made by a notary, who certified that he was successor to the original notary before whom the act was made, and his records. 2. Certificate of three notaries to the genuineness of the signature and seal of the certifying notary. 3. The certificate and seal of the governor of the federal district of Mexico, which was verified by the certificate of the proper secretary of the department of foreign relations of the national government of Mexico, under the seal of that department. *Williams v. Conger*, 49 T. 582.

Necessity for accounting for copy of original.—The certified copy of an act of sale executed under the requirements of the civil law and deposited as an archive in the office of the county clerk of the county in which the land was situate, in 1835, is evidence, without accounting for the copy of the original usually given to the purchaser as evidence of title. *Van Sickle v. Catlett*, 75 T. 404, 13 S. W. 31.

Location of land.—The clerk of the county court can give a certified copy of an original act of sale executed November 23, 1836, which was in his possession. But a copy from the records of the original instrument recorded in a county in which the land is not located is not admissible in evidence. *Broxson v. McDougal*, 63 T. 193, citing *Hutchings v. Bacon*, 46 T. 415; *State v. Cardinas*, 47 T. 250.

Art. 3700. [2312] [2257] Recorded instruments admitted in evidence without proof, when.—Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been, or hereafter may be, so recorded, after being proved or acknowledged in the manner provided by the laws of this state in force at the time of its registration, or at the time it was

proved or acknowledged, or every instrument which has been, or hereafter may be, actually recorded for a period of ten years in the book used by said clerk for the recording of such instruments, whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this state without the necessity of proving its execution, provided, no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years, provided, that the party to give such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record; and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged. And, whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost, or that he can not procure the original, a certified copy of the record of any such instrument shall be admitted in evidence in like manner as the original could be. And after such instrument shall have been actually recorded as herein provided for a period of ten years, it shall be no objection to the admission of same, or a certified copy thereof, as evidence, that the certificate of the officer, who took such proof or acknowledgment, is not in form or substance such as required by the laws of this state; and said instrument shall be given the same effect as if it were not so defective. [Acts 1846, p. 387. Acts 1907, p. 308. P. D. 3716.]

Cited, Crosby v. Ardoin (Civ. App.) 145 S. W. 709 (dissenting opinion); Wolf v. Wilhelm (Civ. App.) 146 S. W. 216.

Historical.—By the act of January 19, 1839 (3d Cong. p. 47; 1 Early Laws, art. 593), copies of deeds, etc., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, were admitted to record in the county where the land lay.

Construction of "three days."—The words "within three days before the trial of the cause," used in the statute, mean "at least three days before the trial," and should be so read. Hammond v. Connolly, 63 T. 62.

Application of article in general.—This act was applicable only to copies of instruments which at the date of the act remained in the public archives, which upon authentication by the public officers in charge of them could be recorded, and this section did not permit instruments then in private hands to be recorded on the faith of certificates made by officers of the preceding government. Lambert v. Weir, 27 T. 359; Wood v. Welder, 42 T. 396.

Statutes in regard to admission of copies of records or written instruments held to apply only to those certified to by the clerks of the county courts of this state. Halliday v. Lambright, 29 C. A. 226, 68 S. W. 712.

This article applies in all cases where the certified copy of a recorded instrument is sought to be used in evidence, the original of which is permitted or required by law to be recorded in the office of the county clerk. Valentine v. Sweatt, 34 C. A. 135, 78 S. W. 386, 387.

This article includes conveyances of land and is broad enough to include a deed defectively acknowledged, is remedial in its nature and applies to suits pending at time it took effect as well as those thereafter executed. Haney v. Gartin, 51 C. A. 577, 113 S. W. 167.

This article applies only to deeds properly recorded in this state, and not to copies of deeds recorded in other states conveying land in this state. William M. Rice Institute v. Freeman (Civ. App.) 145 S. W. 688.

In view of Art. 3694, held, that this article applies exclusively to instruments between private parties, such as deeds, bills of sale, deeds of trust, etc., and that a divorce decree contained in the minutes of the same court in which accused was being tried for murder was admissible without the judgment or a copy having been filed with the record in such prosecution and notice given to accused. Clayton v. State (Cr. App.) 149 S. W. 119.

Purpose of article.—The purpose of this article respecting registration is not to give notice, but to establish a rule of evidence, and under that statute if an instrument required or permitted by law to be recorded has been acknowledged or proved for record, and recorded as the law directs, the original, on compliance with the other provisions of the law, will stand as though its execution had been proved as at common law, unless an affidavit of forgery be filed; and so also will a certified copy thereof, if the inability of the party offering it, to produce the original, be shown. Hancock v. Tram Lumber Co., 65 T. 225; Holmes v. Coryell, 58 T. 685; Beaumont Pasture Co. v. Preston, 65 T. 448.

It is simply intended by this article to render in certain cases instruments and copies of them, which had been recorded a designated period of time, admissible in evidence, which were not admissible under this article before it was amended, but would

otherwise have to be proved as at common law. If the instrument was invalid before, it remained invalid. *Klumpp v. Stanley*, 52 C. A. 239, 113 S. W. 603.

Acknowledgment in general.—Where an instrument is not proven in the mode required for its admission to record, it acquires no authenticity from having been in point of fact recorded. *Craddock v. Merrill*, 2 T. 494; *Lambert v. Weir*, 27 T. 359; *Holliday v. Cromwell*, 26 T. 188.

The registration in the proper county of a deed in 1851, the acknowledgment of which was defective, was validated by the act of February 9, 1860. *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437.

The act of February 5, 1841 (*Sayles' Early Laws*, art. 997, § 20), validated registrations prior to that date, but did not validate a previous defective acknowledgment. *Id.*

Record of a deed showing defective acknowledgment held inadmissible after evidence by the grantor that it was properly acknowledged. *Scales v. Johnson* (Civ. App.) 41 S. W. 823.

The record of an assignment of a patent and a deed held admissible to show a conveyance of the land, with other evidence, though the assignment and the deed were not properly acknowledged, so as to be entitled to record. *Schultz v. Tonty Lumber Co.*, 36 C. A. 448, 82 S. W. 353.

An instrument appearing in the deed records in the handwriting of a deputy clerk, who was the grantor therein, constitute circumstantial evidence of the making of such a deed by the grantor, although the deed is not properly acknowledged for record. *Whitaker v. Thayer*, 38 C. A. 537, 86 S. W. 364.

A record which is void because the deed was improperly acknowledged and not entitled to record is nevertheless admissible to establish the existence of the deed when lost. *Simmons v. Hewitt* (Civ. App.) 87 S. W. 188.

The record of a deed where the certificate of acknowledgment is fatally defective, is a nullity, and a copy of the void record is not admissible for any purpose. The fact that such void record existed would be admissible in evidence to prove the execution of a lost deed. But the existence of such a record cannot be proved by a certified copy thereof. A certified copy of a recorded instrument is evidence of the existence of the record only when the recorded instrument so certified has been properly acknowledged. *Wanza v. Trapp* (Civ. App.) 27 S. W. 878.

This article provides for the introduction of every instrument which is permitted or required to be recorded, and which has been recorded after being "acknowledged in the manner provided by the laws in force at the time of its registration." Held, that the quoted words mean not only that the certificate of acknowledgment itself must be formal, but also that the officer taking the same must have had authority to do so. *Bledsoe v. Haney*, 57 C. A. 285, 122 S. W. 455.

A tax deed, purporting to have been executed by the comptroller, but never acknowledged, was inadmissible. *Wolffarth v. De Lay* (Civ. App.) 142 S. W. 617.

A document admitting that the title to the land in controversy was held in trust held admissible in evidence, though not acknowledged as required by law. *Mortimer v. Jackson* (Civ. App.) 155 S. W. 341.

Location of land.—A deed for land in Wichita county was filed for record in Montague county, to which it was attached. The certificate of record upon the deed showed that it had been "recorded in Clay county records." The deed was offered in evidence as a recorded instrument under this article. Held: (1) Although the deed had been properly filed for record in Montague county, yet the certificate showing the record in Clay county records did not show the deed to have been properly recorded, and it was properly excluded. (2) As notice, the filing was proper and was effective. (3) In connection with the deed, and to show that it had been properly recorded, the original record book was competent evidence, and its exclusion was improper. (4) With the evidence in the record book that the deed had been properly recorded, the deed was admissible, there being no question as to the filing of the deed and notice under the statute. *Land Co. v. Chisholm*, 71 T. 523, 9 S. W. 479.

The registration of a deed in a county other than that in which the land is situated, unless attached to such county, is invalid. See *League v. Thorp*, 24 S. W. 685, 3 C. A. 573; *Tomlinson v. League* (Civ. App.) 25 S. W. 313; *French v. Groesbeck*, 27 S. W. 43, 8 C. A. 19; *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437.

By Art. 1754 county clerks are recorders for their respective counties, and a certified copy of a deed not recorded in the county in which the land is situated is not admissible in evidence. *French v. Groesbeck*, 27 S. W. 43, 8 C. A. 19.

A deed is admissible in evidence, although not recorded in the proper county, where no question of notice is involved and the record is not relied on to prove its execution. *Stooksberry v. Swann*, 12 C. A. 66, 34 S. W. 369.

Certified copy of deed embracing land in separate counties, recorded in one only, held admissible, inability to produce the original being shown. *Western Union Tel. Co. v. Hearne* (Civ. App.) 40 S. W. 50.

A certified copy of power of attorney recorded in a county other than that in which the land is located is inadmissible to prove its execution. *Villareal v. McLaughlin* (Civ. App.) 62 S. W. 99.

Where a deed could, under the statute, be recorded in either of two counties, a certified copy from either county is admissible. *Turner v. Cochran* (Civ. App.) 63 S. W. 154.

The recording of the abstract of the lease in the county where the land lies is sufficient to authorize the admission of a copy in evidence. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 704.

Where copies of deeds are recorded in the county where the land is situated as authorized by Art. 6823, they are admissible under this article. *Logan's Heirs v. Logan*, 31 C. A. 295, 72 S. W. 417.

This statute applies only to deeds properly recorded in this state, and not to copies of deeds recorded in other states conveying land in this state. *William M. Rice Institute v. Freeman* (Civ. App.) 145 S. W. 688.

What are recorded instruments.—On the 5th of October, 1835, a deed for land executed before a second judge of the first instance was signed by the vendor, by the judge, by two instrumental and two assisting witnesses. The protocol was given to the party

as evidence of title. The instrument thus authenticated was a public instrument which required no proof of its execution when offered in evidence. By the act of December 20, 1836, deeds of land were required to be recorded. This instrument was admitted to record on the acknowledgment by the judge of his own signature and proof by him of the signature of the grantor. It was properly admitted in evidence as a recorded instrument. *McKissick v. Colquhoun*, 18 T. 148; *Paschal v. Perez*, 7 T. 348.

A transfer of a located land certificate, executed in 1840, was filed in the general land office in November, 1859. Patent for the land was issued May, 1873. On the 22d of October, 1883, a certified copy of the transfer from the land office was recorded in the county in which the land was situated. This instrument was admitted in evidence as a recorded instrument against one holding under a deed made in 1887 by the original grantee of the certificate. *Robertson v. Du Bose*, 76 T. 1, 13 S. W. 300.

Deed filed in office in Mexico held an archive, so as to render proof by examined copy proper. *De la Garza v. Macmanus* (Civ. App.) 44 S. W. 704.

A certified copy of a judgment in a district court of another county is not a recorded instrument within the meaning of this article and is admissible without having been filed three days before commencement of trial. *Kerr v. Oppenheimer*, 20 C. A. 140, 49 S. W. 149.

This article does not apply to instruments like a writ of execution, and parties who wish to prove that an execution was issued within the twelve months from the date of the judgment, where the court's docket does not show that it was so issued, do not have to give notice that the execution was lost and that they intend to use a certified copy of the execution. Where search for the execution has been made among the papers in the case and in the sheriff's office without avail, evidence aliunde of the issuance of the execution can be introduced. *Corder v. Steiner* (Civ. App.) 54 S. W. 277.

A certified copy of a deed of assignment for the benefit of creditors, which has been properly recorded in the county where the debtors or grantors did business is admissible in evidence under this article after laying the predicate, in a case of trespass to try title. *Batts v. Moore* (Civ. App.) 54 S. W. 1036.

An abstract of title made by a county clerk and certified by him to have been taken from the record of deeds in his office is admissible in evidence. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

Record of a certain affidavit held not admissible in evidence. *White v. McCullough*, 56 C. A. 383, 120 S. W. 1093.

Filing before trial and notice.—The filing and notice simply relieves the party from proving the execution of the deed as at common law, unless impeached by affidavit; but does not preclude the opposing party from disproving the execution of the deed or from showing that it was a forgery. *Jordan v. Robson*, 27 T. 612.

The acknowledgment by a grantor of a deed for record does not render it admissible in evidence, except under the statute, after filing and three days' notice to opposite party. *Wiggins v. Fleishell*, 50 T. 57.

A certified copy of a judgment of the district court is admissible in evidence without being filed as required by Art. 3700. *McDaniel v. Weiss*, 53 T. 257.

When a party to an action of trespass to try title has not filed his deed as required by this article, the genuineness of an instrument offered in evidence may be attacked without filing an affidavit of forgery. *Sartor v. Bollinger*, 59 T. 411.

A decree of partition is admissible as a muniment of title, without serving the defendant with notice before trial of his intention to offer it in evidence. *Harvey v. Edens*, 69 T. 420, 6 S. W. 306; *Stevens v. Gelsner*, 71 T. 140, 8 S. W. 610.

An unrecorded instrument executed in 1841, and offered in evidence in 1887, is admissible without having been filed as required by this article. *McCamant v. Roberts*, 80 T. 316, 15 S. W. 580, 1054.

Notice is not necessary where the instrument is filed as a part of the petition more than three days before trial. *Lignoski v. Crooker*, 24 S. W. 788, 86 T. 324.

When the execution and delivery of a deed is proven by witness, it need not be filed before the trial. *McGehee v. Minter* (Civ. App.) 25 S. W. 718.

Certified copy of deed held inadmissible without compliance with statute. *Henry v. Bounds* (Civ. App.) 46 S. W. 120.

A certified copy of a deed, filed three days before trial, and notice thereof is given is admissible in evidence, the attorney of the party filing the copy having shown that he could not produce the original. *Boyd v. Leish* (Civ. App.) 50 S. W. 618.

The rejection of a copy of a deed on the ground that a certified copy was not filed in court three days before trial, and for the failure to give the statutory notice of the filing, held erroneous. *Latimer v. Kershner* (Civ. App.) 68 S. W. 1016.

In trespass to try title, where a deed under which plaintiff claimed referred to another deed, held proper to permit the record to be read in evidence, without filing a certified copy of the deed referred to and giving the statutory notice. *Bracken v. Bounds* (Civ. App.) 70 S. W. 326.

The record of the rendition of each tax payer is required to be kept in the county clerk's office. The custodian of the same can identify it, and it is admissible in evidence without the three days' statutory notice required in the admission of deeds. *Frazier v. State* (Civ. App.) 81 S. W. 533.

Certified copies of papers relating to incorporation of towns, which are required to be recorded in the county clerk's office, must be filed in the case and three days' notice given, before they can be introduced in evidence. *Lamar v. State*, 49 Cr. R. 563, 95 S. W. 512.

A certified copy of a marriage certificate is inadmissible in a trial for bigamy unless it has been filed among the papers in the case three days before the trial. *Burton v. State*, 101 S. W. 226, 51 Cr. R. 196.

Statement as to proper filing of a registered instrument in papers of suit, so as to be admissible without proof of execution. *Stark v. Harris* (Civ. App.) 106 S. W. 837.

This article applies only to such instruments as have been recorded previous to being filed among the papers in a suit. *Id.*

It is only when it is desired to have an instrument, permitted or required by law to be recorded used as evidence without proof of its execution, that it is necessary to file

it three days before trial, and notice given of such filing to the opposite party. *Clayton v. Ingram* (Civ. App.) 107 S. W. 881.

In a suit to partition lands in which plaintiffs claimed an undivided one-half interest, the fact that the suit was a partition suit did not authorize the admission of a deed under which plaintiffs claimed title, without proof of its execution and without the three days' filing and notice to defendants, required by statute. *Merrill v. Bradley*, 52 C. A. 527, 121 S. W. 561.

Under this article, providing that, to render a deed admissible in evidence, it must be filed in the case before the trial, with notice to the adverse party, and Code Cr. Proc. art. 764, making the rules of evidence in civil suits applicable in criminal actions, the deed records of a county, showing a lease of a building to an amusement company whose employé is on trial for permitting a theatrical performance in the building to be given on Sunday, is inadmissible, where a copy was not filed before the trial and notice given. *Gould v. State*, 61 Cr. R. 195, 134 S. W. 695.

A deed which has been drawn up under the common-law rule, though not filed before the beginning of the trial as prescribed by statute in such cases, is properly received in evidence. *First State Bank of Teague v. Harris* (Civ. App.) 138 S. W. 1162.

In an action on a dramshop keeper's bond, the original bond and the judgment of the county court authorizing him to engage in the business of a retail liquor dealer are properly received in evidence, though they have not been on file among the papers of the case for three days, as provided by this article, relating to the introduction of certified copies of recorded conveyances. *McElroy v. Sparkman* (Civ. App.) 139 S. W. 529.

Where defendant was notified to produce certain original deeds or that secondary evidence would be offered to prove their execution and contents, and the attorneys stipulated that to avoid the expense of certified copies the records of the deeds might be introduced, the receipt of such records in evidence, notwithstanding the technical failure to file certified copies and give three days' notice thereof, did not require a reversal, where it was not claimed that the deeds were forgeries. *Hill v. Walker* (Civ. App.) 143 S. W. 687.

A certified copy of a judgment was admissible in evidence without having been filed with the papers in the case at least three days before the trial and notice thereof given to the opposite party or his attorney. *James v. Midland Grocery & Dry Goods Co.* (Civ. App.) 146 S. W. 1073.

Sufficiency of record.—The proper recording of a deed before filing and notice is indispensable to its admissibility without proof of execution. *Gaines v. Ann*, 26 T. 340; *Holliday v. Cromwell*, 26 T. 188; *Deen v. Wills*, 21 T. 642; *Cavit v. Archer*, 52 T. 166; *McFadden v. Preston*, 54 T. 403; *Wiggins v. Fleishel*, 50 T. 62; *Ross v. Kornrumpff*, 64 T. 390; *Cofey v. Hendricks*, 66 T. 676, 2 S. W. 47; *Land Co. v. Chisholm*, 71 T. 523, 9 S. W. 479.

The fact that the record does not show a seal to the certificate of acknowledgment is immaterial. *Alexander v. Houghton* (Civ. App.) 26 S. W. 1102.

A deed not duly registered is inadmissible in evidence. *Davidson v. Wallingford* (Civ. App.) 30 S. W. 286.

The rejection of a will as evidence because of a defect in the recording of it, which was afterwards corrected, held error, under the circumstances. *Mattfeld v. Huntington*, 17 C. A. 716, 43 S. W. 53.

Time of recording.—The mortgage under which defendants claim title, made by plaintiff's father, held admissible in replevin, though plaintiff did not know it was made, and it was not recorded until after suit was brought. *Saenz v. O. F. Mumme & Co.* (Civ. App.) 85 S. W. 59.

The instrument must have been recorded at the date of filing. If not recorded until the day of trial, though properly acknowledged for record when filed three days previous, the instrument is not admissible under this article. *Gaines v. Ann*, 26 T. 340.

Certified copy.—When a certified copy is offered in evidence showing that the original was proved for record before a notary, who stated in his certificate that he thereto affixed his official seal, it will be presumed that the notary's seal was properly attached to the original certificate, although no evidence of that fact appear on the copy. *Ballard v. Perry*, 28 T. 347.

A second certified copy, issued and certified at a date later than that of the original, and delivered to the party as evidence of title, is not admissible in evidence without proof of its genuineness. *State v. Cardinas*, 47 T. 250.

See circumstances under which a certified copy of a recorded instrument, the genuineness of which was impeached, was admitted in evidence. *Brown v. Simpson*, 67 T. 225, 2 S. W. 644; *Davis v. Pearson*, 26 S. W. 241, 6 C. A. 593.

The admission of a copy of a recorded patent taken from the county land register to prove title in behalf of the party offering it is reversible error when objection is made to its introduction and the statute was not complied with. *R. G. & E. P. R. R. Co. v. Milmo Nat. Bank*, 72 T. 467, 10 S. W. 563.

An examined copy of a certified copy of a recorded instrument is not admissible in evidence. *Lasater v. Van Hook*, 77 T. 650, 14 S. W. 270.

A certified copy of a deed not properly recorded held admissible to show execution. *Guinn v. Musick* (Civ. App.) 41 S. W. 723.

A certified copy of a deed examined, and held not to be a certified copy of a certified copy so as to be inadmissible under the statute as a recorded instrument. *Williams v. Cessna*, 43 C. A. 315, 95 S. W. 1106.

A copy of the record of a document not entitled to be recorded held inadmissible as a certified copy of a legal record. *West v. Houston Oil Co. of Texas*, 46 C. A. 102, 102 S. W. 927.

Under this article making a certified copy of any instrument affecting title to land admissible evidence when a proper predicate is laid, and Art. 5445, declaring that a certificate that a person named has filed proof of residence and occupancy of land for three years is a muniment of title and may be recorded, a certified copy of such a certificate is admissible in evidence on a proper predicate being laid. *Whitaker v. Browning* (Civ. App.) 155 S. W. 1197.

Affidavit of loss, mutilation or inability to procure.—If the affidavit is made by any person other than a party to the suit it should exclude the supposition that the party offering the evidence has it in his power to produce the original. *Crayton v. Munger*, 11 T. 234; *Butler v. Dunagan*, 19 T. 566; *Hooper v. Hall*, 30 T. 154; *Foot v. Silliman*, 77 T. 268, 13 S. W. 1032; *Kauffman v. Shellworth*, 64 T. 179.

An affidavit that the instrument is not and never was in possession of affiant, and that he does not know where the same can be found, is not in compliance with the statute. *Crayton v. Munger*, 11 T. 234; *Hooper v. Hall*, 30 T. 154.

The statute authorizing secondary evidence must be strictly complied with. *Butler v. Dunagan*, 19 T. 566.

A certified copy of a recorded instrument is admissible in evidence upon an affidavit that the original is lost and that it cannot be procured. *Hurley v. Barnard*, 48 T. 83; *Evans v. Womack*, 48 T. 234; *Foot v. Silliman*, 77 T. 268, 13 S. W. 1032.

The affidavit must show diligent search and inquiry of the proper person and in the proper place. The loss must be proved if possible by the person in whose custody it was at the time of the loss, if such person be living; and if dead, application should be made to his representatives and search made among the documents of the deceased. *Vandergriff v. Piercy*, 59 T. 371; *Hill v. Taylor*, 77 T. 295, 14 S. W. 366.

An affidavit by a party's attorney, stating "that he cannot procure the original, and that he has tried and done all he could to procure it," is insufficient. *Kauffman v. Shellworth*, 64 T. 179.

Though a certified copy of deed must be on file in the cause three days before the trial to authorize its introduction in evidence, the affidavit may be made at any time before the commencement of the trial. *Ross v. Kornrumpf*, 64 T. 390.

Where an instrument declared upon is mutilated, and such mutilation is averred and explained in the pleadings, there is no necessity for an affidavit in regard thereto to render it admissible in evidence, where proof other than that of the party himself is offered to explain the mutilation and establish the facts in regard to the execution and validity of such instrument. *Dicks v. Austin College*, 1 App. C. C. § 1069, citing *Withee v. Fearing*, 23 T. 506.

A certified copy of a deed is not admissible in evidence on mere proof that the party offering it caused the original deed to be attached to a commission to take testimony, and sent to the clerk of another county, who had not returned the same, although requested to do so. Such evidence does not establish the fact that the deed could not have been procured by the exercise of reasonable diligence. *Crafts v. Daugherty*, 69 T. 477, 6 S. W. 850.

Six months before a certified copy of a deed was offered in evidence it was filed with the petition, but was not referred to therein. The petition alleged that the original was in the custody of the defendant, and gave him notice to produce it, or secondary evidence of its contents would be offered on the trial. The defendant was its proper custodian. Held, that it was not necessary that the plaintiff should make affidavit that he could not procure the deed; the copy was admissible in evidence. *Pennington v. Schwartz*, 70 T. 211, 8 S. W. 32.

Certified copy of deed is admissible upon affidavit as required in this article; proof of search, etc., for original not needed. *Nye v. Gribble*, 70 T. 458, 8 S. W. 608.

In *Veck v. Holt*, 71 T. 715, 9 S. W. 743, it is said that where a defendant in whose hands a private paper is presumed to be is without the jurisdiction of the court, he cannot be compelled to produce it, and from this fact the affidavit of the plaintiff or his attorney is not necessary to lay a predicate for the introduction of the copy.

A specific statement of the acts of diligence in searching for the lost deed is only necessary when made with a view to the introduction of parol evidence of the contents of the lost deed. *Foot v. Silliman*, 77 T. 268, 13 S. W. 1032. See *Waggoner v. Alford*, 81 T. 365, 16 S. W. 1083, for requisites of affidavit.

When an instrument is proved as at common law, a preliminary affidavit of its loss is unnecessary. *Blanton v. Ray*, 66 T. 61, 71 S. W. 264. When the original ancient instrument is lost, a certified copy may be offered in evidence upon the same proof as would make the original admissible if it could be produced. *G., H. & S. A. Ry. Co. v. Stealey*, 66 T. 468, 1 S. W. 186.

When the loss of an instrument and contents are shown, it is also necessary to prove its execution, and that it once existed as a valid instrument. *Overand v. Menczer*, 83 T. 122, 18 S. W. 301.

When secondary evidence of a deed that has been lost or destroyed is offered, it is not necessary to file a preliminary affidavit of the loss or destruction. *Trimble v. Edwards*, 84 T. 497, 19 S. W. 772. The evidence of a witness on the stand, instead of the affidavit, will be sufficient. *Parks v. Caudle*, 58 T. 220; *Trimble v. Edwards*, 84 T. 497, 19 S. W. 772. But it must be shown that there was diligent search and inquiry made of the proper person, and in the proper places, for the lost deed; the loss must be proved, if possible, by the person in whose custody it was at the time of the loss, if such person be living; and if dead, application should be made to his representatives, and search made among the documents of the deceased. *Vandergriff v. Piercy*, 39 T. 372; *Hill v. Taylor*, 77 T. 295, 14 S. W. 366; *Trimble v. Edwards*, 84 T. 497, 19 S. W. 772.

Prima facie evidence of the execution of the instrument is sufficient unless overcome by evidence to the contrary. *Trinity County Lumber Co. v. Pinckard*, 23 S. W. 720, 1015, 4 C. A. 671; *Steiner v. Jester* (Civ. App.) 23 S. W. 718. When the evidence of a defendant tends to show that plaintiff's grantor was not the person who had title, the burden of proof to show the identity is on plaintiff. *Jester v. Steiner*, 25 S. W. 411, 86 T. 415.

A certified copy of a deed is admissible on the affidavit of plaintiff's attorney that neither he nor the plaintiff could procure the same. *Southall v. Southall*, 6 C. A. 694, 26 S. W. 150.

An affidavit that states that a deed is lost and affiant does not know where it is and states where it is recorded and attaches a certified copy, is sufficient under the statute, to admit evidence that it is lost and cannot be procured. *Thompson v. Johnson*, 24 C. A. 246, 58 S. W. 1031.

A defendant cannot introduce a copy of a deed which has been filed by his codefendant together with an affidavit of the loss of the original, but which has not been introduced in evidence by the codefendant. *Gann v. Roberts*, 32 C. A. 561, 74 S. W. 950.

An affidavit by one of several defendants that "the defendants nor either of them are or is able to produce the following described deed," etc., is a sufficient compliance with the provisions of this article. *Williamson v. Work*, 33 C. A. 369, 77 S. W. 267.

Under the express terms of this article a certified copy of a deed is admissible on filing an affidavit that the original cannot be found or procured. *Smith v. Burgher* (Civ. App.) 136 S. W. 75.

The latter part of this article, referring to the introduction of recorded instruments without proof of execution, applied only to the original instruments, and that copies of a record of deed of trust which had been duly acknowledged and recorded were inadmissible, in the absence of an affidavit of loss or inability to procure the original. *Green v. Gregory* (Civ. App.) 142 S. W. 999.

In an action against an irrigation company for damages from failure to furnish water, it was error to admit a certified copy of its declaration of intention to appropriate the water, which instrument is one required by law to be acknowledged and recorded, where the same was not filed three days before the commencement of the trial and no affidavit was filed alleging the loss of the original instrument as required by this article. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

Affidavit of forgery.—The genuineness of a deed under which plaintiff claims may be attacked although it may have been admitted as a recorded instrument and no affidavit of forgery has been filed. *McGee v. Berrien* (Civ. App.) 28 S. W. 462.

Where affidavit of forgery was filed as to deed relied on by defendants in suit for recovery of land, whether testimony offered to show execution of deed was sufficient to authorize its admission in evidence held for the court. *Thompson v. Johnson*, 24 C. A. 246, 58 S. W. 1030.

Where issue was whether deed under which defendants claimed was a forgery, after introduction of deed in evidence either party might introduce testimony as to the execution of the deed. *Id.*

When a certified copy of a deed was offered in evidence in trespass to try title, defendant objected to its admission on the ground that it did not sufficiently identify the land conveyed, and offered in evidence an original grant to another in the same colony in which the land conveyed was situated, and of the same date of the survey of the parties' remote grantor and issued by the same commissioner, but did not call the court's attention to an affidavit of forgery of the deed to plaintiff's grantor, or object to the admission of the copy for want of proof of execution, or of the loss of the original deed, or object that the copy had not been filed for three days before trial with notice to them. Held, that the certified copy was properly admitted, and was prima facie evidence of the execution of the deed by the grantor. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533.

Where an affidavit of forgery was filed against an ancient recorded assignment of a headright certificate, a certified copy thereof was admissible, the affidavit only imposing on defendants the duty to prove the instrument as at common law. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

Where defendants based their title on a lost deed, producing neither the original nor a certified copy, but undertaking to show its execution and contents as at common law, an affidavit by plaintiffs of the forgery of the deed is of no effect, and should not be called to the attention of the jury by the charge. *Rice v. Tallafarro* (Civ. App.) 156 S. W. 242.

Ancient documents.—See, also, notes under Art. 3687, Rule 16.

A certified copy of deed which had been recorded 30 years, with strong corroborating circumstances of its authenticity, will be admitted in evidence as a copy of an ancient instrument, the genuineness of which has been impeached by affidavit; otherwise, if there is no evidence showing the date of registration. *Brown v. Simpson*, 67 T. 225, 2 S. W. 644.

A copy of a deed purporting on its face to be the act of the corporation, certified to by the county clerk, and which recites that it was executed by the officers of the company under its corporate seal, is admissible in evidence, though a scroll by way of seal is placed in the copy where the corporate seal should have been attached in the original. The presumption must obtain that it was thus sealed, after the lapse of 25 years from its registration. *Catlett v. Starr*, 70 T. 485, 7 S. W. 844.

A certified copy of a deed which has never been so acknowledged as to authorize its registration is not admissible in evidence on an affidavit of loss of the original. No length of time will render such copy admissible as an ancient instrument. *Hill v. Taylor*, 77 T. 295, 14 S. W. 366.

Where a deed not filed under this article is offered in evidence as an ancient instrument, an affidavit that it is forged is unnecessary, and if filed does not make additional proof necessary. *Brown v. Perez* (Civ. App.) 25 S. W. 980.

A certified copy of an ancient instrument is admissible in evidence. *Hill v. Templeton* (Civ. App.) 29 S. W. 535.

Defective acknowledgment of deed actually recorded for ten years prior to assertion of title, in so far as acknowledgment is required for purposes of conveyance and registration, is cured by this article. *Ariola v. Newman*, 51 C. A. 617, 113 S. W. 157, 158.

Where an instrument had been recorded for more than 30 years, even if it had not been so authenticated as to be entitled to record was admissible under this article, in addition to being admissible as an ancient document, it having come from the proper custody. *Milwee v. Phelps*, 53 C. A. 195, 115 S. W. 893.

If the original executed in 1838 was defectively acknowledged it was admissible as an ancient instrument, and if a copy was offered the defect was cured by this article. This statute relates to a rule of evidence in which no one has a vested right. *Sims v. Sealy*, 53 C. A. 518, 116 S. W. 632.

Where a deed has been recorded for more than ten years, and no adverse claim has been asserted during that time, the deed or a certified copy is admissible, whether or not

the certificate of acknowledgment was in form or substance such as required by law at time of its record. *Kin Kaid v. Lee* (Civ. App.) 119 S. W. 345.

Where a deed had been on record since 1853, and no hostile claim had been made against it, failure of one of the grantors to acknowledge it was cured by this article, providing that every instrument actually recorded for 10 years, whether proved or acknowledged as required, or not, should be admitted in evidence without proof of execution. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

Under this article providing that after an instrument has been recorded for 10 years it shall be no objection to its admission in evidence, or to that of a certified copy thereof, that the certificate of acknowledgment is not in form and substance such as required by law, a deed, or certified copy thereof, which has been recorded for 10 years, is admissible in evidence whether duly acknowledged or not. *Bledsoe v. Haney*, 57 C. A. 285, 122 S. W. 455.

This article did not authorize the admission of a will in evidence, in the absence of a judgment probating it. *Dean v. Furrh* (Civ. App.) 124 S. W. 431.

This article relates only to the admissibility of deeds as evidence because of their having been recorded, without reference to their sufficiency as conveyances, and therefore was ineffective to give validity to a recorded deed by a married woman which was otherwise void for want of proper acknowledgment. *Holland v. Votaw*, 103 T. 534, 131 S. W. 406.

This article is ineffective to give validity to a deed by a married woman of her separate property, which was invalid for failure of the certificate of acknowledgment to recite that after executing the deed she declared she "did not wish to retract it." *March v. Spivy* (Civ. App.) 133 S. W. 529.

After a prior deed, defectively acknowledged, had been of record for 10 years, it was good as against a subsequent purchaser, in the absence of proof that he was an innocent purchaser for a valuable consideration, without notice of such prior deed, even though notwithstanding the act were given no further effect than to make the certified copy admissible in evidence. *Bledsoe v. Haney* (Civ. App.) 139 S. W. 612.

A certified copy of a duly recorded deed which had been recorded for more than 30 years held admissible in evidence. *Rudolph v. Tinsley* (Civ. App.) 143 S. W. 209.

See Arts. 7743-7746 and notes thereunder.

Art. 3701. Record books, certain declared valid records, etc.; certified copies, effect of.—All volumes constituting a portion of the records of any county organized prior to January 1, 1882, wherein are recorded deeds, mortgages or trust deeds, or other muniments of title to real estate situated in such county, which volumes and records are now and have been constantly among the archives of such county, as records thereof, shall be, and the same are hereby declared to be, in all respects lawful and valid records of such counties respectively, for all purposes whatsoever relating to titles to real estate, as effectively as if such books and records were originally records of such counties, respectively, and as fully and completely as if such counties had been duly organized at the dates of the filing for record of the instruments recorded therein, as shown therein. Certified copies of the instruments recorded in said volumes, made in accordance with law, shall have the force and effect that certified copies of original records have in organized counties; and same may be used for all purposes lawful for certified copies of original records in ordinary cases in organized counties. [Acts 1905, p. 36.]

Art. 3702. Certified copies of deeds, etc., to land in Archer county recorded in Jack county, when, etc.; evidence, when.—Certified copies of deeds, mortgages, trust deeds and all other instruments in any manner affecting titles to lands in Archer county, which were recorded in Jack county from the tenth day of August, 1866, to the tenth day of August, 1870, said certified copies being made under the hand and seal of the clerk of the county court of Shackelford county, shall be admitted in evidence in all suits where secondary evidence is admissible. [Acts 1897, p. 143.]

Art. 3703. [2319] [2263] Transcribed records, certified copies of, evidence, etc.—Where a county has been heretofore, or may hereafter be, created out of the territory of any organized county, and the records of deeds and other instruments required or permitted by law to be recorded, relating to lands or other property in such new county, have been transcribed and placed on record in such new county, in accordance with law, certified copies of such transcribed records in the new county may be admitted in evidence with like effect as certified copies of the original records. [Acts 1879, ch. 99, p. 106, sec. 3.]

Art. 3704. [2320] Transcribed records, effect of.—Transcribed records for new counties or for newly attached territory, as provided for by law, when properly verified and certified, shall have all the force and effect in judicial proceedings in courts of this state as the original records. [Acts 1879, p. 105.]

Art. 3705. [2313] [2257a] Certain abstracts of title evidence, when.—All abstracts of land titles, or land abstract books to lands in this state, compiled from the records of any county in this state, prior to the year 1890, which said records were partially or wholly destroyed or lost from any cause during the month of May, 1874, March, 1876, and January, 1889, shall hereafter be competent prima facie evidence of the truth of the data or memoranda therein contained and compiled prior to the year 1890, and shall be admissible in evidence in the courts of this state; provided, that the compiler or compilers of such abstracts of land titles or land title abstract books, shall have made heretofore, or before offered in evidence, affidavit before some officer authorized, at the time of making such affidavit, to take acknowledgments to deeds in this state, and to the effect that said abstracts of land titles, or land title abstract books, were compiled by him from the records of the county prior to their destruction or loss, and that they contain a true and correct statement of the matters and things to which they relate; and provided, also, that it shall be admissible to offer in evidence any testimony tending to discredit or substantiate the reliability of such abstract of land titles or land title abstract books, or tending to show the compiler thereof to have been incompetent or unreliable, or competent and reliable; and provided, further, that a copy of such abstract shall be filed in the papers of the cause in which it is sought to be used, and notice given to the opposite party at least five days before the trial, and the same defense may be made as if copies of the original record had been filed; provided, further, that the party offering such abstracts of land titles, or land title abstract books, in evidence shall himself, or by his agent or attorney, have made affidavit that the original instrument to which the said data or memorandum relates is not then on record; and that he has made diligent search and inquiry for the same in places and from persons where and in whose possession it would most probably be found, and has been unable to find the same; that, to his best knowledge and belief, the same is lost or destroyed; and provided, further, that the owner of said abstracts of land titles, or of land title abstract books, shall have filed with the county commissioners' court his application in writing (which may be granted or refused, in the discretion of said court, and if refused, this article shall not become of force as to said application so refused) for an order of said court admitting to record in said court the contract of the said owner in writing, wherein the said owner shall bind himself, his heirs and assigns, as follows: That said owner, his heirs or assigns, will, whenever requested in writing, setting forth the data required by any party to any suit interested in introducing said abstracts of land titles, or land title abstract books, produce the same without charge on the day demanded for introducing in evidence, and upon the trial of any cause in this state; provided, that if said owner, his heirs or assigns, are required to produce said abstracts of land titles, or land title abstract books, in courts of any other county than that to the lands of which said abstract of land titles or land title abstract books pertain, they shall be, by the party at whose instance such production is required, reasonably compensated in advance for the time and expense of the said owner, his heirs or assigns. And the said owner in said contract shall bind himself, his heirs and assigns, to answer in full damages to any party damaged by the failure or default of the said owner, his heirs or assigns, without good cause, to produce said abstracts of land titles, or land title abstract books, data or memoranda, when demanded, as herein

provided. And said contract shall further stipulate that no charge shall ever be made by said owner, his heirs or assigns, in excess of one dollar for each instrument or remove in any title, in the compilation of a complete abstract or title to the lands in the county to which said abstracts of land titles, or land title abstract books, pertain, and that said owner, his heirs and assigns, will, upon request and payment of the fees therefor by any person, either make, compile and certify, or cause to be made, compiled or certified, within a reasonable time, a complete abstract of title to any land to which said abstracts of land titles, or land title abstract books, pertain; provided, that nothing herein contained shall ever be construed to in any way affect or apply to any suit or suits pending in any of the courts in this state on the twelfth day of July, 1891; provided, further, that the provisions of this article shall not apply if it can be shown by competent evidence that any such deeds were improperly recorded; provided, that, whenever any person, company or corporation has heretofore complied with the law which is amended hereby, in order to make an abstract evidence, the said person, company or corporation shall not be required to do anything more or further under this article in order to have the benefits thereof. [Acts 1897, p. 146. Acts 1891, p. 136. Acts 1901, p. 44.]

Art. 3706. [2314] [2258] Certified copy of instrument sued on is evidence, when.—If suit be brought on any instrument or note in writing filed in any suit brought thereupon in any other court of this state, a certified copy of such instrument or note in writing, under the hand and seal of the clerk of the court in which the original may be filed, shall be admitted as evidence in like manner as such original might be; but, if the defendant shall plead and file an affidavit under oath that such original instrument or note in writing has not been executed by him, or by his authority, the clerk of the court having the custody of such original shall, on being subpoenaed as a witness, attend with the same on trial of the cause. [Acts 1891, p. 136. P. D. 3718.]

In general.—A certified copy of a note or mortgage, the original of which is on file in one cause, cannot, if objected to, be read in evidence in another cause pending in the same court. *Morrison v. Bean*, 22 T. 554.

Withdrawal of instrument.—The court will permit the withdrawal of an instrument on file in one cause, for the purpose of using it as evidence in another cause; or the clerk of the court may be compelled to attend with the instrument. *Morrison v. Bean*, 22 T. 554. A certified copy of a lost will is good as original. *Hickman v. Gillam*, 66 T. 314, 1 S. W. 339.

Secondary evidence.—The filing of a list of writings under this article does not preclude a party from proving his title by other evidence. *Hendricks v. Huffmeyer* (Civ. App.) 27 S. W. 777.

Secondary evidence of promissory notes upon which suit has been brought in another county is admissible. *Osborne v. Ayers* (Civ. App.) 32 S. W. 73.

Place of other suit.—That a deed was filed in a suit in another county is not sufficient to authorize the admission of a copy in evidence. *Bauman v. Chambers* (Civ. App.) 28 S. W. 917.

Art. 3707. [2315] [2259] Certified copies from heads of departments evidence.—Certified copies, under the hands and official seals of the heads of departments, of all notes, bonds, mortgages, bills, accounts, or other documents, properly on file in any of the departments of this state, shall be received in evidence on an equal footing with the originals, in all suits now pending, or which may be hereafter instituted, in this state, where the originals of such notes, bonds, mortgages, bills, accounts or other documents would be evidence. [Act Aug. 11, 1870, p. 62. P. D. 6825.]

Land office.—A transcript from the land office showing the action of the traveling board was competent to a certificate for one-third of a league of land, as taking the place of that for a league and labor having the same number and grantee. *Ansaldua v. Schwing*, 81 T. 198, 16 S. W. 989.

Art. 3708. [2316] [2260] Assessment or payment of taxes may be proven, how.—Whenever in any cause it may be material to prove the assessment of any property for taxes, or the payment of any taxes, the certificate of the comptroller of such assessment from the rolls deposited

in his office, or that the payment of such taxes is shown by the records of his office, shall be admissible in evidence to prove the same. [Act Feb. 15, 1858. P. D. 3708.]

Admissibility in evidence of tax records and receipts, see notes under Art. 3687.

Payment of taxes.—The payment of taxes may be shown by direct or circumstantial evidence. *Watson v. Hopkins*, 27 T. 637; *Ochoa v. Miller*, 59 T. 460; *Allen v. Woodson*, 60 T. 651. The receipt of the tax collector is competent evidence. *Deen v. Wills*, 21 T. 642; *Seemuller v. Thornton*, 77 T. 156, 13 S. W. 846. In a suit for the recovery of taxes the amount due was shown by a consolidated statement for the year 1871, made up under the directions of the justices of the peace of Galveston county, and coming from the proper repository thereof, although the roll was not certified as required by the instructions of the comptroller. *Clegg v. Galveston*, 1 App. C. C. § 60.

Parol testimony to payment of taxes is competent. It is not necessary to produce the tax receipts. *McDonough v. Jefferson County*, 79 T. 535, 15 S. W. 490.

Redemption certificates from the office of the comptroller of the state, duly authenticated, purporting to show the amount of costs paid, were admissible in evidence under Art. 3696, making the certificate of such officer as to facts contained in papers on record in his office admissible in evidence in all cases in which the originals would be evidence, and this article providing that the certificate of the comptroller of the payment of taxes, as shown by the records of his office, shall be admissible in evidence to prove such fact. *Tyler & Knudson v. Tom* (Civ. App.) 132 S. W. 850.

Art. 3709. [2317] [2261] Rate of interest in this state presumed, unless, etc.—The rate of interest in any other state, territory or country is presumed to be the same as that established by law in this state, and may be recovered accordingly without allegation or proof of the rate of interest in such other state, territory or country, unless the rate of interest in such other country be alleged and proved. [Id.]

Rate of interest.—It is presumed that the rate of interest in another state is the same as our own. *Henry v. Roe*, 83 T. 446, 18 S. W. 806; *Harrison v. Ilgner*, 74 T. 86, 11 S. W. 1054.

Art. 3710. [2318] [2262] Execution of notes and other instruments presumed, unless, etc.—When any petition, answer, or other pleading shall be founded, in whole or in part, on any instrument or note in writing, charged to have been executed by the other party or by his authority, and not alleged therein to be lost or destroyed, such instrument or note in writing shall be received as evidence without the necessity of proving its execution, unless the party by whom or by whose authority such instrument or note in writing is charged to have been executed, shall file his affidavit in writing denying the execution thereof; and the like rule shall prevail in all suits against indorsers and sureties upon any note or instrument in writing. When any such instrument or note in writing is charged to have been executed by any testator or intestate, it shall be received in evidence in like manner, unless some suspicion is cast upon it by the affidavit of the executor or administrator of such testator or intestate. [Act May 13, 1846. P. D. 1443.]

See, also, notes under Arts. 589, 1906, 3712.

Foundation of suit.—Letters alleged to have been written by a defendant to the plaintiff and containing acknowledgments of indebtedness may be made the foundation of a petition so as to be admissible without proof. *Close v. Judson*, 34 T. 238.

Where an instrument purporting to have been signed by the defendant is not the basis of the suit, he does not have to plead non est factum in order to prove that he did not sign it. *Bateman v. Ward* (Civ. App.) 93 S. W. 510.

Necessity of plea of non est factum and verification thereof.—See *Tarpley v. Poage*, 2 Tex. 139; *Parr v. Johnston*, 15 T. 294; *Barnett v. Logue*, 29 T. 282; *Lee v. Crosby*, 1 App. C. C. § 140; *Blair v. Breeding*, 57 C. A. 147, 121 S. W. 869.

When the instrument purports to have been executed by an attorney, his authority and execution are presumed unless put in issue. *Austin v. Towns*, 10 T. 24; *Reid v. Reid*, 11 T. 585; *Herndon v. Ennis*, 13 T. 410; *Brashear v. Martin*, 25 T. 202. And this although the name of the defendant does not appear on the instrument. *Sessums v. Henry*, 38 T. 37.

A general denial is sufficient to require a party who relies on a lost instrument of writing to prove its execution. *Hampshire v. Floyd*, 39 T. 103.

Where the administrator in a suit on a promissory note against his decedent's estate is unwilling to make the affidavit required by law to a plea of non est factum, it is proper to permit the widow to intervene in the suit and make the necessary affidavit to the plea, where the intervention occasions no delay. *Eborn v. Zimpelman*, 47 T. 503, 26 Am. Rep. 315; *Eccles v. Hill*, 13 T. 67; *Solomon v. Huey*, 1 U. C. 265.

In a suit against two, as partners, to recover an amount alleged to be due on account of checks on the plaintiff drawn by one of the firm after its dissolution, under authority from the late partner to settle the firm debts, which were paid by plaintiff, in the absence of a plea under oath denying the authority of the drawer of the checks to bind the firm, they are admissible in evidence against both defendants, and their

admissibility is not affected by the fact that they were signed alone by the member who had authority to settle the debts. *Bradford v. Taylor*, 61 T. 508.

When the bill of lading is declared on, it is admissible evidence without proof, unless its execution is denied under oath. *T. & P. Ry. Co. v. Logan*, 3 App. C. C. § 187.

A plea of non est factum, not sworn to, only requires, as a general denial, the production of the instrument declared on, but does not require proof of execution. In the absence of a plea of non est factum denying the execution of the instrument sued on, the burden of proving want of authority in the agent making it devolves upon the party denying it. *Fisher v. Bowser*, 1 U. C. 346.

In a suit to recover a reward offered by an express company it was alleged in the petition that the proclamation offering the reward for the arrest of certain persons was made by the Pacific Express Company acting through the persons who assumed to act as its officials, and it could not be heard to deny their authority thus to bind it, unless a plea of non est factum, as required by the statute, was filed. *Blain v. Express Co.*, 69 T. 74, 6 S. W. 679.

In a suit upon promissory notes against maker and to foreclose a chattel mortgage made to secure the notes, the purchaser of the mortgaged article was made defendant. The mortgage was attested by one witness and not acknowledged for record. The original was deposited in the office of the county clerk of the county wherein, by its recitals, the maker resided. The defendants pleaded a general denial. Held, there being no plea of non est factum, the production of the mortgage in evidence was competent against the maker without further proof of its execution. *Chator v. Brunswick Co.*, 71 T. 588, 10 S. W. 250.

When suit is founded on a written instrument charged to have been executed by the authority of the defendant, though it may be ambiguous in its terms, and may not on its face purport to be the act of the defendant, evidence showing that it was not executed by him is not admissible in absence of the plea of non est factum. *Railway Co. v. Tisdale*, 74 T. 8, 11 S. W. 900, 4 L. R. A. 545; *City Water Works v. White*, 61 T. 538; *Bradford v. Taylor*, 64 T. 169.

The allegation in a petition that the contract (for drover's return passage) declared on was executed by or on behalf of defendant, not having been denied by defendant under oath, such contract will be considered its own. *Railway Co. v. Tisdale*, 74 T. 8, 11 S. W. 900, 4 L. R. A. 545; *Railway Co. v. Campbell*, 1 C. A. 509, 20 S. W. 845; *Int. & G. N. R. R. Co. v. Anderson*, 21 S. W. 691, 3 C. A. 8.

In absence of a plea of non est factum, an indorsement upon a rejected claim signed by a name identical with that of the defendant sued as administrator is sufficient. *Tolbert v. McBride*, 75 T. 95, 12 S. W. 752.

The allegation in the petition that the contract (for drover's return passage) declared on was executed by or on behalf of defendant, not having been denied by the defendant under oath, such contract will be considered its own. In the contract discussed the defendant was not named, and it was made by an agent of another. *Railway Co. v. Campbell*, 1 C. A. 509, 20 S. W. 845.

An account showing a balance due to another, delivered to his creditor in a letter signed by the debtor, constitutes a due bill, conclusive in evidence if not denied under oath. *Taylor Water Co. v. Kelley*, 11 C. A. 339, 32 S. W. 436.

Evidence tending to impeach the execution of a note sued on is inadmissible where the answer denying the same is not verified. *Lindley v. Nunn*, 17 C. A. 70, 42 S. W. 310.

A defendant in a partition suit does not have to verify an answer in which he denies the execution of a deed under which plaintiff claims title, because the deed is not the foundation in whole or in part of any pleading on the part of the plaintiff. *Laux v. Laux*, 19 C. A. 693, 50 S. W. 213.

A contract referred to in another, the signature to which was not denied under oath, held proved by proof of the latter. *Clark v. Turk* (Civ. App.) 50 S. W. 1070.

Where vendor's lien note sued on is set out in pleading, and execution by opposite party averred, which is not denied under oath, it is not error to admit it without proof of execution. *Bond v. National Exch. Bank* (Civ. App.) 53 S. W. 71.

Unless a party's authority to execute a written instrument upon which a pleading is founded is denied under oath, there is no necessity to prove the execution thereof. *Hunt v. Siemers*, 22 C. A. 94, 53 S. W. 387.

Evidence disproving execution or delivery of deed held competent, without first filing affidavit of forgery; execution being proven by prima facie evidence, either as at common law or under the statute. *Salazar v. Ybarra* (Civ. App.) 57 S. W. 303.

Where a suit is brought on a written instrument before the recitals therein can be contradicted there must be a plea of non est factum. *Culver v. State*, 42 Cr. R. 645, 62 S. W. 923.

A petition not alleging the signing of a written contract by defendants, but merely an agency between them, held not to require a denial under oath. *Texas & P. Ry. Co. v. Byers Bros.* (Civ. App.) 73 S. W. 427.

Where, in trespass to try title, plaintiff files an affidavit that the deed under which defendant claims is a forgery, such deed cannot be received in evidence until its execution has been proved as at common law. *Williamson v. Gore* (Civ. App.) 73 S. W. 563.

A contract, pleaded by one party, and its authenticity not denied by the adverse party, held admissible in evidence, though not signed by the parties at the end thereof. *Missouri, K. & T. Ry. Co. v. Clark*, 35 C. A. 189, 79 S. W. 827.

A pleading not purporting to be a plea of non est factum need not be verified. *Home Circle Soc. No. 1 v. Shelton* (Civ. App.) 81 S. W. 84.

In an action on a benefit certificate, evidence that the beneficiary was unable to read, and that the agent failed to disclose certain statements in the application as to the applicant's health, held admissible under similar allegations, over objection that application spoke for itself and was not denied under oath in the pleading. *Id.*

Where the petition alleged that the contract sued on was made by defendant's agents, and defendant failed to deny it under oath, the agency must be deemed proved. *J. B. Watkins Land Mortg. Co. v. Campbell* (Civ. App.) 81 S. W. 560.

Where a plea denying an agent's authority was unverified, it was proper for the court to refuse to permit defendant to assume the burden of showing want of authority. *Hamilton v. Bell*, 37 C. A. 456, 84 S. W. 239.

When a written receipt is pleaded in the answer, it must be read in evidence without proof of its execution, unless plaintiff denies it in writing under oath. *State Nat. Bank v. Stewart & Co.*, 39 C. A. 620, 88 S. W. 296.

See note to Art. 3696.

Execution and acceptance of drafts by executrix in her representative capacity held established under the statute when they were offered and introduced in evidence in an action thereon against her. *Ellis v. Marshall Car Wheel & Foundry Co.*, 41 C. A. 501, 96 S. W. 689.

In the absence of a plea of non est factum or a denial of an assignment of a claim on a judgment to claimant under oath, the court did not err in permitting the assignment to be introduced in evidence without proof of execution. *McCormick v. National Bank of Commerce (Civ. App.)* 106 S. W. 747.

Where a note signed by one making his mark and witnessed, was in part the basis of the suit and there was no denial under oath of its execution, it was admissible in evidence without proof of its execution. *Bolden v. Hughes*, 48 C. A. 496, 107 S. W. 91.

In an action on a note given for the price of land and foreclosure of vendor's lien, held proper to admit in evidence a certified copy of the deed and the note. *Id.*

In an action against a principal on an alleged written contract executed by its agent, the failure of the principal to deny under oath the agent's authority held not to authorize proof of acts and conduct of the agent not covered by the written contract. *Waco Mill & Elevator Co. v. Allis-Chalmers Co.*, 49 C. A. 426, 109 S. W. 224.

Where a defendant in an action on a written instrument does not deny by affidavit the execution of the instrument, he may not object to the introduction in evidence of the instrument on the ground that its execution has not been proved. *Dalton v. Dalton (Civ. App.)* 143 S. W. 241.

In an action on a written contract, evidence that a portion of the contract had been inserted without the knowledge of the defendants held inadmissible, in the absence of a denial of the contract under oath. *Fish Bros. Wagon Co. v. G. F. Adams & Co. (Civ. App.)* 146 S. W. 704.

Where defendant did not deny execution of guaranty, under this article, telegraphic message claimed to constitute guaranty held provable by the typewritten copy received by the addressee. *Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.)* 149 S. W. 781.

Where plaintiff's cause of action against defendant carrier was in part based on the bill of lading, want of authority of carrier's agent to issue the bill could only be pleaded under oath. *Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.)* 164 S. W. 1032.

In the absence of an affidavit denying the execution of a supersedeas bond filed in another county, in an action for breach thereof, the original bond was admissible in evidence, and plaintiff was not required to prove it by a certified copy under Art. 3694. *Garrett v. Grisham (Civ. App.)* 156 S. W. 505.

What constitutes a plea of non est factum.—In a suit against a partnership as the maker of a draft, a denial of partnership under oath is equivalent to a plea of non est factum. *Alexander v. Lewis*, 47 T. 481.

An answer in action to enforce contract to convey land, attacking the contract, need not be verified. *Cook v. Roberson (Civ. App.)* 46 S. W. 866.

An answer alleging misapprehension on defendant's part in executing the note in suit, and deceit on plaintiff's part held equivalent to a plea of non est factum, which should be verified. *Hurt v. Wallace (Civ. App.)* 49 S. W. 675.

A plea duly sworn to by defendant that he "did not execute nor deliver the note to the payee for any purpose or indebtedness, whatever," is not a plea of non est factum and does not put the execution of the note in issue. *Davis v. Crawford (Civ. App.)* 53 S. W. 384.

A plea admitting the execution of a written instrument, but alleging alteration thereof, is not a plea of non est factum, and need not be verified. *Kansas Mut. Life Ins. Co. v. Coalson*, 22 C. A. 64, 54 S. W. 388.

When a party has signed a written instrument reciting that on a particular day he received a stated sum of money from a certain person, his denial under oath of the fact that he received the money, or that he received it on the day stated, is not a plea of non est factum, and cannot affect the question of the admissibility of the receipt in evidence. *United Moderns v. Pistole*, 38 C. A. 422, 86 S. W. 377.

It is not necessary that the execution of a written contract be denied under oath, in order to avoid it for duress, fraud, or mistake. *Texas Cent. R. Co. v. West (Civ. App.)* 88 S. W. 426.

In an action against individuals as trustees of a church on a note and lien executed by them, this article held inapplicable in view of the allegations of the petition. *Owens v. Caraway (Civ. App.)* 110 S. W. 474.

An affidavit of the forgery of a deed is sufficient to raise such issue, though made by a person not shown by the record to have sustained any relation to the defendants. *Houston Oil Co. of Texas v. Kimball (Civ. App.)* 114 S. W. 662.

Evidence tending to show that a broker signed a contract without authority may be introduced, though the execution of the contract is not denied under oath. *Floresville Oil & Mfg. Co. v. Texas Refining Co.*, 55 C. A. 78, 118 S. W. 194.

Issues raised by plea.—A denial of the execution of a note does not put in issue the assignment or indorsement. *Barnett v. Logue*, 29 T. 282.

Under plea of non est factum, one may show that the note sued on was altered after delivery; but in such case the plea does not put in issue the signing. *Davis v. Crawford (Civ. App.)* 53 S. W. 384.

A plea of non est factum in an action on a note held to require plaintiff to prove its execution. *Memphis Coffin Co. v. Patton (Civ. App.)* 106 S. W. 697.

Effect of plea non est factum.—When a pleading of the defendant is founded on a written receipt, if it was obtained by fraud, accident or mistake, or was canceled, or for any other cause invalid, the fact by which it was proposed to avoid or invalidate it must be pleaded and proved. *Kelly v. Kelly*, 12 T. 452. Where the plea of non est

factum alleges that the signature of defendant was obtained by fraud, the burden of proof is upon the defendant. *Irvin v. Garner*, 50 T. 52. The burden of proof rests upon the party pleading the alteration of an instrument in writing. *Muckleroy v. Bethany*, 27 T. 551.

When an affidavit that the deed is forged is filed, the deed is not admissible in evidence without proof of its execution. *Powell v. Haley*, 28 T. 52; *Willis v. Lewis*, 28 T. 185; *Belcher v. Fox*, 60 T. 527. When admitted in evidence, the impeaching party may introduce testimony in support of his plea of non est factum. *Cox v. Cock*, 59 T. 521.

The plea of non est factum imposes upon the plaintiff the burden of showing the genuineness of the signature and that an alteration apparent upon the face of the instrument was made under such circumstances as not to vitiate the instrument. Art. 2327; *Bogarth v. Breedlove*, 39 T. 561; *Miller v. Alexander*, 13 T. 497, 65 Am. Dec. 73; *Park v. Glover*, 23 T. 469; *Harper v. Stroud*, 41 T. 367.

When a testimonio of a grant, purporting to have been issued in 1835, was attacked as a forgery, its execution must be established by the assisting witnesses thereto, or their absence must be accounted for and their handwriting proved. *Houston v. Blythe*, 60 T. 506.

A party who has filed an affidavit impeaching a deed filed by his adversary as a forgery may, if satisfied of its genuineness afterwards, withdraw his affidavit; nor would he be thereby precluded from afterwards asserting any right he might have under such deed. *Hammond v. Connolly*, 63 T. 62.

Where non est factum is pleaded, proof of execution must be made by plaintiff. *Robertson v. Du Bose*, 76 T. 1, 13 S. W. 300.

Proof of deed for land executed in Louisiana in 1837 and attacked for forgery, how made. The plaintiffs having made a prima facie case of the genuineness of the instrument so attacked, the burden of proof is cast upon the party charging its forgery to rebut this. *Smith v. Gillum*, 80 T. 120, 15 S. W. 794.

In a trial by the court under the plea of non est factum, the judge may examine and compare papers in evidence, and from this and other evidence form his own conclusions. *Millington v. Millington* (Civ. App.) 25 S. W. 320.

Where defendant, under oath, denies execution of the note sued on plaintiff has the burden of proof. *Harvey v. Harvey* (Civ. App.) 40 S. W. 185.

Under an unverified plea of non est factum, a charge on forgery of a policy held properly refused. *International Order of Twelve of the Knights and Daughters of Tabor v. Boswell* (Civ. App.) 48 S. W. 1108.

When suit is brought on notes alleged to have been executed by authority of defendants, a separate denial by one is not a denial of the authority so far as any of the others are concerned. *Hoxie v. Farmers' & Mechanics' Nat. Bank of Ft. Worth*, 20 C. A. 462, 49 S. W. 637.

Defendant in action on note pleading only general denial and suretyship cannot show alteration of note after delivery. *Connor v. Thornton* (Civ. App.) 51 S. W. 354.

Where complainants in suit for recovery of land filed affidavit to the effect that deed relied on by defendants was a forgery, burden was on defendants to show execution of deed. *Thompson v. Johnson*, 24 C. A. 246, 58 S. W. 1030.

Allegation by plaintiff that a power of attorney was forged, unaccompanied by an affidavit of forgery, held not to shift the burden of proof on defendant. *Williams v. Sapieha* (Civ. App.) 59 S. W. 947.

Failure of defendant to produce the instrument sued on, the execution of which he denied by plea of non est factum, held not to shift the burden of proof, nor preclude defendant from introducing evidence to establish his plea. *Laing v. Sherley* (Civ. App.) 61 S. W. 532.

Where the defendant city, in an action on a renewed note executed by its mayor, pleads non est factum, the burden of showing that the mayor was authorized to execute such note is on the plaintiff. *City of Tyler v. Adams* (Civ. App.) 62 S. W. 119.

In an action on a mutual benefit certificate, where the execution of a receipt for dues pleaded by plaintiff was not denied by defendant's plea under oath, which denied the authority of its financier to execute the receipt, defendant's denial under oath of the date and contents thereof did not affect its admissibility as evidence. *United Moderns v. Pistole*, 38 C. A. 422, 86 S. W. 377.

In an action on a written contract of sale, the buyers' plea of non est factum cast the burden of proving the execution of the contract upon plaintiff. *Feagan v. Barton-Parker Mfg. Co.*, 42 C. A. 373, 93 S. W. 1076.

In trespass to try title, an affidavit made under the statute for the purpose of requiring defendants to prove the execution of a certain deed is not admissible as an item of evidence. *Sydnor v. Texas Savings & Real Estate Inv. Ass'n*, 42 C. A. 138, 94 S. W. 451.

When a plea of non est factum is filed by defendant the burden is on plaintiff to prove execution of instrument. *Clymer v. Terry*, 50 C. A. 300, 109 S. W. 1130.

An instrument, execution of which is denied in defendant's pleadings under oath, held admissible with evidence sufficient to raise the issue of its execution. *Henderson v. Louisiana & Texas Lumber Co.* (Civ. App.) 128 S. W. 671.

Statement of extent of defendant's burden of proof, it having pleaded a release by one as plaintiffs' authorized agent, and there having been a plea of non est factum. *St. Louis & S. F. R. Co. v. Blocker* (Civ. App.) 133 S. W. 156.

Where an affidavit of forgery is filed as against an instrument, the burden is on the party claiming thereunder to establish it prima facie, after which the attacking party must prove his plea of non est factum. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

Where, in an action on a draft, a plea non est factum was filed, the burden was on plaintiff to establish that a person executing it as agent of defendant had authority to do so. *Simon v. Temple Lumber Co.* (Civ. App.) 146 S. W. 592.

In an action on a note alleged to have been signed by one under authority from defendant, in which defendant pleads non est factum, the burden is on plaintiff to show the authority of the person to sign the particular note sued on, as well as the fact of signing. *Connor v. Uvalde Nat. Bank* (Civ. App.) 156 S. W. 1092.

Instruments the execution of which must be denied. The execution of a title bond must be put in issue by the plea of non est factum. *Yeary v. Cummins*, 28 T. 91; *Robinson v. Martel*, 11 T. 149.

The execution of a written receipt must be put in issue by the plea of non est factum. *May v. Pollard*, 28 T. 677.

A receipt for stage fare is an instrument in writing within the meaning of this article. *Sawyer v. Dulaney*, 30 T. 479. And so is a wagoner's receipt. *Lewis v. Lowery*, 31 T. 663. Or a letter written by defendant to plaintiff acknowledging an indebtedness. *Close v. Judson*, 34 T. 288.

When suit is brought on an instrument in writing charged to have been executed by the adverse party, its execution can be put in issue only by a plea of non est factum, although the instrument on its face does not purport to be the act of the defendant. *City Waterworks v. White*, 61 T. 536, citing *Drew v. Harrison*, 12 T. 280; *Kelly v. Kelly*, 12 T. 452; *Reid v. Reid*, 11 T. 591; *Persons v. Frost & Co.*, 25 T. Sup. 130; *Prince v. Thompson*, 21 T. 480; *Sessums v. Henry*, 38 T. 41; *Ferguson v. Wood*, 23 T. 177; *Lewis v. Lowery*, 31 T. 663; *May v. Pollard*, 28 T. 678; and overruling *Compton v. Stage Co.*, 25 T. Sup. 78; *Bradford v. Taylor*, 61 T. 508.

An ancient instrument may be contested by proper evidence without an affidavit of forgery. *Parker v. Chancellor*, 73 T. 475, 11 S. W. 503.

Where suit is brought on a building contract which gives a mechanic's lien, and on the note given for the price, neither proof of execution nor filing and notice are required. *Bosley v. Pease* (Civ. App.) 22 S. W. 516.

This article does not apply to an instrument alleged to have been executed by the grantor of the other party. *Lignoski v. Crooker*, 24 S. W. 788, 86 T. 324. See *Durham v. Atwill* (Civ. App.) 27 S. W. 316. Or when it is an original and its execution is proved. *McGehee v. Minter* (Civ. App.) 25 S. W. 718.

An ancient document, not forming the foundation of a pleading, may be impeached without a prior affidavit of forgery or plea of non est factum. *McDonnell v. De Los Fuentes*, 26 S. W. 792, 7 C. A. 136.

On an issue as to the title to land in which plaintiff relies upon a conveyance of the property to him, which conveyance is attacked as a forgery, the plaintiff may not introduce a copy of the conveyance in evidence before proving the execution of the original. *Robbins v. Hubbard* (Civ. App.) 108 S. W. 773.

Where a deed, offered in evidence, is attacked as a forgery, its execution must be proved in a manner satisfactory to the court to render it admissible in evidence. *Id.*

An instrument executed by a carrier's agent, reciting the receipt of \$10.25 for re-shipment of certain household goods, held a receipt, and not a contract, the execution of which the carrier was bound to deny under oath as a condition to denying its validity. *Anderson v. St. Louis, B. & M. Ry. Co.* (Civ. App.) 156 S. W. 358.

Suit against executor.—In a suit against an executor or administrator, his affidavit to the best of his knowledge and belief is sufficient. *Tarpley v. Poage*, 2 T. 139.

In a suit against an executor on his testator's note, a sworn plea by the defendant that he has reason to believe and does believe that his testator did not execute the note, is a sufficient plea of non est factum. *Scott v. Menly* (Civ. App.) 105 S. W. 55.

Art. 3711. [2321] [2264] Evidence of appointment and qualification of executor, etc.—Whenever it may be necessary to make proof of the appointment and qualification of an executor, administrator or guardian, the letters issued to them in the manner provided by law, or a certificate of the proper clerk under his official seal that such letters have been issued, shall be sufficient evidence of the appointment and qualification of such executor, administrator or guardian. [Act Feb. 25, 1863, p. 5. P. D. 1286.]

Outler v. Elam, 1 App. C. C. § 1003. As to mode of putting in issue the capacity of a party to sue, see ante, Art. 1906.

In federal courts.—Proceedings of courts of probate come within the provisions of the statutes of the United States. Ante, Art. 3694; *House v. House*, 16 T. 600; *Abercrombie v. Stillman*, 77 T. 589, 14 S. W. 196. In the absence of allegation and proof of laws of another state, they are presumed to be similar to the laws of our state. A certificate of the appointment and qualification of the administrator of an estate, sufficient under the statutes of this state, is presumed to be so under the laws of any other state, the official character and signature of the officer giving the certificate being proved in the manner prescribed by the act of congress. *Abercrombie v. Stillman*, 77 T. 589, 14 S. W. 196.

Collateral attack on appointment.—See notes under Art. 3295.

Art. 3712. [2323] [2266] Suit on sworn account.—When any action or defense is founded upon an open account, supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to administer oaths, to the effect that such account is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall, before an announcement of ready for trial in said cause, file a written denial, under oath, stating that such account is not just or true, in whole or in part, and if in part only, stating the items and particulars which are unjust; provided, that, when such counter affidavit shall be filed on the day of the trial, the party claiming under such veri-

fied account shall have the right to continue such cause until the next term of court; when he fails to file such affidavit, he shall not be permitted to deny the account, or any item therein as the case may be. [Acts 1883, p. 110.]

See, also, Art. 1906, subd. 11.

Cited, *Adams v. Gray & Dudley Hardware Co.* (Civ. App.) 153 S. W. 650.

What constitutes open account.—The word "account" applies to transactions between persons in which, by sale upon the one side and purchase upon the other, the title to personal property is passed from one to the other, and the relation of debtor and creditor is thereby created by general course of dealing; and it does not mean one or more isolated transactions resting upon special contract. *McCamant v. Batsell*, 59 T. 363; *H. & T. C. Ry. Co. v. Hays*, 1 App. C. C. § 759; *T. & St. L. Ry. Co. v. Smith*, 2 App. C. C. § 51. See *Mullaly v. Goggan* (Civ. App.) 25 S. W. 666.

An account of a laborer is not an open account within the meaning of Art. 3712. *A. & N. W. R. Co. v. Daniels*, 62 T. 70.

In a suit on a verified account for goods sold and delivered at the several dates mentioned, and at prices specified, in accordance with the terms of a special contract, and upon a letter of credit or guaranty executed by a third person, it was held that the account was an open account. *Moore v. Powers*, 16 C. A. 436, 41 S. W. 707.

An open account is one in respect to which nothing has occurred to bind either party by its statements; an account which is yet fully open to be disputed. A stated account is an account of many items, based upon agreements as to each item as to the prices and the time of payment. It is only an open account that is provable by an affidavit under this article. *Written Grain & Lumber Co. v. Mineola Box Mfg. Co.* (Civ. App.) 95 S. W. 745.

An isolated transaction by which a single article is sold at an agreed price is not such an account between the seller and buyer as may be verified under the statute in such a way as to dispense with proof by the seller suing for the price. *Jacksboro Stone Co. v. Fairbanks Co.*, 48 C. A. 639, 107 S. W. 567.

An account in part for items due for salary under a contract, and in part for board, involves isolated transactions resting on special contract, and is not an account whereby the relation of debtor and creditor is created by a general course of dealing, and though the account is sworn to, defendant need not deny the same under oath. *Bishop v. Mount* (Civ. App.) 152 S. W. 442.

Accounts within article.—An account for merchandise sold and delivered and money advanced is within the statute. *Cahn v. Salinas*, 2 App. C. C. § 104.

Accounts not within article.—Entries of money loaned or advanced. *Cole v. Dial*, 8 T. 347. It seems that books are admissible to prove the payment of cash to order, goods delivered to order, goods delivered and cash paid to a third person on account of the person charged. *Ward v. Wheeler*, 18 T. 249.

An account for money paid by plaintiff as surety on the note of defendant. *McCamant v. Batsell*, 59 T. 363.

An account for amount due for cutting and hauling ties for a railroad. *A. & N. W. Ry. Co. v. Daniels*, 62 T. 70.

An account against a railroad company for damages occasioned by the loss or destruction of goods (*H. & T. C. R. R. Co. v. White*, 1 App. C. C. § 164); and by failure to ship goods (*G., H. & S. A. Ry. Co. v. Gildea*, 2 App. C. C. § 271); for removing and appropriating cross-ties (*T. & P. Ry. Co. v. Looby*, 1 App. C. C. § 577); for damages resulting from a tort (*H. & T. C. Ry. Co. v. Hays*, 1 App. C. C. § 759; *G., H. & S. A. Ry. Co. v. Morris*, 1 App. C. C. § 777).

An account against a railroad for services as a conductor (*T. & St. L. Ry. Co. v. Smith*, 2 App. C. C. § 51); an account for work done in putting up lattice work, and making tables (*Murray v. McCarty*, 2 App. C. C. § 107); an account against a railroad for board of laborers and for services as foreman (*G. H. & S. A. Ry. Co. v. Schwartz*, 2 App. C. C. § 758).

An account which is not due. *Sims v. Howell Bros.*, 4 App. C. C. § 180, 15 S. W. 120. See *Leverett v. Wherry*, 4 App. C. C. § 186, 15 S. W. 121.

Where a claim is a mere aggregation of items based upon special contracts, with nothing open or undetermined. *Ballard v. McMillan*, 25 S. W. 327, 5 C. A. 679.

A verified account for professional services of a lawyer in bringing three separate suits. *De Long v. Miller* (Civ. App.) 37 S. W. 191.

An account by a physician for his services. *Garwood v. Schlichenmaier*, 25 C. A. 176, 60 S. W. 574.

An account that does not appear to be an account for personal property sold and delivered by plaintiff to defendant in a general course of dealing. *Oden & Co. v. Vaughn Grocery Co.*, 34 C. A. 115, 77 S. W. 967.

Time of filing affidavit to account.—The fact that an affidavit to the correctness of an open account was made more than four months before suit was brought does not prevent it constituting prima facie evidence, payments subsequent to its date being matters of defense. *Hulme v. Levis-Zuloski Mercantile Co.* (Civ. App.) 149 S. W. 781.

Affidavit after assignment of account.—An affidavit to an account, made after its assignment, will not support an action by the assignee. *Carpenter v. Historical Pub. Co.* (Civ. App.) 24 S. W. 685.

Nature of debt.—To entitle plaintiff to the benefit of this article it must appear that the debt claimed exists by contract between the parties to the suit, either express or implied, in other words, the action must be founded upon a contract. *Davidson v. McCall Co.* (Civ. App.) 95 S. W. 33.

Sufficiency of affidavit.—An affidavit which fails to state that an account is, within the knowledge of affiant, just and true, etc., is not in compliance with the statute, and if objected to should be excluded as evidence. *Shandy v. Conrales*, 1 App. C. C. § 235. And so where it does not state that "all just and lawful offsets, credits and payments

have been allowed," and that the account is due, it will not support a judgment by default. *Duer v. Endres*, 1 App. C. C. § 323.

An affidavit that stated "that the several items of said account respectively mature as there stated," and it appeared that one of the items had not matured at the date of the affidavit, was held not to be in compliance with the statute. *Shaunnessey v. Le Gierse*, 1 App. C. C. § 379.

It is not an objection to an affidavit to account that it is made by one who was not a member of the plaintiff firm when the goods were sold and delivered. *Moore v. Powers*, 16 C. A. 436, 41 S. W. 707.

Affidavit verifying an account sued on examined, and held not sufficient to warrant judgment by default. *Brin v. Washusetts Shirt Co.* (Civ. App.) 43 S. W. 295.

An affidavit to an account that fails to state that the facts are "within the knowledge of affiant," and that "all just and legal offsets, credits and payments have been allowed," is bad, and judgment by default will be set aside. *Id.*

A verified account, attached as an exhibit to the petition, is properly excluded from evidence where it does not indicate the items thereof nor their nature. *Pittsburg Plate Glass Co. v. Roquemore* (Civ. App.) 88 S. W. 449.

In an action on account made out against a third person, the variance between the account and the affidavit, charging defendant with liability thereon, held immaterial. *Pelican Lumber Co. v. Johnson Mercantile Co.* (Civ. App.) 89 S. W. 439.

In an action on an open account, an affidavit verifying the account held insufficient as not being on the affiant's personal knowledge. *Baggett v. Sheppard* (Civ. App.) 110 S. W. 952.

In an action on an open account, where the affidavit, attached to the petition and received in evidence as prima facie proof of the correctness of the account, was dated July 29, 1910, the fact that the account was dated September 27, 1910, did not render it defective, where it was apparent from other parts of the account that "1910" was inserted in the account in place of "1909" by a mere clerical error. *Hulme v. Levis-Zuloski Mercantile Co.* (Civ. App.) 149 S. W. 781.

The omission of ditto marks in sworn copy of account, attached to petition and received in evidence, held not to render the account insufficient. *Id.*

Effect of affidavit to account.—An account with an accompanying affidavit, as required by the statute, with a certificate of the proper officer that it was sworn to, and of its filing and registration, is admissible in evidence; the certificate of the officer being prima facie evidence of the facts it recites. *Stuart v. Broome*, 59 T. 466.

The affidavit to a sworn account against a partnership proves the partnership as well as all the other facts necessary to make out a prima facie case. *Carder v. Wilder*, 1 App. C. C. § 14, citing *Persons v. Frost*, 25 T. 129.

While the affidavit to an attorney's account for services did not authorize a judgment, yet the account and affidavit formed a pleading in the justice court, and it was error to sustain an exception thereto. *Craig v. Pruitt* (Civ. App.) 60 S. W. 586.

Where an account stands on the books in the name of a party and the goods, money, etc., were received by him, the burden of proving that the goods were purchased on the original undertaking of a third party, and were purchased by party who received the goods as agent of the said third party, and charged to him for convenience of said third party, is on the seller of the goods and this cannot be done by the affidavit required under this statute. Evidence sufficient to establish an original purchase of the goods by the third party must be produced. *Shaw v. Gilmer* (Civ. App.) 66 S. W. 679.

A verified account is admissible in evidence, even though it is not such an account, as, when verified, makes it prima facie evidence of its verity. Its verification does not render it inadmissible. *Standifer v. Bond Hardware Co.* (Civ. App.) 94 S. W. 145.

The fact that an open account sued on was verified did not affect defendant's right to plead a counterclaim. *Hallinan v. Levytansky*, 46 C. A. 228, 102 S. W. 463.

A sworn answer in an action on an account held merely a plea of payment, and not to require the plaintiff to make proof of the various items. *Oliver v. Edward Weil Co.* (Civ. App.) 138 S. W. 1109.

In an action on an open verified account, where the evidence showed certain payments appropriated by defendant firm and plaintiff to the payment of the account due from the firm to plaintiff, an instruction imposing the burden of proof on defendant to show direction to so appropriate the payments held properly denied. *Rotan Grocery Co. v. Tatum* (Civ. App.) 149 S. W. 342.

Counter affidavit.—The counter affidavit may be filed in the court where the cause is pending on appeal. *T. & P. R. R. Co. v. Norton*, 1 App. C. C. § 403.

The affidavit should be according to the fact. The words "in whole or in part" should not be incorporated in the affidavit. *Hensley v. Degener* (Civ. App.) 25 S. W. 1130.

When an account is unjust in part it should be so stated in the controverting affidavit. *Id.*

A sworn denial of the sworn account sued on held insufficient for failure to clearly specify the items claimed to be incorrect. *Eberstadt v. Jones*, 19 C. A. 480, 48 S. W. 558.

Where the answer states that the account sued on "is not just or true in whole, or in part," it embodies a denial of the account as a whole, and the addition of the words "or in part," emphasizes the expression of its unjustness as a whole instead of qualifying it. *Milam v. Ed. H. Harrell Lumber Co.* (Civ. App.) 97 S. W. 825.

When the justness of a verified account sued upon is in writing, denied under oath by defendant, it is incumbent on plaintiff to establish the debt he claims against defendant in the same way he would be required to establish it had his account not been sworn to as permitted by the statute. *Rust v. Sanger Bros.* (Civ. App.) 105 S. W. 66.

Where suit is brought on a private account, and defendant by a sworn plea in writing denies that any part of the account is just, the verified account is inadmissible; no other evidence being offered to show the indebtedness. *Id.*

Where defendant denied under oath the correctness of plaintiff's sworn account, it was not evidence of any fact. *Pitman v. Bloch Queensware Co.*, 48 C. A. 320, 106 S. W. 724.

In an action on a sworn account, defendant's sworn plea, by admitting the correctness of the items of the account, made a prima facie case for plaintiff, though the plea

also alleged that defendant was entitled to certain credits from the amount claimed as due, and the burden was upon defendant to establish such credits by other proof. *Blackwell Durham Tobacco Co. v. Jacobs*, 57 C. A. 295, 122 S. W. 66.

A verified account held not admissible in evidence, notwithstanding the statute, in the absence of other evidence showing its correctness, where the opposing party filed an affidavit denying its correctness. *Stephenville, N. & S. T. Ry. Co. v. Western Coal & Mining Co.* (Civ. App.) 127 S. W. 245.

Where a verified account is denied by defendant under oath, plaintiff must establish his cause of action as in ordinary cases. *Continental Lumber & Tie Co. v. Miller* (Civ. App.) 145 S. W. 735.

Affidavit of defendants, in action on an open verified account, denying the truth of the account and their liability to plaintiff, held sufficient to authorize admission of evidence tending to show that they were not liable. *Rotan Grocery Co. v. Tatum* (Civ. App.) 149 S. W. 342.

A defendant sued on an itemized account due from a firm, in which he had been a partner, who files a sworn plea denying that he was a partner when the items specified in the account were sold, need not file a controverting affidavit of the verified account. *Rodgers-Wade Furniture Co. v. Wynn* (Civ. App.) 156 S. W. 340.

Failure to file counter affidavit and effect thereof.—A verified account is only prima facie evidence, and the defendant, without filing a controverting affidavit, may under proper pleadings show that the debt has been paid (*G., H. & S. A. R. Co. v. McTigue*, 1 App. C. C. § 461), or set up a counterclaim (*Bach, Meirs & Co. v. Ginocchio*, 1 App. C. C. § 1316). But he cannot show that any of the items are incorrectly stated. *Robinson v. Bogardus*, 2 App. C. C. § 828; *Cahn v. Salinas*, 2 App. C. C. § 104.

A defendant may plead a counterclaim without denying, under oath, the justice and correctness of the plaintiff's verified account. *Bach v. Ginocchio*, 1 App. C. C. § 1316; *G., H. & S. A. Ry. Co. v. Schwartz*, 2 App. C. C. 759.

In suit on verified account, defendant's failure to file counter affidavit does not preclude him from showing payment or from setting up counterclaim. *Moore v. Powers*, 16 C. A. 436, 41 S. W. 707.

A defendant may show, without filing a counter affidavit, that an account has been paid, in whole or in part. He may also, under a proper plea, prove a counterclaim. *Id.*

In action on an unsworn account the items need not be proved to satisfaction of jury. *Smith v. Mather* (Civ. App.) 49 S. W. 257.

In an action against a county to recover expenses incurred in caring for persons while quarantined, defendant should be permitted to cross-examine as to the items, though no affidavit of denial was filed before the trial, as required in actions on account by Art. 3642. *King County v. Mitchell* (Civ. App.) 71 S. W. 610.

Where a person guaranteed the payment of an account in such manner as to become primarily liable, such affidavit was sufficient to establish the account as against him, whether or not the buyer was made a party to the suit. *Hulme v. Levis-Zuloski Mercantile Co.* (Civ. App.) 149 S. W. 781.

Right to continuance.—Plaintiff sued upon an itemized verified account for goods sold, and on the day of trial defendant filed a sworn answer alleging that he owed plaintiff nothing when the petition was filed except \$15, which was not then due and which he tendered into court, and pleaded accord and satisfaction and claimed certain credits not allowed in plaintiff's account which, with the exception of \$15, was alleged to be a full settlement of the account. Art. 3712 provides that, when an action is founded on a verified open account, it shall be taken as prima facie evidence of that fact, unless the other party files a written denial under oath, provided that, when the counter-affidavit shall be filed on the day of trial, plaintiff shall have the right to continue the cause until the next term. Held, that the answer raised the issue of the truth of the verified account so as to entitle plaintiff to a continuance as a matter of right. *Bergman Produce Co. v. Browne* (Civ. App.) 141 S. W. 153.

Books of account as evidence in general.—See notes under Art. 3687, Introductory, §§ 87-95, 131, 143.

Art. 3713. [677] [601] Records of corporation are evidence.—The records of any company incorporated under the provisions of any statute of this state, or copies thereof duly authenticated by the signature of the president and secretary of such company, under the corporate seal thereof, shall be competent evidence in any action or proceeding to which such corporation may be a party. [P. D. 5967.]

Foreign corporations.—The statutory requirement that a corporation shall keep minutes of the acts of its directors, and that certified copies thereof shall be admissible as evidence, will be applied to a foreign corporation, in the absence of evidence as to the requirements of the statutes of the state of its domicile. *People's Building, Loan & Savings Ass'n v. Chambers* (Civ. App.) 54 S. W. 247.

TITLE 54

EXECUTION

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

Article 3714. [2324] [2267] Execution on judgment of district and county court, issued when.—From and after the adjournment of every district or county court, it shall be the duty of the clerk thereof to tax the costs in every case in which a final judgment has been rendered against the party liable therefor under such judgment, and which have not been paid by him, and to issue execution for the enforcement of such judgment and the collection of such costs. [Act June 4, 1873, p. 209, sec. 1. P. D. 3772.]

Includes all final judgments.—The provision in this article requiring execution to be issued covers all final judgments, and includes judgment of foreclosure of liens. *Ryan v. Raley*, 48 C. A. 187, 106 S. W. 752.

Final judgment.—See also notes under Title 37, Chapter 15.

Where judgment is rendered on affirmation by the appellate court, the district court may issue execution thereon. *Cope v. Lindsey*, 17 C. A. 203, 43 S. W. 29.

A judgment which does not dispose of all the parties is not a final judgment and will not authorize an execution thereunder. *Texas Co. v. Beddingfield*, 53 C. A. 10, 114 S. W. 894.

Payment and satisfaction of judgment.—A judgment once satisfied in full will not support another execution. *Singer Mfg. Co. v. Herman Mfg. Co.*, 1 App. C. C. § 741.

The payment of a judgment by a stranger to it will operate as an extinguishment

of it, unless there is some understanding that it is to be continued in force for the benefit of the person making the payment. After such payment the judgment will not support an execution, and a purchaser at an execution sale under such satisfied judgment acquires no title to land so sold. *Terry v. O'Neal*, 71 T. 592, 9 S. W. 673. So an order of sale on a judgment foreclosing a vendor's lien which has been settled is a nullity. *Hardin v. Clark*, 21 S. W. 977, 1 C. A. 565.

A judgment which has been paid will not support an order of sale or execution, and a sale under it would be a nullity, and a purchaser thereunder would acquire no title to the land by virtue of such sale. *Hardin v. Clark*, 1 C. A. 565, 21 S. W. 977; *Geers v. Scott* (Civ. App.) 33 S. W. 292.

Execution creditor purchasing at sale cannot claim that the judgment was not entitled to credit to the amount of his bid. *Willis v. Sanger*, 15 C. A. 655, 40 S. W. 229.

Execution creditor purchasing at his sale may have the satisfaction of his judgment set aside upon its appearing that he acquired no title to the property purchased, although he had notice of the facts at time of sale. *Hollon v. Hale*, 21 C. A. 194, 51 S. W. 900.

The return of a sheriff on an execution, and entry of satisfaction of a judgment, will be set aside when the levy is made on property which the judgment debtor does not own. *Massie v. McKee* (Civ. App.) 56 S. W. 119.

Where one of three defendants, against whom a joint judgment had been rendered, paid the entire sum due and took an assignment from the judgment creditor, the judgment was thereby extinguished, and the purchaser was not entitled to enforce contribution by execution. *Deleshaw v. Edelen*, 31 C. A. 416, 72 S. W. 413.

Parties, who by their pleadings have asserted only a right to subject to their execution one's interest in land, held not in a position to invoke exercise by the court of any equitable power to subject to payment of their judgment any equitable interest of such person in the land. *Todd & Hurley v. Garner* (Civ. App.) 133 S. W. 314.

Entry of judgment.—An execution cannot be issued upon a judgment rendered, but not entered upon the minutes. *Hubbart v. Willis State Bank*, 55 C. A. 504, 119 S. W. 711.

The issuance of an order of sale on execution prior to entry of judgment is unauthorized. *Hubbart v. Willis State Bank* (Civ. App.) 152 S. W. 453.

An entry nunc pro tunc of a judgment theretofore rendered related back to the original rendition, and cured the irregularity of issuing an order of sale after rendition, but before entry, of judgment. *Id.*

Void or voidable judgment.—Where land is sold on execution issued on an erroneous but not void judgment, the error cannot avail the purchaser of land from the debtor, as against purchaser under execution. *Focke v. Sterling*, 18 C. A. 8, 44 S. W. 611.

An execution held void because it showed upon its face that it was issued under a void judgment. *Underwood v. Brown*, 29 C. A. 163, 68 S. 206.

A judgment against a nonresident rendered on service by publication only being void for want of jurisdiction over the defendant, an execution sale thereunder passed no title. *Horst v. Lightfoot*, 103 T. 643, 132 S. W. 761.

— **Validation by amendment.**—An execution, void because the judgment under which it was issued was void, cannot be validated by an amendment to the judgment subsequent to the issuance of the execution. *Underwood v. Brown*, 29 C. A. 163, 68 S. W. 206.

Judgment not providing for execution.—Execution sale held valid although execution issued on judgment which did not order its issue. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

An execution may issue on a judgment without any award thereof. *Hartz v. Hausser* (Civ. App.) 90 S. W. 63.

An alias execution held properly issued on a judgment, notwithstanding there had been no specific direction for its issuance. *Weddington v. Carver*, 45 C. A. 68, 100 S. W. 786.

An execution may issue on a judgment not in terms providing therefor. *Ryan v. Raley*, 48 C. A. 187, 106 S. W. 750.

Persons entitled to execution.—See notes under Art. 3729.

Loss or destruction of judgment.—When it appeared that the docket of the justice of the peace was lost or destroyed, and executions dependent upon the judgment rendered by such justice, and the sheriff's deed was produced, accompanied by proof of possession of the land by the purchaser and those claiming under him, it should have been left to the jury to find whether there was such a judgment as recited in the executions. *Walker v. Emerson*, 20 T. 706, 73 Am. Dec. 207.

An execution issued on a judgment destroyed by fire before it was renewed is an irregularity, and the sale of property thereunder for one-fifteenth of its value will be set aside. *Beckham v. Medlock*, 19 C. A. 61, 46 S. W. 402.

Judgments of county court transferred.—As to execution on judgments of county court where jurisdiction has been transferred to the district court, see ante, Art. 1711. Under the former law it was held that the judgment of the county court in such cases should be recorded in the minutes of the district court before an execution should be issued. *Richard v. Belcher*, 25 S. W. 740, 6 C. A. 284.

Judgment in attachment suit.—A judgment against a nonresident in a suit by attachment without personal service operates only upon the attached property, is enforced by an order of sale, and will not support an execution. *Barelli v. Wagner*, 5 C. A. 445, 27 S. W. 17.

Recital of judgment.—See notes under Art. 3729.

Description of and recitals as to parties.—See notes under Art. 3729.

Execution for costs.—See Art. 3922.

Taxation of costs.—The taxing of costs is not an adjudication by the clerk of the items specified nor of the amount, but is simply the performance of a ministerial duty, which if erroneous may be corrected by the court upon a motion made for that purpose. *Patton v. Cox*, 97 T. 253, 77 S. W. 1027.

Officers may demand payment of costs pending suit.—See Art. 2032.

Time for issuance.—A first execution issued more than nine years on a judgment rendered in 1874 was held voidable in a suit instituted in 1886 to set aside such execution and sale. *Garvin v. Hall*, 83 T. 295, 18 S. W. 731.

The duty to issue an execution imposed on the clerk by this article, does not arise until application is made for the writ by the owner of the judgment, and where a judgment has been transferred in writing and filed and entered on the margin of the minutes of the court where the judgment was recorded in accordance with Art. 6833, only the transferee may apply for the issuance of an execution, and Arts. 2032-2034, giving officers of court a remedy for collection of their costs by execution, do not give any officer of the court any interest in the judgment. *Arthur v. Driver* (Civ. App.) 127 S. W. 891.

Issuance to another county.—See notes under Art. 3726.

Injunction against execution.—See notes under Art. 4643.

Art. 3715. [2325] [2268] Execution before adjournment, when.—After the expiration of twenty days from and after the rendition of a final judgment in the district or county court, and after the overruling of any motion therein for a new trial or in arrest of judgment, if no supersedeas bond on appeal or writ of error has been filed and approved, the clerk shall issue execution upon such judgment upon the application of the successful party. [Id.]

Execution before adjournment.—The fact that the court rendering a final judgment has not adjourned at the time of the issuance of execution on such judgment is immaterial if 20 days have elapsed between the date of judgment and the date of the issuance of the writ. *Bumpass v. Morrison*, 70 T. 757, 8 S. W. 596.

Effect of premature issuance.—The premature issuance of an execution is an irregularity, but the writ must be respected until it is vacated in a direct proceeding for that purpose. *Sydnor v. Roberts*, 13 T. 600, 65 Am. Dec. 84; *Boguess v. Howard*, 40 T. 158; *Morris v. Hastings*, 70 T. 26, 7 S. W. 649, 8 Am. St. Rep. 570; *House v. Robertson* (Civ. App.) 34 S. W. 640.

Effect of destruction of record.—The destruction or mutilation of the record does not divest the court or its proper officer of power to issue execution. *McCormick v. Nichols* (Civ. App.) 35 S. W. 526. See Art. 6778.

Art. 3716. [2326] [2269] Execution issued before adjournment, superseded, when.—When an execution has been issued under the preceding article, and a supersedeas bond is afterward filed and approved within the time prescribed by law, the clerk shall immediately issue a writ of supersedeas suspending all further proceedings under such execution.

Recovery of land—Ninety days' time.—The 90 days' time in which a party is allowed to pay money as a condition to the recovery of land does not begin to elapse until the supreme court has refused a writ of error to the court of civil appeals. Then the judgment of the district court begins to have effect. It was suspended until then by appeal upon supersedeas bond. *Fenton v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 65 S. W. 201.

Art. 3717. [2326a] When judgment shall become dormant.—If no execution is issued within twelve months after the rendition of a judgment in any court of record, the judgment shall become dormant and no execution shall issue thereon, unless such judgment be revived; but, where the first execution has issued within the twelve months, the judgment shall not become dormant, unless ten years shall have elapsed between the issuance of executions thereon, and execution may issue at any time within ten years after the issuance of the preceding execution. [Acts 1895, p. 2.]

When judgment shall become dormant.—A judgment upon which an execution has been issued within one year, continues in force for ten years, and at any time during that period another execution might be issued and the judgment enforced without being revived. *Maddox v. Summerlin*, 92 T. 483, 49 S. W. 1033.

A dormant judgment is one that has not been satisfied or barred by lapse of time, but is temporarily inoperative, so far as the right to issue execution is concerned. *Gale Mfg. Co. v. Dupree* (Civ. App.) 146 S. W. 1048 (citing 3 Words and Phrases, p. 2183).

Judgment a cause of action.—Where no execution has been issued on a judgment within 12 months from its rendition, and none can be issued because of the inhibition of this article, and the judgment can only be revived under scire facias provided by Art. 5696, the judgment is a cause of action within the purview of Art. 5702, stopping the running of limitations during the absence of the defendant from the jurisdiction. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

Limitation—Accrual of action.—Issuance of writ of garnishment held not an execution, so as to prevent a judgment being barred by limitations. *Shields v. Stark* (Civ. App.) 51 S. W. 540.

Under Art. 2387, and this article, the cause of action on a judgment on which execution had been issued within the 12 months would not accrue until 10 years after the issuance of the last valid execution, and the 4-year limitations will start to run at that time, under Art. 5690, rather than under Art. 5696, providing for revival of a judgment

by scire facias or an action of debt within 10 years after its date and not thereafter. *Gale Mfg. Co. v. Dupree* (Civ. App.) 146 S. W. 1048.

Validity of execution on dormant judgment.—While an execution sale made under a dormant judgment may be avoided by the defendant in execution, a stranger cannot object to such execution, or to the title of the purchaser at such sale, in a collateral proceeding. *Boggett v. Howard*, 40 T. 153; *Riddle v. Turner*, 52 T. 145; *Meadre Co. v. Aringdale*, 58 T. 447; *Laughter v. Seela*, 59 T. 177.

A sheriff's sale made under execution issued on a dormant judgment is voidable, and as to the purchaser who is a stranger to the proceeding it cannot be collaterally attacked. *Hill v. Newman*, 67 T. 265, 3 S. W. 271.

A sale under a dormant judgment is only voidable, and can only be attacked in a direct proceeding instituted for that purpose. *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4.

Execution on a dormant judgment is improper. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

Revival of judgment.—Sale under execution, issued in favor of assignee, who caused judgment to be revived in assignor's name, held valid. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

Where judgment is defective because revived in favor of assignee in assignor's name, objection therefor must be taken by appeal, and cannot be raised collaterally, by suing purchaser for the land sold under execution pursuant to said judgment. *Id.*

Where plaintiff's judgment cannot be collected because defendant has no property in the state, and it is barred by the statute of limitations in the state in which he has property, plaintiff may sue on such judgment and obtain a new one. *Stevens v. Stone*, 94 T. 415, 60 S. W. 959, 86 Am. St. Rep. 861.

The issuance of an execution on a judgment of revivor only held an irregularity not affecting the title of the purchaser thereunder. *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4.

An execution may be issued under a judgment reviving an original judgment rendered dormant by failure to issue execution thereon within a year, though the judgment of revivor did not provide for execution. *Id.*

Art. 3718. [2327] [2270] Execution from justice's court.—Executions from the justices' courts shall issue as provided in the title relating to said courts.

Art. 3719. [2328] [2271] Execution issued on removal of property, etc.—Upon the filing of an affidavit that the party against whom a judgment for money, other than a judgment for costs only, has been rendered, is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding his creditors, the clerk may issue execution immediately. [Act Jan. 27, 1842, p. 66, sec. 3. P. D. 3774.]

Art. 3720. [2329] [2272] On death of plaintiff, execution issued how.—Where a sole plaintiff, or one of the several plaintiffs, shall die after judgment, execution shall issue on such judgment in the name of the legal representative of such deceased sole plaintiff, or in the name of the surviving plaintiffs, and the legal representative of the deceased plaintiff, as the case may require, upon an affidavit of such death being filed with the clerk, together with a certificate of the appointment of such representative under the hand and seal of the clerk of the court wherein such appointment was made. [Act Feb. 5, 1853. P. D. 13.]

See *Simmang v. Cheney* (Civ. App.) 155 S. W. 1198.

Affidavit—Recitals.—It is not necessary that the execution should recite that the affidavit had been filed, etc. *Scott v. Lyons*, 59 T. 593.

Right of surviving partner to issue execution.—Surviving partner may issue execution on judgment in favor of the firm. *Corder v. Steiner* (Civ. App.) 54 S. W. 277.

Grounds for Injunction.—See notes under Title 69.

Art. 3721. [2330] [2273] On death of executor, etc.—When an executor, administrator, guardian or trustee of an express trust dies or ceases to be such executor, administrator, guardian or trustee after judgment, execution shall issue on such judgment in the name of his successor, upon an affidavit of such death being filed with the clerk, together with the certificate of the appointment of such successor, under the hand and seal of the clerk of the court wherein such appointment was made. [Id.]

Art. 3722. [2331] [2274] On death of nominal plaintiff.—When a person in whose favor a judgment is rendered for the use of another dies after judgment, execution shall issue in the name of the party for whose use the suit was brought, upon an affidavit of such death being filed with the clerk.

Art. 3723. [2332] [2275] On death of defendant, no execution for money.—Where a sole defendant dies after judgment for money against him, execution shall not issue thereon, but the judgment may be proved up and paid in due course of administration. [Act Feb. 5, 1853. P. D. 14.]

May issue against surviving defendants.—Where one of several defendants dies, execution may issue against the remaining defendants. *Turner v. Smith*, 9 T. 626; *Kendrick v. Rice*, 16 T. 254.

Against estate in hands of independent executor.—Execution may issue against the estate of the decedent in the hands of an independent executor under a will. Art. 3363; *Lemmel v. Pauska*, 54 T. 505.

Issuance after death—Effect.—An execution issued after the death of the defendant on a judgment rendered before such death is void; and under an execution issued in the lifetime of the defendant, proceedings subsequent to his death are void. So held in *Conkrite v. Hart*, 10 T. 140; *Boguess v. Lilly*, 18 T. 200; *Chandler v. Burdett*, 20 T. 42; *McMiller v. Butler*, 20 T. 402; *Emmons v. Williams*, 28 T. 776. This rule is questioned in *Webb v. Mallard*, 27 T. 80. In *Cook v. Sparks*, 47 T. 28, held, that a sale after the death of the defendant will be set aside on motion. In *Taylor v. Snow*, 47 T. 462, 26 Am. Rep. 311, held, that such sale may be avoided within the proper time and manner by any party having an interest in the property; and that it is void as against the administrator of the deceased defendant and parties acquiring title through administration. See *Bynum v. Gowan*, 9 C. A. 559, 29 S. W. 1119.

Death after issuance—Effect.—Where a judgment for taxes was rendered against a purchaser of land subject to a vendor's lien, and he died prior to a sale of the land on execution, the sale was void. *Lippincott v. Taylor* (Civ. App.) 135 S. W. 1070.

Collateral attack.—The death of the defendant before judgment cannot be set up in a collateral proceeding to avoid a judgment rendered after his death or sale thereunder. *Taylor v. Snow*, 47 T. 462, 26 Am. Rep. 311; *Grassmeyer v. Beeson*, 18 T. 753, 70 Am. Dec. 309; *Mills v. Alexander*, 21 T. 154; *Thouvenin v. Rodrigues*, 24 T. 469; *Rodrigues v. Lee*, 26 T. 32; *Bohanan v. Hans*, 26 T. 445; *Moke v. Brackett*, 28 T. 443; *Giddings v. Steele*, 28 T. 732, 91 Am. Dec. 336; *Fleming v. Seeligson*, 57 T. 524; *Ewing v. Wilson*, 63 T. 88.

Foreclosure of vendor's lien must be presented to administrator.—A judgment foreclosing the vendor's lien in favor of the vendor after the death of the defendant is a claim for money against the estate of the decedent and must be presented to the administrator for action thereon. A suit to revive such judgment brought by an assignee without such presentation, and the rejection of it, in whole or in part, cannot be maintained against the heirs of the defendant pending an administration. *Jenkins v. Cain*, 72 T. 88, 10 S. W. 391; *Cain v. Woodward*, 74 T. 549, 12 S. W. 319.

Abatement on death—Revival.—Where the time has elapsed in which administration could be had in the estate, holders of judgment against deceased should sue the heirs for their debt, or to revive the judgment that had abated by the death of the defendant. *Fleming v. Ball*, 25 C. A. 209, 60 S. W. 986.

Art. 3724. [2333] [2276] On death of defendant, execution for property.—In all cases of judgments other than money judgments, where the sole defendant, or one or more of several joint defendants, shall die after judgment, upon an affidavit of such death being filed with the clerk, together with the certificate of the appointment of a representative of such decedent, under the hand and seal of the clerk of the court wherein such appointment was made, the proper process on such judgment shall issue against such representative. [Id.]

Art. 3725. [2334] [2277] Terms "plaintiff" and "defendant" defined.—By the term, "plaintiff," as used in this title, is meant the party in whose favor judgment is rendered, and by the term, "defendant," is meant the party against whom judgment was rendered.

Art. 3726. [2335] [2278] County to which execution for money shall issue.—Where the execution requires that the judgment shall be made out of the property of the debtor, it shall be issued in the first instance to the county in which the judgment is rendered, and upon the return thereof that no property can be found, or not sufficient to satisfy the same, execution may be issued to any other county in the state. [Act Jan. 27, 1842. P. D. 3784.]

Issuance to another county.—An execution issued in the first instance to a county other than that in which the judgment was rendered is irregular, but not void. *Smith v. Perkins*, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

A first execution, issued to a county in which an abstract of the judgment had been filed, instead of the county in which the judgment was rendered, was void. *Schneider v. Dorsey*, 96 T. 544, 74 S. W. 526.

Effect of issuance to wrong county.—An execution improperly issued to a county other than that in which the judgment was rendered is not void. *Earle v. Thomas*, 14 T. 583; *Hancock v. Metz*, 15 T. 205.

An execution, such as is required by this article, if issued in the first instance to a county other than the one in which the judgment was rendered, is not void, but

is irregular. It may be avoided at the instance of the defendant in the judgment. An officer is bound to execute such an execution, and can justify under the same. If it is levied and the property sold by virtue thereof, an innocent purchaser will acquire a good title. It is such an execution as is within the provisions of Art. 3717, and if issued within twelve months from the date of the judgment will prevent it from becoming dormant. *Cabell v. Orient Ins. Co.*, 22 C. A. 635, 55 S. W. 610.

Issuance to wrong county—Effect on purchaser.—When execution is issued to another county, the title of the purchaser thereunder is not affected by the fact that defendant had ample property to satisfy the judgment in the county where the judgment was rendered which he failed to point out when called upon. *Sydnor v. Roberts*, 13 T. 598, 65 Am. Dec. 84.

Restraining issuance to wrong county.—An execution must be issued first to the county where the judgment is rendered and an execution issued to another county first can be enjoined. *Norwood v. Orient Insurance Co.* (Civ. App.) 44 S. W. 188.

Injunctions against.—See notes under Title 69.

Presumption as to issuance.—See notes under Art. 3687, Rule 12.

Issuance to another county prevents judgment becoming dormant.—Under this article, Art. 3727, providing that, where the execution requires the sale or delivery of specific property, it may be issued to the county where the property or some part of it is situated, and Art. 5617, providing that duly recorded judgments shall be a lien unless plaintiff shall fail to have execution issued thereon within 12 months after the rendition thereof, an execution issued to a county other than the one where judgment was rendered for the sale of attached property in such other county prevented the judgment becoming dormant without the issuance of an execution to the county in which judgment was rendered within 12 months. *Kingman Texas Implement Co. v. Borders* (Civ. App.) 156 S. W. 614.

Art. 3727. [2336] [2279] Execution for property shall issue.—Where the execution, or any writ in the nature thereof, requires the sale or delivery of specific real or personal property, it may be issued to the county where the property, or some part thereof, is situated.

Tract situated in two counties.—The sale of an entire tract situated in two counties may be made in either. *Miller v. Edinburgh-American L. & M. Co.* (Civ. App.) 37 S. W. 184.

Grounds for Injunction.—See notes under Title 69.

Art. 3728. [2337] [2280] To different counties.—Process in the nature of an execution which requires only the delivery of real or personal property may be issued at the same time to different counties.

Art. 3729. [2338] [2281] Requisites of an execution.—The style of the execution shall be, "The State of Texas." It shall be directed to the sheriff or any constable of the proper county, and shall be signed by the clerk or justice officially, and sealed with the seal of the court, if issued out of the district or county court. It shall correctly describe the judgment, stating the court wherein and the time when rendered, the names of the parties, the amount, if it be for money, and the amount actually due thereon, if less than the original amount, the rate of interest, if other than six per cent, and shall have the following requisites:

1. The several items of the bill of costs to be collected under the execution shall be indorsed thereon in intelligible words and figures.

2. If the judgment be for money simply, it shall require the officer to satisfy the judgment out of the property of the debtor, subject to execution.

3. If the judgment commands the sale of particular property for the satisfaction thereof, the writ shall be framed accordingly.

4. If the judgment be for the delivery of the possession of real or personal property, the writ shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs, damages or rents and profits recovered by the same judgment, out of any property subject to execution of the party against whom it is rendered.

5. If the judgment be for the recovery of personal property or its value, the writ shall command the officer, in case a delivery thereof can not be had, to levy and collect the value thereof for which the judgment was recovered, to be specified therein out of any property of the party against whom the judgment was rendered, liable to execution.

6. It shall require the officer to satisfy the costs adjudged against the party, and the further costs of executing the writ, out of any prop-

erty liable to execution of the party against whom the judgment was rendered.

7. When an alias or pluries execution is issued, it shall show upon its face the number of previous executions which have been issued on the judgment. [Const., art. 5, sec. 12. Act June 4, 1873, p. 209, secs. 1, 2. P. D. 3772.]

See *Bailey v. Block*, 104 T. 101, 134 S. W. 323.

Officer to whom writ may be directed.—An order of sale addressed to the sheriff of A. county is void in the hands of the sheriff of B. county. *Steel v. Metcalf*, 23 S. W. 474, 4 C. A. 313.

Previous executions.—Execution is not void for failure to state the number of executions previously issued. *Corder v. Steiner* (Civ. App.) 54 S. W. 277.

Names of parties.—A failure to name the plaintiffs in a judgment, or a slight discrepancy between the verdict and judgment rendered, cannot be taken advantage of when such judgment is offered as a muniment of title to support a sheriff's deed made under it. *Wyche v. Clapp*, 43 T. 543.

A judgment rendered without giving in the entry the names of the parties, but in the caption giving the firm name, and no names being given in the body of the judgment, will support a sale under execution, reciting the names of all the parties, when the deed under such sale is collaterally attacked. *Smith v. Chenault*, 48 T. 455.

An execution against P. B. Clements is not supported by a judgment against J. B. Clements. *Battle v. Guedry*, 58 T. 111.

In 1867 G. recovered judgment against J. H. and F. C., it not appearing that any execution ever issued thereon. In 1881 execution was issued against S. C. and B. M. H., executors of the will of J. H., and directing that the judgment be satisfied out of the property of S. C. and B. M. H., executors, etc. Held, that the judgment did not support the execution or sale thereunder. *Hart v. McDade*, 61 T. 208.

The fact that there is a variance between the parties to the cause as they were designated in the execution and the judgment on which it issued is not sufficient to exclude a deed based on a sale under execution, it appearing that the cause was, in its progress, sometimes docketed as it appeared in the judgment and sometimes as recited in the execution. *Haskins v. Wallet*, 63 T. 214.

A sale under an execution which does not correctly state the name of the defendant is void. A correction of the execution without notice is void, and if made after the sale, upon notice, would not validate the sale. *Morris v. Balkham*, 75 T. 111, 12 S. W. 970, 16 Am. St. Rep. 874; *McKay v. Paris Bank*, 75 T. 181, 12 S. W. 529, 16 Am. St. Rep. 884.

An execution in the name of C. alone on a judgment in favor of C. & L. as partners is not authorized, and the sale is invalid. *Cleveland v. Simpson*, 77 T. 96, 13 S. W. 851.

By the pleadings the action was shown to be against "Gilbert L. M." Judgment against "Gabriel L. M." Execution against property of "G. L. M." Sale of property of "Gilbert L. M.," not void. *Halsell v. McMurphy* (Civ. App.) 21 S. W. 777.

An execution on a money judgment must name the person whose property is to be subjected to its satisfaction. *Capps v. Leachman*, 90 T. 499, 39 S. W. 917, 59 Am. St. Rep. 830.

Variance between execution and judgment held harmless, and the judgment sufficiently identified as the one on which execution was issued. *Harris v. Dunn* (Civ. App.) 45 S. W. 731.

A judgment and order for sale thereunder held to sufficiently show the judgment debtors. *Day v. Johnson*, 32 C. A. 107, 72 S. W. 426.

An execution omitting the names of plaintiff held not void, under Art. 2388. *Collins v. Hines* (Civ. App.) 100 S. W. 359.

The failure of the execution part of an order of sale to state the name of the party out of whose property the unpaid balance of the judgment was to be made if the property named in the order of sale did not bring a sufficient sum to pay the judgment held an irregularity only. *White v. Taylor*, 46 C. A. 471, 102 S. W. 747.

A writ of execution reciting judgment obtained against "John Dalziel," when it should have been "James Dalziel," is fatally defective under Art. 3729. *Harkey v. Day* (Civ. App.) 129 S. W. 1195.

Statement of amount.—An execution correctly described the judgment, stating the court before which it was rendered, the date of its rendition and the names of the parties to the suit, but misdescribed the amount of the judgment by reciting it as being for \$13.37, debt due and interest, when the judgment was for \$12.50 principal and 6 per cent. interest. The variance was held not material in a collateral proceeding. *Williams v. Ball*, 52 T. 603, 36 Am. Rep. 730; *Waters v. Spofford*, 58 T. 115.

An execution is not void because issued for too large an amount. *Jackson v. Finlay* (Civ. App.) 40 S. W. 427.

Variance between an execution and a judgment held not shown by reason of the fact that the execution was issued for a larger amount than the original amount of the judgment. *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4.

Recital as to date of judgment.—Where the description of a judgment in an execution was erroneous as to the date, but was otherwise correct, it did not render execution or sale thereunder void. *Barnes v. Nix* (Civ. App.) 56 S. W. 202.

Description of property.—Description of property levied on, by which the property might be located by reference to records, held sufficiently definite. *Focke v. Garcla* (Civ. App.) 41 S. W. 187.

Several executions.—Where several executions are issued on the same day, effect of. See *Brackenridge v. Cobb*, 21 S. W. 1034, 85 T. 448; *Driscoll v. Morris*, 21 S. W. 629, 2 C. A. 603.

Affidavit.—It is not necessary that the fact that an affidavit had been filed to obtain an execution instanter should appear in or upon the execution. *Lebreton v. Lamaire* (Civ. App.) 43 S. W. 31.

Cannot issue against independent executrix, when.—An execution cannot issue against an independent executrix on a judgment recovered against the decedent and to which she was never made a party. *Govan v. Bynum*, 17 C. A. 180, 43 S. W. 319.

Order of sale.—An order of sale is governed by the same rules as other executions. *Pierson v. Hammond*, 22 T. 585.

Directions as to property to be taken.—An execution on a judgment which directed that execution issue to be levied upon the effects of the estate of A. C. H., deceased, which commands the sheriff "that of the goods and chattels, lands and tenements of E. H., executrix, and I. N. D., executor of A. C. H., deceased," he make the moneys adjudged, did not authorize or empower the sheriff to levy upon the property of the estate. *Ante*, Art. 3723. The defendants named in the writ were H. and D., and the additional description of them as the executrix and executor did not supply the place of a direction in the writ to levy upon the property of the estate, and sale of property of the estate thereunder is invalid. *Hart v. McDade*, 61 T. 212.

It is not a valid objection to the admissibility of a judgment in evidence as a link in a chain of title to land that it directs the execution to be levied upon the "effects" of the defendant. Unaffected by the context, the word "effects" is generally held to include only personal property, but no distinction could properly have been made by the court rendering the judgment between real and personal property, as both were equally subject to the debt, and it was not necessary for the judgment to define what property was to be levied on further than to indicate that it was to be satisfied out of the property of the defendant. *Horton v. Garrison*, 1 C. A. 31, 20 S. W. 773.

Conformity to judgment.—An order of sale directing sale for gold and for ten per cent. interest on the judgment, when the decree required a collection of "dollars" and interest at eight per cent., the variances were but irregularities and did not affect a sale thereunder. *Hughes v. Driver*, 60 T. 175.

A judgment was rendered for a sum certain and bore no interest. The execution under the judgment recited that the judgment bore ten per cent. interest. The judgment appeared to be against Ann H., the execution recited the judgment against Anna H. Held, that the irregularity of the execution did not render it void in a collateral proceeding. *Fitch v. Boyer*, 61 T. 336.

Execution held not issued in accordance with the judgment in the case. *Wear v. Gillon* (Civ. App.) 40 S. W. 817.

Evidence held to establish that an execution that was lost followed the judgment, and was correctly issued. *Turner v. Crane*, 19 C. A. 369, 47 S. W. 822.

Execution reciting judgment reviving former judgment, and reciting former judgment, sufficiently describes said judgments to render execution sale valid. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

An execution held not void. *Collins v. Hines*, 100 T. 304, 99 S. W. 400.

Collateral attack.—The contradictions in the recitals in an execution and an indorsement thereon held not to render the execution void and a sale under it could not be collaterally attacked. *Ayres v. Patton*, 51 C. A. 186, 111 S. W. 1079.

The failure of an execution to state correctly the amount of the judgment and the costs is an irregularity which may justify the setting aside of the sale when sought in a direct action for that purpose, but does not render the sale void, and it cannot be attacked collaterally. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

Persons entitled to execution.—A judgment of a court can be transferred by parol, but in such case it must be enforced by execution in the name of the original plaintiff. *Garvin v. Hall*, 83 T. 295, 18 S. W. 731.

Issuance of execution.—The term "issue," as applied to an execution, includes its delivery to an officer for enforcement. *Bourn v. Robinson*, 49 C. A. 157, 107 S. W. 873.

Art. 3730. [2339] [2282] Returnable, when.—The execution shall be returnable to the first day of the next term of the court, or in thirty, sixty or ninety days, if so directed by the plaintiff, his agent or attorney. [Act June 4, 1873. P. D. 3775.]

No return day specified.—If no return day is specified in the execution it is returnable on the first day of the next term of the court from whence it is issued. *Tillman v. McDonough*, 2 App. C. C. § 52.

Sale after return day.—A sale of real estate made under an execution after the return day on the writ is void, and the purchaser acquires no title thereby. *Towns v. Harris*, 13 T. 507; *Young v. Smith*, 23 T. 598, 76 Am. Dec. 81; *Hester v. Duprey*, 46 T. 625; *Mitchell v. Ireland*, 54 T. 301; *Tillman v. McDonough*, 2 App. C. C. § 53; *Haney v. Millican*, 2 App. C. C. § 221. See *Holloway v. McIlhenny*, 77 T. 657, 14 S. W. 240; *Witt v. Kaufman*, 25 T. 334; *McKay v. Bank*, 75 T. 181, 12 S. W. 529, 16 Am. St. Rep. 884; *Terry v. Cutler*, 23 S. W. 539, 4 C. A. 570.

Art. 3731. [2340] [2283] Indorsements by officer.—The officer receiving an execution shall indorse thereon the exact hour and day when he received it, and, if he receives more than one on the same day against the same person, he shall number them as received; and, on failure to do, or in case of false indorsement, he and his sureties shall be liable, on motion in the court from whence the execution is issued, three days' notice being given, to a judgment in favor of the plaintiff in execution for twenty per cent on the amount of the execution, together with such damages as the plaintiff in execution may have sustained by such failure or such false indorsement. [Act Jan. 27, 1842. P. D. 3780.]

Effect of noncompliance.—An execution sale may be valid as against the judgment debtor, though the execution was not indorsed as required by this article. *Wilson v. Swasey* (Sup.) 20 S. W. 48.

Penalty recoverable, when.—The penalty for failure to date and number is not recoverable where it does not appear that more than one execution has been received. *De Witt v. Dunn*, 15 T. 106.

Art. 3732. [2341] [2284] Execution levied on property of surety, when.—If it appear upon the face of an execution, or by the indorsement of the clerk, that of those against whom it is issued any one is surety for another, the levy of the execution shall first be made upon the property of the principal subject to execution and situate in the county in which the judgment is rendered. But, if property of the principal can not be found which will, in the opinion of the officer, be sufficient to make the amount of the execution, the levy shall be made on so much property of the principal as may be found, if any, and upon so much of the property of the surety as may be necessary to make the amount of the execution. [Act Feb. 5, 1858. P. D. 4786.]

In general.—A surety, codefendant with his principal in the judgment, has a right to protect himself by causing property of his principal to be taken in satisfaction of the judgment; and where he was also vender to his principal by title bond for the property taken in execution, and after sale under the execution, pursuant to his bond, makes a deed to his principal with general warranty of title, he is not liable on his warranty by reason of the sale of the property so made under execution. *Kelso v. Pratt*, 26 T. 381.

A surety on a note is entitled to have execution issued first against the maker; and, if he pays off the judgment, he is entitled to an execution against the maker for the amount paid. *Hollimon v. Karger*, 30 C. A. 558, 71 S. W. 299.

Article 2000, requires the judgment foreclosing a lien to be that plaintiff recover his debt with foreclosure, and, except in judgments against executors, etc., that an order of sale issue, directing seizure and sale as under execution, and if the proceeds be insufficient to satisfy the judgment, that any balance unpaid be satisfied out of defendant's property. Art. 6331 permits a surety when sued with his principal to have the question of suretyship tried, and Art. 6332 provides, if the findings favor the surety, execution shall be directed to be first levied upon the principal's property, and then upon the property of the surety, necessary to make up any deficiency. Held, that an estate which was surety on notes secured by a vendor's lien should be made a party defendant in an action against the principal debtor on the notes and to foreclose the lien, in order to enable the executrix of the estate to protect the equitable rights of the estate; and hence the principal could not be proceeded against alone in the district court for a personal judgment, and the claim afterwards prosecuted against the estate in the probate court. *Hume v. Perry* (Civ. App.) 136 S. W. 594.

Surety may restrain, when.—Under this article a surety may not obtain an injunction to restrain a sale of his property under an execution, unless he shows by the execution that he is a surety, and that the principal has property in the county in which the judgment was rendered sufficient to satisfy the judgment. *Denson v. Taylor* (Civ. App.) 132 S. W. 811.

Sale of property of surety.—If, under execution against principal and surety, the property of both be seized, the sale of that belonging to the surety, without the sale of that belonging to the principal, would not render the sale void. *Brackenridge v. Cobb*, 85 T. 448, 21 S. W. 1034.

Release of surety.—When the issuance of an execution creates no lien on the debtor's property, the mere fact that the execution is held up by the creditor, unless it be so done in pursuance of a valid and binding agreement with the principal debtor, will not release the surety. *Brown v. Chambers*, 63 T. 131, citing *Hunter v. Clark*, 28 T. 159. See *Parker v. Nations*, 33 T. 210; *Jenkins v. McNeese*, 34 T. 189. See Art. 6333.

Notice of sale.—That notices of sale on execution of a surety's property did not show that a levy was attempted on the principal's property as required by the judgment, held not to make the sale void. *Hillsman v. Cline* (Civ. App.) 145 S. W. 726.

Manner of levy.—In an action on certain notes and to foreclose a mortgage, the manner in which the execution should be levied stated. *Trotti v. Gaar, Scott & Co.* (Civ. App.) 126 S. W. 670.

Art. 3733. [2342] [2285] On death, etc., of officers, enforced by successor.—If the officer receiving an execution die or go out of office before the return of any execution, his successor or other officer authorized to discharge the duties of the office in such case shall proceed therein in the same manner that such officer should have done.

Erroneous recital of deed.—The fact that the execution was levied by one sheriff and the deed recited that it had been levied by the maker thereof, who succeeded him in office, offers no valid objection to the deed. *Haskins v. Wallet*, 63 T. 213.

Art. 3734. [2343] [2286] Enforced without delay.—When an execution against the property of any person is issued to an officer, he shall proceed without delay to levy the same upon the property of the defendant not exempt from execution, unless otherwise directed by the plaintiff, his agent or attorney. [R. S. 1879, 2286.]

Levy not made—Effect.—If the levy of an order of sale is not in fact made, it is only an irregularity and the sale is not void. *Patton v. Collier*, 13 C. A. 544, 38 S. W. 53.

Sheriff cannot estimate deficiency from foreclosure sale and levy on other property.—Under Art. 2000, requiring a mortgage foreclosure judgment to direct the sheriff to sell

the property and to make any deficiency out of the mortgagor's property, as in ordinary executions, and this article, a sheriff holding an order of sale under mortgage foreclosure cannot estimate in advance the proceeds that will probably result from the sale, and levy execution for the probable balance on other property, the judgment provided for by Art. 2000 and the writ thereunder being contingent as to any deficiency until it is rendered certain by sale of the mortgaged property; and a sale of mortgagor's general property under a foreclosure judgment before exhausting the mortgaged property is void. *Bailey v. Block*, 104 T. 101, 134 S. W. 323.

Art. 3735. [2344] [2287] Levy of execution.—The officer shall first call upon the defendant, if he can be found, or, if absent, upon his agent within the county, if known, to point out property to be levied upon; and a levy shall first be made upon the property designated by the defendant or his agent; provided, that if it be personal property, the defendant or his agent deliver the same into the officer's possession; or, if it be real estate, that he deliver to the officer a description thereof by metes and bounds, and that it be situated in whole or in part within the county. If, in the opinion of the officer, the property so designated will not sell for enough to satisfy the execution and costs of sale, he shall notify the defendant or his agent thereof; whereupon the latter may make an additional designation. [Act June 4, 1873, p. 209, sec. 2. P. D. 3775.]

See *Fatheree v. Williams*, 13 C. A. 430, 35 S. W. 324; *Howard v. McBee* (Civ. App.) 138 S. W. 450.

Statute directory.—The statute is directory, and while a levy not made as required might be set aside on a proper proceeding, or the officer making it might be liable for damages, a sale would not necessarily be void. *Pearson v. Flanagan*, 52 T. 266; *Odle v. Frost*, 59 T. 684.

Statute giving defendant privilege of pointing out property is directory. *Beck v. Avondino*, 82 T. 314, 18 S. W. 690.

In an action against a sheriff for conversion, irregularity in a levy of execution held immaterial. *Cox v. Patten* (Civ. App.) 66 S. W. 64.

Selection of property.—A failure of an officer to call upon a party to point out property will not be a ground for setting aside a sale on account of inadequacy of price, unless it appears that such irregularity conduced to the inadequacy of the sum bid. *Allen v. Pierson*, 60 T. 604.

The validity of a sale is not affected by the fact that the return failed to show that the owner was called upon to point out the property, or who pointed it out, or that the notice of sale was posted. *Crabtree v. Whiteselle*, 65 T. 111; *Howard v. North*, 5 T. 290, 51 S. W. 769; *Sydnor v. Roberts*, 13 T. 598, 65 Am. Dec. 84; *Odle v. Frost*, 59 T. 684; *Donnebaum v. Tinsley*, 54 T. 362.

Where the defendant seeks to enjoin the sale on the ground that the levy was made in violation of his right to point out property, he must show that he pointed out property liable to execution sufficient to satisfy the sum; or if such other property is insufficient, that he requested the sheriff to levy on it and sell it before the property he desired to reserve, and that the sheriff in either case refused. *Kingsland v. Harrell*, 1 App. C. C. § 739, citing *Ross v. Lister*, 14 T. 469; *Smith v. Frederick*, 32 T. 256; *Cook v. De La Garza*, 13 T. 436; *Barbee v. Helfin*, 1 App. C. C. § 744.

The statute giving the defendant the privilege of pointing out property is directory, and the courts have refused to disturb sales when the defendant, for want of opportunity, has been denied the right. But when he promptly avails himself of his privilege and actually points out property his right cannot be ignored. *Beck v. Avondino*, 82 T. 314, 18 S. W. 690.

See *Oppenheimer v. Robinson*, 87 T. 174, 27 S. W. 95. The defendant or his agent has a right to designate property upon which execution shall be levied. *Jackson v. Browning*, 1 App. C. C. § 606.

An objection to a levy, because no opportunity to point out other property subject to sale was given, cannot avail where it is not shown that defendant had such, and desired it to be sold. *Yett v. Iron City Nat. Bank* (Civ. App.) 45 S. W. 1033.

A written description of the lots is not directly required by this article. A verbal designation of the property giving the number of the lots and the block and giving the name of the addition in which they are situated sufficiently points out the property. *Beck v. Avindino*, 68 S. W. 829, 29 C. A. 500.

Under this article, where an instrument departed from the requirements of a writ of execution, in that it directed the officer to levy upon certain specified real estate, instead of running against the judgment debtor's property generally, thus peremptorily depriving him of his statutory right to point out his property, the writ was a void process upon its face. *Midkiff v. Bedell* (Civ. App.) 127 S. W. 271.

Under this article and Art. 3736, the judgment creditor need not point out the property to be seized and sold, and by a sale on execution all that passes at the sale is the title of the judgment debtor at the date of the levy or acquired between that time and the sale, and the creditor, in the absence of special circumstances is not estopped from subsequently acquiring a title from the common source of title as against the purchaser at the execution sale. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

Effect of failure to levy on property in order named.—A failure to levy upon property in the order named is immaterial, when it appears that the defendant had an opportunity to point out property to the officer before the levy was made and did not exercise that right. *Anderson v. Oldham*, 82 T. 228, 18 S. W. 557.

Delivery of personal property.—A defendant who fails to deliver personal property to the officer or to furnish him with some identification of it cannot defeat a levy on land. *Anderson v. Oldham*, 82 T. 228, 18 S. W. 557.

Levy upon exempt property—Officer's liability.—See Art. 7130.

Principal and surety—levy.—The principal debtor cannot require that the levy be made on the personal property of his surety, or of the surety on appeal of his codefendant, rather than on his own improved real estate. *Kendrick v. Rice*, 16 T. 254.

Amount of levy.—The value of the property which should be levied on by an officer levying execution stated. *Mara v. Branch* (Civ. App.) 135 S. W. 661.

Grounds for injunction.—See notes under Title 69.

Art. 3736. [2345] [2288] Failure of defendant to designate property.—If no property be thus designated, or if an insufficient amount of property be designated, it shall be the duty of the officer to levy the execution upon the property of the debtor, subject to execution in the following order:

1. On personal or movable property.
2. On uncultivated lands; and,
3. Upon cultivated lands. [Id. sec. 3.]

Property subject to execution.—Railroad shares are personal property and subject to levy and sale under execution. *Baker v. Wasson*, 53 T. 150.

An undivided interest of an execution debtor in land may be sold. *Braden v. Gose*, 57 T. 37; *Aycock v. Kimbrough*, 61 T. 543.

Where the party has paid part of the purchase-money for land, he has an interest therein subject to execution. *Mooring v. McBride*, 62 T. 309.

Real estate conveyed in fraud of creditors is subject to execution against the purchaser. *Hawkins v. Cramer*, 63 T. 99.

An interest in land pending proceedings for partition is subject to execution, even when the levy and sale are made to satisfy costs in a pending suit. *Brown v. Renfro*, 63 T. 600.

A judgment against a mercantile firm and its members authorizes an execution against the firm assets as well as the individuals composing the firm. *Sanger v. Overmier*, 64 T. 57; *Burnett v. Sullivan*, 58 T. 535; *Railroad Co. v. McGaughey*, 62 T. 271; *De Camp v. Bates* (Civ. App.) 37 S. W. 644.

Annual crops fit for harvest may be levied upon as personal chattels. *Horne v. Gambrell*, 1 App. C. C. § 997.

Levy and sale of debtor's interest in land held good levy on land used as homestead. *Beall v. Hollingsworth* (Civ. App.) 46 S. W. 881.

The fact that a debt was incurred after a trust resulted to the debtor does not preclude the creditor from subjecting the trust estate to the debt. *Goodrich v. Hicks*, 19 C. A. 528, 48 S. W. 798.

Interest of purchasers, cultivating land and having paid a part of the price, under an agreement for a deed on full payment, held liable to execution. *Matula v. Lane* (Civ. App.) 56 S. W. 112.

Interest of beneficiary under resulting trust held subject to execution sale. *Hirshfeld v. Howard* (Civ. App.) 60 S. W. 806.

A levy on a tenant's interest in a crop not removed from the premises held valid. *Groesbeck v. Evans*, 40 C. A. 216, 88 S. W. 839.

An assignment of a debtor's property to a trustee for the benefit of creditors held not to divest the title of the property from the debtor, which was, therefore, subject to execution. *Peeples v. Slayden-Kirksey Woolen Mills* (Civ. App.) 90 S. W. 61.

A headright certificate, issued by the authority of the state, until located, is subject to seizure and sale on execution. *Tompkins v. Creighton-McShane Oil Co.* (Civ. App.) 143 S. W. 306.

A mature and ungathered crop is not exempt from execution by reason of the nature of the property. *Ellis v. Bingham* (Civ. App.) 150 S. W. 602.

An officer having a surplus in his hands after a sale of property under execution and satisfaction of the judgment may subject it to a second execution against the defendant. *Turner v. Gibson* (Civ. App.) 152 S. W. 839.

The equity of redemption in property mortgaged to secure a note is subject to levy and sale at the suit of other creditors. *Hudson v. Childree* (Civ. App.) 156 S. W. 1154.

Property not subject to execution.—Land contracted to be conveyed by a bond for title, the land to be selected by the purchaser and the contract depending upon payment by the purchaser, cannot be sold under execution. *Daugherty v. Cox*, 13 T. 209. Adverse possession of land, notice of title of occupant. *Markham v. Parker* (Civ. App.) 31 S. W. 82.

Property reserved by law for the family and exempt from execution is not subject to be levied on even with the consent of the head of the family. And where such property is pointed out by the defendant in execution, the sheriff cannot properly receive it. *Ross v. Lister*, 14 T. 469. See Art. 3737.

Notes and accounts cannot be levied on and sold. *Taylor v. Gillean*, 23 T. 508.

A levy made by the sheriff on lands lying without the limits of his county is void. *Alred v. Montague*, 26 T. 732, 84 Am. Dec. 603.

An interest in land conveyed by parol contract, the enforcement of which is dependent upon equitable circumstances, is not subject to sale under execution against the purchaser. *Hendricks v. Snediker*, 30 T. 296; *Edwards v. Norton*, 55 T. 405; *Day v. Stone*, 59 T. 612; *Mooring v. McBride*, 62 T. 309.

A mere claim for compensation for improvements made on land is not subject to sale under execution. *Hendricks v. Snediker*, 30 T. 308; *Mooring v. McBride*, 62 T. 309.

Property in the hands of a receiver pending litigation is not subject to levy and sale until after the final decree; and a purchaser at a sale under execution acquires no title. *Edwards v. Norton*, 55 T. 405.

An uncertain equitable interest in land is not subject to sale under execution. *Id.*

Property sold under an executory contract, by the terms of which the title remains with the seller until a deferred payment of purchase money is made, is not subject to sale under execution against the purchaser until the amount due is paid or tendered to the vendor. *City National Bank v. Tufts*, 63 T. 113.

An interest in land growing out of the vendor's lien is not subject to sale under execution. *Willis v. Sommerville*, 22 S. W. 781, 3 C. A. 509; *Davis v. Wheeler* (Civ. App.) 23 S. W. 435.

An interest in land acquired under a lease which does not permit a subletting is not subject to sale under execution. *Moser v. Tucker*, 26 S. W. 1044, 1105, 87 T. 94.

An execution against a husband and wife for a tort may be levied on the separate property of the wife, though it contains no specific directions for levy against such estate. *Taylor v. Stephens* (Civ. App.) 42 S. W. 1048.

A leasehold interest, in which lessee has no general power to sublet, held not subject to levy and sale. *Boone v. First Nat. Bank*, 17 C. A. 365, 43 S. W. 594.

Execution levied on property sold under a fraudulent attachment against the judgment debtor creates no lien. *Murphy v. Nash* (Civ. App.) 45 S. W. 944; *Same v. Harlock*, *Id.*; *Same v. Deaderick*, *Id.*

Neither taxes and public revenue, nor property acquired in collecting same, can be seized under execution against city. *Gordon v. Thorp* (Civ. App.) 53 S. W. 357.

A spendthrift trust cannot be subjected to the payment of beneficiary's debts. *Wood v. McClelland* (Civ. App.) 53 S. W. 381.

If execution debtor does not tender the officer personal property sufficient to satisfy the judgment, he cannot complain of the levy upon his land. *Ellis v. Harrison*, 24 C. A. 13, 57 S. W. 986.

Where, in an action by a divorced wife to collect alimony in the divorce decree for the support of a child, on the husband's death pending the action, the payment of the amount should not be enforced by execution, but certified to the county court. *Schultze v. Schultze* (Civ. App.) 66 S. W. 56.

A vendor of land who has transferred the lien notes held to have no interest in the land subject to sale under the execution. *Brotherton v. Anderson*, 27 C. A. 587, 66 S. W. 682.

Where, in divorce proceedings by the wife, a homestead which is community property is set apart for the use of the wife and minor children, it is not subject to sale on execution against the divorced husband. *Holland v. Zilliox*, 38 C. A. 416, 86 S. W. 36.

The interest of a vendor in land which has been sold on a credit and a lien retained to secure the payment of the purchase money held not subject to levy and sale under execution. *Rutherford v. Mothershed*, 42 C. A. 360, 92 S. W. 1021.

One's interest in land from ownership of notes secured by vendor's lien thereon held not subject to execution. *Todd & Hurley v. Garner* (Civ. App.) 133 S. W. 314.

Where, pending a suit to subject a husband's alleged interest in land to plaintiff's judgment, plaintiff caused the husband's interests to be advertised for sale on execution, it was not error to refuse to dissolve the execution on motion. *Skinner v. D. Sullivan & Co.* (Civ. App.) 134 S. W. 426.

The law in force when property is acquired affecting its liability to be taken in execution does not become a part of the contract of purchase. *Lyon & Matthews Co. v. Modern Order of Prætorians* (Civ. App.) 142 S. W. 29.

Selection of property.—See notes under Art. 3735.

Order of sale.—When execution defendant made no tender of personal property sufficient to satisfy the judgment, he cannot recover damages on the ground that execution was levied on his land without a levy first being made on his personal property. *Ellis v. Harrison*, 24 C. A. 13, 57 S. W. 984.

Execution sale of land set aside, the debtor having sufficient personalty to satisfy the debt. *Johnson v. Daniel*, 25 C. A. 587, 63 S. W. 1032.

Power of courts of equity.—The power of courts of equity to aid the infirmity of the law and reach personal property is discussed in *Price v. Brady*, 21 T. 614; *Taylor v. Gillean*, 23 T. 508; *Arthur v. Batte*, 42 T. 159.

Priorities—Sales.—A sale of land under execution against a distributee of an estate is subject to a prior sale made under order of court, and enforcing a lien against the property of the estate. Query, as to the right of the purchaser at execution sale. *Bradshaw v. House*, 43 T. 143.

Grounds for injunction.—See notes under Title 69.

Art. 3737. [2346] [2289] Property not to be designated.—A defendant in execution can not point out property which he has sold, mortgaged or conveyed in trust, or property exempt from forced sale.

Art. 3738. [2347] [2290] Property sold, etc., can not be levied on, when.—Property which the judgment debtor has sold, mortgaged or conveyed in trust shall not be seized in execution, if the purchaser, mortgagee or trustee shall point out other property of the debtor in the county sufficient to satisfy the execution.

Art. 3739. [2348] [2291] Levy on real estate.—In order to make a levy on real estate, it shall not be necessary for the officer to go upon the ground, but it shall be sufficient for him to indorse such levy on the writ.

Sufficiency of levy.—A levy and sale are void for uncertainty where the undivided half interest of R. and O. is levied on and sold, and R. and O. each individually owned such undivided half interest. *Rogers v. Bradford*, 56 T. 630.

— **Signature.**—It is not necessary that the indorsement of levy be signed when it is made; it is sufficient if the return, of which the levy forms a part, is signed. *Howard v. North*, 5 T. 290, 51 Am. Dec. 769; *Miller v. Alexander*, 13 T. 497, 65 Am. Dec. 73.

Indorsement on execution.—The failure of an officer to indorse a levy on execution cannot affect the rights of a purchaser on a collateral attack. *Davis v. Hornbell* (Civ. App.) 24 S. W. 972.

— **Description of land.**—Land should be described in the levy with sufficient certainty to identify it. *Coffee v. Silvan*, 15 T. 354, 65 Am. Dec. 169; *Alexander v. Miller*, 18 T. 893, 70 Am. Dec. 314; *Wilson v. Smith*, 50 T. 365; *Wooters v. Arledge*, 54 T. 395; *Mitchell v. Ireland*, 54 T. 301; *Donnebaum v. Tinsley*, 54 T. 362.

A levy upon a tract of land subdivided into town lots is insufficient unless the separate lots levied upon are specified in the return upon the writ. *Railway Co. v. Harrison*, 72 T. 478, 10 S. W. 556.

The description of land upon which a levy is made is sufficient, when reference is made to the record of deeds in a named county by which it can be made certain. *Brown v. Elmendorf* (Civ. App.) 25 S. W. 145.

A description of the lands in the levy held void for uncertainty. *Hayes v. Gallaher*, 21 C. A. 88, 51 S. W. 280.

Levy on land under execution, describing same as "the Tide Haven tract on Trespalacios, less 177 acres," held sufficient. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

Property not subject to execution.—See notes under Art. 3735.

Art. 3740. [2349] [2292] On personal property.—A levy upon personal property is made by taking possession thereof, when the defendant in execution is entitled to the possession; where the defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them when there are several.

See *Roemer v. Traylor* (Civ. App.) 128 S. W. 685.

Personal property.—Sufficiency of levy.—To constitute a levy upon personal property it is necessary for the officer to take actual possession thereof, or to so control it as that he would be guilty of trespass against the owner but for the writ under which he acts. *Freiberg v. Johnson*, 71 T. 558, 9 S. W. 455.

Where officer goes with an execution to defendant's store, which is locked, and without gaining entrance, nails strips across the door, and reads the writ, and notifies defendant, there is no levy. *Lynch v. Payne* (Civ. App.) 49 S. W. 406.

Judgment creditor, levying on one part of property in possession of defendant, must do so by actual seizure. *Hunstock v. Roberts* (Civ. App.) 65 S. W. 675.

Facts held not to show a completed levy of execution. *Adoue v. Wettermark*, 36 C. A. 585, 82 S. W. 797.

— **Possession.**—The act of possession must be according to the nature of the property; if it be goods, they should be within the officer's view and subject to his control. Or, he should perform some open act in pursuance of his title in relation thereto which would divest the possession of the defendant. *Bryan v. Bridge*, 6 T. 137; *Portis v. Parker*, 8 T. 23, 58 Am. Dec. 95; *Converse v. McKee*, 14 T. 20; *Brown v. Lane*, 19 T. 203; *Grove v. Harris*, 35 T. 320; *Osborne v. Koenigheim*, 57 T. 91.

A levy upon a "stock of goods, wares and merchandise," appraised at a designated sum, is insufficient. *Messner v. Lewis*, 20 T. 221. See *Bourcier v. Edmondson*, 58 T. 675.

When the officer goes to the defendant's locked store, and in the way of levy on goods within the store, nails strips across the door, and reads the execution in front of the house, and notifies the defendant, there is no levy. *Lynch v. Payne* (Civ. App.) 49 S. W. 406.

In levying on the undivided interest of the debtor in personal property, in possession of one of the owners the officer has no authority to take possession of the property, and the levy would be properly made by giving notice to the one in possession. *Hubert v. Hubert*, 46 C. A. 503, 102 S. W. 950.

Under Art. 255, requiring an attachment to be levied as an execution on similar property is levied, and this article, an officer in attaching wood stacked on land must perform such possessory acts or take such undoubted control as to constitute a trespass; a "trespasser" being one who unlawfully enters on or intrudes on another's land, or who unlawfully and forcibly takes another's personalty. *Jones & Nixon v. First State Bank of Hamlin* (Civ. App.) 140 S. W. 116.

— **Confusion of goods.**—When the goods of the husband subject to a levy are commingled with other goods not subject to levy, and which are the separate property of the wife, the levy may be made on the interest of the husband, in analogy to the remedy given against partners for individual debt. *Brown v. Bacon*, 63 T. 595.

Levy, how made, where there is a confusion of goods, see *Evans Co. v. Reeves*, 26 S. W. 219, 6 C. A. 254.

— **Third party entitled to possession.**—If property is levied on by seizure and not by notice in the hands of a third party who is entitled to possession the creditor does not secure a lien. *Sutton v. Gregory* (Civ. App.) 45 S. W. 932.

— **Transferee in fraud of creditors.**—A levy on property claimed by a transferee in fraud of creditors can only be made by taking possession thereof. *Kessler v. Half*, 21 C. A. 91, 51 S. W. 48.

Grounds for injunction.—See notes under Title 69.

Art. 3741. [2350] [2293] On stock running at large.—A levy upon horses, mules, jacks, jennets, horned cattle or hogs running at large in a range, and which can not be herded and penned without great incon-

venience and expense, may be made by designating by reasonable estimate the number of animals and describing them by their marks and brands, or either; such levy shall be made in the presence of two or more credible persons, and notice thereof shall be given in writing to the owner or his herder or agent, if residing within the county and known to the officer.

Running at large in the range.—"Running at large in the range" will apply to cattle in a pasture of four hundred thousand acres, and including parts of three counties, intersected with roads, although the entrances may be guarded. Construing this article and Art. 3763, a levy and sale is not restricted to cattle within the county of the officer at the time of the levy and sale. The levy and sale confers upon the purchaser the right to gather, pen and select the stock wherever found. A sale not made in compliance with the provisions of the statute confers no title. *Gunter v. Cobb*, 82 T. 598, 17 S. W. 848.

A range levy made on cattle described as "running at large on the range in Motley county" is sufficient, in not appearing that the cattle ranged in adjoining counties. *Sparks v. McHugh* (Civ. App.) 43 S. W. 1045.

Stock in inclosure.—A range levy cannot be made upon stock in an inclosure containing 1280 acres of land. *Cope v. Lindsey*, 17 C. A. 203, 43 S. W. 29.

This article does not authorize a range levy upon stock in an inclosure containing 1280 acres of land. *Lindsey v. Cope*, 91 T. 463, 44 S. W. 276.

In custodia legis after levy.—Horses levied on as they run in the range are in custodia legis, and the sheriff on removal of the property from the county may pursue and recapture them. *Rice v. Miller*, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

Debtor retains control.—After a levy the owner remains in control for the purpose of caring for the stock. *Id.* See *Gunter v. Cobb*, 17 S. W. 848, 82 T. 598; *Davis v. Dallas Nat. Bank*, 26 S. W. 222, 7 C. A. 41.

Cattle owned by defendant and others.—Effect of levy on cattle the property of defendant and others. *Donald v. Carpenter*, 27 S. W. 1053, 8 C. A. 321.

Art. 3742. [2351] [2294] Levy on shares of stock, etc.—A levy on the stock of any corporation or joint stock company is made by leaving a notice thereof with any officer of such company. [Act March 13, 1875, p. 102.]

Levy in general.—A levy of the execution not in compliance with this article is void. *Wagner v. Marple*, 10 C. A. 505, 31 S. W. 691.

Requisites of a valid levy on personalty belonging to a partnership, to pay the debt of an individual partner, or on personalty in the hands of a trustee, stated. *Sumner v. Crawford* (Civ. App.) 41 S. W. 825.

Amount of stock.—If by any proper means the officer holding an execution can ascertain the number of shares of stock owned by the debtor, he may levy the execution upon so many as may be proper to satisfy it in the manner directed by the statute. But if he neither possesses nor can acquire such knowledge, the creditor should resort to the process of garnishment, through which he may reach the shares of stock and get a sufficient description of them and then have them sold under execution. *Keating v. Stone & Sons' Live-stock Co.*, 83 T. 467, 18 S. W. 797, 29 Am. St. Rep. 670. See *Smith v. Traders' Nat. Bank*, 74 T. 457, 12 S. W. 113.

Art. 3743. [2352] [2295] Interest of partner.—A levy upon the interest of a partner in partnership property is made by leaving a notice with one or more of the partners, or with a clerk of the partnership.

See *Jones & Nixon v. First State Bank of Hamlin* (Civ. App.) 140 S. W. 116; *Jones v. Lawrence*, 151 S. W. 584 (dissenting opinion); *Slayden-Kirksey Woolen Mill v. Robinson* (Civ. App.) 143 S. W. 294.

Article exclusive.—This article excludes any other mode of levying upon the interest of a partner in partnership property. At common law only the interest of the partner remaining after the debts were settled could be sold; this ordinarily could be ascertained only by an account through a bill in equity. *St. Louis Foundry v. Publishing Co.*, 74 T. 651, 12 S. W. 842, 15 Am. St. Rep. 870; *Middlebrook v. Zapp*, 79 T. 321, 15 S. W. 258. See same case, 73 T. 29, 10 S. W. 732; *Clafin v. Pfeiffer*, 76 T. 469, 13 S. W. 483.

Sufficiency of levy.—When an execution against the individuals composing a mercantile firm is levied on certain lots as the property of the firm, and a sheriff's deed conveys to the purchaser the estate, etc., of the firm, the interest or estate of an individual member of the firm will not pass by the sale. *Rogers v. Bradford*, 56 T. 630.

Where goods are conveyed by a partnership, to be applied to the payment of debts, the interest of the firm is subject to legal process at the suit of other creditors, to be executed in the manner pointed out in this article. *Jackson v. Harby*, 65 T. 710; *Garrity v. Thompson*, 64 T. 697; *Stiles v. Hill*, 62 T. 429; *Raysor v. Reed*, 55 T. 266.

When the execution is levied upon partnership property the officer does not take possession of it. When the officer sells it under execution he does not deliver it to the purchaser, as in ordinary cases of the sale of personal property; but the purchaser becomes the legal owner of whatever interest the execution debtor may have in the same, and he is left to ascertain and adjust the interest with the other partners and with the creditors of the partnership. *Howell v. Jones*, 3 App. C. C. § 208.

Building material was delivered by a contractor, who received a part of the purchase-money. A levy of a writ of attachment against the contractor cannot be made by the seizure of the material, but should be made by notice to the purchaser. *Ellis v. Bonner*, 80 T. 198, 15 S. W. 1045, 26 Am. St. Rep. 731.

Omission of fixtures from the notice of levy on a partner's interest in a stock of firm

merchandise held not to affect the validity of the levy as to the other property seized. *Jones v. Meyer Bros. Drug Co.*, 25 C. A. 234, 61 S. W. 553.

A levy made by seizing property instead of giving notice as required by this and Art. 3740, though one of the claimants was in possession as joint owner, was not void however irregularly made. *Davis v. Jones*, 32 C. A. 424, 75 S. W. 64.

A levy upon the interest of a defendant in a business partnership cannot be made under the statute by leaving a notice with the defendant in execution, but it is necessary for the execution creditor and the partner or partners whose interest is not levied upon that the statute be construed as requiring such notice to be left with one or more of the partners other than the defendant in execution or with a clerk of the partnership. *Adoue v. Wettermark*, 36 C. A. 585, 82 S. W. 799.

Under this article actual seizure of the attached property is not contemplated. If levy is made upon the interest of the partner and notice given as required by this article, it is sufficient. *Seal v. Holcomb*, 48 C. A. 330, 107 S. W. 917.

Partnership property subject to execution against partner.—A levy of an execution to satisfy the separate debt of one of a firm cannot be defeated by any subsequent agreement between the partners. *Thompson v. Tinnin*, 25 T. Sup. 56.

Partnership property may be sold under a judgment and execution against one of the partners. *Halsell v. McMurphy*, 23 S. W. 647, 86 T. 100.

A seizure and sale of partnership property under an execution against a member of the firm are wrongful acts for which the creditor is responsible in damages. *Currie v. Stuart* (Civ. App.) 26 S. W. 147.

Levy of attachment.—Though an attachment for debt of one of the partners of a firm was voidable only and regular on its face, its levy on partnership property, in a manner other than that prescribed by this article, was wrongful. *First State Bank of Hamlin v. Jones & Nixon* (Civ. App.) 139 S. W. 671.

The levy of an attachment upon the interest of a partner in partnership property must be made by leaving notice with one or more of the partners, or with the clerk of the partnership, or it is void. *Id.*

Partnership debts.—Partnership debts are entitled to priority of payment out of the partnership effects before the individual debts of one of the firm. *Converse v. McKee*, 14 T. 20; *Rogers v. Nichols*, 20 T. 719; *De Forest v. Miller*, 42 T. 34; *Longcope v. Bruce*, 44 T. 434; *Bradford v. Johnson*, 44 T. 381; *Weaver v. Ashcroft*, 50 T. 427; *Thompson v. Tinnin*, 25 T. Sup. 56. See, also, *Grant v. Williams*, 1 App. C. C. § 363; *Schley v. Hale*, 1 App. C. C. § 930.

Partnership property in hands of trustee.—A levy upon and seizure of partnership property in the hands of a trustee for the payment of debts, the execution being against one of the partners, is unlawful; and the trustee is entitled to an injunction to compel a restoration of the property, upon a showing that the remainder of the stock would be greatly depreciated in value by the seizure and the trust estate thereby greatly damaged. An action for a trial of the right of property, or against the officer for damages, is not an adequate remedy. *Sumner v. Crawford*, 91 T. 129, 41 S. W. 994.

— **Confusion of goods.**—See notes under Art. 3740.

Art. 3744. [2353] [2296] Goods pledged or mortgaged.—Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold on execution against the person making the pledge, assignment or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee or mortgagee, on complying with the conditions of the pledge, assignment or mortgage. [R. S. 1879, 2296.]

Rights of mortgagee out of possession.—A mortgagee out of possession has no right of action against a creditor who sells mortgaged property under execution. *Wright v. Henderson*, 12 T. 43; *Gillian v. Henderson*, 12 T. 47; *Joost v. Scott*, 19 T. 473; *Belt v. Raguet*, 27 T. 471; *Parker v. Benner*, 1 App. C. C. § 64; *Robinson v. Veal*, 1 App. C. C. § 311; *Gammage v. Silliman*, 2 App. C. C. § 14.

A purchaser at execution sale against the mortgagor in possession has a superior title and right of possession, but subject to the equitable rights of the mortgagee. *Silliman v. Gammage*, 55 T. 365.

Remedies of mortgagee or pledgee.—Where property in possession of a mortgagee or pledgee is seized by the sheriff, and the pledgee's possession is disturbed, he is entitled to the statutory remedy to try the right to the property. *Osborne v. Koenigshelm*, 57 T. 91; *Erwin v. Blanks*, 60 T. 583; *Garrity v. Thompson*, 64 T. 597.

Trial of the right of property.—See Art. 7791.

Sufficiency of levy.—See notes under Art. 3743.

Property subject to execution.—See notes under Art. 3746.

Art. 3745. [2354] [2297] Shares of stock may be sold.—Shares of stock in any joint stock or incorporated company may be sold on execution against the person owning such stock. [Act March 13, 1875, p. 102.]

Interest subject to garnishment.—See notes under Art. 3742.

Grounds for injunction.—See notes under Title 69.

Art. 3746. [2355] [2298] Duty of officer as to property in his hands.—The officer shall keep securely all personal property levied on by him for which no delivery bond has been given; and, if any injury or loss should result to any party interested by his negligence, he and his sureties shall be liable to pay the value of the property so lost or the amount of injury sustained, and ten per cent thereon, to be recovered by

the party injured on motion, three days' notice being given in the court from which the execution issued. [Act Jan. 27, 1842. P. D. 3782.]

Satisfaction presumed from levy, when.—The levy of an execution on personal property is, as a general rule, prima facie evidence of the satisfaction of the execution; but this presumption does not arise when possession remains with the defendant in execution. *Cravens v. Wilson*, 48 T. 324; *Garner v. Cuttler*, 28 T. 175; *Cornelius v. Burford*, 28 T. 203, 91 Am. Dec. 309; *Heilbronner v. Douglas*, 45 T. 402.

Sale of personalty before possession.—A sale of personal property not present at the time of the levy and sale, or in some way under the control of the officer, is void, except in those cases where it is otherwise expressly provided by statute. *Brown v. Lane*, 19 T. 203. See Arts. 3741-3744.

Trial of right of property.—An officer who has surrendered personal property to a claimant cannot, before the trial, return the bond to the maker and receive the property. *Durst v. Padgitt*, 24 S. W. 666, 5 C. A. 304.

Art. 3747. [2356] [2299] Expenses for keeping property.—The officer shall be authorized to retain out of the proceeds of personal property sold upon execution all reasonable expenses incurred by him in making the levy and keeping the property. [Id.]

Compensation for caring for live stock.—In view of Arts. 2000 and 7101, held, a court might properly allow a sheriff compensation in a proceeding against him to recover money collected by him under an order of sale, in which the sheriff filed an answer, claiming compensation for taking care of live stock levied on, which was equivalent to a motion to retax costs. *Coleman Nat. Bank v. Futch* (Civ. App.) 146 S. W. 957.

Art. 3748. [2357] [2300] Defendant may give delivery bond and keep property.—Any personal property taken in execution may be returned to the defendant by the officer upon the delivery by the defendant to him of a bond, payable to the plaintiff, with two or more good and sufficient sureties, to be approved by the officer, to the effect that the property shall be delivered to the officer at the time and place named in the bond, to be sold according to law, or for the payment to the officer of a fair value thereof, which shall be stated in the bond. [Act Jan. 27, 1842. P. D. 3778.]

Privilege to defendant only.—The privilege of retaining possession is given to the defendant only. *Harris v. Shackelford*, 6 T. 133.

Lien released by acceptance of bond.—Whatever lien was created by the levy, was released by the acceptance of the delivery bond, unless the property was afterwards voluntarily delivered to the officer to be sold under the original levy. *Webb v. Caldwell* (Civ. App.) 112 S. W. 98.

Grounds for Injunction.—See notes under Title 69.

Art. 3749. [2358] [2301] Property may be sold by defendant.—Where property has been replevied, as provided in the preceding article, the defendant may sell or dispose of the same, paying the officer the stipulated value thereof.

Art. 3750. [2359] [2302] Forfeited delivery bond.—In case of the non-delivery of the property according to the terms of the bond, and non-payment of the value thereof, the officer shall forthwith return the bond, indorsed, "forfeited," to the clerk of the court from which execution issued; whereupon, if the judgment remain unsatisfied in whole or in part, the clerk shall issue execution against the principal debtor and the sureties on the bond for the amount due, not exceeding the stipulated value of the property, upon which execution no delivery bond shall be taken, which fact shall be indorsed by the clerk on the execution. [Id. P. D. 3779.]

Original judgment.—The statutory judgment against the sureties on a forfeited bond does not discharge the original judgment. *Cole v. Robertson*, 6 T. 356, 55 Am. Dec. 784.

Presumption as to return.—See notes under Art. 3687, Rule 12.

Effect of forfeiture.—The forfeiture of a bond operates as a judgment (*Smith v. Basinger*, 12 T. 227; *Burton v. Miller*, 14 T. 299), which cannot be set aside except by direct proceedings for that purpose (*Testard v. Neilson*, 20 T. 139).

Art. 3751. [2360] [2303] Real property sold, how.—Real property taken by virtue of any execution shall be sold at public auction, at the court house door of the county, on the first Tuesday of the month, between the hours of ten o'clock, a. m. and four o'clock p. m. [Id. P. D. 3776.]

Marion county.—By the act of January 25, 1875, the sale of property under legal process and deeds of trust in Marion county is required to be made at the northeast corner

of Austin and Walnut streets, in the city of Jefferson. Sp. Laws 14th Leg., S. S., p. 6. This act was repealed by the act of April 9, 1883 (18th Leg. p. 54).

Effect of noncompliance.—A sale at a time or place other than that prescribed by law is void. *Howard v. North*, 5 T. 290, 51 Am. Dec. 769; *Brown v. Christie*, 27 T. 73; *Grace v. Garnett*, 38 T. 156; *Sinclair v. Stanley*, 64 T. 67. Parol evidence is admissible to prove irregularities in a sheriff's sale. *Grace v. Garnett*, 38 T. 156.

Sale after return day.—A sale of land after return day of execution is void. *Hester v. Duprey*, 46 T. 625; *Mitchell v. Ireland*, 54 T. 301; *Cain v. Woodward*, 74 T. 549, 12 S. W. 319; *Terry v. Cutler*, 23 S. W. 539, 4 C. A. 570.

Tuesday, a legal holiday.—Sales may be made on Tuesday, although it is a legal holiday. *Crabtree v. Whiteselle*, 65 T. 111.

Sheriff cannot sell land lying without county.—A sheriff has no power to sell lands lying without the limits of his own county. When the land lies partly in his own and partly in another county, his sale is valid as to so much of the land as is within his county, and void as to the remainder. *Alred v. Montague*, 26 T. 732, 84 Am. Dec. 603.

Judgment ordering land of one county sold in another.—Where a judgment in partition orders sale of two tracts of land situated in two counties to be made in one county and sale is made thereunder, neither the judgment nor sale can be collaterally attacked on this account, though the statutes require land to be sold under execution in the county wherein situated. It is the judgment which protects the sale from collateral attack. *Menard v. MacDonald*, 52 C. A. 627, 115 S. W. 64, 65.

Enjoining sale.—See notes under Title 69.

Art. 3752. [2361] [2304] Sale of lands, etc., elsewhere than at court house door.—Where by law the public sales of lands in any county are directed to be made at any other place than the court house door, the sales herein provided to be made at the court house door shall be made at the place designated by such law.

Art. 3753. [2362] [2305] Lots in a city or town, how sold.—If real property situated in any town or city, taken in execution, consist of several lots, tracts or parcels, each shall be offered separately, unless the same be not susceptible of a separate sale by reason of the character of the improvements thereon.

Application.—This article applies to an order of sale. *Moore v. Perry*, 13 C. A. 204, 36 S. W. 838.

The above statute relates to the manner of sale and not to the form of judgment. *Glasscock v. Price* (Civ. App.) 45 S. W. 415.

Effect of noncompliance.—In the absence of any claim that property sold on execution was sacrificed, that the return on an execution fails to show that lots were sold separately is immaterial. *Wilson v. Swasey* (Sup.) 20 S. W. 48.

Sale of separate and detached parcels of land en masse held not to invalidate sale. *New England Loan & Trust Co. v. Avery* (Civ. App.) 41 S. W. 673.

Four lots were sold in bulk worth \$3,000 for only \$375. The proof showed that the two unimproved lots were worth more than the judgment. The sale was properly set aside by the court. *Moore v. Perry* (Civ. App.) 46 S. W. 878.

The fact that defendants were cited by publication and a number of lots were sold at an execution sale in bulk, as directly prohibited by this article, and no notice was given of the sale, as required by Art. 3757, taken in connection with gross inadequacy of price, are a sufficient basis for cancellation of the sale. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Grounds for Injunction.—See notes under Title 69.

Art. 3754. [2363] [2306] Lands not in a city, etc., sold in lots, when.—When lands not situated in any town or city are taken in execution, the defendant in such writ in whom the legal or equitable title to such land may be vested, shall have the right to present to the officer holding such execution, at any time before the sale so as not to delay the same being made as advertised, a plat of said land as actually surveyed, in lots of not less than fifty acres, by the county surveyor of the county wherein said premises are situated. The plat shall be accompanied by the field-notes of each lot as numbered, with the certificate of the county surveyor, that the same are correct, and the defendant shall have the right to designate the order in which the lots shall be sold. [Act Feb. 22, 1875, p. 50.]

Subdivision and sale in parcels.—A levy of execution on 200 acres off the south end of 800 acres held to be sufficient. *Turner v. Crane*, 19 C. A. 369, 47 S. W. 822.

The levy being upon land, a party can protect himself against an excessive levy by having the land subdivided and sold in small tracts. *Ellis v. Harrison*, 24 C. A. 13, 57 S. W. 986.

An execution sale of tracts of land in bulk for an inadequate price held invalid. *Guy v. Edmundson* (Civ. App.) 135 S. W. 615.

Property not subject to execution.—See Art. 3736.

Art. 3755. [2364] [2307] **Sale of lots shall cease, when.**—When a sufficient number of such lots are sold to satisfy the amount due on the execution, the sale shall cease at the request of the defendant. [Id.]

Art. 3756. [2365] [2308] **Expenses of selling lots, how paid.**—The expenses of the survey and all other expenses attending the sale of said land in lots, as hereinbefore provided, shall be paid by the defendant, and shall in no case constitute any additional cost in said case. [Id.]

Art. 3757. [2366] [2309] **Notice of sale of real estate.**—The time and place of making sale of real estate under execution, order of sale, or venditioni exponas, shall be advertised by the officer by having the notice thereof published in the English language once a week for three consecutive weeks preceding such sale, in some newspaper published in said county. The first of said publications shall appear not less than twenty days immediately preceding the day of sale. Said notice shall contain a statement of the authority by virtue of which the sale is to be made, the time of levy, and the time and place of sale; it shall also contain a brief description of the property to be sold, and shall give the number of acres, original survey, locality in the county, and the name by which the land is most generally known, but it shall not be necessary for it to contain field-notes. Publishers of newspapers shall receive for publishing said sales fifty cents per square for the first insertion and thirty cents per square for subsequent insertions, to be taxed and paid as other costs; for such publication, ten lines shall constitute a square, and the body of no such advertisements shall be printed in larger type than brier; provided, that no fee for advertising any property in a newspaper under the provisions of this article shall exceed the sum of five dollars. If there be no newspapers published in the county, or none the publisher of which will publish the notice of sale for the compensation herein fixed, the officer shall then post such notice in writing in three public places in the county, one of which shall be at the court house door of such county, for at least twenty days successively next before the day of sale. The officer making the levy shall give the defendant or his attorney written notice of such sale, either in person or by mail, which notice shall substantially conform to the foregoing requirements. But nothing herein shall affect the method of advertising land under the powers conferred by any deed of trust or other contract lien. [Acts 1895, p. 168. Acts 1842, p. 66. Acts 1903, p. 104.]

Article 2367, R. S. 1895, from Acts 1879, p. 152, repealed by Acts 1903, p. 105.

See Chamberlain v. Trammell (Civ. App.) 131 S. W. 227; Levy v. Persons, 145 S. W. 286.

In general.—When a notice of a judicial sale has not been properly given, if objection be made by defendant in execution without unnecessary delay, the sale may be set aside; if not made in reasonable time, it will be considered as waived. In a collateral proceeding it is not essential to the validity of an execution sale that there should have been an advertisement of the property; though if the irregularity is brought about by the fraudulent collusion of the purchaser, and the property sells for a grossly inadequate price, the sale may be avoided as to such vendee and those claiming under him with notice. Construing Art. 3769, held, that it was not the intention of the legislature that sales of property under execution should be void on account of mere irregularities in advertising or in failing to advertise such property, but it was intended that the injured party should seek redress from the officer, and this in consideration of the public policy that execution sales should be sustained. *Morris v. Hastings*, 70 T. 26, 7 S. W. 649, 8 Am. St. Rep. 570.

A notice of sale in conformity with this article is sufficient. *Citizens' Nat. Bank v. Interior Land & Immigration Co.*, 14 C. A. 301, 37 S. W. 447.

The statute of 1895 governing sales under execution is brought forward in the Revised Statutes as this article. *Marston v. Yaites* (Civ. App.) 66 S. W. 868.

This article supersedes the law of judicial sales in force at the date of the passage of Art. 3759. *Fischer v. Simon*, 95 T. 234, 66 S. W. 884.

Notice to defendant—Necessity and sufficiency.—An execution sale will be set aside if the defendant is not served with notice as the statute requires, where the defendant gave notice at the sale of such irregularity and the property sold for only two-fifths of its value. *Leeper v. O'Donohue*, 18 C. A. 531, 45 S. W. 327.

The sale of a homestead under execution for taxes will be set aside upon the showing that the sheriff failed to serve notice on the owner and that the property was worth \$2,500 and sold only for \$151.00 and that there was a portion of the property on which no buildings were situated, which, if sold, would have satisfied the judgment. *Bean v. City of Brownwood*, 91 T. 684, 45 S. W. 897.

A statute requiring sales under deeds of trust to be made on a certain day of the month is unconstitutional, as applied to a deed executed before its passage and providing for sale "at any time" after default. *Thompson v. Cobb*, 95 T. 140, 65 S. W. 1090, 93 Am. St. Rep. 320.

Notice of the sale cannot be served upon an attorney appointed by the court to represent defendant cited by publication in a suit for taxes. *Crosby v. Bannowsky*, 95 T. 449, 63 S. W. 48.

The posting in the United States mail of a properly addressed and stamped notice is sufficient, whether the notice is received or not. *Rogers v. Moore* (Civ. App.) 94 S. W. 113.

This article as amended by the twenty-eighth legislature requires the levying officer under execution or order of sale to give defendant or his attorney written notice of the sale, either in person or by mail, and the mailing of a notice of a sale under a tax lien is sufficient, although the party does not receive it. To require the officer to see that the mailed notice is received is the same as requiring personal notice which the law does not demand. *Rogers v. Moore*, 100 T. 220, 97 S. W. 685.

Notice that a judgment existed, and that the same would be enforced by a sale of real estate if not paid, was not equivalent to the statutory notice required to be given to the defendant in execution that land levied on had been actually advertised for sale. *Snouffer v. Heisig* (Civ. App.) 130 S. W. 912.

That a sheriff conducting a sale of real estate on execution failed to send notice by mail to the judgment debtor though knowing her address did not raise a conclusive presumption that such omission was the cause of a sale for a grossly inadequate price; and hence an instruction assuming that the inadequacy was produced by the irregularity, unless rebutted by proof that it was not, throwing the burden of rebutting such prima facie presumption on the defendant, was correct. *Id.*

An execution sale for an inadequate price held invalid where the constable holding the sale informed the owners of the land that the advertisement would be withdrawn and the sale would not be held. *Guy v. Edmundson* (Civ. App.) 135 S. W. 615.

The first publication of an execution sale of land should be full 20 days before the sale; the date of publication not being counted. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Length of notice.—Where a deed of trust requires 10 days' notice of sale, a sale made on the 18th pursuant to a notice published on the 8th is void. *Lerch v. Hill*, 2 C. A. 421, 21 S. W. 183.

Setting aside sale—Defects in or want of notice.—In an action to set aside an execution sale on the ground, among others that the constable falsely represented that the sale would not take place, evidence that the defendant did not know of such statement held properly excluded. *Guy v. Edmundson* (Civ. App.) 135 S. W. 615.

A sheriff's deed will not be set aside on collateral attack for want of notice of the sale, especially in the absence of a showing that the irregularity was caused by the fraud or collusion of the purchaser, or that the property sold for a grossly inadequate price. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

Defects combined with inadequacy of price.—Real estate of the value of \$1,200 was sold for the sum of \$25 under an execution on a judgment for \$666, with foreclosure of vendor's lien. Before the receipt of the amount of the bid by the sheriff and delivery of the deed, the plaintiff in the execution enjoined the sheriff from executing a deed on account of the gross inadequacy of price and that the execution had been issued by mistake and he was not present at the sale, the defendant in execution being insolvent. *Hughes v. Duncan*, 60 T. 72.

A sale for a grossly inadequate price, made without the knowledge of the defendant in execution, will be set aside. *Schmidt v. Burnett* (Civ. App.) 23 S. W. 228; *Martin v. Anderson*, 23 S. W. 290, 4 C. A. 111. See *Driscoll v. Morris*, 21 S. W. 629, 2 C. A. 603.

Sale will be set aside where 20 days' notice was not given, and the property sold for two-fifths of its value. *Leeper v. O'Donohue*, 18 C. A. 531, 45 S. W. 327.

In a suit to set aside a sheriff's deed, pursuant to a sale of real estate on execution, evidence held not to justify submission to the jury of the question whether the sheriff's failure to send notice of the sale to the judgment debtor contributed to the inadequacy of the price for which the property was sold. *Snouffer v. Heisig* (Civ. App.) 130 S. W. 912.

At the time an execution sale was advertised to be made, there were two newspapers published in the county, either of which would have published the notice for the statutory fee, but the only advertisement of the sale that was made was by posted notices. There were three tracts of land sold, but they were not offered nor sold separately. The interest of the judgment debtor in the land was worth \$1,800. The judgment creditor bid in the land for \$15, paying a part of that amount as the cost of executing the writ, and credited the balance on the judgment. After the sale had been advertised, the constable informed the agent of the owner of the land that the advertisement would be withdrawn and the property would not be sold, and this information was repeated to the owner on the day before the sale, and, relying thereon, no one interested in the land was represented at the sale. Held, that the jury in an action to set aside the execution sale and cancel the constable's deed were justified in finding that the sale should be set aside. *Guy v. Edmundson* (Civ. App.) 135 S. W. 615.

The fact that defendants were cited by publication and a number of lots were sold at an execution sale in bulk, as directly prohibited by Art. 3753, and no notice was given of the sale, as required by this article, taken in connection with gross inadequacy of price, are a sufficient basis for cancellation of the sale. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Excuse for failure to sue.—A party living out of the state and served by publication and having no legal notice of a sale under execution was excused from instituting a suit to have it set aside until several years later. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Grounds for injunction.—See notes under Title 69.

Art. 3758. [2368] [2310] "Court house door" defined.—By the "court house door" of a county is meant either of the principal entrances to the house provided by the proper authority for the holding of the district court; and where, from any cause, there is no such house, the door of the house where the district court was last held in that county shall be deemed to be the court house door. Where the court house, or house used by the court, has been destroyed by fire or other cause, and another has not been designated by the proper authority, the place where such house stood shall be deemed to be the court house door.

Notice posted near door sufficient.—It would seem that a notice posted near the door and in immediate view of it fully meets the purpose of the law. *Howard v. Fulton*, 79 T. 231, 14 S. W. 1061.

Sale not at court house door—Effect.—A sale under a deed of trust which required it to be made at the door of the court house of M. county, if made at any other place is void. *Boone v. Miller*, 86 T. 74, 23 S. W. 574.

Art. 3759. [2369] [2310a] Real estate sales under deeds of trust, how made.—All sales of real estate made in this state under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. Notice shall be given as now required in judicial sales; and such sales shall be made at public vendue, between the hours of ten o'clock a. m. and four o'clock p. m. of the first Tuesday in any month; provided, that, when such real estate is situated in an unorganized county, such sale shall be made in the county to which such unorganized county is attached for judicial purposes, and, where such real estate is situated in two or more counties, the sale may be made in any county where any part of the real estate is situated, after notice as required in judicial sales has been given in every county in which any part of such real estate is situated. [Acts 1889, p. 143.]

Art. 3759
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Amended
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| 1. Historical. | 15. — Publication or other constructive notice. |
| 2. Trust deeds which may be foreclosed. | 16. Sale in parcels. |
| 3. Nature and form of remedy. | 17. Order of offering for sale. |
| 4. Power as authority for sale in general. | 18. Persons who may purchase. |
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| 6. Right to foreclose. | 20. Waiver of sale. |
| 7. Rights of junior incumbrancers. | 21. Title and rights of purchaser. |
| 8. Authority to execute power and execution of power in general. | 22. Conveyance to purchaser. |
| 9. — Substitute trustee. | 23. Proceeds. |
| 10. Time for exercise of power. | 24. Fees and costs. |
| 11. Preliminary proceedings in general. | 25. Operation and effect. |
| 12. Place of sale. | 26. Wrongful foreclosure. |
| 13. Time of sale. | 27. Question for jury. |
| 14. Notice of sale. | |

1. Historical.—The act of 1889 providing that real estate sales made under powers, conferred by deeds of trust should be in the county in which the lands are situated, has no application to a deed of trust executed before the act was passed. *Chandler v. Peters* (Civ. App.) 44 S. W. 867.

The law in regard to giving notice of sales under trust deeds has not been changed or amended since it was passed in 1889, and it has been brought forward into the Revised Statutes as this article. *Swain v. Mitchell*, 27 C. A. 62, 66 S. W. 62.

The act of 1889 prescribing mode of making sales under trust deeds is construed as amended since it was passed in 1889, and it has been brought forward into the Revised Statutes as this article. *Marston v. Yaites* (Civ. App.) 66 S. W. 868.

The language of this statute means that such notice shall be given as was required at the time the act of 1889 went into effect. *Id.*

The article applicable to judicial sales in force at the date of the passage of this article has been repealed, and is superseded by Art. 3757. *Fischer v. Simon*, 95 T. 234, 66 S. W. 884.

The act adopting the Revised Statutes in 1895 (Final Title, § 19), and also the act adopting the Revised Statutes in 1911 (Final Title, § 16), provided that the provisions of the Revised Statutes, so far as they are substantially the same as the statutes in force at the time when the Revised Statutes shall go into effect shall be construed as continuations thereof, and not as new enactments. The Revised Statutes of 1911 continued as Art. 3759 article 2369 of the Revised Statutes of 1895 in its exact language. Held, that a sale by a trustee in a deed of trust made in 1911 is to be governed by the act of 1889, rather than by a subsequent statute requiring service of notice on the defendant in execution, and hence no service on the mortgagor is necessary, especially in view of Art. 3757. *Corbett v. Sweeney* (Civ. App.) 161 S. W. 858.

2. Trust deeds which may be foreclosed.—If a deed describe the note secured so sufficiently that it may be identified by the rejection of erroneous recitals, the trustee may enforce the deed in the manner prescribed therein without first reforming the description in equity. *Thompson v. Cobb*, 95 T. 140, 65 S. W. 1090, 93 Am. St. Rep. 820.

3. **Nature and form of remedy.**—The fact that a trust deed did not authorize the trustee to sell the property until both principal and interest had matured held not to prevent the mortgagee from foreclosing by suit. *Warren v. Harrold*, 92 T. 417, 49 S. W. 364.

A party cannot foreclose a deed of trust and also have a sale made by the trustee. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

4. **Power as authority for sale in general.**—A trustee with power to sell can act thereunder so long as any part of the secured debt remains unpaid. *Groesbeeck v. Crow*, 85 T. 200, 20 S. W. 49.

Provisions in a trust deed held to make a sale and conveyance by the trustee proof of performance of all prerequisites to exercise of the power of sale. *McCreary v. Reliance Lumber Co.*, 16 C. A. 45, 41 S. W. 485.

In the absence of statute, held, that the court had no power to change the terms of a mortgage relating to maturity and sale. *Harrold v. Warren* (Civ. App.) 46 S. W. 657.

Deed of trust to secure debt having provided that recitations in any deed by trustee under power of will should be prima facie evidence of the truth thereof, recital of non-payment of debt is prima facie evidence. *Allen v. Courtney*, 24 C. A. 86, 58 S. W. 200.

Under the provisions of a deed of trust to secure a note, a recital in the deed executed thereunder by the trustee that the request to sell was made by the holder of the note held prima facie true. *Swain v. Mitchell*, 27 C. A. 62, 66 S. W. 61.

In selling under a trust deed, the trustee must strictly follow the terms of the deed, and the details prescribed as to the manner of the sale must be literally pursued. *Chamberlain v. Trammell* (Civ. App.) 131 S. W. 227.

A provision in a deed of trust for foreclosure by the trustee held only to authorize a request for foreclosure by the holder of the notes secured. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

A trustee must strictly follow the provisions of the trust deed in making a sale thereunder. *McCollum v. Jones* (Civ. App.) 141 S. W. 1030.

A trustee in a deed of trust, with power to sell, held authorized to act under the power, so long as any sum is due on the debt secured thereby. *Word v. Colley* (Civ. App.) 143 S. W. 257.

The provisions of a trust deed authorizing a sale of the property of the grantor must be strictly complied with in all their details, though such details may seem unimportant and frivolous. *Michael v. Crawford* (Civ. App.) 150 S. W. 465.

5. **Revocation or suspension of power.**—A partner's death does not defeat the power of sale in a trust deed to partnership land. *Barnett v. Houston*, 18 C. A. 134, 44 S. W. 689.

Power to sell under a trust deed held not affected by the death of the owner, where the time in which administration might have been taken out had not expired. *Silverman v. Landrum*, 19 C. A. 402, 47 S. W. 404.

Power to sell under a trust deed held not revoked by death of the grantor, but exercisable after the expiration of four years from his death. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 252.

A power to sell contained in a deed of trust to secure a debt is revoked by the death of the grantor, followed by administration of his estate. *Markham v. Wortham* (Civ. App.) 67 S. W. 341.

Power of sale in deed of trust held revoked by death of one to whom was conveyed an interest in the land subject to payment of part of secured debt. *Whitmire v. May*, 29 C. A. 244, 69 S. W. 100.

Death of the owner of land subject to a deed of trust held to revoke the power of sale contained in the deed, so that the land could be applied to the debt only by proceedings in the administration of decedent's estate. *Whitmire v. May*, 96 T. 317, 72 S. W. 375.

Power of sale in trust deed held revoked by death of grantor, and sale thereunder void, though deed provided that death of grantor should not affect the same. *Texas Loan Agency v. Dinger*, 33 C. A. 118, 75 S. W. 866.

A power of sale in a trust deed is revoked by the death of the holder of the equity of redemption in the land subject thereto, pending administration of his estate by an independent executor. *Williams v. Armistead*, 41 C. A. 35, 90 S. W. 925.

A power of sale in a trust deed held revoked by the death of a purchaser of the premises. *Taylor v. Williams* (Civ. App.) 105 S. W. 837.

A power of sale in a deed of trust is not revoked by the death of the mortgagor after conveyance to a third person. *Taylor v. Williams*, 101 T. 388, 108 S. W. 815; *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

The death of the owners of land covered by a deed of trust suspended power of the trustee to sell. *Girardeau v. Perkins* (Civ. App.) 126 S. W. 633.

A sale under a power in a deed of trust after the death of the grantor held voidable when made before administration is begun, and valid provided no administration is begun within the statutory time. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

The power of sale given in a mortgage or deed of trust is a power coupled with an interest, and continues in force and survives the death of the mortgagor. *Wiener v. Zweib*, 105 T. 262, 141 S. W. 771.

The power of sale given in a mortgage is a valuable right acquired by contract, inuring to the mortgagee, and cannot be impaired by any subsequent act of the mortgagor with regard to the property. *Hampshire v. Greeves*, 104 T. 620, 143 S. W. 147.

6. **Right to foreclose.**—In a suit to enjoin the foreclosure of a trust deed, that the land was previously sold held not to bar the execution of the trust, it appearing that the sale was void. *Williams v. Armistead*, 41 C. A. 35, 90 S. W. 925.

Evidence held to show that the holder of one of two notes secured by a deed of trust had waived his right to enforce his lien so as to render sufficient a request to the trustee to sell made by the holder of the other note only. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

It was no excuse for the failure of a trustee in a deed of trust to strictly observe conditions imposed by one of the subscribers, that compliance had become impossible by payment of the note secured by the deed. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

7. **Rights of junior incumbrancers.**—The right of a mortgagee to redeem from the holder of senior equities held not to arise until his purchase of the equity of redemption under a sale under his deed of trust. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

Where property was sold under a prior deed of trust, a subsequent mortgagee could not redeem. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

A junior incumbrancer is not entitled to notice of a foreclosure by a prior incumbrancer under a power of sale. *Hampshire v. Greeves*, 104 T. 620, 143 S. W. 147.

8. **Authority to execute power and execution of power in general.**—The trustee named in a trust deed held to have authority, even as against the beneficiary, to declare the money due, and sell the lands and make deeds to the purchaser. *Edinburgh American Land Mortg. Co. v. Briggs* (Civ. App.) 41 S. W. 1036.

Where a trust deed to a guardian of certain minor heirs empowered him to sell, such power did not pass to his successor as guardian. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 252.

A deed by a substituted trustee under a deed of trust held improperly excluded because the sale was under an advertisement by the original trustee. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

A substituted trustee under a deed of trust, having been appointed independent executor of the beneficiary, had no further authority to act as trustee in foreclosure proceedings. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

It is the duty of a trustee under a deed of trust to inform a beneficiary of an intended sale. *Jones v. Lynch* (Civ. App.) 137 S. W. 395.

Evidence held to show a valid sale under a trust deed by a duly authorized substituted trustee. *McCullum v. Jones* (Civ. App.) 141 S. W. 1030.

The trustee named in a mortgage deed of trust becomes the special agent of both parties. *Hampshire v. Greeves*, 104 T. 620, 143 S. W. 147.

9. — **Substitute trustee.**—Where trustee in deed given to secure notes dies before sale thereunder, on default the district court can appoint substitute trustee. *Davis v. Converse* (Civ. App.) 46 S. W. 910.

On death of payee of notes secured by trust deed, and on death of the trustee, executors of the payee may sue for appointment of another trustee. *Id.*

That a trustee in a deed of trust had never accepted the appointment did not authorize the appointment of a substitute trustee, in the absence of refusal or disqualification of original trustee to foreclose. *Bracken v. Bounds*, 96 T. 200, 71 S. W. 547.

Where one has given a trust deed, and then sold the property to another, after which there is a sale under the trust deed by a substitute trustee, his subsequent ratification of the appointment of the substitute trustee is ineffectual as against his vendee. *Bemis v. Williams*, 32 C. A. 393, 74 S. W. 332.

Under a trust deed, held, that a substitute trustee might not sell till the trustee had been requested and had failed to do so, or had become disqualified. *Id.*

Nonresident administratrix, as the legal holder of deed of trust on property of her intestate in the state, held to have the right to appoint a substitute trustee to sell the trust property, without having taken out letters of administration in the state. *Peacock v. Cummings*, 34 C. A. 431, 78 S. W. 1002.

Sale under deed of trust by substituted trustee held void. *Davis v. Hughes*, 38 C. A. 473, 85 S. W. 1161.

Sale by substitute trustee under deed of trust held valid, though no request was made on original trustee to make sale. *Ward v. Forrester* (Civ. App.) 87 S. W. 751.

In a suit to cancel a sale under a deed of trust, the evidence held to warrant a finding that the appointment of a substituted trustee was made by one other than the holder of the note. *Wilder v. Moren*, 40 C. A. 393, 89 S. W. 1087.

In the absence of proof to the contrary, the declination of a trustee in a deed of trust to act held to carry with it the idea that he had been requested to act. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

Stipulations in a trust deed as to the substitution of a trustee held valid. *McCullum v. Jones* (Civ. App.) 141 S. W. 1030.

Appointment of a substituted trustee held in effect made by the holder of the deed, instead of by his attorney in fact. *Michael v. Crawford* (Civ. App.) 150 S. W. 465.

The authority conferred in a deed of trust on the holder of a note to appoint a substituted trustee is not one of personal trust or confidence, so as to preclude a delegation thereof to the creditor's attorney in fact. *Id.*

Where the holder of a note secured by a deed of trust had in fact authorized an attorney to appoint a substituted trustee to sell property, though the power did not do so in terms, it was not essential that the authority be evidenced by a writing, and a subsequent written acknowledgment of authority and ratification of the exercise of the power was admissible as evidence of the fact. *Id.*

10. **Time for exercise of power.**—A sale by the trustee under power in a deed of trust pending administration of the estate of the deceased grantor is void. *Harris v. Wilson* (Civ. App.) 40 S. W. 868.

A trust deed held not to authorize a sale until default both in principal and interest due at the maturity of the note is secured, and until a request to sell by its holder subsequent to maturity. *Harrold v. Warren* (Civ. App.) 46 S. W. 657.

Act March 21, 1889, prescribing the time and place of sale of lands under trust deed, held not to apply to deeds executed before its enactment. *Childs v. Hill*, 20 C. A. 162, 49 S. W. 652.

A sale by the trustee at the request of the maker of a deed of trust after the debt secured by it had been paid held to pass the legal title. *Montague County v. Meadows*, 21 C. A. 256, 51 S. W. 556.

A power of sale in a mortgage cannot be exercised pending administration of maker's estate under an independent executor, even after the expiration of four years from his death. *Swearingen v. Williams*, 28 C. A. 559, 67 S. W. 1061.

The mortgagee having exercised his option to declare all the notes due for default, and commenced foreclosure, the mortgagor cannot have it stopped by payment of what otherwise would have been due and costs to date. *Lincoln v. Corbett*, 31 C. A. 352, 72 S. W. 224.

The fact that notes secured by a deed of trust were given for purchase money held not to justify a sale under the deed, after the death of the grantee of the land, who had assumed the debt. *Whitmire v. May*, 96 T. 317, 72 S. W. 375.

A mortgagee can sell under a deed of trust on maturity of the debt. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

11. **Preliminary proceedings in general.**—Where a deed of trust securing two notes authorized the trustee to sell the property upon the request of the holder of the notes, this did not authorize a sale by request of the holder of one of them; the other being unpaid in whole or in part. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

12. **Place of sale.**—Where a trust deed provides for sale at court house in a certain county, a sale at a court house in a different county is invalid. *Beitel v. Dobbin* (Civ. App.) 44 S. W. 299.

A sale under a trust deed in a county other than that provided for in the deed held void. *Chandler v. Peters* (Civ. App.) 44 S. W. 867.

Grantor in trust deed held estopped to claim that the sale was made in a wrong county, where he was present, and encouraged the sale. *Id.*

Where a trust deed only authorizes a sale of the property in a county other than that in which the land is situated, a sale thereunder in a county where it is situated is invalid. *Galloway v. Kerr* (Civ. App.) 63 S. W. 180.

A deed of trust is not ineffectual because it provides for sale in county other than that in which the land lies. The statute should be read into the deed as a part thereof, and the power should be executed in the county which the statute designates. *Kerr v. Galloway*, 94 T. 641, 64 S. W. 859, 860.

13. **Time of sale.**—A sale of land under a deed of trust is void, if made on a date other than that stated in the deed. *Galloway v. Kerr* (Civ. App.) 63 S. W. 184.

Words "within lawful hours," in a deed of trust, held not to require sale on a day prescribed in a statute specifying the hours on such day when sales should be made. *Thompson v. Cobb*, 95 T. 140, 65 S. W. 1090, 93 Am. St. Rep. 820.

14. **Notice of sale.**—That a deed of trust only required one notice of sale held not to affect its validity. *Willis v. Sanger*, 15 C. A. 655, 40 S. W. 229.

It is not necessary to give written notice to the debtor on a sale of real estate under a trust deed. *Georgi v. Juergen* (Civ. App.) 66 S. W. 873.

Notice of sale under trust deed held not posted as required by statute. *National Loan & Investment Co. v. Dorenblaser*, 30 C. A. 148, 69 S. W. 1019.

This article does not prevent the parties to a trust deed from contracting for such additional notice as they think proper, as by requiring notice by advertising in a newspaper, though the act only required notice by posting in public places. *Chamberlain v. Trammell* (Civ. App.) 131 S. W. 227.

Since this article provides that notice shall be given as required in judicial sales, held that, as no notice is required to be given to the defendant on a judicial sale of real estate, an instruction, in an action to set aside a conveyance pursuant to a foreclosure of the trust deed, directing a verdict for plaintiffs in case the jury found that the grantor in the deed was not notified of the sale, was properly refused. *Morris v. Simmons* (Civ. App.) 138 S. W. 800.

15. — **Publication or other constructive notice.**—Where a trust deed provided that notice of sale should be published for 20 days, a notice published for 19 days was insufficient. *Childs v. Hill*, 20 C. A. 162, 49 S. W. 652.

Publication of advertisement of sale under trust deed held to sufficiently comply with terms of instrument. *City of El Paso v. Ft. Dearborn Nat. Bank* (Civ. App.) 71 S. W. 799.

Foreclosure sale under a trust deed held valid, although the notices thereof were not posted by the substitute trustee himself. *Walker v. Taylor* (Civ. App.) 142 S. W. 31.

A trustee in a trust deed, authorized to give notices of sale, may delegate the posting of notices to a subagent. *Id.*

Maker of a trust deed held to have made a foreclosure sale his own act, and to have waived any defects as to notices. *Id.*

A provision of a trust deed requiring notice of sale to be posted did not contemplate that the trustee should in person do the posting. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

16. **Sale in parcels.**—Sale of lots as a whole under trust deed held no abuse of discretion, in the absence of evidence that a better price would have been obtained by a sale in parcels. *National Loan & Investment Co. v. Dorenblaser*, 30 C. A. 148, 69 S. W. 1019.

17. **Order of offering for sale.**—A trustee under a trust deed was not bound to first sell that part of the land covered by the deed in which a purchaser from the mortgagor before foreclosure owned no interest, at least in the absence of request from such purchaser. *McCollum v. Jones* (Civ. App.) 141 S. W. 1030.

18. **Persons who may purchase.**—Purchaser of property assuming payment of two mortgages cannot purchase at foreclosure under the prior one, and claim as against the second. *Beitel v. Dobbin* (Civ. App.) 44 S. W. 299.

Evidence held not to show that a son of the mortgagor purchased at foreclosure sale in the interest of the mortgagor, so as to cancel the debt. *Morris v. Housley* (Civ. App.) 47 S. W. 846.

19. **Setting aside sale.**—Sale under a trust deed held invalid. *National Loan & Investment Co. v. Dorenblaser*, 30 C. A. 148, 69 S. W. 1019.

A sale of land under a deed of trust given by plaintiff's grantor, without her knowledge, held not to preclude her recovery of the land. *Parks v. Worthington* (Civ. App.) 104 S. W. 921.

Heirs of a grantor held to have no right to question the validity of a sale under a trust deed made after the death of the grantor before any administration, but within the time when administration might be begun. *Wiener v. Zwieb*, 105 T. 262, 141 S. W. 771.

Second mortgagee held not entitled to attack the validity of the foreclosure sale under a prior mortgage, or deed of trust. *Walker v. Taylor* (Civ. App.) 142 S. W. 31.

Inadequacy of price for which property covered by deed of trust was sold on foreclosure is insufficient in itself, without being supplemented by proof of bad faith, mistake, or undue advantage, to set aside the sale. *Evants v. Erdman* (Civ. App.) 153 S. W. 929.

While, ordinarily a mortgagor's insanity does not justify setting aside a sale made under foreclosure of a deed of trust, a sale was properly vacated where the land, which was worth from \$2,500 to \$3,000, was sold to the mortgagee for \$101, subject to a \$1,450 mortgage. *James v. Chaney* (Civ. App.) 154 S. W. 679.

20. **Waiver of sale.**—Allowing grantor in trust deed to remain in possession does not affect the right to enforce a power of sale. *Dimmit County v. Oppenheimer* (Civ. App.) 42 S. W. 1029.

21. **Title and rights of purchaser.**—Where a trust deed authorized sale by trustee on default in payment of interest, proof of default and of the sale held sufficient, with the deed, to show that the title passed. *Western Union Tel. Co. v. Hearne* (Civ. App.) 40 S. W. 50.

Evidence held sufficient to establish that the trustee in a trust deed had performed all prerequisites to a valid sale. *McCreary v. Reliance Lumber Co.*, 16 C. A. 45, 41 S. W. 485.

Rights of purchaser under a trustee's sale determined. *Barnett v. Houston*, 18 C. A. 134, 44 S. W. 689.

Deed of trust and sale thereunder held to confer apparent title on purchasers, so that the conveyance of the legal title to innocent purchaser was a good defense to an action for recovery of the land. *Schneider v. Sellers*, 98 T. 380, 84 S. W. 417.

Where defendant purchased certain property on foreclosure of a deed of trust, for himself and the other creditors secured by the deed, without paying any money, and thereafter repudiated the trust, it was not essential to plaintiffs' recovery that any tender should be made to defendant. *Haywood v. Scarborough* (Civ. App.) 102 S. W. 469.

A sale by a trustee under a trust deed made without the notice required by the deed is of no effect. *Meisner v. Taylor*, 56 C. A. 187, 120 S. W. 1014.

Where a building did not become bound by a mortgage on the realty, it being not a fixture, the purchaser at the trustee's sale, acquired only the rights which the mortgagors had. *Shelton v. Piner* (Civ. App.) 126 S. W. 65.

A purchaser under a deed of trust on a homestead held charged with notice of the homestead character of the property. *Girardeau v. Perkins* (Civ. App.) 126 S. W. 633.

A bank purchasing property and assuming a prior lien thereon held not to obtain any title as against a junior lien, by acquiring the debt secured by the prior lien and buying in at the trustee's sale on foreclosure. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

A sale under a power in a deed of trust after the death of the grantor, made before an administration was begun, but before the expiration of the time within which an administration might be begun, held effective to pass title to the purchaser, subject to a subsequent administration. *Wiener v. Zwieb*, 105 T. 262, 141 S. W. 771.

In a foreclosure action by a junior mortgagee in which a prior mortgagee was made a party defendant, held, that a purchaser of title to the land acquired by sale under the prior lien might plead his title in bar of the right of the junior lienholder to foreclose. *Hampshire v. Greeves*, 104 T. 620, 143 S. W. 147.

The purchaser under a foreclosure sale in the exercise of a power of sale given in a mortgage takes the mortgagor's title divested of all incumbrances made since the creation of the power of sale. *Id.*

By a regular sale under a mortgage power of sale, the mortgagor and all persons claiming in equity of redemption by a privity of estate with him are precluded as fully as if they had been made parties thereto. *Id.*

Trustee in a deed of trust to secure a debt who, after foreclosure, bought the property from the purchaser at the sale, who was the holder of the debt secured, held not chargeable with knowledge of an agreement of his vendor to discharge certain junior liens. *Id.*

22. **Conveyance to purchaser.**—A conveyance by a sheriff on foreclosure of a deed of trust held to pass all interest of the grantor in the tract described, notwithstanding the acreage was understated by mistake. *Anderson v. Casey-Swasey Co.* (Civ. App.) 120 S. W. 918.

A deed under a trust deed held not to convey title to the premises. *Meisner v. Taylor*, 56 C. A. 187, 120 S. W. 1014.

23. **Proceeds.**—Where a sale of land under the terms of a trust deed is regularly made by the trustee, the trustor is not entitled to the benefits of another foreclosure. *Davidson v. Jefferson* (Civ. App.) 76 S. W. 765.

Unidentified proceeds of the sale of mortgaged property held not impressed with trust in favor of the mortgagees. *Texas Moline Plow Co. v. Kingman Texas Implement Co.*, 32 C. A. 343, 80 S. W. 1042.

A payment of an indebtedness by the sale of mortgaged real property is an "involuntary payment," as to which the debtor has no right to make an application, under the rules governing voluntary payments. *Blair v. Teel* (Civ. App.) 152 S. W. 878.

On sale under a married woman's deed of trust of her real property given for a loan, part of which was paid over to her husband, and part of which was used for the benefit of her estate, held, that neither party, without the other's consent, could apply the proceeds first to the payment of either portion of the indebtedness, but that it must be applied pro rata to the debt due from her and that due from her husband. *Id.*

Upon the sale of a tract upon which trust deeds were executed to secure notes held by a bank, held, that one who as to mortgagor was a surety on a note secured by a trust deed which was a second lien, but was a principal as to the bank, was entitled to have a part of the proceeds of the sale received by the bank credited to the payment of the note on which he was liable, after a note secured by a trust deed was paid, though he was not entitled to have two vendor's lien notes executed to the bank by the mortgagor as security for a judgment lien against the land credited upon his note. *Abbott v. First Nat. Bank* (Civ. App.) 155 S. W. 321.

A provision in a trust deed executed on lots that it was security for future advances would not entitle the mortgagee to apply the proceeds of the sale of another survey upon which it also held a trust deed as a credit upon the note secured by the first-mentioned trust deed, as against a surety on a note secured by a trust deed on such survey. *Id.*

24. **Fees and costs.**—The sum of \$80 is a reasonable compensation to a trustee for foreclosing a deed of trust given to secure a \$4,000 note. *Harris v. First Nat. Bank* (Civ. App.) 45 S. W. 311.

In the absence of a stipulation in a deed of trust as to expenses arising from its execution, the trustee is entitled to reasonable compensation. *Id.*

The right of a trustee to compensation and to an allowance of attorney's fees on the foreclosure of the deed of trust held to rest on contract. *Orient Trust Co. v. St. Louis Union Trust Co.* (Civ. App.) 126 S. W. 310.

If the mortgagee and the owner of the equity of redemption agreed that no trustee's fees should be allowed for the foreclosure proceedings, such fees should not be assessed against the owner of the equity of redemption. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

25. **Operation and effect.**—A void sale by the trustee held not to satisfy the note and vendor's lien secured by the trust deed, and that plaintiffs claiming under the grantor could not recover without payment of such balance. *McCreary v. Reliance Lumber Co.*, 16 C. A. 46, 41 S. W. 485.

Sale under deed of trust held not to preclude the mortgagee's right to specific performance of the mortgagor's contract to convey. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

A sale under a trust deed will cut off the equity of redemption of a junior lienholder who, without timely tender of the amount of the senior claim, files suit for foreclosure and adjustment of equities before the actual sale, but after the senior lienor's election to proceed by trustee's sale and after advertisement made. *Tolleson v. Nobles* (Civ. App.) 152 S. W. 850.

26. **Wrongful foreclosure.**—One selling without authority from the owner land held in trust to secure a debt, is liable for the value of the land at the date of sale less the amount of the indebtedness; but if authorized to sell, is liable only for the amount actually received less such indebtedness. *Ullman v. Devereux* (Civ. App.) 93 S. W. 472.

Where one holding the title to land as security for a debt due from the owner makes an unauthorized sale of the land, he is liable in damages for the value of the land at the date of the sale, less the amount of the indebtedness. *Ullman v. Devereux*, 46 C. A. 459, 102 S. W. 1163.

27. **Question for jury.**—See notes under Art. 1971.

Art. 3760. [2370] [2311] **Sale of personal property.**—Personal property taken in execution shall be sold on the premises where it is taken in execution, or at the court house door of the county, or at some other place if, owing to the nature of the property, it is more convenient to exhibit it to purchasers at such place. [Act Jan. 27, 1842. P. D. 3776.]

Art. 3761. [2371] [2312] **Notice of sale of personal property.**—Previous notice of the time and place of the sale of any personal property on execution shall be given for ten days successively, by posting up written or printed notices thereof in at least three public places in the county, one of which shall be at the court house door of the county and one at the place where the sale is to be made. [*Id.*]

In general.—If the judgment debtor has become the owner of property under Art. 3969, a valid levy of execution can only be made by seizure and not by merely giving notices. *Hunstock v. Roberts* (Civ. App.) 65 S. W. 675, 677.

Selling at place different from one named.—Where an officer sells personal property at a place different from the one named in the notice of sale, he becomes liable as a trespasser *ab initio*, although he may have paid over the proceeds of the execution. *Mollett v. Hodges*, 1 App. C. C. § 399.

Art. 3762. [2372] [2313] **Personal property present at sale, except.**—Personal property shall not be sold, unless the same be present and subject to the view of those attending the sale, when it is susceptible of being thus exhibited, except shares of stock in joint stock or incorporated companies, and in cases where the defendant in execution has merely an interest without right to the exclusive possession, in which case the interest of the defendant may be sold and conveyed without the presence or delivery of the property.

Sale of personal property not exhibited—Effect.—A sale of personal property not exhibited as here required is a nullity. *Geo. R. Dickinson Paper Co. v. Publishing Co.* (Civ. App.) 31 S. W. 1083.

Art. 3763. [2373] [2314] **Sale of stock running in range.**—When a levy is made upon horses, mules, jacks, jennets, horned cattle or hogs running at large in the range, under article 3741 of this title, it is not necessary that such stock, or any part thereof, should be present at the

place of sale, and the purchaser at such sale is authorized to gather and pen such stock and select therefrom the number purchased by him.

Sale out of view.—The sale of an estray is illegal, when the estrayed animal sold is out of view of the bidders when sold. *Floyd v. State* (Cr. App.) 68 S. W. 691.

Art. 3764. [2374] [2315] When execution not satisfied.—When the property levied upon does not sell for enough to satisfy the execution, the officer shall proceed anew, as in the first instance, to make the residue.

Art. 3765. [2375] [2316] Conveyance to purchaser.—When a sale has been made and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest and claim which the defendant in execution had in and to the property sold. [Id. P. D. 3795.]

Basset v. Sherrod, 13 Civ. App. 327, 35 S. W. 312; *Wofford v. McKinna*, 23 T. 37, 76 Am. Dec. 53; *Wooters v. Arledge*, 54 T. 397; *Norris v. Hunt*, 51 T. 612; *Pfeiffer v. Lindsay*, 66 T. 124, 1 S. W. 264.

Sheriff's deed.—The statute in regard to sheriff's deeds under execution provides that such deeds shall be for all the right, title, interest and claim which the defendant in execution had in and to the property sold. *Ostrom v. Arnold* (Civ. App.) 58 S. W. 632.

Memorandum unnecessary.—No written memorandum is necessary to bind the sale. *Lockridge v. Baldwin*, 20 T. 303, 70 Am. Dec. 385.

Necessity.—A sheriff's deed is not necessary to pass title at a sheriff's sale of real estate. A valid judgment, execution and sale are sufficient for this purpose. But if a deed be made, and the recitals contained in it correspond with those in the return, they cannot be varied by parol evidence in a collateral proceeding after a great lapse of time. Purchasers at a sheriff's sale have a remedy to correct a mistake by a direct proceeding brought in the court from which the execution issued, for the purpose of correcting or amending the return and to reform the deed. *Flaniken v. Neal*, 67 T. 629, 4 S. W. 212.

The execution of a sheriff's deed is a ministerial act, and not essential to the validity of the sale made by him. *Reeder v. Eidson* (Civ. App.) 102 S. W. 750.

A judgment creditor held under the evidence to acquire no right to the property levied on. *Patterson v. Williams* (Civ. App.) 126 S. W. 601.

A judgment creditor held to acquire title at an execution sale though a deed from the sheriff was not executed. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

Right to conveyance.—It is the duty of the purchaser to comply with the terms of the sale before he can demand a deed. *Lockridge v. Baldwin*, 20 T. 303, 70 Am. Dec. 385.

Judgment creditor, having an order of sale against undivided half interest in land, is entitled to writ of possession. *Modisette v. National Bank*, 23 C. A. 589, 56 S. W. 1007.

Recitals.—The recitals in a sheriff's deed that a particular interest in land had been levied on and sold will not conclude the purchaser at the sheriff's sale from showing, by the process under which the sale was made and the decree of foreclosure, that an interest other than that recited in the deed was actually offered for sale and sold, and that the purchaser became entitled to what he actually bought, although additional to that described in the deed as having been levied on. The recitals in a sheriff's deed are evidence of what was sold, but they are not conclusive. The sheriff's sale conveys to the purchaser whatever of title was subject to the sale as indicated in the decree of foreclosure and in the order of sale. *Briscoe v. Bronaugh*, 1 T. 333, 46 Am. Dec. 108; *Lee v. Salinas*, 15 T. 497; *Tuttle v. Turner*, 28 T. 773; *Baird v. Trice*, 51 T. 555; *Rippetoe v. Dwyer*, 1 U. C. 498.

It is not necessary that either the judgment or the execution should be recited in the sheriff's deed. And if there be an attempt to recite them, a mistake or misrecital will not impair the validity of the deed. *Howard v. North*, 5 T. 290, 51 Am. Dec. 769.

The recitals in the sheriff's deed will aid the description of the property in the return. *Whitney v. Krapf*, 27 S. W. 843, 8 C. A. 304.

A sheriff's deed not reciting in what county the land levied on was situated held sufficient when it recited that the levy was made by the sheriff of a certain county, and the sale was made therein. *Turner v. Crane*, 19 C. A. 369, 47 S. W. 822.

That the date of a judicial sale as stated in the sheriff's deed varies from the date stated in the return upon the order of sale does not render the sale void. *Temple v. Branch Saw Co.*, 39 C. A. 606, 88 S. W. 442.

Where it appeared that the books, papers, and records of the justice's court had been lost, the recitation in defendant's deed by virtue of an execution sale, as to the judgment and execution, was sufficient to show the authority to sell the property under the execution. *Smitherman v. Louisiana & T. Lumber Co.* (Civ. App.) 130 S. W. 633.

Description of property.—A deed is void when the description of land is so indefinite that it cannot be identified. *Howard v. North*, 5 T. 290, 51 Am. Dec. 769; *Coffee v. Silvan*, 15 T. 354, 65 Am. Dec. 169; *Hurt v. Moore*, 19 T. 269; *Ballard v. Anderson*, 18 T. 377; *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 53; *Kilpatrick v. Sisneros*, 23 T. 113; *Pressley v. Testard*, 29 T. 199; *Hearne v. Erhardt*, 33 T. 60; *Kingston v. Pickins*, 46 T. 99; *Flanagan v. Boggess*, 46 T. 330; *Ragsdale v. Robinson*, 48 T. 380; *Norris v. Hunt*, 51 T. 609; *Donnebaum v. Tinsley*, 54 T. 362; *Knowles v. Torbitt*, 53 T. 557; *Mitchell v. Ireland*, 54 T. 301; *Bowles v. Beal*, 60 T. 322; *Dwyre v. Speer*, 27 S. W. 585, 8 C. A. 88.

The land sold must be reasonably designated in the conveyance. Extrinsic evidence is admissible to locate and identify the land. *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 53; *Norris v. Hunt*, 51 T. 609; *Wooters v. Arledge*, 54 T. 395; *Pfeiffer v. Lindsay*, 66 T. 123, 1 S. W. 264; *Wilson v. Smith*, 50 T. 370; *Giddings v. Day*, 84 T. 608, 19 S. W. 682; *Smith v. Crosby*, 23 S. W. 10, 86 T. 15, 40 Am. St. Rep. 818.

A description of lands conveyed in a deed must be sufficiently certain to identify the land by the description given, or by deeds and instruments specifically referred to in the sheriff's deed. *Brown v. Chambers*, 63 T. 131. See *Wilson v. Smith*, 50 T. 365; *Kingston v. Pickins*, 46 T. 99.

In a sheriff's deed, otherwise valid, reference is made to other well-known deeds for description; the deeds so referred to are produced, and describe the land. Held, that such deed will convey title to the land so identified. *Wright v. Lassiter*, 71 T. 640, 10 S. W. 295.

The rule is well settled that less indulgence will be shown in favor of descriptions in deeds based on compulsory sales than applies to descriptions in deeds voluntarily executed by the owner. In compulsory sales under judicial process, if there is a patent ambiguity in the description of the land sold it cannot be aided by parol evidence, and the deed is void. *Beze v. Calvert*, 2 C. A. 202, 20 S. W. 1130.

A defective description of land in the levy and deed of the sheriff may be cured by a deed by the debtor to the purchaser as against subsequent creditors. *Willis v. Nichols*, 23 S. W. 1025, 5 C. A. 154.

A description in an execution and deed held sufficient. *Watson v. McClane*, 18 C. A. 212, 45 S. W. 176.

A sheriff's deed of a survey to different persons held not void because it described the several tracts only by the number of acres in each. *Harris v. Dunn* (Civ. App.) 45 S. W. 731.

Description in a sheriff's deed held not to vitiate his levy. *Turner v. Crane*, 19 C. A. 369, 47 S. W. 322.

A sheriff's deed held to insufficiently describe the property. *Edrington v. Hermann* (Civ. App.) 74 S. W. 936.

Description of land in sheriff's deed held insufficient. *Edrington v. Hermann*, 97 T. 193, 77 S. W. 408.

Where neither an execution levy nor the deed after sale particularly described the land, it was insufficient to convey title to the purchaser. *Veatch v. Gray*, 41 C. A. 145, 91 S. W. 324.

A deed executed by a sheriff, pursuant to a sale under an execution, is not void because of its failure to state that the land sold was located in the county. *Reeder v. Eldson* (Civ. App.) 102 S. W. 750.

A sheriff's deed does not require a more definite description than is necessary to the efficiency of a voluntary deed. *Gallup v. Flood*, 46 C. A. 644, 103 S. W. 426.

The rule that a description is sufficient if the land can be identified with the aid of extrinsic evidence applies to sales under execution. *Anderson v. Casey-Swasey Co.* (Civ. App.) 120 S. W. 918.

In trespass to try title, constable's deed held not defective for want of a proper description of the property. *Smitherman v. Louisiana & T. Lumber Co.* (Civ. App.) 130 S. W. 633.

A recital in a sheriff's deed, that the premises described therein, including 120 tracts, "were struck off to H. for the sum of \$50, she being the highest bidder," etc., does not exclude the possibility that the tracts were sold separately. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

Description of parties.—As to the description of the parties to the judgment and execution, see *Howard v. North*, 5 T. 290, 51 Am. Dec. 769; *Stephens v. Turner*, 29 S. W. 937, 9 C. A. 623; *Smith v. Chenault*, 48 T. 455; *Fitch v. Boyer*, 51 T. 341; *Cooke v. Avery*, 147 U. S. 391, 13 Sup. Ct. 340, 37 L. Ed. 209.

Execution.—The deed can be executed by a deputy sheriff who makes the levy and sale. *Davis v. Rankin*, 50 T. 279; *Burrow v. Brown*, 59 T. 457.

Amendment.—A sheriff may amend his deed, even after he goes out of office. *Flemming v. Powell*, 2 T. 225. Title may be shown by valid judgment, execution and sale, payment of purchase-money, and facts necessary to entitle the purchaser to a deed. *Flancken v. Neal*, 67 T. 629, 4 S. W. 212; *Higgins v. Bordages* (Civ. App.) 28 S. W. 350.

Title acquired by purchaser.—In deraigning title under a sheriff's deed, a valid judgment and execution must be proven to support the deed. *Wright v. Doherty*, 50 T. 34; *Criswell v. Ragsdale*, 18 T. 443; *Walker v. Emerson*, 20 T. 706, 73 Am. Dec. 207; *Hart v. McDade*, 61 T. 208.

A purchaser at an execution sale cannot acquire a better title than the judgment debtor has. *Jones v. Powers*, 65 T. 207.

The sheriff can convey by his deed only such property as was sold under execution, and he cannot cure defects in the description of the land by accurately describing it in his deed. *Pfeiffer v. Lindsay*, 66 T. 123, 1 S. W. 264.

The purchaser's title under a valid judgment, execution and sale becomes perfect upon the execution of the deed. If the return of the sheriff afterwards made is incorrect, and in contradiction of the deed, it cannot affect the purchaser's title already perfected. *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452.

A sheriff's deed executed before the patent for the land sold was issued conveys no title in the absence of proof that at the time of the levy the land had been located. *Watkins v. Hill*, 2 C. A. 358, 21 S. W. 374.

A sheriff's deed to a headright certificate, which purported to convey all the rights and claim of the debtor therein, held not objectionable, as failing to convey anything. *Harris v. Dunn* (Civ. App.) 45 S. W. 731.

A purchaser at execution sale, to sustain his title, must show that the judgment debtor had title at the time of the sale. *Thomas v. Morrison*, 92 T. 329, 48 S. W. 500.

Sale of realty under execution is good only against interest of judgment debtor; and, if he has none, no title passes thereby. *Barnes v. Krause* (Civ. App.) 53 S. W. 92.

When a purchaser of land on an execution sale had taken coal therefrom, prior thereto, under a claim of title by another deed, the claim for damages therefor is merged in the sheriff's deed. *Smith v. Olson* (Civ. App.) 56 S. W. 568.

Where defendant has title to real estate at the time of the sale thereof under an execution against him, he cannot set up a title afterwards acquired as a defense to an action of trespass to try title by the execution purchaser. *Bonner v. Ogilvie*, 24 C. A. 237, 58 S. W. 1027.

After partition of community property on decree in divorce, purchaser at execution sale against husband acquires title only to tracts partitioned to the husband. *Ryan v. Engleson*, 26 C. A. 192, 62 S. W. 1072.

Where a judgment debtor owned an undivided half of 3,000 acres, part of a certain survey, an execution sale and sheriff's deed of all his "right, title, and interest in and to 2,300 acres, part of" such survey, conveyed no title, though a few days after the sale the land was partitioned, and 2,235 acres allotted to him. *Boyce v. Hornberger*, 29 C. A. 337, 68 S. W. 701.

Where a deed by a purchaser at execution sale by its terms passes the legal title, and is recorded, the title given is, as against one claiming under a subsequent deed from the execution debtor, valid, though the grantee of the execution purchaser makes no claim to the land. *Williamson v. Gore* (Civ. App.) 73 S. W. 563.

As a general rule, title to property sold at judicial sale passes upon confirmation thereof and payment of the purchase money. *Dilley v. Jasper Lumber Co.* (Civ. App.) 114 S. W. 878.

A title acquired by an execution defendant subsequent to the sale under the execution does not inure to the benefit of the purchaser. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

Purchaser's equity of redemption held to pass on sale upon foreclosure of attachment by a creditor of the purchaser. *Levy v. Pearsons* (Civ. App.) 131 S. W. 446.

Where a judgment for taxes was rendered against a purchaser of land subject to a vendor's lien, and the land was sold under such judgment, the purchaser acquired the vendee's interest only. *Lippincott v. Taylor* (Civ. App.) 135 S. W. 1070.

Possession of purchaser.—A purchaser under execution against a mortgagor cannot recover the premises from the mortgagee rightfully in possession, until the mortgage debt is paid. *Murrell v. Kelly-Goodfellow Shoe Co.*, 18 C. A. 114, 44 S. W. 27.

Void execution held to give the purchaser no right to possession. *Houston Ice & Brewing Co. v. Stratton*, 40 C. A. 378, 89 S. W. 1111.

Where a party suing for land claimed under an execution sale does not prove his title, but the defendant on cross-action has the sale set aside, the mere fact that there were other parties claiming the property did not give plaintiff grounds for complaint. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Rights of purchaser from purchaser.—*Bona fide* purchasers in general, see notes under Art. 6824.

A plaintiff seeking to recover under a title acquired at execution sale must show that the land at the time of levy and sale was owned by the execution debtor. *Ferryman v. Rayburn* (Civ. App.) 30 S. W. 915.

Where a sale on execution has been canceled by a judgment of a court having jurisdiction, a subsequent deed by the execution vendee passes no title. *Aldridge v. Pardee*, 24 C. A. 254, 60 S. W. 789.

The grantee of one who purchased land at an execution sale acting for the judgment creditor acquires no interest as against the judgment creditor, where the execution purchaser had no authority to sell. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

Execution sale under dormant judgment.—See notes under Art. 3714.

Collateral attack.—If the recitals on the return of an execution correspond with those contained in the sheriff's deed as to the extent of the interest in land levied on and sold, parol evidence is not admissible in a collateral proceeding to correct or vary such recitals. Under such circumstances the party whose rights are prejudiced must seek relief in a direct proceeding brought to obtain it. (This case distinguished from *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452.) *Flaniken v. Neal*, 67 T. 629, 4 S. W. 212.

Deed as evidence.—In an action of trespass to try title, the defendant only pleading not guilty, a sheriff's deed offered by defendant, without a judgment and execution to support it, was properly excluded. *Tudor v. Hodges*, 71 T. 392, 9 S. W. 443.

Art. 3766. [2376] [2316a] Deeds to the state in usual form.—In all cases where property is purchased by the state, under article 357, the officer selling the same shall execute and deliver to the state a deed of conveyance to the same, such as is prescribed for individuals in similar cases. [Acts 1879, p. 9.]

Art. 3767. [2377] [2317] Conveyance made after death of purchaser.—In case the purchaser, having complied with the terms of the sale, shall die before a conveyance shall have been executed to him, the officer shall convey the property sold to the purchaser, nevertheless, and the conveyance shall have the same effect as if it had been executed in the lifetime of the purchaser.

See *Timmins v. Bonner*, 58 T. 554; *Richardson v. Knox*, 14 C. A. 402, 37 S. W. 189.

Art. 3768. [2378] [2318] Purchaser deemed innocent.—A purchaser at sale under execution shall be deemed to be an innocent purchaser without notice in all cases where he would be deemed to be such had the sale been made voluntarily by the defendant in person.

Bona fide purchaser in general.—A sale under execution upon a judgment erroneous but not void will be sustained where a stranger to the judgment is a purchaser. This rule does not apply to purchases voluntarily made from a party to a suit. *Harle v. Langdon*, 60 T. 555; *Treadway v. Eastburn*, 57 T. 209; *Mosley v. Gainer*, 10 T. 393.

A purchaser may be a bona fide purchaser for valuable consideration where he has paid less than the real value of the property, but where the price is grossly inadequate

he cannot be so considered. *McKamey v. Thorp*, 61 T. 652; *Nichols-Stewart v. Crosby*, 29 S. W. 380, 87 T. 443; *State Nat. Bank v. Waxahachie Bank* (Civ. App.) 30 S. W. 366.

An attorney who purchases at execution sale on a judgment in favor of his client cannot be called a bona fide purchaser, and the sale will be set aside in a direct proceeding for that purpose upon slight additional grounds showing injustice or unfairness. *Mc-Laury v. Miller*, 64 T. 381.

A purchaser at execution sale is deemed an innocent bona fide purchaser in all cases where he would be deemed to be such had the sale been made voluntarily by the defendant in person. An innocent purchaser from one who purchases with notice is as fully protected as if he had bought without notice from the vendor of the party from whom he purchased. *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452. The purchaser of property at an execution sale under a judgment which is void upon its face for want of service on the defendant acquires no title as against the original owner. *Collins v. Miller*, 64 T. 118.

A judgment creditor, who purchased the property of his debtor under execution and credited his bid on the debt, held not an innocent purchaser. *Hirsch v. Howell* (Civ. App.) 60 S. W. 887.

The validity of a deed by a father to his children of property subject to a resulting trust in their favor held immaterial against a purchaser of such property on an execution against the father. *Hicks v. Pogue*, 33 C. A. 333, 76 S. W. 786.

A purchaser of land at an execution sale, subject to a resulting trust, held not entitled to the land as against beneficiaries of the trust, unless a consideration other than a credit on the judgment is paid. *Id.*

A purchaser at execution sale without notice of irregularities in the proceedings leading up to the sale is protected if the judgment is valid, and the execution and sheriff's deed are regular. *First Nat. Bank of Houston v. South Beaumont Land & Improvement Co.* (Civ. App.) 128 S. W. 436.

Where the purchaser of land at an execution sale is acting either for himself or for the person to whom he causes the sheriff's deed to be made, the grantee in the sheriff's deed occupies the position of an ordinary purchaser at an execution sale, and takes his chances of getting title. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

The rule that bona fide purchaser for valuable consideration, without notice of equity, acquires a title superior to that of the owner of the equity applies to a purchaser at execution sale. *Aycock v. Thompson* (Civ. App.) 146 S. W. 641.

Attorney for plaintiff purchasing on execution sale, who, after paying the costs, credits the amount of the bid on the judgment, held not a bona fide purchaser for value. *Id.*

— Notice.—A purchaser at an execution sale, under a judgment against the husband, acquires title to the property purchased, if the same was acquired during coverture by deed, though executed to the wife, if the purchaser at such sale had no knowledge that the property was acquired by the separate means of the wife. *Cline v. Upton*, 56 T. 319. But if, at the time of the purchase, such purchaser had notice of the real interest of the wife in the property, and that it had been acquired by her separate means, he would acquire no title, and the fact that a lien on the land had previously been acquired by the record of the judgment would not affect the right of the wife to such land. *Ross v. Kornrumpf*, 64 T. 390.

A purchase of land under execution against the husband, the apparent title to which is in the community, but which was paid for with the wife's separate means, the knowledge of which fact was communicated to the purchaser after the levy but before the purchase at execution sale, cannot be an innocent purchaser. *Bonner v. Stevens*, 60 T. 616. And see *Parker v. Coop*, 60 T. 111; *McKamey v. Thorp*, 61 T. 649; *Stoker v. Bailey*, 62 T. 299.

One who purchases under an execution on a judgment barred on its face, and who upon proper inquiry would have discovered that the judgment had been discharged in bankruptcy, acquires no title as against a former purchaser of whose interest he had no actual notice. *Hart v. McDade*, 61 T. 208.

Though land conveyed to the husband during coverture is presumed to be community property, and the purchaser at execution sale under a valid judgment against him takes title, it is otherwise if it was purchased with the wife's separate property. She then becomes the equitable owner, and notice of her rights given at such sale will defeat any right the purchaser would otherwise have acquired. *Harris v. Seinsheimer*, 67 T. 356, 3 S. W. 307.

That an execution did not describe the judgment as to names of parties, etc.; that it appeared to have been issued as a first execution over a year from its rendition, would charge purchasers with notice of whatever appeared upon the face of the execution and might be developed by an examination of the judgment. *Irvin v. Ferguson*, 83 T. 491, 18 S. W. 820.

Land was acquired during coverture; afterwards the parties were divorced, the wife died, and the husband incurred debts, which were satisfied by a sale of the land under execution. Other than the recitals in the deed there was no evidence that the purchaser at the execution sale or his vendee paid a valuable consideration or that they were ignorant of the condition of the title. Under these facts the heirs of the mother were entitled to recover her interest in the land. *Henry v. Forshee*, 84 T. 185, 19 S. W. 381.

Where at the time of a levy on land the creditor had no notice of a prior unrecorded deed of the land, a purchaser at the sale is not affected by the deed, though he had notice of it at the time of the sale. *Blum v. Schwartz* (Sup.) 20 S. W. 54.

The issuance of executions subsequent to the one under which the sale was made of the land in litigation, to other counties, although fraudulent in attempting to hinder and delay other creditors, would not affect the title of a purchaser under such second execution having no notice of the facts constituting the fraud. *Brackenridge v. Cobb*, 85 T. 448, 21 S. W. 1034.

Purchaser of land at execution sale with notice of equity in third person held to have bought subject thereto. *Milby v. Regan*, 16 C. A. 352, 41 S. W. 372.

Purchaser at execution sale held to acquire title as against one holding under unrecorded deed. *West v. Loeb*, 16 C. A. 399, 42 S. W. 612.

The sale of a wife's separate property on execution against the husband does not

affect the wife's interest, though the title was in the husband, where the purchaser had notice. *Raley v. Abright* (Civ. App.) 43 S. W. 538.

The grantee of an unrecorded deed has a better title than a purchaser under an execution having notice of the deed before the levy was made. *Holt v. Hunt*, 18 C. A. 363, 44 S. W. 889.

The rights of a cestui que trust held superior to those of an execution purchaser under a judgment against the trustee in whose name the property appeared as owner on the records. *John B. Hood Camp Confederate Veterans v. De Cordova*, 92 T. 202, 47 S. W. 522.

Title to land held not deraigned through an execution sale, but through a subsequent purchase by the execution purchaser of the judgment debtor. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

Purchaser at execution sale knowing of unrecorded mortgage held entitled to avail himself of equities of judgment creditor not knowing thereof. *Barnett v. Squires* (Civ. App.) 52 S. W. 612.

Where real estate which was the community property of the husband and wife was sold after the death of the wife, on an execution against the husband, and the purchaser for a valuable consideration had no notice of the claims of the heirs of the wife therein, he took a title superior to that of such heir. *Smith v. Olson* (Civ. App.) 56 S. W. 568.

A judgment creditor, who purchased at an execution sale with notice that land was claimed by the debtor's wife as her separate property, held entitled to only such interest in the lot as constituted community property at the time of the sale. *Hirsch v. Howell* (Civ. App.) 60 S. W. 887.

Purchasers at an execution sale against a husband, notified of a wife's title to the land sold, and referred to a deed, could not rely on mistake in deed and obtain a title superior to that of the wife. *McCroary v. Lutz* (Civ. App.) 62 S. W. 1094.

Where an answer alleged a wife's equitable title to land omitted by mistake from the husband's deed thereto, and that a subsequent deed of correction was made, the latter was admissible against purchasers with notice buying at an execution sale against the husband. *Id.*

An execution purchaser of land acquires title and right of possession as against the holder of a prior, but unrecorded, deed by the execution defendant. *Central City Trust Co. v. Waco Bldg. Ass'n*, 95 T. 48, 64 S. W. 998.

Evidence considered, and held sufficient to justify a finding that a purchaser of property on execution sale against a guardian had notice that the property was purchased with money belonging to the ward. *Norton v. Keller* (Civ. App.) 65 S. W. 490.

Owner of vendor's lien notes held not estopped to set up his claim against an execution purchaser. *Brotherton v. Anderson*, 27 C. A. 587, 66 S. W. 682.

One purchasing land at an execution sale held to have had constructive notice of vendor's lien, though the lien notes were not recorded. *Id.*

Purchasers at execution sale get no title, as against holders of vendor's lien notes, having notice thereof before recording abstract of judgment. *Puster v. Anderson*, 27 C. A. 626, 66 S. W. 684.

That an abstract of judgment was not recorded until after the judgment debtor had transferred certain land was of no avail to the transferee, as against a purchaser at sale under the judgment, in the absence of any showing that the transfer was in good faith. *Weinert v. Simmang*, 29 C. A. 435, 68 S. W. 1011.

A failure to show good faith and absence of notice in a purchaser at execution sale subsequent to deed by the debtor to his wife relieves those claiming through the wife from showing more than a vesting of title in her by the deed. *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 258.

Where defendant purchased land from the purchaser at an execution sale, knowing that such sale had been set aside by the court, he cannot claim the land as an innocent purchaser. *Day v. Johnson*, 32 C. A. 107, 72 S. W. 426.

Possession of heir held referable to record title as heir, and not to unrecorded title as purchaser of co-heir's interest, and hence such possession was not notice to execution purchaser of unrecorded title. *Sanger Bros. v. Collum* (Civ. App.) 78 S. W. 401.

Execution creditor, who becomes purchaser of realty, held to stand on footing of bona fide purchaser as against debtor's prior unrecorded deed. *Id.*

The rule relating to when a purchaser at execution sale may not be a bona fide purchaser held applicable only to a case where the purchaser claims to be a bona fide purchaser without notice of a prior conveyance. *Clark v. Bell*, 40 C. A. 39, 89 S. W. 38.

A purchaser at execution sale without notice of irregularities in the proceedings leading up to the sale is protected in his title if the judgment under which the sale is made be valid, and the execution and sheriff's deed be regular; purchasers without actual notice being charged only with notice of defects in the execution which appear upon its face or are developed by an examination of the judgment on which it is based. *First Nat. Bank v. South Beaumont Land & Imp. Co.* (Civ. App.) 128 S. W. 436.

In a suit to set aside a sheriff's deed to certain real estate, evidence held to warrant a finding that the purchaser had notice that the judgment debtor held title as trustee only. *Snouffer v. Helsing* (Civ. App.) 130 S. W. 912.

— **Judgment creditor as purchaser.**—Where a judgment creditor purchases, it is not necessary that the money be in fact paid to the sheriff. The credit upon the execution is evidence of payment. *Blum v. Rogers*, 71 T. 669, 9 S. W. 595.

A creditor purchasing property and crediting the amount of his bid on the execution is not an innocent bona fide purchaser. *I. S. Brown Hardware Co. v. Marwitz*, 10 C. A. 458, 32 S. W. 78; *Nichols-Stewart v. Crosby*, 29 S. W. 380, 87 T. 443; *McKamey v. Thorp*, 61 T. 648; *Overstreet v. Manning*, 67 T. 661, 4 S. W. 248; *Barnett v. Vincent*, 69 T. 687, 7 S. W. 525, 5 Am. St. Rep. 98; *Burnham v. McMichael*, 6 C. A. 496, 26 S. W. 887; *Cobb v. Trammell*, 9 C. A. 527, 30 S. W. 482; *State Bank of Waxahachie Bank* (Civ. App.) 30 S. W. 366.

A purchaser at execution sale crediting the amount of his bid on the judgment is not a bona fide purchaser. *Aultman v. George*, 12 C. A. 457, 34 S. W. 652; *McKamey v. Thorp*, 61 T. 652; *Cobb v. Trammell*, 9 C. A. 527, 30 S. W. 482.

An execution creditor who bids in the property is not a purchaser for value, and takes subject to the rights of third persons. *Focke v. Garcia* (Civ. App.) 48 S. W. 755.

The application of the bid of a judgment creditor for land sold under execution to costs of the sale and execution held insufficient to render such creditor a bona fide purchaser of the land. *Hicks v. Pogue*, 33 C. A. 333, 76 S. W. 786.

A creditor purchasing land at his own execution sale is not an innocent purchaser, where he merely credits the amount of his bid on the judgment. *Henderson v. Rushing*, 47 C. A. 485, 105 S. W. 840.

Where land is bought at execution sale by the judgment creditor, held, that he is presumed not to have paid cash, but to have credited his bid on the judgment. *Lightfoot v. Horst* (Civ. App.) 122 S. W. 606.

The judgment creditor buying at execution sale and crediting his bid on the judgment held not a bona fide purchaser. *Id.*

— Evidence.—See notes under Art. 3637.

Liens and Incumbrances on property—In general.—A purchaser at a judicial sale subject to a lien held not to become personally liable for the amount secured by such lien. *Houston & T. C. R. Co. v. State* (Civ. App.) 41 S. W. 157.

Purchaser at foreclosure sale held to have taken the land free from other lien held by the judgment creditor, though purchaser paid less than the value and had notice of the other lien. *Alston v. Piper*, 34 C. A. 539, 79 S. W. 357.

Purchaser at foreclosure sale held to have taken the land free from another lien held by the judgment creditor, notwithstanding that the deed of trust foreclosed had purported to convey the entire interest, when as a matter of fact the grantor then had only a half interest. *Id.*

— **Equitable liens in general.**—An equitable lien for the purchase money of land is superior to the rights of a purchaser at execution sale with notice. *Davis v. Wheeler* (Civ. App.) 23 S. W. 435.

— **Vendor's lien.**—As against a purchaser with notice of a vendor's lien acquired before sale under a judgment with a legal lien on the land, the operation of the lien of the judgment will be confined to the actual interest of the judgment debtor in the estate at the time such lien was fixed, and that, although the purchaser had no actual notice when the lien attached. *Senter v. Lambeth*, 59 T. 260; *Calvert v. Roche*, 59 T. 463.

One who acquires a purchaser's equity of redemption by buying land at execution sale cannot recover it from the vendor without finishing payment. *Levy v. Persons* (Civ. App.) 131 S. W. 446.

— **Mortgage lien.**—Execution sale of mortgaged lands passes title subject to the lien of the mortgage. *Wilkins v. Bryarly* (Civ. App.) 46 S. W. 266.

— **Attachment lien.**—Title acquired under execution sale held superior to lien of attachment levied subsequent to judgment lien, notwithstanding unauthorized release of judgment. *Corbett v. Provident Nat. Bank* (Civ. App.) 57 S. W. 61.

Subsequent purchasers.—See notes under Art. 6824.

Art. 3769. [2379] [2319] Penalty for making sale otherwise than as authorized by law.—Any officer who shall sell any property without giving the previous notice herein directed, or who shall sell the same otherwise than in the manner herein prescribed, shall forfeit and pay to the party injured not less than ten nor more than two hundred dollars in addition to such other damages as the party may have sustained, to be recovered, on motion, five days' notice thereof being given, from such officer and his sureties.

Liability of officer.—The policy of our law seems to be that execution sales should be upheld, and that for his damages occasioned by failure to give proper notice of the sale the execution debtor should have his action against the officer guilty of the dereliction. *Rogers v. Moore* (Civ. App.) 94 S. W. 113.

Where it appeared that plaintiff in execution and the officer who made a levy on exempt property were informed that the debtor was the head of a family, that he worked the horses levied on to make a living for himself and family, that he claimed the horses as exempt from execution, that he had no other team which he could use and was not financially able to buy another, the plaintiff in execution and the officer committed a tort, and the officer was liable to the debtor for the consequences resulting from the levy and sale of the property. *Ralley v. Hopkins* (Civ. App.) 131 S. W. 624.

Under this article an officer would be liable for damages resulting from his failure to advertise for sale goods levied upon. *Mara v. Branch* (Civ. App.) 135 S. W. 661.

Art. 3770. [2380] [2320] Officer or deputy shall not purchase.—If any officer making sale of property on execution, or his deputy, shall, directly or indirectly, purchase the same, the sale shall be void.

Art. 3771. [2381] [2321] Purchaser failing to comply.—If any person shall bid off property at any sale made by virtue of an execution, and shall fail to comply with the terms of the sale, he shall be liable to pay the plaintiff in execution twenty per cent on the value of the property thus bid off, besides costs, to be recovered on motion, five days' previous notice of such motion being given to the defendant; and, should the property on a second sale bring less than on the former, he shall be

liable to pay to the defendant in execution all loss which he sustains thereby, to be recovered on motion as above provided. [Id. P. D. 3786.]

Construction of "twenty per cent."—The statute does not mean by the words "twenty per cent. on the value of the property thus bid off" the value of the property unincumbered, unless it be unincumbered. It relates to what is in reality actually sold. *Towell v. Smith* (Civ. App.) 55 S. W. 186.

If the property be so incumbered that the sale passes a right of no value, no recovery of 20 per cent. on the value of the property bid off, can be had if the purchaser shall fail to comply with the terms of the sale. *Towell v. Smith* (Civ. App.) 55 S. W. 186.

This article does not mean by the words "twenty per cent. of the value of the property thus bid off" the value of the property unincumbered, unless it is unincumbered; but it relates to what is really sold. If it is so incumbered that the sale passes a right of no value no recovery can be had under this article. *Borden v. Fahey*, 56 C. A. 218, 120 S. W. 564.

Liabilities of purchaser on failure to comply with bid.—Where a bidder at an execution sale fails to pay amount of his bid, the execution creditor is entitled to recover from the bidder 20 per cent. of the bid, but he is not entitled to recover from the bidder, the difference between the amounts for which the land was sold at first and second sales. The execution debtor is entitled to this difference. *Shanley v. York*, 54 C. A. 214, 118 S. W. 147.

Purchasing under mistake.—A creditor purchasing under the mistaken supposition that he can apply the amount of his debt to the payment of his bid may be relieved from his obligation to take the property and pay the money, unless his mistake was the consequence of his negligence. *Interstate National Bank v. O'Dwyer* (Civ. App.) 38 S. W. 368.

A bidder at an execution sale whose bid is the result of a mistake held not to incur the penalty authorized by Art. 3771. *Borden v. Fahey*, 56 C. A. 218, 120 S. W. 564.

Bid cancelled.—A purchaser at an execution sale may have the credit of his bid cancelled by showing that the property bought belonged to a third party. *Hollon v. Hale*, 21 C. A. 194, 51 S. W. 900.

Right of defendant in execution to amount recovered.—Where plaintiff in execution recovered from a defaulting bidder the difference between his bid and the price obtained on resale, which, under the statute, belonged to defendant in execution, the execution defendant, not being a party to the action against the defaulting bidder, could recover from plaintiff in execution, in a proper proceeding, the amount wrongfully recovered by him. *Shanley v. York*, 54 C. A. 214, 118 S. W. 146.

Art. 3772. [2382] [2322] Re-sale of property.—When the terms of the sale shall not be complied with by the bidder, the sheriff shall proceed to sell the property again on the same day, if there be sufficient time; but, if not, he shall readvertise and sell the same as in the first instance. [Id. P. D. 3787.]

Art. 3773. [2383] [2323] Return of execution by mail.—When an execution is issued to any county other than the one in which the judgment is rendered, return may be made by mail; but money can not be thus sent except by direction of the party entitled to receive the same or his attorney of record.

Art. 3774. [2384] [2324] Money to be paid over.—When an officer has collected money on execution, he shall pay over the same to the party entitled thereto at the earliest opportunity.

Sheriff should pay to assignee.—Where notice is given to the sheriff, before collection, of a valid transfer of the judgment, the money, when collected, should be paid to the assignee. *McClane v. Rogers*, 42 T. 214; *Hudson v. Morriss*, 55 T. 595.

Money of debtor in hands of sheriff.—When an officer holds an execution in favor of and against the same person, he may apply the money collected on one to the satisfaction of the other. *Hamilton v. Ward*, 4 T. 356; *Walton v. Compton*, 28 T. 569; *Cook v. Gatewood*, 43 T. 185.

Money collected on execution in the hands of a sheriff, and belonging to a judgment debtor against whom the sheriff holds an execution, may be applied to the payment of such execution by the sheriff. *Mann v. Kelsey*, 71 T. 609, 12 S. W. 43, 10 Am. St. Rep. 800.

Liability of sureties on bond of justice of the peace.—See notes under Art. 2283.

Art. 3775. [2385] [2325] Failure to pay over money.—Should an officer fail or refuse to pay over money collected under an execution when demanded by the person entitled to receive the same, he shall be liable to pay to such person the amount so collected, with damages at the rate of five per cent per month thereon, besides interests and costs, which may be recovered of him and his sureties by the party entitled to receive the same on motion before the court from which said execution issued, five days' previous notice thereof being given to said officer and his sureties. [Id. P. D. 3781.]

Only on motion.—Damages are recoverable only on motion. *Hamilton v. Ward*, 4 T. 356; *De La Garza v. Booth*, 28 T. 478, 91 Am. Dec. 328; *Scogins v. Perry*, 46 T. 111; *Murray v. G., C. & S. F. Ry. Co.*, 63 T. 407, 51 Am. Rep. 650.

Motion in what court.—Motion must be made in the court from which the execution issued (*De Witt v. Dunn*, 15 T. 106; *Beaver v. Batte*, 19 T. 111; *De La Garza v. Booth*, 28 T. 478, 91 Am. Dec. 328) by the party to the execution (*Beaver v. Batte*, 19 T. 111; *Hicks v. Gray*, 25 T. 82), and must be filed without unnecessary delay (*Scogins v. Perry*, 46 T. 111; *Donley v. Wiggins*, 52 T. 301).

Remedy cumulative.—The remedy by motion is cumulative. *De La Garza v. Booth*, 28 T. 478, 91 Am. Dec. 328; *Hamilton v. Ward*, 4 T. 356.

Demand unnecessary.—A previous demand is necessary before a motion. *Beaver v. Batte*, 19 T. 111; *De La Garza v. Booth*, 28 T. 478, 91 Am. Dec. 328; *Poer v. Brown*, 24 T. 34; *Donley v. Wiggins*, 52 T. 301.

Burden of proof.—See notes under Art. 3687, Rule 12.

Penalty will not be enforced, when.—Damages are not recoverable when payment is refused on the ground of reasonable doubt as to who is entitled to the money. *McMahan v. Hall*, 36 T. 59; *Platt v. Phillips*, 37 T. 9.

The penalty for failing to pay over money collected will not be enforced when there has been an unreasonable delay in instituting proceedings. *Donley v. Wiggins*, 52 T. 301.

Liabilities of sureties.—The sureties are not liable for money received after the return day of the execution, no previous levy having been made. *Hamilton v. Ward*, 4 T. 356; *Haley v. Greenwood*, 28 T. 680; *Thomas v. Browder*, 33 T. 783.

The statute which authorizes suit against a surety without suing the principal applies to this motion. *Poer v. Brown*, 24 T. 34.

Motion.—Where a sheriff collects money on execution under a judgment on a forfeited recognizance, and fails to account, the district attorney may file a motion in the name of the state (under Art. 3773) for the use of the county. *Russell v. State* (Civ. App.) 40 S. W. 69.

Art. 3776. [2386] [2326] Failure to levy or sell, penalty for.—Should an officer fail or refuse to levy upon or sell any property justly liable to execution, when the same might have been done, he and his sureties shall be liable to the party entitled to receive the money collected on such execution for the full amount of the debt, interest and costs, to be recovered on motion before the court from which said execution issued, five days' previous notice thereof being given to said officer and his sureties. [*Id.* P. D. 3796.]

Necessary to show, what.—The ability of an officer to make a levy must be shown. *Hamilton v. Ward*, 4 T. 356; *Underwood v. Russell*, 4 T. 175; *Smith v. Perry*, 18 T. 510, 70 Am. Dec. 295; *Batte v. Chandler*, 53 T. 613.

It is necessary to show that the execution had been placed in the hands of the sheriff; and that while in his hands he had been required to make a levy when it was in his power to do so, and that he had failed. *Lyendecker v. Martin*, 38 T. 287.

Sureties not necessary parties.—In a motion against an officer for balance on judgment for not collecting the amount of the execution, his sureties need not be made parties. They can be included in the motion, but if the plaintiff does not see fit to include them, he need not. *Murray v. Evans*, 25 C. A. 335, 60 S. W. 788.

Motion in what court.—The motion may be made in the county court from which the execution was issued, although the amount of the judgment affirmed and damages exceeds \$1,000. *Banner v. Henry* (Civ. App.) 31 S. W. 1098.

Five days' notice.—In computing the five days' notice, the time should be reckoned from the date of the acceptance and not from the date of filing the acceptance of service. *Murray v. Evans*, 25 C. A. 331, 60 S. W. 787.

Acceptance of service.—The waiver and acceptance of service filed by defendant dispenses with the issuance and service of notice of the motion as required by this article. *Murray v. Evans*, 25 C. A. 331, 60 S. W. 787.

What will excuse officer.—The existence of prior liens does not excuse the failure to sell. *Smothers v. Field*, 65 T. 435.

The sheriff may rebut by disproving the facts or may show matter in avoidance. *Smothers v. Field*, 65 T. 435; *Cobbs v. Coleman*, 14 T. 594; *Dearborn v. Phillips*, 21 T. 449; *Anderson v. McKay*, 30 T. 186.

Malicious prosecution of motion.—The rule that applies to ordinary civil suits applies to the character of proceeding provided for by motion under this article. The merely bringing of an unjust or unfounded suit against one, is not actionable; nor is one liable for damages for malicious prosecution of a motion under this article. *Nowotny v. Grona*, 44 C. A. 325, 98 S. W. 416.

Pleading.—See notes under Art. 1827.

Art. 3777. [2387] [2327] Failure to return execution.—Should an officer neglect or refuse to return any execution as required by law, or should he make a false return thereon, he and his sureties shall be liable to the party entitled to receive the money collected on such execution for the full amount of the debt, interests and costs, to be recovered as provided in the preceding article. [*Id.* P. D. 3796.]

See *Waxahachie Nursery Co. v. Sansom* (Civ. App.) 138 S. W. 422.

Motion, by whom.—Motion must be made by the plaintiff in the execution. *Hicks v. Gray*, 25 T. 82.

An assignee of a judgment who is entitled to receive the money when collected on an execution or order of sale in the hands of an officer and which is not returned is the proper party to a motion made to recover the money on account of the failure of the officer to return. The assignor of such judgment is not a proper party. *Ranken v. Jones* (Civ. App.) 53 S. W. 583.

What will excuse officer.—When a motion was filed after a debt had been satisfied, the sheriff is not liable for nominal damages. *Hamilton v. Ward*, 4 T. 356; *Underwood v. Russell*, 4 T. 175.

Where the debt has been paid or defendant has no property, the sheriff is liable for nominal damages only. *Smith v. Perry*, 18 T. 510, 70 Am. Dec. 295.

An officer may exonerate himself from liability by showing that the defendant is insolvent and the money could not have been collected by the use of proper diligence. *Smith v. Perry*, 18 T. 510, 70 Am. Dec. 295; *Griswold v. Chandler*, 22 T. 637; *Vaughn v. Warnell*, 28 T. 119; *Ellis v. Blanks* (Civ. App.) 25 S. W. 309. Or that the judgment was void. *Wilson v. Sparks*, 9 T. 621. But that the service of process was insufficient is no answer to the motion. *Griswold v. Chandler*, 22 T. 637.

The sheriff having failed to return the execution he was liable for the full amount of the judgment unless it was made to appear that no injury resulted to plaintiff, and merely showing that defendant in judgment was insolvent was not sufficient to relieve sheriff from liability, especially as there was other testimony showing that the defendant owned property subject to execution within sheriff's jurisdiction. *Hale v. Bickett*, 34 C. A. 369, 78 S. W. 531.

Art. 3778. [2388] [2328] Surplus to be paid to defendant.—If, on the sale of property, more money is received than is sufficient to pay the amount of the execution or executions in the hands of the officer, the surplus shall be immediately paid over to the defendant, his agent or attorney. [Id. P. D. 3777.]

Authority of sheriff to receive money.—A sheriff has authority to receive money only on the execution in his hands. *Harris v. Ellis*, 30 T. 4, 94 Am. Dec. 296.

After the return of the execution, the sheriff has no authority to receive payment of the judgment. *Id.*

Surplus subject to garnishment.—The excess of the proceeds of a sale under execution, remaining in the sheriff's hands after satisfying the execution, is subject to garnishment by another creditor of the judgment debtor. *Turner v. Gibson*, 105 T. 488, 151 S. W. 793, 43 L. R. A. (N. S.) 571.

Under this article the officer ceases to hold the remainder of the proceeds in his official capacity, and becomes a debtor to the execution defendant as to the surplus, so that such surplus is subject to garnishment by a creditor of the execution defendant. *Turner v. Gibson* (Civ. App.) 152 S. W. 839.

Officer may subject surplus to another execution.—An officer having a surplus in his hands after a sale of property under execution and satisfaction of the judgment may subject it to a second execution against defendant. *Turner v. Gibson* (Civ. App.) 152 S. W. 839.

Money of debtor in hands of sheriff.—See notes under Art. 3774.

Art. 3779. [2389] [2329] Return of execution.—Every execution shall be returned forthwith, upon being satisfied by the collection of the money, or upon order of the plaintiff or his attorney indorsed thereon.

Sufficiency of return.—In trespass to try title, the return of the execution under which the sale was had held inadmissible for failure to sufficiently describe the property purported to be conveyed. *Stipe v. Shirley*, 27 C. A. 97, 64 S. W. 1012.

Sheriff's return to execution and his deed held not void for uncertainty of description when with extrinsic evidence they designate property intended to be conveyed. *Buckner v. Vancleave*, 34 C. A. 312, 78 S. W. 541.

Venditioni exponas necessary for sale.—A return of the execution exhibiting an interest levied on, and thereby showing property of the defendant in custodia legis for satisfaction of the judgment, requires the issuance of a writ of venditioni exponas in order to sell the property. *Borden v. McRea*, 46 T. 396. This writ confers upon the officer authority to sell pursuant to the levy advertised and commanded on the writ without re-advertising the property. *Young v. Smith*, 23 T. 598, 76 Am. Dec. 81.

Conflict in recitals.—Where there is a conflict between a sheriff's deed and his return, the recitals in the deed always control. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Conclusiveness.—The return of the sheriff cannot be impeached in a collateral proceeding. *Schneider v. Ferguson*, 77 T. 573, 14 S. W. 154; *Rutledge v. Mayfield* (Civ. App.) 26 S. W. 910.

The return of the sheriff cannot be collaterally attacked so far as the defendant is concerned. *Rutledge v. Mayfield* (Civ. App.) 26 S. W. 910.

Strangers to a proceeding in which an execution is issued may collaterally assail a return thereon. *Holt v. Hunt*, 18 C. A. 363, 44 S. W. 889.

Plaintiff cannot defeat defendant's title to property acquired at execution sale in a prior suit by claiming that the levy was defective, since that would be a collateral attack on the officer's return. *Sparks v. McHugh*, 21 C. A. 265, 51 S. W. 873.

Constable's return held conclusive as against parties to suit on collateral attack. *Houssels v. Pitts* (Civ. App.) 52 S. W. 588.

This statute must be followed in making the levy. The statute does not prescribe a form of the officers' return, nor does it provide that the return shall show the manner in which the levy was made. The return will be construed liberally and the presumption indulged that the levy was legally made. The return cannot be attacked collaterally. *Jones v. Meyer Bros. Drug Co.*, 25 C. A. 234, 61 S. W. 554.

A sheriff, sued for conversion by levy and sale under execution, held estopped from denying the legality of the levy by his return on the execution. *Cox v. Patten* (Civ. App.) 66 S. W. 64.

In a suit between a judgment debtor and purchaser of the debtor's land at an execution sale, plaintiff held entitled to impeach the officer's return on the notice of sale, by showing that such notice was not in fact served as alleged. *Moore v. Snowball*, 36 C. A. 495, 82 S. W. 330.

Failure of the sheriff's return to show that written notice was given the defendants of execution sale held not conclusive that proper notice was not given. *Paschall v. Brown* (Civ. App.) 133 S. W. 509.

Necessity of appraisal.—Sale of land under execution cannot be attacked, in action to try title, on ground of irregularity in sheriff's failure to append appraisalment to return of execution. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

Cure of defects.—A defective return of the levy on land may be corrected by the recitals in the sheriff's deed. *Whitney v. Kropf*, 8 C. A. 304, 27 S. W. 843.

Effect of defects.—The title of a purchaser of land at sheriff's sale rests upon a valid judgment, levy and execution sale. The levy must describe the land sufficiently to identify it. *Donnebaum v. Tinsley*, 54 T. 362. Mere want of certainty in the return will not invalidate the sale. *Riddle v. Bush*, 27 T. 675; *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657. See Art. 3766.

A clerical error in the return to an execution issued June 9th, reciting a levy on June 1st, did not vitiate sale thereunder; the levy having been made on July 1st. *Davidson v. Chandler*, 27 C. A. 418, 65 S. W. 1080.

Parol evidence to explain return.—See notes under Art. 3687.

Authority of sheriff to receive money.—See notes under Art. 3778.

Art. 3780. [2390] [2330] Death of defendant operates as supersedeas, when.—The death of the defendant after the execution is issued shall operate as a supersedeas thereof; but the lien of the execution, when one has been acquired by a levy, shall be recognized and enforced by the county court in the payment of the debts of the deceased.

Sale under execution issued after death.—A sale under execution issued after the death of a sole defendant, when the judgment is for money, is void. *Conkrite v. Hart*, 10 T. 140; *McMiller v. Butler*, 20 T. 402; *Hooper v. Caruthers*, 78 T. 432, 15 S. W. 98; *Bynum v. Gowan*, 29 S. W. 1119, 9 C. A. 559.

Death prior to sale.—In view of Art. 3723, where a judgment for taxes was rendered against a purchaser of land subject to a vendor's lien, and he died prior to a sale of the land on execution, the sale was void. *Lippincott v. Taylor* (Civ. App.) 135 S. W. 1070.

Art. 3781. [2391] [2331] Death of plaintiff does not abate writ.—An execution shall not be abated by the death of the plaintiff therein after the execution has been issued, but the same shall be executed and returned in the same manner as if the plaintiff was still living.

Art. 3782. [2392] [2332] Execution docket.—The clerk of each of the several courts shall keep an execution docket in which he shall enter a statement of all executions as they are issued by him, specifying the names of the parties, the amount of the judgment, the amount due thereon, the rate of interest when it exceeds eight per cent, the costs, the date of issuing the execution, to whom delivered, and the return of the officer thereon, with the date of such return; and such docket entries shall be taken and deemed to be a record. [Id. P. D. 3773. Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Entries in execution docket admissible.—Certified copies of entries in the execution docket are admissible in evidence. *Schleicher v. Markward*, 61 T. 99.

Art. 3783. [2393] [2333] Index to execution docket.—The clerk shall keep an index and cross-index to the execution docket; and, when execution is in favor of or against several persons, it shall be indexed in the name of each person.

Art. 3784. [2394] [2334] Penalty for failing to keep docket and index.—Any clerk who shall fail to keep an execution docket and index thereto, as hereinbefore directed, or shall neglect to make the entries therein, shall, besides being punished as provided in the penal law, be liable to any person injured for the amount of damages sustained by such neglect, to be recovered in a suit against him and his sureties on his official bond.

DECISIONS RELATING TO SUBJECT OF TITLE IN GENERAL

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| 1. Indemnity to officer. | 11. — Jurisdiction. |
| 2. Withdrawal of execution. | 12. — Limitations and laches. |
| 3. Suppression of competition at bidding. | 13. — Tender. |
| 4. Rights of highest rejected bidder. | 14. — Parties. |
| 5. Who may purchase at sale. | 15. — Sufficiency of evidence. |
| 6. Grounds for setting aside sale. | 16. — Instructions and questions for jury. |
| 7. — Inadequacy of price. | 17. — Effect of setting aside sale. |
| 8. — Inadequacy of price combined with other objections. | 18. Collateral attack on sale. |
| 9. Estoppel to set aside sale. | 19. Purchase by agent. |
| 10. Actions to set aside sale—Defenses. | 20. Title of purchaser in general. |

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| 21. Equities against debtor. | 30. — Damages in general. |
| 22. Effect of reversal of judgment. | 31. — Exemplary damages. |
| 23. Rights of purchaser on setting aside sale. | 32. — Mitigation of damages. |
| 24. Wrongful execution. | 33. — Remoteness of damages. |
| 25. — Liability of plaintiff in execution. | 34. — Attorney's fees. |
| 26. — Liability of creditor in general. | 35. — Mental anguish. |
| 27. — Selling property not levied on. | 36. — Pleading. |
| 28. — Separate causes of action. | 37. — Admissibility of evidence. |
| 29. — Conditions precedent. | 38. — Sufficiency of evidence. |
| | 39. — Instructions. |

1. **Indemnity to officer.**—A sheriff has no right to demand an indemnity bond before levying upon real estate; and the refusal to give such a bond will not justify the sheriff in abandoning the levy and refusing to sell the property. *Bryan v. Bridge*, 6 T. 137.

Evidence held to warrant a finding that goods levied on equaled in value the indemnity bond so as to entitle sheriff to demand further indemnity before making new levy. *Seasongood v. Campbell* (Civ. App.) 49 S. W. 407.

An officer holding an execution may require indemnity before levying on personal property. *Id.*

An indemnity bond, given a constable after the illegal levy of an execution to induce him not to return the property, is enforceable against the sureties. *Hines v. Norris* (Civ. App.) 81 S. W. 791.

2. **Withdrawal of execution.**—An invalid execution may be withdrawn at any time before sale of property levied on or the intervention of the rights of third parties. *Wingfield v. Hackney*, 30 C. A. 39, 69 S. W. 446.

3. **Suppression of competition at bidding.**—An action by the owner of property sold for customs duties for a nominal consideration may be maintained by her for an alleged fraudulent stifling of competition at the sale. *Ney v. Ladd* (Civ. App.) 68 S. W. 1014.

An arrangement between bidders on property sold under an execution held not to constitute an agreement to suppress competition. *Snouffer v. Heisig* (Civ. App.) 130 S. W. 912.

4. **Rights of highest rejected bidder.**—One whose bid, though the highest at execution sale was unaccepted, has a remedy by motion to vacate the sale to another. *Rugely v. Moore*, 23 C. A. 10, 54 S. W. 379.

5. **Who may purchase at sale.**—A county judge should not be permitted to purchase and hold land sold under an execution, which he controlled for the county. *Bell County v. Felts* (Civ. App.) 120 S. W. 1065; *Felts v. Bell County*, 103 T. 616, 132 S. W. 123.

6. **Grounds for setting aside sale.**—A sale under execution may be set aside on account of the irregularity in the proceedings anterior to the sale, by a proceeding instituted for that purpose. *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657; *Owen v. City of Navasota*, 44 T. 517; *Cook v. Sparks*, 47 T. 28; *Cline v. Upton*, 56 T. 319; *Elam v. Donald*, 58 T. 816.

Mere irregularities in a judicial sale will not affect the title of a purchaser in good faith. *Harle v. Langdon*, 60 T. 555; *Morris v. Hastings*, 70 T. 26, 7 S. W. 649, 8 Am. St. Rep. 570; *Huckins v. Leitner*, 4 App. C. C. § 20, 14 S. W. 1016.

A sheriff's sale made in violation of an agreement between all the parties in interest that the sale should not take place unless all were present, and at which the land sold for an inadequate consideration, was set aside. *Ward v. Duer*, 70 T. 231, 11 S. W. 116.

One purchasing property for one-fifteenth of its value at execution sale not founded on a judgment of record is not an innocent purchaser. *Beckham v. Medlock*, 19 C. A. 61, 46 S. W. 402.

Irregularities in judgment and sale on execution do not affect title passing on sale under execution. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

An execution sale of lands held properly set aside. *Day v. Johnson*, 32 C. A. 107, 72 S. W. 426.

Rights acquired by innocent strangers for value under an execution on a judgment of a justice of the peace fair on its face will not be disturbed, though the judgment be invalid. *Carpenter v. Anderson*, 33 C. A. 491, 77 S. W. 291.

An execution sale of personalty held not subject to collateral attack. *Hubert v. Hubert*, 46 C. A. 503, 102 S. W. 948.

That a bid at execution sale was credited on the judgment and exceeded the judgment finally affirmed held not to sustain a collateral attack on the execution sale, even though the excess of the bid over the final judgment was not paid. *Wade v. Flanary* (Civ. App.) 108 S. W. 506.

An execution sale held not open to collateral attack. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

A certain irregularity in proceedings leading up to a judicial sale held not such as to render the sale void, in the absence of a showing that persons intending to bid had notice of the defect, and because of it refrained from bidding. *First Nat. Bank of Houston v. South Beaumont Land & Improvement Co.* (Civ. App.) 128 S. W. 436.

A judgment creditor held not entitled to impeach the title of the purchaser at the execution sale on the ground of irregularities in the proceedings antedating and including the sale. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

An execution sale after compromise of the judgment and promise of the execution plaintiff to stop the sale was void in toto, though the compromise did not provide for payment of costs, and no notice thereof was given to the officer. *Marshall v. Marshall* (Civ. App.) 150 S. W. 755.

7. **Inadequacy of price.**—Inadequacy of price without additional circumstances is not sufficient to invalidate a sale. *Allen v. Stephanes*, 18 T. 658; *Baker v. Clepper*, 26 T. 629, 84 Am. Dec. 591; *Chamblee v. Tarbox*, 27 T. 139, 84 Am. Dec. 614; *Taul v. Wright*, 45 T. 388; *Cravens v. Wilson*, 48 T. 324; *Pearson v. Flanagan*, 52 T. 266; *Pearson v. Hudson*, 52 T. 352; *Johnson v. Crawl*, 55 T. 571; *Atchison v. Owen*, 58 T. 610; *Allen v. Pierson*, 60 T. 604; *Hughes v. Duncan*, 60 T. 72; *Haskins v. Waillett*, 63 T. 213.

A sale of property in violation of law, made under the persuasion of one who became the purchaser, for a grossly inadequate price, may be avoided by the judgment debtor. *Stone v. Day*, 69 T. 13, 5 S. W. 642, 5 Am. St. Rep. 17.

A sale under execution of land at a grossly inadequate price will not be set aside for an irregularity which did not conduce to such result. *Driscoll v. Morris*, 21 S. W. 629, 2 C. A. 603. See *Fuller v. L. & I. Co.* (Civ. App.) 23 S. W. 571; *Davis v. Harnbell* (Civ. App.) 24 S. W. 972.

Where land was sold under execution, the owner cannot complain of inadequacy of price to which his conduct contributed. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

The fact that the sum bid on execution sale of personal property was inadequate does not in itself invalidate the sale. *Hunstock v. Roberts* (Civ. App.) 55 S. W. 514.

Circumstances held sufficient to entitle a judgment creditor to have a judicial sale set aside for inadequacy of price. *Lee v. Texas & N. O. Ry. Co.*, 22 C. A. 501, 55 S. W. 976.

A sale of land under execution held not void for inadequacy of price. *Valdez v. Cohen*, 23 C. A. 475, 56 S. W. 375.

Inadequacy of price held not sufficient to justify setting aside a sale under execution. *Martin v. Bryson*, 31 C. A. 98, 71 S. W. 615.

A purchaser of land at execution sale, known to be worth \$2,500, for \$53, held not bona fide, so as to support the conveyance. *Carpenter v. Anderson*, 33 C. A. 484, 77 S. W. 291.

When an execution sale is attacked, it is not necessary to show affirmatively that the ground relied on to avoid it in connection with inadequacy of price occasioned the inadequacy. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

Inadequacy of price alone does not render a judicial sale, publicly made, void, and is not ground for setting it aside after confirmation and payment of the purchase money. *Dilley v. Jasper Lumber Co.* (Civ. App.) 114 S. W. 878.

Effect of inadequacy of price at an execution sale as invalidating the sale stated. *Guy v. Edmundson* (Civ. App.) 135 S. W. 615.

Where a constable sold a large number of lots at an execution sale, the fact that a party attempting to have the sale set aside only claimed a portion of them did not render it improper to include the value of all the lots to arrive at a proper conclusion as to inadequacy of price. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Where property has been sold at execution sale at a very inadequate price, a court of equity will set the sale aside, where defendant makes a prompt offer to pay the indebtedness, costs, and interest. *Id.*

A sale under execution will be set aside for slight irregularities where gross inadequacy in price is shown. *Peters v. Rice* (Civ. App.) 157 S. W. 1181.

8. — Inadequacy of price combined with other objections.—As to effect of irregularities coupled with gross inadequacy of price, see *Scott v. Allen*, 1 T. 512; *Bennett v. Gamble*, 1 T. 132; *Martin v. Rice*, 16 T. 160; *Criswell v. Ragsdale*, 18 T. 443; *Taul v. Wright*, 45 T. 394; *Cook v. Sparks*, 47 T. 28; *Weaver v. Nugent*, 72 T. 280, 10 S. W. 458, 13 Am. St. Rep. 792; *McKay v. Bank*, 75 T. 184, 12 S. W. 529, 16 Am. St. Rep. 884; *Cleveland v. Simpson*, 77 T. 96, 13 S. W. 851; *Irvin v. Ferguson*, 83 T. 491, 18 S. W. 820; *Jackson v. Steffins*, 32 S. W. 862; *Martin v. Anderson*, 4 C. A. 111, 23 S. W. 290; *City of Vernon v. Montgomery* (Civ. App.) 33 S. W. 606.

An execution sale of property under a levy in violation of law, made under the persuasion of one who became the purchaser thereof at such sale for a grossly inadequate price, may as to such purchaser be avoided by the judgment debtor. *Stone v. Day*, 69 T. 13, 5 S. W. 642, 5 Am. St. Rep. 17.

Gross inadequacy of price alone is not ground to avoid a sale, but if accompanied with slight irregularities attending the sale will avoid a sheriff's sale. *Jones v. Pratt*, 77 T. 210, 13 S. W. 887; *Smith v. Perkins*, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

An execution sale, where the judgment creditor knows his debtor to be insane, for an inadequate consideration, held voidable. *Houghton v. Rice*, 15 C. A. 561, 40 S. W. 349.

Irregularities combined with inadequacy of price will not affect an execution sale, unless the irregularities contributed to the inadequacy. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

An execution sale of property which had previously been conveyed by the debtor for the fraudulent purpose of placing it beyond the reach of his creditors will not be set aside at the instance of the fraudulent grantee on the ground of inadequacy of price. *Clark v. Bell*, 40 C. A. 39, 89 S. W. 38.

Certain irregularities in an order of sale, coupled with inadequacy of price, held sufficient to set aside a judicial sale. *White v. Taylor*, 46 C. A. 471, 102 S. W. 747.

A purchaser's fraud in making the purchase with knowledge that the judgment had been satisfied, in connection with inadequacy of price, was sufficient to warrant setting aside an execution sale. *Marshall v. Marshall* (Civ. App.) 150 S. W. 755.

9. Estoppel to set aside sale.—Plaintiff held not estopped from setting aside a sheriff's sale of certain lands. *Kennedy v. Walker* (Civ. App.) 138 S. W. 1115.

10. Actions to set aside sale—Defenses.—A judgment creditor's agent, who arrived at the place of holding a judicial sale in time to have bid if the sale had not been made half an hour earlier than usual, is not guilty of such negligence as will defeat such creditor's right to set it aside for inadequacy of price. *Lee v. Texas & N. O. Ry. Co.*, 22 C. A. 501, 55 S. W. 976.

11. — Jurisdiction.—See notes under Title 35, Chapter 3.

12. — Limitations and laches.—See notes under Title 87, Chapter 2.

An execution debtor complaining of inadequacy in price at sale of his property should promptly act to avoid such sale against the necessary parties. *Brackenridge v. Cobb*, 85 T. 448, 21 S. W. 1034.

13. — Tender.—Execution sale set aside on tender by execution debtor of amount paid. *Steffens v. Jackson*, 16 C. A. 280, 41 S. W. 520.

Purchaser of land sold under execution held not required to accept a tender of the amount paid from the judgment debtor on demand for reconveyance. *Valdez v. Cohen*, 23 C. A. 475, 56 S. W. 375.

Judgment setting aside sale on execution at suit of plaintiff will not be disturbed, though amount of bid tendered by plaintiff was not deposited in court. *Johnson v. Daniel*, 25 C. A. 587, 63 S. W. 1032.

In an action to set aside an execution sale, a tender of the amount of money actually paid by the purchaser held sufficient. *Guy v. Edmundson* (Civ. App.) 135 S. W. 615.

Where an execution debtor notified the execution purchaser, before the sale that the judgment had been settled, a case of fraud was shown, and the debtor was not required to tender to the purchaser the amount of his bid in an action to set aside the sale. *Marshall v. Marshall* (Civ. App.) 150 S. W. 755.

14. — **Parties.**—See notes at end of Title 37, Chapter 5.

15. — **Sufficiency of evidence.**—Evidence held to justify setting aside a sale of a homestead under a judgment on a sewerage improvement certificate. *Moore v. Perry* (Civ. App.) 46 S. W. 878.

Evidence held sufficient to sustain a finding that a purchaser at a judicial sale and the sheriff acted together for the purpose of securing a sale of the property for an inadequate price. *Lee v. Texas & N. O. Ry. Co.*, 22 C. A. 501, 55 S. W. 976.

16. — **Instructions and questions for jury.**—See notes under Art. 1971.

17. — **Effect of setting aside sale.**—Where a party claiming a number of lots under an execution sale brought action against defendants for such lots, but the defendants claimed only a portion of them and prayed for cancellation of the constable's deed on the ground that the sale was fraudulent, and defendants prevailed, the plaintiff also lost all title to the lots not claimed by defendants. *Moore v. Miller* (Civ. App.) 165 S. W. 573.

18. **Collateral attack on sale.**—Plaintiffs in trespass to try title held land by deed from a purchaser of it at an execution sale. The defendants in possession in reconvention pleaded that they held by deed from the heirs of the defendant in the execution, and set up facts as avoiding the sale, tendering the purchase money and interest. The plea was filed more than ten years after the sale. No other parties were made or asked to be made. Held, that the plea in reconvention could not be considered as a direct attack, but only collateral, and that matters in avoidance of the sale would not avail as a defense, or as grounds for recovery by the defendants, the sale not being void. *Smith v. Perkins*, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

That the judgment under which corporate stock was sold under execution is valid does not preclude an attack on the sale for irregularities calculated to affect the price for which the stock was sold. *First Nat. Bank of Houston v. South Beaumont Land & Improvement Co.* (Civ. App.) 128 S. W. 436.

To make an execution sale immune from collateral attack, there must be a valid judgment and execution. *Bailey v. Block*, 104 T. 101, 134 S. W. 323.

Where plaintiff brings trespass to try title, claiming under an execution sale, and defendants tender the amount of the judgment, but attempt to set aside the sale for fraud, such attempt is a direct, and not a collateral, attack upon the sale. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

19. **Purchase by agent.**—Persons to whom property was struck off at judicial sale held not bound by the purchase unless the person assuming to bid in their behalf was authorized. *Richards v. E. V. & J. F. O'Neal* (Civ. App.) 157 S. W. 302.

20. **Title of purchaser in general.**—Title acquired at a sheriff's sale may be shown by proof of the validity of the judgment, issuance of execution thereon, a sale thereunder, and payment of the purchase money. *Reeder v. Eidson* (Civ. App.) 102 S. W. 750.

21. **Equities against debtor.**—Judgment debtor held not estopped to dispute the validity of an execution sale under a judgment by confession, where the judgment was confessed by her attorney for a larger amount than was authorized. *Cordray v. Neuhaus*, 25 C. A. 247, 61 S. W. 415.

Where a husband purchased a moiety of certain land partly with his wife's money, the wife was entitled as against the husband's creditors to an undivided interest in proportion to the amount of consideration she contributed. *Skinner v. D. Sullivan & Co.* (Civ. App.) 134 S. W. 426.

22. **Effect of reversal of judgment.**—See notes under Art. 2029.

23. **Rights of purchaser on setting aside sale.**—When a judgment debtor seeks to recover property irregularly sold under execution, the purchaser will not be compelled to restore the same without being reimbursed the amount paid and applied to the judgment. *Howard v. North*, 5 T. 290, 51 Am. Dec. 769; *Bailey v. White*, 13 T. 114; *Andrews v. Richardson*, 21 T. 287; *Morton v. Welborne*, 21 T. 772; *Stone v. Darnell*, 25 T. Sup. 430, 78 Am. Dec. 582; *Johnson v. Caldwell*, 38 T. 217; *Walker v. Lawler*, 45 T. 532; *Burns v. Ledbetter*, 54 T. 374.

When a sale is made under a void judgment the owner of the property is not bound to refund the purchase money. *Stegall v. Huff*, 54 T. 193.

A purchaser at a sheriff's sale who, after paying money on his bid which discharges the judgment, received a defective sheriff's deed, may be subrogated to the lien of the original judgment. His right of action does not depend on his possession; if in possession he cannot be disturbed in it by the original judgment debtor until the money paid by him in discharging the judgment has been refunded. *Jones v. Smith*, 55 T. 383.

A purchaser at a sale made under a decree of court which had no jurisdiction may still under some circumstances be a purchaser in good faith, and as such entitled to compensation for improvements made on land purchased before eviction. *French v. Grenet*, 57 T. 273.

The claim of a defendant in possession under a void judicial sale for the value of necessary and beneficial repairs made by him on improved real estate, and which have enhanced the value of the property, is based upon a higher equity than if the improvements were merely ornamental or new. *Id.*

A purchaser who has made permanent and valuable improvements in good faith is also entitled to compensation for his improvements. *Allen v. Pierson*, 60 T. 604; *Jones v. Smith*, 55 T. 383.

A purchaser at sheriff's sale whose money, paid on the purchase, satisfied the judgment under which the sale was made, is entitled to be subrogated to the rights of the plaintiff in execution, if the sale should be held void. *Flaniken v. Neal*, 67 T. 629, 4 S. W. 212.

Where defendants claim under an invalid execution sale against plaintiffs' ancestors, the latter will be required to pay the amount bid at the sale as a condition precedent to a recovery. *Hayes v. Gallaher*, 21 C. A. 88, 51 S. W. 280.

In an action by the purchaser at an execution sale against the interest of a partner, to recover such interest, recovery is not limited to the goods bought at the sale and actually in stock at the time of trial, but the plaintiff is entitled to compensation for the property disposed of intervening the sale and trial, as for a conversion. *Jones v. Meyer Bros. Drug Co.*, 25 C. A. 234, 61 S. W. 553.

A vendee at an execution sale, which is set aside for invalidity of the judgment, held entitled to be reimbursed by the judgment debtor to the extent of the sum paid. *Carpenter v. Anderson*, 33 C. A. 484, 77 S. W. 291.

Where plaintiffs, in a suit to set aside an execution sale of land, were not the sole owners at the time of the sale, on the sale being vacated they were only required to return such portion of the purchase price as corresponded to their proportionate interests in the land. *Moore v. Snowball*, 36 C. A. 495, 82 S. W. 330.

An execution purchaser, on the failure of title, cannot recover from the execution creditor the amount of his bid. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

Execution to enforce decree foreclosing vendor's lien held not susceptible of levy on naked legal title, reserved by grantee to secure purchase money on resale, after assignment of the vendor's lien notes taken for the price on such resale. *Ross v. Bailey* (Civ. App.) 143 S. W. 961.

That the holders of vendor's lien notes accepted part payment on the notes from the debtor and his grantee after their maturity, as they had been extended, would not estop them from enforcing a judgment of foreclosure, since the debtor and his grantee, in making such payment, were merely doing what they were bound to do. *Shannon v. Hay* (Civ. App.) 153 S. W. 360.

Where land was purchased subject to vendor's lien notes, which were afterwards foreclosed, but where action on the judgment was stayed on the execution of extended notes, which provided that the agreement was intended to stop further action on the judgment until maturity of such notes, the purchaser was not entitled to enjoin the execution of such judgment, so as to require the creditors to obtain a new judgment. *Id.*

24. **Wrongful execution.**—Ownership in common of personal property by the heirs of a decedent, accompanied by actual possession at the time the property was levied on, is sufficient as against a purchaser at an execution sale against the tenant in possession to entitle him to maintain a suit to recover the property on the theory that it was exempt. *Rogers v. Fuller* (Civ. App.) 142 S. W. 68.

25. — **Liability of plaintiff in execution.**—Plaintiff in execution is liable for property of estate of decedent taken under judgment against administrator personally. *Pinkard v. Willis*, 24 C. A. 69, 57 S. W. 891.

26. — **Liability of creditor in general.**—An execution creditor who is not present at the time property is levied on, and does not authorize or sanction abuse of such property, is not liable for damages. *Ainsa v. Moses* (Civ. App.) 100 S. W. 791.

27. — **Selling property not levied on.**—Where a judgment orders the sale of specific premises, the sheriff cannot thereunder sell other land to satisfy a balance due. *Giesscke v. Hoffman* (Civ. App.) 40 S. W. 1034.

Property not levied on should not be sold under execution. *Mara v. Branch* (Civ. App.) 135 S. W. 661.

28. — **Separate causes of action.**—See notes under Art. 1827.

29. — **Conditions precedent.**—A wife held entitled to sue for the conversion of corporate stock by a sale thereof, under execution against the husband, without paying a note held by the husband's judgment creditor and secured by stock pledged by the husband. *First Nat. Bank v. Thomas* (Civ. App.) 118 S. W. 221.

30. — **Damages in general.**—In estimating plaintiff's damages resulting from the sale of exempt property, the amount of his indebtedness which was satisfied by the sale of the property is to be taken into account and credited on such damages. *McGaughey v. Meek*, 1 App. C. C. § 1197. In rendering judgment against the defendant for the value of the exempt article wrongfully sold by him under execution, he is not entitled to deduction for the sum realized from its wrongful sale to apply to the payment of the debt for which the execution issued. *Cone v. Lewis*, 64 T. 331, 53 Am. Rep. 767.

In an action for damages for value of property illegally seized and sold, in computing damages the amount the goods sold for and a balance on the judgment should be allowed as credits, the goods seized being in excess of value over the judgment. *Beck v. Avondino*, 82 T. 314, 18 S. W. 690.

Measure of damages for wrongful seizure of personal property under judicial process is its value and interest. *Gilmour v. Heinze*, 85 T. 76, 19 S. W. 1075.

In an action for the seizure and sale of property under execution which belonged to a person not a party to the writ and was purchased by the owner, the measure of damages is the amount paid, with interest, and the depreciation in value. *Field v. Munster*, 11 C. A. 341, 32 S. W. 417.

The measure of damages for the wrongful seizure of mules levied on as the property of a third person is their value at the time of the seizure, with interest. *Nelson v. Ashmore* (Civ. App.) 56 S. W. 938.

In an action for wrongful levy of execution, charge to allow damages in respect to plaintiff's crops, when the same had not in fact been levied on, required reversal. *Baughn v. Allen* (Civ. App.) 68 S. W. 207.

The measure of damages for a levy on exempt crops is, so far as the mere conversion of the crops is concerned, the value thereof. *Moore v. Graham*, 29 C. A. 235, 69 S. W. 200.

In an action for an alleged wrongful levy, the measure of damages held the value of the goods seized, less the amount of the judgment. *Avindino's Heirs v. Fr. Beck & Co.* (Civ. App.) 73 S. W. 539.

In action for unlawful entry into plaintiff's dwelling, and seizure and sale of a piano therein under an order of sale, the measure of plaintiff's damages determined. *Hillman v. Edwards* (Civ. App.) 74 S. W. 787.

A statutory levy on land held not to authorize a recovery, in the absence of specific damages. *Adoue v. Wettermark*, 36 C. A. 585, 82 S. W. 797.

Damages for suffering and sickness are not recoverable in an action for wrongful levy on property. *Ainsa v. Moses* (Civ. App.) 100 S. W. 791.

Value of use and hire of animals wrongfully seized under execution and detained for over two years, held not to be estimated by value of use and hire by the day or by the month. *Railey v. Hopkins*, 50 C. A. 600, 110 S. W. 779.

In an action for wrongful levy of execution, the intentions of the officer making the levy held immaterial. *Rainey v. Kemp*, 54 C. A. 486, 118 S. W. 630.

The levy of an attachment on exempt property authorizes a recovery by the owner of the actual damages sustained, and where the writ was issued and levied maliciously and without probable cause, he may recover exemplary damages. *Carroll v. First Nat. Bank of Denison* (Civ. App.) 148 S. W. 818.

The measure of damages for a wrongful levy and seizure of goods is the goods, or their value, with compensation for the detention. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

Where an officer wrongfully levied on two horses of defendant, and for five or six days defendant was not permitted to use the horses, and the reasonable value of their use was about \$3 per day apiece, a judgment for \$8 damages was authorized. *Parlin & Orendorff Implement Co. v. Clements* (Civ. App.) 156 S. W. 368.

An owner of property wrongfully levied on under execution, who refrains from using the property under the instructions of the officer making the levy, and who is thereby for a time deprived of its earning capacity, may recover the reasonable value of its use during and up to the time he was informed of the release of the levy. *Id.*

31. — **Exemplary damages.**—If an illegal levy and seizure of property is oppressive and the conduct of the officer malicious, exemplary damages may be recovered against not only the officer, but any other person who knowingly encouraged or directed the malicious act. He who accepts benefit under an illegal levy upon the property of another, after knowledge of the illegal act, will be responsible equally with the officer for such damage as is the natural and proximate result of the illegal act. *Brown v. Bridges*, 70 T. 661, 8 S. W. 502.

In the absence of bad faith, oppression, or wantonness, vindictive damages cannot be recovered for wrongful levy. *Willis v. Chowning*, 18 C. A. 625, 46 S. W. 45.

In an action for the wrongful levy of an execution, an allowance of \$50 for attorney's fees as a part of vindictive damages allowed held not error. *Deleshaw v. Edelen*, 31 C. A. 416, 72 S. W. 413.

Exemplary damages held not recoverable for a levy on land, in the absence of actual damages. *Adoue v. Wettermark*, 36 C. A. 585, 82 S. W. 797.

In an action against a constable for levying on exempt property, and doing so in a malicious and oppressive manner, plaintiffs held entitled to recover exemplary damages. *Farouf v. Cornwell*, 40 C. A. 529, 90 S. W. 537.

In an action for unlawfully levying on plaintiff's property and selling the same, evidence held sufficient to warrant exemplary damages. *Sparks v. Ponder*, 42 C. A. 431, 94 S. W. 428.

In an action for damages for alleged wrongful levy of execution, instructions authorizing a recovery for exemplary damages held erroneous. *First Bank of Mertens v. Stefens*, 51 C. A. 211, 111 S. W. 782.

32. — **Mitigation of damages.**—In action for unlawful entry into plaintiff's dwelling, and seizure and sale of a piano therein, under an order of sale, held proper to show what amount of the proceeds of the sale of the piano had been credited on the judgment in mitigation of plaintiff's damages. *Hillman v. Edwards* (Civ. App.) 74 S. W. 787.

33. — **Remoteness of damages.**—Certain damages resulting from a wrongful levy under an execution held not too remote. *First Nat. Bank v. Thomas* (Civ. App.) 118 S. W. 221.

34. — **Attorney's fees.**—See notes under Title 37, Chapter 24.

35. — **Mental anguish.**—Mental anguish, or the effect on the standing as an individual, or as a minister of the gospel, of a member of an unincorporated missionary association from a wrongful levy on the property of the association, is too remote to form the basis for damages. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

36. — **Pleading.**—See notes under Art. 1827.

37. — **Admissibility of evidence.**—See notes under Art. 3687, Rule 5.

38. — **Sufficiency of evidence.**—A finding of the value of goods illegally sold under execution held justified by the evidence. *Avindino's Heirs v. Fr. Beck & Co.* (Civ. App.) 73 S. W. 539.

Evidence in action for damages for loss of crop from wrongful levy examined, and held sufficient to sustain verdict for plaintiff. *Parker v. Hale* (Civ. App.) 78 S. W. 555.

In an action for unlawfully levying upon and selling plaintiff's property, evidence held sufficient to warrant a finding as to the market value of the property on the date of the levy. *Sparks v. Ponder*, 42 C. A. 431, 94 S. W. 428.

39. — **Instructions.**—See notes under Art. 1971.

TITLE 55

EXEMPTIONS

Chap.	Chap.
1. Property Exempt from Forced Sale.	2. Excess Over Homestead, etc., How Set Apart and Subjected to Execution.

CHAPTER ONE

PROPERTY EXEMPT FROM FORCED SALE

Art.	Art.
3785. Property exempt from, to every family.	3789. Ferryboat, etc.
3786. "Homestead" defined.	3790. Public property exempt.
3787. Proceeds of sale of homestead exempt for six months.	3791. Public libraries.
3788. Property otherwise exempt.	3792. Homestead exemption does not apply, when.
	3793. Other exemptions not applying.

Article 3785. [2395] [2335] Property exempt from, to every family.—The following property shall be reserved to every family, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided:

1. The homestead of the family.
2. All household and kitchen furniture.
3. Any lot or lots in a cemetery held for the purpose of sepulture.
4. All implements of husbandry.
5. All tools, apparatus and books belonging to any trade or profession.
6. The family library and all family portraits and pictures.
7. Five milch cows and their calves.
8. Two yoke of work oxen, with necessary yokes and chains.
9. Two horses and one wagon.
10. One carriage or buggy.
11. One gun.
12. Twenty hogs.
13. Twenty head of sheep.
14. All saddles, bridles, and harness necessary for the use of the family.
15. All provisions and forage on hand for home consumption; and,
16. All current wages for personal services. [Const., art. 16, secs. 28, 50. Act Aug. 15, 1870, p. 127, sec. 2. Act April 24, 1874, p. 137, sec. 70. P. D. 6834, 6003.]

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| 1. What law governs. | 17. — Vehicles. |
| 2. Constitutional provisions. | 18. — Question for jury. |
| 3. Construction of statutes. | 19. Milch cows. |
| 4. Repeal of statute. | 20. Horses and wagon. |
| 5. Family. | 21. Carriage. |
| 6. — Grandparent and grandchild. | 22. Provisions and forage. |
| 7. — Unmarried persons. | 23. Wages. |
| 8. — Persons divorced or living apart. | 24. Evidence. |
| 9. — Adulterous relations. | 25. Waiver of exemptions of personal property. |
| 10. Residence in state. | 26. Wrongful levy on exempt property. |
| 11. Household furniture. | 27. Cemetery lots exempt. |
| 12. Implements of husbandry. | 28. Exemption from turnpike tolls. |
| 13. Tools and apparatus belonging to trade or profession. | 29. Setting apart homestead and other exemptions of decedent. |
| 14. — Printer and publisher | 30. Fraudulent conveyance of homestead. |
| 15. — Restaurant. | |
| 16. — Soda fountain. | |

1. What law governs.—The right of exemption is governed by the law of the forum. Missouri, K. & T. Ry. Co. of Texas v. Swartz, 53 C. A. 389, 115 S. W. 275.
 2. Constitutional provisions.—It is the duty of the legislature to protect from forced sale a certain portion of personal property belonging to families. Const. art. 16, § 49.

3. **Construction of statutes.**—Exemption statutes are liberally construed. *Cobbs v. Coleman*, 14 T. 594; *Rogers v. Ferguson*, 32 T. 533; *Helm v. Pridgen*, 1 App. C. C. § 644; *Betz v. Maier*, 12 C. A. 219, 33 S. W. 710; *Rock Island Plow Co. v. Alten* (Civ. App.) 111 S. W. 973; *Parker v. Sweet*, 127 S. W. 881; *Patterson v. English*, 142 S. W. 18.

4. **Repeal of statute.**—An exemption statute in force when a debt was contracted cannot be repealed if the repeal materially impairs the contractual obligation. *Lyon & Matthews Co. v. Modern Order of Prætorians* (Civ. App.) 142 S. W. 29.

5. **Family.**—The term "family," used in its generic sense, embraces a household composed of parents and children and other relatives or domestics and servants; in short, every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object—the promotion of their mutual interest and happiness. *Wilson v. Cochran*, 31 T. 680, 98 Am. Dec. 553.

To constitute a family the relations between its members must arise from social status, and not from mere contract; there must be a legal obligation on the head of the family to support the other members, and a corresponding dependence on their part for support. *Roco v. Green*, 50 T. 486; *Howard v. Marshall*, 48 T. 471; *Whitehead v. Nickelson*, 48 T. 517; *Wolfe v. Buckley*, 52 T. 641.

When a homestead has been once acquired, the subsequent death, marriage or removal of all the individuals who composed the family, except the surviving husband or wife, does not subject the homestead to forced sale under a judgment. *Blum v. Gaines*, 57 T. 119; *Schneider v. Bray*, 59 T. 668.

Where no constituent of the family remains, a homestead may be sold after the death of the survivor of the marital union in discharge of his debts. *Givens v. Hudson*, 64 T. 471.

A family is not constituted by adult descendants other than unmarried daughters remaining with the family of the deceased. *Givens v. Hudson*, 64 T. 471. See *Conner v. Hawkins*, 66 T. 639, 2 S. W. 520.

An exemption of personal property from forced sale while the debtor has a family does not continue in his favor after the other members of the family are dead. *Allen v. Ashburn*, 27 C. A. 239, 65 S. W. 45.

One's status as head of a family held such as to entitle him to claim a homestead. *Dinwiddie v. Tims*, 52 C. A. 72, 114 S. W. 400.

6. — **Grandparent and grandchild.**—A granddaughter, with her parents' consent, living with her grandmother and maintained and supported by her, the arrangement being terminable at the will of either, was held not to have been a constituent of her family and entitled to the homestead freed from the claims of creditors. *Phillips v. Price*, 12 C. A. 408, 34 S. W. 784. See *Clark v. Goins* (Civ. App.) 23 S. W. 703; *Roco v. Green*, 50 T. 483.

A grandmother and grandchild held to constitute a family under the meaning of the homestead exemption. *First Nat. Bank v. Sokolski* (Civ. App.) 131 S. W. 818.

A debtor who was a widow, residing with and caring for her granddaughter, a child nearly 12 years of age, held the "head of a family," and entitled to hold the property on which they lived exempt as a residence homestead. *First Nat. Bank v. Sokolski* (Civ. App.) 150 S. W. 312.

7. — **Unmarried persons.**—In the absence of a wife a family may be constituted by a single man and other persons whom he is under a legal or moral obligation to support. *Howard v. Marshall*, 48 T. 477; *Whitehead v. Nickelson*, 48 T. 517; *Roco v. Green*, 50 T. 489; *Lane v. Phillips*, 69 T. 240, 6 S. W. 610, 5 Am. St. Rep. 41; *Barry v. Hale*, 2 C. A. 668, 21 S. W. 783; *Mullins v. Looke*, 27 S. W. 926, 8 C. A. 138.

A single man, his widowed mother and a sister, living together, constitute a family. *Barry v. Hale*, 21 S. W. 783, 2 C. A. 668.

A family not constituted by a single man and a child to whom he is under no legal or moral obligation. *Mullins v. Looke*, 27 S. W. 926, 8 C. A. 138.

Property owned and occupied by a widower alone for 15 years is not a homestead, although he expected an unmarried daughter who lived abroad to make her home with him. *Davis v. Cuthbertson* (Civ. App.) 45 S. W. 426.

On death of married man leaving wife only, held, that she was entitled to exemption of a business homestead. *Evans v. Pace*, 21 C. A. 368, 51 S. W. 1094.

An unmarried woman, under a moral obligation to look after certain nephews and nieces living with her, held the head of a family, and as such entitled to a homestead exemption. *American Nat. Bank v. Cruger*, 31 C. A. 17, 71 S. W. 784.

A family composed of a man and his illegitimate daughter may assert homestead rights. *Rutherford v. Mothershed*, 42 C. A. 360, 92 S. W. 1021.

Where an obligation rests on a brother to support and take care of his sister, and there is a corresponding state of independence on her part for such support, a family relation exists within the statute exempting homesteads. *H. P. Drought & Co. v. Stallworth*, 45 C. A. 159, 100 S. W. 188.

Unless the marital relation exists, real estate owned by a man cannot be subject to the homestead laws. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

8. — **Persons divorced or living apart.**—A divorced wife cannot assert a claim for herself in the homestead of her former husband after his decease. The children of the husband, after his divorce from his wife, are constituents of his family, and entitled to the homestead exemption, although their custody had been awarded to the wife. *Hall v. Fields*, 81 T. 555, 17 S. W. 82; *Bahn v. Stacke*, 89 T. 203, 34 S. W. 103, 59 Am. St. Rep. 40; *Id.* (Civ. App.) 34 S. W. 651. See *Rogers v. Fox*, 4 App. C. C. § 85, 16 S. W. 781.

A divorced wife is entitled to a homestead in her share of community land that had not been partitioned, if she lives on it and supports her children, but not so with the husband though he worked on the property a short time as an employé and contributed a small amount to the support of the minor children. *S. W. Mfg. Co. v. Swan* (Civ. App.) 43 S. W. 813.

Divorce obtained by wife held not to affect her homestead rights in community property decreed to her and formerly occupied by her husband. *Holland v. Zilliox*, 38 C. A. 416, 86 S. W. 36.

Where plaintiff, though married, had no children, and was divorced from her husband, and thereafter her family consisted only of herself, she could not claim a homestead right in land thereafter owned by her. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

Facts held not to show an abandonment of a homestead by a husband retaining the custody of his children, notwithstanding a divorce obtained by the wife. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

A judgment of divorce, awarding the wife costs of the suit, cannot be satisfied out of the homestead of the husband, while he retains custody of the children, though the judgment awarded such custody to the wife. *Id.*

Where a marriage is dissolved by divorce, the homestead rights of the parties depend on the presence of other constituents of the family and the subsequent relations of the parties to those constituents. *Id.*

The duty of a husband to support his children, notwithstanding a divorce awarding to the wife the custody of the children, held to constitute the husband and children, when living together, a family entitled to a homestead. *Id.*

The award of the custody of the children to the wife upon granting her a divorce held not to discharge the husband's obligation to support them, so as to divest him of his homestead right as head of a family; the children in fact living with him on the homestead, and would not do so even if the children had lived apart from him. *Speer & Goodnight v. Sykes*, 102 T. 451, 119 S. W. 86, 132 Am. St. Rep. 896.

A married man is the head of a family, though he is living apart from his wife, and has attempted to secure a divorce; none having been obtained. *Ray v. Curry* (Civ. App.) 126 S. W. 26.

Property owned by one who has been divorced and has no children, so that the family consists of her alone, is not her homestead. *Comstock v. Lomax* (Civ. App.) 135 S. W. 185.

Where a divorced woman acquired hotel property by exchanging other land therefor, and lived in the hotel, which was rented to another person, but her children resided in another county, and, on borrowing money, gave a lien on the hotel property to secure the same, designating other property as her homestead, the hotel property could not be considered her homestead. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

The husband's status as head of the family is not destroyed by divorce, and hence he can claim a homestead exemption. *Shook v. Shook* (Civ. App.) 145 S. W. 682.

A district court, in a divorce action, cannot subject the husband's interest in the homestead to the payment of claims by the wife for counsel fees and reimbursement for community debts paid out of her separate property. *Id.*

9. — **Adulterous relations.**—The benefit of the homestead law cannot extend to a man and woman living together in adultery. But a natural obligation rests on the father of illegitimate children to support them, and they living with him may constitute such a family as may assert homestead rights. *Lane v. Phillips*, 69 T. 240, 6 S. W. 610, 5 Am. St. Rep. 41; *Gay v. Halton*, 75 T. 203, 12 S. W. 847.

To constitute a homestead within the statute, there must be a family, and the family must exist by authority of law, and not in violation thereof. *Middleton v. Johnston* (Civ. App.) 110 S. W. 789.

Where a woman and her putative husband were living together illegally at the time he bought certain property, they did not constitute a family within the meaning of the homestead law, so as to permit such property being declared homestead property, and a conveyance of the land by him was not void because she did not join therein. *Id.*

10. **Residence in state.**—A nonresident who is the head of a family, and who owns exempt property which he brings into the state temporarily, is entitled to claim the property as exempt. *Carroll v. First State Bank of Denison* (Civ. App.) 148 S. W. 818.

11. **Household furniture.**—The exemption of household and kitchen furniture includes only furniture for the family, and will not include beyond this furniture used in hotels and restaurants. *Heidenheimer v. Blumenkron*, 56 T. 308; *Frank v. Bean*, 3 App. C. C. § 211.

The statute embraces all necessary, convenient or ornamental articles with which a household is equipped, and may include a piano used for the instruction of children in music. *Alsop v. Jordan*, 69 T. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

A piano is "household and kitchen furniture," when used as furniture in house-keeping. It is not exempt when placed in the salesroom of a music dealer for sale. *McCoy v. Thompson* (Civ. App.) 138 S. W. 1062.

12. **Implements of husbandry.**—What constitutes an implement of husbandry is a question of fact to be submitted to the jury. *Henry v. McLean*, 1 App. C. C. § 1079. As to the exemption of a mowing machine and threshing machine, see *Tucker v. Napier*, 1 App. C. C. § 670. A mill and gin with their machinery are not exempt, unless they are a part of exempt realty. *Cullers v. James*, 66 T. 494, 1 S. W. 314.

13. **Tools and apparatus belonging to trade or profession.**—The business of saddle, harness and collar making is a trade. *Nichols v. Porter*, 26 S. W. 859, 7 C. A. 302; *Green v. Raymond*, 58 T. 80, 44 Am. Rep. 601; *Cone v. Lewis*, 64 T. 331, 53 Am. Rep. 767, *Alsop v. Jordan*, 69 T. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

The word "trade" includes commercial and mechanical pursuits and business occupations, with the possible exception of the learned professions, the liberal arts and agriculture. The word "profession" is defined to be the occupation, not mechanical, agricultural or the like, to which one devotes himself. *Betz v. Maier*, 12 C. A. 219, 33 S. W. 710. See cases cited.

14. — **Printer and publisher.**—The printing press, type and cases needed in a printing office and owned by an editor and publisher of a newspaper are exempt. *Green v. Raymond*, 58 T. 80, 44 Am. Rep. 601.

The tools and apparatus of a job printer exempt. *St. Louis Type Foundry v. Taylor* (Civ. App.) 35 S. W. 691.

15. — **Restaurant.**—The furniture of a restaurant, such as lunch counter, shelving, stools, stove, cooking utensils, dishes, etc., is not exempt under this article, and there-

fore insurance money due for its loss is subject to garnishment. *Simmang v. Penn. Fire Ins. Co.*, 102 T. 39, 112 S. W. 1045, 132 Am. St. Rep. 846, reversing *Geise v. Pennsylvania Fire Ins. Co.* (Civ. App.) 107 S. W. 555.

16. — **Soda fountain.**—A soda fountain is not a tool or apparatus belonging to a trade or profession and is not exempt from execution under this article and Art. 3788. *McCord-Collins Co. v. Lazarus* (Civ. App.) 50 S. W. 1048.

17. — **Vehicles.**—Draymen and cartmen are protected in the possession of their vehicles. *Cone v. Lewis*, 64 T. 331, 53 Am. Rep. 767.

18. — **Question for jury.**—Whether property is exempt depends on the evidence and is a question of fact for the jury. *Tucker v. Napier*, 1 App. C. C. § 670. See, also, notes under Art. 1971, § 82.

19. **Milch cows.**—A heifer bought by a debtor with the bona fide intention that it should be raised and bred is exempt. Heifers which had never been milked, but which were with calf when the levy was made, and which the debtor, who was the head of the family, was keeping as his milch cows, are exempt. *Patterson v. English* (Civ. App.) 142 S. W. 18.

20. **Horses and wagon.**—Under the ninth clause, geldings, mares or mules intended for family use are exempt. *Allison v. Brookshire*, 35 T. 199; *Robinson v. Robertson*, 2 App. C. C. § 254.

Two colts that have never been used for family purposes can be selected as the two horses exempted by the above article. *Hall v. Miller*, 21 C. A. 336, 51 S. W. 36.

If husband have in his possession four horses, two the separate property of his wife and two community, or his separate property, he can select for purpose of exemption the two not the separate property of his wife and his creditors could not complain. *McClelland v. Barnard*, 36 C. A. 118, 81 S. W. 592.

21. **Carriage.**—An automobile is a carriage. *Parker v. Sweet* (Civ. App.) 127 S. W. 881; *Peevehouse v. Smith*, 152 S. W. 1196.

22. **Provisions and forage.**—Cotton on hand is not included in either the term "provision" or "forage," and is not exempt from forced sale. *Seligson v. Staples*, 1 App. C. C. § 1072.

Corn necessary for home consumption, and exempt, is not made subject to levy because the debtor owned 100 hogs, instead of 20, the number exempt from execution. *Burris v. Booth* (Civ. App.) 40 S. W. 186.

On an issue of whether wheat attached was exempt, held, the court should have followed the language of the statute, exempting provisions and forage for home consumption. *Bell v. Fox*, 37 C. A. 522, 84 S. W. 384.

23. **Wages.**—See, also, *Childress v. Franks* (Civ. App.) 44 S. W. 868.

Past-due wages left with employer because they cannot be collected held "current wages," and exempt. But past-due wages voluntarily left with employer held not "current wages," and not exempt. *Davidson v. F. H. Logeman Chair Co.* (Civ. App.) 41 S. W. 824.

24. **Evidence.**—Where the garnishee admitted the indebtedness to the debtor, the burden was upon the debtor to establish a plea that the fund in the garnishee's hands was exempt. *Lyon & Matthews Co. v. Modern Order of Praetorians* (Civ. App.) 142 S. W. 29.

25. **Waiver of exemptions of personal property.**—Where a reservation of a lien on exempt personal property by partitioners was intended to indemnify them as garnishees only, such reservation did not affect plaintiff's right to an exemption against other creditors. *Rogers v. Fuller* (Civ. App.) 142 S. W. 68.

Where partitioners of decedent's personal property delivered plaintiff's share to him conditionally on his agreement to return the same if necessary to satisfy a garnishment, the partitioners could assert their right to the property only on proof that they had discharged the liability, in which case they would be entitled only to foreclose their lien, and hence plaintiff's creditors could not acquire the rights of partitioners by a sale of the property under execution against plaintiff and against partitioners as garnishees. *Id.*

26. **Wrongful levy on exempt property.**—See, also, notes at end of Title 54.

The husband and wife may jointly sue for damages for the seizure of property under execution exempt from forced sale. *Cunningham v. Coyle*, 2 App. C. C. § 422, citing *Cradock v. Goodwin*, 54 T. 578; *Neeper v. Irons*, 3 App. C. C. § 185.

27. **Cemetery lots exempt.**—See Art. 767.

28. **Exemption from turnpike tolls.**—See Art. 1275.

29. **Setting apart homestead and other exemptions of decedent.**—See Title 52, Chapter 18.

30. **Fraudulent conveyance of homestead.**—See notes under Art. 3966.

Art. 3786. [2396] [2336] "Homestead" defined.—The homestead of a family, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, consisting of a lot or lots, not to exceed in value five thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; provided, also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired. [Acts 1897, p. 131.]

1. But one homestead allowed.
2. Effect of having other property.
3. Estate or interest sustaining homestead right.
4. — Building.
5. — Leasehold.
6. — Life estate.
7. — Mortgaged land.
8. — Tenants in common.
9. — Partnership property.
10. Intent to acquire homestead.
11. Use and occupation as homestead necessary.
12. — Character and mode of use or occupancy.
13. Purpose of occupancy and use.
14. — Illegitimate business.
15. — Business homestead.
16. Character of homestead as urban or rural.
17. — Extent and value of homestead.
18. — Homestead in town or village.
19. — Extension of corporate limits.
20. Separate tracts or lots.
21. Part of building.
22. Time of acquisition of homestead.
23. Change of homestead.
24. Evidence of homestead right.
25. Crops on homestead.
26. Rents and royalties.
27. Abandonment of homestead.
28. — Consent of wife.
29. — Absence from homestead and other acts.
30. — Intent to return to homestead.
31. — Acquiring other residence or homestead.
32. — Conveyance or sale.
33. — Renting or leasing.
34. — Waiver.
35. — Evidence.
36. Estoppel to claim homestead.
37. Conveyance or incumbrance of homestead.
38. — How made.
39. — Agreement as to boundaries.
40. — Sale.
41. — Conveyance between husband and wife.
42. — Mortgage.
43. — Mortgage by unmarried debtor.
44. — Effect of abandonment or termination of homestead right.
45. — Excess over homestead.
46. — Consent of wife.
47. — Estoppel to deny validity.
48. — Rights of purchasers or mortgagees.
49. — Rights of bona fide purchasers.
50. Testamentary disposition of exemption.
51. Effect of levy and forced sale of homestead.
52. Judgment as lien against homestead.
53. Rights of surviving husband, wife, children or heirs.

See *Andrews v. Hagadon*, 54 T. 571; *Peregoy v. Kottwitz*, 54 T. 497; *Kaufman v. Fore*, 73 T. 308, 11 S. W. 278; *Harle v. Richards*, 78 T. 80, 14 S. W. 257; *Russell v. Nalle*, 20 S. W. 1006, 23 S. W. 901, 2 C. A. 60.

1. But one homestead allowed.—Homestead rights cannot be so blended that exemptions can be partly in town and partly in the country. One occupying a rural homestead cannot claim his place of business in a town as exempt. *Swearingen v. Bassett*, 65 T. 267; *Iken v. Olenick*, 42 T. 195; *Rogers v. Ragland*, 42 T. 122; *First National Bank v. Walsh* (Civ. App.) 26 S. W. 1113.

One cannot at the same time have an urban and a rural homestead. *Lauchelmer v. Saunders*, 19 C. A. 392, 47 S. W. 543; *Dillard v. Cochran* (Civ. App.) 153 S. W. 662.

Const. Art. 16, § 51, provides that a "homestead" in a city, town, or village shall consist of a lot or lots not to exceed in value \$5,000 at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided the same be used for the purposes of a home or as a place to exercise the calling or business of the head of the family. Held, that such provision exempts to the head of a family but one homestead. *Harrington v. Mayo* (Civ. App.) 130 S. W. 650.

2. Effect of having other property.—The fact that a person claiming a homestead had other property held not to conclude him from setting up such a claim. *Furtner v. Edgewood Distilling Co.*, 16 C. A. 359, 41 S. W. 184.

3. Estate or interest sustaining homestead right.—A homestead may be established on property held by tenants in common, but not to prejudice the right of the co-tenant. *Clements v. Lacy*, 51 T. 150; *Swearingen v. Bassett*, 65 T. 267; *Luhn v. Stone*, 65 T. 439.

A homestead right of the wife attaches to any interest in land owned by husband and wife in common or by either separately. Such a right will attach to an equitable estate, an estate for life, or to a leasehold interest. *Baines v. Baker*, 60 T. 139; *Freeman v. Hamblin*, 1 C. A. 157, 21 S. W. 1019.

While the title of a vendee who has not paid for land occupied by him as homestead is not good as against his vendor, as against all others his title is good. *Lee v. Welborne*, 71 T. 500, 9 S. W. 471.

The homestead right will attach to an equitable estate, an estate for life, or a leasehold interest. *Phillips v. Warner*, 4 App. C. C. § 147, 16 S. W. 423.

The wife's homestead rights attach to separate property of the husband when occupied, equally as if it were community. *Freeman v. Hamblin*, 1 C. A. 157, 21 S. W. 1019.

Possession of improvement and payment of price under parol sale of land give vendee a title to which a homestead may attach. *Dotson v. Barnett*, 18 C. A. 253, 41 S. W. 99.

Where vendor's lien notes on land which became a homestead after delivery of the notes are paid, the homestead rights of the maker's wife attach. *James v. Daniels* (Civ. App.) 43 S. W. 26.

Where land had been occupied adversely by a husband and wife as a homestead for 10 years, it could not be disposed of by the husband without the consent of the wife. *Hennessy v. Savings & Loan Co.*, 22 C. A. 591, 55 S. W. 124.

Where real estate is conveyed in trust for children, and a life estate retained by husband and wife, a sufficient interest therein was retained to enable them to establish a homestead on the land. *Silverman v. Landrum* (Civ. App.) 56 S. W. 107.

Evidence considered, and held, that a homestead right could not attach to property deeded with a reservation of a life estate, during the life of the life tenant. *Hampton v. Gilliland*, 23 C. A. 87, 56 S. W. 572.

Intention of remainder-man to occupy land as homestead on expiration of life estate will not give homestead right. *Loessin v. Washington*, 23 C. A. 515, 57 S. W. 990.

Where a husband and wife have held peaceable adverse possession of realty for 10 years, cultivating and enjoying the same, the wife's title thereto cannot be impaired by

the husband's executing a lease of it without the wife's knowledge. *Williams v. City of Galveston* (Civ. App.) 53 S. W. 551.

A homestead right can be asserted, as against all but the state, by a purchaser of school lands, though part of the price is not paid. *Gibbons v. Hall* (Civ. App.) 59 S. W. 814.

Homestead right held to have attached to premises, prior to an incumbrance by the husband, so that the wife's interest could not be divested without a conveyance in which she joined, or by abandonment. *Texas Land & Mortg. Co. v. Cooper* (Civ. App.) 67 S. W. 173.

It is not necessary that a debtor should hold an assignable interest in land to claim an exemption thereof as his homestead. *Birdwell v. Burleson*, 31 C. A. 31, 72 S. W. 446.

That property to which defendants held title and occupied as their homestead was not paid for did not affect their homestead rights, except as against the vendor or the holder of a prior lien. *Powars v. Palmer*, 36 C. A. 212, 81 S. W. 817.

A conveyance to complainant in fee simple with a condition subsequent is sufficient to support his claim that the property is exempt as homestead. *Tracy v. Harbin*, 40 C. A. 395, 89 S. W. 999.

A wife is not entitled to homestead in land on which she resides, where her husband has never been the legal or equitable owner thereof. *Elam v. Carter*, 55 C. A. 649, 119 S. W. 914.

The adverse possession by husband and wife with a view of acquiring title to a homestead creates only an inchoate right to the land, and at any time before the title is perfected the possession may, regardless of the consent of the wife, be interrupted, and the rights thereunder surrendered by the husband alone. *Coler v. Alexander* (Civ. App.) 128 S. W. 664.

Homestead rights cannot be created in real estate in favor of a trustee as against the cestui que trust. *Keller v. Keller* (Civ. App.) 141 S. W. 581.

4. — **Building.**—A house, although the owner has no interest or estate in the land on which it stands, is exempt as the home of the family or a place of business. *Cullers v. James*, 66 T. 494, 1 S. W. 314.

5. — **Leasehold.**—The following charge defines a homestead in the leasehold interest in land: "If you believe from the evidence that plaintiff rented for the year 1887 the land on which the growing cotton which was sold under defendant's execution was raised, and was also a tenant on said land, and that said land was the homestead of himself and family for that year and occupied as such, though for only one year, then the said growing crop, under the law, would be exempt as a growing crop on his homestead, not subject to sale under defendant's execution." *Phillips v. Warner*, 4 App. C. C. § 147, 16 S. W. 423.

A house built on leased land and occupied by the family as a residence is an exempt homestead. *Anheuser B. B. Ass'n v. Smith* (Civ. App.) 26 S. W. 94.

One may have a homestead in land, though he has only a leasehold interest therein. *Allen v. Ashburn*, 27 C. A. 239, 65 S. W. 45.

A tenant may claim a homestead in premises occupied under a lease, which gives him an "estate" in the premises. *Ellis v. Bingham* (Civ. App.) 150 S. W. 602.

6. — **Life estate.**—The fact that a debtor was insolvent when he purchased land, and had title to the same conveyed to his children, with a life estate only in himself, held not to affect his homestead exemption. *Brown v. Rash*, 40 C. A. 203, 89 S. W. 438.

The owner of a life estate in land may assert a homestead therein. *Powell v. Ott* (Civ. App.) 146 S. W. 1019.

7. — **Mortgaged land.**—A homestead may be designated upon mortgaged land. *McGaughey v. American Nat. Bank*, 41 C. A. 191, 92 S. W. 1003.

8. — **Tenants in common.**—The head of a family, residing on a tract of 50 acres of land situated a mile distant from another tract of 246 acres, which also belongs to him, a part of which is in cultivation, may claim as homestead the land on which he resides, and as much of the other as will make up the 200 acres exempted by law. That the larger survey is held as tenant in common does not prevent the homestead from being established upon it, subject to the rights of the cotenant. *Clements v. Lacy*, 51 T. 150; *Morgan v. Estate of Morgan*, 1 U. C. 400.

The exemption attaches to the homestead interest in an undivided tract of land. If the land is sold for partition, the exemption would attach to and protect the proceeds of sale made for partition to the extent of the homestead value. *Jenkins v. Voltz*, 54 T. 636.

A deed of trust was executed by two persons to secure a debt for which both were bound. The land conveyed was, at the time of the execution of the trust deed, owned jointly by the debtors. Afterwards one purchased the interest of the other and died, when his widow claimed homestead rights in the entire property. Held, that such rights attached only to the interest owned by her deceased husband at the time the trust deed was executed; second, improvements made by the decedent with the separate funds of his wife upon the property entitled her to protection pro tanto; third, all children of the deceased party were necessary parties to the action by the creditor seeking an enforcement of the trust on the property; fourth, partition should be made in such manner as to protect the interests of all the parties in the property. *Griffie v. Maxey*, 58 T. 210.

M. owned an undivided interest of one-third in a tract of land containing 300 acres, and claimed the same as his homestead. M.'s interest in the land having been sold under a judgment against him, the purchaser claimed that M.'s homestead interest was restricted to the 200 acres of land which included his improvements, and did not extend to his undivided interest in the remaining 100 acres. Held, that the homestead interest extended through the entire tract and was protected from forced sale. *Brown v. McLennan*, 60 T. 43, citing *Jenkins v. Voltz*, 54 T. 639; *Clements v. Lacy*, 51 T. 161. See, also, *Luhn v. Stone*, 65 T. 439.

When on a rural homestead improvements are made at the joint expense of two tenants in common, the homestead being occupied as such by only one of them, the occupant is entitled to 200 acres, embracing the homestead improvements, and his cotenant would be entitled to an allowance for the amount expended by him in making such improvements. *Lewis v. Sellick*, 69 T. 379, 7 S. W. 673.

A tenant in common, who establishes and improves a homestead on the common property, is entitled in partition to have allotted to him the portion of the land so improved, or so much of it as may be equal in value to his share of the entire tract, independent of the improvements. *Parr v. Newby*, 73 T. 468, 11 S. W. 490; *Clements v. Lacy*, 51 T. 156; *Jenkins v. Volz*, 54 T. 639.

The head of a family is entitled, as against creditors, to a full 200-acre homestead, with improvements, out of a 400-acre tract in which he has an undivided half interest. *Carroll v. Jeffries*, 39 C. A. 126, 87 S. W. 1050.

Owner of undivided half interest in 400 acres of land, whose homestead of 160 acres equals the other 240 acres in value, has no interest in 40 additional acres. *Id.*

Homestead rights of tenant in common stated. *Griffin v. Harris*, 39 C. A. 586, 88 S. W. 493.

A tenant in common may acquire a homestead in land owned in common with others. *Powell v. Ott* (Civ. App.) 146 S. W. 1019.

9. — **Partnership property.**—A partner in a solvent firm may designate his interest in partnership realty as a part of his homestead, either as a residence or place of business. *Swearingen v. Bassett*, 65 T. 267.

A partner held entitled to a homestead in firm lands, subject to rights of copartners. *Gordon v. McCall*, 20 C. A. 283, 48 S. W. 1111.

As against the creditors of a firm, a partner who has built a house and resides on firm lands may select a homestead, including his improvements. *Williams v. Meyer* (Civ. App.) 64 S. W. 66.

One partner, without consent of the other, cannot select a homestead out of two tracts belonging to the firm in an irregular form, so as to include all the improvements on both tracts. *Id.*

One partner, residing on the firm property which is used for milling purposes, cannot, without his copartner's assent, select a homestead therein, so as to include the mill and its fixtures. *Allen v. Meyer* (Civ. App.) 65 S. W. 645.

A person, residing on partnership lands with his copartner's consent, can claim a homestead in such land. *Id.*

10. **Intent to acquire homestead.**—A designation of premises, accompanied by acts of preparation and followed by residence, will protect the homestead; but until the homestead rights are vested the intention may be abandoned. *Kempner v. Comer*, 73 T. 196, 11 S. W. 194.

Homestead rights attach to a lot that is purchased with the intention of improving it as a home and fenced and shade trees planted and sidewalks built. *Bell et al. v. Great-house*, 20 C. A. 478, 49 S. W. 258.

Land held to be a widower's homestead, where he lived on it, while intending to make it a home for himself and a minor child when he got through school in another state. *Crenshaw v. Bray* (Civ. App.) 50 S. W. 623.

The grantor of a deed of trust held not to have had homestead rights in property conveyed; and hence his subsequent conveyance thereof, after foreclosure of such trust deed, passed no title. *Milmo Nat. Bank v. Hirsch* (Civ. App.) 54 S. W. 781.

Answers of jury to special interrogatories in an action to recover realty, sold under execution and claimed by plaintiff as a homestead, held to sustain judgment for plaintiff. *Foley v. Holtkamp*, 28 C. A. 123, 66 S. W. 891.

House and lot purchased by a married man held to constitute his homestead. *Hardin v. Neal*, 32 C. A. 335, 74 S. W. 334.

Property of a husband during his lifetime can only be set apart as a homestead by acts of his indicating an intention to so designate the property. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

Statement of what must be shown to sustain right to homestead, where the property was not actually occupied when the claim arose. *Dinwiddie v. Tims*, 52 C. A. 72, 114 S. W. 400.

Elements of intention necessary to impress on unoccupied premises a homestead character under the Constitution, stated. *Parker v. Cook*, 57 C. A. 234, 122 S. W. 419.

The act of a husband residing in Oklahoma in secretly leaving his wife, and going with their children to Texas, where he purchased land and resided on it with the children for about 15 months, when he sold it to defendant, indicated an intent to impress the land with the character of a homestead, so that the wife was entitled to the benefit thereof on her discovery of the whereabouts of the husband and children after the husband has sold the land. *Crutcher v. Sanders* (Civ. App.) 145 S. W. 658.

11. **Use and occupation as homestead necessary.**—The use of property as a home must co-exist with the intention that it shall be a home to invest it with the homestead character. *Fort v. Powell*, 59 T. 321; *Lone Star Brewing Co. v. Felder* (Civ. App.) 31 S. W. 524.

Where a family occupy a homestead, the homestead right will not attach to another tract of land purchased and improved with the intention to occupy it as a residence at some future time. *Bray v. Aikin*, 60 T. 688.

Where there has been no previous occupation of land as a homestead, to invest it with that quality it is essential that there be an existing bona fide intention to dedicate the property as a homestead, accompanied with such acts of preparation and subsequent occupation as will amount to notice of a dedication. *Gardner v. Douglas*, 64 T. 76, citing *Franklin v. Coffee*, 18 T. 417, 70 Am. Dec. 292; *Barnes v. White*, 53 T. 628; *Brooks v. Chatham*, 57 T. 31; *Swope v. Stantzenberger*, 59 T. 390; *Sowers v. Peterson*, 59 T. 216; *Burgher v. Henderson*, 9 C. A. 521, 29 S. W. 522.

The occupation of real estate by husband and wife with an existing intention to make it their permanent residence constitutes it their homestead without regard to the duration of such occupancy. A subsequent removal with no intention of abandonment does not defeat the homestead rights, even when a purchaser had no notice of former occupancy. *Parr v. Newby*, 73 T. 468, 11 S. W. 490.

A head of a family occupying a house and lot in a town under a five years' lease cannot establish a homestead right in rural property never occupied by him by improvements made with reference to its future use as a residence, so as to defeat a mortgage thereon executed by him. *Johnston v. Martin*, 81 T. 18, 16 S. W. 550.

Dedication of unoccupied land as a homestead is not shown by the erection of a building thereon, the intention to so use and occupy it not being otherwise shown. *Collier v. Betterton*, 29 S. W. 490, 8 C. A. 479.

A homestead is not established by an intention to occupy land as such, accompanied by trifling acts of preparation. *Bente v. Lange*, 29 S. W. 813, 9 C. A. 328; *Wolf v. Butler*, 28 S. W. 51, 8 C. A. 468.

A homestead is not dedicated by a mere intention to occupy the land as such. *Adams v. Kaufman*, 11 C. A. 179, 32 S. W. 712.

To constitute a homestead, there must be actual occupancy as such or present intent to so occupy and acts indicating such intent. *Wilkerson v. Jones* (Civ. App.) 40 S. W. 1046.

A woman after her second marriage, moved off of some property inherited from her first husband, who never lived upon it, and her sons remained in possession. When she died she left the property to her sons, who claimed it as their mother's homestead. Held, such property is not exempt from the payment of decedent's debts, as it was not her homestead. *Craddock v. Burlison*, 21 C. A. 250, 52 S. W. 644.

That husband and wife intend to live on certain land as their homestead does not make it their homestead before they occupy or improve it. *Muckelroy v. House*, 21 C. A. 673, 52 S. W. 1038.

An intention to occupy property at a future time as a homestead held not to create a homestead right. *O'Brien v. Woeltz*, 94 T. 148, 53 S. W. 943, 86 Am. St. Rep. 829.

The intention of a householder and his wife to move onto a farm owned by them when they were able to build thereon was not sufficient to impress the farm with the character of a homestead. *George v. Ryon* (Civ. App.) 61 S. W. 138.

Land not used and claimed as a homestead held not to be treated as such, to the exclusion of land so used, when the owner mortgaged the latter land, though he made oath it was not his homestead. *Temple v. Watkins Land Co.* (Civ. App.) 81 S. W. 1188.

Mere intent to make certain land a home in the future held insufficient to render it exempt as homestead property. *Johnson v. Burton*, 39 C. A. 249, 87 S. W. 181.

Certain property, never having been occupied by a husband and wife as a family residence, held not to have constituted a homestead as a matter of law. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

A party sold his saloon business for \$1,800, part in cash and notes and \$400 in a piece of land with house on it, in which he never lived but said he intended it for a homestead, but he did no act showing an intention to so use it. Under the circumstances the property was not exempt as a homestead from forced sale. *McGovern v. Talaferro* (Civ. App.) 112 S. W. 815.

Lots intended for a homestead held not subject to a mortgage executed by the owner and his wife. *Houston Ice & Brewing Co. v. J. M. Sharp & Co.* (Civ. App.) 114 S. W. 180.

Under the constitutional provision relating to homesteads on premises not in a city, and providing that the homestead shall be used for the purpose of a home or a place to exercise the calling of the head of the family, a carpenter, who avows his intention of working at his trade, refusing to reside on the farm because he cannot make a living on it, and who does not intend to occupy it until he can pursue his calling in the vicinity of the homestead so as to enable him to support his family, and whose only excuse for not occupying the premises is its unfitness to make a living on, and who delays settling on the premises for almost a year before an action to enjoin the levy of an execution against the property to satisfy a judgment against him, cannot claim a homestead in such action. *Parker v. Cook*, 57 C. A. 234, 122 S. W. 419.

A lot of land purchased by a debtor's wife with an intent to erect a music room, to be used in connection with the debtor's teaching business and conveyed to him, held not to constitute a part of the debtor's business homestead. *Harrington v. Mayo* (Civ. App.) 130 S. W. 650.

If one has never lived on property, a secret intent to occupy it as a home at some indefinite time in the future would not invest it with a homestead character; but, if he bought it to make a home thereon, he will be allowed a reasonable time to make necessary arrangements to occupy it as such; but his intent to so occupy it must be shown by acts of preparation begun with reasonable promptness, and its occupancy cannot be delayed beyond a reasonable time. *Parsons v. McKinney* (Civ. App.) 133 S. W. 1084.

Where the owners of land did not live upon it, and rented it out, and there was no house thereon, a mere vague intention to make it a homestead in the future cannot render it such. *Wiseman v. Watters* (Civ. App.) 142 S. W. 134.

Though when one exchanged his house for wild, unimproved land he declared an intention to subsequently make it his home, and afterwards, while trying to sell it, stated that if he did not sell it he intended some time to live on it, yet, he having done nothing to improve it, and been prevented by various circumstances from moving on it, he could not claim it was a homestead. *Black v. Hanz* (Civ. App.) 146 S. W. 309.

Plaintiffs in trespass to try title could not assert a homestead exemption in land which they had never used or occupied as a homestead. *Cook v. Houston Oil Co.* of Texas (Civ. App.) 154 S. W. 279.

12. — Character and mode of use or occupancy.—A lot adjoining a lot used for a homestead is not thereby exempt, unless it is also used as a part of the homestead. *Andrews v. Hagadon*, 54 T. 571; *Peregoy v. Kottwitz*, 54 T. 497.

An uninclosed lot in a city on which the owner occasionally stakes out his horse or calf, exercising no greater exclusive use than he could make of the uninclosed property of others, does not bring the lot within the homestead exemption. *Effinger v. Cates*, 61 T. 590.

Where a part of a lot is separated by a fence from that which is occupied as a homestead, and is rented out under circumstances showing that it was the intention of the owner to rent it permanently, accompanied by the execution of a deed of trust thereon, with a declaration of abandonment of the homestead right, it is not exempt. *Stringer v. Swenson*, 63 T. 7. See *Medlenka v. Downing*, 59 T. 32.

The former occupancy of other property as a home, which may be still owned by husband and wife, becomes immaterial, if at the time of the levy the property seized under

execution was actually occupied and used as the home residence. *Ingle v. Lee*, 70 T. 609, 8 S. W. 325.

A married man with family owned two adjoining lots under one inclosure. He leased one of the lots, upon which was a house. Becoming involved, he obtained possession of the leased lot and appropriated it to home uses. He had the legal right to do so, for the purpose of withdrawing it from liability for his debts, if done before a lien upon it was fixed by his creditors. *Milburn Wagon Co. v. Kennedy*, 75 T. 212, 13 S. W. 28.

A lot selected for a home, upon which improvements are commenced, does not lose its exemption by reason of temporary absence. *Dobkins v. Kuykendall*, 81 T. 180, 16 S. W. 743.

K., having a wife and children, owning no land, bought an unimproved tract for a home. At once they selected the place thereon for the house, laid a stone foundation, and hauled logs for the dwelling. Being unable to complete it they rented land elsewhere; the husband and wife parted; the wife and children returned to the land. Held, the testimony showed facts sufficient to complete the homestead rights. *Id.*

Vacant lots are impressed with the homestead character by an intention and preparation to use them as a home. *Cameron v. Gebhard*, 85 T. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; *Gallagher v. Keller*, 87 T. 472, 29 S. W. 647; *Id.*, 4 C. A. 454, 23 S. W. 296; *King v. Wright (Civ. App.)* 33 S. W. 530.

Improvements on a lot preparatory to its occupancy, with intention to occupy it, evidence of homestead rights. *Gallagher v. Keller (Civ. App.)* 30 S. W. 248.

Homestead rights cannot attach to several separate and distinct houses, although each may at some time have been occupied by the owner as a residence. *Hendrick v. Hendrick*, 13 C. A. 49, 34 S. W. 804.

The mere depositing of dirt upon a lot to fill depressions is not such an act of preparation as will, in connection with intention, give it the homestead character. *Churchwell v. Sweeney*, 29 C. A. 166, 68 S. W. 185.

It is not essential to constitute a homestead that the parties asserting it shall have actually moved part of their belongings thereon. *Davidson v. Jefferson (Civ. App.)* 68 S. W. 822.

Defendant's possession of land awarded to one of his minor children by a partition decree held to exempt that part of the tract inherited by him through the death of one child as his homestead. *Birdwell v. Bursleson*, 31 C. A. 31, 72 S. W. 446.

A tract of land held as a matter of law not to be the homestead of the owner. *Ryon v. George*, 32 C. A. 504, 75 S. W. 48.

Certain property held used "for purposes of the home" and a part of the homestead. *Lacour v. L. W. Levy & Co.*, 49 C. A. 163, 108 S. W. 190.

Property upon which a materialman's lien was attempted to be fixed held the owner's homestead, so that the liens were void. *Republic Guaranty & Surety Co. v. Wm. Cameron & Co. (Civ. App.)* 143 S. W. 317.

13. Purpose of occupancy and use.—Where a detached lot is continuously used in connection with the home residence so as to contribute to the comfort of the home place, as for a pasture or stable in which to keep the domestic animals of the family, it is invested with the homestead character. *Axer v. Bassett*, 63 T. 545; *Blum v. Whitworth*, 66 T. 350, 1 S. W. 108; *Effinger v. Cates*, 61 T. 590; *Little v. Baker (Civ. App.)* 26 S. W. 305.

A person occupying land in which he has an inheritable interest, and continuing to occupy it after descent cast, with a manifest intention to appropriate it as a homestead, accompanied by acts illustrating his purpose, acquires a homestead interest therein, which will attach to such portion of the land as may be set apart to him, on partition, with the other heirs. *Crabtree v. Whiteselle*, 65 T. 111; *Luhn v. Stone*, 65 T. 439.

Lots in a block in a town or city not actually improved or used in connection with the homestead are not exempt. *Wynne v. Hudson*, 66 T. 1, 17 S. W. 110; *Blum v. Rogers*, 78 T. 531, 15 S. W. 115; *Langston v. Maxey*, 74 T. 155, 12 S. W. 27; *Cullum v. Price (Civ. App.)* 23 S. W. 711.

The mill house of a miller with the land upon which it is situated, the mill yard and adjacent outhouses used in connection therewith are exempt. *Maroney Hardware Co. v. Connellee (Civ. App.)* 25 S. W. 448.

A part of a house standing upon lots exempted as a homestead cannot be subjected to forced sale on the ground that such part is leased or rented for other purposes. *Forsgard v. Ford*, 87 T. 185, 27 S. W. 57, 25 L. R. A. 155.

The use of land in a city, detached from that on which the family resides, to raise products for home consumption, is a use of such property for the purposes of a home. *Waggner v. Haskell*, 13 C. A. 630, 35 S. W. 711; *Steves v. Whitaker (Civ. App.)* 38 S. W. 1026.

Evidence held to show that certain premises were a homestead, notwithstanding there were two tenements thereon, one of which was rented. *Storrie v. Woessner (Civ. App.)* 47 S. W. 837.

A lot on which the owner built a residence, which she rented for 15 years, to obtain revenue to live elsewhere, is not a homestead. *McDonald v. Ortiz (Civ. App.)* 50 S. W. 478.

The principal use to which land is applied determines its character. Where house is built for and let to tenants though a part of the lot on which it is built is used as a garden for ornamentation and for ingress and egress to the dwelling house, such user does not make it a homestead. *Heatherly v. Little*, 21 C. A. 664, 52 S. W. 980.

So much of a lot adjacent to the owner's residence as is occupied by his barn is a part of his homestead. *Wurzbach v. Menger*, 27 C. A. 290, 65 S. W. 679.

The use made of land may determine its character, as to whether it is a homestead or not. *Harris v. Matthews*, 36 C. A. 424, 81 S. W. 1198.

Where a person is possessed of several different parcels of land, aggregating over 200 acres, all of which are used for the purpose of a home, he has the right to designate any 200 acres thereof as his homestead, though the use may be a mere convenience and produce little or no revenue. *Pickett v. Gleed*, 39 C. A. 71, 86 S. W. 946.

Part of a lot adjoining a homestead was segregated from it and cannot be claimed as exempt, where that part had been improved and leased for business purposes, and the only use of it by the family was to occasionally store a few articles of household

furniture, and brief use as a cigar factory. *Blair v. Park Bank & Trust Co.* (Civ. App.) 130 S. W. 718.

The principal use of land must be considered in determining whether it is exempt as a homestead. *Id.*

14. — **Illegitimate business.**—A place where business prohibited by the penal laws, such as gaming, is conducted, is not protected; and, even if legitimate, was also conducted simply to conceal that which was illegal. *Tillman v. Brown*, 64 T. 181; *Chase v. Swayne*, 88 T. 218, 30 S. W. 1049, 53 Am. St. Rep. 742.

15. — **Business homestead.**—Where a lot in a town is occupied as a place of business, another lot used in a way incidentally useful or profitable in carrying on such business will not exempt it from forced sale. *McDonald v. Campbell*, 57 T. 614.

The constitution of 1876 extended the exemption to the place of business of the head of the family. *Inge v. Cain*, 65 T. 75; *Miller v. Menke*, 56 T. 539; *Wright v. Straub*, 64 T. 64; *Wynne v. Hudson*, 66 T. 1, 17 S. W. 110. The constitution of 1876 places only two limitations upon property exempt as a place of business. The lot shall not exceed \$5,000 in value, and it shall be used as a place to exercise the calling or business of the head of the family. It may be used as a residence and place of business. *Tenny v. Wessell* (Civ. App.) 26 S. W. 436. Neither the value of the improvements placed upon it, nor the nature and extent of the operations carried on there, will subject it to forced sale, and all machinery annexed to the freehold, so as to become a part of the realty, becomes exempt as part of the homestead. *Willis v. Morris*, 66 T. 628, 1 S. W. 799, 59 Am. Rep. 634; *Wynne v. Hudson*, 66 T. 1, 17 S. W. 110; *Shryock v. Latimer*, 57 T. 677; *Hargadene v. Whitfield*, 71 T. 489, 9 S. W. 475; *Pfeiffer v. McNatt*, 74 T. 641, 12 S. W. 821; *King v. Harter*, 70 T. 579, 8 S. W. 308; *Beard v. Blum*, 64 T. 59; *Duncan v. Alexander*, 83 T. 441, 18 S. W. 817. This protection exists only as long as it is used. *Shryock v. Latimer*, 57 T. 674; *Wright v. Straub*, 64 T. 64; *Cline v. Upton*, 56 T. 320; *Griffie v. Maxey*, 58 T. 214; *Harle v. Richards*, 78 T. 80, 14 S. W. 257; *Hill v. Estate of R. B. Hill*, 85 T. 103, 19 S. W. 1016; *Hull v. Naumberg*, 1 C. A. 132, 20 S. W. 1126. Where the owner of a business lot leases it during his temporary engagement in another business, the exemption is not necessarily lost thereby. *Bowman v. Watson*, 66 T. 295, 1 S. W. 273. But if the head of the family dies while using it as his place of business, the property passes to his widow and heirs as a part of the homestead. *Clift v. Kaufman*, 60 T. 64.

When it is shown that a part of a lot or lots is occupied by the business house of the head of a family, the remaining portions of the lots are exempt from forced sale, unless it is shown that such part is put to some use other than that connected with the business. *Lavell v. Lapowski*, 85 T. 168, 19 S. W. 1004.

The lots must be used as a place where the head of the family exercises his calling or business. It is his workshop, office or other place where he habitually is, in the following of his calling, and not any other lot or building which he may incidentally use in connection therewith. *Hinzie v. Moody*, 1 C. A. 26, 20 S. W. 769.

The constitution exempts not only a "lot" but "lots" as a place to exercise the calling or business of the head of a family, and does not restrict this calling or business to any single branch or department. *Schneider v. Campbell*, 1 C. A. 314, 21 S. W. 55.

A business homestead can be established by the intention to appropriate the property as a place of business. *Wolf v. Butler*, 28 S. W. 51, 8 C. A. 468.

A business homestead defined. *Hinzie v. Moody*, 13 C. A. 193, 35 S. W. 832.

A building, a portion of which is occupied by the owner as his place of business, is exempt. *Brennan v. Fuller*, 14 C. A. 509, 37 S. W. 641, citing *Shryock v. Latimer*, 57 T. 677; *Pfeiffer v. McNatt*, 74 T. 640, 12 S. W. 821; *Hinzie v. Moody*, 13 C. A. 193, 35 S. W. 832; *Forsgard v. Ford*, 87 T. 185, 27 S. W. 57, 25 L. R. A. 155; *Bailey v. Bauknight* (Civ. App.) 25 S. W. 56; *Prufrock v. Joseph* (Civ. App.) 27 S. W. 264.

One having several places of business can only claim one as a business homestead. *Parrish v. Frey*, 18 C. A. 271, 44 S. W. 322.

The question of whether a building erected in place of one's business homestead, which had been burned, was a business homestead, held to depend on the owner's intention to so occupy it. *Kahler v. Carruthers*, 18 C. A. 216, 45 S. W. 160.

A business homestead upon the death of a husband remains as such to the wife where she continues to use it as a place of business. *Evans v. Pace*, 21 C. A. 368, 51 S. W. 1094.

An owner of a gin bought a lot and house adjoining, used it as a place for his hired man, who looked after the gin, to sleep. Held, such house and lot did not constitute a part of the business homestead. *Id.*

Property cannot be held as part of a business homestead unless situated in contiguity with it. *Woeltz v. Woeltz* (Civ. App.) 57 S. W. 905.

Neither a husband conducting two businesses in different places, nor his wife on his death, can claim both properties as exempt business homesteads. *Wingfield v. Hackney*, 30 C. A. 39, 69 S. W. 446.

One carrying on business, at intervals when health permits, indiscriminately in two places, held not entitled to claim one of them as a business homestead, unless he was using it when it was levied on. *Gibbs v. Hartenstein* (Civ. App.) 81 S. W. 59.

Where a building occupied by a debtor as a business homestead was an entirety, occupancy sufficient to exempt any part thereof was sufficient to exempt the whole. *Billings v. Matlage*, 36 C. A. 619, 82 S. W. 805.

Lots held not exempt as a part of the homestead within the rule preserving the place of business, as a part of the homestead under certain conditions. *Schmick v. Simmons* (Civ. App.) 107 S. W. 568.

A tract held part of a business homestead making a mortgage thereon void. *Dignowity v. Lindheim* (Civ. App.) 109 S. W. 966.

The renting of rooms held not the pursuit of a calling or business within the Constitution relating to homesteads. *Lyon v. Files*, 50 C. A. 630, 110 S. W. 999.

Certain facts held to show that parcels of land were a part of a business homestead. *Rock Island Plow Co. v. Alten* (Civ. App.) 111 S. W. 973.

Where property was originally purchased by a debtor's wife for the erection of a building to be used as a music room in connection with the debtor's teaching business,

but the debtor thereafter purchased the lot from his wife and persuaded her not to build the music room there, and, at the time the lot was levied on, such purpose was abandoned, it was not exempt as a part of the debtor's business homestead. *Harrington v. Mayo* (Civ. App.) 130 S. W. 650.

Where a school teacher maintained a normal college where pupils were taught and boarded, land on which the college buildings were situated was exempt as his business homestead, but several other disconnected lots on which students were roomed and boarded were not so exempt. *Id.*

Where a school teacher maintained a normal college and boarded students taught there, parcels of land disconnected from that on which the college buildings were located, used as a baseball ground and to raise vegetables to supply the students' tables, were not exempt as his business homestead. *Id.*

16. Character of homestead as urban or rural.—There cannot be a blending of urban and rural homestead, so that part can be in town and part in country. *Iken v. Olenick*, 42 T. 195; *Keith v. Hyndman*, 57 T. 425; *Swearingen v. Bassett*, 65 T. 271; *Williams v. Willis*, 84 T. 398, 19 S. W. 683. See *Foust v. Sanger*, 13 C. A. 410, 35 S. W. 404.

To establish an exception to the rule that homestead rights cannot be blended so that an exemption can be partly in town and partly in the country, the burden of establishing facts making a case an exception to the rule devolved upon claimant. *Keith v. Hyndman*, 57 T. 425.

A homestead may be within the corporate limits of a city, and still be rural, within Const. art. 16, § 51. *Wilder v. McConnell*, 91 T. 600, 45 S. W. 145.

Land held not to lose its character of rural homestead by the fact that after it was included within city limits the owner platted part of it. *Atkinson v. Phares*, 20 C. A. 150, 49 S. W. 653.

Certain lots held to be urban property in a suit to enjoin the levy of execution thereon on the ground that they were part of plaintiff's rural homestead. *Harris v. Matthews*, 36 C. A. 424, 81 S. W. 1198.

A rural homestead may be changed into an urban homestead and, after such change, the portion of the rural homestead which is not within the town, or which is not actually used for homestead purposes, loses its homestead character. *Ayres v. Patton*, 51 C. A. 186, 111 S. W. 1079.

In determining whether a homestead is urban or rural, the corporate line does not control. *First Nat. Bank v. Litchfield* (Civ. App.) 144 S. W. 350.

17. — Extent and value of homestead.—There is no limit as to the value of the improvements on a residence homestead in a city, town or village. *Chase v. Swayne*, 88 T. 218, 30 S. W. 1049, 53 Am. St. Rep. 742.

Tract of 40 acres may be a rural homestead, though 30 acres and the house are within the city limits. *Paris Exchange Bank v. Hulen*, 21 C. A. 285, 52 S. W. 278.

Where one resided on a 16-acre tract within a town, adjoining a larger tract used for pasturing, and there was a small farm about the middle of the tract, the homestead could not be extended to any of the tract which lay without the town limits. *Batts v. Middlesex Banking Co.*, 26 C. A. 515, 63 S. W. 1046.

Where original homestead was not worth \$5,000 when so designated by debtor, but was worth more when he acquired other property, creditor held not entitled to excess in original homestead, unless debtor insisted on holding after-acquired land as part of such homestead. *Fitzhugh v. Connor*, 32 C. A. 277, 74 S. W. 83.

Property occupied by a husband and wife held homestead, so that the husband could not convey a railroad right of way by a deed in which the wife did not join. *Gulf, B. & G. N. Ry. Co. v. Lewis* (Civ. App.) 85 S. W. 817.

18. — Homestead in town or village.—Evidence held to show that a mortgagor's homestead was in a village, within the meaning of the constitution, and that farm by him mortgaged was therefore no part of such homestead. *Mikael v. Equitable Securities Co.*, 32 C. A. 182, 74 S. W. 67.

19. — Extension of corporate limits.—A country homestead is not affected by the mere laying out of contiguous lands into street, blocks and lots. *Taylor v. Boulware*, 17 T. 74, 67 Am. Dec. 642; *Bassett v. Messner*, 30 T. 604; *Neeley v. Case* (Civ. App.) 32 S. W. 785.

The extension of the corporate limits of a city to include a rural homestead does not, of itself, affect the pre-existing homestead rights of the owner. *Clark v. Nolan*, 38 T. 421. But the rule does not apply when the owner acquiesces and dedicates streets, etc. *Waggener v. Haskell* (Civ. App.) 35 S. W. 711.

The extension of the corporate limits of a town over a rural homestead, and the laying out of contiguous land into streets, etc., will not deprive the homestead of its rural character. *I. B. Watkins Land Mortgage Co. v. Abbott*, 14 C. A. 447, 37 S. W. 252.

Where land was included within the limits of a town, but not within the town plat, held, that it did not cease to be a rural homestead. *Ayres v. Lamb* (Civ. App.) 40 S. W. 1024.

A city extended so as to bring within its limits a rural homestead. Held, that the fact that the owners divided it into different lots and built houses on it, which they rented and used the proceeds for the support of the family, did not destroy its homestead character. *Wilder v. McConnell* (Civ. App.) 43 S. W. 807.

A homestead may be within corporate limits and still rural as to the exemption. This in a case where rural homestead is included in city limits without consent of owner. *Wilder v. McConnell*, 91 T. 600, 45 S. W. 145.

Where a real estate owner acquires an adjacent tract, and the first tract is afterwards included in a village, the entire tract constitutes an urban homestead, and the latter tract cannot be sold under execution, even if it was issued after the first tract was included in the village. *Saunders v. Lanham* (Civ. App.) 57 S. W. 70.

Where a city is authorized to extend its corporate limits so as to include agricultural lands, a homestead right in such lands must be determined by the conditions existing when such right is questioned, and not at the time when such property was acquired. *Lauchheimer v. Saunders*, 27 C. A. 484, 65 S. W. 500.

Constitutional guaranty of homestead does not prevent its character as urban or rural at the time of its acquisition from being changed by actual extension of a town around the same. *L. H. Lauchheimer & Sons v. Saunders*, 97 T. 137, 76 S. W. 750.

20. Separate tracts or lots.—When tracts of land claimed as a rural homestead are widely separate, they are within the homestead protection if used for homestead purposes; but when the rural homestead has been fixed on one of them, there must be such use of a subsequently acquired parcel to invest it with a homestead character as would be required to make an original designation of a homestead. *Brooks v. Chatham*, 57 T. 31. See *Iken v. Olenick*, 42 T. 195. As to renting a rural homestead, see *Foreman v. Meroney*, 62 T. 723.

Under the constitutions of 1845, 1866 and 1869, in order for several city lots to constitute one homestead they had to be used for homestead purposes, and not merely as a place of business for the head of the family. *Inge v. Cain*, 65 T. 75; *Iken v. Olenick*, 42 T. 195, overruling *Hancock v. Morgan*, 17 T. 582.

Homestead may be established on one or more lots in a town or city. *Bailey v. Bauknight* (Civ. App.) 25 S. W. 56.

Contiguous lots purchased for enlarging homestead, exempt. *Little v. Baker* (Civ. App.) 26 S. W. 305.

A tract distant four miles from that on which debtor resided, both being used for raising garden truck, and necessary for support of debtor's family, held part of homestead, though rented out on shares. *Baldeschweiler v. Ship*, 21 C. A. 80, 50 S. W. 644.

A party living on a lot, in a village containing a schoolhouse and a few residences, and cultivating a farm in the county, can claim both as a homestead. *Crisp v. Thrash* (Civ. App.) 52 S. W. 92.

Two adjoining lots held to constitute a homestead, though they had separate houses on each. *Weidemeyer v. Bryan*, 21 C. A. 428, 53 S. W. 353.

Residence of claimants on separate tract held not inconsistent with their claim. *Maupin v. McCall* (Civ. App.) 54 S. W. 623.

Land held not deprived of homestead character by mere fact of family's residence on lots forming part of addition to city. *Jolly v. Diehl*, 38 C. A. 549, 86 S. W. 965.

Forty-acre tract of land, contiguous to 160-acre tract, held part of owner's homestead. *Carroll v. Jeffries*, 39 C. A. 126, 87 S. W. 1050.

Twelve-acre lot in city detached from residence held not a homestead. *L. W. Levy & Co. v. Lacour*, 43 C. A. 191, 94 S. W. 380.

Land outside a town held not part of the homestead of one residing in the town. *Parker v. W. L. Moody & Co.*, 43 C. A. 492, 96 S. W. 650.

A parcel of land, though detached from the homestead proper, held a part of the homestead within the constitution. *Autry v. Reasor*, 102 T. 123, 108 S. W. 1162.

A 57-acre tract in the country forms no part of a homestead consisting of a block in an unincorporated town. *Dignowity v. Lindhelm* (Civ. App.) 109 S. W. 966.

Lots separated from other lots by an intervening lot held not a part of a business homestead. *Rock Island Plow Co. v. Alten*, 102 T. 366, 116 S. W. 1144.

Where one owning several tracts of land adjoining wishes to select his homestead, the tracts must be considered as one, and he may select any part thereof not embracing more than 200 acres. *Watkins Land Co. v. Temple*, 56 C. A. 65, 119 S. W. 728.

An urban homestead given by Const. art. 16, § 51, providing that such homestead shall consist of a lot or lots not exceeding \$5,000 in value, may consist of a lot or lots, contiguous to or separated from each other, provided they are put to such uses as contribute to the enjoyment of the home. *Harrington v. Mayo* (Civ. App.) 130 S. W. 650.

Land on which the college building of a school teacher was situated held exempt as his business homestead, but not so as to disconnected parcels of land on which students were boarded. *Id.*

Where a debtor maintained a college, disconnected tracts of land used as a baseball ground and as a vegetable garden held not exempt as the debtor's business homestead. *Id.*

Part of a lot adjoining a homestead held segregated from it and not subject to exemption. *Blair v. Park Bank & Trust Co.* (Civ. App.) 130 S. W. 718.

A rural homestead may consist of separate and disconnected tracts of land, provided they do not exceed 200 acres. *Dillard v. Cochran* (Civ. App.) 153 S. W. 662.

21. Part of building.—Homestead exemption held to extend to abandoned part of a building, where such part was not separated or partitioned from the main building. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

22. Time of acquisition of homestead.—Homestead exemption exists from the date of its designation. *Cameron v. Gebhard*, 85 T. 610, 22 S. W. 1033, 34 Am. St. Rep. 332; *Heady v. Bexar Bldg. Ass'n* (Civ. App.) 26 S. W. 468.

Vacant lots conveyed to plaintiff, who agreed to furnish money with which to erect a house thereon, and reconvey to grantors, reserving a vendor's lien for money advanced, did not become grantor's homestead until reconveyance, and hence was not exempt from the lien. *West End Town Co. v. Grigg*, 93 T. 451, 56 S. W. 49.

23. Change of homestead.—Mere purchase of other property than that on which defendants resided as their homestead held insufficient to create a homestead right therein. *Powers v. Palmer*, 36 C. A. 212, 81 S. W. 817.

Where defendants' homestead rights in certain property were fully protected when a judgment became a lien on other property owned by them, they could not acquire homestead rights in the property subject to such lien. *Id.*

The fact that at the time of marriage a woman was occupying her separate property as the homestead of herself and minor children did not prevent the husband, while acting in good faith, from moving his family therefrom and acquiring some other homestead. *Duncan v. Hand* (Civ. App.) 87 S. W. 233.

24. Evidence of homestead right.—The positive and formal declaration of the husband and wife will not divest of the homestead protection urban property actually used as such. *Kauffman v. Ruhl*, 65 T. 723; *Medlenka v. Downing*, 59 T. 32; *Jacobs v. Hawkins*, 63 T. 1.

Actual occupation of premises is better evidence of homestead rights than the declarations of husband and wife. *Mortgage Co. v. Norton*, 71 T. 683, 10 S. W. 301; *Kempner v. Comer*, 73 T. 203, 11 S. W. 194; *Loan Co. v. Blalock*, 76 T. 89, 13 S. W. 12; *Moerlein v. S. M. & L. I. Co.*, 29 S. W. 162, 9 C. A. 415.

Evidence sufficient to show dedication of a homestead. See *Gallagher v. Keller*, 23 S. W. 296, 4 C. A. 454; *Charles v. Chaney* (Civ. App.) 26 S. W. 169; *Medlenka v. Downing*, 59 T. 32.

Burden of proof rests upon one claiming an exempt homestead. *Mullins v. Looke*, 27 S. W. 926, 8 C. A. 138; *Roe v. Davis* (Civ. App.) 142 S. W. 950.

The designation of a lot of land for homestead purposes may be shown by the acts of the owner before and after a levy and sale under execution. *Gallagher v. Keller*, 29 S. W. 647, 87 T. 472.

A finding that a lot adjoining plaintiff's residence lot was not a part of the homestead held justified by the evidence. *Jones v. Lee* (Civ. App.) 41 S. W. 195.

Intent of wife in selecting homestead held admissible to show intent of husband, where husband and wife are in accord. *Gunn v. Wynne* (Civ. App.) 43 S. W. 290.

Where it is in issue whether certain land is a homestead, and the use of the land shows a homestead, it will be held such, though the owner and his wife testify they had no homestead intent. *Batts v. Middlesex Banking Co.*, 26 C. A. 515, 63 S. W. 1046.

Evidence held to justify a finding that plaintiff, in an action to recover realty sold under execution, had formed an intention to occupy the land as homestead prior to the execution. *Foley v. Holtkamp*, 28 C. A. 123, 66 S. W. 891.

In trespass to try title to land sold to defendant under execution, the burden was on plaintiffs to establish their claim that the land was their homestead when defendant's rights attached. *Cobb v. Collins*, 51 C. A. 63, 111 S. W. 760.

Defendant, who, after buying a lot and contracting for materials for a house thereon, left the county with his family because of indictments against him, has the burden of proving that the place was his homestead at the time plaintiff acquired a materialman's lien thereon. *Rockwell Bros. Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

Property occupied by a divorced woman held not a homestead. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

Evidence, in trespass to try title, in which plaintiff claimed under a purchase at a sale under a trust deed executed by defendant, held to sustain a finding that the land covered by the trust deed was not defendant's homestead. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

25. Crops on homestead.—Crops upon the rural homestead not gathered are exempt from forced sale. *Alexander v. Holt*, 59 T. 205; *Anderson v. Lassemore*, 1 App. C. C. § 951; *Cunningham v. Coyle*, 2 App. C. C. § 423; *Eaves v. Williams* (Civ. App.) 31 S. W. 86; *Coates v. Caldwell*, 71 T. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

Matured crops grown on, but not severed from, the homestead, are exempt from forced sale. *Allen v. Ashburn*, 27 C. A. 239, 65 S. W. 45.

Unsevered crops on a tract of leased land, separate from another leased tract, where the dwelling is situated, and leased from another landlord, but occupied in connection therewith as a homestead, are exempt from attachment. *Moore v. Graham*, 29 C. A. 235, 69 S. W. 200.

Growing crops on one's homestead held not to have lost their exempt character. *Staggs' Heirs v. Piland*, 31 C. A. 245, 71 S. W. 762.

An ungathered crop on the homestead of a debtor is exempt from forced sale. *Paraker v. Hale* (Civ. App.) 78 S. W. 555.

Where land, though rented, was the homestead of the tenant, ungathered cotton was exempt from forced sale. *Nunn-Weldon Dry Goods Co. v. Haden* (Civ. App.) 95 S. W. 73.

The seizure of cotton growing on the debtor's homestead, under writ of attachment, held wrongful, authorizing the debtor to recover damages for the wrongful attachment. *Pate v. Vardeman* (Civ. App.) 141 S. W. 317.

A mature and ungathered crop is not exempt from execution by reason of the nature of the property. *Ellis v. Bingham* (Civ. App.) 150 S. W. 602.

Where a contract created the relation of landlord and tenant, plaintiff was entitled to claim crops grown on the land as exempt on the theory that they were the proceeds of his homestead. *McCullough Hardware Co. v. Call* (Civ. App.) 155 S. W. 718.

26. Rents and royalties.—Royalty upon coal taken from the homestead is not exempt. *Collins Mfg. Co. v. Carr*, 11 C. A. 364, 32 S. W. 366.

The rental value of a homestead that accrued during its wrongful seizure and detention is exempt. *National Bank of Denison v. Killgore*, 17 C. A. 462, 43 S. W. 565.

Rents due from one trespassing on a homestead are exempt to the owner thereof. *La Master v. Dickson*, 17 C. A. 473, 43 S. W. 911.

27. Abandonment of homestead.—The fact that a part of the ground claimed as an urban homestead is used for purposes of mere convenience and pleasure will not divest it of its homestead character. *Medlenka v. Downing*, 59 T. 32.

The whole or any part of an urban homestead may be lost by abandonment or by the erection thereon of buildings inconsistent with the homestead use. *Medlenka v. Downing*, 59 T. 32; *Wynne v. Hudson*, 66 T. 1, 17 S. W. 110. But if such abandonment is attempted by the husband in fraud of the rights of a wife, or with intent to evade the prohibition against giving liens thereon, the property, being really still a part of the homestead, would continue impressed with the homestead character. *Medlenka v. Downing*, 59 T. 32.

The lapse of eight days between the cessation of business and the sale of the premises on which business was conducted, there having been no abandonment of the premises, will not destroy their exemption as a homestead. *Scheuber v. Ballow*, 64 T. 166.

A husband and wife agreed to separate, divided their rural homestead, and conveyed one-half to K. to hold in trust for the husband. The husband lived apart from his wife, but acquired no other homestead. The homestead exemption in the tract conveyed to K. was not divested. *Crockett v. Templeton*, 65 T. 134.

Election of a shoemaker as a county treasurer held not to operate as an abandonment of his business homestead. *Schoellkopf v. Cameron*, 19 C. A. 593, 47 S. W. 548.

A lot bought by a party with the intention of building his residence on it, but afterwards used to grow vegetables for the use of the family, does not constitute an abandonment of it for a homestead. *Anderson v. Sessions*, 93 T. 279, 51 S. W. 874, 77 Am. St. Rep. 873.

Abandoned homestead become subject to execution, without regard to intent of owner to put the property to different uses. *Freeman v. Cates*, 22 C. A. 623, 55 S. W. 524.

Facts held not to constitute an abandonment of a business homestead. *Id.*

Where, when mortgage was executed on a residence homestead, a building had been started on a portion of the land, but it had not been put to any use inconsistent with that of a homestead, and, when completed, it was used as a business homestead, the property was not abandoned as a homestead, so as to make the mortgage valid. *Woeltz v. Woeltz* (Civ. App.) 57 S. W. 905.

Occupancy of land as homestead by heir held not divested by temporary payment of rent in ignorance of rights. *Loessin v. Washington*, 23 C. A. 515, 57 S. W. 990.

A portion of the lot on which a saloon was located, and which the owner used for a passageway for cattle used in his business, held to be a part of a homestead, though there had been an abandonment as to the saloon. *Warren v. Kohr*, 26 C. A. 331, 64 S. W. 62.

The homestead intention may be abandoned at any time, and the exemption thereby ended; and a mortgage on the property induced by the disclaimer of such intention is valid. *Davidson v. Jefferson* (Civ. App.) 68 S. W. 822.

The detention of a widow in a lunatic asylum is not a voluntary abandonment of her homestead, and does not affect her rights therein. *Flynn v. Hancock*, 35 C. A. 395, 80 S. W. 245.

One held not to lose his claim of business homestead because of enforced interruption of business on account of ill health. *Gibbs v. Hartenstein* (Civ. App.) 81 S. W. 59.

A duly recorded judgment against the owner of a business homestead attaches when the property ceases to be a homestead if still the property of the judgment debtor. *Bradley v. Janssen* (Civ. App.) 93 S. W. 506.

When a homestead character once attaches to property, it continues to be the homestead until the owner voluntarily changes its character by disposing of the property or by leaving with the intention of not returning and occupying it as a home. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

Where a husband and wife abandoned a homestead, a husband's conveyance held valid without wife joining therein. *Robertson v. Hefley*, 55 C. A. 368, 118 S. W. 1159.

"Abandonment of a homestead," defined. *Wiener v. Zweb* (Civ. App.) 128 S. W. 699.

Mere intention to sell a homestead and acquire another does not destroy the homestead character. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

After a homestead is abandoned, it is subject to levy as other property, though the owner has not acquired another homestead. *Baker v. Magee* (Civ. App.) 136 S. W. 1161.

28. — **Consent of wife.**—The abandonment by the husband alone defeats the homestead right of the children. Long-continued absence may be evidence of abandonment, but is not conclusive if there is an intention to return. *Thorn v. Dill*, 56 T. 145; *Smith v. Uzzell*, 56 T. 315; *Cline v. Upton*, 56 T. 319.

The husband may in good faith abandon a part of the business homestead, and the abandoned portion would become subject to levy and sale. *Shryock v. Latimer*, 57 T. 674; *Wynne v. Hudson*, 66 T. 1, 17 S. W. 110; *Bowman v. Watson*, 66 T. 295, 1 S. W. 273; *Malone v. Kornrumpf*, 84 T. 454, 19 S. W. 607; *Blackburn v. Knight*, 81 T. 326, 16 S. W. 1075; *Glasscock v. Stringer* (Civ. App.) 33 S. W. 677; *Clift v. Kaufman*, 60 T. 64; *Cline v. Upton*, 56 T. 320; *Kaufman v. Fore*, 73 T. 308, 11 S. W. 278.

A husband, without the concurrence of his wife, may divest his place of business of the homestead protection by abandonment, and then himself convey it. *Morris v. Geis-ecke*, 60 T. 633; *Inge v. Cain*, 65 T. 75; *Archibald v. Jacobs*, 69 T. 248, 6 S. W. 177; *Wynne v. Hudson*, 66 T. 1, 17 S. W. 110; *McCarty v. Brackenridge*, 1 C. A. 170, 20 S. W. 997; *Dickson v. Allen* (Civ. App.) 24 S. W. 661; *Davis v. Taylor*, 33 S. W. 543; *Keller v. Beattie*, 34 S. W. 667; *White v. Cowles*, 155 S. W. 982.

An instruction held erroneous, as requiring a wife to concur with the husband in his intent to abandon the homestead. *Building & Loan Ass'n of Dakota v. Guillemet*, 15 C. A. 649, 40 S. W. 225.

Renunciation by husband without consent of wife held a fraud on homestead right. *Arnold v. Macdonald*, 22 C. A. 487, 55 S. W. 529.

In an action by a husband and wife to recover their homestead from an innocent third person purchasing from plaintiffs' mortgagee, held, that the acts of the husband cannot affect the wife's interest. *Black v. Garner* (Civ. App.) 63 S. W. 918.

The determination of a husband to abandon his homestead is binding on his wife, who remained with him in his absence from the county. *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185.

A wife cannot be deprived of her homestead by her husband, without her consent, accepting a lease of it from a person who has no title thereto. *Lumpkin v. Woods* (Civ. App.) 135 S. W. 1139.

Where a husband and wife live on a homestead, the separate property of the husband, and the wife is legally declared insane, so as to be incapacitated from consenting to a deed of the homestead by joinder, and privy acknowledgment, and the husband, with the children, removes from the homestead, his sale of the lot, more than a year after such removal, with no intent to defraud the wife, is valid, regardless of whether, at the time of the removal and abandonment, he intended to acquire another homestead, or whether another homestead had in fact been acquired. *Gilley v. Troop* (Civ. App.) 146 S. W. 954.

A husband acting in good faith may abandon a homestead and acquire a new one, regardless of his wife's wishes. *Gibson v. Pierce* (Civ. App.) 146 S. W. 983.

29. — **Absence from homestead and other acts.**—The words "to use and occupy," within the meaning of article 16, section 52, of the constitution, does not require a residence on the land. When left either from necessity or convenience by the family, no

matter for how long a time, so long as it contributes to the support of the family it remains a homestead until title is acquired to another home, and which is used and occupied as such. *Foreman v. Meroney*, 62 T. 723; *Aultman v. Allen*, 12 C. A. 227, 33 S. W. 679.

Homestead abandoned if not occupied, when. *Graves v. Campbell*, 74 T. 579, 12 S. W. 239; *Farmer v. Hale*, 14 C. A. 73, 37 S. W. 164.

A business homestead is abandoned by the cessation of business therein. *Willis v. Pounds*, 25 S. W. 715, 6 C. A. 512; *Tackaberry v. National Bank*, 85 T. 488, 22 S. W. 151, 299.

Homestead abandoned for three years prior to conveyance held subject to lien of prior judgment. *Kerr v. Oppenheimer*, 20 C. A. 140, 49 S. W. 149.

Where a divorce decree gave the wife one half of the homestead absolutely, and the use of the other half during the children's minority for their support, the husband's ouster by judicial process, putting his wife in possession of the whole tract, held not to divest the husband's homestead right in the land, so that he could reoccupy it as a homestead after his wife sold her interest in the whole tract. *Speer & Goodnight v. Sykes*, 102 T. 451, 119 S. W. 86, 132 Am. St. Rep. 896.

The mere fact that a married man had some kind of business at a particular place and that he was living there with his family, attending to it at the time of his death, did not show as matter of law an abandonment of his homestead located elsewhere. *McComas v. Curtis* (Civ. App.) 130 S. W. 594.

Removal from a homestead with a fixed intent not to return is an abandonment, though another homestead has not been acquired. *Republic Guaranty & Surety Co. v. Wm. Cameron & Co.* (Civ. App.) 143 S. W. 317.

Where a widow occupying premises as a homestead married, and she and her husband voluntarily left the premises, with no intent on the part of the husband to again make the same a homestead of the family, the property became subject to execution sale. *White v. Cowles* (Civ. App.) 155 S. W. 982.

That a husband intended to sell out a livery business belonging to his wife and move to another country, will not constitute abandonment of the business homestead so long as he was actually in possession thereof, using and occupying it as such. *Farmers' State Bank of Quannah v. Farmer* (Civ. App.) 157 S. W. 283.

30. — **Intent to return to homestead.**—Abandonment of a homestead may be shown by long absence of the family and other circumstances tending to show an intention to abandon. *Sanders v. Sheran*, 66 T. 655, 2 S. W. 804.

A qualified intention of one leaving a homestead not to return to it, if he can sell it and invest the proceeds in a home that will suit him better, is not an intention which, connected with change of domicile, will operate an abandonment. *Id.*

A removal with no intention of abandonment does not defeat the homestead rights, even when a purchaser had no notice of former occupancy. *Parr v. Newby*, 73 T. 468, 11 S. W. 490.

A rural homestead is not lost by a temporary absence for the purpose of schooling the children of the family. *Reinstein v. Daniels*, 75 T. 640, 13 S. W. 21; *Aultman v. Allen*, 12 C. A. 227, 33 S. W. 679.

That the head of the family when he left the homestead intended to return and use and occupy it is evidence that it was not abandoned. *Rollins v. O'Farrel*, 77 T. 95, 13 S. W. 1021; *Foreman v. Meroney*, 62 T. 723; *Graves v. Campbell*, 74 T. 579, 12 S. W. 238; *Locke v. Bonnell*, 14 C. A. 354, 37 S. W. 250.

A homestead exemption is lost by voluntarily leaving the homestead with the intention not to return, the husband and wife concurring. *Myers v. Evans*, 81 T. 317, 16 S. W. 1060; *Reece v. Renfro*, 68 T. 192, 4 S. W. 545; *Graves v. Campbell*, 74 T. 576, 12 S. W. 238; *Archibald v. Jacobs*, 6 S. W. 178, 69 T. 248; *Mortgage Co. v. Norton*, 71 T. 683, 10 S. W. 301; *Pellat v. Decker*, 72 T. 581, 10 S. W. 696; *Kempner v. Comer*, 73 T. 203, 11 S. W. 194.

An offer to sell the homestead while temporarily absent is not evidence of abandonment. *Aultman v. Allen*, 12 C. A. 227, 33 S. W. 679.

An urban homestead is lost by abandonment with the intention not to return. *Keller v. Beattie* (Civ. App.) 34 S. W. 667.

Temporary abandonment of homestead and living on rented premises held not to forfeit homestead right. *Building & Loan Ass'n of Dakota v. Guillemet*, 15 C. A. 649, 40 S. W. 225.

Where a father is compelled from sickness to leave his homestead, and his children find shelter elsewhere, it is not such an abandonment as to deprive his children of rights therein. *Mealy v. Lipp*, 16 C. A. 163, 40 S. W. 824.

Family living off their homestead farm for eight years, for the purpose of educating their children in town, held not to be a conclusive abandonment of homestead. *Gunn v. Wynne* (Civ. App.) 43 S. W. 290.

To prevent abandonment of a homestead, the intention to return and occupy and use it as a homestead must continue to exist in the mind of the owner, who has moved away. *Schwartzman v. Cabell* (Civ. App.) 49 S. W. 113.

A levy on a homestead is good if made after the formation of the intent of the owner to permanently abandon the property as his homestead. *Bell v. Greathouse*, 20 C. A. 478, 49 S. W. 258.

Lease of business homestead, with intention of returning thereto on expiration of lease, held not to constitute an abandonment of homestead while intention to return continued. *Alexander v. Lovitt* (Civ. App.) 56 S. W. 685.

A father's act in leaving his homestead and removing to a village to educate his children held not abandonment. *Birdwell v. Burleson*, 31 C. A. 31, 72 S. W. 446.

Instruction, not making homestead right depend on intention at time of execution sale, held erroneous. *White v. Epperson*, 32 C. A. 162, 73 S. W. 851.

A homestead held not to have lost its character as such by the owner's removal to the homestead of his wife and residing there with her. *Canning v. Andrews*, 38 C. A. 232, 85 S. W. 22.

A removal to another state intended as temporary only and accompanied at all times during the absence by an intention to return and reoccupy the homestead will not defeat

a homestead right once enjoyed within the state. *Gaar, Scott & Co. v. Burge*, 49 C. A. 599, 110 S. W. 181.

Abandonment of a homestead held accomplished by going away with the definite intention never to return. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

The intent to return, which will prevent a removal from a homestead from constituting an abandonment, must continue during the entire absence. *Lynch v. McGown*, 54 C. A. 390, 117 S. W. 884.

To constitute an abandonment of a homestead, it must appear that there was a removal with a fixed intention never to return. *Armstrong v. Neville* (Civ. App.) 117 S. W. 1010.

Conduct of a person held not to show a fixed intention never to return to his homestead. *Id.*

The abandonment of a homestead by removal therefrom depends on whether the removal was with the fixed intention of not returning to the place as a home. *Thigpen v. Russell*, 55 C. A. 211, 118 S. W. 1080.

That the claimants of homestead received a deed of other property held not to show abandonment, if they at all times intended to return to the homestead. *Id.*

An offer to sell a homestead was not necessarily inconsistent with the claimants' intention to return thereto and reoccupy it as a home, if they did not sell. *Id.*

For removal from the homestead to be an abandonment, there must be an intent not to return, and, where the intent not to return has not been formed, the homestead character is not destroyed, though another home has been acquired, for absence, however long, is merely a circumstance tending to show abandonment, and will not be conclusive where there are other circumstances showing an intent to return. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

An abandonment of a homestead is accomplished only by removal therefrom coupled with an intention never to return. *Herman v. Smith* (Civ. App.) 141 S. W. 1087.

A wife compelled in consequence of her husband's treatment to leave his home temporarily, either from necessity to make a living or other causes not of her own making, does not thereby lose her homestead rights. *Id.*

31. — **Acquiring other residence or homestead.**—The best evidence of abandonment of an old homestead is the acquisition and permanent use of another as such. *Ogden v. Giddings*, 15 T. 486; *Shepherd v. Cassidy*, 20 T. 29, 70 Am. Dec. 372; *Woolfolk v. Ricketts*, 41 T. 362. A homestead may be abandoned when no other has been acquired. *Reece v. Renfro*, 68 T. 194, 4 S. W. 545; *Cline v. Upton*, 56 T. 322; *Jordan v. Godman*, 19 T. 273; *Davis v. Taylor* (Civ. App.) 33 S. W. 543.

When a new homestead is not acquired, the total abandonment of the old home with the intention not to return must be clearly shown. *Gouenant v. Cockrell*, 20 T. 98; *Cross v. Everts*, 28 T. 534; *Thomas v. Williams*, 50 T. 274; *Smith v. Uzzell*, 56 T. 315; *Cline v. Upton*, 56 T. 323; *Reece v. Renfro*, 68 T. 194, 4 S. W. 545; *Cantine v. Dennis* (Civ. App.) 37 S. W. 184.

Where a part of a homestead is sold, including the residence, the homestead right in the remainder of the tract is not divested until a new home is acquired. *Scott v. Dyer*, 60 T. 135, citing *Shepherd v. Cassidy*, 20 T. 24, 70 Am. Dec. 372; *Gouenant v. Cockrell*, 20 T. 96. That the wife and family remained on the homestead until it could be sold for the purpose of defraying the expenses of joining her husband in another state is not fraudulent. *McDannell v. Ragsdale*, 71 T. 23, 8 S. W. 625, 10 Am. St. Rep. 729; *Traders' Ins. Co. v. Chase*, 11 C. A. 13, 31 S. W. 1103; *Dobkins v. Kuykendall*, 81 T. 180, 16 S. W. 743; *Gallagher v. Keller* (Civ. App.) 30 S. W. 248.

When the husband in good faith removes from a former homestead and with his wife occupies a new homestead, it operates as an abandonment of the original homestead. *Slavin v. Wheeler*, 61 T. 654. See *Welborne v. Downing*, 73 T. 527, 11 S. W. 501. And so when they remove from the state. *Perry v. Scott*; 68 T. 208, 7 S. W. 384.

The acquisition of a new homestead is not absolutely essential to the abandonment of homestead rights. *Reece v. Renfro*, 68 T. 194, 4 S. W. 545; *Moore v. Johnston*, 12 C. A. 694, 34 S. W. 771.

The acquirement of another residence without intent to make it a homestead does not constitute a permanent abandonment of the original homestead. *Baum v. Williams*, 16 C. A. 407, 41 S. W. 840.

Where a woman who has a homestead marries and lives on the homestead of her husband, with no intent of repossessing herself of her former home, she cannot claim it as a homestead. *Ghent v. Boyd*, 18 C. A. 88, 43 S. W. 891.

Where plaintiff, after selling their original homestead, moved from it to the new homestead, made a partial payment thereon, and obligated himself to pay the balance, the original homestead was abandoned. *Alvord Nat. Bank v. Ferguson* (Civ. App.) 126 S. W. 622.

32. — **Conveyance or sale.**—When husband and wife unite in a conveyance of the homestead in order to abandon it, the homestead is divested. *Edmondson v. Blessing*, 42 T. 596; *Blessing v. Edmondson*, 49 T. 333. See *Marler v. Handy*, 88 T. 421, 31 S. W. 636.

A. sold his homestead and acquired another. His vendee executed to his vendor of the first homestead notes in lieu of other notes given by A. to the original vendor, with the agreement that they should be secured by a lien on the land. The land afterwards passed into the possession of A. Held that, his vendee being insolvent, he was responsible to the original vendor on the substituted notes. *Thorn v. Dill*, 56 T. 145.

A. and wife conveyed to B. their homestead, receiving payment, a part in cash and a note unsecured by a vendor's lien for the balance. A. afterward transferred the note to C. Subsequently A. and B. canceled their trade, the former receiving from B. a conveyance of the land and executing to C. a note to be substituted in place of the note transferred by A. to C. Held, that the homestead right of A. and wife in the land was subject to the lien of the note so executed to C. *Brooks v. Young*, 60 T. 32.

A simulated conveyance of a homestead, in contemplation of abandonment, and to be held for the grantor, subjects it to sale under execution. *Willis v. Pounds*, 25 S. W. 715, 6 C. A. 512.

New homestead not acquired until after actual abandonment of old homestead. *Allen v. Whitaker* (Civ. App.) 27 S. W. 507.

A new homestead cannot be established before the actual abandonment of the old homestead. *Id.*

A deed by a wife after her husband's death held not an abandonment of her homestead where grantor, pursuant to the deed, continues to live on the property. *Wilson v. Fields* (Civ. App.) 50 S. W. 1024.

Plaintiffs, being owners of one-half interest in lands subject to the occupancy of their mother as a homestead, on her abandonment of homestead after sale of her interest, become entitled to possession of the entire tract. *De Garcia v. Lozano* (Civ. App.) 54 S. W. 280.

A vendee of property under an absolute deed, alleged by creditors of the vendor to be a mortgage and to be paid in full, cannot set up as against the creditors that it is the vendor's homestead. *Palm v. Chernowsky*, 28 C. A. 405, 67 S. W. 165.

Where the holder of a homestead conveyed the same to one of the members of her family, but remained in possession, her possession as a tenant at sufferance was sufficient to sustain her right of homestead. *American Nat. Bank v. Cruger*, 31 C. A. 17, 71 S. W. 784.

The owner of a business homestead, by conveying to another, abandons his homestead exemption. *R. E. Bell Hardware Co. v. Riddle*, 31 C. A. 411, 72 S. W. 613.

That one intends to sell his homestead, and not to invest the proceeds in another home, does not show conclusively an absolute intent to abandon it. *Gaar, Scott & Co. v. Burge*, 49 C. A. 599, 110 S. W. 181.

An intention and efforts to sell a homestead held not to constitute an abandonment thereof. *Id.*

33. — **Renting or leasing.**—Homestead rights not defeated by renting a part of the house or lots. *Iken v. Olenick*, 42 T. 195; *Foreman v. Meroney*, 62 T. 723; *Hall v. Fields*, 81 T. 558, 17 S. W. 82; *Axer v. Bassett*, 63 T. 545; *Blum v. Whitworth*, 66 T. 350, 1 S. W. 108; *Medlinka v. Downing*, 59 T. 32; *Bowman v. Watson*, 66 T. 295, 1 S. W. 273; *Hensley v. Shields*, 25 S. W. 37, 6 C. A. 136.

Homestead not abandoned by a temporary lease. *Newton v. Calhoun*, 68 T. 451, 4 S. W. 645; *Blum v. Rogers*, 78 T. 531, 15 S. W. 115; *Hensley v. Shields*, 25 S. W. 37, 6 C. A. 136; *Bailey v. Bauknight* (Civ. App.) 25 S. W. 56; *Hill v. Hill*, 85 T. 103, 19 S. W. 1016.

Land adjoining the owner's residence, which had been improved and rented out, held subject to levy on execution. *Williams v. Cleveland*, 18 C. A. 133, 44 S. W. 689.

A homestead held not abandoned, where the owner divided the lot by a fence and rented a portion of it temporarily. *Shook v. Shook*, 21 C. A. 177, 50 S. W. 731.

Where a homesteader fits up a part of his residence homestead for a store and rents it, it loses its residence homestead character. *King v. C. M. Hapgood Shoe Co.*, 21 C. A. 217, 51 S. W. 532.

When part of the homestead lot is detached and buildings erected thereon for the purpose of being permanently rented such detached property ceases to be a part of the homestead. *Torres v. Cuneo* (Civ. App.) 53 S. W. 828.

A lease of a homestead held sufficient evidence to support a finding that there was such an abandonment as would render the property subject to execution. *Warren v. Kohr*, 26 C. A. 331, 64 S. W. 62.

The fact that houses on lots adjacent to the owner's residence have been rented for ten years or more, and that the rent money is necessary for the support of his family, is conclusive that the lots have been permanently set apart as tenant houses. *Wurzbach v. Menger*, 27 C. A. 290, 65 S. W. 679.

A leasing of a business homestead for three years, with an option of five, is a fixed intention to resume business on the property. *Alexander v. Lovitt* (Civ. App.) 67 S. W. 927.

The owner of a business homestead held to have abandoned it by a sale of his business and a lease of the homestead. *Alexander v. Lovitt*, 95 T. 661, 69 S. W. 68.

The rental of a part of a debtor's business homestead held insufficient to establish an abandonment thereof. *Billings v. Matlage*, 36 C. A. 619, 82 S. W. 805.

This article does not expressly confer upon the owner the power to rent the homestead. The execution of a lease of the community homestead for a term of two years by the husband alone is void, because not signed and acknowledged by the wife, and the court is not authorized to construe such void lease as good for one year, and treat the holding of the lessee a renting for one year. *Haile v. Haile* (Civ. App.) 93 S. W. 436.

Temporary renting of a part of the homestead does not constitute divestiture of the homestead character of the property. *H. P. Drought & Co. v. Stallworth*, 45 C. A. 159, 100 S. W. 188.

The renting of a portion of a rural homestead deprives the rented part of its homestead character. *Autry v. Reazor*, 102 T. 123, 113 S. W. 748.

34. — **Waiver.**—A maker of a note secured by a vendor's lien may in a suit to foreclose the lien waive his homestead rights. *Zeno v. Adoue*, 54 C. A. 36, 117 S. W. 1039.

35. — **Evidence.**—Admissibility of evidence, see notes under Art. 3687.
Abandonment of the homestead, how shown. *Medlenka v. Downing*, 59 T. 38; *Newton v. Calhoun*, 68 T. 451, 4 S. W. 645; *Langston v. Maxey*, 74 T. 159, 12 S. W. 27; *Giersa v. Gray* (Civ. App.) 31 S. W. 231; *Jamison v. Lewis* (Civ. App.) 35 S. W. 954.

Evidence as to abandonment of homestead. *Harbison v. Tennison* (Civ. App.) 38 S. W. 232.

Evidence held to show segregation and abandonment of a business homestead, so as to render it liable to execution. *Carothers v. Lange* (Civ. App.) 55 S. W. 580.

Evidence considered, and held to show that a husband had separated 1 lot out from the homestead block of 12 lots, and abandoned it as a homestead, before conveying it by his deed, in which his wife did not join, and that such deed conveyed a good title. *Drew v. Wooten*, 27 C. A. 456, 66 S. W. 331.

In determining whether property once a homestead has been permanently abandoned, all the circumstances and facts must be considered. *H. P. Drought & Co. v. Stallworth*, 45 C. A. 159, 100 S. W. 188.

The abandonment of a homestead should not be found to exist unless it is clearly shown beyond all reasonable ground of dispute. *Armstrong v. Neville* (Civ. App.) 117 S. W. 1010.

A fact held not to show an abandonment of a homestead. *McComas v. Curtis* (Civ. App.) 130 S. W. 594.

Evidence held to support a finding of abandonment of part of a homestead. *Burns v. Parker* (Civ. App.) 137 S. W. 705.

36. **Estoppel to claim homestead.**—Representations as to homestead an estoppel, when. *Haswell v. Forbes*, 27 S. W. 566, 8 C. A. 82.

A recital in a mortgage signed by husband and wife that certain property not occupied by them was not their homestead operates as an estoppel. *Moerlein v. Scottish M. & L. I. Co.*, 29 S. W. 162, 9 C. A. 415.

Parties may be estopped from claiming exemption of homestead by fraudulent representations and acts. *Carden v. Short* (Civ. App.) 31 S. W. 246.

Declarations of intention not to occupy premises as a homestead not actually occupied as such will estop a claim thereto against one who, under a belief of such declarations, has loaned money on the security of such property. *Harmson v. Wesche* (Civ. App.) 32 S. W. 192.

A husband cannot estop himself and wife from asserting right of homestead by taking a lease from a third person. *Dotson v. Barnett*, 16 C. A. 258, 41 S. W. 99.

Mere representations do not estop mortgagors to claim homestead in mortgaged premises. *Hawes v. Parrish*, 16 C. A. 497, 41 S. W. 132.

The wife is not estopped from setting up her claim to the homestead because she signed the deed, there being no privy acknowledgment, and because it was through her instrumentality that the sale was made and the money was counted into her lap. *Huss v. Wells*, 17 C. A. 195, 44 S. W. 33.

Representations by borrowers that a certain place was their homestead, which were relied on by the lender, held to estop borrowers from claiming other property as a homestead. *White v. Dabney* (Civ. App.) 46 S. W. 653.

In action to set aside judgment foreclosing vendor's lien, owners of premises held estopped to set up homestead exemption in the premises. *Butler v. Carter* (Civ. App.) 58 S. W. 632.

Where defendant in an application for a loan designated a part of his farm and a tract belonging to his wife as a homestead, and plaintiff accepted a mortgage on the balance, defendant held estopped from setting up a homestead in the mortgaged land. *Hunter v. Kelley* (Civ. App.) 60 S. W. 890.

Children of mortgagor held estopped to claim homestead. *Leslie v. Elliott*, 26 C. A. 578, 64 S. W. 1037.

Where defendant and wife occupied two separate pieces of property in a manner calculated to convey the impression that each was a homestead, a deed of trust on one reciting that it was not a homestead, together with a written designation, executed at the same time, declaring that the other was a homestead, held to raise the question of estoppel. *Parrish v. Hawes*, 95 T. 185, 66 S. W. 209.

Failure to record deed to homestead held not to preclude wife from asserting homestead rights as against purchaser of fraudulent vendor lien notes, executed by husband in connection with subsequent recorded, but fictitious, deed. *Texas Land & Mortg. Co. v. Cooper* (Civ. App.) 67 S. W. 173.

Plaintiffs held not estopped from claiming that their father's homestead had been abandoned. *Beck v. Avindino*, 29 C. A. 500, 63 S. W. 827.

Grantor in deed of trust of a homestead held not estopped to assert that the property was his homestead. *Letzerich v. Lidiak*, 31 C. A. 120, 70 S. W. 773.

The mere statement in a deed of trust that the land was not homestead would not estop the grantors from afterwards asserting it to be such. *Crebbin v. Mosely* (Civ. App.) 74 S. W. 815.

Husband and wife, mortgaging homestead, held not estopped to assert that it was homestead. *Sheckles v. Lewis*, 33 C. A. 8, 75 S. W. 336.

An application for a loan on a mortgage held to estop the mortgagor from claiming any homestead right in his mortgaged premises. *Thompson Sav. Bank v. Gregory*, 36 C. A. 578, 82 S. W. 802.

Recital in deed of trust held not to estop grantor's wife from claiming land as a homestead. *McGaughey v. American Nat. Bank*, 41 C. A. 191, 92 S. W. 1003.

Where claimants are not in actual possession, subjecting the property to homestead use, representations amounting to fraud will estop them from thereafter claiming the property as homestead as against persons acting on such representations. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

Effect of a disclaimer of homestead interest in mortgaged land stated. *Dignowity v. Lindheim* (Civ. App.) 109 S. W. 966.

Where property has actually become a homestead, mere declarations of the owner and her husband negating the idea of homestead made while they were occupying the property as a homestead, does not change its homestead character, and no estoppel arises from such declarations. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

No representations in a deed by a man and his wife, in the actual possession of homestead property, will defeat the exemption, though, if claimants are not in actual possession, representations amounting to fraud will prevent them from setting up the homestead claim as against persons acting on such representation without knowledge of the exemption claim. *Deaton v. Southern Irr. Co.* (Civ. App.) 144 S. W. 294.

Where a married man is in actual possession of property, using the same as a business homestead, no representations made to a mortgagee, either by him or his wife, will defeat the constitutional exemption, for those dealing with them cannot ignore the notice conveyed by the actual use of the property. *Farmers' State Bank of Quana v. Farmer* (Civ. App.) 157 S. W. 283.

37. **Conveyance or incumbrance of homestead.**—A conveyance by husband and wife, absolute on its face, of a homestead, with a contemporaneous agreement with the vendee that it shall be reconveyed on repayment to him of the money constituting the considera-

tion, is valid, if the relation of creditor and debtor between the parties was terminated by the deed; but if that relation continued it would be a pretended conveyance and void. *Hurt v. Cooper*, 63 T. 362; *Astugueville v. Loustaunau*, 61 T. 233; *Loving v. Milliken*, 59 T. 425; *Hudson v. Wilkinson*, 45 T. 445; *Fowler v. Stoneum*, 11 T. 478, 62 Am. Dec. 490; *Carter v. Carter*, 5 T. 93; *Heidenheimer v. Stewart*, 65 T. 321.

Where land has become a homestead prior to the owner executing a note which did not include any of the purchase price of the land, the payee could acquire no lien on the land as security for the note. *Sweet v. Lyon*, 39 C. A. 450, 88 S. W. 384.

Under Const. art. 16, § 51, and this article, the homestead right of a married woman rests upon the fact that she has the status of a wife, and that as such she actually used and occupied the 200-acre homestead for the purpose of a home, at the time of its attempted alienation, and did not join in the execution of the conveyance or in any way assent thereto. *McCracken v. Taylor* (Civ. App.) 146 S. W. 693.

38. — How made.—See Title 24, Chapter 1, Art. 1115, and notes.

39. — Agreement as to boundaries.—The right of adjoining landowners to agree as to their common boundary is not affected by the fact that one of the lots is a homestead. *McKeon v. Roan* (Civ. App.) 106 S. W. 404.

40. — Sale.—A conditional sale of a homestead is valid. *Astugueville v. Loustaunau*, 61 T. 233.

A homestead is subject to an actual bona fide sale. *Johnston v. Fraser* (Civ. App.) 92 S. W. 49.

A deed by the grantee of a trust deed executed at the request of the owner held to convey title. *Alvord Nat. Bank v. Ferguson* (Civ. App.) 126 S. W. 622.

41. — Conveyance between husband and wife.—The husband cannot execute to his wife a mortgage upon their homestead to secure a loan from her. *Madden v. Madden*, 79 T. 595, 15 S. W. 480.

A conveyance of exempt community property by an insolvent husband to his wife is valid against his subsequent creditors. *Texarkana Bank v. Hall* (Civ. App.) 30 S. W. 73.

42. — Mortgage.—Parol evidence alone is not sufficient to establish that a conveyance of the homestead, absolute and duly acknowledged, was intended as a mortgage, unless the proof is clear, satisfactory and convincing. *Brewster v. Davis*, 59 T. 478.

The wife is a necessary party to suit foreclosing a lien upon the homestead. *Thompson v. Jones*, 60 T. 94.

An absolute deed conveying the homestead to secure a debt is a mortgage, and therefore void. *Williams v. Chambers* (Civ. App.) 26 S. W. 270; *Odum v. Menafee*, 11 C. A. 119, 33 S. W. 129.

The conveyance of a homestead was made to evade the homestead law. Afterwards money was borrowed secured by a deed of trust on it from a party whose agent knew the character of the transaction. Deed of trust was held void and the holder of the lien debt in the absence of pleadings was not permitted to show that the agent took the deed of trust with the intent to defraud his principal. *Stephenson v. Yeorgan*, 17 C. A. 111, 42 S. W. 626.

The intention to abandon a homestead will not validate a mortgage given thereon. *Caywood v. Henderson* (Civ. App.) 44 S. W. 927.

A charge on constructive notice of deceit in securing loan on homestead held uncalled for. *Texas Loan & Savings Co. v. Allen* (Civ. App.) 46 S. W. 833.

Where grantors of a homestead took a note from the grantee, reserving a vendor's lien, and executed a written assignment of the note, acknowledging the validity of the lien and guaranteeing payment of the note, instrument held not invalid as a mortgage of homestead. *Breneman v. Mayer*, 24 C. A. 164, 58 S. W. 725.

A mortgage held not void because its execution constituted one of the acts by which the property therein described was segregated from the homestead. *O'Brien v. Woelitz*, 94 T. 148, 58 S. W. 943, 86 Am. St. Rep. 829.

A mortgage on land used for homestead purposes, but not included in a prior designation of the homestead, held valid. *Brin v. Anderson*, 25 C. A. 323, 60 S. W. 778.

A deed of trust by a husband and wife on their homestead for a sum in excess of the amount necessary to pay liens on the homestead is void as to such excess. *Hillyer v. Westfall* (Civ. App.) 67 S. W. 1045.

Whether land is exempt as a homestead from operation of a trust deed is to be determined by the conditions existing at the time such deed is given. *Crebbin v. Moseley* (Civ. App.) 74 S. W. 815.

A mortgage given on the homestead by the husband and wife is absolutely void, though at the time it was given the mortgagors had formed the intention of abandoning the homestead. *Delaney v. Walker*, 34 C. A. 358, 79 S. W. 601.

A deed of trust for security on a rural homestead and also on a town lot is void as to the homestead, but valid as to the town lot. *Dignowity v. Baumblatt*, 38 C. A. 363, 85 S. W. 834.

A deed of trust of an urban homestead is not given validity by a temporary abandonment of the premises. *Id.*

A deed of trust for security on an urban homestead is void, though the homestead consists of two tracts of land. *Id.*

That a deed of trust executed by a husband and wife on their homestead was ineffective to create a lien thereon did not avoid their personal obligation to pay the debt secured thereby. *Fontaine v. Nuse*, 38 C. A. 358, 85 S. W. 852.

Land embraced within a deed of trust, which was used as a homestead at the time of the execution of the deed, was not subject to the mortgage lien. *McGaughey v. American Nat. Bank*, 41 C. A. 191, 92 S. W. 1003.

Agreement by debtor that creditor should take deed to land occupied as homestead and hold same as security for indebtedness other than purchase money held void. *Blake v. Lowry*, 43 C. A. 17, 93 S. W. 521.

A mortgage of a homestead held not to create a lien as against a married mortgagor living on the premises with his wife. *Adams v. Bartell*, 46 C. A. 349, 102 S. W. 779.

A mortgage or trust deed given on a homestead by the owner and his wife, is void, no matter what method was adopted to fix a lien thereby or how firm the belief that a lien could be created. *Hall v. Jennings* (Civ. App.) 104 S. W. 489.

Conveyance of a homestead to a creditor of the husband and a reconveyance to him by the creditor reserving a vendor's lien as part of the same transaction held an invalid attempt to incumber the homestead. *Sanger Bros. v. Brooks*, 101 T. 115, 105 S. W. 37.

A mortgage of fixtures attached to a homestead, void under the constitution, prohibiting liens on homesteads, was not vitIALIZED by the subsequent cancellation of the title on which the homestead right was predicated. *Doak v. Moore*, 48 C. A. 594, 109 S. W. 405.

A mortgage of fixtures attached to the homestead cannot be rendered valid by agreement that the property shall be treated as chattels. *Id.*

Where one owning adjoining tracts embracing more than 200 acres has impressed the homestead character on parts of tracts, his dwelling, garden, etc., must be included in his homestead, and the excess of 200 acres may be mortgaged by him. *Watkins Land Co. v. Temple*, 66 C. A. 65, 119 S. W. 728.

Where a mortgage by means of a deed absolute on its face was placed on a homestead, it is void so far as the homestead is concerned. *O'Neill v. O'Neill* (Civ. App.) 135 S. W. 729.

Statement of conditions on which the head of a family having more than 200 acres impressed with the homestead character may designate 200 acres as a homestead, and mortgage the balance. *Watkins Land Co. v. Temple* (Civ. App.) 135 S. W. 1063.

Plaintiff, furnishing money to pay purchase money notes given for a homestead conveyed to her, held not prevented from enforcing a mortgage lien against the homestead. *Parker v. Bushong* (Civ. App.) 143 S. W. 281.

Commissions paid to procure a loan for the purchase of a homestead, constituting no part of the original contract for the purchase, cannot be secured by a lien on the homestead. *James v. Chaney* (Civ. App.) 154 S. W. 679.

43. — **Mortgage by unmarried debtor.**—An unmarried man having a family of relatives may mortgage his homestead. *Smith v. Von Hutton*, 75 T. 626, 13 S. W. 18.

An unmarried surviving spouse can mortgage the homestead. *Hensel v. Building Co.*, 85 T. 215, 20 S. W. 116; *Rice v. S. A. Mortg. Co.* (Civ. App.) 30 S. W. 75; *Lacy v. Rollins*, 74 T. 566, 12 S. W. 314; *Watts v. Miller*, 76 T. 13, 13 S. W. 16; *Bateman v. Pool*, 84 T. 405, 19 S. W. 552; *Klobassa v. Raley*, 23 S. W. 253, 1 C. A. 165; *Harle v. Richards*, 78 T. 80, 14 S. W. 257; *Moore v. Poole* (Civ. App.) 25 S. W. 802; *Astugueville v. Loutanau*, 61 T. 233.

An unmarried man, though the head of a family, can create a valid lien on his homestead. *Davis v. Converse* (Civ. App.) 46 S. W. 910.

An unmarried man may mortgage his homestead, though the same is exempt from execution. *Melton v. Beasley*, 56 C. A. 537, 121 S. W. 574.

An unmarried woman may mortgage her homestead, though she is the head of a family of minor children. *McGee v. Tinner* (Civ. App.) 129 S. W. 866.

44. — **Effect of abandonment or termination of homestead right.**—A recorded lien attaches to land as soon as it has lost its homestead character by abandonment. *Marks v. Bell*, 10 C. A. 587, 31 S. W. 699; *Glasscock v. Stringer* (Civ. App.) 33 S. W. 677.

A mortgage made in violation of the constitutional inhibition cannot become valid by a subsequent abandonment of the homestead. *Caywood v. Henderson* (Civ. App.) 44 S. W. 927.

The abandonment of a city homestead, and the designation of a country place as a homestead, permits the mortgaging of such city property. *White v. Dabney* (Civ. App.) 46 S. W. 653.

A deed of trust of a business homestead held valid where, prior to its execution, the grantor formed an intention to abandon the premises, which he did after its execution. *Sanger v. Hicks Co.*, 22 C. A. 473, 56 S. W. 775.

A mortgage, void because given on a business homestead, is not validated by a subsequent abandonment of the property as a homestead. *O'Brien v. Woeltz*, 94 T. 148, 53 S. W. 943, 86 Am. St. Rep. 829; *Woeltz v. Same* (Civ. App.) 57 S. W. 905.

Where a husband and wife joined in the sale of their homestead, which was community property, the contract was enforceable as against the husband on the termination of the homestead either by abandonment or death of the wife. *Ley v. Hahn*, 36 C. A. 208, 81 S. W. 354.

Prior to the present constitution, a deed of trust of the homestead, executed by the husband alone to secure a community debt, held valid on the death of the wife. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

45. — **Excess over homestead.**—Where a mortgagee desires to subject to the payment of his debt the interest of a debtor in land in excess of the homestead right, and there are other joint owners of the land, the proper practice is to make such joint owners parties for partition before sale. *Jenkins v. Veltz*, 54 T. 636.

The owner of a 340-acre tract of land can sell 4 acres in one corner over which a road passes, as there is more than sufficient left to constitute the homestead. *Neiman v. Schuster* (Civ. App.) 43 S. W. 1075.

A trust deed on business homestead held valid to the extent that the combined value of the unimproved lots used for business and residence homestead purposes exceeded \$5,000. *St. Louis Brewing Ass'n v. Walker*, 23 C. A. 6, 54 S. W. 360.

A mortgage executed after a declaration of a homestead on the land was void, except as to the amount in excess of the 200 acres allowed. *Smith v. Van Slyke* (Civ. App.) 139 S. W. 619.

In determining whether there was an excess of over 200 acres allowed as a homestead in several tracts, in a proceeding to foreclose mortgage liens, the field notes showing an excess were prima facie proof of that fact. *Id.*

46. — **Consent of wife.**—See Art. 1115 and notes.

47. — **Estoppel to deny validity.**—Transfer of purchase-money notes received in simulated sale of homestead estops husband and wife from setting up simulated character of the transaction. *Campbell v. Crowley* (Civ. App.) 56 S. W. 373.

Husband and wife not estopped, by reconveyance of homestead to them from grantee under simulated sale, and assumption of notes given for purchase price, from setting up character of transaction against purchaser of notes with notice. *Id.*

Abandonment of homestead, and transfer of notes received in simulated sale of said property to purchaser with notice, will not estop husband and wife from setting up simulated character of transaction. *Id.*

Grantee of purchaser of homestead at trustee's sale, who took conveyance without notice of simulated character of trust deed, is entitled to protection in action by husband and wife to recover property. *Id.*

Mortgagors submitting to a judgment foreclosing the mortgage lien could not thereafter claim that the mortgage was void because of the homestead character of the property. *Blair v. Guaranty Savings, Loan & Investment Co.*, 54 C. A. 443, 118 S. W. 608.

48. — **Rights of purchasers or mortgagees.**—A simulated sale was made of the homestead to enable the grantee to borrow money for the husband. A party who loaned money to the grantee is charged with notice of his agent of the character of the sale in the absence of evidence that the agent colluded with the other parties to defraud his principal. *People's Building, Loan & Savings Association v. Dailey*, 17 C. A. 38, 42 S. W. 364.

Improvements placed on land by a purchaser with the knowledge of a widow's homestead rights therein become part of the realty and inure to the benefit of the homestead estate. *Hillen v. Williams*, 25 C. A. 268, 60 S. W. 997.

In a suit to foreclose a mortgage, one who had purchased part of the land from the mortgagor, subject to the mortgage, could not defend against the mortgage by setting up that the land was a homestead. *Batts v. Middlesex Banking Co.*, 26 C. A. 515, 63 S. W. 1046.

When lands including a homestead are conveyed by deed of trust which is invalid as to the homestead, except as to an amount, less than the secured debt, which is sufficient to remove previously existing liens from the homestead, a sale of the entire tract by the trustee passes no title to the homestead. *Hillyer v. Westfall* (Civ. App.) 67 S. W. 1045.

Where land of a lunatic on which he resided as head of a family was sold to pay debts, the question as to whether the purchaser acquired a good title held dependent on whether the property was the homestead of the lunatic when it was sold. *Griffin v. Harris*, 39 C. A. 586, 88 S. W. 493.

One mortgaging land not used openly in connection with his home held estopped from claiming it as a homestead. *Watkins Land Co. v. Temple*, 56 C. A. 65, 119 S. W. 728.

A lien held not fixed by the abstracting of a judgment as against premises occupied by the debtor and his wife as a homestead. *Garth v. Stuart* (Civ. App.) 125 S. W. 611.

The sale of a homestead under a deed of trust for an indebtedness, part only of which is a valid lien, under the constitution is void. *Girardeau v. Perkins* (Civ. App.) 126 S. W. 633.

Where the whole indebtedness, part of which was a valid lien on the homestead, was embraced in one note, payments made thereon should be applied to discharge that part of the indebtedness which was a valid lien on the homestead. *Id.*

Where all that part of a debt secured by a deed of trust on a homestead which was a valid lien on the homestead had been paid before the sale of the property under the deed of trust, the trustee had no power to sell, and the sale by him conveyed no title. *Id.*

Where a debt secured by a deed of trust constituted a valid lien on the homestead of T. and wife at the date of the execution of another deed of trust to B. and formed a part of the amount secured by the second deed of trust, to this extent the deed of trust was a lien on the homestead. *Id.*

B., holding a deed of trust on a homestead, held to have a valid lien on the homestead for taxes paid. *Id.*

In satisfying a mortgage lien out of land designated as a homestead, held, that any excess over the 200 acres allowed as a homestead should be located out of a tract sold by the homesteader. *Smith v. Van Slyke* (Civ. App.) 139 S. W. 619.

49. — **Rights of bona fide purchasers.**—See notes under Art. 6824.

50. **Testamentary disposition of exemption.**—The exemption of homestead property from forced sale for the payment of debts cannot be transmitted by will. *Roots v. Robertson*, 93 T. 365, 55 S. W. 308.

51. **Effect of levy and forced sale of homestead.**—The levy of a writ of attachment and foreclosure of an attachment lien on property which constitutes a homestead gives no right therein. *Holland v. Zilliox*, 38 C. A. 416, 86 S. W. 36.

A forced sale of a homestead, except for that which the constitution makes it liable, is void, and a grantee of the purchaser at such sale acquires no better title than the purchaser did. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

An attempted sale of land under execution, while it was occupied as a homestead by the head of a family, was void, and conveyed no title to the purchaser. *Speer & Goodnight v. Sykes*, 102 T. 451, 119 S. W. 86, 132 Am. St. Rep. 896.

The levy of an attachment does not create a lien on a homestead. *Strong v. H. T. Elder & Sons* (Civ. App.) 125 S. W. 374.

52. **Judgment as lien against homestead.**—A judgment lien does not attach to the homestead of a judgment debtor. *Savage v. Cowan* (Civ. App.) 113 S. W. 319.

53. **Rights of surviving husband, wife, children or heirs.**—See Title 52, Chapter 18.

Art. 3787. Proceeds of sale of homestead exempt for six months.—The proceeds of the voluntary sale of the homestead shall not be subject to garnishment or forced sale within six months after such sale. [Id.]

See *State Board of Medical Examiners v. Taylor*, 103 T. 444, 129 S. W. 600.

Proceeds of exempt property.—When a homestead has been sold under legal process, a surplus remaining after satisfying the debt for which it was sold is not subject to seizure under legal process. *Hunter v. Woodert*, 55 T. 433.

And so when the old homestead is sold with the intention of reinvesting the money in another, the unpaid purchase money cannot be subjected to the payment of debts. *Watkins v. Davis*, 61 T. 414.

A husband has the right to control the proceeds of the homestead. *Alvord Nat. Bank v. Ferguson* (Civ. App.) 126 S. W. 622.

This article does not require that a suit to enforce the right conferred by the statute shall be instituted within six months. *Henry v. Boedker* (Civ. App.) 141 S. W. 811.

Under this article an attorney who has sold his client's homestead rights for a consideration partly in cash cannot, without his consent, subject the proceeds in his hands to an extinguishment of the client's notes held by himself. *Id.*

— **Voluntary sale or exchange.**—Property acquired by voluntary exchange of exempt property, if from its character and use it is also exempt, will receive the same protection from forced sale which shielded the property given in exchange for it. This rule applies to the acquisition by the widow, after the death of the husband, of a new homestead in exchange for the old one, even though there be no constituent of her own family, for whose support she is liable, residing with her. *Schneider v. Bray*, 59 T. 668, citing *Whittenberg v. Lloyd*, 49 T. 633; *Wolfe v. Buckley*, 52 T. 641.

When exempt property is sold and voluntarily converted into property not exempt, the latter is not exempt from forced sale. *Kingsland v. McGowan*, 3 App. C. C. § 32.

Notes given for the purchase money of a homestead are not exempt from garnishment. *Mann v. Kelsey*, 71 T. 609, 12 S. W. 43, 10 Am. St. Rep. 800; *Kirby v. Giddings*, 75 T. 679, 13 S. W. 27; *Moursund v. Priess*, 84 T. 554, 19 S. W. 775; *Womack v. Stokes*, 12 C. A. 648, 35 S. W. 82. See Art. 2396.

Where parties traded their home in town for a farm, intending to use it as a homestead, and never abandoned such intention, they may restrain a sale thereof under execution. *Rutherford v. Cox*, 25 C. A. 499, 61 S. W. 527.

A judgment creditor of husband held not entitled to subject to lien vendor's lien notes given the wife on sale of the homestead. *Howard v. Mayher*, 69 C. A. 529, 88 S. W. 409.

The proceeds of the sale of the homestead are exempt from the payment of the husband's debts, except purchase money of a homestead and taxes thereon. *Alvord Nat. Bank v. Ferguson* (Civ. App.) 126 S. W. 622.

On the sale of a homestead, the proceeds remain exempt for six months if not sooner invested in a new homestead. *Shook v. Shook* (Civ. App.) 145 S. W. 682.

— **Involuntary conversion.**—When exempt property is taken from the owner against his will and its form changed by process of law, the proceeds are protected until there is a reasonable opportunity to reinvest in other exempt property. *Kingsland v. McGowan*, 3 App. C. C. § 32, citing *Whittenberg v. Lloyd*, 49 T. 633; *North v. Shearn*, 15 T. 175; *Paschal v. Cushman*, 26 T. 75.

The compensation received for homestead property condemned by a city while occupied by the widow could not be partitioned between the widow and decedent's heirs over her objection, but should be ordered by the court to be reinvested in another homestead. *Lucas v. Lucas*, 104 T. 636, 143 S. W. 1153.

— **Proceeds of insurance.**—Insurance money on a homestead is not subject to the payment of general debts. *Cameron v. Fay*, 55 T. 58; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 T. 582; *Porter v. Porter*, 2 App. C. C. § 434; *Ward v. Goggan*, 4 C. A. 274, 23 S. W. 479; *Insurance Co. v. Jameson*, 6 C. A. 282, 25 S. W. 307; *Swayne v. Chase* (Civ. App.) 29 S. W. 418; *Chase v. Swayne*, 88 T. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; *Traders' Ins. Co. v. Chase*, 11 C. A. 13, 31 S. W. 1103; *Continental Ins. Co. v. Chase* (Civ. App.) 33 S. W. 602.

Proceeds of a fire insurance policy on a building which is a part of a homestead are exempt from the payment of the husband's debts, except purchase money of a homestead and taxes thereon. *Alvord Nat. Bank v. Ferguson* (Civ. App.) 126 S. W. 622.

— **Property purchased with proceeds.**—Where the owner of a homestead sold the same and applied proceeds to payments of liens on other land, in improving it, he could claim part of it, which was of no greater value than that sold as a homestead. *Leland v. Chamberlin* (Civ. App.) 60 S. W. 435.

Three parcels of land constituting one tract of less than 200 acres, on which a debtor moved, intending to make the same his homestead, held not subject to execution. *Schneider v. Dorsey* (Civ. App.) 72 S. W. 1029.

Judgment creditor held not to have acquired a lien on certain land purchased by judgment debtor with proceeds of a sale of his homestead. *Ellis v. Light* (Civ. App.) 73 S. W. 551.

Where a judgment debtor sold his home before the filing by the judgment creditor of an abstract of a justice's judgment in the office of the county clerk, and bought 80 acres of land, which he intended to be his homestead, held, that the 80 acres was the debtor's homestead and the judgment was not a lien thereon. *First State Bank of Emory v. Allen* (Civ. App.) 150 S. W. 747.

Art. 3788. [2397] [2337] Property exempt to others than families.—The following property shall be reserved to persons who are not constituents of a family, exempt from attachment, execution and every other species of forced sale:

1. A lot or lots in a cemetery, held for the purpose of sepulture.
2. All wearing apparel.
3. All tools, apparatus and books belonging to any trade or profession.
4. One horse, saddle and bridle.
5. Current wages for personal services. [Act Aug. 15, 1887, p. 127, sec. 2. P. D. 6834. Const., art. 16, sec. 28.]

See Const. art. 16, § 49.

Wearing apparel.—A diamond stud worn continuously and used for fastening a shirt front is "wearing apparel" and exempt. *In re Smith* (D. C.) 96 Fed. 832.

A diamond ring worn on the finger is exempt. *First Nat. Bank v. Robinson* (Civ. App.) 124 S. W. 177.

Tools and apparatus belonging to trade or profession.—A bicycle used by an architect is not exempt from forced sale. *Smith v. Horton*, 19 C. A. 28, 46 S. W. 401.

A single man, who is a land, loan, and insurance agent, is not entitled to a buggy and harness as exempt from execution as tools and apparatus belonging to his trade and profession. *Cates v. McClure*, 27 C. A. 459, 66 S. W. 224.

A typewriter is not exempt, as a tool belonging to the profession of a physician, though he uses it in correspondence and advertising his business. *Massie v. Atchley*, 28 C. A. 114, 66 S. W. 582.

— **Furniture in restaurant.**—Furniture used in a restaurant business such as dishes, ranges, counters, stools and the like is not exempt from forced sale under this article. *Stone v. Schneider-Davis Co.* (Civ. App.) 112 S. W. 134.

Cemetery lots exempt from forced sale.—See Art. 767.

Art. 3789. [2398] [2338] Ferryboat, etc.—There shall be reserved to every ferryman exempt from attachment, execution and every other species of forced sale, except as hereinafter provided, one ferryboat, keel or flatboat; used as a ferryboat, with the necessary tackle for operating the same, not exceeding in value five hundred dollars; but such exemption shall not apply to any recovery for damages sustained by the negligence or other improper conduct on the part of such ferryman. [Act Feb. 13, 1858, p. 21, sec. 1. P. D. 3802.]

Art. 3790. [2399] [2339] Public property of counties, cities and towns exempt.—The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used and intended for extinguishing fires, public grounds and other property devoted exclusively to the use and benefit of the public, shall also be exempt from forced sale; provided, that nothing herein shall prevent the enforcement of the vendor's lien, the mechanic's or builder's lien, or other liens existing on the eighteenth day of April, 1876, when the existing constitution went into effect. [Const., art. 9, sec. 9.]

See *Capps v. Citizens' Nat. Bank of Longview* (Civ. App.) 134 S. W. 808.

Property exempt.—Property of a city not held for public purposes is subject to sale under execution against a city. *City of Laredo v. Nalle*, 65 T. 362; *City of Sherman v. Williams*, 84 T. 422, 19 S. W. 606, 31 Am. St. Rep. 66; *City of Laredo v. Benavides* (Civ. App.) 25 S. W. 482.

No equitable lien is created on fund due a contractor in hands of a county, by reason of actual notice of claim of materialman for material furnished the contractor for the construction of a county courthouse. *Herring-Hall-Marvin Co. v. Kroeger*, 23 C. A. 672, 57 S. W. 980.

The property of a religious and charitable hospital is not exempt from execution, though services are given free to those who cannot pay, and all sums received are expended in maintenance of the establishment. *Armendarez v. Hotel Dieu* (Civ. App.) 145 S. W. 1030.

Road work.—The construction of roads is a public work and laborers and materialmen have no lien. *National Bank of Denison v. Coleman* (Civ. App.) 151 S. W. 1123.

Art. 3791. [2400] [2340] Public libraries.—All public libraries shall be exempt from attachment, execution and every other species of forced sale. [Act Aug. 15, 1870, p. 127, sec. 2. P. D. 6834.]

Art. 3792. [2401] [2341] Homestead exemption does not apply, when.—The exemption of the homestead provided for in this chapter shall not apply where the debt is due:

1. For the purchase money of such homestead or a part of such purchase money.

2. For taxes due thereon.

3. For work and material used in constructing improvements thereon; but in this last case such work and material must have been contracted for in writing, and the consent of the wife, if there be one, must have been given in the same manner as is by law required in making a sale and conveyance of the homestead. [Const., art. 16, sec. 50.]

Purchase money.—The homestead exemption cannot prevail against the enforcement of the purchase-money therefor. The husband can settle and adjust the indebtedness for the purchase-money by a rescission of the contract, by reconveying the land to the vendor without being joined by his wife. *De Bruhl v. Maas*, 54 T. 474; *Roy v. Clarke*, 75 T. 29, 12 S. W. 845; *Clitus v. Langford*, 24 S. W. 325; *McCarty v. Brackenridge*, 1 C. A. 170, 20 S. W. 997. See *Lippencott v. York*, 24 S. W. 275, 86 T. 276.

Where a deed conveying land by its terms reserves a lien upon the property to

secure the payment of a specific sum of money, a homestead right is not acquired by the purchaser as against the lien, though the sum named constitutes no part of the purchase money proper. *Berry v. Boggess*, 62 T. 239.

A vendor's lien on a homestead, acquired by virtue of a void transfer of title to one having valid title, cannot be foreclosed. *Hayes v. Taylor*, 17 C. A. 449, 43 S. W. 314.

A note which also reserves a vendor's lien given to cover accrued interest on a vendor's lien note on the homestead constitutes a valid lien. *Green v. Johnson* (Civ. App.) 44 S. W. 6.

In action on vendor's lien note, held, that land was homestead was immaterial. *Bond v. National Exch. Bank* (Civ. App.) 53 S. W. 71.

A vendor's purchase money lien on land is valid, though the land was purchased and used as a homestead. *Lennox v. Sanders* (Civ. App.) 54 S. W. 1076.

An instruction that a purchase-money lien reserved in notes was valid, notwithstanding the defense of homestead, held erroneous under the evidence. *Evans v. Daniel*, 25 C. A. 362, 60 S. W. 1012.

Where a lien appearing to be for the purchase is created on land of a homestead character, a good-faith purchaser of such lien may enforce it. *Jones v. Male*, 26 C. A. 181, 62 S. W. 827.

Evidence held to show that notes recited as consideration for deed were given in payment for the property, and therefore that vendor retained the legal title until their payment; a vendor's lien being reserved. *Walsh v. Ford*, 27 C. A. 573, 66 S. W. 854.

Action by a vendor held to be to enforce a debt for purchase money to which the homestead rights of defendants were subject, and not to enforce a lien on a homestead created without the wife's consent. *Naquin v. Texas Savings & Real Estate Inv. Ass'n* (Civ. App.) 67 S. W. 908.

On release of lien on homestead during life of wife, the wife's rights held to vest in her free of lien, and on her death her heirs will take free of lien. *Boles v. Walton*, 32 C. A. 595, 74 S. W. 81.

A homestead right held not superior to a prior lien for purchase money. *Smith v. Owen*, 49 C. A. 51, 107 S. W. 929.

A homestead is subject to sale on foreclosure of purchase price notes at the suit of a bona fide assignee thereof. *Hightower Bros. v. W. F. Taylor Co.* (Civ. App.) 126 S. W. 621.

Defendant had a vendor's lien upon a number of lots, and a bank had a mortgage upon a part of them. Defendant released two lots not included in the bank's mortgage. Held, that the fact that the lots released were the homestead of the purchaser did not prevent the release from inuring to the benefit of the bank. *First State Bank v. Cox* (Civ. App.) 139 S. W. 1.

One who paid the notes representing the price of a homestead could enforce a mortgage given by the owners to secure the money advanced. *Parker v. Bushong* (Civ. App.) 143 S. W. 281.

Where real property, subject to vendor's lien notes, becomes the homestead of the purchaser, the homestead is nevertheless subject to the lien notes. *Quinn v. Dickinson* (Civ. App.) 146 S. W. 993.

The homestead claim is inferior to a vendor's rights to the unpaid purchase money. *Evans v. Marlow* (Civ. App.) 149 S. W. 347.

— **Loans and advances for purchase money.**—A note and mortgage executed by husband and wife for money borrowed to prevent the sale of the homestead for unpaid purchase money, and which on its face declares that it is executed for the purchase money of the homestead, subrogates the holder, when the money is applied in paying the lien, to the rights of the original vendors. Such a note afterwards renewed for a larger amount and including money not used to satisfy the vendor's lien is still entitled to a lien on the homestead for the amount used in discharging the original vendor's lien. *Hicks v. Morris*, 57 T. 658; *Joiner v. Perkins*, 59 T. 302; *Warhund v. Merritt*, 60 T. 27; *Bowles v. Beal*, 60 T. 322; *Morris v. Geisecke*, 60 T. 635.

The husband can incur the homestead lots for unpaid purchase money by mortgage with right of possession, the consent of the wife not being a prerequisite. *Archhold v. B. C. Evans Co.*, 11 C. A. 138, 32 S. W. 795.

A mortgage on the homestead to secure a loan of money, a part of which was used to take up a vendor's lien note and in improving the property, is void. A homestead cannot be subject to a lien, except in the manner provided by the constitution. *Building & Loan Ass'n v. Logan* (Civ. App.) 33 S. W. 1088.

One seeking to avoid foreclosure of mortgage on homestead held required to tender payment of valid portion of debt represented by loan used in paying vendor's lien on the homestead. *Dixon v. National Loan & Investment Co.* (Civ. App.) 40 S. W. 541.

Where a purchaser of realty pays the price and then borrows from the vendor, the lien in the deed for such borrowed money is valid. *Jones v. Male*, 26 C. A. 181, 62 S. W. 827.

A mortgage executed to secure money to pay for the land mortgaged can be enforced against a claim of homestead. *Crow v. Kellman* (Civ. App.) 70 S. W. 564.

Defense of homestead held not available against a note given by owner of homestead. *Johnston v. Arrendale*, 30 C. A. 504, 71 S. W. 45.

A trust deed on a homestead to secure money obtained to buy the lot and erect the building held a valid lien, under Const. art. 16, § 50. *Bayless v. Standard Savings & Loan Ass'n*, 39 C. A. 353, 87 S. W. 872.

Commissions paid to procure a loan for the purpose of a homestead, constituting no part of the original contract for the purchase, cannot be secured by a lien on the homestead. *James v. Chaney* (Civ. App.) 154 S. W. 679.

Taxes.—A special assessment against a homestead for street paving is not a tax within the meaning of the constitution authorizing the homestead to be sold for taxes due thereon. *Lovenberg v. Galveston*, 17 C. A. 169, 42 S. W. 1024.

A sale of a homestead for a greater amount of taxes than could legally be assessed against it, is void. *Hayes v. Taylor*, 17 C. A. 449, 43 S. W. 314.

The wife is not a necessary party in a tax suit to foreclose a lien on the homestead. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

A penalty cannot, under the constitution, be imposed on a homestead in addition to "taxes due thereon." *Toepperwein v. City of San Antonio* (Civ. App.) 124 S. W. 699.

Improvements.—No forced sale of a homestead, since the adoption of the constitution of 1876, can be made for work done and materials furnished in constructing improvements on it, unless the contract therefor is in writing, and the consent of the wife given thereto under the formalities required in making a conveyance. *Barnes v. White*, 53 T. 628.

The lien upon the homestead exists only when the material, etc., for which a note is given was furnished under a previous contract duly executed. A contract made and acknowledged afterwards does not give a lien on the homestead. *Taylor v. Huck*, 65 T. 238; *Reese v. Corlew*, 60 T. 70.

As to lien on homestead for improvements, see *Lippencott v. York*, 86 T. 283, 24 S. W. 275; *Walters v. Association*, 29 S. W. 51, 8 C. A. 500; *Cameron v. Gebhard*, 85 T. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; *Luzenburg v. Association*, 29 S. W. 237, 9 C. A. 261; *Heady v. Association* (Civ. App.) 26 S. W. 468; *Walker v. House* (Civ. App.) 24 S. W. 82; *Lignoski v. Crooker*, 86 T. 324, 24 S. W. 278, 788; *Pioneer Savings & Loan Co. v. Paschall*, 12 C. A. 613, 34 S. W. 1001.

The lien of a deed of trust, in which the wife did not join, to secure a debt for improvements on the property, held superior to a subsequent homestead claim in her favor. *Heatherly v. Little* (Civ. App.) 40 S. W. 445.

A mere change of the plans in the construction of homestead improvements under a contract will not vitiate the contract. *Banks v. House* (Civ. App.) 50 S. W. 1022.

Under contract to improve lot intended by owner as a homestead, mechanic's lien limited by homestead rights of husband and wife. *Sproule v. McFarland* (Civ. App.) 56 S. W. 693.

Materialmen who possessed knowledge sufficient to put men of ordinary prudence on inquiry as to the intention of the owner to occupy the building as a homestead, held not entitled to mechanics' liens on the property. *Haldeman v. McDonald* (Civ. App.) 58 S. W. 1040.

Testimony in a suit to foreclose a deed of trust on a homestead held proper to establish the validity of a mechanic's lien, which was material and necessary to sustain the deed. *Interstate Building & Loan Ass'n v. Goforth*, 94 T. 259, 59 S. W. 871.

For a contract to give a mechanic's lien on a homestead, held, that it was enough that it was executed and acknowledged, without acknowledgment of the notes called for by it, or registration of it or the notes. *Moreno v. R. B. Spencer & Bro.*, 37 C. A. 69, 82 S. W. 1054.

Where a husband and wife executed a note to secure a mechanic's lien on their homestead, the husband, without the consent of his wife, could not renew the note, which was about to be barred by limitations. *Sudduth v. Du Bose*, 42 C. A. 226, 93 S. W. 235.

A wife held estopped to deny the authority of her husband to declare the completion of a building contract on which declaration a trustee was authorized to deliver certain notes secured by a mechanic's lien on the homestead to the contractors. *Roane v. Murphy* (Civ. App.) 96 S. W. 782.

Market value of lumber held immaterial issue. *Mabry v. Citizens' Lumber Co.*, 47 C. A. 443, 105 S. W. 1156.

One held entitled to enforce a lien against a homestead for an improvement thereon. *Hicks v. Texas Loan & Investment Co.*, 51 C. A. 298, 111 S. W. 784.

Under the statute giving a lien on a homestead for improvements, both the contract and the employment of the work and material on the homestead in compliance therewith are made essential to the lien. *Murphy v. Williams*, 103 T. 155, 124 S. W. 900.

— **Loans and advances for improvements.**—As to the mode of creating a lien upon the homestead, see *Lippencott v. York*, 24 S. W. 275, 86 T. 276.

Money advanced to pay for labor and material in the erection of a dwelling house as a homestead can be secured by a lien on such property. This comes within the exception to article 16, section 50, of the constitution. *Pioneer Savings Loan Co. v. Everheart*, 18 C. A. 192, 44 S. W. 885.

One who loaned money to pay contractors and materialmen for the erection of a building on defendant's homestead held not entitled to a mechanic's lien therefor. *First Nat. Bank v. Campbell*, 24 C. A. 160, 58 S. W. 628.

Where the purchaser of realty pays the price and then borrows from the vendor, who obtains a lien for the loan, the purchaser does not acquire title by such payment and by making slight improvements, so as to defeat such lien by a claim of homestead. *Jones v. Male* (Civ. App.) 62 S. W. 827.

For a mere loan of money a lien cannot be created on a homestead. *Murphy v. Williams* (Civ. App.) 116 S. W. 412.

One advancing to a contractor money on notes secured by a lien on a homestead to enable the owner to improve the sale held entitled to a lien thereon to the amount of the advances. *Id.*

Where a husband and wife gave notes secured by a lien on the homestead to obtain money to improve the homestead and the money was used for such improvements, the lender was entitled to the lien. *Id.*

Under Const. art. 16, § 50, a deed of trust on a homestead, in so far as it concerns money lent the owner to improve the property, although it was afterward in fact used for that purpose, was void, since this was not a contract in writing for work and materials used in improvements on the property. *Girardeau v. Perkins* (Civ. App.) 128 S. W. 633.

Attorney's fees.—Homestead held liable to claim for attorney fees, where creditor is obliged to litigate his right to a lien. *Sproule v. McFarland* (Civ. App.) 56 S. W. 693.

A stipulation for attorney's fees in a mechanic's lien note held enforceable against the property. *American Mut. Bldg. & Sav. Ass'n v. Harn* (Civ. App.) 62 S. W. 74.

Attorney's fees provided for in a mortgage on the homestead to secure the costs of improvements thereon cannot be enforced against the homestead. *Harn v. American Mut. Bldg. & Sav. Ass'n*, 95 T. 79, 65 S. W. 176.

Attorney's fees provided for in a building contract executed by a husband and wife for the improvement of the homestead are not a lien on the homestead, though the contract

gives a mechanic's and materialman's lien thereon for money due the contractor. *American Mut. Bldg. & Sav. Ass'n v. Daugherty*, 27 C. A. 430, 66 S. W. 131.

A provision in a contract for the erection of a house on a homestead, giving an attorney's fee on foreclosure of a mechanic's lien, held invalid. *Summerville v. King* (Sup.) 84 S. W. 643.

Pre-existing liens.—The husband has the right in good faith to convey the community homestead in settlement of a valid lien thereon, or to adjust it as he sees proper, without being joined with his wife. *White v. Sheppard*, 16 T. 172; *Clements v. Lacey*, 51 T. 160; *Hicks v. Morris*, 57 T. 658; *Wheatley v. Griffin*, 60 T. 212; *Investors' Mortg. Sec. Co. v. Loyd*, 11 C. A. 449, 33 S. W. 750.

The husband may adjust liens on the homestead and substitute a new lien therefor. *Clements v. Lacy*, 51 T. 151; *Gillum v. Collier*, 53 T. 592; *De Bruhl v. Maas*, 54 T. 487; *Hicks v. Morris*, 57 T. 662; *Morris v. Geisecke*, 60 T. 635; *Baker v. Collins*, 23 S. W. 493, 4 C. A. 520.

Where the land claimed as a homestead is charged with equities and incumbrances antedating the purchase, the husband, acting in good faith, has the right to adjust such equities and incumbrances by substituting for them a new lien on the land. *Robinson v. Doss*, 53 T. 502.

A homestead right is subordinated to a lien on the premises when dedicated as a homestead. *Claybrooks v. Kelly*, 61 T. 634; *Gage v. Neblet*, 57 T. 374; *Wright v. Straub*, 64 T. 64; *Brooks v. Chatham*, 57 T. 31; *Warhund v. Merritt*, 60 T. 24.

A person was living on rented premises, intended to purchase them for a homestead, and did so purchase, but prior thereto a judgment was rendered against him. Held, that his right of homestead was superior to the lien of the judgment. *Freiberg v. Walzem*, 85 T. 264, 21 S. W. 60, 34 Am. St. Rep. 808.

Occupation of land as a homestead will not defeat a prior lien. *McCandless v. Freeman* (Civ. App.) 23 S. W. 1112.

A judgment lien cannot be extended to the homestead. But a judgment lien once fixed is superior to a subsequently acquired homestead right. *Wallis v. Wendler*, 27 C. A. 235, 65 S. W. 44.

A deed of trust to certain land held to relate back to the date of the agreement to give the same, and therefore prior to a homestead claim arising after the date of such agreement. *Ferguson v. Walter Connally & Co.*, 33 C. A. 245, 76 S. W. 609.

Land conveyed by deed of trust to secure a debt held not relieved from the lien thereof by the fact that it subsequently became a part of the debtor's homestead. *Id.*

Plaintiffs held precluded from asserting a homestead claim to land as against one holding prior equities and incumbrances thereon. *Cahill v. Dickson* (Civ. App.) 77 S. W. 281.

The purchaser of a homestead acquired it unaffected by the lien of a judgment against the grantor. *Howard v. Mayher*, 39 C. A. 529, 88 S. W. 409.

A trust deed held to create a lien superior to the homestead right, though the land was afterwards actually used as a homestead. *Watson v. City Nat. Bank of Texarkana*, 56 C. A. 138, 119 S. W. 915.

The lien of an execution is superior to homestead rights subsequently acquired by the debtor. *Id.*

Any homestead interest held subject to rights under a contract made prior to acquisition of such interest. *Parriss v. Jewell*, 57 C. A. 199, 122 S. W. 399.

Mechanics' liens on homesteads.—See Art. 5631.

Art. 3793. [2402] [2342] Exemptions not to override claims for rent, etc.—The exemption of personal property provided for in this chapter shall not apply when the debt is due for rents and advances made by a landlord to his tenant, under the provisions of title eighty, or to other debts which are secured by a lien on such property. [Act April 2, 1874, p. 56, sec. 1.]

Mortgage or lien.—A sale of exempt property under execution is not justified by the claim that it was subject to a lien for the debt on which execution was issued when such lien was not foreclosed by the judgment. *McGaughy v. Meek*, 1 App. C. C. § 1196.

Personal property exempt from forced sale is subject to a mortgage or lien given by the owner. *Rose v. Martin* (Civ. App.) 33 S. W. 284.

Costs.—A municipal ordinance prohibiting stock from running at large held to empower the holding of animals, exempt from execution, found running at large, for the costs and compensation provided for in the ordinance. *Thompson v. City of Brownwood*, 44 C. A. 623, 98 S. W. 938.

CHAPTER TWO

EXCESS OVER HOMESTEAD, ETC., HOW SET APART AND SUBJECT TO EXECUTION

Art.	Art.
3794. Voluntary designation of, and who may set aside homestead.	3801. Return of service.
3795. Mode of setting it apart.	3802. Return prima facie evidence.
3796. Instrument to be recorded.	3803. Defendant may designate homestead.
3797. Excess subject to execution, etc.	3804. Mode of making designation by defendant.
3798. Owner to be notified to set apart.	3805. Designation to be recorded.
3799. Notice, what.	3806. Effect of, when made by defendant.
3800. Service of notice.	3807. Proceeding when defendant falls.

Art.	Art.
3808. Commissioners to designate.	3813. Fees of clerk, etc.
3809. Requisites of such designation.	3814. Fees taxed as costs.
3810. To be returned and recorded; effect of.	3815. Excess to be sold.
3811. Sheriff's return.	3816. Defendant may change, but, etc.
3812. Compensation of commissioners and surveyor.	3817. Provisions cumulative.
	3818. Personal property may be designated.

Article 3794. [2403] [2343] Voluntary designation of, and who may set aside, homestead in the country.—When the homestead of a family, not being in a town or city; is a part of a larger tract or tracts of land than is exempt from forced sale as such homestead, it shall be lawful for the head of the family to designate and set apart the homestead, not exceeding two hundred acres, to which the family is entitled under the constitution and laws of this state. [Act May 7, 1873, p. 64, sec. 1, et seq. P. D. 6994a, et seq.]

Designation of rural homestead out of part of larger tract.—Where the homestead of 200 acres is a part of a larger tract, the husband, acting in good faith, can define the homestead and mortgage the excess. *Mackey v. Wallace*, 26 T. 526; *Holleman v. Smith*, 39 T. 357; *Medlenka v. Downing*, 59 T. 32; *Slavin v. Wheeler*, 61 T. 658; *McDannell v. Ragsdale*, 71 T. 26, 18 S. W. 625, 10 Am. St. Rep. 753; *Freeman v. Hamlin*, 1 C. A. 163, 21 S. W. 1019; *Mitchell v. Nix*, 1 U. C. 126; *Cervenka v. Dyches* (Civ. App.) 32 S. W. 316.

Courts cannot control the designation of a rural homestead out of a large tract, so as to include land never used or claimed as homestead by the family. *Freeman v. Hamblin*, 1 C. A. 157, 21 S. W. 1019.

As to designation as homestead of part of a large tract of land, see *Cervenka v. Dyches* (Civ. App.) 32 S. W. 316.

When the homestead is on a tract of land exceeding 200 acres, and the owner thereof owns another tract of land not connected with the homestead tract and in no way used for the purposes of a home, the head of the family cannot designate a part of the homestead tract and the piece not contiguous—and not used for the purposes of the home—as his homestead, so as to entitle him to mortgage the part of the homestead tract left out of the designation. If, however, the detached had been used for the purposes of a home in connection with the homestead tract, then he could designate 200 acres out of the two tracts so as to include all the detached portion. *Affleck v. Wangemann*, 93 T. 351, 55 S. W. 312.

Where a party entitled to select a certain quantity of land as a homestead selected more than he was entitled to, commissioners appointed to make partition had power to reduce the homestead to the proper amount by cutting off such part of the land as they saw fit. *Robb v. Robb* (Civ. App.) 62 S. W. 125.

Fact that designation of homestead was planned, prepared, and executed at instance of mortgagee held not to affect validity of mortgage. *Pickett v. Gleed*, 39 C. A. 71, 86 S. W. 946.

The head of a family, residing on a tract of more than 200 acres of rural land, may designate a 200-acre tract therefrom as a homestead. *McGaughey v. American Nat. Bank* 41 C. A. 191, 92 S. W. 1003.

The purpose of this and the succeeding article is to provide a means by which a homestead may be designated out of a larger tract, but the husband is not limited by these articles from otherwise making the designation, the only limitation being that he cannot exclude his residence. *Morris v. Pratt*, 53 C. A. 181, 116 S. W. 647.

The purpose of the statute in allowing a homesteader to designate in good faith, out of a larger tract, a particular tract actually used as a homestead is to locate the homestead within the boundaries of the land so designated, and to exclude other lands from the homestead claim, and a designation of a particular tract as a homestead is not invalid as to the claimant or creditors because the tracts designated contained in excess over the 200 acres allowed by statute, since the excess would not be exempted from execution sale, and could be set aside, as provided by law, in case of levy. *Smith v. Van Slyke* (Civ. App.) 139 S. W. 619.

— **Urban homesteads.**—The provisions of this chapter have no application to homesteads in towns and cities. *Pellat v. Decker*, 72 T. 578, 10 S. W. 696; *Mortgage Co. v. Norton*, 71 T. 683, 10 S. W. 301.

Wife's consent to designation.—When there is an excess of land in a rural homestead, the homestead may be designated by the husband, but in such designation he cannot renounce the actual homestead,—that is, the place of residence. *Freeman v. Hamblin*, 1 C. A. 157, 21 S. W. 1019.

Where the husband designates the land used for homestead purposes as a homestead, it is binding on him and his wife, though done without her knowledge and though the designation included his wife's separate land, and thereby excluded better lands of his own, more advantageously located. *Brin v. Anderson*, 25 C. A. 323, 60 S. W. 780.

On an issue as to whether property was the homestead of plaintiff and wife, it was proper to charge that the husband alone has the right to designate the homestead. *Evens v. Daniel*, 25 C. A. 362, 60 S. W. 1012.

Designation of certain lands as homestead by husband alone held binding. *Anderson v. Brin* (Civ. App.) 73 S. W. 838.

When the husband, as the head of his family sets apart a homestead, it is not essential to the validity of the designation that it be signed by the wife, or, in the absence of fraud, that it be assented to or concurred in by her. *Pickett v. Gleed*, 39 C. A. 71, 86 S. W. 946.

A husband can designate mortgaged land as a homestead, and the wife need not sign the designation nor acknowledge the same, under this article and Arts. 3795 and 3796. *McGaughey v. American Nat. Bank*, 41 C. A. 191, 92 S. W. 1009.

The husband may choose the homestead, regardless of the wishes of the wife. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

The husband has the right to choose the homestead for the family. *White v. Cowles* (Civ. App.) 155 S. W. 982.

Effect of designation.—If a husband and wife make a formal declaration that their homestead consists of a less number of acres than are exempted from forced sale, such declaration will not operate to reduce their homestead, when a larger number of acres, not exceeding 200, are in fact occupied as a homestead. *Radford v. Wood*, 65 T. 471.

The designation of a particular place as a business homestead is binding on the wife, and prevents the assertion of another place as such homestead as against third parties who acted upon the former in good faith. *Parrish v. Frey*, 18 C. A. 271, 44 S. W. 322.

The homestead character of an orchard, intended for family use and located within a reasonable distance of the family residence, held not removed by a homestead designation in which it was not included. *Brin v. Anderson*, 25 C. A. 323, 60 S. W. 778.

Under the statute permitting the designation of a homestead out of a large tract, the fact that the designation included more than the 200 acres allowed by statute would not invalidate the homestead as to such 200 acres. *Smith v. Van Slyke* (Civ. App.) 139 S. W. 619.

Setting apart homestead other exemptions of decedent.—See Title 52, Chapter 18.

Art. 3795. [2404] [2344] Mode of setting it apart.—The party desiring so to designate and set apart the homestead shall file for record with the clerk of the county court of the county in which the land, or a part thereof, may be, an instrument of writing containing a description by metes or bounds, or other sufficient description to identify it, of the homestead so claimed by him, stating the name of the original grantee and the number of acres, and, if more than one survey, the number of acres in each.

Necessity and sufficiency of designation.—A head of a family by living upon a tract of land of less than 200 acres thereby sufficiently designates such tract as a homestead, even if other lands are owned by the head of the family. *Coates v. Caldwell*, 71 T. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

Written declaration in a mortgage that the homestead was not on the mortgaged tract, but was on another, held a sufficient designation of a homestead. *American Freehold Land Mortg. Co. v. Dulock* (Civ. App.) 67 S. W. 172.

Declarations by a husband, on mortgaging one of two properties, indicating his intention to hold the other as his homestead, only bind the wife and render the mortgage valid in case the unmortgaged property is then used as a homestead. *Parrish v. Hawes* (Civ. App.) 67 S. W. 1044.

Evidence held to authorize a finding that certain land was impressed with a homestead character. *McGaughey v. American Nat. Bank*, 41 C. A. 191, 92 S. W. 1003.

Designation of homestead held not affected by tax sale so as to require new designation after redemption. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

One can designate a homestead out of a larger tract by executing and acknowledging a deed of trust upon the excess in acreage of land owned by him over the 200 acres which he was entitled to hold as his homestead. Of course the 200 acres must include his residence. *Morris v. Pratt*, 53 C. A. 181, 116 S. W. 647.

Art. 3796. [2405] [2345] Instrument to be recorded, etc.—Such instrument shall be signed by the party and acknowledged or proved as other instruments for record, and shall state that the party has designated and set apart as his homestead the tract or tracts of land so claimed by him; and such instrument shall be recorded by the clerk in the record of deeds of said county.

Art. 3797. [2406] [2346] Excess over homestead subject to execution.—Where the owner of such a homestead, part of a larger tract, as is described in article 3794, has failed to designate and set apart his homestead as provided in the three preceding articles, the excess of such tract or tracts of land over and above the homestead exemption may be partitioned and separated from such homestead and subjected to levy and sale under execution, if otherwise subject, as hereinafter directed. [Id.]

Execution sale of excess.—The excess over 200 acres of a rural homestead may be sold under execution by a levy and sale of the debtor's interest in the whole. See following articles; also Art. 3817. *Beall v. Hollingsworth* (Civ. App.) 46 S. W. 881.

Transfer of excess.—See notes under Art. 3786.

Art. 3798. [2407] [2347] Owner to be notified to set apart, etc.—The sheriff or constable holding an execution against the owner of such excess of land, over and above his exempted homestead, and not separated and partitioned therefrom, may, on his own motion, and shall, if required by the plaintiff in execution, his agent or attorney, notify the defendant in execution to designate and set apart his homestead from

the remainder of the land so owned and occupied by him, and that on his failure to do so within ten days the sheriff or constable will proceed to have such partition made as provided by law. [Id.]

Art. 3799. [2408] [2348] **Notice, what.**—The notice mentioned in the preceding article shall be written or printed, and shall be signed by the sheriff or constable. [Id.]

Art. 3800. [2409] [2349] **Service of notice.**—Such notice may be served on the defendant by the sheriff or constable by reading the same to him, or by leaving a copy of the same at his place of residence, with some person over fourteen years of age. [Id.]

Art. 3801. [2410] [2350] **Return of service.**—The sheriff or constable shall return said notice to the court from which the execution issued, with his return indorsed thereon, showing how he executed the same. [Id.]

Art. 3802. [2411] [2351] **Return prima facie evidence.**—The notice and return indorsed thereon shall be filed by the proper officer of the court, and shall be prima facie evidence of the facts stated. [Id.]

Art. 3803. [2412] [2352] **Defendant may designate his homestead.**—On the service of such notice, the defendant in execution shall have the right, within ten days thereafter, to designate and set apart his homestead from any excess of land owned by him, and deliver the same to the sheriff or constable. [Id.]

Art. 3804. [2413] [2353] **Mode of making designation by defendant.**—The designation and setting apart so made by the defendant shall be such as is required by articles 3795 and 3796. [Id.]

Art. 3805. [2414] [2354] **Designation to be recorded.**—The sheriff or constable shall deliver the designation or setting apart of the homestead so made to the clerk of the county court of the county in which such homestead, or a part thereof, is, and such clerk shall forthwith record the same in the record of deeds of his said county. [Id.]

Art. 3806. [2415] [2355] **Effect of, when made by defendant.**—Such designation and setting apart of the homestead made by the defendant under any of the preceding articles shall operate as a relinquishment of all right of homestead in the excess of land so partitioned from the homestead, and shall be binding on the defendant, and all others in privity with him, and the same, or a certified copy of the record thereof, shall be admitted in evidence of the facts stated therein. [Id.]

Art. 3807. [2416] [2356] **Defendant failing, officer to appoint commissioners.**—If the defendant in execution shall fail or refuse, within ten days after such notice, to so designate and set apart his homestead, the sheriff or constable holding such execution shall, at the earliest practicable time, summon either verbally or in writing three disinterested freeholders of the county, neighbors of the defendant in execution, as commissioners to designate for the defendant his homestead. [Id.]

Art. 3808. [2417] [2357] **Commissioners to designate homestead.**—The commissioners shall, as soon as practicable, proceed to partition the homestead of the defendant from the remainder of the tract or tracts, and may, if they deem it necessary, call in a surveyor to assist them. The action of such commissioners shall be reduced to writing and signed by them, or a majority of them, and shall be sworn to before some officer authorized to administer oaths, which shall be sufficient to admit the same to record. [Id.]

Art. 3809. [2418] [2358] **Requisites of designation by commissioners.**—The designation of the homestead by such commissioners shall contain all the requisites prescribed for a designation and setting apart

by the defendant, and, in addition thereto, shall state that the commissioners making the same were summoned by the sheriff or constable holding said execution to perform such duty and that the designation of the homestead made by them is fair and just to the best of their judgment and belief. [Id.]

Art. 3810. [2419] [2359] **To be returned and recorded; effect of.**—The commissioners shall return their said designation to the sheriff or constable, who shall deliver the same to the clerk of the county court to be recorded; and such designation, or a certified copy thereof, shall have the same effect as if the defendant had made the same under the provisions of this chapter. [Id.]

Art. 3811. [2420] [2360] **Sheriff's return.**—Whenever a homestead is designated under the provisions of this chapter, the sheriff or constable holding said execution shall make due return thereon, showing:

1. That notice to designate his homestead was given to the defendant in execution, referring to said notice and return thereon, which shall be returned with said execution.

2. That the designation of his homestead was delivered to him by the defendant, and has been filed by him with the county clerk, stating the dates of such delivery and filing.

3. If the defendant has failed or refused to deliver to him the designation of his homestead within the time prescribed by law, the return shall show that fact, and also that commissioners were duly appointed by him, and that the designation made by such commissioners was filed by him with the clerk of the county court, stating the times when said acts were done; and such return shall be prima facie evidence of the facts therein stated. [Id.]

Art. 3812. [2421] [2361] **Compensation of commissioners and surveyor.**—The commissioners shall be entitled to receive for their services the sum of two dollars per day, and the surveyor the sum of five dollars per day, to include pay for chain carriers. [Id.]

Art. 3813. [2422] [2362] **Fees of clerk, etc.**—The sheriff or constable and clerk shall, for their services, be entitled to such fees as are, or may be, allowed by law. [Id.]

Art. 3814. [2423] [2363] **Fees, etc., taxed as costs.**—Such fees and expenses shall be taxed as part of the costs of the execution against the defendant and collected as other costs. [Id.]

Art. 3815. [2424] [2364] **Excess to be sold.**—Whenever the homestead of the defendant in execution has been designated in either of the modes prescribed in this chapter, the officer holding said execution may proceed to sell the excess over and above the homestead, in accordance with the law governing sales under execution. [Id.]

Art. 3816. [2425] [2365] **Defendant may change, etc., but, etc.**—The defendant may, at any time after his homestead has been designated and set apart in either of the modes pointed out in this chapter, change the boundaries of his said homestead by an instrument executed and recorded in the manner provided for in articles 3795 and 3796, but such change shall not impair the rights of parties acquired prior to such change.

Rights of mortgagee.—Under this article, a change of the boundaries of a homestead would not affect the rights of a mortgagee in land, included within the boundaries after the change, which had accrued theretofore, so that he could enforce his lien as to such land. *Smith v. Van Slyke* (Civ. App.) 139 S. W. 619.

Art. 3817. [2426] [2366] **Provisions of this chapter cumulative.**—The provisions of this chapter in regard to the designation of the homestead are cumulative, and shall not be construed so as to interfere with, or abrogate, any other mode or remedy now known to the law for subjecting the excess of the homestead tract of land over and above

the exemption to forced sale, or any mode known to the law for producing partition by the purchaser at such execution sale, between himself and the owner of the homestead. [Id.]

Designation after execution sale.—A debtor can designate by metes and bounds his 200-acre homestead out of a larger tract in which his interest has been sold under execution. *Beall v. Hollingsworth* (Civ. App.) 46 S. W. 881.

Marshaling assets.—As to marshaling of assets where land is subject to homestead rights and a mortgage. *Henkel v. Bohenke*, 26 S. W. 645, 7 C. A. 16.

In order to protect a homestead, mortgagor held entitled to have land purchased at a foreclosure sale in bankruptcy proceedings first sold to satisfy a vendor's lien existing against all of the land. *Deaton v. Southern Irr. Co.* (Civ. App.) 144 S. W. 294.

Art. 3818. [2427] [2367] Personal property may be designated, etc.—Where there is more personal property of the same kind than is exempt from execution, the head of the family, or other person entitled to such exemption, may point out the portions to be levied on; but, if he fails to do so within a reasonable time after being requested by the officer holding the execution, such officer may make the selection for himself; but such notice shall only be necessary when the defendant is at the time to be found within the county, by leaving a copy of the same at his place of residence, with some person over fourteen years of age. [Id.]

Designation before levy.—The defendant in execution, in possession of a larger number of horses than exempt, has a right to designate those upon which the execution may be levied. *Yancy v. Felker*, 3 App. C. C. § 249.

Designation after levy.—Where officer levying attachment does not request defendant to select exemptions, the latter may do so at the trial. *Hall v. Miller*, 21 C. A. 336, 51 S. W. 36.

Marshaling assets.—Where a chattel mortgage covering exempt and nonexempt property has been recorded, the mortgagor can require the mortgagee, in foreclosing, to first exhaust the nonexempt property. *Baughn v. Allen* (Civ. App.) 68 S. W. 207.

TITLE 56

EXPRESS COMPANIES

Art. 3819.	Express companies declared common carriers, and duties defined.	Art. 3823.	To keep general office in this state, etc.
3820.	Railroad commission to regulate rates, etc.	3824.	To furnish information to railroad commission.
3821.	Penalties against, and railroad commission to enforce.	3825.	To give notice of place of general office.
3822.	Powers of commission over, same as over railroads.		

[See notes on the subject in general, at end of title.]

Article 3819. [2428] Express companies declared common carriers and duties defined.—Every person, firm or corporation which shall do the business of an express company, upon railroads or otherwise, in this state, by the carrying of any kind of property, money, papers, packages or other things, are hereby declared to be common carriers, and shall receive, safely carry and promptly deliver at the express office nearest destination every such article as may be tendered to them, and in the carriage of which they are engaged; provided, that no such company shall be compelled to carry any gunpowder, dynamite, kerosene, naphtha, gasoline, matches or other dangerous or inflammable oils, acids or materials, except under such regulations as may be prescribed by the railroad commission. It shall be unlawful for any person, firm or corporation so engaged to demand or receive for such services other than reasonable compensation. [Acts 1891, p. 48.]

Art. 3820. [2429] Railroad commission to regulate rates, etc.—The railroad commission of the state of Texas shall have power, and it shall be its duty, to fix and establish reasonable and just rates of charges for each class or kind of property, money, papers, packages and other things to be charged for and received by each express company on all such property, money, papers, packages and things which, by the contract of carriage, are to be transported by such express company between points wholly within this state, which rates or charges may be made to apply to all such companies, and may be changed or modified by said commission from time to time in such manner as may become necessary. Said commission shall have the same power to make and prescribe such rules and regulations for the government and control of such express companies as is, or may be, conferred upon said commission for the regulation of railroads.

Art. 3821. [2430] Penalties against, and railroad commission to enforce.—Every express company doing business in this state which shall demand or receive a greater compensation than that which may be prescribed and fixed by the said railroad commission for the transportation of any class or kind of property, money, papers, packages or things, shall be deemed guilty of extortion, and shall forfeit and pay to the state of Texas a sum not to exceed five hundred dollars for each offense; provided, that, if it shall appear that such violation was not wilful, said company shall have ten days to refund such overcharges or damages, in which case the penalty shall not be incurred. And the said commission shall have authority and it shall be its duty to sue for and recover the same in the same manner as may be prescribed by law for like suits against railroad companies.

Art. 3822. [2431] Powers of commission over, same as over railroads.—The said commission shall have authority, and it shall be its duty to call upon such express companies for reports, and investigate

their books in the same manner as may be prescribed by law for the regulation of railroad companies, and the said commission shall have power and authority to institute suits, sue out such writs and process as may be applicable and authorized for the regulation of railroad companies. All laws, rules and regulations made and prescribed for the government and control of railroads, in so far as they are applicable, shall be of equal force and effect against all express companies.

Art. 3823. To keep general office in this state, etc.—Every incorporated express company shall keep a general office in this state, at some place on the line of its transportation, in which it shall keep its books, accounts and contracts, relating to express business, or copies thereof, embracing all books, papers and contracts, or copies thereof, showing the value of its property of all kinds, and the amount of all its receipts and disbursements on account of the express business done in this state. The books, papers and contracts required to be kept in said general office shall at all times be subject to inspection and examination by the officers of the state of Texas, and by any member or members of the railroad commission of Texas, or by its authorized agent, officer or employé. A failure to comply with any of the foregoing provisions of this article shall subject the offending company, and any officer, agent or employé of such company so offending, to a penalty of not less than one hundred nor more than five hundred dollars. And a failure to comply with the foregoing provision shall subject the company so offending to forfeit its charter and privileges of doing business as an express company in this state. The railroad commission of Texas shall report to the attorney general of the state the name of any company, and the officers, agents or employés thereof, violating any of the provisions of this and of articles 3824 and 3825, and any suits to recover the penalties herein prescribed, or to forfeit the charter of such express company doing business in this state, shall be instituted and prosecuted in a court having jurisdiction, in the county of Travis, in the state of Texas, by the attorney general of the state. [Acts 1897, p. 14, sec. 1.]

See *Ft. Worth & D. C. Ry. Co. v. Drew* (Civ. App.) 140 S. W. 810.

Art. 3824. To furnish information to railroad commission.—Any incorporated express company with its principal office in another state, and doing business as such express company in this state, is hereby required to provide and keep, in its general office in this state, a copy of its charter, and to make full annual statements of the value of all its property, including a like statement of all its indebtedness, and of all its annual receipts and expenditures as such express company, to the railroad commission of Texas, at such time or times as may be prescribed by it; which statement shall be certified to be correct, and shall be sworn to by the president and secretary, or general manager in Texas, of such company; and such company shall permit any member or members of the railroad commission of Texas, or its authorized agent, to freely examine any and all books, papers and contracts, in said office; and, should any such company, or any person in charge of said office, refuse to permit such examination, this shall be sufficient ground for the withdrawal, by this state, of its privilege of doing business as such express company in this state; and it shall be the duty of the attorney general of the state to institute and conduct suits for that purpose in a court having jurisdiction in Travis county, in the state of Texas. [Id. sec. 2.]

Art. 3825. To give notice of place of general office.—Every express company doing business as such in this state shall, within ninety days after the passage of this act, establish the general office provided for in this act, at some point on their line of transportation in this state, and shall immediately give notice in writing to the railroad commission of Texas of the place at which such general office is located, and shall, at

the same time, give notice in writing to the said commission of the name and official designation of the person or persons, officer or officers, charged with the management of such general office, and shall, from time to time, give like notices in writing of any change of location of such general office, or of the person or persons, officer or officers, charged with the management. A failure to comply with any of the provisions of this article shall be sufficient cause for withdrawing from such express company the privilege of doing business as such in this state. [Id. sec. 3.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Negligence in general.—Where a person was killed by coming in contact with an express truck on a station platform and being dragged from a train and run over, the act of the servant of the express company in leaving the truck within 18 inches of the train held not the act of the express company. *Houston & T. C. R. Co. v. Wells, Fargo & Co.* (Civ. App.) 125 S. W. 971.

An express company operating over a railroad owes the railway employes and all others rightfully on or near the track a duty to use ordinary care to not injure them. *Wells Fargo & Co. v. McIntyre* (Civ. App.) 136 S. W. 1196.

Express company as carrier.—Where two parties have made a contract, which is broken by one of them, the damage which the other party ought ordinarily to receive for such breach is such as arises in the usual course of things from the breach itself, or such as may be reasonably supposed to have been contemplated by both parties at the time of contracting as the probable result of its breach. *Fac. Ex. Co. v. Darnell*, 62 T. 639.

The consignor may maintain against the carrier an action for breach of its contract, without reference to his property in the goods shipped. *Railway Co. v. Smith*, 84 T. 348, 19 S. W. 509; *Railway Co. v. Scott*, 4 C. A. 76, 26 S. W. 239; *Railway Co. v. Klepper* (Civ. App.) 24 S. W. 567.

An express company is responsible for damages resulting from delay in delivery of freight. *Pacific Express Co. v. Black*, 27 S. W. 830, 8 C. A. 363; *Wells, Fargo & Co. v. Battle*, 5 C. A. 532, 24 S. W. 353.

Consignee of express package held entitled to exemplary damages on malicious disregard of his rights by the express company. *Gary v. Wells Fargo & Co.'s Express* (Civ. App.) 40 S. W. 845.

The fact that an express company had notice of plaintiff's connection with medicine shipped to her agent, subsequent to shipping, does not make it liable for special damages for failure to promptly deliver thereafter. *Pacific Exp. Co. v. Redman* (Civ. App.) 60 S. W. 677.

In an action against an express company for failure to promptly deliver medicine shipped to plaintiff's agent, evidence held insufficient to show notice of plaintiff's connection with the shipment. *Id.*

Evidence examined and held insufficient to prove a contract with a carrier to carry goods at less than the tariff rates. *Wells Fargo Exp. Co. v. Williams* (Civ. App.) 71 S. W. 314.

In an action for the loss of goods shipped by express, evidence held sufficient to support a finding against the carrier on the issue of the shipper's fraud in attempting to get the goods carried for less than the established rate. *Wells Fargo & Co. v. Neiman-Marcus Co.* (Civ. App.) 125 S. W. 614.

Since a duty to disclose the contents of a package ordinarily does not rest on the shipper, in absence of a request by the carrier for such information, the mere failure of a shipper to state that the package contained a valuable ring did not absolve the carrier from liability for loss of the ring. *Head v. Pacific Express Co.* (Civ. App.) 126 S. W. 682.

Representations made by a shipper's agent to a carrier as to the nature of the goods bound the shipper to the same extent as made by himself. *Id.*

A reply by a shipper, in answer to an inquiry of the carrier's agent as to whether the package contained anything breakable or anything requiring it to be given special attention, that it did not, was not a false statement of the facts, though the package contained a valuable diamond ring. *Id.*

Though a carrier was absolved from liability as insurer because of misrepresentations by the shipper as to the nature of the goods shipped, whereby the carrier was induced to omit precautions which it would otherwise have employed, it was liable as bailee for failure to exercise ordinary care to safely deliver the property. *Id.*

Evidence in an action against an express company for damages for failure to promptly ship the corpse of plaintiff's husband held to sustain a finding that defendant's agent did not contract to pay the undertaker's bill. *Gathright v. Pacific Express Co.* (Sup.) 145 S. W. 1185, affirming judgment (Civ. App.) *Pacific Express Co. v. Gathright*, 130 S. W. 1035.

— **Authority of agent.**—An express company held liable for refusal of driver to deliver express package where it ratified his conduct. *Gary v. Wells Fargo & Co.'s Express* (Civ. App.) 40 S. W. 845.

An agent of an express company did not have authority to agree for the company to pay the undertaker's charges on a corpse and ship it. *Gathright v. Pacific Express Co.* (Sup.) 145 S. W. 1185, affirming judgment (Civ. App.) *Pacific Express Co. v. Gathright*, 130 S. W. 1035.

The local agent of an express company had no authority to make a contract for a shipment from another city having an office to his own city. *Id.*

A station agent has authority to bind the carrier by a contract to furnish a particular kind of car for the transportation of fowls. *Wells Fargo & Co. Express v. Hennessy* (Civ. App.) 156 S. W. 1158.

One dealing with the agent of an express company is not bound by secret instructions given by the company to such agent. *Id.*

An instruction that a local express agent had no authority to bind the company by a contract to furnish a special car was properly refused; the agent having such apparent authority without reference to the carrier's usual course of business or private instructions to its employes. *Id.*

— **Limitation of liability.**—A contract with an express company for the transportation of goods, which is made in Illinois, which limits its liability, contrary to an Illinois statute, does not limit the company's liability for loss occurring outside the state. *Pittman v. Pacific Exp. Co.*, 24 C. A. 595, 59 S. W. 949.

Where a carrier receiving a package for transportation, under a contract stipulating that in no event should it be liable beyond \$50 at which sum the property was valued, failed to deliver the package, it breached its contract and became liable for the full value thereof as against the defense that payment of the full value which exceeded \$50 would make it liable to prosecution for violation of the law requiring equal charges, because the charges were based on a \$50 valuation. *Wells Fargo & Co. v. Neiman-Marcus Co.* (Civ. App.) 125 S. W. 614.

A special contract limiting a carrier's liability will not be presumed from inference, custom, or failure to object. *Pacific Express Co. v. Rudman* (Civ. App.) 145 S. W. 268.

A provision in a bill of lading that the carrier should not be held liable beyond \$50, "unless the true value is stated herein, and an extra charge paid, based upon such higher value," is not void as an attempt to arbitrarily limit liability for loss from negligence without regard to real value. *Pacific Express Co. v. Ross* (Civ. App.) 154 S. W. 340.

Express company as employer.—Loading express matter in a car in a dangerous manner is not a breach of the duty to furnish a safe place to work, which an express company owes to a servant employed to ride in one of its cars. *Wells, Fargo & Co. v. Page*, 29 C. A. 489, 68 S. W. 528.

Evidence held to justify a jury in finding that injuries to servant resulted from employer's negligence in failing to provide safe truck and platform, and that the injuries are permanent. *Wells, Fargo & Co. Express v. Boyle* (Civ. App.) 98 S. W. 441.

In an action for injuries to a servant of an express company, caused by the falling of parcels from a truck, a finding that the defect in the truck was the proximate cause of the injury held unauthorized. *Wells-Fargo & Co. Express v. Boyle*, 100 T. 577, 102 S. W. 107.

TITLE 57

FACTORS AND COMMISSION MERCHANTS

Art.	Art.
3826. Commission merchant defined.	3832. Drawbacks, rebates, etc., prohibited.
3827. Bond of.	3832a. Prescribing the duties of a shipper.
3828. Bond made where; suit in same county.	3832b. Not to apply to cotton, etc.
3829. Factors, etc., prohibited from being interested in their own sales.	3832c. Livestock commission merchants defined.
3830. Factor to render account of sales and give particulars under penalty.	3832d. Bond of.
3831. No charge allowed for mending, etc., unless the same has been actually done.	3832e. Suits on bond.
	3832f. New bond required, when.
	3832g. Bond filed, where; fees.
	3832h. Laws not repealed.
	3832i. Laws repealed.

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

Article 3826. Commission merchant defined.—Any person, firm or corporation pursuing, or who shall pursue, the business of selling produce, or goods, wares or merchandise of any kind upon consignment for a commission, shall be deemed to be a commission merchant. [Acts 1907, p. 61, sec. 1.]

Factor.—A factor is one to whom goods are sent for sale on commission. The consignor is the principal holding the general property. *Milburn Mfg. Co. v. Peak*, 39 T. 209, 34 S. W. 102.

Where goods were shipped to be sold by the consignee, and the proceeds remitted to the consignor, there was no sale, the consignee being an agent merely. *Barnes v. Darby*, 18 C. A. 468, 44 S. W. 1029.

An agent employed by bankrupts to purchase cotton for them with his own funds on a salary, held a factor. *Couturie v. Roensch* (Civ. App.) 134 S. W. 413.

Art. 3827. Bond of.—Every commission merchant is hereby required to make bond in the sum of three thousand dollars, entered into with two or more good and sufficient sureties, who are residents of this state, and who shall make affidavit before some officer authorized to administer oaths, that they in their own right, over and above all exemptions, are worth the full amount of the bond they sign as sureties, payable to the county judge of each county in which such commission merchant maintains an office, and to the successors in office of such county judge as trustees for all persons who may become entitled to the benefits of this Act; conditioned that such commission merchant will faithfully and truly perform all agreements and contracts entered into with consignors for said produce, goods, wares or merchandise, that said commission merchant will promptly receive and sell such produce, goods, wares or merchandise, and will on receipt of such produce, goods, wares or merchandise class the same, and if such class as made by such commission merchant is not as high as that made and sent to him by the consignor, he (the commission merchant), will immediately notify the consignor of such fact and of the class made by him; and, as soon as sold will send to the consignor a full and complete account of sales of same, giving an itemized account thereof, and the price received, the dates of sales, and shall, within five days after said produce, goods, wares or merchandise are sold, send to the consignor the full amount received for the same, less the commission due said commission merchant under the contract of consignment, which bond shall be approved by the county judge of the county in which said commission merchant maintains an office, and by said county judge filed for record in the county clerk's office as chattel mortgages are now authorized to be filed by law; provided, that any commission merchant may be bonded under the provisions of this Act by a solvent surety company, doing business in this state, to be approved by the county judge under the provisions of this

article. [Acts 1907, p. 61, sec. 2. Acts 1913, p. 178, sec. 1. Amending Art. 3827, Rev. St. 1911.]

Art. 3828. Bond made where; suit in same county.—Such bond shall be made and filed for record in each county in which such commission merchant maintains an office, and in which county suits may be maintained upon such bond by any person claiming to have been damaged by a breach of its condition; provided, that said bond shall not become void upon the first recovery thereon, but may be sued upon until the amount thereof is exhausted; provided, however, that when said bond by suits of recovery has been reduced to the sum of fifteen hundred dollars, that said commission merchant shall be required to enter into a new bond in the sum of three thousand dollars as required in the first instance under the provisions of this chapter; which said new bond shall be liable for all future contracts, agreements or consignments thereafter entered into by said commission merchant and consignor of such produce, cotton, sugar, goods, wares or merchandise, and upon failure of said commission merchant to give said new bond, as above required, he shall cease doing business in this state; provided any commission merchant, as herein defined, who shall engage in business as such commission merchant, without first making and filing the bond provided for in articles 3827 and 3828, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars. [Id.]

Art. 3829. [2432] Factors, etc., prohibited from being interested in their own sales.—No factor or commission merchant, to whom any cotton, sugar, produce or merchandise of any kind is consigned, for sale on commission or otherwise, shall purchase the same or reserve any interest whatever therein upon the sale of the same, either directly or indirectly, in his own name or in the name or through the instrumentality of another, for his own benefit or for the benefit of another, or as factor or agent of any other person, without express license from the owner or consignor of such cotton, sugar, produce or other merchandise, or some person authorized by him, given in writing so to do, under a penalty of forfeiture of one-half the value of cotton, sugar, produce or other merchandise so purchased or sold, to be recovered by the owner of the same by suit before any court of competent jurisdiction in the county where the sale took place, or wherein the offending party resides. [Act Feb. 11, 1860. P. D. 3803.]

Right to represent both buyer and seller.—A person cannot act for both buyer and seller and receive commissions from both except by consent of both parties. *Tinsley v. Penniman*, 12 C. A. 591, 34 S. W. 365.

Art. 3830. Factor to render account of sales and give particulars under penalty.—Upon the shipment of any produce, cotton, sugar, goods, wares or merchandise, consigned for sale to any factor or commission merchant, it is hereby made his duty that such commission merchant will faithfully and truly perform all agreements and contracts entered into with consignors for said produce, cotton, sugar, goods, wares and [and] merchandise; that said commission merchant will promptly receive and sell such produce, cotton, sugar, goods, wares or merchandise, in accord with the contract of consignment and will on receipt of such produce, cotton, sugar, goods, wares or merchandise class the same, and if such class as made by such commission merchant is not as high as that made and sent to him by the consignor, he, (the commission merchant), will immediately notify the consignor of such fact and of the class made by him and as soon as sold will send to the consignor a full and complete account of sales of same, giving an itemized account thereof, and the price received, the dates of sales, and shall, within five days after said produce, cotton, sugar, goods, wares or merchandise are sold, send to the consignor the full amount received for the same, less the

commission due said commission merchant under the contract of consignment; and if cotton, sugar, or other produce sold by weight, the weight of the same in gross, and the tare allowed, and be accompanied by the certificate or memorandum, signed by the weigher who weighed the same, of the weight and condition as required by law, and upon failure of the said commission merchant to comply with any one of the provisions of this article, he and the bondsmen required by this chapter shall be liable for all actual damages incurred by the consignor by reason thereof, and in addition thereto a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the consignor in a suit filed for said actual damages and for said penalty. [Act Feb. 11, 1860. P. D. 3804. Acts 1913, p. 178, sec. 1, amending Art. 3830, Rev. St. 1911.]

Necessity for accounting.—A commission merchant must keep and render an account. *Nugent v. Martin*, 1 App. C. C. 1173.

Art. 3831. [2434] No charge allowed for mending, etc., unless same has been actually done.—No commission merchant or factor shall be permitted to make any charge for mending, or patching, or roping bales, or for cooperage or repairing bales, or for labor, or hauling, or cartage, or for storage, marking or weighing, unless the same has been actually done; and, in case of any such charge, a bill of particulars shall be rendered notwithstanding any usage or custom to the contrary to make such charge, by rate or average; and the person offending against the provisions of this chapter shall be liable to a penalty of not more than five hundred nor less than one hundred dollars, to be recovered by the owner or consignor, as in the two preceding articles. [Id. P. D. 3805.]

Art. 3832. [2435] Drawbacks, rebates, etc., prohibited.—All drawbacks and rebatement of insurance, freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service, of or to any cotton, grain or any other produce or article of commerce, paid or allowed, or contracted for, to any common carrier, shipper, merchant, commission merchant, factor, agent or middleman of any kind, not the true and absolute owner thereof, are forever prohibited. [Const., art. 16, sec. 25.]

Art. 3832a. Prescribing the duties of a shipper.—Every consignor of produce, goods, wares or merchandise in this state consigning produce, goods, wares, merchandise to commission merchants to be sold on commission shall, when he consigns such produce, goods, wares or merchandise, send to such commission merchant a written statement in which such consignor shall state the amount, the quality or class, the condition of such produce, goods, wares or merchandise so consigned, and if said commission merchant, on receipt of same, fails to promptly notify said consignor of any objection he may have to the class, quality or quantity so consigned, then such statement shall be prima facie evidence of the fact that said consignment of such produce, goods, wares or merchandise is truly stated in said statement by the consignor to said commission merchant, provided further, that when such produce, goods, wares or merchandise is received by said commission merchant, such commission merchant shall give to the agent of the railroad or other carrier so delivering such produce, goods, wares or merchandise, a receipt for same which receipt shall state the quality, quantity, grade and condition of such produce, goods, wares or merchandise, and said agent of the railroad or other carrier shall keep such receipt on file in his office subject to the inspection of any one interested in such shipment, for six months from the date of such receipt. [Acts 1913, p. 178, sec. 1, amending Title 57, Rev. St. 1911.]

Explanatory.—Acts 1913, p. 178, sec. 1, amends Arts. 3827, 3828, and 3830, tit. 57, ch. 1, Rev. Civ. St. 1911, so as to read as set forth by said preceding articles, and by adding to said title and chapter article "3833," etc. This article is here designated as 3832a, to distinguish it from Art. 3833, post.

Art. 3832b. Not to apply to cotton, etc.—None of the provisions of this bill shall apply to cotton, and nothing herein shall be construed as repealing or affecting any existing laws touching the subject of commission merchants or brokers as the same relates to the handling of cotton. [Id. sec. 1a.]

Art. 3832c. Livestock commission merchants defined.—That any person, firm or corporation pursuing or who shall pursue the business of selling livestock, cattle, cows, calves, bulls, steers, hogs, sheep, mules, horses, jacks and jennets, or any of them upon consignment for a commission or other charges, or who shall solicit consignments of live stock as a commission merchant or who shall advertise or hold himself out to be such, shall be deemed and held to be a livestock commission merchant within the meaning of this Act. [Acts 1913, p. 93, sec. 1.]

Art. 3832d. Bond of.—That all livestock commission merchants be and they are hereby required to make bond each in the sum of \$10,000.00 entered into with two or more good and sufficient sureties, who are residents of this state, or some surety company duly and legally authorized to do business in this state, payable to the county judge of the county in which such livestock commission merchant resides or has his principal office, and to his successors in office, as trustees for all persons who may become entitled to the benefits of this Act, such bond to be filed in the county where such commission merchant has his principal office or place of business, in which county suits may be maintained on such bond and such bond shall be conditioned that such livestock commission merchant will faithfully and truly perform all agreements entered into with consignors with respects to receiving, handling, selling and making remittances and payments made to him, which bond shall be approved by the county clerk of the county in which such livestock commission merchant resides, or has principal office and by him, be filed and recorded. [Id. sec. 2.]

Art. 3832e. Suits on bond.—That the bond provided for by the preceding section may be sued upon and recovery had thereon by any person claiming to have been damaged by a breach of its conditions; provided, that said bond shall not become void upon the first recovery thereon, but may be sued upon until the amount thereof is exhausted. That upon the exhaustion of said bond by recoveries thereon, said livestock commission merchant shall be required to make and file a new bond conditioned as provided in section 2 [Art. 3832d] hereof. [Id. sec. 3.]

Art. 3832f. New bond required, when.—That if it shall come to the knowledge of the said county judge or the county clerk that either or all of the sureties on said bond are, or may become insolvent, then it shall be the duty of said county judge or said county clerk to require said live stock commission merchant to enter into, execute and deliver a new bond, as herein provided for. [Id. sec. 3a.]

Explanatory.—Section 4 of this act is purely criminal in character, and is omitted.

Art. 3832g. Bond filed, where; fees.—The bond herein mentioned shall be filed and kept by the county clerk of the county where filed, who shall receive the sum of fifty cents for each such bond, same to be paid by such commission merchant. [Id. sec. 5.]

Art. 3832h. Laws not repealed.—It is expressly declared that none of the provisions of title 57 of the Revised Civil Statutes of 1911 [Arts. 3826–3832], are affected or in anywise modified or repealed by the provisions of this Act. [Id. sec. 6.]

Art. 3832i. Laws repealed.—That all laws and parts of laws in conflict herewith be, and the same are hereby repealed. [Id. sec. 7.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Authority to sell.—The mere fact that the owner of lands gave a land agent a list of the lands, with the net price per acre of the same, does not constitute an agency with authority to sell. *White v. Templeton*, 79 T. 454, 15 S. W. 483. See *Graves v. Bains*, 78 T. 92, 14 S. W. 256.

Authority under two instruments.—An agent having authority under two instruments may act under either. *Douglas v. Baker*, 79 T. 499, 15 S. W. 801.

Sale without authority.—A commission merchant selling cotton without authority is liable for the highest price during the season and after the sale. *Porter v. Heath*, 2 App. C. C. § 125.

A cotton factor is liable to the owner of cotton shipped to him by a cotton dealer and sold as the property of the dealer, although the factor believes it to be the property of the dealer, who is indebted to the factor for advances, the money received being applied on such advances. *Kempner v. Thompson*, 45 C. A. 267, 100 S. W. 351.

Revocation of authority.—The authority of a real estate broker can be revoked at any time before a sale. *Neal v. Lehman*, 11 C. A. 461, 34 S. W. 153.

Effect of custom.—A usage and custom among people engaged in the business of land agents and their customers, known to persons placing land in their hands for sale, is binding on them. *Harrell v. Zimpleman*, 66 T. 292, 17 S. W. 478; *Hoefling v. Hamilton*, 84 T. 517, 19 S. W. 689; *Armstrong v. O'Brien*, 83 T. 635, 19 S. W. 268.

In action against commission merchant on a contract for outright purchase of cattle made with defendant's agent, issue as to custom of commission merchants with reference to advance on shipments is immaterial. *Greer v. First Nat. Bank of Marble Falls* (Civ. App.) 47 S. W. 1045.

Duty and liability in general.—Where defendant's agent exercised ordinary care to obtain the fair market value of plaintiff's cattle as a factor, defendant held not liable in damages to plaintiff, although the cattle were sold for less than their market value. *Drumm-Flato Commission Co. v. Union Meat Co.*, 33 C. A. 587, 77 S. W. 634.

Rice milling company held to owe to shipper duty of exercising ordinary diligence to sell his shipment at the best price obtainable. *Bouldin v. Atlantic Rice Mills Co.* (Civ. App.) 86 S. W. 795.

A broker marketing goods on commission was not responsible for a failure of the goods to realize a profit in the market where sold, where he did not ship them with foreknowledge of their realizing no profit. *Webster v. Richardson*, 55 C. A. 391, 119 S. W. 142.

Liability for goods destroyed.—Brokers through whom goods were sold held not liable on an agreement that the goods should be returned to them at a certain place where the goods were destroyed by fire before they were returned there. *Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Civ. App.) 122 S. W. 443.

Liability as to proceeds.—Fund retained by factors as the proceeds of a sale made in the course of their business held to constitute a trust fund, the character of which is not changed by a deposit thereof to their individual credit. *Interstate Nat. Bank v. Claxton* (Civ. App.) 77 S. W. 44.

An assignee of certain drafts on a commission merchant attached to bills of lading for corn shipped held liable to the consignee for the difference between the amount paid on such drafts and the value of the corn. *F. Groos & Co. v. Brewster*, 34 C. A. 140, 78 S. W. 359.

Assignees of drafts on a commission merchant which had been refused by the drawee, held not entitled to object to his failure to draw other drafts on the drawers of the original drafts under a subsequent arrangement, until after corn for which the original drafts were drawn had been sold, in the absence of proof of prejudice. *Id.*

Plaintiff held entitled to recover from defendant proceeds of the sale of rice belonging to plaintiff, which defendant paid over to third person, without authority from plaintiff and after being notified not to do so. *Post v. Houston Rice Milling Co.*, 35 C. A. 642, 80 S. W. 1025.

Del credere agency.—A factor selling goods under a del credere commission, it seems, is liable for the debt. *Milburn Mfg. Co. v. Peak*, 89 T. 209, 34 S. W. 102.

A contract by a merchant to sell goods on commission at a price fixed by the manufacturer held a contract of sale, where the merchant guarantees payment. *Williams v. Drummond Tobacco Co.*, 17 C. A. 635, 44 S. W. 185.

Advances.—Factors held not entitled to recover from principal for money advanced to purchase goods, more than average price paid for all goods so purchased. *Beakley v. Rainier* (Civ. App.) 78 S. W. 702.

Under the terms of a contract between a cotton factor and shipper, the factor held to have had a right to deduct a certain sum from the proceeds of sales and apply it to an advancement made by him. *Kempner v. Patrick*, 43 C. A. 216, 95 S. W. 51.

Interest on advances.—See notes under Art. 72.

Compensation.—An agent employed to sell land for a specified sum is entitled to commissions if he finds a person ready and willing to purchase at the price named and on the terms specified. *Kennedy v. Clark*, 1 App. C. C. § 843. See *Burns v. Hill*, 2 App. C. C. § 523.

His right to a commission is forfeited by gross neglect or misconduct. *Nugent v. Martin*, 1 App. C. C. § 1173.

An authority to sell land at "\$7,500, net," does not entitle the agent to the entire proceeds of the sale above that sum, but entitles him to reasonable compensation only. *Turnley v. Michael*, 4 App. C. C. § 223, 15 S. W. 912.

A broker is entitled to his commissions when the sale is contracted (*Conkling v. Krauer*, 70 T. 735, 11 S. W. 117; *Sullivan v. Hampton* [Civ. App.] 32 S. W. 235); and his right is not defeated by his wrongful discharge (*Eidson v. Saxon* [Civ. App.] 30 S. W. 957; *Lyle v. University Land & Investment Co.* [Civ. App.] 30 S. W. 723; *Montgomery v. Biering* [Civ. App.] 30 S. W. 508; *Byrd v. Frost* [Civ. App.] 29 S. W. 46; *Dunn v. Price*, 28 S. W. 681, 87 T. 318; *Tinsley v. Dowell*, 87 T. 23, 26 S. W. 946; *Graves v. Bains*, 78 T. 92, 14 S. W. 256; *Stringfellow v. Powers*, 4 C. A. 199, 23 S. W. 313).

Effect of custom as to compensation of a factor or broker. See *Harrell v. Zimpleman*, 66 T. 292, 17 S. W. 478; *De Cordova v. Bahn*, 74 T. 643, 12 S. W. 845.

In an action to recover a commission for selling land, held, that the agent was not entitled to recover, where he acted in bad faith and in hostility to the interests of his principal. *Smith v. Tripis*, 21 S. W. 722, 2 C. A. 267.

A broker is not entitled to commissions for a sale not consummated or not in conformity with his instruction. *O'Brien v. Gilliland*, 4 C. A. 40, 23 S. W. 244. See *Taylor v. Cox* (Sup.) 7 S. W. 69, 16 S. W. 1063.

Where a factor was employed to sell two train loads of cattle which were shipped in one, he was not entitled to recover commissions for sale of subsequent load of cattle, the sale of which indirectly grew out of the first sale. *Taylor v. Johnston*, 30 C. A. 471, 70 S. W. 1022.

In an action by a broker for commissions, evidence held to support a finding of plaintiff's negligence in marketing goods as to a part only of the shipments made by him. *Webster v. Richardson*, 55 C. A. 391, 119 S. W. 142.

Lien.—See notes under Title 86, chapter 8.

TITLE 58

FEES OF OFFICE

- | | | | |
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| Chap. | 1. Certain State Officers. | Chap. | 3. County Officers. |
| | 2. Clerks of the Supreme Court and Courts of Civil Appeals. | | 4. General Provisions. |

CHAPTER ONE

CERTAIN STATE OFFICERS

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|-------|---|--|--|
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| 3833. | Certain state officers to furnish copies and certificates. | 3841. | Fees of attorney general. |
| 3834. | Fees of such officers therefor. | 4. COMMISSIONER OF GENERAL LAND OFFICE | |
| 3835. | Shall not charge certain officers therefor. | 3842. | Fees of commissioner of general land office. |
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| | 2. SECRETARY OF STATE | 3843. | Fees of comptroller. |
| 3837. | Fees of state department. | 6. COMMISSIONER OF INSURANCE AND BANKING | |
| 3838. | Minimum fees in certain cases. | 3844. | Fees of commissioner of insurance and banking. |
| 3839. | Pending suit not affected. | 7. RAILROAD COMMISSION | |
| 3840. | Fees paid in advance to secretary and by him to treasury monthly. | 3845. | Fees of railroad commission. |

1. GENERAL PROVISIONS

Article 3833. [2436] [2372] Secretary of state, commissioner general land office, and other officers to furnish copies and certificates.—It shall be the duty of the secretary of state, commissioner of the general land office, comptroller, treasurer, commissioner of agriculture, commissioner of insurance and banking, state librarian, adjutant general, and attorney general, to furnish any person who may apply for the same with a copy of any paper, document or record in their respective offices, and also to give certificates, attested by the seals of their respective offices, certifying to any fact or facts contained in the papers, documents or records of their offices, to any person applying for the same. [Act March 20, 1848. P. D. 3806.]

See note under Art. 3832a.

Art. 3834. [2437] [2373] Fees of such officers for copies and certificates.—It shall be lawful for the officers named in the preceding article to demand and receive the following fees for the services mentioned therein, except as otherwise specially provided in this chapter: [Acts 1907, p. 283. P. D. 3807.]

- For copies of any paper, document, or record in their offices, in the English language, including certificate and seal, for each hundred words..... \$.15
- For copies of any paper, document, or record in their offices, in any other language than the English, including certificate and seal, for each hundred words..... .25
- For each translated copy of any paper, document, or record in their offices, including certificate and seal, for each hundred words.. .30
- For the copy of any plat or map in their offices, such fee as may be established by the officer in whose office the same is made, to be determined with reference to the amount of labor required
- For each certificate not otherwise provided for..... .50

Art. 3835. [2438] [2374] Shall not charge officers of state for copies.—Nothing contained in the two preceding articles shall authorize either of the officers therein named to demand or receive fees from any officer of the state for copies of any papers, documents, or records in their offices, or for any certificate in relation to any matter in their offices when such copies or certificates are required in the performance of any of the official duties of such officer. [Id. P. D. 3810.]

Art. 3836. [2444] [2379] Shall keep fee book and render account of fees quarterly.—It shall be the duty of the secretary of state, commissioner of the general land office, comptroller, treasurer, commissioner of agriculture, commissioner of insurance and banking, state librarian, adjutant general and attorney general, respectively, to keep fee books in their several offices in which they shall enter all the fees received for any of the services named in this chapter; and they shall quarterly file with the comptroller an account of all fees so received by them respectively; which account shall be verified by the affidavit of the officer rendering the same; and such officers shall also, at the end of each quarter, pay over to the treasurer of the state all money received by them respectively under the provisions of this chapter. [Act March 20, 1848. P. D. 3808.]

2. SECRETARY OF STATE

Art. 3837. [2439] Fees of state department.—The secretary of state, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the state the following fees:

For each and every charter, amendment or supplement thereto, of a private corporation created for the purpose of operating or constructing a railroad, magnetic telegraph line or street railway or express company, authorized or required by law to be recorded in said department, a fee of two hundred dollars to be paid when said charter is filed; provided, that if the authorized capital stock of said corporation shall exceed one hundred thousand dollars, it shall be required to pay an additional fee of fifty cents for each one thousand dollars authorized capital stock, or fractional part thereof, after the first.

For each and every charter, amendment or supplement thereto, of a private corporation intended for the support of public worship, any benevolent, charitable, educational, missionary, literary or scientific undertaking, the maintenance of a library, the promotion of painting, music or other fine arts, the encouragement of agriculture or horticulture, the maintenance of public parks, the maintenance of a public cemetery not for profit, a fee of ten dollars to be paid when the charter is filed.

For each and every charter, amendment or supplement thereto, of a private corporation created for any other purpose, intended for mutual profit or benefit, a fee of fifty dollars shall be paid when said charter is filed; provided, that, if the authorized capital stock of said corporation shall exceed ten thousand dollars, it shall be required to pay an additional fee of ten dollars for each additional ten thousand dollars of its authorized capital stock, or fractional part thereof, after the first.

For each commission to every officer elected or appointed in this state, a fee of one dollar; and each and every state, district, county and precinct officer elected or appointed in this state is required to apply for and receive his commission; provided, that the secretary of state shall not be required to forward copies of laws to nor attest the authority of any officer in this state who fails or refuses to take out his commission as required herein.

For each official certificate, a fee of one dollar.

For each warrant of requisition, a fee of two dollars.

For every remission of fine or forfeiture, one dollar.

For copies of any paper, document or record in his office, for each one hundred words, fifteen cents.

Art. 3837
Vernon-Say
1914
Amended
36 L. P. 16

Art. 3837
Vernon Sayles
1914
Amended
36 L. P. 79

For each and every charter, amendment or supplement thereto, taken out under chapter 16, title 25, Revised Statutes, (channel and dock corporations), a fee of two hundred dollars shall be paid to the secretary of state for the use and benefit of the state, which shall be paid when the charter, amendment or supplement thereto is filed for record.

For each foreign corporation obtaining permit to do business in this state shall pay fees as follows: fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this state, shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the state of Texas. [Acts 1907, S. S., p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S., p. 267.]

Construction and operation in general.—Under the rule that if a statute is capable of two constructions, one of which will render it valid and the other invalid, the former construction will be adopted, this article though broad enough to embrace foreign or interstate business, should be construed to apply only to domestic or intrastate business, so as not to violate the commerce clause of the federal Constitution. *Western Union Telegraph Co. v. State* (Civ. App.) 121 S. W. 194.

A foreign corporation, not empowered to do so by the federal government, has no authority to transact a local or domestic business in a state, unless authority be granted by the state, which can impose any conditions as a prerequisite to permission to do such business, and the corporation cannot question the reasonableness or validity of the law prescribing the conditions, and hence the state could exact a fee; the sum depending upon the amount of the corporation's entire capital stock, the major portion of which was outside of the state. *Id.*

Under Const. art. 4, § 22, and this article, where a foreign corporation doing a local nongovernmental business in the state had not paid the fee, it was exercising a corporate power not authorized by law, and the attorney general under the constitution could proceed to prevent it from further exercising such unlawful power, regardless of what other penalty the legislature had prescribed. *Id.*

Indorsement on railroad bonds.—Secretary of state cannot charge fee of \$1.00 for making indorsement on railroad bonds required by R. S. 1895, art. 4581i. *State ex rel. G., H. & N. Ry. Co. v. Hardy*, 93 T. 340, 55 S. W. 322, 323.

Amendment to charter of corporation.—When a corporation files an amendment to its charter that does not increase its capital stock, it is only required to pay the fixed fee of \$100, and nothing additional. *St. Louis S. W. Ry. Co. of Texas v. Tod*, 94 T. 632, 64 S. W. 778.

Art. 3838. Minimum fees in certain cases.—The minimum fee for any foreign building and loan company shall be two hundred and fifty dollars; provided, further, that the fee required to be paid by any foreign corporation for a permit to do the business of loaning money in this state shall in no event exceed one thousand dollars. [*Id.*]

Art. 3839. Pending suit not affected.—Nothing in this chapter, nor in articles 1315 and 1316, shall in anywise affect any suit now pending in the name, or in behalf of, the state of Texas, as against any foreign corporation. [*Id.*]

Art. 3840. Fees paid in advance to secretary and by him to treasury monthly.—All fees mentioned in articles 3837 and 3838 shall be paid in advance into the office of the secretary of state, and shall be by him paid into the state treasury monthly. [*Id.*]

3. ATTORNEY GENERAL

Art. 3841. [2440] [2375] Fees of attorney general.—The attorney general shall be entitled to the following fees:

For each affirmance of judgment in cases to which the state may be

a party involving pecuniary liabilities to the state, ten per cent on the amount collected if under one thousand dollars, and five per cent for all above that sum, to be paid out of the money when collected.

For all cases involving the forfeiture of charters, heard on appeal before the supreme court or court of appeals, twenty-five dollars.

But the whole amount of fees allowed the attorney general shall not exceed the sum of two thousand dollars per annum, and the excess of such fees over two thousand dollars per annum shall be paid into the state treasury. [Act Aug. 23, 1876, p. 284, sec. 2.]

4. COMMISSIONER OF GENERAL LAND OFFICE

Art. 3842. [2441] [2376] Fees of commissioner of general land office.—The commissioner of the general land office is authorized and required to charge for the use of the state the following fees for issuing certificates and patents for land, to-wit:

Art. 3842
Vernon Sayles
1914
Amended
86 L. P. 86

For certificates for three hundred and twenty acres of land or less	\$ 2 00
For certificates for over three hundred and twenty and up to and including six hundred and forty acres of land.....	4 00
For certificates for over six hundred and forty and up to and including one thousand two hundred and eighty acres of land	5 00
For certificates for over one thousand two hundred and eighty acres of land.....	7 00
For filing each deed transferring one tract of land.....	50
For each additional tract in each deed.....	25
For filing affidavit of non-settlement and affidavit in rebuttal....	50
For filing protests, decrees and affidavit of ownership.....	50
For issuing certificate of facts covering one survey.....	1 00
For each additional tract contained in said certificate.....	25
For issuing certificate of occupancy on the home section.....	1 00
For each additional tract shown in said certificate, when called for by the owner.....	50
For copy of any paper, document or record, in the English language, for each 100 words.....	20
For copy of any paper, document or record in any other language than the English, for each 100 words.....	30
For each translated copy of any paper, document or record, for each 100 words.....	35
For copy of any plat or map, fee to be determined with reference to amount of labor required, per hour.....	1 00
For each certificate not otherwise provided for.....	50
For patent for 320 acres of land or less.....	5 00
For patent for over 320 acres, up to and including 640.....	6 00
For patent for over 640 up to and including 1280 acres.....	10 00
For patent for over 1280 up to and including 1476 acres, or one-third league.....	12 50
For patent for over 1476 and containing less than 4605 acres, or one league and labor.....	15 00
For patent for one league and labor (4605) acres.....	20 00
For patent for each additional league, or fraction thereof.....	20 00
For filing original field-notes.....	1 00
Where an examination of the records of the land office is demanded in person or by letter, by any person other than the owner of the survey, his agent or attorney, which ownership shall be disclosed by the records of the land office, and the agent's or attorney's authority must be in writing and filed in the land office, shall be charged a fee of.....	50
If such examination is extended beyond fifteen minutes, the charge shall be made in proportion to the time consumed at the rate, each hour.....	1 00

Fee for certified copy of certificate of the class of Toby scrip....	\$ 2 50
For headright certificate.....	1 00
For railroad certificate.....	1 00
For field-notes.....	1 00
For pre-emption application.....	75
For application to buy the school land with obligation for deferred payment.....	1 25
For obligation for deferred payment for school land.....	75
For proof of occupancy.....	1 00
For deed of transfer or bond for title, or power of attorney.....	1 50
For patent.....	1 25
For application for surveyor, Act of February 23, 1900.....	75
For affidavit of settlement or non-settlement on school land....	1 00
For filing affidavit of non-settlement and affidavit in reition.....	50
For lease application of contract, not exceeding six tracts.....	75
For each additional six tracts add.....	25
For letters and impressions of letters.....	50
For extract copy of muster roll, traveling land boards reports, clerk's returns relating to headright certificates, patent delivery books, school land sales record books, etc., each.....	2 00
For lithograph map of Brewster, El Paso, Pecos and Val Verde and Webb counties, two parts, each part \$1.....	2 00
For maps of such other counties as are lithographed.....	50
For blue print copies of maps \$3.00 to \$8.00, copy of map, or part thereof, depends upon each order and estimates will be furnished upon receipt at request. [Acts June 2, 1876, p. 176. P. D. 6844a. See Acts 1879, ch. 55, for penalty for not paying fees and taking out patents. Acts 1907, p. 283.]	

5. COMPTROLLER

Art. 3843. [2442] [2377] Fees of comptroller.—The comptroller of public accounts shall charge the following fees:

For examinations in which the state, or any county, has no interest, for each hour or fraction of an hour spent in such examination	\$ 50
For each sealed certificate issued.....	50

[Acts 1875, p. 182, sec. 2.]

6. COMMISSIONER OF INSURANCE AND BANKING

Art. 3844. [2443] [2378] Fees of commissioner of insurance and banking.—The commissioner of insurance and banking shall charge and receive for the use of the state the following fees, to-wit:

For filing each declaration or certified copy of charter of insurance company.....	\$ 25 00
For filing the annual statement of an insurance company, or certificate in lieu thereof.....	20 00
For certificate of authority and certified copy thereof.....	1 00
For every copy of any paper filed in his department, for each folio	20
For affixing his official seal and certifying to the same.....	1 00
For valuing policies of life insurance companies, for each one million of insurance or fraction thereof.....	10 00
For official examination of companies under the law, the actual expenses incurred, and ten dollars a day, not to exceed....	250 00

[Acts 1876, p. 223, sec. 12. Acts 1907, p. 127, sec. 16.]

1060

1060

1060

7. RAILROAD COMMISSION

Art. 3845. Fees of railroad commission.—The railroad commission of Texas shall be, and it is hereby, authorized to charge fees for copies of all papers furnished by it, except such as may be furnished to some department of the state government, as follows:

For copies of any paper, document or record in its office, including certificate and seal, to be applied by the secretary, for each one hundred words, fifteen cents; provided, that this article shall not be so construed as to authorize the charging of such fees for railroad companies or other persons for tariff sheets for their own use, which such tariff sheets are in force.

The fees so charged and collected shall be accounted for by the secretary of the railroad commission and paid into the treasury as provided for in article 3836. [Acts 1899, p. 297.]

CHAPTER TWO

CLERKS OF THE SUPREME COURT AND COURTS OF CIVIL APPEALS

Art. 3846. Fees of clerk of supreme court.	Art. 3848. Compensation for services not provided for.
3847. Fees of clerks of courts of civil appeals.	

Article 3846. [2445] [2380] Fees of clerk of supreme court.—The clerk of the supreme court shall receive the following fees:

Entering appearance of either party, in person or by attorney, to be charged but once.....	\$ 50
Docketing each cause, to be charged but once.....	50
Filing the record in each cause.....	50
Entering each rule or motion.....	25
Entering the order of the court upon any rule or motion, or entering any interlocutory judgment.....	50
Administering an oath or affirmation without a certificate.....	15
Administering an oath or affirmation and giving certificate thereof, with seal.....	25
Entering each continuance.....	20
Entering each final judgment or decree.....	1 00
Each writ issued.....	1 00
Making out and transmitting the mandate and judgment of the supreme court to any inferior court.....	1 50
Making copies of any papers or records in their offices, including certificate and seal, for each one hundred words.....	15
Recording the opinions of the judges, for each one hundred words	20
Taxing the bill of costs in each case with copy thereof.....	50
Issuing attorney's license.....	5 00

[Acts 1876, p. 285, sec. 4, modified by Acts 1893, p. 165.]

For fees of deputy clerks, see Art. 1536.

Art. 3847. [1011] Fees of clerks of courts of civil appeals.—The clerks of the courts of civil appeals shall receive as compensation for their services the following fees:

Entering appearances of either party, in person or by attorney, to be charged but once.....	\$ 50
Docketing each cause, to be charged but once.....	50
Filing the record in each cause.....	50
Entering each rule or motion.....	25

Entering the order of court upon any rule or motion, or entering any interlocutory judgment.....	\$ 50
Administering an oath or affirmation, without a certificate.....	15
Administering an oath or affirmation and giving a certificate thereof with seal.....	25
Entering each continuance.....	20
Entering each final judgment or decree.....	1 00
Each writ issued.....	1 00
Making out and transmitting the mandate and judgment of the court to any inferior court.....	1 50
Making copies of any papers or records in their offices, including certificate and seal, for each 100 words.....	10
Recording the opinions of the judges, for each 100 words.....	15
Taxing the bill of costs in each case.....	50
Filing each brief, or other paper necessary to be filed.....	10
For certificate and seal, where same is necessary.....	50
Recording sheriff's return on execution.....	50
For issuing copies of each notice ordered by court.....	50

[Acts 1893, p. 8. Acts 1892, p. 33. Acts 1893, p. 165.]

Art. 3848. [2446] [2382] Compensation for services not provided for.—The clerks of the supreme court and courts of civil appeals for every service not herein provided for shall receive such fees as may be allowed by the court, not to exceed the fees herein allowed for services requiring a like amount of labor. [Act Aug. 23, 1876, p. 285, sec. 4.]

For provisions as to office rent, stationery, etc., of the clerks of the supreme court, courts of civil appeals and court of criminal appeals, see Art. 3904.

CHAPTER THREE

COUNTY OFFICERS

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	2. CLERKS OF THE DISTRICT COURT		9. COLLECTOR OF TAXES
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3858.	Compensation for ex officio services.	3874.	Commissions on school fund.
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	3. CLERKS OF THE COUNTY COURT		11. DISTRICT AND COUNTY SURVEYORS
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3866.	Compensation for ex officio services.		
	5. JUSTICES OF THE PEACE		
3867.	Justices' fees.		

1. COUNTY JUDGE

Article 3849. [2447] [2383] Fees of county judge in probate matters.—The county judge shall receive the following fees in probate matters:

Probating a will.....	\$2 00
Granting letters testamentary, of administration or of guardianship	50
Each order of sale.....	50
Each approval and confirmation of sale.....	50
Each decree refusing order of sale, or refusing confirmation of sale	50
Each decree of partition and distribution.....	2 00
Each decree approving or setting aside the report of commissioner of partition and distribution.....	2 00
Each decree removing an executor, administrator or guardian, to be paid by such executor, administrator or guardian.....	1 00
Each fiat or certificate.....	50
Each continuance.....	10
Each order, not otherwise provided for.....	50
Administering oath or affirmation with certificate and seal.....	50
Administering oath or affirmation without certificate and seal...	25

[Act Aug. 23, 1876, p. 284, sec. 6.]

Art. 3850. [2448] [2384] Commission allowed county judge.—There shall also be allowed the county judge a commission of one-half of one per cent upon the actual cash receipts of each executor, administrator or guardian, upon the approval of the exhibits and the final settlement of the account of such executor, administrator or guardian, but no more than one such commission shall be charged on any amount received by any such executor, administrator or guardian. [Id.]

No commission on receipts of community survivor.—The judge is not entitled to commissions on the cash receipts of a survivor in community; as, the proceeds of sales made in the management of the estate outside of the court. *Mann v. Earnest*, 25 S. W. 1042, 6 C. A. 606.

As member of commissioners' court.—See note under Art. 3852.

Salary as county superintendent.—See Art. 3886.

Art. 3851. [2449] [2385] Fees in lunacy cases, etc.—For every case of lunacy disposed of by the county judge, he shall receive three dollars, to be paid out of the county treasury. For each civil cause finally disposed of by the county judge, by trial or otherwise, he shall receive a fee of three dollars, to be taxed against the party cast in the suit; provided, that if the party cast in the suit has filed his oath of inability to pay costs during the progress of the cause, or be unable to pay costs, then the county judge shall be allowed by the county commissioners' court such compensation as they may deem proper, not to exceed three dollars for each state case. [Id. Acts of 1879, ch. 81, p. 91.]

Art. 3852. [2450] [2386] Compensation for ex officio services.—For presiding over the commissioners' court, ordering elections and making returns thereof, hearing and determining civil causes, and transacting all other official business not otherwise provided for, the county judge shall receive such salary from the county treasury as may be allowed him by order of the commissioners' court. [Id.]

Modification or revocation of order.—The order under this article cannot be regarded as a contract, and can be changed, modified or revoked at any time. *Collingsworth County v. Myers* (Civ. App.) 35 S. W. 414.

Compensation as member of commissioners' court.—Although a county judge receives a salary for ex officio services, he is nevertheless entitled to \$3 per day for each day he acts as a member of the commissioners' court. *Farmer v. Shaw* (Civ. App.) 54 S. W. 772.

The county judge is entitled to a salary in addition to his \$3 per day as a member of commissioners' court. *Farmer v. Shaw*, 93 T. 438, 55 S. W. 1115.

Reimbursement of expenditures.—On a county receiving a decree for the recovery of certain land purchased by the county judge, the latter held not entitled to reimbursement for money expended in connection with the land. *Bell County v. Felts* (Civ. App.) 120 S. W. 1065.

Art. 3853. [2451] [2387] Fees for testing weights and measures, etc.—For testing any steelyard, balance or beam, the county judge shall receive from the applicant a fee of fifty cents, and, for every weight or measure, ten cents. [P. D. 5358.]

Art. 3854. [2452] [2388] Fees for hiring out county convicts.—The county judge shall receive the following fees for hiring out county convicts, in all cases to be paid in advance by the party hiring a convict, the same to be repaid to the contractor or employer when demanded, out of the wages of such convict, viz.:

For every bond required to be taken.....	\$ 1 00
For the examination and approval of each bond.....	50

[Act Aug. 21, p. 230, sec. 14.]

2. CLERKS OF THE DISTRICT COURT

Art. 3855. [2453] [2389] Fees of clerks of the district courts.—The clerks of the district courts shall receive for the following services in civil cases the following fees, to-wit:

For copy of petition, including certificate and seal, each one hundred words.....	\$ 20
Each writ of citation.....	75
Each copy of citation.....	50
Docketing each cause, to be charged but once.....	20
Every other order, judgment or decree, not otherwise provided for.....	75
Docketing each rule or motion, including rule for cost.....	15
Filing each paper.....	15
Entering appearance of each party to a suit, to be charged but once.....	15
Each continuance.....	20
Swearing each witness.....	10
Administering an oath, affirmation, or taking affidavit, certificate and seal; provided, that he shall only be allowed pay for one certificate to each witness claim for attendance in behalf of plaintiff, and one each in behalf of defendant, at any one term of the court.....	50
Each subpoena issued.....	25
Each additional name inserted in subpoena.....	15
Approving bond (except for cost).....	1 50
Swearing and impaneling a jury.....	35
Receiving and recording a verdict of a jury.....	35
Assessing damages in each case not tried by a jury.....	50
Each commission to take depositions.....	75
Taking depositions, each one hundred words.....	15
Issuing copies of interrogatories with certificate and seal, per one hundred words.....	15
Each final judgment.....	1 00
Where judgment exceeds three hundred words, the additional fee for each one hundred words in excess of three hundred words shall be.....	15
For each order of sale.....	1 00
For each execution.....	75
For each writ of possession or restitution.....	75
For each injunction writ.....	75
Each copy of injunction writ.....	75
For every other writ not otherwise provided for.....	75

For each copy of writ not otherwise provided for.....	\$ 50
Recording returns of any writ, where such return is required by law to be recorded, including the return on all writs, except subpoenas	50
Each certificate to any facts contained in his office.....	75
Making out and transmitting the records and proceedings in a cause to any inferior court, for each one hundred words.....	10
Making out and transmitting mandate or judgment of the district court upon appeal from the county court.....	1 00
Filing a record in a cause appealed to the district court.....	50
Transcribing, comparing and verifying record books of his office, payable out of the county treasury, upon warrants issued upon the order of commissioners' court, each one hundred words	15
Making transcript of records and papers in any cause upon appeal, or writ of error, with certificate and seal, each one hundred words	15
Making copy of all records of judgments or papers on file in his office, for any party applying for same, with certificate and seal, each one hundred words.....	15
Taxing the bill of costs in any case with copy of same.....	25
Filing and recording the declaration of intention to be a citizen of the United States.....	2 00
Issuing certificate of naturalization.....	2 50

[Acts 1901, p. 24.]

Constitutionality.—The provisions in the law limiting the fees and compensation of officers in counties less than 30,000 in population is not a local or special law. A law which relates to persons or things as a class is a general law, while a law which relates to particular persons or things of a class is special and comes within the constitutional prohibition. *Kabelmacher v. Kabelmacher*, 21 C. A. 317, 51 S. W. 353.

The act of 1897, page 5, in so far as it regulates the compensation of officers and their fees is not unconstitutional. If a law contains more than one subject not expressed in the title the law is void only as to that subject not expressed. *Id.*

Fees for transcript.—District clerks are entitled to 10 cents per 100 words for making transcripts on appeal. Section 7 of the act of the called session of the 25th legislature, page 12, does not apply. *Kabelmacher v. Kabelmacher*, 21 C. A. 317, 51 S. W. 353.

District clerks cannot charge more than 10 cents per 100 words for making transcripts in civil cases on appeal. *McLennan County v. Graves*, 26 C. A. 49, 62 S. W. 122.

Fee for recording return of citation.—A clerk cannot charge a fee for recording return of citation, because there is no law requiring such return to be recorded. *Texas, M. Ry. Co. v. Parker*, 28 C. A. 116, 66 S. W. 583.

Fees in receivership proceedings.—In railroad receivership proceedings, an allowance to the clerk of court held an allowance for a special duty imposed by the court. *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 296.

Commission on penalties collected.—This statute regulates the fees of the clerk in civil actions, and he is not entitled to 5 per cent. commission on moneys collected for the state as penalties for violating the anti-trust laws. Article 1193 (1143) of the Code of Criminal Procedure does not apply to civil actions in behalf of the state to recover penalties. *State v. Hart*, 96 T. 102, 70 S. W. 948, 949.

One order for several cases.—Where by agreement of parties one order is to apply to a number of cases, and but one order is entered upon the minutes of the court, the clerk is entitled to a fee but for one order. *Hanrick v. Ake*, 75 T. 142, 12 S. W. 818.

Subpoena.—The insertion of a name in a subpoena, within the statute fixing fees for the district court clerk, held only to be made by the clerk or his deputy. *Aitgelt v. Callaghan* (Civ. App.) 144 S. W. 1166.

Discrimination.—The clerk cannot discriminate between litigants and charge fees against one at a higher rate than he would be entitled to charge the other if the latter had been cast in the suit. *Wichita Mill & Elevator Co. v. State*, 57 C. A. 165, 122 S. W. 427.

Clerk of criminal district court.—See Art. 2213.

Art. 3856. Clerk shall compare and certify copies, etc.; fees.—Whenever, in any suit, a certified copy of any petition or any other instrument is necessary in the district court, it shall be lawful for the plaintiff or defendant to prepare such true and correct copy thereof, and submit the same to the clerk of the district court, whose duty it shall be to compare the same with the original instrument, and, if found to be correct, he shall attach his certificate of true copy. For such services he shall receive fifty cents for each certificate and seal, and, in addition thereto, the sum of ten cents per page, three hundred words to the page, for each page of each copy. But nothing in this or the preceding

article shall be construed as repealing the maximum fixed by existing law upon the total compensation allowed to district clerks. [Acts 1901, p. 24. Acts 1897, S. S. p. 44. Acts 1897, S. S. p. 12. Acts 1895, p. 170.]

Certified copies of petitions.—Under this and the preceding article, where a clerk received and used printed matter prepared by plaintiff to obtain the benefit of such section, from which, by pasting sheets together and filling blanks, he made copies of a petition, he is estopped to claim the larger fee, under section 1, for making copies of such petition. *Wichita Mill & Elevator Co. v. State*, 57 C. A. 165, 122 S. W. 427.

Art. 3857. [2454] [2390] Fees in probate matters.—In matters relating to estates of deceased persons and minors, when the same are transacted in the district court, the clerk of such court shall receive the same fees that are allowed therefor to clerks of the county court.

Art. 3858. [2456] [2392] Compensation for ex officio services.—The clerk of the district court shall receive, in addition to the fees herein allowed, for the care and preservation of the records of his office, keeping the necessary indexes, and other labor of the like class, to be paid out of the county treasury on the order of the commissioners' court, such sum as said commissioners' court shall determine. [Act Aug. 23, 1876, p. 287, sec. 8. Acts 1879, ch. 81, p. 92.]

Art. 3859. No compensation for assessing damages.—No district clerk shall receive any compensation for assessing damages in any case. [Acts 1897, S. S. p. 13.]

3. CLERKS OF THE COUNTY COURT

Art. 3860. [2457] [2393] Fees of clerks of county court.—Clerks of the county court shall receive the following fees:

Filing each paper.....	\$ 05
Issuing notices, including copies for posting or publication.....	75
Docketing each application, complaint, petition or proceeding, to be charged but once.....	10
Each writ or citation, including copy thereof.....	50
Each copy of any paper that is required to accompany any writ or citation, with certificate and seal, for each one hundred words	10
Issuing letters testamentary, of administration or guardianship..	50
Each final judgment or decree.....	50
Every other order or decree, not exceeding 100 words.....	15
Where such other order or decree contains 100 words and not more than 200 words.....	25
When any final judgment or decree, or any other order or decree, exceeds 200 words, an additional fee for each 100 words in excess of 200 words.....	10
Recording all papers required to be recorded by them in relation to estates of decedents or wards, for each one hundred words	10
Administering oath to executor, administrator or guardian.....	10
Administering oath or affirmation in other cases, without certificate and seal.....	15
Administering oath or affirmation with a certificate and seal....	25
Entering each order of the court approving or disapproving a claim against an estate.....	25
Filing each paper, except subpoenas.....	05
Each appearance, to be charged but once.....	05
Entering each continuance, except in estates.....	10
Each subpoena.....	25
Each additional name inserted in a subpoena.....	05
Approving bond, except bond for costs and notarial bond.....	1 00
Approving notarial bond.....	50
Swearing each witness.....	10
Swearing and impaneling a jury.....	25
Receiving and recording a verdict.....	25

Assessing damages in each case not tried by a jury.....	\$ 50
Each commission to take depositions.....	50
Taking depositions, each 100 words.....	15
Each execution, order of sale, writ of possession, restitution or other writ not otherwise provided for.....	50
For recording return of any writ, when any such return is required by law to be recorded.....	50
Where the return exceeds 300 words, for each 100 words in excess of 300 words.....	10
Copies of interrogatories, cross-interrogatories and all other papers or records required to be copied by him, including certificate and seal, where the copy does not exceed 200 words, for each 100 words.....	15
Where the copy exceeds 200 words, for each additional 100 words in excess of 200 words.....	10
Transcript in any case where appeal or writ of error is taken, with certificate and seal, each 100 words.....	10
Each certificate to any fact or facts contained in the records of his office, with certificate and seal, when not otherwise provided for	50
Taxing the bill of costs in each cause, with a copy thereof.....	25
For recording attachments and returns, the same fees allowed for recording deeds.	
For filing and recording chattel mortgage deposited.....	25
For entering satisfaction of chattel mortgages.....	25
Recording all papers required or permitted by law to be recorded, not otherwise provided for, including certificate and seal, for each 100 words.....	10
Transcribing records for new counties and added territory, for each one hundred words.....	15
Transcribing, comparing and verifying record books of his office, payable out of the county treasury upon warrant issued under the order of the commissioners' court, for each one hundred words	10
Issuing and recording marriage license.....	1 00
Recording each mark and brand, or either.....	25
Issuing each license, other than a marriage license, where the law provides for him to issue such license.....	1 00
Recording and certifying bills of sale under the stock laws, for each one hundred words.....	15
Recording each mark and brand and giving certificate thereof....	75
Revising the list of marks and brands, such compensation as the county commissioners' court may allow.	
Qualifying a notary public.....	50

[Id. sec. 9. Act Aug. 23, 1876, p. 301, sec. 26. Acts 1897, S. S. p. 13. Acts 1897, p. 44. Acts 1897, S. S. p. 13. Acts 1899, p. 81. Acts 1879, p. 134. Acts 1897, S. S. p. 13. Acts 1879, p. 105. Acts 1897, S. S. p. 13.]

Not affected by fee bill.—Compensation for the work provided for in this article seems not to have been affected by the fee bill as will be evident from an inspection of the twenty-sixth section thereof providing that laws not in conflict with the act are not affected. *Tarrant County v. Butler*, 35 C. A. 421, 80 S. W. 660.

Payment of fees.—A clerk of the trial court was not entitled to refuse to prepare and deliver a transcript to an appellant because he had refused to comply with his agreement to pay for the transcript when delivered. *Taylor v. Gardner* (Civ. App.) 99 S. W. 411.

A party who files a deed for record is not required to pay the recording fees before the record is made. *William Carlisle & Co. v. King*, 103 T. 620, 133 S. W. 241.

Recovery of fees paid county.—Where a county clerk by mistake collected fees in excess of those allowed by law, and paid them over to the county, he, being liable for their repayment to the parties paying them, may recover them from the county. *Tarrant County v. Rogers* (Civ. App.) 125 S. W. 592.

A county clerk held estopped from asserting that fees collected and paid over to the county were illegal. *Tarrant County v. Rogers*, 104 T. 224, 135 S. W. 110.

Art. 3861. [2458] [2394] Compensation for preserving the records, etc.—It shall be the duty of the county judge at each term of his court to inquire into and examine the amount of labor actually and necessarily performed by the clerk of his court, in the care and preservation of the records of his office, in the making and keeping of the necessary indexes thereto, and other labor of a like class, and to allow said clerk a reasonable compensation therefor, not to exceed the fees allowed him by law for like services, and not to exceed one hundred dollars annually, to be paid out of the county treasury upon the sworn account of such clerk, approved in writing thereon by the county judge. [Act Aug. 23, 1876, p. 287, sec. 9.]

Compensation for new indexes.—As Art. 1753 makes it the duty of the county clerk to keep proper indexes of all records of his office, where the commissioners' court makes a contract with the county clerk to make new indexes of deeds and other public records of his office for \$8,000, the clerk must account for this money in his settlement with the said court for fees of his office received during his term under the maximum fee bill law. *Tarrant County v. Butler*, 35 C. A. 421, 80 S. W. 659.

The commissioners' court had no authority to agree to pay the county clerk a certain sum for work in indexing the record, and hence the county was not bound by such an agreement and may recover from the clerk the amount paid him for doing the work in excess of what it actually cost. *Tarrant County v. Rogers* (Civ. App.) 125 S. W. 592.

Art. 3862. [2459] [2395] Compensation for ex officio services.—For all ex officio services in relation to roads, bridges and ferries, issuing jury scrip, county warrants, and taking receipts therefor, services in habeas corpus cases, making out bar dockets, keeping county convict book, keeping record of trust funds, filing and docketing all papers for commissioners' court, keeping road overseer's book and list of hands, recording all collection returns of delinquent insolvents, and list of lands sold to individuals for taxes, recording county treasurers' reports, recording reports of justices of the peace, recording reports of animals slaughtered, and services in connection with all elections, and all other public services not otherwise provided for, to be paid upon the order of the commissioners' court out of the treasury, the clerk shall receive the sum of not less than ten dollars nor more than twenty-five dollars per annum for each one thousand inhabitants of his county; provided, that the total amount paid the clerk in any one year shall not be less than fifty nor more than five hundred dollars, said amount to be paid quarterly. No county clerk shall be compelled to file or record any instrument of writing permitted or required by law to be recorded until after payment or tender of payment of all legal fees for such filing or recording has been made; provided, that nothing herein shall be construed to include papers or instruments filed or recorded in suits pending in the county court. [Acts 1881, p. 99.]

Mandatory provision.—The provision that county clerks shall receive for all ex officio services not less than \$10 nor more than \$25 per annum for each 1,000 inhabitants in his county, the total in one year to be not less than \$50 nor more than \$500, was mandatory. *Navarro County v. Howard* (Civ. App.) 129 S. W. 857.

Repeal.—Acts 17th Leg. c. 87, in so far as it was mandatory, is repealed by Acts 25th Leg. Ex. Sess. c. 5, entitled "An act to fix certain civil fees to be charged by certain county officers, * * * to limit and regulate the compensation of the * * * clerk of the county court * * * and to repeal all laws in conflict herewith," fixing, by section 10, the maximum fees that may be retained by the clerk of the county court at \$2,500 per annum, and, in addition thereto, one-fourth of the excess fees collected by him, but providing in section 15 that the commissioners' court shall not be debarred from allowing compensation for ex officio services not to be included in estimating the maximum provided in the act, when, in their judgment, such compensation is necessary; such compensation not to exceed the amount now provided by law for such services. *Navarro County v. Howard* (Civ. App.) 129 S. W. 857.

Notice of deed as affected by failure to pay filing fee.—See note under Art. 6824.

Registration of instruments.—See Title 118, Chapter 3.

Art. 3863. No compensation for assessing damages.—No county clerk shall receive any compensation for assessing damages in any case. [Acts 1897, S. S. p. 13.]

For fees of county clerk in lunacy cases, see Art. 165.

4. SHERIFFS

Art. 3864. [2460] [2396] Sheriff's fees.—Sheriffs shall receive the following fees:

Serving each original citation in a civil suit.....	\$ 75
Summoning each witness.....	50
Levying and returning each writ of attachment or sequestration..	2 00
Copy of attachment writ and return for recording.....	1 00
Levying each execution.....	1 00
Return of execution.....	50
Serving each writ of garnishment or other process not otherwise provided for.....	75
Serving each writ of injunction.....	1 00
Collecting money on execution or order of a sale, when the same is made by a sale, for the first \$100 or less, 4 per cent; for the second \$100, 3 per cent; for all sums over \$200 and not exceeding \$1000, two per cent; for all sums over \$1000 and not exceeding \$5000, one per cent; for all sums over \$5000, one-half of one per cent.	
Taking and approving each bond, and returning the same to the proper court when necessary.....	1 00
Endorsing the forfeitures of any bond required to be endorsed by him	50
Executing and returning each writ of possession or restitution...	3 00
Posting the advertisements for sale under execution, or any order of sale.....	1 00
Posting any other notices required by law not otherwise provided for	1 00
Executing a deed to each purchaser of real estate under execution or order of sale.....	2 00
Executing a bill of sale to each purchaser of personal property under an execution or order of sale, when demanded by the purchaser	1 00
For each case tried in the district or county court, a jury fee shall be taxed for the sheriff of.....	50
For services in designating a homestead.....	2 00

Art. 3864
Vernon Sayles
1914
Amended
38-L.P. 397

For traveling in the service of any civil process, sheriffs and constables shall receive five cents for each mile going and coming; if two or more persons are mentioned in the writ, he shall charge for the distance actually and necessarily traveled in the service of the same.

Collecting money on an execution or an order of sale, when the same is made by a sale, for the first one hundred dollars or less, four per cent; for the second one hundred dollars, three per cent; for all sums over two hundred dollars, two per cent. When the money is collected by the sheriff without a sale, one-half of the above rates shall be allowed him.

For every day the sheriff or his deputy shall attend the district or county court, he shall receive two dollars a day, to be paid by the county, for each day that the sheriff by himself or a deputy shall attend said court. [Acts 1876, p. 289. Acts 1897, S. S. p. 13. Acts 1879, p. 92. Acts 1889, p. 80.]

Service on several defendants.—A sheriff is entitled to a fee for each copy of citation served where there are more defendants than one in a suit residing in same county. Moore et al. v. McClure et al., 26 C. A. 459, 64 S. W. 810.

Attending commissioners' court.—A sheriff is not entitled to \$2 a day for attending on the commissioners' court, but his compensation was the ex officio allowance under Art. 3866. Robinson v. Smith County, 33 C. A. 251, 76 S. W. 584.

Attending criminal court.—A county is liable to the sheriff for only \$2 a day for each day that he or his deputy may attend upon a criminal district court, even though the judge of the court may require the sheriff to have two deputies attend upon the court because necessary. Ledbetter v. Dallas County, 51 C. A. 140, 111 S. W. 194, 195.

Sale under one order to different purchasers.—Where a sheriff sells under one order of sale and at one place and time a number of pieces of land to different purchasers, it is only one sale, and he is entitled to commissions on the aggregate amount received and not commissions allowed by law on each separate piece. McLennan County v. Graves, 94 T. 635, 64 S. W. 861.

Collecting debt without sale.—Under Art. 3864 where a party holding a vendor's lien collected his money after foreclosure without a sale, the sheriff could not recover his commission. Lee v. Brooks (Civ. App.) 131 S. W. 1195.

Execution and deed.—Sheriff is allowed \$1.50 for levying execution and \$2 for a deed to each purchaser. Eustis v. Henrietta, 91 T. 325, 43 S. W. 259.

Where a sheriff sells lands at one sale to different parties, he is allowed \$2 for each deed which he executes to purchasers. McLennan County v. Graves, 94 T. 635, 64 S. W. 861.

Delinquent tax proceedings.—A sheriff held entitled to commission for money collected on a sale of land for taxes, though he received money collected under the same order from other parcels without sale. City of San Antonio v. Campbell (Civ. App.) 56 S. W. 130.

A sheriff is not entitled to compensation for service of notices of the sale for delinquent city taxes on parties and their attorneys. Id.

Foreclosing vendor's lien.—Where a county forecloses a vendor's lien on school lands under an order directing that the lands be sold in certain parcels held proper to allow the sheriff to tax the costs as for several sales, rather than as for one sale. McLennan County v. Graves, 26 C. A. 49, 62 S. W. 122.

Where a county forecloses a vendor's lien on school lands, the sheriff held entitled to retain from proceeds costs of the suit and sale. Id.

Caring for attached property.—The sheriff is entitled to charge his reasonable expenditures in taking care of attached property. Worley v. Shelton (Civ. App.) 86 S. W. 794.

Sheriff's charge for taking care of attached property held unreasonable. Id.

Mileage.—A sheriff, charging for service of process, can only rightfully charge for the distance actually traveled in any case, but he is entitled to charge the amount specified in the statute for each writ, though he may serve a number in making one trip. When two or more persons are mentioned in the same writ, he can charge for but one mileage. Railway Co. v. Dawson, 69 T. 519, 7 S. W. 63.

Application of fees to indebtedness.—A commissioners' court, on allowing claims of a sheriff for fees of office, could not appropriate the amount so allowed to the payment of an indebtedness from the sheriff to the county. Denman v. Coffee, 42 C. A. 78, 91 S. W. 800.

Art. 3865. [2461] [2397] Sheriffs' fees for serving process from supreme court, etc.—Sheriffs shall be allowed for all process issued from the supreme court or courts of civil appeals, and served by them, the same fees as are allowed them for similar service upon process issued from the district court. [Act March 9, 1875, p. 70, sec. 3.]

Art. 3866. [2462] [2398] Compensation for ex officio services.—For summoning jurors in district and county courts, serving all election notices, notices to overseers of roads and doing all other public business not otherwise provided for, the sheriff may receive annually not exceeding five hundred dollars, to be fixed by the commissioners' court at the same time other ex officio salaries are fixed; provided, that, in counties exceeding twenty-five thousand population at last decennial census, sheriffs may receive an additional amount not exceeding fifty dollars for each five thousand population in excess of twenty-five thousand up to fifty thousand population, to be paid out of the general funds of the county on the order of the commissioners' court. Provided, that the total amount of compensation which may be paid annually under the provisions of this act shall not exceed the sum of eight hundred dollars. [Acts 1905, p. 91.]

For fees of sheriff in lunacy cases, see Art. 165.

5. JUSTICES OF THE PEACE

Art. 3867. [2463] [2399] Justices' fees.—Justices of the peace shall receive the following fees: [Acts 1875, p. 291, sec. 12. Acts 1897, S. S. p. 13.]

Each citation.....	\$ 50
Each subpoena for one witness.....	25
Each additional name inserted in a subpoena.....	05
Docketing each cause.....	10
Filing each paper.....	05
Each continuance.....	10

Each bond not otherwise provided for.....	\$ 50
Swearing each witness in court.....	10
Administering an oath or affirmation without a certificate.....	10
Administering an oath or affirmation with a certificate.....	25
Administering the oath, approving bond and issuing a writ of attachment or sequestration.....	1 50
Issuing any other writ or process not otherwise provided for....	50
Causing a jury to be summoned and swearing them.....	25
Receiving and recording verdict of jury.....	25
Each order in a cause not otherwise provided for.....	25
Each final judgment.....	50
Each application to set aside a judgment or for a new trial, with the final judgment thereon	50
Each appeal bond.....	25
Each commission to take depositions.....	50
Copy of interrogatories or cross-interrogatories, for each one hundred words, including certificate.....	10
Making and certifying a transcript of the entries on his docket, and filing the same, together with the original papers in the case, in the proper court, in each case of appeal or certiorari..	1 50
Each execution or order of sale.....	60
Each writ of possession or restitution.....	75
Receiving and recording the return on each execution, order of sale, writ of possession or restitution, if a levy is returned or the writ executed.....	30
If no levy is returned or the writ not executed.....	10
Making copies of any papers or records in his office for any person applying for the same, for each one hundred words including certificate	10
Taxing costs, including copy thereof, in each case.....	10
Each certificate not otherwise provided for.....	25
Taking acknowledgment for stay of judgment.....	50

For fees of justice of the peace in lunacy cases, see Art. 165.

6. CONSTABLES

Art. 3868. [2464] [2400] Constables' fees.—Constables shall receive the following fees for services rendered in business connected with courts of justices of the peace: [Id. p. 291, sec. 13.]

Serving each citation in civil suit.....	\$ 70
Serving each garnishment.....	70
Serving each notice for the taking of depositions and copy of interrogatories	70
Serving each subpoena.....	50
Levying and returning each writ of attachment or sequestration..	1 50
Copy of attachment writ and return for recording.....	1 00
Levying each execution.....	70
Executing order of sale, writ of possession or restitution.....	1 00
Returning each execution, order of sale, writ of possession or restitution	40
Taking and approving each bond.....	1 00
Summoning a jury in justice's court.....	1 00
Advertising sale under execution or order of sale.....	70
Making title to purchaser of real estate under execution or order of sale.....	2 00
Making title to purchaser of personal property under execution or order of sale, when demanded by purchaser.....	50

Taking care of property levied upon by virtue of any legal process, all reasonable and necessary expenses, to be taxed and allowed by the

court to which such process is returnable. Collecting money under an execution or order of sale, when a sale is made, four per cent on the amount actually collected by him. When the money is collected by him without a sale, two per cent on the amount actually collected by him. [Id. p. 291, sec. 13. Acts 1889, p. 80.]

Art. 3869. [2465] [2401] **Fees for services in district or county courts.**—For all services performed by constables in business connected with the district and county courts, they shall receive the same fees allowed sheriffs for the same services. [Id.]

7. COUNTY COMMISSIONERS

Art. 3870. [2466] [2402] **Per diem pay of county commissioners.**—Each county commissioner, and the county judge when acting as such, shall receive from the county treasury, to be paid on the order of the commissioners' court, the sum of three dollars for each day he is engaged in holding a term of the commissioners' court, but such commissioners shall receive no pay for holding more than one special term of their court per month. [Act Aug. 23, 1876, p. 292, sec. 14.]

Compensation as member of commissioners' court.—See notes under Art. 3852.

8. ASSESSOR OF TAXES

Art. 3871. Assessors' compensation.—Each assessor of taxes shall receive the following compensation for his services, which shall be estimated upon the total values of the property assessed, as follows: For assessing the state and county tax, on all sums for the first two million dollars or less, five cents for each one hundred dollars of property assessed; and on all sums in excess of two million dollars and less than five million dollars, two and one-fourth cents on each one hundred dollars; and on all sums in excess of five million dollars, one and seven-tenths cents on each one hundred dollars; one-half of the above fees shall be paid by the state, and one-half by the county; and for assessing the poll tax five cents for each poll, which shall be paid by the state. The commissioners' court may allow to the assessor of taxes such sums of money, to be paid monthly from the county treasury, as may be necessary to pay for clerical work, taking assessments and making out the tax rolls of the county, such sums so allowed to be deducted from the amount allowed to the assessor as compensation upon the completion of said tax rolls; provided, the amount allowed the assessor by the commissioners' court shall not exceed the compensation that may be due by the county to him for assessing. [Acts 1897, S. S. p. 8, sec. 8.]

9. COLLECTOR OF TAXES

Art. 3872. Collector's compensation.—There shall be paid for the collection of taxes, as compensation for the services of the collector, beginning with the first day of September of each year, five per cent on the first ten thousand dollars collected for the state, and four per cent on the next ten thousand dollars collected for the state, and one per cent on all collected over that sum; for collecting the county taxes, five per cent on the first five thousand dollars of such taxes collected, and four per cent on the next five thousand dollars collected, and one and one-fourth per cent on all such taxes collected over that sum; and, in counties owing subsidies to railroads, the collectors shall receive only one per cent for collecting such railroad tax; and, in cases where property is levied upon and sold for taxes, he shall receive the same compensation as allowed by law to sheriffs or constables upon making a levy and sale in similar cases, but in no case to include commissions on

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such sales; and, on all occupation and license taxes collected, five per cent. [Id. p. 8, sec. 9.]

Taxes paid by predecessor.—An incoming tax collector held entitled to recover commissions on taxes paid by the outgoing collector for the benefit of the taxpayers, in order to benefit himself to the extent of the commissions. *Graves v. Bullen*, 53 C. A. 261, 115 S. W. 1177.

10. COUNTY TREASURER

Art. 3873. [2467] [2403] County treasurers' commissions.—The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners' court as follows: For receiving all moneys, other than school funds, for the county, not exceeding two and one-half per cent, and not exceeding two and one-half per cent for paying out the same; provided, however, he shall receive no commissions for receiving money from his predecessor nor for paying over money to his successor in office. [Id. sec. 15.]

See *Horton v. Rockwall County* (Civ. App.) 149 S. W. 297.

Amount discretionary with commissioners' court.—Under Const. art. 16, § 44, giving county treasurers such compensation as may be provided by law, and under this article, the amount of commission is discretionary with that court; but it cannot validly provide that he shall receive no commission, and, on such order being made, the treasurer is entitled to the commission fixed by a previous order. *Hill County v. Sauls* (Civ. App.) 134 S. W. 267.

When not fixed by court entitled to maximum.—When commissions are not fixed by order of the court, the treasurer is entitled to the maximum fees. *Bastrop County v. Hearn*, 70 T. 563, 8 S. W. 302.

Serving more than one year.—If the county treasurer holds more than a year before his successor qualifies, he is entitled to pay at the same ratio for the time he holds. *Davenport v. Eastland*, 94 T. 277, 60 S. W. 244.

Under this article, the treasurer who served more than one year was entitled to commissions as money was received and paid out, and not a proportionate amount of the commissions for the time he served. *Hill County v. Sauls* (Civ. App.) 134 S. W. 267.

Maximum allowance.—The county treasurer is entitled to only \$2,000 per annum to be paid out of the fees fixed by the commissioners' court, if such fees should amount to that much. *Davenport v. Eastland*, 94 T. 277, 60 S. W. 244.

Funds on which commission should be paid.—The county treasurer is entitled to the custody of all county funds and the commissions thereon. *Wall v. McConnell*, 65 T. 397; *Trinity County v. Vickery*, 65 T. 554. See post, Art. 2467.

No distinction can be made between general and special funds belonging to the county, and no authority exists in a commissioners' court to deprive the treasurer of the right to his commissions for receiving and paying out county funds by directing their receipt and disbursement by any other person. In such case a right of action in favor of the treasurer exists to recover the amount allowed by law for receiving and paying out the money. *Bastrop County v. Hearn*, 70 T. 563, 8 S. W. 302.

Making reports.—A county treasurer is not entitled to fees for making the reports required by Arts. 1437, 1446, of the Revised Statutes. *Wharton County v. Ahldag*, 84 T. 12, 19 S. W. 291.

Bonds and amounts received from sale thereof.—A county treasurer is not entitled to commissions on county bonds delivered to a contractor and which had never been sold. *Baylor County v. Taylor*, 3 C. A. 523, 22 S. W. 983.

A treasurer cannot be deprived of his statutory fees by the delivery of bonds to a contractor. *Waller County v. Rankin* (Civ. App.) 35 S. W. 876.

A county treasurer is not entitled to commissions on bonds surrendered by the owner in lieu of new ones issued to him. *Farmer v. Aransas County*, 21 C. A. 549, 53 S. W. 607.

Money realized from sale of bonds held to belong to county, so as to entitle its treasurer to commissions thereon. *Presidio County v. Walker*, 29 C. A. 609, 69 S. W. 97.

County scrip.—The county treasurer is not entitled to commissions on county scrip delivered for cancellation (*Wharton County v. Ahldag*, 84 T. 12, 19 S. W. 291), or received in payment of ad valorem taxes (Id.), or received by him from the tax collector and reported for cancellation (*McKinney v. Robinson*, 84 T. 489, 19 S. W. 699; *Baylor County v. Taylor*, 3 C. A. 523, 22 S. W. 983).

Payment or purchase of judgment.—Evidence, in an action against a county by its ex-treasurer for commissions on the theory that the county borrowed money of a bank and therewith paid a judgment against the county, held sufficient to sustain a finding that the transaction was but a purchase by the bank of the judgment. *Benefield v. Marion County*, 43 C. A. 245, 95 S. W. 713.

Rate.—Under this article, courts cannot interfere with an order fixing the commission at 1½ mills on the dollar. *Hill County v. Sauls* (Civ. App.) 134 S. W. 267.

Art. 3874. [2468] Commissions on school fund.—The treasurers of the several counties shall be treasurers of the available public free school fund and also of the permanent county school fund for their respective counties. The treasurers of the several counties shall be allowed for

receiving and disbursing the school funds one-half of one per cent for receiving, and one-half of one per cent for disbursing, said commissions to be paid out of the available school fund of the county; provided, no commissions shall be paid for receiving the balance transmitted to him by his predecessor, or for turning over the balance in his hands to his successor; and provided, further, that he shall receive no commissions on money transferred. [Acts 1891, p. 147.]

See Hill County v. Sauls (Civ. App.) 134 S. W. 267.

Transfer of funds to county depositaries.—Under Const. art. 16, § 44, providing that the legislature shall prescribe the duties of the county treasurer, who shall have such compensation as may be provided by law, the legislature, notwithstanding this article, had power to pass Acts 31st Leg. ch. 12, transferring the custody of such funds to the county depositaries, thus relieving the county treasurers of any liability for such funds so deposited, and providing that no commissions shall thereafter be paid for receiving or disbursing the same. Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Art. 3875. [2469] [2405] Commissions shall not exceed \$2,000 annually.—The commissions allowed to any county treasurer shall not exceed two thousand dollars annually. [Id. Acts 1879, ch. 69, p. 79.]

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11. DISTRICT AND COUNTY SURVEYORS

Art. 3876. [2470] [2406] District and county surveyors' fees.—District and county surveyors shall receive the following fees: [Id. sec. 16.]

Inspecting and recording the field-notes and plat of a survey for any tract of land over one-third of a league.....	\$ 3 00
One-third of a league.....	2 00
Less than one-third of a league.....	1 00
For recording surveys and plats required in article 5319, for each one hundred words.....	20
Examination of papers and records in his office at the request of any person.....	25
Copies of all field-notes and plats, or any other papers or records in his office, for each one hundred words, including certificate	20
Surveying any tract of land, including all expenses in making the survey, and returning the plat and field-notes of the survey, for each English lineal mile actually run.....	3 00
Surveying any tract of land, including all expenses of making the survey, and returning the plat and field-notes, when the distance actually run is less than one English lineal mile.....	2 50
For services in designating a homestead, to include pay for chain carriers, for each day's service.....	5 00

[Act 1881, p. 71.]

Field work by deputy surveyor.—When field work is done by a deputy surveyor he is entitled to the legal fees therefor. Bates v. Thompson, 61 T. 335.

Void contract for payment of fees.—A contract for the payment of higher fees than prescribed by law is void. Bates v. Thompson, 61 T. 335. See Keith v. Fountain, 3 C. A. 391, 22 S. W. 191.

12. INSPECTOR OF HIDES AND ANIMALS

Art. 3877. [2471] [2407] Fees of inspector of hides and animals.—Inspectors of hides and animals for each county or district shall receive the following fees:

For each hide or animal inspected.....	\$ 10
If more than fifty hides or animals are inspected in the same lot at the same time for the same person, for each hide or animal in excess of fifty.....	03
For each certificate of acknowledgment.....	50

[Act Aug. 23, 1876, p. 301, sec. 25. Id. sec. 17, p. 302, sec. 30.]

13. NOTARIES PUBLIC

Art. 3878. [2472] [2408] Fees of notaries public.—Notaries public shall receive the following fees:

Protesting a bill or note for non-acceptance or non-payment, registering and seal.....	\$ 2 50
Each notice of protest.....	50
Protest in all other cases, for each one hundred words.....	20
Certificate and seal to such protest.....	50
Taking the acknowledgment or proof of any deed or other instrument of writing for registration, including certificate and seal	50
Taking the acknowledgment of a married woman to any deed or other instrument of writing authorized to be executed by her, including certificate and seal.....	1 00
Administering an oath or affirmation with certificate and seal....	25
All certificates under seal not otherwise provided for.....	50
Copies of all records and papers in their office, including certificate and seal, if less than two hundred words.....	50
If more than two hundred words, for each one hundred words in excess of two hundred, in addition to the fee of fifty cents....	15
All notarial acts not otherwise provided for.....	50
Taking the depositions of a witness, for each one hundred words	15
Swearing a witness to depositions, making certificate thereof with seal, and all other business connected with taking such deposition	50

[Act Aug. 23, 1876, p. 293, sec. 18.]

14. PUBLIC WEIGHERS

Art. 3879. [2473] [2409] Fees of public weighers.—Public weighers shall receive the following fees:

For each bale of cotton weighed, not exceeding.....	\$ 10
When he shall run a cotton yard in connection with his weighing, his compensation shall not exceed, as yardage for the first month after same is received for storage, per bale.....	15
Thereafter per bale per month, not exceeding.....	10
For each bale or sack of wool, or hogshead of sugar or wagon load of hay, pecans or grain.....	10
For each part of a wagon load of hay, grain or pecans, not exceeding	05
For each barrel weighed.....	10
For each bale of hides weighed.....	10
For each loose hide weighed.....	02

And he shall not be obliged to deliver any such articles so weighed until his fee therefor shall have been paid. [Acts 1875, p. 162, sec. 7. Acts 1879, p. 117, sec. 6. Acts 1903, p. 217.]

CHAPTER FOUR

GENERAL PROVISIONS

<p>Art. 3880. Official failing to take out commission shall not receive fees or compensation. 3881. Maximum amount of fees allowed. 3882. Maximum fees in certain counties. 3883. Maximum fees in certain counties containing city of 25,000 inhabitants, etc.</p>	<p>Art. 3884. County attorney, compensation in certain counties. 3885. District attorney, compensation of. 3886. County judge, compensation as superintendent of public instruction. 3887. Last United States census to govern as to population of cities.</p>
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Art.	Art.
3888. Amounts allowed to be retained out of fees collected; state not responsible.	fluence appointment, etc.; compensation, how paid.
3889. Excess fees to be paid to county treasurer.	3904. Office rent, stationery, etc., to clerks of supreme court and courts of appeals.
3890. Officer not collecting maximum fees, etc., may retain out of delinquent fees collected, remainder paid to treasurer.	3905. Stationery, etc., allowed certain county officers.
3891. Fees of district clerks in counties having more than one district.	3906. No fees allowed on motions for security for costs, etc.
3892. Delinquent fees, collection of, commissions on, remainder paid to treasurer.	3907. Judgment containing several orders, one fee only shall be charged.
3893. Compensation for ex-officio services, etc., may be allowed by commissioners' court, proviso.	3908. Fees of officers for taking acknowledgments, etc.
3894. Officials named in Arts. 3881-3886 to keep accounts; duties of grand jury and district judge as to.	3909. Clerks are prohibited from acting as conveyancers, etc.
3895. Officers to make sworn statement, etc., to show what.	3910. Fees in suits to be taxed against party cast, etc.
3896. Fiscal year defined, and regulation of reports.	3911. No charge for copies of papers, when.
3897. Monthly report; statement of expenses; audit, etc.	3912. No fees for examination.
3898. Certain officers not required to report fees or keep accounts, proviso as to district attorney.	3913. Officers shall keep fee books.
3899. Collector and assessor to file with comptroller copies of sworn statements.	3914. Fee bill shall be produced, etc., before fees are collectible.
3900. Officer recovering money or fees belonging to another shall inform him and pay over on demand.	3915. Penalty for demanding, etc., fees unlawfully.
3901. Officers to report fees collected, etc., requisites of report.	3916. Certain officers shall keep list of fees posted, etc.
3902. Officers to pay over fees, etc., to treasurer after four years, etc.; statements; disposition.	3917. Fees shall not be demanded in advance, etc.
3903. Officer may appoint deputies how; county judge not to attempt to in-	3918. Execution for costs.
	3919. Bill of costs shall accompany execution.
	3920. Execution shall issue on demand of person entitled to costs.
	3921. Preceding articles, etc., do not apply to executors, etc.
	3922. Execution for costs shall not issue, until, etc.
	3923. No fee allowed for filing certain papers.
	3924. Any other fees of office.
	3925. State's attorney fees in school land litigation.
	3926. Defense attorney fees in such cases.

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

Article 3880. Official failing to take out commission shall not receive fees or compensation, etc.—Any official who refuses or fails to take out a commission shall not be entitled to receive or collect, either from the state or from individuals, any fee or fees, or any sum or sums of money, as fees of office, or compensation for official services; and it shall be unlawful for the comptroller of public accounts, any county commissioners' court, any county auditor or any other person whose duty it is to approve claims or accounts of public officials, to approve or to pay any claim or account in favor of any and all such officers who have failed or refused to take out and pay for their commission as officials as required by this article; and the secretary of state shall, from time to time, as such commissions are issued by him, furnish a list thereof to the comptroller of public accounts and the county commissioners' court and the county auditor, with the name of the county in which such officers reside, and of the district judge. [Acts 1907, p. 501.]

Art. 3881. Maximum amount of fees allowed.—Hereafter the maximum amount of fees of all kinds that may be retained by any officer mentioned in this section (article) as compensation for services shall be as follows: County judge, an amount not exceeding two thousand two hundred and fifty dollars per annum; sheriff, an amount not exceeding two thousand seven hundred and fifty dollars per annum; clerk of the county court, an amount not exceeding two thousand two hundred and fifty dollars per annum; county attorney, an amount not exceeding two thousand two hundred and fifty dollars per annum; clerk of the district court, an amount not exceeding two thousand two hundred and fifty dollars per annum; collector of taxes, an amount not exceeding two

thousand two hundred and fifty dollars per annum; assessor of taxes, an amount not exceeding two thousand two hundred and fifty dollars per annum; justices of the peace, an amount not exceeding two thousand dollars per annum; constables, an amount not exceeding two thousand dollars per annum; provided, that this Act shall not apply to justices of the peace or constables except those holding offices in cities of more than twenty thousand inhabitants, to be determined by the last United States census. [Acts 1913, p. 246, sec. 1.]

Explanatory.—Acts 1913, p. 246, sec. 1, amends Rev. St. 1911, arts. 3381–3383, 3887, 3889, 3893, 3897, 3898, and 3903. Section 2 provides that this law shall take effect December 1, 1914.

Constitutionality.—This article is not repugnant to article 5, section 21, state constitution. *Hare v. Grayson County* (Civ. App.) 51 S. W. 656.

Repeal of statute.—Acts 17th Leg. c. 87, providing that county clerks shall receive certain sums for ex officio services, in so far as it was mandatory, is repealed by Acts 25th Leg. Ex. Sess. c. 5, entitled "An act to fix certain civil fees to be charged by certain county officers, * * * to limit and regulate the compensation of the * * * clerk of the county court * * * and to repeal all laws in conflict herewith," fixing, by section 10, the maximum fees that may be retained by the clerk of the county court at \$2,500 per annum, and, in addition thereto, one-fourth of the excess fees collected by him, but providing in section 15 that the commissioners' court shall not be debarred from allowing compensation for ex officio services not to be included in estimating the maximum provided in the act, when, in their judgment, such compensation is necessary; such compensation not to exceed the amount now provided by law for such services. *Navarro County v. Howard* (Civ. App.) 129 S. W. 857.

"Fees of all kinds."—The phrase "fees of all kinds" embraces every kind of compensation allowed by law to a county clerk unless excepted by some provision of the statute. *Ellis County v. Thompson*, 95 T. 22, 66 S. W. 49.

In Acts 25th Leg. Ex. Sess. c. 5, § 10, fixing the maximum amount of fees of all kinds that may be retained by any officer as compensation for his services, the phrase "fees of all kinds," as applied to the clerk of the county court embraces every kind of compensation allowed by law to him, unless excepted by some provision of the act. *Navarro County v. Howard* (Civ. App.) 129 S. W. 857.

Art. 3882. Maximum fees in certain counties.—In any county shown by the last United States census to contain as many as twenty-five thousand inhabitants the following amounts shall be allowed, viz: county judge, an amount not exceeding twenty-five hundred dollars per annum; sheriff, an amount not exceeding three thousand dollars per annum; clerk of the county court, an amount not exceeding twenty-four hundred dollars per annum; county attorney, an amount not exceeding twenty-four hundred dollars per annum; district attorney, an amount not exceeding twenty-five hundred dollars per annum, inclusive of the five hundred dollars allowed by the constitution and paid by the state; clerk of the district court, an amount not exceeding twenty-four hundred dollars per annum; collector of taxes, an amount not exceeding twenty-four hundred dollars per annum; assessor of taxes, an amount not exceeding twenty-four hundred dollars per annum. [Id.]

See note under Art. 3881.

Art. 3883. Maximum fees in counties containing city of 25,000 inhabitants, etc.—In counties containing a city of over twenty-five thousand inhabitants, or, in such counties as shown by the last United States census, shall contain as many as thirty-eight thousand inhabitants, the following amount of fees shall be allowed, viz: county judge, an amount not exceeding thirty-five hundred dollars per annum; sheriff, an amount not exceeding thirty-five hundred dollars per annum; clerk of the county court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; county attorney, an amount not exceeding thirty-five hundred dollars per annum; district attorney, an amount not exceeding twenty-five hundred dollars, inclusive of the five hundred dollars allowed by the constitution and paid by the state; clerk of the district court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; collector of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; assessor of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; provided, the compensation fixed herein for sheriffs and their deputies shall be

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exclusive of any rewards received for the apprehension of criminals or fugitives from justice. [Id.]

See note under Art. 3881.

District and county attorneys.—See Arts. 363, 365.

In counties that cast 7,500 votes or more in presidential elections, the county attorney is entitled to retain for his individual services fees to the extent of \$2,500 and one-fourth of the excess. *Hare v. Grayson County* (Civ. App.) 51 S. W. 656.

Art. 3884. County attorney, compensation in certain counties.—The county attorney in those counties having no district attorney, where he performs the duties of district attorney, may receive the same compensation as provided for the district attorney. [Acts 1897, S. S. p. 43, sec. 10.]

For fees of county attorney in lunacy cases, see Art. 165.

Art. 3885. District attorney, compensation of.—The maximum fixed for the compensation of the district attorney shall be construed to be the amount which that officer is authorized to retain of fees allowed such officer in his district, whether composed of one or more counties. [Id. sec. 10.]

Art. 3886. County judge, compensation as superintendent of public instruction.—In counties where a county judge acts as superintendent of public instruction, he shall receive such other salary as may be provided by the commissioners' court, not to exceed the sum of six hundred dollars per annum. [Id. sec. 10.]

Salary or county judge as county superintendent.—This article empowers the commissioners' court to allow county judges for services as county superintendents of public instruction a salary not to exceed \$600 per annum. This precludes the idea that they are any longer entitled to commissions as provided by the old law. *Stevens v. Campbell*, 26 C. A. 213, 63 S. W. 162.

Art. 3887. Last United States census to govern in all cases.—The last United States census shall govern as to population in all cases. [Acts 1897, S. S. p. 43, sec. 10. Acts 1913, p. 246, sec. 1, amending Art. 3887, Rev. St. 1911.]

See note under Art. 3881.

Art. 3888. Amounts allowed to be retained out of fees collected; state not responsible.—The amounts allowed to each officer mentioned in articles 3881 to 3886, inclusive, may be retained out of the fees collected by him under existing laws; but in no case shall the state or the county be responsible for the payment of any sum when the fees collected by any officer are less than the maximum compensation allowed by this chapter, or be responsible for the pay of any deputy or assistant. [Acts 1897, S. S. p. 9, sec. 11. Acts 1907, p. 50.]

Amount which might be retained.—The term "maximum" means the specified sum, \$2,500 (in this case), and the phrase, "The excess of the fees collected by the said officers" signifies that sum which remains after taking from the whole the maximum and the amount paid to deputies. Hence the officer is entitled to retain one-fourth of the amount he receives above the maximum after he has paid his deputies. *Ellis County v. Thompson*, 95 T. 22, 64 S. W. 927.

Art. 3889. Fees, how disposed of; excess fees, etc.—Each officer named in this chapter shall first, out of the fees of his office, pay or be paid, the amount allowed him, under the provisions of this chapter, together with the salaries of his assistants or deputies. If the fees of such office collected in any year be more than the amount needed to pay the amount allowed such officer and his assistants and deputies, same shall be deemed excess fees, and of such excess fees such officer shall retain one-fourth; and in counties having between 25,000 and 38,000 inhabitants until such one-fourth amounts to the sum of twelve hundred and fifty dollars; and counties containing a city of more than 25,000 population, or in which county the population exceeds 38,000, until such one-fourth amounts to the sum of fifteen hundred dollars, such population to be based on the United States census last preceding any given year. All amounts received by such officer as fees of his office beside those which he is allowed to retain by the provisions of this chapter,

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shall be paid into the county treasury of such county. [Acts 1897, S. S. p. 9, sec. 11. Acts 1907, p. 50. Acts 1913, p. 246, sec. 1, amending Art. 3889, Rev. St. 1911.]

See note under Art. 3881.

Art. 3890. Officer not collecting maximum fees, etc., may retain out of delinquent fees collected, remainder paid to treasurer.—Any officer mentioned in articles 3881 to 3886, who does not collect the maximum amount of his fees for any fiscal year and who reports delinquent fees for that year, shall be entitled to retain, when collected, such part of such delinquent fees as is sufficient to complete the maximum compensation for the year in which delinquent fees were charged, and also to retain the one-fourth of the excess belonging to him, and the remainder of the delinquent fees for that fiscal year shall be paid as here-in provided for when collected. [Acts 1897, S. S. p. 9, sec. 11. Acts 1907, p. 50.]

Art. 3891. Fees of district clerks in counties having more than one district.—In all counties in this state having more than one judicial district, the district clerks thereof shall in no case be allowed fees in excess of the maximum fees allowed clerks in counties having only one district court. [Id.]

Art. 3892. Delinquent fees, collection of, commissions on, remainder paid to treasurer.—All fees due and not collected as shown in the report required by article 3895 shall be collected by the officer to whose office the fees accrued; and, out of such part of delinquent fees as may be due the county, the officer making such collection shall be entitled to ten per cent of the amount collected by him, and the remainder shall be paid into the county treasury, as provided in article 3889 of this act. It shall not be legal for any officer to remit any fee that may be due under the law fixing fees. [Acts 1897, S. S. p. 10, sec. 13.]

Cannot remit fees.—Since the statute prescribes the county clerk's fees for transcribing the records and making new indexes, a contract between the county clerk and county commissioners fixing the clerk's compensation for such work even for less than the legal amount was invalid; the county clerk under Pen. Code 1911, art. 113, and this article, having no right to remit any part of his fees. *Russel v. Cordwent* (Civ. App.) 152 S. W. 239.

Collection of fees after expiration of term.—After a county officer has gone out of office he has no right to collect the fees that accrued to his office while he was the incumbent. *Ellis County v. Thompson*, 95 T. 22, 66 S. W. 49.

Fees of clerk of district court.—See Art. 3855 et seq.

Art. 3893. Compensation for ex-officio services, when may be allowed by commissioners' court; proviso.—The commissioners' court is hereby debarred from allowing compensation for ex-officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the commissioners' court shall allow compensation for ex-officio services when, in their judgment, such compensation is necessary; provided, such compensation for ex-officio services allowed shall not increase the compensation of the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter. [Acts 1897, S. S. p. 10, sec. 13. Acts 1913, p. 246, sec. 1, amending Art. 3893, Rev. St. 1911.]

See note under Art. 3881.

Acts 17th Leg. ch. 87, repealed.—See notes under Art. 3882.

Art. 3894. Officials named in articles 3881 to 3886 to keep accounts; duty of grand jury and district judge as to.—It shall be the duty of those officials named in articles 3881 to 3886, and also the sheriffs, to keep a correct statement of the sums coming into their hands as fees and commissions, in a book to be provided by them for that purpose, in which the officer at the time when any fees or moneys shall come into his hands shall enter the same; and it shall be the duty of the grand

jury (and the district judge shall so charge the grand jury) to examine these accounts at the session of the district court next succeeding the first day of December of each year, and make a report on same to the district court at the conclusion of the session of the grand jury. [Acts 1897, S. S. sec. 16.]

Art. 3895. Officers to make sworn statement, etc., to show what.—Each officer mentioned in articles 3881 to 3886, and also the sheriff, shall, at the close of each fiscal year, make to the district court of the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected, and by whom due, and the number of deputies and assistants employed by him during the year, and the amount paid, or to be paid each. [Acts 1897, S. S. p. 11. Acts 1907, p. 50.]

Art. 3896. Fiscal year defined, and regulation of reports.—A fiscal year, within the meaning of this chapter, shall begin on December 1 of each year; and each officer named in articles 3881 to 3886, and also the sheriff, shall file the reports and make the settlement required in this chapter on December 1 of each year. Whenever such officer serves for a fractional part of a fiscal year, he shall nevertheless file his report and make a settlement for such part of a year as he serves, and shall be entitled to such proportional part of the maximum allowed as the time of his services bears to the entire year. However, an incoming officer elected at the general election, who qualifies prior to December 1 next following, shall not be required to file any report or make any settlement before December 1 of the following year; but his report and settlement shall embrace the entire period dated from his qualification. [Acts 1897, S. S. p. 11, sec. 19.]

Art. 3897. Monthly report; statement of expenses; audit, etc.—At the close of each month of his tenure of such office each officer whose fees are affected by the provisions of this Act shall make as a part of the report now required by law, an itemized and sworn statement of all the actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses and other necessary expense. If such expense be incurred in connection with any particular case, such statement shall name such case. Such expense account shall be subject to the audit of the county auditor, and if it appear that any item of such expense was not incurred by such officer, or that such item was not necessary thereto, such item may be by such auditor or court rejected. In which case the correctness of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense, referred to in this paragraph, shall not be taken to include the salaries of assistants or deputies which are elsewhere herein provided for. The amount of such expense shall be deducted by the officer in making each such report, from the amount, if any, due by him to the county under the provisions of this Act. [Acts 1897, S. S. p. 11, sec. 19. Acts 1913, p. 246, sec. 1, amending Art. 3897, Rev. St. 1911.]

See note under Art. 3881.

Art. 3898. Certain officers not required to report fees or keep statement; proviso as to district attorney.—The officers named in articles 3881 to 3886, in those counties having a population of twenty-five thousand inhabitants or less shall not be required to make a report of fees as provided in article 3895, or to keep the statement provided for in article 3894; the population of the county to be determined by the last United States census; provided, that all district attorneys shall be required to make the reports and keep the statements required in this chapter. [Acts 1913, p. 246, sec. 1.]

See note under Art. 3881.

Art. 3896
Vernon Sayles
1914
Amended
38-L.P. 223

Art. 3898
Vernon Sayles
1914
Amended
36 L. P. 301

Art. 3898
Vernon Sayles
1914
Amended
38-L.P. 397

Art. 3899. Collector and assessor to file with comptroller copies of sworn statements.—The tax collector and tax assessor, at the time of their settlement of accounts with the comptroller, shall file with him a copy of the sworn statement required under article 3895. [Acts 1897, S. S. p. 11, sec. 18.]

Art. 3900. Officer recovering money or fees belonging to another shall inform him and pay over on demand, etc.—It shall be the duty of every county and precinct officer in the state of Texas who shall, in his official capacity, collect or receive any money or fees belonging to any witness, officer or other person, to inform such person of the collection of such money or fees, and to promptly pay the same over on demand to the person entitled thereto, taking receipt therefor, which shall be entered or noted in the fee book of such officer. [Acts 1907, p. 120.]

Art. 3901. Officers to report fees collected, etc., requisites of report.—On or before the second Mondays in February, May, August and November of each year, said officers shall make report in writing and under oath to the commissioners' court of their respective counties of all such moneys and fees so collected by them during the quarter last preceding, and remaining in their hands uncalled for, giving the number and the style of each cause in which said moneys or fees accrued, and the name of the person entitled thereto; which report shall be filed with the county clerk of said county, and the same shall be by him kept and preserved for future reference and examination. [Id. sec. 2.]

Art. 3902. Officers to pay over fees, etc., to treasurer after four years, etc.; statements; disposition.—Every officer collecting or having the custody of any money or fees embraced within the provisions of this and the two preceding articles, at the expiration of four years from the time of collecting or receiving such money or fees, in all cases where the same have not been paid over to the person or persons entitled thereto, shall pay the same to the county treasurer of his respective county, accompanying the same by an itemized statement, as provided in article 3901, which statement shall be filed and kept by said treasurer; and said money or fees shall be by him placed to the credit of the road and bridge fund of the county; and the treasurer shall issue to the said officer his receipt for said money or fees, itemizing the same as above provided, which receipt shall be filed by said officer with the county clerk of his respective county; provided, that any officer, upon retiring from office, having any money or fees in his hands embraced within the provisions of this and the two preceding articles, and which are not due to be turned over to the county treasurer as herein provided, shall turn the same over to his successor in office, together with an itemized list of the same as hereinbefore provided, taking proper receipt therefor; and his successor shall report and pay over the same to the county treasurer in accordance with the provisions of this article. [Id. sec. 3.]

Art. 3903. Officer may appoint deputies, how; county judge not to influence appointment, etc.; compensation, how paid.—Whenever any officer named in articles 3881 to 3886 shall require the service of deputies or assistants in the performance of his duties, he shall apply to the county judge of his county for authority to appoint same; and the county judge shall issue an order authorizing the appointment of such a number of deputies or assistants as in his opinion may be necessary for the efficient performance of the duties of said office. The officer applying for appointment of a deputy or assistant, or deputies or assistants, shall make affidavit that they are necessary for the efficiency of the public service, and the county judge may require, in addition, a statement showing the need of such deputies or assistants; and in no case shall the county judge attempt to influence the appointment of any

Art. 3903
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37 L. P. 186

person as deputy or assistant in any office. Provided, that in all counties having a population in excess of 100,000 inhabitants, the district attorney of any district, or the county attorney of any county where there is no district attorney, is authorized, with the consent of the county judge of the county for which such appointment is intended, to appoint not to exceed two (2) assistants in addition to his regular deputies or assistants, the number of said deputies not to exceed two for the entire district, regardless of the number of counties it may contain, which two assistants shall not be required to possess the qualifications prescribed by law for district or county attorneys, and who shall perform such duties as may be assigned to them by the county attorney of such county, or the district attorney of such district, and who shall receive as their compensation \$100.00 per month, to be paid in monthly installments out of the county funds, of the county for which such appointment is made, by warrants drawn on such county funds; and provided, further, that in counties having a population in excess of one hundred thousand inhabitants, the district attorney in the county of his residence or the county attorney where there is not a district attorney, shall be allowed by order of the commissioners court of the county where such official resides, as in the judgment of the commissioners court may be necessary, to the proper administration of the duties of such office, not to exceed, however, the sum of \$50.00 per month. Such amount as may be thus necessarily incurred shall be paid by the commissioners court upon affidavit made by the district attorney or the county attorney, showing the necessity of such expense and for what same was incurred. The commissioners court may also require any other evidence as in their opinion may be necessary to show the necessity of such expenditure but they shall be the sole judge as to the necessity for such expenditure and their judgment allowing same shall be final. The maximum amount allowed for deputies or assistants for their services shall be follows, towit:

First assistant or chief deputy, a sum not to exceed a rate of twelve hundred dollars per annum; others not to exceed a rate of nine hundred dollars per annum.

Provided, however, that in counties having a population of 37,500 or over, the maximum salaries allowed for deputies or assistants for their services shall be as follows:

First assistant or chief deputy, a sum not to exceed a rate of eighteen hundred dollars per annum; heads of each department not to exceed the sum of fifteen hundred dollars per annum; others, not to exceed a rate of twelve hundred dollars per annum.

The county judge in issuing his order granting authority to appoint deputies or assistants, shall state in such order the number of deputies or assistants authorized and the amount to be paid each; and the amount of compensation allowed shall be paid out of the fees of office to which said deputies or assistants may be appointed, and shall not be included in estimating the maximum salaries of officers named in articles 3881 to 3886. [Acts 1897, S. S. p. 10, sec. 12. . Acts 1913, p. 286, sec. 1, amending Art. 3903, Rev. St. 1911.]

Explanatory.—Art. 3903, Rev. St. 1911, was amended by Acts 1913, p. 246, approved April 3, 1913, the amendment to take effect December 1, 1914. Such article was again amended at the same session of the legislature (Acts 1913, p. 286) so as to read as above, but the act was made to take effect from and after its passage. The later amendment was approved April 7, 1913.

Art. 3904. [2474] [2410] Office rent, stationery, etc., to clerks of supreme court and courts of appeals.—There shall be allowed to the clerks of the supreme court and courts of civil and criminal appeals, reasonable office rent, stationery and furniture for their offices, to be paid on the order and approval of their respective courts out of the appropriation for the contingent expenses of said courts. [Act Aug. 23, 1876, p. 285, sec. 4.]

Art. 3905. [2475] [2411] Stationery, etc., allowed certain county officers.—There shall be allowed to county judges, clerks of the district and county courts, sheriffs and county treasurers, such books, stationery, including blank bail bonds and blank complaints, and office furniture as may be necessary for their offices, to be paid for on the order of the commissioners' court out of the county treasury; and suitable offices shall also be provided by the commissioners' court for said officers at the expense of the county. And such books and stationery as are necessary in their performance of their duties shall also be furnished justices of the peace by said commissioners' court. [Acts 1885, p. 112.]

Art. 3906. [2476] [2412] No fees allowed on motions for security for costs, etc.—Clerks of the district and county courts and justices of the peace shall receive no fees for motions or judgments upon motions for security for costs, nor for taking and approving a bond for costs. [Id. sec. 9.]

Art. 3907. [2477] [2413] Judgment containing several orders, one fee only shall be charged.—A judgment containing several orders shall be considered as one judgment, and only one fee shall be charged by the court, clerk or justice of the peace for rendering or entering the same. [Id.]

Art. 3908. [2478] [2414] Fees of officers for taking acknowledgments, etc.—Clerks of the district and county courts and other officers authorized by law to take acknowledgment or proof of deeds or other instruments of writing shall receive the same fees for taking such acknowledgment or proof as are allowed notaries public for the same services.

Art. 3909. [2479] [2415] Clerks are prohibited from acting as conveyancers, etc.—All clerks and their deputies are prohibited from charging any fees or commissions for writing deeds, mortgages, bills of sale, or any other conveyance for any person, unless they pay the same tax, if any, which may be required by law to be paid by conveyancers or attorneys at law. [Id. sec. 9.]

Art. 3910. [2480] [2415] Fees in suits to be taxed against party cast, etc.—The fees allowed in this title pertaining to suits or actions in courts shall be allowed and taxed in the bill of costs against the party cast in the suit or action wherein any such service shall be rendered, except where it is otherwise provided by law or adjudged by the court. [Id. sec. 20.]

Art. 3911. [2481] [2417] No charge for copies of papers, when.—No copy of a paper not required by law to be copied shall be allowed and taxed in the bill of costs; and, if any party or attorney shall take out copies of his own pleadings, or of papers filed by him in any cause, it shall be at his own expense, and no charge for such copies shall be allowed in the bill of costs. [Id.]

Art. 3912. [2482] [2418] No fee for examinations.—No clerk of a court, justice of the peace or other officer shall be allowed to charge any fee for the examination of any paper or record in his office. [Id. sec. 21.]

Art. 3913. [2483] [2419] Officers shall keep fee books.—Every officer entitled by law to charge fees for services shall keep a fee book, and shall enter therein all fees charged for services rendered; which fee book shall, at all times, be subject to the inspection of any person wishing to see the amount of fees therein charged. [Id. sec. 22.]

Art. 3914. [2484] [2420] Fee bill shall be produced, etc., before fees are collectible.—None of the fees mentioned in this title shall be payable to any person whomsoever until there be produced, or ready to be produced, unto the person owing or chargeable with the same, a bill or account in writing containing the particulars of such fees, signed

by the clerk or officer to whom such fees are due, or by whom the same are charged, or by the successor in office, or legal representative of such clerk or officer. [Id. sec. 23.]

Art. 3915. [2485] [2421] Penalty for demanding, etc., fees unlawfully.—If any of the officers named in this title shall demand and receive any higher fees than are prescribed to them in this title, or any fees that are not allowed by this title, such officer shall be liable to the party aggrieved for fourfold the fees so unlawfully demanded and received by him, to be recovered in any court of competent jurisdiction, and may also be punished criminally for extortion, as prescribed in the Penal Code. [Id. sec. 24. See Acts 1879, ch. 108, sec. 9.]

Penalty applies only to fees named.—The penalty prescribed in this article applies only to fees named in this title. *Wood County v. Cate*, 75 T. 215, 12 S. W. 535.

Fee to notary making premature protest.—The payment of the regular fee to a notary making a premature protest in ignorance of the law is not extortion within the meaning of this act, and having been paid voluntarily cannot be recovered back. *Hirshfield v. Bank*, 83 T. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660.

Liability for fees unlawfully received.—Even if a county clerk under the common law and in equity was not liable for the return of fees collected in excess of the amounts allowed by law, he is made liable by this article. *Tarrant County v. Rogers* (Civ. App.) 126 S. W. 592.

Art. 3916. [2486] [2422] Certain officers shall keep list of fees posted, etc.—It shall be the duty of county judges, clerks of the district and county courts, sheriffs, justices of the peace, constables and notaries public of the several counties, to keep posted up, at all times, in a conspicuous place in their respective offices a complete list of fees allowed by law to be charged by them respectively. [Id. sec. 25.]

Art. 3917. [2487] [2423] Fees shall not be demanded in advance, etc.—Officers receiving any process to be executed shall not be entitled in any case to demand their fees for executing the same in advance of such execution, but their fees shall be taxed and collected as other costs in the case.

Art. 3918. [2488] [2424] Execution for costs.—It shall be lawful for any clerk of a court or justice of the peace, when any suit is determined in their respective courts and the costs are not paid by the party against whom the same have been adjudged, to issue execution therefor against such party, under the same rules governing executions in other cases, to be levied and collected as in other cases. [Id. sec. 26.]

Art. 3919. [2489] [2425] Bill of costs shall accompany execution.—A bill of costs, showing each item thereof, for which the party against whom the execution issues is liable, shall accompany each execution or order of sale. [Id.]

Art. 3920. [2490] [2426] Execution shall issue on demand of person entitled to costs.—Any person to whom any costs are due in a suit or action, which has been determined, may demand that execution issue therefor; and, thereupon it shall be the duty of the clerk or justice of the peace to issue execution for all costs due by such party at once.

Art. 3921. [2492] [2428] Preceding articles, etc., do not apply to executors, etc.—The preceding articles in relation to executions and payment of costs do not apply to executors, administrators or guardians, but in cases where costs are adjudged against an estate of a deceased person, or of a ward, the same shall be collected as provided in the titles, "Estates of Decedents," and, "Guardian and Ward." [Id. sec. 26. Acts 1879, ch. 81, p. 93.]

Art. 3922. [2493] [2429] Execution for costs shall not issue, until, etc.—No execution for costs shall issue in any case until after judgment rendered therefor by the court.

See Art. 2030 et seq.

Execution for costs.—An execution must be authorized by, and conform to, the judgment; if there be no judgment for costs there can be no execution for them, unless it be

founded on some positive provision of the statute superseding the general rule. *Criswell v. Ragsdale*, 18 T. 443; *Howard v. North*, 5 T. 290, 51 Am. Dec. 769.

Art. 3923. [2494] [2430] No fee allowed for filing certain papers.—No clerk or justice of the peace shall be entitled to any fee for filing any process or paper issued by him and returned into his court.

Affidavit of witness as to attendance.—No clerk is entitled to fees for filing papers issued by him and returned into court. The affidavit of witnesses as to attendance cannot be considered as issued by him and he is entitled to fees for filing same. *Texas, M. Ry. Co. v. Parker*, 28 C. A. 116, 66 S. W. 583.

Art. 3924. [2495] Any other fees of office.—Any other fees of office not embraced within this title, but otherwise provided for, shall not be affected by the provisions hereof.

Application of statute to counties having a population not exceeding 15,000.—The officers of counties having a population not exceeding 15,000 do not have to report the amount of fees annually collected by them and they are generally exempted from the provisions of the act. *Stephens v. Campbell*, 26 C. A. 213, 63 S. W. 162.

Art. 3925. [2495a] State's attorney fees in school land litigation.—District and county attorneys who have represented, or may hereafter represent, the state in suits for the recovery of interest and purchase money due the state on account of sales of school lands, made under the laws of 1879 and 1881, or for the forfeiture of said lands on account of non-payment of said interest and purchase money, shall be allowed a fee of ten dollars for each of such cases in which the state recovers judgment; said fees to be approved by the judge who tried the case, or his successors in office, and certified by the clerk of the trial court, and when so approved and certified shall be paid out of any moneys in the treasury not otherwise appropriated; provided, that, in cases where suits are filed by one district or county attorney and judgment obtained by his successor in office, the fee shall be equally divided between them. [Acts 1893, p. 29.]

Art. 3926. [2495b] Defense attorney fees in such cases.—A fee of five dollars for every suit heretofore or hereafter brought [shall] be allowed attorneys appointed by the court to represent the defendant in all cases where the state recovered judgment and where the costs can not be made out of the defendant; said fee to be paid by the state upon the presentation of an account allowed by the district court trying said case, stating the number and style of the suit and that the state recovered therein, that the attorney was appointed and represented the defendant therein, and that the costs can not be recovered out of said defendant. [Id.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Authority of court to fix compensation.—Unless the statute expressly provide for fees for the particular service performed by an officer, the courts have no power to fix a compensation for the services rendered. *Wharton County v. Ahldag*, 84 T. 12, 19 S. W. 291. See *James v. Wilson*, 7 T. 230.

Assignment of compensation.—It is contrary to public policy for a public officer to assign or give a lien upon his unearned compensation, either salary or fees, and such assignment or lien is void. *Bank v. Fink*, 24 S. W. 256, 86 T. 303, 40 Am. St. Rep. 833; *Williams v. Ford* (Civ. App.) 27 S. W. 723.

A contract with a candidate for public office to pay him certain sums for the privilege of selecting his deputies and receiving his fees held void. *Willis v. Weatherford Compress Co.* (Civ. App.) 66 S. W. 472.

Where the fees of a public officer are collected by another under a void assignment of such fees, such collection is ineffectual as to such officer, and they are still uncollected so far as he is concerned. *Id.*

Where, acting under a void assignment, an assignee has collected the fees of an officer, the moneys so collected cannot be recovered from such assignee by the officer, or reached by his creditors in garnishment proceedings. *Id.*

Contract for additional compensation.—Where the law fixes the compensation which an officer shall receive for given services, he cannot contract to receive from other sources any additional compensation for such services. *Stringer v. Franklin County* (Civ. App.) 123 S. W. 1168.

Right of county attorney to retain fees.—Rev. St. 1895, art. 2495c, provides that the county attorney shall receive in addition to his stated salary one-fourth of the excess of the fees collected by him. Article 2495d requires a sworn statement showing the amount of fees collected and the amount of fees charged and not collected. Article 2495f declares that all fees due and not collected shall be collected by the officer to whose office the fees

accrued, and out of such part of delinquent fees as may be due the county the officer making such collection shall be entitled to 10 per cent. and the remainder shall be paid into the county treasury. Held that, before the county is entitled to any fees collected by the county attorney, it must appear that when he received such fees, he had collected in fees the maximum compensation allowed him by law, for, until then, he is entitled to all fees collected, and the county has no interest therein. *Lattimore v. Tarrant County*, 57 C. A. 610, 124 S. W. 205.

Recovery of fees paid.—Under the common law and in equity, where a county clerk by mistake collected fees in excess of those allowed by law, he is liable for the repayment to the parties paying them of the excessive amounts collected and the county is not entitled to an accounting therefor; and if he has paid them over to the county, he may recover them from the county. *Tarrant County v. Rogers* (Civ. App.) 125 S. W. 592.

TITLE 59

FENCES

[See "Stock Laws" and Penal Code.]

Art.		Art.	
3927.	"Sufficient fence" defined.	3932.	Unlawful removal of dividing fence.
3928.	Complaint and proceedings thereon.	3933.	Lawful removal of same.
3929.	Stock may be impounded, when.	3934.	Adjacent owners, required to remove fence, how.
3930.	Owner not liable, when.		
3931.	Liability for injuring stock.		

Article 3927. [2496] [2431] "Sufficient fence" defined.—Every gardener, farmer or planter shall make a sufficient fence about his cleared land in cultivation, at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same; but it shall be unlawful for any persons whomsoever, by joining fences or otherwise, to build or maintain more than three miles lineal measure of fence running in the same general direction without a gateway in the same, which gateway must be at least eight feet wide, and shall not be locked. [Act Feb. 5, 1840, p. 179. P. D. 3838. P. C. arts. 685, 686. Acts 1884, p. 37.]

Object of laws.—The statute requiring farmers and others to make a sufficient fence about cleared land in cultivation was designed for the protection of crops inside the inclosure against stock running at large. The failure to keep a fence around a growing crop, which in its nature could not be regarded as dangerous to stock, would not render the owner in possession liable for injury which might result to animals that had entered and been injured by eating of the crop. *Fennell v. Railway Co.*, 70 T. 670, 8 S. W. 486.

The purpose of this act is to give landowners complying with its requirements as to fences a special remedy for damages by trespassing stock, irrespective of negligence. *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

Necessity for gateway.—It is unlawful to build or maintain, by joining or otherwise, more than three miles of fence running in the same direction without a gateway.

Negligence in construction of fences.—A landowner owes no duty to persons trespassing upon his lands in the construction of fencing not along public highways, and there can be no negligence in the construction of such fencing. *Worthington v. Wade*, 82 T. 26, 17 S. W. 520.

Negligence in construction of fence a question of fact. *Hester v. Windham* (Civ. App.) 27 S. W. 1078.

Barbed wire fence in town or city.—A barbed wire fence may be constructed within the limits of a town or city, if not prohibited by an ordinance, and in the absence of evidence showing it to be a nuisance the owner is not liable for injury to stock caused thereby. *Robertson v. Wooley*, 23 S. W. 828, 5 C. A. 237.

Duty to repair fences.—The lessee of rented premises must keep the fences in repair. *Taul v. Shanklin*, 1 App. C. C. § 1138.

The owner of land pasturing cattle for pay is bound to keep up the fences. He cannot recover pay for pasturage of cattle escaping by reason of defective fencing, and is responsible for damages resulting from their loss. *McAuley v. Harris*, 71 T. 631, 9 S. W. 679.

One tearing down another's fences is bound only to put the fence in as good a condition as it was before it was torn down. *Gulf, C. & S. F. Ry. Co. v. McMurrrough*, 41 C. A. 216, 91 S. W. 320.

Where defendant orally contracted to pasture certain cattle at a certain price per head, an agreement that he would not overstock the pasture nor permit the fences surrounding the same to become out of repair will be implied. *J. B. Wallis & Co. v. Wallace* (Civ. App.) 92 S. W. 43.

— **Contributory negligence.**—The failure of an owner to exercise ordinary care in repairing a fence torn down by another so as to keep stock from trespassing on his crops is contributory negligence. *Gulf, C. & S. F. Ry. Co. v. McMurrrough*, 41 C. A. 216, 91 S. W. 320.

Lawful fence—Stock laws.—See Arts. 7227, 7254.

Fences around irrigation farms.—See Art. 4990.

Art. 3928. [2497] [2432] Complaint before justice of the peace, when made.—When any trespass shall have been done by any cattle, horses, hogs or other stock, on the cleared and cultivated ground of any person, it shall be lawful for such person to complain thereof to any justice of the peace for the county where such trespass shall have been done, and such justice is hereby authorized and required to cause two disinterested and impartial freeholders to be summoned, who, with such

justice, shall view and examine on oath whether complainant's fence be sufficient or not, and what damages he has sustained by such trespass, and certify the same in writing; and, if it shall so appear that said fence be sufficient, then the owner of such cattle, horses, hogs or other stock, shall make full satisfaction for the trespass to the party injured, to be recovered before any tribunal having cognizance thereof.

Object of laws.—See notes under Art. 3927.

Necessity and sufficiency of inclosure.—Where the fence is sufficient, damages for injuries to crops by another's stock can be recovered; otherwise not. *Hoskins v. Huling*, 2 App. C. C. § 161.

At common law the right of pasturage on uninclosed land vested in the owner of the land, and the right of common, in the absence of his consent, did not exist. The owner of cattle grazing upon the lands of another was responsible for all damage done by them, whether the land was inclosed or not. In Texas, if the owner of land takes no steps to guard against intrusion by the cattle of another, he cannot complain if they graze upon it. If he incloses it, his inclosure must be respected, even though it is not inclosed with a statutory fence. *Davis v. Davis*, 70 T. 123, 7 S. W. 826; *Abbey v. Shiner*, 24 S. W. 91, 5 C. A. 287; *Pace v. Potter*, 85 T. 473, 22 S. W. 300.

Under this article and Art. 3927 it is essential to plaintiff's right to recover that he establish that his land was inclosed with a sufficient fence at least five feet high. *Gest v. Dube* (Civ. App.) 142 S. W. 965.

Injuries by stock coming from land in common inclosure.—Plaintiff and defendant owned lands adjoining. By the fences of other land-owners the territory occupied by the plaintiff and defendant became surrounded by fences. The defendant put cattle upon his land. Held, that such act and conditions did not make him liable in damages from his cattle pasturing upon the lands of the plaintiff; otherwise if the defendant had taken and held exclusive possession of the lands of the plaintiff within such an inclosure. *Pace v. Potter*, 85 T. 473, 22 S. W. 300.

The rule that a party whose lands are in a common inclosure with the lands of another cannot complain of damages from stock wandering from the other party's lands to his own does not apply so as to prevent his recovery of damages from cattle which are pastured upon his lands under a claim of right. *Tandy v. Fowler* (Civ. App.) 150 S. W. 481.

It is not material to a cattle owner's liability for trespass that the lands are not properly inclosed with a fence, where he committed the trespass by pasturing his cattle thereon under a claim of right. *Id.*

Liability for injuries by cattle breaking through fence.—Where plaintiff's cattle were injured by defendant's bulls breaking through a feeding pen, consisting of a fence sufficient to turn ordinary cattle, defendant was liable for the injuries. *Trammell v. Turner* (Civ. App.) 82 S. W. 325.

In an action for damages from a trespass by defendant's cattle, an issue as to whether defendant "knew and intended" that the cattle herded by him outside of plaintiff's fence would break the fence was not erroneous. *Moore v. Pierson* (Civ. App.) 93 S. W. 1007.

The owner of cattle who herded them just outside another's pasture was not liable for their trespass after breaking through the fence, in the absence of anything tending to show that the cattle were breachy. *Id.*

In an action for damages caused by defendant having driven cattle upon a strip of land knowing and intending that they should break plaintiff's fence, a charge on the circumstances under which plaintiff would be entitled to recover held not erroneous. *Moore v. Pierson*, 100 T. 113, 94 S. W. 1132.

The duties and liabilities of the owner of stock and of landowners in case of damage from the breaking of fences by cattle permitted to roam at large stated. *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

— **Communicating disease.**—One held liable where his cattle broke through the fences of another and communicated a dangerous disease to his cattle, though defendant did not know that his cattle were infected with such disease. *Clarendon Land, Investment & Agency Co., Limited, v. McClelland* (Civ. App.) 21 S. W. 170.

Inclosing land of another.—One who by mistake builds a fence on the adjoining land of another may remove it to his own land. *Long v. Cude*, 75 T. 225, 12 S. W. 827.

Where the owner of several tracts of land in inclosing them within one large inclosure necessarily incloses a tract belonging to another, this is an appropriation of such other person's land, and the pasture owner is liable in trespass to try title for rental value of the tract thus inclosed, although the pasture fence contains gates every three miles, and the pasture owner disclaims title and possession of such tract. *St. Louis Cattle Co. v. Vaught*, 1 C. A. 388, 20 S. W. 855.

Joining fences.—See notes under Art. 3932.

Sufficiency and conclusiveness of report.—In an action on a report of viewers for damage caused by stock under Arts. 3927-3930, the report held insufficient to sustain an action. *Gest v. Dube* (Civ. App.) 142 S. W. 965.

Under this article and Art. 3928, providing that, in case of depredations by cattle on complaint to a justice, he and two freeholders may examine and report on oath the condition of the fence and the extent of the damage on which an action may be maintained, such report was not conclusive of the sufficiency of complainant's fence, but that defendant was entitled in an action on the report to show that the fence maintained was not in fact five feet high, and that it had a water gap through which stock entered at will. *Id.*

Nature of remedy.—This and following articles, providing for distraint of animals breaking through a close surrounded by a lawful fence and causing damage to crops, create a remedy by a summary proceeding; and hence the statute must be strictly followed before liability can attach. *Gest v. Dube* (Civ. App.) 142 S. W. 965.

Issues and proof.—Under the allegations of the petition in an action for damage to crops from trespassing stock, plaintiff held not bound to prove that the fence around the premises was of any particular kind. *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

Plaintiff in an action for injuries to crops caused by trespassing stock held entitled to have the issue of whether his fence was sufficient to exclude cattle not of a fence-breaking nature submitted to the jury only in case the evidence warranted a finding that defendant was negligent in permitting his stock to run at large. *Id.*

Measure of damages.—The measure of damages for injuries to the crop is the actual loss sustained, which ordinarily is the value of the crops destroyed. *Taul v. Shanklin*, 1 App. C. C., § 1139.

Art. 3929. [2498] [2433] Stock may be impounded, when.—In case of a second trespass by the same cattle, horses, hogs or other stock, the owner, lessee or proprietor of the premises upon which the trespass is committed may, if he deem it necessary for the protection and preservation of his premises, or the crops growing thereon, cause such stock to be penned and turned over to the sheriff or constable and held responsible to the person damaged for all damages caused by said stock and all costs thereon. [P. D. 6845.]

Summary remedy.—See note under Art. 3928.

Sufficiency and conclusiveness of report.—See note under Art. 3928.

Art. 3930. [2499] [2434] Owner of cattle, etc., not liable, when.—If it shall appear that the said fence is insufficient, then the owner of such cattle, horses, hogs or other stock, shall not be liable to make satisfaction for such damages. [*Id.* P. D. 6845.]

Liability for damages.—One herding animals upon uninclosed pasturage belonging to another is liable for the damage done the land, the measure of which is the market value of the pasturage. *Dignowitty v. Ballantyne*, 3 App. C. C. § 195.

The owner of cattle has a right to permit them to run at large upon the open range, or upon his own inclosed lands, unless they are known to be breachy, or fence breaking, vicious or diseased. The liability upon the stock owner having notice is for such damages as that character of animals might be expected to commit. *Clarendon L. I. & A. Co. v. McClelland*, 89 T. 483, 35 S. W. 474, 31 L. R. A. 669, 59 Am. St. Rep. 70.

This article modifies the common law doctrine of absolute liability and limits the liability of the owner of stock to damages inflicted upon premises which are inclosed by a lawful fence. *Frazer v. Bedford* (Civ. App.) 66 S. W. 573.

A landowner is not entitled to a remedy for trespass by stock, unless he fences with a sufficient fence. *Texas Cent. Ry. Co. v. Pruitt*, 49 C. A. 370, 110 S. W. 966.

Art. 3931. [2500] [2435] Persons injuring stock, liable, when.—If any person whose fence shall be adjudged insufficient shall, with guns, dogs or otherwise maim, wound or kill any horses, cattle, hogs or other stock, or cause or procure the same to be done, such person so offending shall make full satisfaction to the person injured for all damages by such person sustained, to be recovered before any tribunal having cognizance thereof. [P. D. 3840.]

Right to shoot cattle breaking through a good fence.—Where a person has a good fence, and another's cattle break through it, he has a right to shoot them to protect his crop. *Huffman v. State*, 53 Cr. R. 489, 110 S. W. 749.

Art. 3932. [2501] Unlawful to remove adjoining fence except, when.—Hereafter, it shall be unlawful for any person who is a joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to, or connected with, any fence owned or controlled by any other person, to remove the same, except by mutual consent or as hereinafter provided. [Act March 17, 1887. Act April 6, 1889, p. 45.]

Joining fences.—If one proprietor incloses his land by a fence on the line, an adjoining proprietor may join fences. *Nolan v. Mendere*, 77 T. 565, 14 S. W. 167, 19 Am. St. Rep. 801.

Right to remove fence.—Where a landowner joins his fence to a right of way fence, and afterwards receives notice to disconnect it, which he disregards, held that he cannot recover damages occasioned by its removal by the company. *Texas Cent. R. Co. v. Wills* (Civ. App.) 41 S. W. 848.

If one has joined his fence to another's so as to utilize that other's in forming his own inclosure, that other does not have to notify him before he can move his own fence. *McNeely v. State*, 50 Cr. R. 279, 96 S. W. 1083.

It is not criminal for one in the actual peaceful and quiet possession of a fence to remove it. *Fitzsimon v. State*, 62 Cr. R. 440, 138 S. W. 110.

Damages for conversion of fence.—In an action for conversion of a certain fence, plaintiff's measure of damages held, not what he paid for the fence, but its market value, if it had a market value; otherwise its reasonable value at the time he was to have received it. *Harrison v. McGehee* (Civ. App.) 139 S. W. 613.

Art. 3933. [2502] Can not separate fence, except, how.—Any person who is the owner or part owner of any fences connected with or adjoined to any fences owned in part or in whole by any other person shall have the right to withdraw or separate his fence or part of fence from the fence of any other person or persons in this state; but such person who desires to withdraw or separate such fence from the fence of any other person shall give notice in writing to such person, his agent, attorney, or lessee, of his intention to separate or withdraw his fence, or part thereof, for at least six months prior to the time of such intended withdrawal or separation. [Id.]

Court in which action must be brought.—A suit to restrain the removal of a division fence must be instituted in the district court. *Scripture v. Kent*, 1 App. C. C. § 1057; *Dauenhauer v. Devine*, 51 T. 480, 32 Am. Rep. 627. See *Owens v. Prather*, 1 App. C. C. § 1131, where it is held that a suit for damages for the removal of rails on a division fence may be brought in the county court.

Fence does not include hedge.—The word "fence" as used in this and preceding article has no reference to and does not include within its meaning a hedge. But where a hedge is the dividing line between two tracts of land it cannot be destroyed by either party without trespassing on the rights of the other. *Brown v. Johnson* (Civ. App.) 73 S. W. 49.

Damages for removal.—The measure of damages for the removal of a fence without compliance with the requirements of the statute is the value of cattle scattered and lost thereby, reasonable diligence having been used to find them, and the reasonable expense, if any, of gathering them. *St. Louis Cattle Co. v. Gholson* (Civ. App.) 30 S. W. 269.

Art. 3934. [2503] Adjacent owners required to remove fence, how.—Any person who is the owner of any fence wholly upon his own land to which the fence of another is adjoined or connected in any manner, may require the owner of any such fence to disconnect and withdraw the same back on his own land by first giving notice in writing, for at least six months, to such person, his agent, attorney, or lessee, to disconnect and withdraw his fence back on his own land. [Id.]

TITLE 60

FISCAL YEAR

Art. 3935. Termination of fiscal year. 3936. Accounts to be closed and reports compiled. 3937. Secretary of state to have reports printed.	Art. 3938. Legislators to be furnished with copies of reports. 3939. Purpose of title.
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Article 3935. [2504] [2436] Termination of fiscal year.—The fiscal year of the state shall terminate on the thirty-first day of August of each year, and appropriations made for the support of the state government shall conform thereto. [Acts 1901, p. 9. Acts 1857, p. 17.]

Art. 3936. [2505] [2437] Accounts to be closed and reports compiled.—All officers who are required by law to report annually or biennially to the legislature or governor shall close their accounts on said date, and as soon thereafter as practicable shall prepare and compile their respective reports. [Id. P. D. 3864.]

Art. 3937. [2506] [2438] Secretary of state to have reports printed.—All annual or biennial reports intended for the use of the legislature or governor shall be transmitted by the respective officers to the secretary of state on or before the first day of November; and the secretary of state shall cause the same to be printed in accordance with the laws regulating public printing, as soon as practicable; all biennial reports to be printed before the assembling of the legislature. [Id. P. D. 3865.]

Art. 3938. [2507] [2439] Legislators to be furnished with copies of reports.—Upon the organization of the legislature, the secretary of state shall transmit to the presiding officers of both houses ten copies of each printed report for the use of the members of the legislature. [Id. P. D. 3866.]

Art. 3939. Purpose of title.—The purpose of this chapter is to require all appropriations for the support of the state government to conform to the fiscal year as provided in article 3935; and all officers that are required by law to report annually or biennially to either the legislature or governor to close their accounts, transmit their reports at a uniform date; and all laws or parts of laws in conflict with this act are hereby repealed. [Id.]

TITLE 61

FORCIBLE ENTRY AND DETAINER

Art.	Art.
3940. In what cases the action will lie.	3953. Jury cases, impaneling; hearing; verdict.
3941. "Forcible entry" defined.	3954. Judgment of the court, writ, etc.
3942. Other cases of forcible detainer.	3955. Writ of restitution not to issue for two days.
3943. Venue.	3956. May appeal, when and how.
3944. Citation.	3957. Form of appeal bond.
3944a. Suit for rent may be joined; judgment, etc.	3958. Duty of justice in case of appeal.
3945. Requisites of the complaint.	3959. Trial de novo.
3946. Service and return of citation.	3960. Damages may be proved, when.
3947. Either party may demand a jury; precept for and service.	3961. Judgment by default, when.
3948. Other jurors may be summoned, when.	3962. Judgment of county court final, etc., except, etc.
3949. Docketing and trial.	3963. Writ of restitution, etc.
3950. Right of possession only issue.	3964. Shall not bar action for trespass, etc.
3951. Trial may be postponed for cause.	
3952. Hearing and judgment without jury.	

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

Article 3940. [2519] [2440] In what cases the action will lie.—If any person (1) shall make an entry into any lands, tenements or other real property, except in cases where entry is given by law, or (2) shall make any such entry by force, or (3) if any person shall wilfully and without force hold over any lands, tenements or other real property after the termination of the time for which such lands, tenements or other real property were let to him, or to the person under whom he claims, after demand made in writing for the possession thereof by the person or persons entitled to such possession, such person shall be adjudged guilty of forcible entry and detainer, or of forcible detainer, as the case may be. [Act Aug. 17, 1876, p. 155, sec. 1.]

Persons entitled to sue.—The action must be brought by the tenant whose possession is disturbed, and not by his landlord. *Hays v. Porter*, 27 T. 92.

A claimant of land who has been turned out of possession by a writ issued in a suit to which he was not a party can maintain this action. *Laird v. Winters*, 27 T. 440, 86 Am. Dec. 620; *Wyatt v. Munroe*, 27 T. 268.

A third party claiming possession under a superior title cannot intervene. *Texas Land Co. v. Turman*, 53 T. 619.

One intending to purchase school land which he had caused to be surveyed, and who is not an actual settler thereon, cannot maintain an action of forcible entry and detainer. *Richardson v. Westmoreland*, 4 App. C. C. § 313, 19 S. W. 432.

An action can be maintained by one to whom the defendant in possession has attorned. *Grabfelder v. Gazetti* (Civ. App.) 26 S. W. 436; *Cadwallader v. Lovec*, 10 C. A. 1, 29 S. W. 666.

Under this article and Art. 3941, one who was in the actual possession of premises and was forcibly ejected therefrom, under an execution which did not include the premises taken, by another who entered and held possession, was entitled to maintain forcible entry and detainer to recover possession. *Granberry v. Storey* (Civ. App.) 127 S. W. 1122.

Persons against whom action may be brought.—This action cannot be maintained against one who entered upon land under a contract of purchase. *Cunningham v. Ammerman*, 3 App. C. C. § 352.

Existence of relation of landlord and tenant.—A lease by express contract by one tenant to his cotenant of his interest in the property creates the relation of landlord and tenant as between themselves. *McKie v. Anderson*, 78 T. 207, 14 S. W. 576; *Grabfelder v. Gazetti* (Civ. App.) 26 S. W. 436.

In order to constitute a forcible detainer under this article, the relationship of landlord and tenant must exist. *Francis v. Holmes*, 54 C. A. 608, 118 S. W. 881.

Action against owner for destruction of improvements.—One who unlawfully enters upon and improves a portion of a tract of land when the other portion is in actual possession by the true owner of the entire tract may maintain an action for damages against the true owner of the land for a forcible destruction of his improvements, his forcible ejection from the premises, and the removal of his personal effects therefrom. *Sinclair v. Stanley*, 69 T. 718, 7 S. W. 511.

Premises leased for immoral purposes.—An action for forcible detainer can be maintained when the premises are leased for immoral purposes. *Murat v. Micand* (Civ. App.) 25 S. W. 312.

Entry during absence of occupant.—An entry upon the premises during the casual absence of the occupant is within the statute. *Holmes v. Holloway*, 21 T. 658.

Prior possession of plaintiff.—One who has leased an inclosed pasture and has stock therein and is in control thereof, although he does not live on the premises, is in actual possession of same, and if another enters upon and takes possession, during the absence, and without consent of the lessee, he is guilty of forcible entry and detainer, within the meaning of the law. *Zuercher v. Startz*, 53 C. A. 442, 115 S. W. 1175.

Possession of defendant.—A tenant in possession may defend by showing that he purchased the landlord's title, or that he has attorned to another who has so purchased. *Texas Land Co. v. Turman*, 53 T. 619.

He cannot set up an adverse title acquired before his tenancy commenced. *Hoskins v. Bigham*, 1 App. C. C. § 1027.

Against a plaintiff suing for possession a purchaser under him on an executory contract for non-payment of purchase money (the purchaser being in possession when the contract was made), the fact that the purchase was induced by false and material representations of the plaintiff, presents a proper defense. In such a case the defendant may retain possession and defeat a recovery, except as to the interest of his vendor. *Hammers v. Hanrick*, 69 T. 412, 7 S. W. 345.

One cannot enter and forcibly take possession of land from another, even under a claim of title, without subjecting himself to an action for forcible entry and detainer. *McRae v. White* (Civ. App.) 42 S. W. 793.

Where a lessee has accepted rent from one unlawfully in possession and has treated him as a subtenant, the lessor cannot maintain a possessory action. *McSweeney v. Ellerman* (Civ. App.) 155 S. W. 270.

— **Under defective writ.**—A writ, under which land was taken, which did not include the land taken, was not color of authority so as to prevent the person ousted from recovering such land by forcible entry and detainer. *Granberry v. Storey* (Civ. App.) 127 S. W. 1122.

Where the execution, under which land was taken and the possessor ousted, and the judgment upon which it was issued, did not include the land taken, it was immaterial, upon his right to maintain forcible entry and detainer therefor, that the judgment creditor was entitled to a judgment foreclosing a lien upon the land taken, and that it was not included in the judgment by mistake; the remedy of forcible entry and detainer being to protect the possession so as to prevent violent entries, irrespective of the ultimate right of ownership or superiority of title. *Id.*

Demand.—A demand for possession on the day before bringing forcible entry and detainer held sufficient. *Beauchamp v. Runnels*, 35 C. A. 212, 79 S. W. 1105.

Jurisdiction of justice of the peace.—In this class of cases the justice's court acts as a court of general jurisdiction, and its judgment in a case where it has jurisdiction over the parties is not void, however erroneous it may be. *Clayton v. Hurt*, 32 S. W. 876, 88 T. 595.

The tenant's right to possession ceases as well upon the happening of some contingency stated in the contract of lease, as upon the expiration of the term and the landlord's right to re-enter begins. Not in the one case more than in the other is it necessary to resort to the district court to have determined the landlord's right to possession. The right to the possession is properly determined in the justice court in a forcible entry and detainer suit. *Walther v. Anderson*, 52 C. A. 360, 114 S. W. 414, 417, 418.

Trespass to try title in lieu.—One in whose favor the action may lie may bring an action of trespass to try title in lieu of this proceeding. *Thurber v. Conners*, 57 T. 96; *Andrews v. Parker*, 48 T. 94; *McDannell v. Cherry*, 64 T. 177.

Art. 3941. [2520] [2441] "Forcible entry" defined.—A "forcible entry" or an entry where entry is not given by law within the meaning of this chapter is:

1. An entry without the consent of the person having the actual possession.

2. As to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

Peaceable entry by one entitled to possession.—A forcible entry upon a peaceable possession is unlawful. But one lawfully entitled can make peaceable entry, even when another is in occupation, and such entry restores him to complete possession. *Heironimus v. Duncan*, 11 C. A. 610, 33 S. W. 287. See *Baker v. Cornelius*, 6 C. A. 27, 24 S. W. 949; *Sinclair v. Stanley*, 64 T. 67; *Id.*, 69 T. 718, 7 S. W. 511.

Art. 3942. [2521] [2442] Other cases of forcible detainer.—A person shall be adjudged guilty of forcible detainer also in the following cases:

1. Where a tenant at will or by sufferance refuses, after demand made in writing as aforesaid, to give possession to the landlord after the determination of his will.

2. Where the tenant of a person who has made a forcible entry refuses to give possession, after demand as aforesaid, to the person upon whose possession the forcible entry was made.

3. Where a person who has made a forcible entry upon the possession of one who acquired it by forcible entry refuses to give possession on demand, as aforesaid, to him upon whose possession the first forcible entry was made.

4. Where a person who has made a forcible entry upon the possession of a tenant for a term refuses to deliver possession to the landlord, upon demand as aforesaid, after the term expires; and, if the term expire whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant. It is not material whether the tenant shall have received possession from his landlord or have become his tenant after obtaining possession.

Parol evidence to show written demand.—That the demand was made in writing as required by statute can be shown by parol. *Steele v. Steele*, 2 App. C. C. § 347.

Estoppel to deny landlord's title.—See notes under Title 80.

Possession under contract of purchase.—Where possession is given under a contract of purchase, an action of forcible entry and detainer, or forcible detainer will not lie. *Francis v. Holmes*, 54 C. A. 608, 118 S. W. 881.

Art. 3943. [2522] [2443] Venue.—Any justice of the peace of the precinct where the property is situated shall have jurisdiction to hear and determine any case arising under this title. [Id. sec. 4.]

Art. 3944. [2523] [2444] Citation.—Whenever the party aggrieved, or his authorized agent, shall file his complaint in writing and under oath with such justice of the peace, it shall be his duty immediately to issue his citation to the sheriff or any constable of his county, commanding him to summon the person against whom complaint is made to appear before such justice, at a time and place named in such citation, such time being for not more than ten nor less than six days from the date of the citation. [Id. sec. 4.]

Art. 3944
Vernon-Sayles
1914
Amended
35 L. P. 363

Art. 3944
Vernon-Sayles
1914
Fourth C. S.
35 L. P. 176

Art. 3944a. Suit for rent may be joined; judgment, etc.—A suit for rent may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court, in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court. [Acts 1911, p. 27, sec. 1.]

Acts 1911, p. 27, sec. 1, enacts that Title 49 of Rev. Civ. St. of 1895 be amended so as to add to Art. 2523 another article, to be known as Art. 2523a.

Suit for rent in connection with one for forcible entry and detainer.—The only exception permitting a suit for rent in connection with one for forcible entry and detainer is that in favor of landlords as against their tenants, where the rents claimed are in such amount as to give the justice's court jurisdiction. *Hengy v. Hengy* (Civ. App.) 151 S. W. 1127.

Art. 3945. [2524] [2445] Requisites of the complaint.—The complaint named in the preceding article shall describe the lands, tenements or premises, the possession of which is claimed, with certainty sufficient to identify the same; and it shall also state the facts which entitle the complainant to the possession and authorize the action under the first three articles of this title. [Act Aug. 17, 1876, p. 155.]

Requisites and sufficiency of complaint.—The complaint should allege that the premises or a part thereof are situated in the precinct in which suit is brought and that the relation of landlord and tenant exists between the parties. *Yarborough v. Chamberlain*, 1 App. C. C. § 1122. The facts must be clearly stated in the complaint. *Cooper v. Marchbanks*, 22 T. 1.

The land must be described (*Ochoa v. Garza*, 1 App. C. C. § 939; *Steele v. Steele*, 2 App. C. C. § 346) so as to identify it (*Murat v. Micaud* [Civ. App.] 25 S. W. 312).

For a complaint held sufficient, see *Irvin v. Davenport*, 84 T. 512, 19 S. W. 692; *McHenry v. Curtis*, 3 App. C. C. § 269.

Complaint in forcible entry and detainer held insufficient, because it does not locate the land in the precinct where action is brought, does not sufficiently describe the land, does not state statutory grounds for bringing the action, and shows no ouster. *Lasater v. Fant* (Civ. App.) 43 S. W. 321.

A complaint in an action of forcible entry and detainer in justice court held not insufficient to give the court jurisdiction for failure of the jurat to show by whom it was verified. *Stacks v. Simmons* (Civ. App.) 58 S. W. 958.

Description of land in complaint for forcible entry and detainer held not incapable of supporting a judgment. *Evetts v. Johns* (Civ. App.) 76 S. W. 778.

Amendment.—A complaint in forcible entry and detainer may, as far as the description of the property is concerned, be amended like any other pleading. *Evetts v. Johns* (Civ. App.) 76 S. W. 778; *Granberry v. Storey*, 127 S. W. 1122.

Variance.—Where a complaint in a forcible detainer avers complainant's possession of the premises, and demise of them to defendant, and the evidence fails to show such possession and any demise for any term, complainant cannot recover. *Willis v. Roan* (Civ. App.) 58 S. W. 966.

Art. 3946. [2525] [2446] Service and return of citation.—The sheriff or constable receiving such citation shall execute the same by reading it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least five days before the return day thereof; and he shall return such citation, with his action written thereon, to the justice of the peace who issued the same, on the day assigned for trial. [Id.]

Art. 3947. [2526] [2447] Either party may demand a jury; precept for and service.—Either party to the suit shall have the right of trial by jury, by making demand for a jury to the justice of the peace on or before the day for which the case is set for trial, and paying the jury fee of three dollars; and, when a jury is demanded, the justice of the peace shall issue a precept to the sheriff or any constable of the county, commanding him to summon a jury of six men, qualified jurors of the county, to appear before him on the day set for trying the complaint, to serve as jurors, and shall be returned with the name of the jurors thereon to the said justice of the peace on the day assigned for trial. If no jury be demanded, the case shall be tried by the justice of the peace without a jury. [Acts 1876, p. 155. Acts 1897, p. 16.]

Art. 3948. [2527] [2448] Other jurors may be summoned, when.—If any of the jurors summoned as aforesaid shall fail or refuse to attend, or shall be excused after being challenged, a jury shall be completed by causing other qualified jurors to be summoned immediately. [Acts 1876, p. 155.]

Art. 3949. [2528] [2449] Shall be docketed and tried as other cases, etc.—The cause shall be docketed and tried as other cases; and the justice of the peace shall have authority to issue subpoenas for witnesses, to enforce their attendance, and to punish for contempts. [Id.]

Art. 3950. [2529] [2450] Right of possession the only issue.—On the trial of any case of forcible entry, or of forcible detainer, under the provisions of this title, the only issue shall be as to the right to actual possession; and the merits of the title shall not be inquired into.

See, also, note under Art. 3944a.

What issues may be determined.—The only question in issue is the right of possession without regard to the merits of the title. *Comley v. Stanfield*, 10 T. 546, 60 Am. Dec. 219; *Warren v. Kelly*, 17 T. 544; *Smith v. Ryan*, 20 T. 661; *Clark v. Snow*, 24 T. 242; *Boaz v. Graham*, 1 App. C. C. § 159; *Wilson v. Beauchamp*, 1 App. C. C. § 713; *Steele v. Steele*, 2 App. C. C. § 348.

This remedy is given when the premises are in the quiet occupancy of one, and are forcibly entered upon by another, or where a lessee, after the expiration of his lease, refuses to restore possession to his lessor. An inquiry as to the title is not permitted in such cases. *Railway Co. v. Cahill* (Civ. App.) 23 S. W. 232.

In forcible entry and detainer, the title to improvements erected by the lease cannot be determined. *Meyer v. O'Dell*, 18 C. A. 210, 44 S. W. 545.

An action of forcible entry and detainer in justice's court involves only the issue of prior possession; and hence a plea to the jurisdiction on the assumption that the case involves the issue of title should be overruled. *Renfro v. Harris*, 28 C. A. 58, 66 S. W. 460.

Where an owner and a would-be purchaser make an agreement of sale on certain conditions and possession is given by the owner, and the conditions fail, the relation of landlord and tenant is not established, so as to authorize a suit for forcible entry and detainer or forcible detainer. The issue is one of title and not of possession. *Francis v. Holmes*, 54 C. A. 608, 118 S. W. 881.

On a partnership accounting, an instruction that no rents of lands claimed to be partnership property could be awarded because certain judgments in forcible entry and detainer cases had established defendant's right thereto was erroneous, since under this article and Art. 3964 a judgment in forcible entry and detainer merely disposes of the right of possession and determines nothing concerning the rents. *Hengy v. Hengy* (Civ. App.) 151 S. W. 1127.

Art. 3951. [2530] [2451] Trial may be postponed for cause.—For good cause shown, supported by affidavit by either party, the trial may be postponed for a time not exceeding six days. [Id.]

Effect of improper postponement.—An improper postponement of a case of forcible detainer in justice's court for more than six days was a mere irregularity, which would

not affect the justice's jurisdiction so as to make the judgment subject to collateral attack in an action between the parties for breach of a rent contract. *Calhoun v. Kirkpatrick* (Civ. App.) 155 S. W. 686.

Art. 3952. [2531] [2452] Hearing and judgment without jury.—On the day named in the citation for trial, or on the day to which the case may be postponed according to the provisions of the preceding article, if no jury is demanded, the justice of the peace shall hear the evidence and render his judgment of guilty or not guilty of the charge as stated in the complaint. [Acts 1876, p. 155. Acts 1897, p. 16.]

Art. 3953. [2531] [2452] Jury case, impaneling; hearing; verdict.—If a jury is demanded by either party, the jury shall be impaneled and sworn as in other cases; and, after hearing the evidence, they shall return their verdict of guilty or not guilty of the charge as stated in the complaint. [Id.]

Evidence.—See notes under Art. 3687.

Direction of verdict.—Where, in an action of forcible entry and detainer of school land, it clearly appeared that plaintiff was in possession, that his possession was recognized by the land office, and that defendant entered unlawfully, it was not error to direct a verdict for plaintiff. *Renfro v. Harris*, 28 C. A. 53, 66 S. W. 460.

Art. 3954. [2532] [2453] Judgment of the court, and writ, etc.—If the justice of the peace, if no jury is demanded, or the jury, in case one is demanded, find the defendant guilty, the said justice of the peace shall give judgment thereon for the plaintiff to have restitution of the premises and for costs; and he shall award his writ of restitution and may issue execution for the costs, but, should the defendant be found not guilty, judgment shall be given in favor of the defendant and against the plaintiff for all costs, and execution may issue therefor. [Acts 1876, p. 155. Acts 1897, p. 16.]

Judgment.—A judgment for rent is unauthorized. *Wilson v. Beauchamp*, 1 App. C. C. § 713; *Clark v. Snow*, 24 T. 242; *Steele v. Steele*, 2 App. C. C. § 348. See *Boaz v. Graham*, 1 App. C. C. § 159.

A judgment for possession at some future time is void. *Maybin v. Fitzgerald* (Civ. App.) 45 S. W. 611.

The entry in the docket of a justice in an action of forcible entry and detainer held not to show a valid judgment. *Stacks v. Simmons* (Civ. App.) 58 S. W. 958.

Art. 3955. [2533] [2454] Writ of restitution not to issue for two days.—No writ of restitution shall issue until the expiration of two days from the rendition of the judgment. [Acts 1876, p. 155.]

Fixture can be removed.—Property affixed to the land of another under a license from the owner is personal property which can be removed within a reasonable time after notice. *Wright v. Macdonnell*, 30 S. W. 907, 88 T. 140.

Issuance of writ pending motion for new trial.—A writ of restitution, issued while a motion for new trial in forcible entry and detainer was pending, is not void. *Rosenfield v. Barnett*, 26 C. A. 71, 64 S. W. 944.

Art. 3956. [2534] [2455] May appeal, when and how.—Either party, his agent or attorney, may appeal from any final judgment rendered by the justice of the peace in such case, to the county court of the county in which the judgment is rendered, by giving notice thereof in open court and by filing with such justice of the peace, within five days after the rendition of said judgment, a bond with two or more good and sufficient sureties, to be approved by said justice of the peace, and payable to the adverse party, conditioned that he will prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him; and no motion for a new trial shall be necessary to authorize such appeal. [Id. p. 163, sec. 21.]

Appeal.—Judgment of restitution in an action of forcible entry and detainer, in favor of a defendant in an action of trespass to try title, admissible, though the action be still pending in the court of appeals. *Westmoreland v. Richardson*, 21 S. W. 167, 2 C. A. 175.

As to the right of appeal, see *Emerson v. Emerson* (Civ. App.) 35 S. W. 425.

Art. 3957. [2535] [2456] Form of appeal bond.—The appeal bond made in the preceding article may be substantially as follows:

“The State of Texas,

“County of _____.

“Whereas, Upon a writ of forcible entry (or forcible detainer) in favor of A B, and against C D, tried before _____, a justice of the peace

of ——— county, a judgment was rendered in favor of the said A B on the ——— day of ———, A. D. ———, and against the said C D, from which the said C D has appealed to the county court; now, therefore, the said C D and ———, his sureties, covenant that he will prosecute his said appeal with effect and pay all costs and damages which may be adjudged against him.

“Given under our hands this ——— day of ———, A. D. ———.”

Art. 3958. [2536] [2457] Duty of justice in case of appeal.—Whenever such appeal bond shall be executed and filed, the justice of the peace shall stay all further proceedings on the judgment, and he shall immediately make out a transcript of all the entries made on his docket of the proceedings had in the case before him; and he shall file the same, together with all the original papers, with the clerk of the county court of the county in which the trial was had, on or before the first day of the first term of said court, or, if there be insufficient time, on or before the first day of the next succeeding term thereof.

Art. 3959. [2537] [2458] Trial de novo.—The clerk of the county court shall docket the cause, and the same shall be tried de novo, with or without a jury, as in other cases.

Necessity for making objections in court below.—Defendant in forcible entry and detainer, who had appeared and answered to an amended complaint, held not entitled on appeal to object to the allowance of the amendment. *Evetts v. Johns* (Civ. App.) 76 S. W. 778.

An objection that the land sought to be recovered in forcible entry and detainer proceedings was insufficiently described in the complaint, cannot be first made on appeal. *Granberry v. Storey* (Civ. App.) 127 S. W. 1122.

Art. 3960. [2538] [2459] Damages may be proved, when.—On the trial of said cause in the county court the appellee shall be permitted to prove the damages for withholding the possession of the premises from the appellee during the pendency of the appeal, and for the reasonable expenses of the appellee in prosecuting or defending the cause in the county court; and, if the possession of the premises be not adjudged to the appellant, the said court shall render judgment also in favor of the appellee and against said appellant and the sureties on his bond for the damages proven and all costs.

Damages recoverable.—The amount recoverable in the county court is limited to the damages accruing during the pendency of the appeal, and the reasonable expenses incurred in the county court. *Steele v. Steele*, 2 App. C. C. 348.

The rental value of the premises for the wrongful withholding of the possession in an action of forcible entry and detainer and the fee of the attorney can be recovered under the above article. *McRae v. White* (Civ. App.) 42 S. W. 793.

Art. 3961. [2539] [2460] Judgment by default, when.—Should the defendant, by himself or his attorney, fail to enter an appearance upon the docket of the county court on appearance day, and before the case is called regularly for trial, the facts alleged in the complaint may be taken as admitted, and judgment by default may be entered accordingly. [Id.]

Default only in county court.—In forcible entry and detainer cases judgments by default are allowed only in the county court and they are tried at a regular term, and not summarily as in justice court. *Stacks v. Simmons*, 58 S. W. 960.

Art. 3962. [2540] [2461] Judgment of county court, final, etc., except, etc.—After a trial upon the merits, the proper judgment shall be rendered upon the law and the facts, or upon the verdict of the jury, as the case may be; and the judgment of the county court finally disposing of the cause shall be conclusive of the litigation, and no further appeal shall be allowed, except where the judgment shall be for damages in an amount exceeding one hundred dollars.

Constitutionality.—This law was declared to be unconstitutional in the case of *Supreme Lodge United Benevolent Association v. Johnson* (Civ. App.) 77 S. W. 661. The court held that section 16 was the only part unconstitutional, but that it was so interwoven and connected with the other provisions of the law as to render them inoperative without it; therefore the whole law was held to be inoperative.

When appeal will lie.—An appeal cannot be taken from the judgment of the county court, except when there has been a judgment for a sum exceeding \$100 on a trial upon

the merits. *Yarbrough v. Jenkins*, 3 App. C. C. § 464. See *Emerson v. Emerson* (Civ. App.) 35 S. W. 425.

Under this article an appeal will not lie from a county court judgment dismissing an appeal from a justice's judgment allowing no damages. *Lane v. Jack*, 25 C. A. 496, 61 S. W. 422; *Kerlin v. Bassett* (Civ. App.) 152 S. W. 526.

Assignment of error.—Where plaintiff was an actual settler on school land, an assignment of error that the court by overruling exceptions to defendant's plea to jurisdiction, decided "that a naked trespasser, who has fenced in free land, may invoke the remedy of forcible entry and detainer, and dispossess a bona fide settler," it without merit. *Renfro v. Harris*, 28 C. A. 58, 66 S. W. 460.

Conclusiveness of judgment.—In an action to recover realty claimed by adverse possession, a judgment in forcible detainer by a third party ejecting defendants from a part of the premises held admissible only to fix the time when the change in the location of the fence inclosing the premises was made. *Williams v. City of Galveston* (Civ. App.) 58 S. W. 551.

Where a complaint for damages for an eviction under a writ of restitution issued on a void judgment in forcible entry and detainer states that the justice of the peace and plaintiff knew that the judgment was void, a demurrer will be sustained on the ground that the defendants were acting under color of law. *Stacks v. Simmons* (Civ. App.) 58 S. W. 958.

Judgment in forcible entry and detainer held *res judicata* in a subsequent suit for damages for eviction under the judgment. *Rankin v. Hooks* (Civ. App.) 81 S. W. 1005.

In an action for damages for ousting plaintiff from premises under a judgment in unlawful detainer, claimed to be void because defendant therein was of a different name from the plaintiff, evidence held to show that plaintiff was the defendant in the unlawful detainer suit, and the judgment therein. *Anderson v. Zorn* (Civ. App.) 131 S. W. 835.

Art. 3963. [2541] [2462] Writ of restitution, etc., by whom issued and served.—The writ of restitution, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of restitution shall not be suspended or superseded in any case by any appeal taken from such final judgment in the county court.

Art. 3964. [2542] [2463] Shall not bar action for trespass, etc.—The proceedings under a forcible entry, or forcible detainer, shall not bar an action for trespass, damages, waste, rent or mesne profits.

Judgment as barring right to rent.—On a partnership accounting, an instruction that no rents of lands claimed to be partnership property could be awarded because certain judgments in forcible entry and detainer cases had established defendant's right thereto was erroneous, since under Art. 3950 and this article a judgment in forcible entry and detainer merely disposes of the right of possession and determines nothing concerning the rents. *Hengy v. Hengy* (Civ. App.) 151 S. W. 1127.

DECISIONS RELATING TO SUBJECT IN GENERAL

Damages from judgment or writ of restitution.—It is no defense to an action for an eviction under process issued on a void judgment rendered in forcible entry and detainer proceedings that the plaintiff was in wrongful possession of the property. *Stacks v. Simmons* (Civ. App.) 58 S. W. 958.

— **Liability of justice and plaintiff in general.**—Where a judgment of forcible entry and detainer is void, defendant is not bound to move to set it aside or appeal, but may maintain an action for damages against the justice who rendered the judgment and the plaintiff in the action for injuries received in attempting to enforce such judgment. *Stacks v. Simmons* (Civ. App.) 58 S. W. 958.

— **Liability for invalid writ or unauthorized service.**—A voidable writ of restitution held to justify the plaintiff in the writ and the officer executing the same. *Rosenfield v. Barnett*, 26 C. A. 71, 64 S. W. 944.

The plaintiff in forcible entry and detainer held not liable for the premature issuance of the writ of restitution and its service in an unauthorized manner. *Id.*

— **Crops.**—One claiming possession of land as tenant cannot recover of the alleged landlord for conversion of a crop planted after judgment for the landlord in an action of forcible entry and detainer. *Rankin v. Hooks* (Civ. App.) 81 S. W. 1005.

A tenant ejected from irrigated garden land in forcible detainer by the landlord for failure to pay rent cannot recover for the crops planted on the land when he was evicted. *Calhoun v. Kirkpatrick* (Civ. App.) 155 S. W. 686.

TITLE 62

FRAUDS AND FRAUDULENT CONVEYANCES

Art.	Art.
3965. Written memorandum required to maintain certain actions.	3970. Mortgage of chattels void, when.
3966. Conveyance to defraud creditors, etc., void.	3971. Merchandise, sales in bulk, void when, etc., unless, etc.
3967. Voluntary conveyances.	3972. Purchaser conforming to provisions, not accountable.
3968. Gift of goods, etc.	3973. Not applicable in what cases.
3969. Loan of chattels.	

Article 3965. [2543] [2464] Written memorandum required to maintain certain actions.—No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized:

1. To charge any executor or administrator upon any promise to answer any debt or damages due from his testator or intestate, out of his own estate; or,
2. To charge any person upon a promise to answer for the debt, default or miscarriage of another; or,
3. To charge any person upon any agreement made upon consideration of marriage; or
4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,
5. Upon any agreement which is not to be performed within the space of one year from the making thereof. [Act Jan. 18, 1840. P. D. 3875.]

See *Lancaster v. Richardson*, 13 C. A. 682, 35 S. W. 749; *Milan v. Rio Grande & E. P. Ry. Co.* (Civ. App.) 37 S. W. 165.

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| 1. Promises to answer for the debt, default or miscarriage of another in general. | 29. ——— Payment. |
| 2. Nature of debt or default. | 30. ——— Improvements. |
| 3. Promise to debtor to discharge debt. | 31. ——— Possession and payment. |
| 4. Promise to indemnify. | 32. ——— Possession and improvements. |
| 5. Original or collateral promise in general. | 33. ——— Payment and improvements. |
| 6. Acceptance of bill of exchange. | 34. Contracts implied by law on part performance. |
| 7. Guaranty. | 35. Contracts completely performed. |
| 8. New consideration beneficial to promisor. | 36. Discharge of contracts without performance. |
| 9. Promise to pay from property of debtor. | 37. Modification of contract. |
| 10. Discharge of original debtor. | 38. Equitable relief. |
| 11. Agreements not to be performed within one year—In general. | 39. Persons to whom statute is available. |
| 12. ——— Possibility of performance. | 40. Writing subsequent to oral agreement. |
| 13. ——— Commencement of period. | 41. Waiver of bar of statute. |
| 14. ——— Sufficiency of performance possible within one year. | 42. Trusts. |
| 15. Creation of estates or interests in general. | 43. Requisites and sufficiency of writing. |
| 16. Creation of leases. | 44. ——— Description of parties. |
| 17. Assignment, grant or surrender of existing estates, interests or terms. | 45. ——— Description of land. |
| 18. ——— Exchange. | 46. ——— Statement of price. |
| 19. ——— Establishment of boundary. | 47. ——— Signature. |
| 20. ——— Partition. | 48. Contents of memorandum in general. |
| 21. Contracts for sale of interests in land. | 49. Time of making memorandum. |
| 22. ——— Nature of property. | 50. Statement of consideration. |
| 23. ——— Judicial sales. | 51. Signature of memorandum. |
| 24. Law prior to enactment. | 52. Separate writings. |
| 25. Sale of lumber. | 53. Parol acceptance of written offer. |
| 26. Liability of agent. | 54. Promises by executors and administrators. |
| 27. Part performance—In general. | 55. Contracts as ground of defense. |
| 28. ——— Possession. | 56. Pleading. |
| | 57. ——— As ground of defense. |
| | 58. Demurrer raising defense. |
| | 59. Objections to evidence of oral contract. |
| | 60. Evidence. |
| | 61. Instructions. |

1. Promises to answer for the debt, default or miscarriage of another in general.—An agreement by one to pay for certain work if another does not is within the statute of frauds. *Loftus v. Ivy*, 14 C. A. 701, 37 S. W. 766.

One verbally submitting another's debt to arbitration held not liable to pay the award not having promised to do so in writing. *Bryant v. Ellis' Adm'r*, 20 C. A. 298, 49 S. W. 234.

The verbal promise of the president of defendant railway company to pay a debt of a construction company held unenforceable under the statute of frauds. *Texas Southern Ry. Co. v. Pyle* (Civ. App.) 83 S. W. 234.

An oral agreement by one to see that another is paid by a third person for services rendered to the third person is within this article. *E. J. Chauvin & Co. v. McKnight* (Civ. App.) 132 S. W. 383.

An oral promise by defendant to pay a debt of his brother to plaintiff, upon purchasing the brother's business, was prima facie within the statute of frauds. *Estes v. Bryant-Fort-Daniel Co.* (Civ. App.) 140 S. W. 1177.

The agreement of defendant bank to collect and pay over to plaintiffs what F. owed them, as evidenced by his written order, indorsed by them to it, is not an undertaking to answer for the debt or default of another, within the statute of frauds. *American Nat. Bank v. Petry* (Civ. App.) 141 S. W. 1040.

Where the owner of a building under construction procures his superintendent of construction to take out employer's liability insurance in his own name, but for the owner's account, his parol agreement to pay the premiums thereon is not within the statute of frauds as a promise to pay the debt of another. *Ripley v. Ocean, etc., Corp.* (Civ. App.) 146 S. W. 974.

Defendant, acting for himself and his partner, sold cattle to a third person, who delivered in partial payment a check for \$650, which was not paid. The third person at the same time bought cattle from plaintiff's intestate for \$7,200, and contracted to buy other cattle, and agreed to pay \$1,000 as earnest money. The third person drew his check on a bank, payable to the intestate, for \$8,850, which included the amount of the \$650 unpaid check. The bank paid the check, but on discovering that \$1,650 did not represent the price of cattle bought by the third person, as represented, it sued the intestate therefor. The third person failed to pay the price of the cattle, and defendant and his partner kept the cattle. Defendant had no interest in the dealings between the third person and the intestate, and had no knowledge for several years that the \$650 check had not been paid. Held, that a parol promise by defendant to pay his pro rata of any recovery by the bank in its action against the intestate was not enforceable, within this article, as a promise to hold defendant on any part of the intestate's individual indebtedness. *Penick v. Castles* (Civ. App.) 144 S. W. 297.

An owner's parol agreement to pay for lumber previously contracted for by a contractor, to be used in rebuilding the owner's house, was void under the statute of frauds. *Marks v. Jones* (Civ. App.) 154 S. W. 618.

2. Nature of debt or default.—It must be the same debt for which the original debtor is liable, and not a different undertaking. The promise required to be in writing must be a collateral and not an original or independent one. *Wattenbarger v. Hodges*, 38 C. A. 329, 85 S. W. 1014.

An oral promise to pay a note held within the statute of frauds. *Pye v. Commercial Nat. Bank* (Civ. App.) 97 S. W. 127.

3. Promise to debtor to discharge debt.—An agreement between a debtor and a third person, upon a valuable consideration, that the latter will pay a debt, gives the creditor a cause of action on which he may sue. *McCown v. Schrimpf*, 21 T. 27, 73 Am. Dec. 221; *Spann v. Cochran*, 63 T. 242; *Heath v. Coreth*, 11 C. A. 91, 32 S. W. 56.

An assumption of a vendor's lien on purchase of land held not within the statute of frauds. *Pickett v. Jackson* (Civ. App.) 42 S. W. 568.

A verbal promise of a vendor who assumed mortgage as part of purchase price held not within the statute. *Beitel v. Dobbin* (Civ. App.) 44 S. W. 299.

The verbal promise to debtor to pay his debts in consideration of a bill of sale of property, which recites that the promisors will pay the promisee's debts, is binding as to a creditor not privy thereto. *Gay v. Pemberton* (Civ. App.) 44 S. W. 400.

The promise of a purchaser of land to pay a debt of the vendor as part payment of the purchase price is not within the statute of frauds. *Hill v. Hoeldtke*, 104 T. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672.

4. Promise to indemnify.—A verbal promise to indemnify an officer for an act done at the request of the promisor is not within the statute. *Heidenheimer v. Johnston*, 1 App. C. C. § 646.

The verbal promise to hold one harmless if the promisee would become surety on the appeal bond of a third party is not within the statute of frauds, and may be enforced against the promisor when the surety is compelled to pay the bond. *Campbell v. Pucket*, 1 U. C. 465.

Contract of surety with co-sureties to assume debt in case of failure of the principal to pay it held not void under statute of frauds. *Hall v. Taylor* (Civ. App.) 95 S. W. 755.

A principal's promise to reimburse his surety for paying the principal's debt is not within the statute. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

A parol promise of indemnity, supported by a sufficient consideration, is not within the statute of frauds. *Ferrell v. Millican* (Civ. App.) 156 S. W. 230.

5. Original or collateral promise in general.—One whose signature to an obligation as surety has been obtained upon a condition not performed is not bound by a subsequent verbal promise to pay. *Loving v. Dixon*, 56 T. 75.

A contract made by one for the benefit of another is not, on that ground alone, within the statute. *Price v. McCoy*, 1 App. C. C. § 182.

If a promisor is the mere surety of another, a verbal promise to pay is within the statute. *Clendenning v. Mathews*, 1 App. C. C. § 908. Verbal extension of time for payment of a note. *Austin R. E. & A. Co. v. Bohn* (Civ. App.) 27 S. W. 1047.

In general, where the liability of a guarantor is collateral and not absolute, and is dependent upon the default of another, notice of such default must be given within

reasonable time; but when the guaranty absolutely and unconditionally provides that the principal shall pay a given sum at a stated time, no notice of default is necessary before suing the guarantor. *Johnson v. Nasworthy*, 4 App. C. C. § 108, 16 S. W. 758.

A promise "to see paid" a claim for services rendered another ordinarily implies security. *Rentfrow v. Lancaster*, 10 C. A. 321, 31 S. W. 229.

A verbal contract by a carrier to answer for the default or miscarriage of others is not within the statute of frauds, connecting lines being deemed the agents of contracting lines. *Thompson v. Railway Co.*, 11 C. A. 145, 32 S. W. 427.

When the undertaking is to pay another's debt, the burden is on the party who seeks to prove that the undertaking is an original and independent contract so as to escape the statute. *Henry v. Kizer Lumber Co.* (Civ. App.) 33 S. W. 278. The evidence to show an existing contract relation between the plaintiff and a third party, and to prove that a promise by the defendant to pay the debt of such party is a new and original undertaking, and not a contract of suretyship, must be clear and satisfactory. *Ridgell v. Reeves*, 2 App. C. C. § 436.

A creditor held not estopped, by an account showing one to be a surety, from showing that he agreed to become primarily liable. *Nixon v. Jacobs*, 22 C. A. 97, 53 S. W. 595.

A promise by a bank to pay for goods to be sold on its credit to a depositor is not within the statute of frauds, and hence need not be in writing. *First Nat. Bank v. Greenville Oil & Cotton Co.*, 24 C. A. 645, 60 S. W. 828.

An owner's oral promise to see that a materialman was paid held within the statute of frauds. *Nichols v. Dixon* (Civ. App.) 85 S. W. 1051.

Under the provision of the statute of frauds that no one shall be held to pay the debt or perform the obligation of another, unless the undertaking so to do be in writing, where one purchases the subject of a written contract and undertakes its performance, the undertaking, though oral, is binding. *City of Tyler v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 87 S. W. 238.

A contract by the operators of a sawmill for services of a physician to be rendered to its mill hands held an original obligation, and not a contract to answer for the debts of the mill hands, within the statute of frauds. *Lennard v. Texarkana Lumber Co.*, 46 C. A. 402, 94 S. W. 383.

In an action to recover the price of lumber, evidence that a contract executed by another was the contract of defendant held not objectionable as obnoxious to the statute of frauds in relation to agreements to answer for the debt of another. *Southern Pine & Cypress Co. v. Bruce Lumber Co.*, 43 C. A. 150, 95 S. W. 28.

A liability asserted against defendant held on an original promise, and not on a promise to pay another's debt, within the statute of frauds. *American Brewing Ass'n v. Gossett* (Civ. App.) 107 S. W. 357.

To take an oral promise to pay another's debt out of the statute of frauds (Art. 3965), it must be original; a promise to "secure the payments" for merchandise sold another being insufficient. *Porter v. Norman* (Civ. App.) 136 S. W. 1173.

A principal's promise to reimburse his surety for paying the principal's debt is not within the statute of frauds. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

An agreement by defendant to pay the premiums on an insurance policy issued in the name of another held not within the statute of frauds, as a promise to pay another's debt, where the policy was taken out at defendant's request, and was in fact for his benefit. *Ripley v. Ocean Accident & Guarantee Corporation* (Civ. App.) 146 S. W. 974.

A partner's promise to pay a debt of the firm made in the course of a settlement was an original promise not within the statute of frauds. *Brown v. Brown* (Civ. App.) 155 S. W. 551.

6. Acceptance of bill of exchange.—A verbal acceptance of a bill of exchange is not within the statute. *Lemmon v. Box*, 20 T. 329; *Walters v. G., H. & S. A. Ry. Co.*, 1 App. C. C. § 753; *Neuman v. Schroeder*, 71 T. 81, 8 S. W. 632.

7. Guaranty.—A verbal guaranty made at the request of a firm to certain of its creditors to pay certain subsisting demands against the firm, followed by payment, made after and with notice of the dissolution of the partnership, constitutes a good cause of action against such firm. *Lee v. Stowe*, 57 T. 444.

Where, in pursuance of a verbal guaranty, the guarantor has discharged the debt of another, he can recover from the debtor the amount paid for his use. *Id.*

Where a contract of guaranty is delivered to the creditor's agent, notice of acceptance by the principal is not necessary. *Lemp v. Armengol*, 86 T. 690, 26 S. W. 941.

8. New consideration beneficial to promisor.—If the consideration of the promise is the discharge of an existing debt, and the debt is discharged in consequence of the promise, it is an original contract which need not be in writing. *Bason v. Hughart*, 2 T. 476; *Smith v. Montgomery*, 3 T. 204; *Warren v. Smith*, 24 T. 484, 76 Am. Dec. 115; *Hill v. Frost*, 59 T. 25.

A promise to pay the debt of another, based upon an original and independent consideration, creates a direct obligation from the promisor to the promisee, which the latter may enforce. *Lemmon v. Box*, 20 T. 329; *Muller v. Riviere*, 59 T. 642, 46 Am. Rep. 291; *Spann v. Cochran*, 63 T. 240; *Morris v. Gaines*, 82 T. 257, 17 S. W. 538; *Cohen v. Simpson* (Civ. App.) 32 S. W. 59; *Bartley v. Rhodes* (Civ. App.) 33 S. W. 604.

The terms of a contract by which one party agrees to pay over to another party a sum of money for a third party, the first party being indebted to the second and the second to the third, does not come within the statute of frauds. *McCown v. Schrimpf*, 21 T. 27, 73 Am. Dec. 221; *Hill v. Frost*, 59 T. 25; *Spann v. Cochran*, 63 T. 240; *Blankenship v. Tillman*, 4 App. C. C. § 296, 18 S. W. 646; *Bartley v. Rhodes* (Civ. App.) 33 S. W. 604.

When one for a sufficient consideration undertakes to pay the debt due to another by a third party, the agreement is not within the statute of frauds. *Thomas v. Hammond*, 47 T. 42; *Monroe v. Buchanan*, 27 T. 241; *Rollinson v. Hope*, 18 T. 446; *G., H. & S. A. Ry. Co. v. Ehrenworth*, 1 App. C. C. § 786; *Spann v. Cochran*, 63 T. 240; *McCown v. Schrimpf*, 21 T. 27, 73 Am. Dec. 221; *Cannon v. McDaniel*, 46 T. 303; *Hicks v.*

Morris, 57 T. 658; *Wahrmund v. Merritt*, 60 T. 24; *Eyler v. Eyler*, 60 T. 315; *Ridgell v. Reeves*, 2 App. C. C. § 436; *Railway Co. v. Turner*, 2 App. C. C. § 815.

A., in consideration of the promise of B. not to foreclose a deed of trust held upon a stock of goods executed by her deceased husband, and of his promise to continue to furnish her goods, to be covered, as in the case of her husband, by a deed of trust, promised verbally to pay B. for the amount due from her husband out of the proceeds of an insurance policy on his life. Held, that A.'s promise was not within the statute of frauds, as the consideration in part grew out of a new transaction and rested upon fresh and substantial personal benefit to herself. *Muller v. Riviere*, 59 T. 640, 46 Am. Rep. 291.

A promise to pay his own debt by the discharge of a debt of another is not within the statute. *Spann v. Cochran*, 63 T. 240.

Promise to answer for another's debt held to be for promisor's benefit, and not within statute. *Lyon v. Lindsay* (Civ. App.) 39 S. W. 1101.

An action cannot be maintained on an oral promise to pay the debt of another, where the promise is collateral to the debt and does not discharge it. *Starr v. Taylor* (Civ. App.) 56 S. W. 543.

In an action to enjoin the removal of defendant's railroad offices and shops from plaintiff city, defendant held bound by oral adoption of contract to perpetually maintain the same in the city. *City of Tyler v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 87 S. W. 238.

A parol promise to pay the note of another resting upon a valuable consideration is not within the statute of frauds, where its main purpose was to subserve the interest of the promisor. *Blakeney v. Nalle & Co.*, 45 C. A. 635, 101 S. W. 875.

Undertaking by banking firm to pay debts of a bank, based upon a sufficient consideration, held not within the statute of frauds. *Hoskins v. Velasco Nat. Bank*, 48 C. A. 246, 107 S. W. 598.

An obligation to pay for goods sold and delivered to another held enforceable, notwithstanding the statute of frauds. *Old River Lumber Co. v. Skeeters* (Civ. App.) 140 S. W. 511.

An agreement to pay another's debt must be supported by a consideration moving to the promisor from the creditor. *Estes v. Bryant-Fort-Daniel Co.* (Civ. App.) 140 S. W. 1177.

Plaintiff who had furnished materials for a building to the contractor, was given an order by the architect, approved by the contractor, on the owner, who refused to pay on the ground that defendant, another materialman, had notified him not to pay anything further to the contractor except for labor bills. Plaintiff's representative then called on defendant and told its managing member that unless plaintiff's claim was paid it would bring suit, but if defendant would see that the claim was paid it would do nothing. Defendant's managing member told him that it would see that plaintiff's claim was paid, and, relying on this promise, plaintiff did nothing further. Held, that the promise, although oral, was based on sufficient consideration, and hence not void under the statute of frauds. *R. B. Spencer & Co. v. Nalle & Co.* (Civ. App.) 143 S. W. 991.

The statute of frauds is no defense to an action on a note assumed as part of the purchase price of property. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 145 S. W. 722.

9. Promise to pay from property of debtor.—Where one having the funds of another in his hands verbally promises to pay the debt of such person, he is bound thereby. *Woods v. Davis*, 1 App. C. C. § 952.

A landlord's assent to his tenant's agreement to ship plaintiff 400 sacks of rice, as part of an agreement by which plaintiff loaned \$200 to the tenant, held not a contract to answer for the tenant's default, within the statute of frauds. *Grosbeck v. T. H. Thompson Milling Co.* (Civ. App.) 86 S. W. 346.

An agreement to collect and pay over held not one to answer for the debt or default of another within the statute of frauds. *American Nat. Bank v. Petry* (Civ. App.) 141 S. W. 1040.

10. Discharge of original debtor.—The discharge of a debtor will support the promise of another to pay the debt. *First Nat. Bank v. Border*, 29 S. W. 659, 9 C. A. 670.

11. Agreements not to be performed within one year—in general.—It is only where the lease or contract alleged shows by its terms that it is for a longer term than one year, or that the performance thereof was not to be within a year, that the defect would exist which would bring the action within the statute of frauds. *Robb v. Railway Co.*, 82 T. 392, 18 S. W. 707.

A verbal agreement by a railway company to issue a free pass to a creditor and stop trains at his house, in part satisfaction of a judgment, is not within the statute. *Railway Co. v. Wood* (Civ. App.) 29 S. W. 411.

An agreement for the extension of the time for the payment of a note for a longer term than one year is within the statute of frauds. *Kearby v. Hopkins*, 14 C. A. 166, 36 S. W. 506.

A contract of employment to commence at a future date and run for twelve months is within the statute. *Moody v. Jones* (Civ. App.) 37 S. W. 378.

An oral promise to extend a note for one year, and that thereafter the note shall not become due until a year after the payee has notified the maker to pay is void. *Tunstall v. Clifton* (Civ. App.) 49 S. W. 244.

Where, in an action for breach of contract of marriage, there was no evidence that the time of performance was fixed at a period longer than a year, the statute of frauds is not applicable. *Clark v. Reese*, 26 C. A. 619, 64 S. W. 783.

An oral contract to lease premises for a term of five years is within the statute of frauds. *Pinto v. Rintleman*, 42 C. A. 344, 92 S. W. 1003.

A contract for physician's services held not within the statute of frauds as a contract not performable within a year. *Lennard v. Texarkana Lumber Co.*, 46 C. A. 402, 94 S. W. 383.

Where an original contract of employment was void under the statute of frauds, a new contract subsequently executed, which obviated such defect, did not constitute a novation. *San Antonio Light Pub. Co. v. Moore*, 46 C. A. 259, 101 S. W. 867.

In an action for breach of a contract of employment, evidence held to exclude the operation of a custom of hiring employes, relied on to take the case out of the statute of frauds. *Stovall v. Gardner* (Civ. App.) 103 S. W. 405.

A contract to bore a well held not within the statute of frauds. *Hall v. Cook* (Civ. App.) 117 S. W. 449.

An oral lease of premises for less than one year is valid. *Dickinson Creamery Co. v. Lyle* (Civ. App.) 130 S. W. 904.

A subsequent contract changing any of the terms of a written lease of realty for more than one year, required by the statute of frauds to be in writing, must also be in writing. *Beard v. A. A. Gooch & Son* (Civ. App.) 130 S. W. 1022.

Contracts for the extension of notes for one year are not within the statute of frauds because not in writing. *Matthews v. Towell* (Civ. App.) 138 S. W. 169.

An agreement by a broker to join in a guaranty to a prospective purchaser held within the statute of frauds. *Griffith v. Bradford* (Civ. App.) 138 S. W. 1072.

Where a broker, to effect a sale, verbally agreed with the purchaser to join the vendor in a guaranty that the property would bring a certain rental for 15 months, such agreement would not bind the broker until reduced to writing and signed, under this article. *Id.*

An oral employment contract held invalid under the statute of frauds, so far as related to defendant's services for the months a cotton gin was not in operation during the season of 1908-09. *Guitar v. McGee* (Civ. App.) 139 S. W. 622.

A parol contract binding one to care for and breed the stock of the owner for three years for a part of the increase is void within the statute of frauds, and, where the owner takes possession within a few months after the making of the contract, he cannot rely on the contract to prevent the other party from recovering the reasonable value of the pasturage furnished. *Crenshaw v. Bishop* (Civ. App.) 143 S. W. 284.

Strictly speaking, a lease is a term for years; and if it exists for a longer period than one year it must, under the statute, be in writing. *Ellis v. Bingham* (Civ. App.) 150 S. W. 602.

12. — Possibility of performance.—An agreement that may or may not be performed within a year, as circumstances control, is not within the statute. *Thouvenin v. Lea*, 26 T. 612; *Thomas v. Hammond*, 47 T. 42; *Jones v. Green* (Civ. App.) 31 S. W. 1087.

A parol contract was for a lease of land for one year, with the privilege reserved by the lessee of continuing the lease five years should he so desire. Held, that the contract was not within the statute of frauds, as it might or might not be performed within the year. *Murphy v. Service*, 2 App. C. C. § 747.

An agreement which may be terminated within the year by the death of a party thereto is not within the statute. *Weatherford Ry. Co. v. Wood*, 30 S. W. 859, 88 T. 191, 28 L. R. A. 526.

A verbal agreement not to engage in a particular business for two years may possibly be performed within one year, and hence is not within the statute. *Erwin v. Hayden* (Civ. App.) 43 S. W. 610.

A contract held capable of performance within one year, and hence not within the statute. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

An agreement to look after land and pay taxes on it for the use of it is not within the statute of frauds. *New York & Texas Land Co. v. Dooley*, 33 C. A. 636, 77 S. W. 1030.

Where a mortgagor of land died pending a suit to set aside the mortgage for duress, and his son, who had purchased the land, intervened, certain evidence as to agreement between the father and son held not objectionable, as showing a contract to be performed between them in the future. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1105.

Oral agreement, modifying vendor's lien notes, so as to authorize payment "at any time," was not within the statute of frauds. *Booher v. Anderson* (Civ. App.) 86 S. W. 956.

A contract to form a partnership within a year for the handling and sale of cattle within five years held not within the statute of frauds. *Shropshire v. Adams*, 40 C. A. 339, 89 S. W. 448.

Where a verbal contract is capable of being performed, and is performed by one of the parties thereto, within one year from the date of the making of the contract, it is not within the statute of frauds and the other party is bound by the contract. *City of Tyler v. St. L. S. W. Ry. Co.*, 99 T. 491, 91 S. W. 4.

A new arrangement for the employment of plaintiff for the remainder of a term specified in a contract which was within the statute of frauds held an original contract of employment not within the statute. *San Antonio Light Pub. Co. v. Moore*, 46 C. A. 259, 101 S. W. 867.

An oral contract of employment made November 20, 1905, covering a period from January 1, 1906, to December 31st of that year, was within the statute of frauds. *Id.*

An employment contract held not obnoxious to the statute of frauds requiring contracts not to be performed within a year to be in writing. *Texarkana Lumber Co. v. Lennard* (Civ. App.) 104 S. W. 506.

An oral agreement for the payment of rents as a portion of the consideration for the conveyance of land held impossible of performance within a year, and hence not within the statute of frauds. *Tipton v. Tipton*, 55 C. A. 192, 118 S. W. 842.

A contract between a city and a railroad, whereby the railroad, in consideration of a right of way through streets, agrees to locate and keep its general offices and shops in the city capable of being executed and actually executed by one party within a year from its making, is not within the statute of frauds. *Kansas City, M. & O. R. Co. v. City of Sweetwater* (Civ. App.) 131 S. W. 251.

A promise to marry plaintiff as soon as defendant could have a suitable home erected and wind up his business held not within the statute of frauds as one not to be performed within a year. *Huggins v. Carey* (Civ. App.) 149 S. W. 390.

In an action against a surety on a note, an allegation that plaintiff agreed for a consideration to extend the time of payment for one year, and that the principal debtor

might pay the note by work for plaintiff, and that he had done work of greater value than the amount due on the note, was not objectionable on the ground that the oral contract that the note might be paid in work was within the statute of frauds as a contract for services not to be performed within a year; the services having been alleged to have been actually performed and it not appearing that they could not have been performed within a year. *Lee v. Durham* (Civ. App.) 156 S. W. 1135.

13. — **Commencement of period.**—The time between the making of a lease and the commencement of it in possession is no part of the term; and the parol lease for one year may be made to commence in futuro. *Styles v. Rector*, 1 App. C. C. § 957; *Randall v. Thompson*, 1 App. C. C. § 1100; *Bateman v. Maddox*, 36 T. 546, 26 S. W. 51. Tenant holding over: *City of San Antonio v. French*, 80 T. 575, 16 S. W. 440, 26 Am. St. Rep. 763.

14. — **Sufficiency of performance possible within one year.**—Where one side of a contract is to be performed within the year, and is so performed, the contract is not within the statute, although the other side may be in its nature incapable of performance within a year. *Miller v. Roberts*, 18 T. 16, 67 Am. Dec. 688.

15. **Creation of estates or interests in general.**—In our statute the words "or an interest in, or concerning real estate," which appear in the English statute, are omitted. As a consequence, many verbal agreements concerning real estate, or creating an interest or trust in real estate, can be here enforced which would come within the terms of the English statute. *Anderson v. Powers*, 59 T. 213, citing *James v. Fulcrod*, 5 T. 516, 55 Am. Dec. 743; *Evans v. Hardeman*, 15 T. 480; *Stuart v. Baker*, 17 T. 417; *Miller v. Roberts*, 18 T. 16, 67 Am. Dec. 688; *Bullion v. Campbell*, 27 T. 653; *Smock v. Tandy*, 28 T. 132; *Gibbons v. Bell*, 45 T. 418.

A contract that the expenses incurred by parties as coplaintiffs in a suit to recover certain lands were to be refunded when the suit was decreed, and the lands recovered in it partitioned among the plaintiffs, is not within the statute. *Gonzales v. Chartier*, 63 T. 36.

Parol agreement between an upper and lower dam owner, where latter was built first, that, if diversion of water by upper dam should injuriously affect lower dam, water should be restored, does not inure to benefit of one who purchased lower dam without notice thereof. *Cape v. Thompson*, 21 C. A. 681, 53 S. W. 368.

Parol evidence is admissible to show privity of possession between several parties for different periods, which, added together, complete the time necessary to establish title by adverse possession. *Johnson v. Simpson*, 22 C. A. 290, 54 S. W. 308.

The civil law in force in Texas prior to 1840 recognized the validity of verbal sales of land. *Carlisle v. Gibbs*, 44 C. A. 139, 98 S. W. 192.

A contract to deliver to one a certain amount of the proceeds of the sale of land is not one for sale of land within the statute of frauds. *Parriss v. Jewell*, 57 C. A. 199, 122 S. W. 399.

A verbal agreement between a vendor and persons signing a note as sureties for the purchaser on his receiving a loan to apply on the purchase price, that the sureties should have a vendor's lien on the premises, is void under the statute of frauds. *Singleton v. Goeman* (Civ. App.) 123 S. W. 436.

An alleged contract held not to be in contravention of the statute. *Hammons v. Clwer* (Civ. App.) 127 S. W. 889.

An agreement to acquire land for another is not within the statute. *Low v. Gray* (Civ. App.) 130 S. W. 270.

16. **Creation of leases.**—A parol extension of a written lease is not within the statute of frauds. *Dockery v. Thorne* (Civ. App.) 135 S. W. 593.

Under Statute of Frauds, subd. 4, a perpetual tenancy, whereby the lessee was to have possession of the land as long as he paid the yearly rental, is void unless created by an instrument in writing. *Hill v. Hunter* (Civ. App.) 157 S. W. 247.

17. **Assignment, grant or surrender of existing estates, interests or terms.**—A verbal promise of a father to give his children certain land in lieu of land of theirs which he had sold held void under the statute. *Arnold v. Ellis*, 20 C. A. 262, 48 S. W. 883.

A transfer of title to land cannot be shown by parol. *Thompson v. Dutton* (Civ. App.) 69 S. W. 641.

In an action on a note given for the conveyance of a leasehold estate, the fact that the conveyance was not evidenced by writing, and that no possession was taken, was no defense. *Wilkinson v. Sweet* (Civ. App.) 93 S. W. 702.

The gift or relinquishment of a life estate is a gift of lands within the statute of frauds. The plea sufficiently set up the statute of frauds, though it characterized the estate of the life tenant as an estate which might be for more than a year. *Wallis v. Turner* (Civ. App.) 95 S. W. 62.

An agreement for the release of a vendor's lien held enforceable in equity even though it could be considered as within the statute of frauds. *McKinley v. Wilson* (Civ. App.) 96 S. W. 112.

A certificate of land issued by the state may be transferred by parol at any time before the land is surveyed and located. *Carlisle v. Gibbs*, 44 C. A. 139, 98 S. W. 192.

Under statute of frauds, held decedent could not divest himself of title to land by a verbal agreement. *Jante v. Culbreth* (Civ. App.) 101 S. W. 279.

A person claiming real estate under a parol sale or gift, can obtain no assistance from the law, because it declares such sale or gift invalid, and in order to enforce such parol agreement he must prove possession and the making of valuable improvements of a permanent character, or other facts showing that the transaction is a fraud upon the purchaser or donee if not enforced. *Altgelt v. Escalera*, 51 C. A. 103, 110 S. W. 990.

A verbal release of a vendor's lien retained in the deed is valid if supported by a sufficient consideration. *Atteberry v. Burnett* (Civ. App.) 130 S. W. 1028.

Where complainants alleged that they were induced to execute an absolute deed to certain property by defendant's promise to execute a contract to reconvey the land to them on the termination of defendant's use, which promise defendant had refused to perform and did not intend to perform, such fraud was not available to complainants as a means of procuring the legal title to the land after the contract had been fully executed

and the relations of the parties had ceased, as distinguished from a rescission, since to grant such relief would be to enforce a parol contract for the conveyance of land, in violation of the statute of frauds. *May v. Cearly* (Civ. App.) 138 S. W. 165.

A parol agreement to release claims in community property held not enforceable. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

18. — **Exchange.**—Where a daughter appropriated land owned jointly with her father, and acquiesced in his appropriation of a tract belonging to her separately, there was a void verbal exchange. *Laufer v. Powell*, 30 C. A. 604, 71 S. W. 549.

19. — **Establishment of boundary.**—A parol contract by adjoining proprietors of land as to the division line is not within the statute. *Houston v. Sneed*, 15 T. 307. Nor is a parol agreement for the partition of land. *Stuart v. Baker*, 17 T. 417; *Smock v. Tandy*, 28 T. 130; *Glasscock v. Hughes*, 55 T. 461; *Gonzales v. Chartier*, 63 T. 36. See *Evans v. Martin*, 25 S. W. 688, 6 C. A. 331; *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612; *Wardlow v. Miller*, 69 T. 395, 6 S. W. 292; *Aycock v. Kimbrough*, 71 T. 333, 12 S. W. 71, 10 Am. St. Rep. 745. A contract by which parties agree to acquire land is not within the statute. *Smock v. Tandy*, 28 T. 132; *Gibbons v. Bell*, 45 T. 417. Owners of adjoining lands agreeing upon and fixing a common boundary line are bound thereby, although the agreement is not in writing. *Edwards v. Smith*, 71 T. 156, 9 S. W. 77.

The validity of an agreement for the settlement of a boundary does not depend on the accuracy with which the line is run. Time and long acquiescence are not necessary to the validity of a parol agreement fixing a compromise division line. *Cooper v. Austin*, 58 T. 494.

A parol agreement between adjoining owners that a survey of the boundary line shall be made, which is done, is not within the statute of frauds, and can be enforced. *Masterson v. Bokel*, 20 C. A. 416, 51 S. W. 39.

A parol agreement fixing the boundary line between two lots as the center of a party wall, acquiesced in for 16 years, held not within the statute of frauds. *Roberts v. Fellman Dry Goods Co.*, 42 C. A. 590, 92 S. W. 1060.

Where a boundary line has been established by agreement, it may be afterwards changed without an agreement in writing. *McDonald v. McCrabb*, 47 C. A. 259, 105 S. W. 238.

An agreement between adjoining landowners as to their common boundary is not within the statute of frauds. *McKeon v. Roan* (Civ. App.) 106 S. W. 404.

The removal of an established boundary line by landowners and subsequent recognition of the boundary line established is not obnoxious to the statute of frauds, though not in writing, or within the statutes regulating conveyances of real estate. *Caruthers v. Hadley* (Civ. App.) 134 S. W. 757.

An oral agreement between adjoining landowners that surveyors ascertain the boundary line held not within the statute of frauds. *Hill v. Walker* (Civ. App.) 140 S. W. 1159.

While a verbal agreement for the settlement of an uncertain boundary line is binding between the parties, because no title is affected thereby, such an agreement was void, because it was a parol conveyance of land in violation of the statute of frauds, where the division line had been marked by a fence for more than 20 years and the fence, though not originally on the true boundary, had determined the legal boundary by limitations. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

20. — **Partition.**—A parol partition of lands among joint tenants or tenants in common is not within the statute of frauds or the statute regulating the transfer of real estate by married women (*Aycock v. Kimbrough*, 71 T. 330, 12 S. W. 71, 10 Am. St. Rep. 745), and may be made by a married woman in parol (*Martin v. Harris* [Civ. App.] 26 S. W. 91).

Contract construed, and held to be one for the sale of land, and within the statute, unless in writing. *Zanderson v. Sullivan*, 91 T. 499, 44 S. W. 484.

A parol agreement by a husband, who has conveyed an undivided 110 acres of land out of a 310-acre homestead owned by him and his wife as community property, that the purchaser shall take his 110 acres out of a certain part of the property, where not made in fraud of the homestead rights of the wife, is valid. *Mass v. Bromberg*, 28 C. A. 145, 66 S. W. 468.

21. **Contracts for sale of interests in land.**—An agreement for the rescission of an executory contract for the sale of land is within the statute. *Dial v. Crain*, 10 T. 444.

As to the effect of a parol contract for the sale of land founded upon a good consideration, see *Boze v. Davis*, 14 T. 331; *Hendricks v. Snediker*, 30 T. 296; *Curlin v. Hendricks*, 35 T. 235; *Murphy v. Stell*, 43 T. 123.

A deed for land cannot be annulled by a parol agreement. *Van Hook v. Simmons*, 25 T. 323, 78 Am. Dec. 573; *Thomas v. Groesbeck*, 40 T. 530.

Land located, surveyed and ready for patent has, in contemplation of law, been acquired by the owner of the certificate, and a verbal agreement to convey an interest in it is within the statute of frauds, and specific performance cannot be enforced. *Aiken v. Hale & McDonald*, 1 U. C. 318.

The words "any contract for the sale of real estate" include every agreement by which one promises to alienate an existing interest in land upon consideration either good or valuable; hence a contract to convey land in consideration of labor or services to be rendered is within the statute. *Sprague v. Haines*, 68 T. 215, 4 S. W. 371.

An agreement between two or more persons for the joint acquisition of land is not, within the meaning of the statute of frauds, a contract for the sale of land which, to be valid, must be in writing. *Gardner v. Randell*, 70 T. 453, 7 S. W. 781; *Reed v. Howard*, 71 T. 204, 9 S. W. 109.

The time for the performance of a contract for the sale of land may be extended by a verbal agreement. *Bullis v. Presidio Mining Co.*, 75 T. 540, 12 S. W. 397.

R., by parol, contracted with W. for land and entered into possession. R. was unable to pay, and C. made the payment of the greater part of the purchase-money to W., when W. deeded the land to R., who at the same time deeded the same to C. R. and wife refused to yield possession, and the wife claimed homestead rights in two hundred acres of the tract. It was held that, as against W., R. and his wife could not assert homestead rights. As C., by payment to W., was subrogated to his rights, he took the land by trans-

fer free from any homestead rights, it appearing that the transactions between R. and C. were not in fraud of R.'s wife. *Roy v. Clarke*, 75 T. 28, 12 S. W. 845.

Acceptance of offer must be in writing. Offer to sell, and telegram from owner's agent referring to a letter by mail, to the effect that a certain party would take the land on the terms proposed, requiring a sketch of the land to be attached to the contract, first payment to be made after being satisfied as to title. Owner also proposed to have a survey made before closing contract. Held, no contract sufficient to bind owner. *Foster v. New York & Texas Land Co.*, 22 S. W. 260, 2 C. A. 505.

An agent without written authority can bind his principal in an executory contract for sale of land. *Huffman v. Cartwright*, 44 T. 296; *Marlin v. Kosmyroski* (Civ. App.) 27 S. W. 1042.

A contract wherein an agent employed to sell lands is to receive his compensation from the proceeds of sales is not void, under the statute. *Cotton v. Rand* (Civ. App.) 51 S. W. 55.

Oral agreement by husband to give his property to his wife, if she would allow proceeds of her separate property to be used for its improvement, held insufficient to transfer title under statute of frauds. *Parrish v. Williams* (Civ. App.) 53 S. W. 79.

Purchaser by parol can enforce specific performance, when sued for land, only by showing equities, and tendering unpaid purchase money before judgment. *Folk v. Kyser*, 21 C. A. 676, 53 S. W. 87.

An alleged executed parol agreement for sale of land held not enforceable because within the statute of frauds. *Newcomb v. Cox*, 27 C. A. 583, 66 S. W. 338.

An agreement between a vendor and purchaser with reference to a reconveyance of land after the vendor's purchase thereof on foreclosure of his lien held to be an agreement to convey land within the statute of frauds. *Foster v. Ross*, 33 C. A. 615, 77 S. W. 990.

A parol contract to convey land is void, where the land is not surveyed, and is not specifically agreed upon and identified, and two years has elapsed before the vendee has taken any action under the purported contract, and five years has elapsed before vendor learns that vendee is insisting on enforcement of the contract. *Wiley v. Whaley* (Civ. App.) 85 S. W. 1166.

A verbal sale of land does not convey title, unless the vendee takes possession of the land and makes valuable and permanent improvements. *Keith v. Keith*, 39 C. A. 363, 87 S. W. 384.

In order to take a parol agreement to sell land out of the statute of frauds, there must have been an executed parol agreement to sell, and the vendee must have made improvements. *Bringham v. Texas Co.*, 39 C. A. 500, 87 S. W. 893.

An oral promise to give an interest in real estate is void under the statute of frauds. *Dietrich v. Heintz*, 44 C. A. 602, 99 S. W. 417.

This article requires to be in writing any contract for the sale of real estate. *Allen v. Allen*, 101 T. 362, 107 S. W. 529.

A contract by citizens of a town with a railroad company to pay it certain amounts of money for extending its railroad held not a contract for the sale of land within the statute of frauds. *Texas & G. Ry. Co. v. Whiteside*, 55 C. A. 593, 119 S. W. 126.

A contract held not one for sale of land within the statute of frauds. *Parriss v. Jewell*, 57 C. A. 199, 122 S. W. 399.

An oral contract, if one of sale of land by H. to C. and wife in consideration of their looking after other land of H., cannot be enforced, so as to constitute a defense for persons in possession under C. and wife in trespass to try title by persons claiming under H.; the consideration not having been performed. *Emporia Lumber Co. v. Tucker*, 103 T. 547, 131 S. W. 408.

A parol contract to purchase real estate for the joint benefit of the promisor and others is not within the statute of frauds. *Buckner v. Carter* (Civ. App.) 137 S. W. 442.

A parol agreement by an owner employing a broker to procure a purchaser, made with the purchaser procured by the broker, to give the purchaser a specified time to decide whether he will accept the terms specified is a "contract for the sale of real estate" within the statute of frauds. *Granger Real Estate Exch. v. Anderson* (Civ. App.) 145 S. W. 262.

22. — **Nature of property.**—A parol contract to pay for the improvements upon land is not within the statute. *Thouvenin v. Lea*, 26 T. 612. The sale of removable fixtures is not within this title. *Moody v. Aiken*, 50 T. 73; *Brown v. Roland*, 11 C. A. 648, 33 S. W. 273.

A verbal sale of a permanent structure on land is void under the statute of frauds. *Brown v. Roland*, 92 T. 54, 45 S. W. 795.

A sale of growing timber with a right of ingress and egress to cut and remove the same held a sale of an interest in land that can only pass by deed or grant. *Burkitt v. Wynne* (Civ. App.) 132 S. W. 816.

A contract of sale of timber held a contract for the sale of real estate within the statute of frauds. Art. 3965, subd. 4. *Adams v. Hughes* (Civ. App.) 140 S. W. 1163.

A sale of a growing crop of hay with leave to the buyer to enter and remove it is not a sale of an interest in land within the fourth section of the statute of frauds. *Kreisle v. Wilson* (Civ. App.) 148 S. W. 1132.

A verbal contract for the sale of a permanent water right is not void under the statute of frauds as being a contract concerning the sale of land. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

A contract to gather, thresh, and deliver a growing crop of oats, for which defendant agreed to pay 60 cents a bushel, held not within the statute of frauds as a contract for the sale of an interest in real property. *Crosby v. De Bord* (Civ. App.) 155 S. W. 647.

23. — **Judicial sales.**—One purchasing realty at execution sale cannot enforce specific performance, unless the officer's return or other memorandum shows sale. *Rugely v. Moore*, 23 C. A. 10, 54 S. W. 379.

24. **Law prior to enactment.**—Prior to the enactment of the statute of frauds, January 18, 1840, a parol sale of land, accompanied by possession, passed a title as valid and legal as a written conveyance. *Briscoe v. Bronaugh*, 1 T. 326, 46 Am. Dec. 108; *Sullivan v. Dimmitt*, 34 T. 114.

A parol sale of land by the wife, with the consent of the husband, was valid under the laws in force prior to 1840. *Monroe v. Searcy*, 20 T. 348. See *Heirs of Reddin v. Smith*, 65 T. 26.

25. **Sale of lumber.**—An owner's parol agreement to pay for lumber previously contracted for by a contractor, to be used in rebuilding the owner's house, was void under the statute of frauds. *Marks v. Jones* (Civ. App.) 154 S. W. 618.

26. **Liability of agent.**—Where a contract made by an agent is void under the statute of frauds, the agent, though not authorized by his alleged principal, is not liable thereon. *Morrison v. Hazzard* (Civ. App.) 88 S. W. 385.

27. **Part performance.**—In general.—Part performance referable to a parol agreement will take the case out of the statute. *Castleman v. Sherry*, 42 T. 59; *Ponce v. McWhorter*, 50 T. 563.

An oral agreement for a letting of land for a greater period than one year may be taken out of the statute by part performance. *Anderson v. Anderson*, 13 C. A. 527, 36 S. W. 816.

Acts of a purchaser of personal property in reliance on performance by defendant held not such part performance as would take the contract out of the statute of frauds. *Jones v. National Cotton Oil Co.*, 31 C. A. 420, 72 S. W. 248.

Facts held not to show such part performance as to take contract for sale of land out of statute of frauds. *Wiley v. Whaley* (Civ. App.) 85 S. W. 1165.

Liability under agreement to pay certain writing obligatory in consideration of conveyance of land to obligors held not defeated merely because agreement was not in writing. *Conly v. Hampton* (Civ. App.) 87 S. W. 1171.

Defendants, having cut and appropriated timber from plaintiff's land under an oral contract, held not entitled to defend a suit for the value thereof on the ground that the contract was within the statute of frauds. *Alford Bros. & Whiteside v. Williams*, 41 C. A. 436, 91 S. W. 636.

In trespass to try title, where defendant claimed the premises under a verbal lease, certain facts considered and held inadequate to take such lease out of the operation of the statute of frauds. *Lechenger v. Merchants' Nat. Bank* (Civ. App.) 96 S. W. 638.

Where an original contract of employment was within the statute of frauds as not performable within a year, part performance was ineffective to validate it. *San Antonio Light Pub. Co. v. Moore*, 46 C. A. 259, 101 S. W. 867.

The statute of frauds (Art. 3965) has no application to a contract to transfer a lease of land belonging to the public school fund and to assist the purchaser of the lease in purchasing the land from the state, where the plaintiff has performed the contract and the defendant has received the benefit of the performance. *Belcher v. Schmidt* (Civ. App.) 132 S. W. 833.

Part performance is available to remove a lease for more than a year from the operation of the statute of frauds. *Dockery v. Thorne* (Civ. App.) 135 S. W. 593.

A tenant held bound by an extension of a lease, though he did not sign it. *Id.*

A parol agreement by a wife and children to release their claim in community estate in consideration of the husband and father conveying to them other land is not enforceable, though the conveyances were made. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

Title to one-third of an acre of land omitted from a deed by mistake held not sustainable on the theory of an oral sale. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

Notwithstanding the invalidity of a lease under the statute of frauds, the lessor is liable for such part performance thereof as he knowingly receives the benefits of. *Garrett v. Danner* (Civ. App.) 146 S. W. 678.

While the statute of frauds prevents the creation by parol of an irrevocable license with respect to real property, yet where there has been a parol license under a definite contract, with performance on one side, such part performance takes the case out of the statute and equity will enforce the licensee's rights in case of attempted revocation. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

Where a lessee, in reliance upon his lessor's statement that he could have the property as long as he paid the rent, borrowed money to discharge his obligations to the lessor, there is no such change of position as to take the agreement out of the statute of frauds. *Hill v. Hunter* (Civ. App.) 157 S. W. 247.

28. — **Possession.**—In parol sale of land followed by possession, the vendee promising to pay a stipulated price, the vendor tendering a deed, the vendee cannot defeat recovery of the purchase-money under the statute of frauds. *Watson v. Baker*, 71 T. 739, 9 S. W. 867.

Mere possession, without the making of permanent improvements, held insufficient to entitle a donee of land to specific performance. *West v. Webster*, 39 C. A. 272, 87 S. W. 196.

Entry into possession of premises and performance of consideration held not such part performance as to take a parol contract for the conveyance of land out of the statute of frauds. *Terry v. Craft* (Civ. App.) 87 S. W. 844.

The provision of the statute of frauds that no action shall be brought, etc., applying to those who interpose an oral contract respecting lands as an affirmative defense, a defendant in possession of premises cannot interpose a verbal lease of five years in defense of his possession. *Lechenger v. Merchants' Nat. Bank* (Civ. App.) 96 S. W. 638.

Possession alone is not sufficient to entitle a plaintiff to specific performance of a parol contract to convey land. *Cobb v. Johnson*, 101 T. 440, 108 S. W. 811.

A purchaser of land held in such exclusive possession as to warrant specific performance of a parol contract of sale. *Babcock v. Lewis*, 52 C. A. 8, 113 S. W. 584.

An oral contract for sale of land cannot be enforced so as to constitute a defense for one in possession under it in trespass to try title; the consideration not having been performed. *Emporia Lumber Co. v. Tucker*, 103 T. 547, 131 S. W. 408.

29. — **Payment.**—The mere payment of the purchase money to the holder of the legal title to land, upon an agreement that the title is to be held for the payor, does not create an equitable title capable of enforcement. *Wright v. Bearrow*, 13 C. A. 146, 35 S. W. 190.

Specific performance of an oral contract to convey land will not be granted, in the absence of possession or permanent improvements made thereon, though the purchase price has been paid. *McCarty v. May* (Civ. App.) 74 S. W. 804.

Defendant having sought a parol extension of a lease and paid the rent for part of the extended period, held not entitled to claim that it was unenforceable under the statute of frauds. *Dockery v. Thorne* (Civ. App.) 135 S. W. 593.

Though a lease was insufficient under the statute of frauds, if the lessee with the lessor's knowledge and acquiescence, as part performance of the contract, furnished supplies and boarded the lessor and his hands when he had not agreed to do so, the lessor will be liable for the reasonable value of such part performance, of which he received the benefit. *Garrett v. Danner* (Civ. App.) 146 S. W. 678.

Payment of the purchase price, unaccompanied by possession, will not support a parol sale of land. *Dixon v. McNeese* (Civ. App.) 152 S. W. 675.

30. — **Improvements.**—Improvements of insignificant value, and paid for by the use and occupation of the land, will not take the contract out of the statute. *Eason v. Eason*, 61 T. 225.

Certain improvements, made after a parol gift of land, held permanent and valuable. *La Master v. Dickson*, 17 C. A. 473, 43 S. W. 911.

Improvements not exceeding the value of rents held sufficient to take a parol gift out of the statute of frauds. *Id.*

Certain facts held to constitute a parol sale, so that, improvements having been made, there was a right to specific performance. *Kuteman v. Carroll* (Civ. App.) 80 S. W. 842.

In trespass to try title, certain improvements held not sufficiently substantial to warrant submitting to the jury the question of defendant's right to the land under a parol gift. *Hutcheson v. Chandler*, 47 C. A. 124, 104 S. W. 434.

In a suit for specific performance of an oral contract to convey land, certain improvements made on the property held insufficient to entitle defendant to a specific performance. *Cobb v. Johnson*, 101 T. 440, 108 S. W. 811.

A parol gift of land accompanied by improvements by the donee after the donor's death is invalid under the statute of frauds. *Hammond v. Hammond*, 49 C. A. 482, 108 S. W. 1024.

Certain improvements made by a donee under a parol gift of land during the donor's lifetime held insufficient to take the gift out of the statute of frauds. *Baldwin v. Riley*, 49 C. A. 557, 108 S. W. 1192.

Expenditures and improvements by a purchaser of land under a parol contract held not so insignificant as to warrant a refusal of specific performance, though they did not equal in value what the purchaser had gained by his occupancy of the land. *Babcock v. Lewis*, 52 C. A. 8, 113 S. W. 584.

Certain improvements held insufficient to take a parol gift of land out of the statute of frauds. *Elam v. Carter*, 55 C. A. 649, 119 S. W. 914.

A parol gift of land is invalid unless the donee has made sufficient improvements to take the case out of the statute of frauds. *Id.*

About \$100 in improvements held too small an amount, in comparison with the value of a section of land, to furnish the basis for specific performance of an alleged parol gift thereof. *Atchley v. Perry*, 55 C. A. 538, 120 S. W. 1105.

An oral transfer of a homestead from husband to wife may be made without her obtaining exclusive possession, provided she makes improvements based thereon during his lifetime other than those naturally required to make the place habitable. *Reyes v. Escalera* (Civ. App.) 131 S. W. 627.

When a parol purchaser has been fully compensated for his improvements or has gained more by his possession than he has expended in improvements, such improvements will not avail him as a ground for specific performance. *Cook v. Erwin* (Civ. App.) 133 S. W. 897.

The owners of certain oil land executed a deed which, by mistake of the description, excluded one-third of an acre intended to be conveyed. After the death of one of them, the grantee sunk an oil well on the excluded land, which exhausted the oil. Held, that a transfer of the omitted land could not be established on the theory of an oral sale, since, after the death of one of the grantors, title by oral sale could not be perfected by erecting improvements, and, the well having exhausted, the oil was no longer an improvement. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

31. — **Possession and payment.**—When the lessee takes possession of the premises and pays a part of the rent, it will take the parol contract out of the operation of the statute. *Randall v. Thompson*, 1 App. C. C. § 1101.

Where by virtue of a parol lease for a period longer than one year the landlord places the tenant in possession of the premises, and receives from him one or more installments of rent in accordance with the terms of the lease, this constitutes such part performance as will take the contract out of the statute of frauds and the same may be enforced in accordance with its terms. *Sorrells v. Goldberg*, 34 C. A. 265, 73 S. W. 712.

Fact that vendee of land under parol contract remained in possession until her claim to recover for the consideration given by her was barred by limitations held not to entitle her to specific performance, or create an estoppel against the grantor's estate. *Terry v. Craft* (Civ. App.) 87 S. W. 844.

One who purchases land under a verbal contract, paying the purchase price, entering possession and occupying the land, acquires title. *Mitchell v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 130 S. W. 735.

32. — **Possession and Improvements.**—When the purchase money for land has been paid, and the vendee has taken possession and made valuable improvements, with the knowledge of the vendor, a verbal contract for its sale will be enforced. *Garner v. Stubblefield*, 5 T. 552; *Dugan v. Colville*, 8 T. 126; *Ottenhouse v. Burselson*, 11 T. 87; *Whitson v. Smith*, 15 T. 36; *Taylor v. Ashley*, 15 T. 50; *Neatherly v. Ripley*, 21 T. 434; *Hubbard v. Horn*, 24 T. 270; *Bracken v. Hambrick*, 25 T. 408; *Taylor v. Roland*, 26 T. 293; *Howes' Heirs v. Rogers*, 32 T. 218; *Johnson v. Bowden*, 37 T. 621; *Schrimpf v. Settegast*, 38 T. 96; *Robinson v. Davenport*, 40 T. 333; *Castleman v. Sherry*, 42 T. 59; *Moreland v.*

Barnhart, 44 T. 275; Edwards v. Norton, 48 T. 291; Ponce v. McWhorter, 50 T. 562; Hibbert v. Aylott, 52 T. 530.

If the vendor under a parol contract puts the vendee in possession and afterwards refuses to complete his contract, he must pay for the improvements made by the occupant. *Thouvenin v. Lea*, 26 T. 612; *Saunders v. Wilson*, 19 T. 194.

To sustain a parol gift of lands followed by possession and large expenditure in improvements thereon by the grantee, it is necessary that the terms and conditions of such contract be clear and free from ambiguity, and that possession was taken and improvements made on the strength of it. Permissive occupation by the father and acceptance of the gift by the son will not be sufficient to bring the case within the rule. *Murphy v. Stell*, 43 T. 123.

Possession of land and improvements thereon made after the death of the vendor will not take a verbal contract out of the statute. *Ryan v. Wilson*, 56 T. 36; *Whitsett v. Miller*, 1 U. C. 203; *Wooldridge v. Hancock*, 70 T. 18, 6 S. W. 818.

Where a vendee or donee of land has been placed in possession and made improvements of value sufficient to entitle the party to a specific performance, the use of the premises will go with the equitable right to the property. *Wells v. Davis*, 77 T. 636, 14 S. W. 237.

Equities of a parol gift of land held to take it out of the statute. *Davis v. Portwood*, 20 C. A. 548, 50 S. W. 615.

An oral contract to clear land for the use thereof for three years held taken out of the statute of frauds by part performance. *Wanhscaffe v. Pontoja* (Civ. App.) 63 S. W. 663.

In trespass to try title based on a parol gift together with possession and improvements thereunder, evidence held to show that the improvements were not of such a character as to take the gift out of the operation of the statute of frauds. *Wallis v. Turner* (Civ. App.) 95 S. W. 61.

The possession of land by one claiming it as a gift to her for life, with remainder to her children, and the making of permanent valuable improvements thereon, was sufficient to take both the life estate and the remainder out of the statute of frauds. *Combest v. Wall* (Civ. App.) 102 S. W. 147.

In order that equity may sustain a parol gift of land, possession must have been taken and substantial improvements made by the donee upon the faith of the gift. *Hutcherson v. Chandler*, 47 C. A. 124, 104 S. W. 434.

A parol gift of land accompanied by possession and improvements held valid in equity, notwithstanding the statute of frauds. *Hammond v. Hammond*, 49 C. A. 482, 108 S. W. 1024.

To take a parol gift of land out of the statute of frauds, possession must be taken by the donee and substantial improvements made with the acquiescence and during the lifetime of the donor. *Baldwin v. Riley*, 49 C. A. 557, 108 S. W. 1192.

Where a party relies upon possession and improvements under a verbal sale of land to take this sale out of the operation of the statute of frauds, it must appear that the possession was taken and improvements made during the life of the vendor and under such circumstances as to afford a presumption that he knew of and acquiesced therein. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

The rights of a party claiming land through possession and improvements under a verbal sale are unaffected by his having a deed thereto from the same party who made the oral sale, but which was intended by the parties as a mortgage. *Id.*

The rule that a donee of land is entitled to specific performance if he takes possession of the land and makes improvements is based upon equitable principles of estoppel, and the relative values of the improvements and of the land must be considered. *Cook v. Erwin* (Civ. App.) 133 S. W. 897.

A parol gift of land is unsustainable, unless it is shown that the donee had possession and made valuable improvements with the knowledge and consent of the donor. *Yealock v. Yealock* (Civ. App.) 141 S. W. 842.

A parol sale of land will be upheld where the vendee is put in possession, and, relying on the sale, makes valuable improvements, such circumstances creating an equitable title which will be protected in equity. *Dixon v. McNeese* (Civ. App.) 152 S. W. 675.

33. — **Payment and Improvements.**—An action brought by a party against another for specific performance of an unwritten agreement conveying lands in consideration of labor and improvements made on the land, cannot be maintained, even though the land has been thus paid for in full, unaccompanied by other facts, such as exclusive possession and the like. *Ward v. Stuart*, 62 T. 333; *Ann Berta Lodge v. Leverton*, 42 T. 18.

An executed parol sale of land, the purchase money being paid and possession taken, followed by improvements, constitutes a good title in the vendee. *Harold v. Sumner*, 78 T. 581, 14 S. W. 995.

In trespass to try title, a plea attempting to set up the statute of frauds in defense held insufficient. *Wallis v. Turner* (Civ. App.) 95 S. W. 61.

The statute of frauds held not to avail where land being sold by parol, and the vendor having failed to make title, the purchaser sues for money paid and improvements made. *Burleson v. Tinnin* (Civ. App.) 100 S. W. 350.

Improvements made and part payment of the price of land held to entitle the purchaser to specific performance of an oral contract of sale. *Babcock v. Lewis*, 52 C. A. 8, 113 S. W. 584.

34. **Contracts implied by law on part performance.**—A widow's contract to convey land in fulfillment of her husband's oral agreement to convey the same, which he failed to perform, held sufficient to take the husband's oral agreement out of the statute of frauds, and entitle the purchaser to specific performance. *McCarty v. May* (Civ. App.) 74 S. W. 804.

Where defendant's testator failed to comply with an oral agreement to convey land to plaintiffs, in consideration of their conveyance of land to another, plaintiffs were entitled to recover from his estate the value of the land conveyed by them. *Id.*

An oral contract for the caring of live stock for a term of years for a share of the increase, must be determined as if no contract had been made, and the one caring for

the stock could recover the reasonable value of feed furnished. *Crenshaw v. Bishop* (Civ. App.) 143 S. W. 284.

35. Contracts completely performed.—A surety's answer, in a suit on a note, that for a valuable consideration the time was extended for one year with the privilege to the principal debtor of paying the note in work, and that the value of such work performed was greater than the note, held not objectionable on the ground that the oral contract was a contract for services not to be performed within a year, and within the statute of frauds. *Lee v. Durham* (Civ. App.) 156 S. W. 1135.

36. Discharge of contracts without performance.—A parol contract for cancellation of an agreement for the purchase of land is without the statute of frauds. *E. F. Rowson & Co. v. McKinney* (Civ. App.) 157 S. W. 271.

37. Modification of contract.—A subsequent contract changing any of the terms of a written lease of realty for more than one year required by the statute of frauds to be in writing must also be in writing. *Beard v. A. A. Gooch & Son* (Civ. App.) 130 S. W. 1022.

Nothing short of a subsequent contract in writing meeting the requirements of the statute of frauds can change a written agreement showing whose interest is to be charged with a conveyance of part of the land owned by tenants in common. *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

A written contract of sale of timber held not subject to modification by parol agreement. *Adams v. Hughes* (Civ. App.) 140 S. W. 1163.

38. Equitable relief.—When one refuses to complete an agreement which is void by the statute of frauds, after receiving a benefit from part performance, he must pay for what he has received. *Ray v. Young*, 13 T. 550; *Thouvenin v. Lea*, 26 T. 612; *Brewer v. Wall*, 23 T. 585, 76 Am. Dec. 76; *Allison v. Shilling*, 27 T. 450, 86 Am. Dec. 622; *Wright v. Hays*, 34 T. 253; *Bell v. Schwartz*, 37 T. 572.

Equity will enforce a verbal gift of land from the father to his son when clearly established, if it be accompanied by possession followed by improvements made on the strength of the gift with the consent of the father. *Willis v. Matthews*, 46 T. 478.

An owner of land cannot urge the statute of frauds to invalidate a parol sale thereof between adverse claimants to which he was not a party. *McManus v. Matthews* (Civ. App.) 55 S. W. 589.

Special answer in trespass to try title held not demurrable on the ground that the contract therein alleged was within the statute of frauds, and that the court had no jurisdiction to hear a claim for the recovery of money alleged to have been paid thereunder. *Brown v. Randolph*, 26 C. A. 66, 62 S. W. 981.

A parol sale or gift of real estate cannot be enforced at law, but equity will grant relief if possession and the making of permanent valuable improvements are shown or other facts showing that the transaction is a fraud upon the purchaser or donee if not enforced. *Altgelt v. Escalera*, 51 C. A. 108, 110 S. W. 990.

39. Persons to whom statute is available.—The invalidity of a parol contract within the statute cannot be set up by a stranger to it. The defense is personal to the one sought to be charged. *Railway Co. v. Settegast*, 79 T. 256, 15 S. W. 288; *Robb v. Railway Co.*, 82 T. 392, 18 S. W. 707.

The maker of a note for land to which he has been admitted into possession and deed offered him cannot plead want of consideration of the note merely because the sale was by parol. *Busby v. Bush*, 79 T. 656, 15 S. W. 638.

The defense that a transfer of land is void under the statute cannot be raised by a third party. *Bell v. Beazley*, 18 C. A. 639, 45 S. W. 401.

Where defendant not only sought parol extension of the written lease, but paid rent for the part of the time for which extension was granted, he could not then assert that the extension was invalid under the statute. *Dockery v. Thorn* (Civ. App.) 135 S. W. 593.

Owner employing a broker to procure a purchaser but reserving right to sell held entitled to show that he orally contracted to sell the land to a third person prior to a sale by the broker. *Lewis v. Vaughan* (Civ. App.) 144 S. W. 1186.

Where, as a part of the consideration for the purchase of property, the purchaser assumed and agreed to pay certain notes, he cannot assert that his agreement was within the statute of frauds, as a parting with title to property, in reliance on the promise, rendered the debt the original obligation of the purchaser. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 145 S. W. 722.

40. Writing subsequent to oral agreement.—Where a written escrow agreement provided for the delivery of the deed upon approval by an attorney of the deeds deposited with the escrow holder, a contemporaneous parol agreement by which the parties were to deliver other abstracts which were to be considered in connection with the deeds deposited in passing upon the title could not be ingrafted upon the written agreement and enforced without violating the statute of frauds (Art. 3965), unless the escrow agreement was first reformed, so as to embody the terms of the parol agreement. *Cress v. Holloway* (Civ. App.) 135 S. W. 209.

G. being the owner of an undivided third of certain lands, and H. having an interest in the remaining two-thirds, and claiming to be the sole owner of such two-thirds, H. contracted in writing to convey to G. and C., in consideration of their defending against the claims of others to part of such two-thirds interest, an undivided one-sixth interest in his personal share of the lands, and in such contract G. agreed to relinquish to C. his interest in said one-sixth, the contract further providing the said one-sixth interest thus secured to C. to be taken out of H.'s interest in said lands, after deducting the one-third interest belonging to G. Held, that nothing short of a subsequent contract in writing meeting the requirements of the statute of frauds could change such agreement, so as to allow the land conveyed to C. by H. and G., in execution of such agreement, to be charged to the interest of G. in partition between him and H. *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

41. Waiver of bar of statute.—A deed repudiated by the vendee, and destroyed with his consent, cannot afterwards be claimed by him as a compliance with the statute of frauds. *Sullivan v. O'Neal*, 66 T. 433, 1 S. W. 185.

One promising by parol to convey land in consideration of services to be performed held estopped from setting up the statute of frauds. *Hand v. Nix*, 39 C. A. 403, 87 S. W. 204.

Vendee in parol contract for the sale of land held to acquire title by estoppel as against the successors of his vendor, although he also placed reliance on other sources of title. *Bringham v. Texas Co.*, 39 C. A. 500, 87 S. W. 893.

Where the lessor urged the statute of frauds as a bar to the enforcement of a lease as to only a part of the term covered, and sought to rely on an oral contract for the whole term, he waived his right to assert its invalidity. *Garrett v. Danner* (Civ. App.) 146 S. W. 678.

42. **Trusts.**—An agreement by purchaser at execution sale to hold the land subject to reconveyance to the execution debtor held not void, because oral. *Brown v. Jackson* (Civ. App.) 40 S. W. 162.

A grantor of an absolute conveyance may by parol create a trust in favor of a stranger to the deed. *Barnet v. Houston*, 18 C. A. 134, 44 S. W. 689.

Evidence held to warrant a finding of a parol trust in favor of the grantor. *Stubblefield v. Stubblefield* (Civ. App.) 45 S. W. 965.

Verbal agreement creating a trust concerning lands held not within the statute of frauds. *Branch v. De Blanc* (Civ. App.) 62 S. W. 134.

The statute of frauds does not require constructive trusts to be created in writing. *Houser v. Jordan*, 26 C. A. 398, 63 S. W. 1049.

Contract to furnish purchase money, and convey land to plaintiff on being repaid, held to raise an express trust, so as not to be within the statute of frauds. *Lucia v. Adams*, 36 C. A. 454, 82 S. W. 335.

In Texas an express trust may be created by parol. *Allen v. Allen* (Civ. App.) 105 S. W. 53.

A grantor held entitled to show that the grantee held the premises under a parol trust. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

Express trusts in land are not within the statute of frauds, and may be proved by parol. *Id.*

A parol agreement creating a trust in land held valid notwithstanding the statute of frauds. *Id.*

A trust held not affected by the statute of frauds. *Salter v. Gentry* (Civ. App.) 130 S. W. 627.

An express trust in land may be established by parol, notwithstanding the statute of frauds. *Smalley v. Paine* (Civ. App.) 130 S. W. 739.

A parol contract between parties, in pursuance of which one party purchased real estate for the joint benefit of all the parties, is not within the statute of frauds. *Buckner v. Carter* (Civ. App.) 137 S. W. 442.

A parol agreement to acquire and hold lands in trust for another is not within the statute of frauds. *Henyman v. Trevino* (Civ. App.) 137 S. W. 458.

An agreement need not be in writing, in order to create an express trust in land. *Watkins v. Watkins* (Civ. App.) 141 S. W. 1047.

43. **Requisites and sufficiency of writing.**—A void contract for the sale of land, not amounting to an unconditional promise to pay the balance of the price, held insufficient to take the parol contract for the sale out of the statute of frauds. *Cammack v. Prather* (Civ. App.) 74 S. W. 354.

Writing held insufficient to take verbal contract for sale of real estate out of statute of frauds, so as to entitle party to specific performance. *Penshorn v. Kunkel*, 41 C. A. 97, 90 S. W. 719.

An instrument held sufficiently specific on which to base a decree of specific performance. *McAllen v. Raphael* (Civ. App.) 96 S. W. 760.

In order to pass a permanent right to use another's lands for a particular purpose, the writing must show with reasonable certainty, either in itself or by reference to other writing, the parties, consideration, and subject-matter of the contract. *Menczer v. Poage*, 55 C. A. 415, 118 S. W. 863.

A contract for the conveyance of real estate held in form subject to specific performance. *Redwine v. Hudman*, 104 T. 21, 133 S. W. 426.

44. — **Description of parties.**—An instrument of writing purporting to be a contract to convey land that does not give the names of the sellers nor any description of them, nor refer to any paper where the names can be ascertained will not support an action for specific performance. *Morrison v. Hazzard* (Civ. App.) 88 S. W. 387.

45. — **Description of land.**—A deed held not void under the statute, though the description of the land was defective. *Regan v. Milby*, 21 C. A. 21, 50 S. W. 587.

46. — **Statement of price.**—It is not necessary that the price stipulated to be paid should be expressed in writing. *Adkins v. Watson*, 12 T. 199; *Thomas v. Hammond*, 47 T. 42; *Fulton v. Robinson*, 55 T. 401.

Purchase price of land, not embraced in contract for sale thereof, held may be shown by parol. *Dyer v. Winston*, 33 C. A. 412, 77 S. W. 227.

Contract for sale of land, omitting to embrace the selling price, held not deficient in execution. *Id.*

47. — **Signature.**—Written authority is not necessary to enable an agent to bind his principal in an executory contract for the sale of land. *Huffman v. Cartwright*, 44 T. 296; *Marlin v. Kosmyroski* (Civ. App.) 27 S. W. 1042.

A contract for the sale of land, signed by a part owner, will not bind the other. *Moore v. Powell*, 25 S. W. 472, 6 C. A. 43.

Contract for sale of land, not signed by person agreeing to purchase, held not within the statute of frauds. *Dyer v. Winston*, 33 C. A. 412, 77 S. W. 227.

A conveyance by another than the owners, merely on their parol consent, held ineffectual; there being nothing to constitute an estoppel. *Kuteman v. Carroll* (Civ. App.) 80 S. W. 842.

A written contract signed by one party alone held not affected by the statute of frauds. *Cotulla v. Barlow* (Civ. App.) 115 S. W. 294.

Under this article a contract to convey land need only be signed by the party to

be charged therewith, and need not be binding upon both parties. *Hazzard v. Morrison* (Civ. App.) 130 S. W. 244.

A writing reciting that the person signing the same was a justice of the peace of the town of Socorro, and that in 1854, in the month of August, he had given possession to T., a resident of the town, of a piece of land in a place called the "acequia dura," consisting of the measurements shown by an annexed survey, to hold in the right of a neighbor, as T. has the rights of citizenship, having done all the ditch work necessary and that such land was given him with the consent and pleasure of the neighbors and citizens of the town in order that he may be warranted in the same, and there is no adverse claim, "as I have freely done this act," and that such resident shall be obligated to record this document in the office of the county that it may have greater force. The writing was signed, "L., Justice of the Peace." Held, that the writing was sufficient to take the transaction out of the statute. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

Under this article specific performance being sought by the vendor, it is enough that the signing is by the vendee alone. *Black v. Hanz* (Civ. App.) 146 S. W. 309.

48. Contents of memorandum in general.—The memorandum of the sale of land should be so reasonably definite and certain within itself, or by other writing referred to, that the contract can be made out as to parties, consideration and subject-matter, without resort to parol evidence. *Johnson v. Granger*, 51 T. 42; *Dial v. Crain*, 10 T. 444; *Peters v. Phillips*, 19 T. 74, 70 Am. Dec. 319; *Patton v. Rucker* 29 T. 402; *Norris v. Hunt*, 51 T. 609; *Fulton v. Robinson*, 55 T. 401; *Watson v. Baker*, 71 T. 739, 9 S. W. 867.

A memorandum must describe the land, the subject of the contract, with sufficient exactness to identify it. Parol evidence cannot add to an imperfect contract a material part in order to sustain it, but it can apply a description in it to the subject of the contract. *Watson v. Baker*, 71 T. 739, 9 S. W. 867.

A writing: "Proposition: All costs and lawyers' fees for litigation \$150; also \$1,000 for choice of corner." "I accept the above proposition. T. H. Zanderson"—held void as a land contract. *Sullivan v. Zanderson* (Civ. App.) 42 S. W. 1027.

A memorandum held too indefinite to constitute a contract for sale of land, within the statute. *Zanderson v. Sullivan*, 91 T. 499, 44 S. W. 484.

Memorandum for the sale of lands, held insufficient under the statute of frauds. *Penn v. Texas Yellow Pine Lumber Co.*, 35 C. A. 181, 79 S. W. 842.

A memorandum executed by a justice of the peace of the town of Socorro relating to the conveyance of land to a resident of the town held sufficient to take the transaction out of the statute of frauds. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

A letter written by defendant as to plaintiff's prospective employment held not a sufficient memorandum to bind defendants to pay plaintiff's claim for back wages against a former land company. *Warner v. Hamilton* (Civ. App.) 138 S. W. 809.

49. Time of making memorandum.—The memorandum in writing of a contract for the sale of land, required by the statute of frauds, may not only be shown by correspondence, but may be made subsequent to the agreement. *Black v. Hanz* (Civ. App.) 146 S. W. 309.

50. Statement of consideration.—Where a county conveyed school lands to defendant, taking his obligation for the price, a subsequent written contract reducing such interest held not within the statute of frauds. *Delta County v. Blackburn* (Civ. App.) 90 S. W. 902.

51. Signature of memorandum.—A memorandum may be signed by an agent. *Tynan v. Dullnig*, 25 S. W. 465, 818; *Heffron v. Pollard*, 73 T. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

A memorandum of receipt made by the agent of the owner of land held a sufficient contract of sale under the statute of frauds. *Donnell v. Currie & Dohoney* (Civ. App.) 131 S. W. 88.

52. Separate writings.—In a suit to enforce a contract for the sale of land, certain correspondence between the parties held insufficient to take the contract out of the statute of frauds. *Dillard v. Sanders* (Civ. App.) 97 S. W. 108.

A letter sent by H. to B., stating, "Inclosed find deed of the land I bought from you," and asking that it be signed by B. and wife, and returned, and the inclosed deed, reciting that B. and wife, in consideration of a stated amount, conveyed to H. the described land, are sufficient to take the oral contract out of the statute. *Black v. Hanz* (Civ. App.) 146 S. W. 309.

53. Parol acceptance of written offer.—A verbal acceptance of an offer made in writing and signed by the party to be charged is sufficient. *Anderson v. Tinsley* (Civ. App.) 28 S. W. 121.

54. Promises by executors and administrators.—An administrator is not bound personally by an agreement to make good to a purchaser any loss he may sustain by reason of defect in title to land sold by him unless the agreement is in writing. *Club Land & Cattle Co. v. Dallas County*, 26 C. A. 449, 64 S. W. 875.

The parol promise of an executrix after the death of her husband to pay for services rendered him during his lifetime is void under this statute. *Flannery v. Chidgey*, 33 C. A. 638, 77 S. W. 1035.

55. Contracts as ground of defense.—Where an owner makes a parol contract for the care of his stock for three years for a part of the increase and within a few months thereafter takes possession of the stock he cannot rely on the contract to prevent the recovery of the reasonable value of the pasturage furnished. *Crenshaw v. Bishop* (Civ. App.) 143 S. W. 284.

56. Pleading.—See notes under Title 37, Chapter 3.

57. — As ground of defense.—See notes under Title 37, Chapter 8.

58. Demurrer raising defense.—See notes at end of Title 37, chapter 2.

59. Objections to evidence of oral contract.—In trespass to try title, plaintiff held entitled to prove a parol gift, so that defendant could not raise the defense of the statute of frauds by objecting to such evidence. *Wallis v. Turner* (Civ. App.) 95 S. W. 61.

While a general denial is sufficient to let in the defense of the statute of frauds, defendant is obliged to make his defense good by objecting to parol evidence, sought to prove the contract sued on. *International Harvester Co. v. Campbell*, 43 C. A. 421, 96 S. W. 93.

In an action for breach of a contract of employment, the defense of the statute of frauds held not raised by a request for a peremptory instruction for defendant. *Id.*

A failure to object to parol evidence proving the contract relied on to constitute a cause of action operates as a waiver of the statute of frauds, not specially pleaded. *Id.*

60. Evidence.—Though a nuncupative will cannot pass title to land, yet it is admissible, when offered in connection with other evidence, to show that the deceased had previously made a parol sale or gift of the land to the devisee. *Wooldridge v. Hancock*, 70 T. 18, 6 S. W. 818.

A deed and writing held competent to show parol conveyance had been brought within the statute. *Texas & P. Ry. Co. v. O'Mahoney* (Civ. App.) 50 S. W. 1049.

Evidence of a written agreement to sell land does not preclude the jury from basing their verdict on a parol agreement preceding the alleged written agreement. *Bringham v. Texas Co.*, 39 C. A. 500, 87 S. W. 893.

An oral promise by defendant to pay a debt of his brother to plaintiff, upon purchasing the brother's business, was prima facie within the statute of frauds. *Estes v. Bryant-Fort-Daniel Co.* (Civ. App.) 140 S. W. 1177.

61. Instructions.—See notes under Title 37, Chapter 13.

Art. 3966. [2544] [2465] Conveyance to defraud creditors, etc., void.—Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. [P. D. 3876.]

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| 1. Validity of transfer in general. | 20. — Knowledge or notice of intent and participation therein. |
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| 3. Collusive suits. | 22. Validity as between original parties or their representatives. |
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| 12. — Sureties. | 31. Registration. |
| 13. — Mortgages and other transfers as security. | 32. Redemption of incumbered property. |
| 14. Preference of wife. | 33. Rights of mortgagor's creditors. |
| 15. Consideration and payment of liabilities. | 34. Cancellation of fraudulent conveyance. |
| 16. — Moral obligation. | 35. Remedies of creditor. |
| 17. — Transactions between husband and wife. | 36. Presumptions, burden of proof and admissibility of evidence. |
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1. Validity of transfer in general.—D. conveyed to P. land and real estate of the estimated value of \$5,000. At the same time P. executed to D. an instrument reciting the conveyance of the property, and agreed to sell the same on the best terms possible, and out of the proceeds was (1) to retain compensation to himself not exceeding ten per cent.; (2) to retain an amount sufficient to pay costs and attorney's fees to defend the interest of the persons named in the schedule; (3) to pay out the remainder pro rata to the persons named in the schedule; and if, after the claims of the persons named in the schedule had been paid, there was a remainder, to pay the same to any creditor of said D. which he (P.) might elect. Held, the reservation to the assignee to declare future preferences rendered the assignment fraudulent and void. *Moody v. Paschal*, 60 T. 483.

Transfer of part of a stock of merchandise to the creditor's agent held to constitute a valid sale, as against attaching creditors. *Triplett v. Morris*, 18 C. A. 50, 44 S. W. 684.

Validity of transfer of interest for creditors determined. *Bell v. Beazley*, 18 C. A. 639, 45 S. W. 401.

A deed conveying grantor's expectancy to real estate held not fraudulent as against subsequent creditors. *Searcy v. Gwaltney Bros.*, 36 C. A. 158, 81 S. W. 576.

2. Badges of fraud.—Conveyance of a stock of goods, followed on the same day by a transfer of notes and accounts, held one transaction. Value of property exceeding debt secured held a badge of fraud. *Baylor v. Brown*, 21 S. W. 73, 3 C. A. 177.

The fact that one to whom an insolvent transferred his firm interest is insolvent, and cannot pay debts of old firm, held not to make transaction fraudulent. *Bell v. Beazley*, 18 C. A. 639, 45 S. W. 401.

The employment of the grantors of a stock of goods, after execution of a trust deed of the same, as clerks by the trustee, does not invalidate the deed for fraud. *Boltz v. Engelke* (Civ. App.) 63 S. W. 899.

The retention of the possession of personalty by the seller creates a rebuttable presumption that the sale is fraudulent. *Perry v. Patton* (Civ. App.) 68 S. W. 1018.

Mere indefinite indulgence and delay in the collection of a dishonored note is not a badge of fraud. *Eason v. Garrison & Kelly*, 26 C. A. 574, 82 S. W. 800.

That the value of property transferred by an insolvent to a preferred creditor exceeds the amount of the debt does not invalidate the transfer, if the value is reasonably proportioned to the debt. *Awalt v. Schooler* (Civ. App.) 131 S. W. 302.

3. Collusive suits.—A fraudulent diversion of a debtor's property is as frequently accomplished by a collusive suit as by a direct transfer, and both means are denounced by the statute in the same terms. *Martin Clothing Co. v. Page*, 1 C. A. 537, 21 S. W. 702.

4. Purchase of homestead.—Transfer by partner in failing circumstances of his interest in exchange for a homestead held not fraudulent. *Bell v. Beazley*, 18 C. A. 639, 45 S. W. 401.

The transfer of a judgment by an insolvent debtor is not fraudulent where he receives in part payment a house and lot which he claims as a homestead, although he made the transfer to prevent his creditors from reaching the judgment. *Thompson v. International & G. N. R. Co.*, 45 C. A. 285, 100 S. W. 197.

5. Property subject to claims of creditors in general.—Party having no lien on fund due his debtor in hands of county cannot maintain action to set aside fraudulent transfer thereof. *Herring-Hall-Marvin Co. v. Kroeger*, 23 C. A. 672, 57 S. W. 980.

Where a husband has taken the title to land purchased with his wife's money, the fact that the husband and wife join in a conveyance of the property to a stranger to prevent its seizure for the husband's debts does not render the conveyance void as in fraud of his creditors. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

6. Exempt property in general.—The conveyance of property which is exempt by law from forced sale is not within the purview of the statute. *Wood v. Chambers*, 20 T. 247, 70 Am. Dec. 382; *Cox v. Shropshire*, 25 T. 113; *Martel v. Somers*, 26 T. 551; *Beard v. Blum*, 64 T. 59; *Scheuber v. Ballow*, 64 T. 166.

If the conveyance of exempt property is simulated and colorable, merely made upon a secret trust that the vendee should hold the property for the vendor after the latter had abandoned the use of it, by its subsequent abandonment it becomes liable to be taken in execution. *Cox v. Shropshire*, 25 T. 113.

7. Homestead.—Where a homestead is conveyed with intent to defraud creditors, but the grantor continues in occupation, the conveyance is not in law fraudulent as to such creditors. *Brown v. Moore* (Civ. App.) 64 S. W. 781.

Creditors of the owner of a homestead cannot complain of a sale thereof as fraudulent. *Heidelbach, Friedlander & Co. v. Carter*, 34 C. A. 579, 79 S. W. 346.

The conveyance of a homestead, even for the purpose of avoiding the payment of the grantor's debts does not fall within this article. *Jolly v. Diehl*, 38 C. A. 549, 86 S. W. 966.

Sale by mortgagor to mortgagee of crop gathered and ungathered from his homestead and partly exempt and partly nonexempt held not fraudulent as to creditors. *Nunn-Weldon Dry Goods Co. v. Haden* (Civ. App.) 95 S. W. 73.

On attachment of land claimed to have been fraudulently conveyed to defendant debtor's wife, the debtor and his wife claiming the land as a homestead, the case held determinable upon the status of the homestead claim at the time of the conveyance. *Gaar, Scott & Co. v. Burge*, 49 C. A. 599, 110 S. W. 181.

If property had not been abandoned as a homestead when it was conveyed to the owner's wife, an intent to abandon in the future did not make the conveyance fraudulent as to his creditors. *Id.*

A conveyance of a homestead, whether with or without consideration, and though to defraud the owner's creditors, is valid, and will not be set aside as fraudulent. *Holt v. Abby* (Civ. App.) 141 S. W. 173.

That a wife allowed her son to manage her separate property and conduct the business in his name will not deprive her of any right or equity which she might have, even though the arrangement was fraudulent. *Farmers' State Bank of Quanah v. Farmer* (Civ. App.) 157 S. W. 283.

8. Insolvency element of fraud.—The sale of property by a debtor in failing circumstances, known to the purchaser, for a fair consideration paid in money or negotiable notes, may be fraudulent. *Seligson v. Brown*, 61 T. 180.

When property has been conveyed in good faith by a debtor to his creditor in payment of his debt, it is immaterial that the creditor knew that he owed other debts which would not be paid. *Rider v. Hunt*, 6 C. A. 238, 25 S. W. 314.

A conveyance by an insolvent debtor of all his property not exempt for cash to one knowing his indebtedness is fraudulent where the purchase money is not applied to his debts. *Proetzel v. Buck Stove Co.* (Civ. App.) 26 S. W. 1110.

A bona fide sale without fraudulent intent on part of vendor, for a fair and valuable consideration, is not void on account of the vendor's insolvency. *Cox v. Morrison* (Civ. App.) 31 S. W. 85.

Grantee held chargeable with notice of grantor's insolvency, and deed void as against creditors, though grantee was innocent of any corrupt motive. *Paddock v. Jackson*, 16 C. A. 655, 41 S. W. 700.

Where a grantor known to grantee to be insolvent receives the purchase price of the property conveyed in money and notes, to be used in grantor's discretion, the conveyance held void as in fraud of creditors. *Armstrong v. Elliott*, 20 C. A. 41, 49 S. W. 635.

Mere fact that grantor is insolvent held not to make a transfer of his property to a creditor invalid as to other creditors. *Moore v. Robinson* (Civ. App.) 75 S. W. 890.

A deed from an insolvent, with or without a consideration, executed under such cir-

circumstances as to charge the vendee with notice, can be set aside by creditor. *Davis v. Culp* (Civ. App.) 78 S. W. 554.

A transfer of property by an insolvent to one having knowledge of the insolvency held not presumptively fraudulent. *Meyer Bros. Drug Co. v. Durham*, 35 C. A. 71, 79 S. W. 860.

Mere insolvency of a buyer of goods and his concealment of such fact does not necessarily indicate an intention to defraud, justifying a rescission by the seller. *Slayden-Kirksey Woolen Mills v. Weber*, 46 C. A. 433, 102 S. W. 471.

The insolvency of a vendor at the time of a sale will not defeat the title of vendee purchasing for a valuable consideration without notice of the vendor's insolvency. *Folkes v. Wyatt* (Civ. App.) 126 S. W. 958.

A purchaser of goods from an insolvent debtor though he pays full value, if chargeable with notice of the seller's fraudulent intent, acquires no title as against creditors, and such creditors may proceed by execution, attachment, or garnishment. *McIntosh & Warren v. Owosso Carriage & Sleigh Co.* (Civ. App.) 146 S. W. 239.

An insolvent debtor may transfer property in good faith to a creditor in payment of the debt provided the creditor also acts in good faith, though the effect is to prevent other creditors from collecting their debts. *Whitesides v. Bacon* (Civ. App.) 150 S. W. 301.

9. Reservations and trusts.—A failing debtor may in good faith provide for the payment of designated debts by a mortgage of property with a power of sale, and such an instrument is not invalid because of the interest that might possibly remain to the mortgagor after the payment of the enumerated debts. Such an interest, if any, can be reached by unsecured creditors through proper process. *Scott v. McDaniel*, 67 T. 315, 3 S. W. 291. An insolvent debtor may prefer partnership debts. *Chesser v. Clamp*, 10 C. A. 350, 30 S. W. 466.

Where a preferred creditor pays money or executes a negotiable note to his insolvent debtor as part consideration for his purchase of the debtor's goods, the transaction will not be declared fraudulent in law where it is not shown that more goods have been knowingly received than are reasonably required to pay the debt. *Oppenheimer v. Halff*, 68 T. 409, 4 S. W. 562; *Blankenship v. Willis*, 1 C. A. 657, 20 S. W. 952.

Reserving trifling amounts by a debtor in making an assignment is no indication of fraud, and that most of the claims assigned are worthless is no objection to the assignment, when it appears they were all he had. *Black v. Vaughn*, 70 T. 47, 7 S. W. 604.

If a creditor purchase from his debtor goods exceeding in value the amount of his debt, and cancel the debt in part payment, and the sale is in all respects fair and honest, he will be protected like any other purchaser. The fact that the surplus in value was paid to the debtor is immaterial, unless the transaction was made for the purpose of giving the debtor the advantage of such surplus, and in order to defraud his other creditors. *Allen v. Carpenter*, 66 T. 138, 18 S. W. 347; *Black v. Vaughn*, 70 T. 47, 7 S. W. 604; *Oppenheimer v. Halff*, 68 T. 409; 4 S. W. 562; *Harness Co. v. Schoellkopf*, 71 T. 412, 9 S. W. 336.

A conveyance in trust of goods by an insolvent debtor, the proceeds of sale, after satisfying a particular debt, to be paid to the grantor, is not necessarily invalid. Otherwise where the value of the goods greatly exceeds the amount of the debt, and the trustee is allowed six months in making a sale. *Greer v. Richardson Drug Co.*, 1 C. A. 634, 20 S. W. 1127.

A conveyance of property in trust for the payment of debts, empowering a sale at retail, is valid unless the property in value exceeded the valid debts intended to be secured. *Rainwater-Boogher Hat Co. v. Weaver*, 23 S. W. 914; 4 C. A. 594; *Baldwin v. Peet*, 22 T. 720, 75 Am. Dec. 806; *Simon v. Ash*, 1 C. A. 202, 20 S. W. 719. See *Gregg v. Cleveland*, 82 T. 187, 17 S. W. 777.

A creditor may lawfully pay his debtor a sum of money in consideration of a sale of goods not exceeding in value the amount of the debt. *Phillips v. Schoellkopf* (Sup.) 29 S. W. 645, citing *Oppenheimer v. Halff*, 68 T. 409, 4 S. W. 562.

Where the mortgagee is shown to be the trustee of the mortgagor for the residuary interest, a finding that the mortgage was void because of agreement to purchase at a reduced price held sustained by the evidence. *Frost v. Mason*, 17 C. A. 465, 44 S. W. 53.

One who conspires with a debtor to defraud his creditors, and purchases his property from a trustee for less than it is worth, is liable to the creditors for the difference between the value and the amount paid, though the trustee has applied the proceeds to the payment of bona fide claims. *Kosminsky v. Hamburger*, 21 C. A. 341, 51 S. W. 53.

Where a husband, fearing alimony would be decreed against him in a divorce suit, conveyed land to be held for him, a reconveyance would not be denied; it not appearing that alimony was ever decreed. *Rivera v. White*, 94 T. 538, 63 S. W. 125.

That a conveyance was in trust held not proven by grantor's admissions. *Moulton v. Sturgis Nat. Bank* (Civ. App.) 65 S. W. 1114.

A grantor executing a deed to defraud his creditors may not create a trust in favor of a third person. *Roth v. Schroeter* (Civ. App.) 129 S. W. 203.

A conveyance by a trustee under a secret trust to the beneficiary held not fraudulent as against creditors of the trustee, unless the beneficiary knowingly permitted the trustee to represent that he was the owner of the property, inducing creditors to extend credit on the faith of it. *Stone v. Stitt* (Civ. App.) 132 S. W. 862.

Where a person makes an absolute conveyance of land without consideration, in fraud of his creditors, though with an understanding that it is to be held only in trust, neither he nor his heirs can enforce the trust against the grantee nor a purchaser from the grantee. *Scarborough v. Blount* (Civ. App.) 154 S. W. 312.

The rights of a purchaser of the equity of redemption for a valuable consideration from the mortgagor would not be affected by any illegality in an agreement theretofore made by the mortgagor with a creditor to convey his property to the creditor, who agreed to pay the surplus after paying the debts to mortgagor's wife. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

10. Right of debtor to prefer creditor.—A debtor, though in failing circumstances, has the right, in making an assignment of his property for the benefit of his creditors,

to prefer creditors, if done bona fide; and if the purpose is to pay honest debts, either by a general distribution or by expressing preference among his creditors, it will be valid. *Baldwin v. Peet*, 22 T. 717, 75 Am. Dec. 806; *Blum v. Simpson*, 71 T. 623, 9 S. W. 662.

An insolvent debtor has the right to pay one or more of his just debts with money or property, conveyed at a fair price, either to the debtor or to some other person who, by the terms of the sale, is bound to see, and does see, that the money or property is appropriated for that purpose. The fact that a preference is thus designedly given, and the effect of which is to delay, or even defeat, other creditors in the collection of their debts, does not render such payment or conveyance fraudulent and void. But if the purpose of the debtor, within the knowledge of such creditor, is to secure to himself an interest in the property so conveyed, or to place the same, or any part thereof, beyond the reach of his creditors, the payment or conveyance is absolutely void. *Lewy v. Fischl*, 65 T. 311; *Schneider v. Sansom*, 62 T. 201, 50 Am. Rep. 521; *Hamilton v. East Texas Ins. Co.*, 1 App. C. C. § 448; *Schneider v. Bullard*, 1 App. C. C. § 1185; *Gamble v. Talbot*, 2 App. C. C. § 731; *Pessels v. Schwab Clothing Co.* (Civ. App.) 25 S. W. 814; *Florsheim Bros. v. Watterman*, 10 C. A. 102, 30 S. W. 505.

A debtor has the legal right to pay one or more of his just debts with money or property (*Sweeney v. Conley*, 71 T. 543, 9 S. W. 548; *Willis v. Whitsitt*, 67 T. 673, 4 S. W. 253), though he may thereby withdraw from the reach of other creditors property which they might subject to the payment of their debts equally just; and for this purpose the debtor may convey or sell the property at a fair price to some person who, by the terms of the sale, is bound to see, and does see, that the money is at once appropriated to that purpose. And so a bona fide creditor can, by agreement, acquire a valid lien upon property of an insolvent debtor. The intent to hinder, delay or defraud creditors cannot exist where the purpose is to appropriate the property of the debtor or the proceeds of its fair value to the payment of one or more just debts, in a manner and at a time satisfactory to the creditor to be paid. Knowledge by the purchaser that the debtor intended, after paying certain debts, to apply the residue of the property to the payment of other just debts, even by way of preference, would not vitiate the sale. *Ellis v. Valentine*, 65 T. 532; *Numsen v. Ellis*, 3 App. C. C. § 135; *Bailey v. Crittenden*, 3 App. C. C. § 179; *Williams v. Perry*, 3 App. C. C. § 210.

A sale by a failing debtor for the purpose of applying the proceeds of sale to the payment of his debts is not fraudulent as to creditors not sharing in the proceeds of such sale. *Sweeney v. Conley*, 71 T. 543, 9 S. W. 548; *Willis v. Whitsitt*, 67 T. 673, 4 S. W. 253.

An insolvent debtor may pay certain of his creditors in full, and leave others unpaid, and may sell property for such purpose. *Rogers v. Driscoll* (Civ. App.) 125 S. W. 599.

11. — **Individual debt of partner.**—The preference of the individual debt of a partner by the conveyance of both partners of the firm assets, they being insufficient to satisfy all the firm creditors, is fraudulent as to the latter. *Bloch v. Spruance*, 12 C. A. 309, 33 S. W. 1002.

12. — **Sureties.**—Sureties may assume the debt of their principal and take property at a reasonable price whether principal be solvent or insolvent. *Traders' Bank v. Clare*, 76 T. 47, 13 S. W. 183.

A failing debtor may protect his surety by a transfer of goods reasonably proportioned to the amount of the debt. *Frees v. Baker*, 81 T. 216, 16 S. W. 900, 13 L. R. A. 340; *Keating Imp. & Mach. Co. v. Terre Haute C. & B. Co.*, 11 C. A. 216, 32 S. W. 556. The natural and ordinary result of a conveyance of property by an insolvent debtor for negotiable promissory notes is to withdraw it from the reach of creditors—is to hinder and delay creditors. *Blum v. McBride*, 69 T. 60, 5 S. W. 641.

13. — **Mortgages and other transfers as security.**—A creditor may in good faith secure his debt from a failing or insolvent debtor, although his mortgage may delay and hinder other creditors in the collection of their debts. *Ellis v. Valentine*, 65 T. 547; *Rider v. Hunt*, 6 C. A. 243, 25 S. W. 314; *Kraus v. Haas*, 6 C. A. 665, 25 S. W. 1025; *Haas v. Kraus*, 27 S. W. 256, 86 T. 687; *Refining Co. v. Harrison*, 9 C. A. 141, 29 S. W. 500; *Wood v. Castlebury* (Civ. App.) 34 S. W. 653.

An insolvent debtor has the right to transfer a debt due himself as a collateral to secure his debt to another, and a reservation to himself in the transfer of any balance that may remain after the satisfaction of his own debt does not render the transfer fraudulent. *McClure v. Sheek's Heirs*, 68 T. 426, 4 S. W. 552.

Mortgagees as well as purchasers are protected. *Hardware Co. v. Kaufman*, 77 T. 138, 8 S. W. 283. See *Steffan v. Bank*, 69 T. 517, 6 S. W. 823; *McKamey v. Thorp*, 61 T. 648; *Shoe Co. v. Mars*, 82 T. 493, 17 S. W. 370; *Rives v. Stephens* (Civ. App.) 28 S. W. 707.

A mortgage by an insolvent debtor to creditors to secure an actual indebtedness and an additional sum advanced is fraudulent as to other creditors. *Wallis v. Adoue*, 76 T. 118, 13 S. W. 63.

A mortgage with power to sell is not void as to a creditor by reason of a direction that the sales must be made in regular course of business. *Simon v. McDonald*, 85 T. 237, 20 S. W. 52.

A deed of trust for the benefit of creditors is not void as to bona fide creditors, though fraudulent as to others. *Hamilton-Brown Shoe Co. v. Lastinger* (Civ. App.) 26 S. W. 924.

A mortgage executed to secure the payment of a note in consideration of an extension of time is supported by a valuable consideration, and is superior to the equitable rights of another in the mortgaged property not known to the mortgagee. *Halbert v. Paddleford* (Civ. App.) 33 S. W. 592.

Trust deed for creditors held not fraudulent on its face. *Moore v. Blum* (Civ. App.) 40 S. W. 511.

Trust deed of firm property to secure debt of existing firm and of a prior firm held not void as in fraud of creditors. *Bell v. Beazley*, 13 C. A. 639, 45 S. W. 401.

A deed of trust for creditors not under general assignment law held fraudulent in requiring creditors in a certain class to release their claims in full. *Temple Grocer Co. v. Clabaugh*, 18 C. A. 655, 45 S. W. 482.

Acceptance of a deed of trust for certain creditors by one not participating in the fraudulent intent with which it was executed held to make it a lien to secure the debt of such creditor. *Sutton v. Simon*, 91 T. 638, 45 S. W. 559.

Terms of a mortgage to secure creditors considered, and held not fraudulent as to creditors whose claims were not secured thereby. *Fry v. Hawkins* (Civ. App.) 45 S. W. 621.

Where a mortgage given by husband and wife was valid, it was immaterial to the husband's creditors whether a deed under which the wife claimed to have derived sole title from the husband was fraudulent. *Avery v. Popper* (Civ. App.) 45 S. W. 951.

A mortgage to secure a valid debt held not fraudulent, though the mortgagee knew that the debtor's motive was to secure him in preference to other creditors. *Cameron v. Cates* (Civ. App.) 46 S. W. 398.

A conveyance by an insolvent debtor to secure creditors, where there is one preferred bona fide accepting creditor, is not illegal, though the other parties intended to defraud the nonpreferred creditors. *Cleveland v. People's Nat. Bank* (Civ. App.) 49 S. W. 523.

That insolvent tenant mortgaged his property to secure future rent and payment of debts held not to make landlord liable as garnishee to tenant's creditors. *Mayer v. Templeton* (Civ. App.) 53 S. W. 68.

Deed of trust preferring certain creditors, made with intent to delay other creditors, will be enforced for benefit of creditors without knowledge of such intent. *Wade v. Odle*, 21 C. A. 656, 54 S. W. 786.

Property conveyed by deed preferring creditors being less than the amount of debts secured, an attaching creditor cannot complain of provision in deed tending to hinder unsecured creditors, the preferred creditors being innocent of fraud. *Wade v. Odle*, 21 C. A. 656, 54 S. W. 786.

A mortgage to secure a fictitious debt, executed by an insolvent mortgagor with the intent to hinder other creditors, with the mortgagee's knowledge, held void as against the mortgagor's creditors. *Watts v. Dubois* (Civ. App.) 66 S. W. 698.

A mortgage in good faith on firm property to secure a firm debt and an individual partner's debt held valid, though the firm was insolvent. *Id.*

Where a chattel mortgage was given to secure a present debt, a subsequent oral agreement that it should cover future advances held void as to creditors of the mortgagor. *F. Groos & Co. v. First Nat. Bank* (Civ. App.) 72 S. W. 402.

If the debt which is the subject of the security is a valid and subsisting debt and a bona fide transaction, evidenced by a note, then the fact of executing a mortgage intended by the parties as security is not sufficient to make the mortgage void as to creditors, especially where there had been an agreement in advance of the note for the security. *Hudson v. Childree* (Civ. App.) 156 S. W. 1154.

14. **Preference of wife.**—An insolvent debtor may prefer a creditor, and even though the creditor preferred be his wife the transaction is valid if open and made for the bona fide purpose of paying a debt. *Cox v. Miller*, 54 T. 16; *Weir Plow Co. v. Carroll*, 4 App. C. C. § 178, 15 S. W. 123; *Bowie v. Hendrick* (Civ. App.) 35 S. W. 317; *Jacobs v. Womack* (Civ. App.) 26 S. W. 436.

The rule that the debtor can prefer a creditor applies where the wife is the creditor of the husband. *Thompson v. Hervey*, 2 App. C. C. § 506.

An insolvent husband can prefer and pay the bona fide debt owing his wife over debts of other creditors. *Massie v. McKee* (Civ. App.) 56 S. W. 119.

15. **Consideration and payment of liabilities.**—As to payments to creditors, see *Smith v. Whitfield*, 67 T. 124, 2 S. W. 822; *Black v. Vaughn*, 70 T. 47, 7 S. W. 604; *Jackson v. Harby*, 70 T. 410, 8 S. W. 71; *Sweeney v. Conley*, 71 T. 543, 9 S. W. 548; *Ramsey v. Hurley*, 72 T. 194, 12 S. W. 56; *Davis v. Beason*, 77 T. 604, 14 S. W. 198; *Frees v. Baker*, 81 T. 216, 16 S. W. 900, 13 L. R. A. 340; *Ellis v. Valentine*, 65 T. 532; *La Belle Wagon Works v. Tidball*, 59 T. 291; *Schneider v. Sansom*, 62 T. 201, 50 Am. Rep. 521; *Moody v. Paschal*, 60 T. 483.

The taking of goods in payment of a just debt, reasonably sufficient to satisfy the debt, is not fraudulent. *Owens v. Clark*, 78 T. 547, 550, 15 S. W. 101; *Jacobs v. Totty*, 76 T. 348, 13 S. W. 372; *Lewy v. Fischl*, 65 T. 320; *Greenleve v. Blum*, 59 T. 126; *Ellis v. Valentine*, 65 T. 543; *Edwards v. Dickson*, 66 T. 614, 2 S. W. 718; *Harness Co. v. Schoelkopf*, 71 T. 422, 9 S. W. 336; *Allen v. Carpenter*, 66 T. 140, 18 S. W. 347; *Reynolds v. Weinman* (Civ. App.) 25 S. W. 33.

It is not improper for an insolvent merchant to either transfer his property itself in discharge of a debt or to sell it for money and pay the debt with the money, or to do both. It only prohibits him from disposing of it "with intent to delay," etc. *Sanger v. Colbert*, 84 T. 668, 19 S. W. 863.

A payment by a creditor to an insolvent debtor of a sum of money in consideration of personal property of value in excess of the debt renders the transaction fraudulent and void. See *Williams v. Moore*, 25 S. W. 1010, 6 C. A. 340, citing *Oppenheimer v. Half*, 68 T. 409, 4 S. W. 604; *Wallis v. Adoue*, 76 T. 118, 13 S. W. 63; *Gallagher v. Goldfrank*, 75 T. 563, 12 S. W. 964; *Seligson v. Brown*, 61 T. 180; *Elsner v. Graber*, 69 T. 222, 6 S. W. 560; *Traders' Bank v. Day*, 27 S. W. 265, 7 C. A. 569; *Ewing v. Teague* (Civ. App.) 29 S. W. 401.

H., being indebted, executed a chattel mortgage with power of sale to P. as trustee, conveying all his stock of goods, worth \$1,400, for the benefit of certain creditors, and preferring the bank of which P. was cashier. At the same time H. withdrew from the bank, with its consent, the balance of his deposit, \$223. It was held that a creditor may lawfully pay his debtor a sum of money in consideration of a sale to him by the latter of a stock of goods in payment of his debts, provided the goods so sold do not exceed in value the amount of such debt. On the other hand it is well established that if in such a case the value of the goods is greater than the original indebtedness the transaction is fraudulent. *Phillips v. Schoelkopf* (Sup.) 29 S. W. 645; *Id.* (Civ. App.) 29 S. W. 918.

Transfer by insolvent to one having knowledge thereof, in payment of an antecedent debt exceeding the value of the property transferred, is valid. *Texas Drug Co. v. Shields*, 20 C. A. 274, 48 S. W. 832.

Transfer by an insolvent of all his property in payment of a debt held fraudulent as to creditors. *Half v. Goldfrank* (Civ. App.) 49 S. W. 1095.

The invalidity of an insolvent's transfer of his property to a creditor in payment of the debt, the property largely exceeding the debt, held not dependent on the creditor's knowledge. *Id.*

A transfer in payment of a pre-existing debt, though the intent be to delay and defraud creditors, is valid. *Texas Drug Co. v. Baker*, 20 C. A. 684, 50 S. W. 157.

Where one of several creditors, knowing that the debtor is insolvent, accepts a conveyance from him of only so much property as is reasonably sufficient to discharge the debt, the conveyance is valid. *Broach v. Garth* (Civ. App.) 50 S. W. 594.

A party who took goods in satisfaction of a debt is not estopped, in a proceeding attacking the conveyance to him as fraudulent, from showing the real value of the goods. *Belknap v. Groover* (Civ. App.) 56 S. W. 249.

Where a wife with her husband's consent purchases her debtor's property and assumes payments of debts due other creditors to procure satisfaction of a debt to her, the conveyance is not fraudulent. *Hugo & Schmeltzer Co. v. Hirsch* (Civ. App.) 63 S. W. 163.

Where a debtor conveys all his property in payment of a debt, and the value of the property greatly exceeds the amount of the debt, the conveyance is fraudulent as against the other creditors of the debtor. *Clark v. Bell*, 40 C. A. 39, 89 S. W. 38.

A conveyance by the maker of a note in payment thereof held not fraudulent as to the maker's creditors, though the person to whom the conveyance was made had acquired the note to protect the maker from suit on it. *Riske v. Rotan Grocery Co.* (Civ. App.) 93 S. W. 708.

Plaintiff, having been induced to sell goods by a false statement of his vendee as to his financial condition, a large indebtedness to defendants having been omitted therefrom with their connivance, may avoid the sale and recover the property from defendants, to whom the goods were transferred in payment of this pre-existing indebtedness. *Parlin & Orendorff Co. v. Glover*, 45 C. A. 93, 99 S. W. 592.

That the value of property transferred by an insolvent to a preferred creditor exceeds the amount of the debt does not invalidate the transfer, if the value is reasonably proportioned to the debt. *Awalt v. Schooler* (Civ. App.) 131 S. W. 302.

Insolvent debtor held entitled to pay one creditor to the exclusion of others, provided the transaction be in good faith. *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

Where, prior to the levy of a writ of attachment against an insolvent debtor, he transferred the property to another creditor in satisfaction of a debt, and it did not appear that the property was reasonably worth more than sufficient for its satisfaction, the transferee was entitled to hold the property as against the attachment creditor. *Jackson v. Downs* (Civ. App.) 149 S. W. 286.

16. — **Moral obligation.**—Where defendant's mother conveyed land to him by gift in consideration that he should build thereon and live near her in her old age, and should reconvey if he did not do so, the moral obligation which defendant assumed was a sufficient consideration to protect a reconveyance, voluntarily made, from attack by his creditors as without consideration and fraudulent. *Paris Grocer Co. v. Burns*, 56 C. A. 223, 120 S. W. 552.

17. — **Transactions between husband and wife.**—Conveyance by partner on division of firm assets of his share to pay debt due his wife held not fraudulent as to creditors. *Bonds v. Eagle & Phoenix Mfg. Co.* (Civ. App.) 44 S. W. 539.

A transfer of property by an insolvent husband to his wife, to whom he is indebted, which is of no greater value than reasonably sufficient to pay her debt, is valid as against his other creditors. *Thompson v. Wilson*, 24 C. A. 666, 60 S. W. 354.

Conveyance of land from husband to wife in satisfaction of a bona fide debt held not fraudulent as against creditors of the husband. *McCrary v. Lutz*, 94 T. 650, 64 S. W. 780.

Bank stock, transferred by a wife to her husband to qualify him as a director, on the understanding that on his election he should retransfer the same, held not subject, after the retransfer, to garnishment by a creditor of the husband. *Citizens' Nat. Bank v. Sturgis Nat. Bank* (Civ. App.) 81 S. W. 550.

Settlement between a husband and wife under certain conditions held valid as against creditors. *Parks v. Worthington*, 101 T. 505, 109 S. W. 909.

The transfer of property by a debtor to his wife to pay an indebtedness to her is not fraudulent if no more property is transferred than is reasonably sufficient to satisfy the debt, as a failing debtor has the right to prefer one or more of his creditors to the exclusion of others. *Broussard v. Lawson* (Civ. App.) 124 S. W. 712.

18. — **Partial invalidity or illegality.**—Where the value of goods did not exceed the debt, exclusive of interest, in satisfaction of which they were transferred, it was immaterial, in attacking the transfer as fraudulent, what portion of the interest was usurious. *Belknap v. Groover* (Civ. App.) 56 S. W. 249.

19. **Fraudulent intent of debtor.**—Trust deed in favor of creditors to hinder and delay other creditors held not void as to creditors secured thereby whose claims were not fraudulent. *Galveston Dry-Goods Co. v. Blum*, 23 C. A. 703, 57 S. W. 1121.

A transfer of property from debtor to creditor is not invalidated by the mere fact that it is made in order to defeat another creditor in the collection of his claim. *Moore v. Robinson* (Civ. App.) 75 S. W. 890.

A conveyance of real estate, unless made with the intent of placing the same beyond the reach of the creditors of the grantor, is not fraudulent as to subsequent creditors. *Searcy v. Gwaltney Bros.*, 36 C. A. 158, 81 S. W. 576.

20. — **Knowledge or notice of intent and participation therein.**—When property is purchased for a valuable consideration from an insolvent debtor, and the conveyance is attacked as fraudulent by a creditor, it devolves upon him to prove that the conveyance was made by the vendor with a fraudulent intent, and that this intent was known to the purchaser. But when the conveyance is made to a third party for the benefit of certain preferred creditors, it is then immaterial whether this intent was known to either the trustee or the beneficiaries, and if the deed was executed with the intent to delay,

hinder or defraud creditors, it is void. *Simon v. Ash*, 1 C. A. 202, 20 S. W. 719, approving *Baldwin v. Peet*, 22 T. 710, 75 Am. Dec. 806.

If the sale be made with the intent on the part of the seller to hinder, delay or defraud creditors, and that intent was known to the purchaser, or could have been known by the use of diligence, the sale is void, though made for good and valuable consideration. The word "notice" includes every fact which the purchaser could have ascertained by a proper use of the knowledge he actually possessed. *Traylor v. Townsend*, 61 T. 144; *Wright v. Lynn*, 16 T. 34; *Mills v. Howeth*, 19 T. 259, 70 Am. Dec. 331; *Humphries v. Freeman*, 22 T. 45; *Weisiger v. Chisholm*, 28 T. 780; *Blum v. Simpson*, 66 T. 84, 17 S. W. 402; *Allen v. Carpenter*, 66 T. 138, 18 S. W. 347.

The creditor may receive payment of an honest debt in property of his debtor at a fair valuation, though he may know at the time that the debtor's intent in making the payment is, and the necessary effect of his act will be, to place the property beyond the reach of other creditors. *Lewy v. Fischl*, 65 T. 311; *Greenleve, Block & Co. v. Blum*, 59 T. 124; *La Belle Wagon Works v. Tidball*, 59 T. 291; *Schneider v. Sansom*, 62 T. 201, 50 Am. Rep. 521; *Iglehart v. Willis*, 58 T. 306; *Blum v. Welborne*, 58 T. 157; *Keating v. Vaughn*, 61 T. 518; *Lambeth v. McClinton*, 65 T. 108; *Allen v. Carpenter*, 66 T. 138, 18 S. W. 347; *Smith v. Whitfield*, 67 T. 124, 2 S. W. 822; *Thompson v. Hervey*, 2 App. C. C. § 506; *La Belle v. Tidball*, 69 T. 161, 6 S. W. 672; *Elser v. Graber*, 69 T. 222, 6 S. W. 560.

A sale by a debtor for the purpose of defrauding his creditors is void when his vendee had notice of facts sufficient to put a man with ordinary prudence upon notice of the purpose of the vendor. *Blum v. Simpson*, 71 T. 628, 9 S. W. 662.

A purchaser from a failing debtor who sold in fraud of his creditors, in order to hold the property must show that he, having no notice of the fraud, paid cash or had given his negotiable notes for the consideration. *Tillman v. Heller*, 78 T. 597, 14 S. W. 700, 11 L. R. A. 628, 22 Am. St. Rep. 77.

It being shown that a valuable consideration was paid, the creditor must show that the purchaser had actual or constructive knowledge of the fraudulent intent. *Le Page v. Slade*, 79 T. 473, 15 S. W. 496.

A conveyance to secure a bona fide debt is invalid if made with a fraudulent intent and the creditor participates in such intent. *Mixon v. Symonds*, 21 S. W. 772, 2 C. A. 629; *Stuart v. Smith* (Civ. App.) 21 S. W. 1026.

Purchase of property of debtor by creditor to amount of debt held valid though purchaser may have had knowledge of intent of debtor to hinder other creditors. *Head v. Bracht* (Civ. App.) 40 S. W. 630.

Purchaser from insolvent will be protected unless he knew of fraudulent intent. *Wofford v. Farmer*, 90 T. 651, 40 S. W. 788; *Id.* (Civ. App.) 40 S. W. 739; *Hillboldt v. Waugh*, 47 S. W. 829.

A purchase from an insolvent held not fraudulent though purchaser knew of insolvency, where he did not know of any intent to defraud creditors though the sale was on credit. *Ligon v. Tilman* (Civ. App.) 43 S. W. 1069.

It is not the duty of a buyer, who knows that the seller is indebted to a third person, to see that the proceeds of the sale are used in paying such third person. *Ellis v. Hudson* (Civ. App.) 44 S. W. 550.

Evidence held to support a finding that a transfer by a merchant of his stock in trade to a corporation organized by him was fraudulent, and that the corporation was a party to the fraud. *Holloway Seed Co. v. City Nat. Bank* (Civ. App.) 47 S. W. 77.

An instruction that if the purchaser's only purpose in taking the transfer was to collect his debt, it was valid though the debtor intended to defraud other creditors, was faulty as omitting to charge that the purchaser must have no notice of the debtor's intent. *Koch v. Bruce*, 20 C. A. 634, 49 S. W. 1101.

Intent to aid an insolvent debtor in hindering creditors will not invalidate a transfer of personalty in settlement of a bona fide debt, if no excess of property is received. *Garrity v. Rankin* (Civ. App.) 55 S. W. 367.

A mortgage to secure a bona fide debt, executed by an insolvent mortgagor with intent to hinder his creditors, held valid, unless the mortgagee participated in the fraudulent intent. *Watts v. Dubois* (Civ. App.) 66 S. W. 698.

Wife held not charged with notice of fraudulent character of deed of trust executed by her son, by reason of knowledge in her husband. *M. A. Cooper & Co. v. Sawyer*, 31 C. A. 620, 73 S. W. 992.

The purchase by a creditor of property from an insolvent debtor with knowledge of the insolvency is not fraudulent as to other creditors by reason of the debtor's intent to defraud them, in the absence of participation by the purchasing creditor in such fraudulent intent. *Sparks v. Ponder*, 42 C. A. 431, 94 S. W. 428.

A sale made with the intention of defrauding creditors held invalid against them if the vendee knew of such intent, or had constructive notice thereof. *Baze v. Island City Mfg. Co.* (Civ. App.) 94 S. W. 460.

An attachment against grantor held to afford no evidence against grantee of the indebtedness, and, without further proof, the party asserting it does not put himself in a position to attack the conveyance as fraudulent. *Parks v. Worthington*, 101 T. 505, 109 S. W. 909.

Rule as to validity of transfers by insolvents to preferred creditors where such creditor acts in good faith, stated. *Awalt v. Schooler* (Civ. App.) 131 S. W. 302.

Where a mother furnished the money for the purchase of real estate, the legal title to which was taken in the name of her son, a conveyance by him to his mother before any creditor of the son had attached the property would not be set aside as against creditors, unless it appeared that the mother knowingly permitted the son to represent that he was the owner of the property, and thereby caused creditors to extend credit to him on the faith of his ownership. *Stone v. Stitt* (Civ. App.) 132 S. W. 862.

Mere knowledge of indebtedness and even of insolvency will not render a sale void as to creditors, unless the purchaser had notice of a fraudulent intent on the part of the debtor to hinder, delay, or defraud his creditors, or knowledge of such facts as would put a reasonably prudent man upon inquiry, under this article. *McIlroy v. Stone* (Civ. App.) 143 S. W. 944.

A purchaser of goods from an insolvent debtor, though he pays full value, if chargeable with notice of the seller's fraudulent intent, acquires no title as against creditors, and such creditors may proceed by execution, attachment, or garnishment. *McIntosh & Warren v. Owosso Carriage & Sleigh Co.* (Civ. App.) 146 S. W. 239.

Sales by an insolvent debtor to hinder, delay, and defraud creditors, when the intent could be known by the purchaser by the exercise of ordinary diligence, even though he paid a consideration, are void as to creditors of the vendor. *Whitesides v. Bacon* (Civ. App.) 150 S. W. 301.

An insolvent debtor may transfer property to a creditor in payment of the debt, provided the creditor receiving the property acts in good faith, and takes the same for the sole purpose of collecting a bona fide debt, though the effect of the transaction is to hinder and delay other creditors, or to prevent them from collecting their debts. *Id.*

21. Persons entitled to assert invalidity in general.—A person who is not a creditor or a subsequent purchaser without notice cannot question the validity of a conveyance made by one who afterwards becomes his debtor. *De Garza v. Galvan*, 55 T. 53.

A creditor holding a debt discharged in bankruptcy, upon which he afterwards recovered judgment, cannot attack for fraud a conveyance made prior to the judgment. *Hodges v. Taylor*, 57 T. 196; *Riggs v. Hanrick*, 59 T. 570; *Cason v. Chambers*, 62 T. 305.

Pending a suit for divorce, the wife, when asserting her claim for alimony, is, within the meaning of the statutes prohibiting fraudulent conveyances, to be deemed a creditor. *Lott v. Kaiser*, 61 T. 665. See *Murray v. Murray*, 66 T. 207, 18 S. W. 506.

L., for the purpose of defrauding his creditors, conveyed to B. certain property subject to execution, and which was afterwards sold under a judgment against L. In consideration of the sale B. executed to L. his note for the purchase money. Before its maturity, the note having been lost, L. transferred his interest to M., who was not shown to have paid value therefor, and he, after the maturity of the lost note, transferred it to S. Held, in an action by S. against B. on the note, the latter could set up the fraudulent character of the transaction in bar. *Davis v. Sittig*, 65 T. 497.

Legal proceedings properly instituted, but having the effect of hindering and delaying other creditors, are not voidable by them. *Martin-Brown Co. v. Perrell*, 77 T. 199, 13 S. W. 975.

Creditors held to be estopped from attacking a transfer of corporate property as fraudulent, where they have acquiesced in such transfer. *Tenney v. Ballard, Webb & Burnette Hat Co.*, 17 C. A. 144, 43 S. W. 296.

A conveyance made with intent to defeat a certain creditor will be set aside in his favor, whether the claim existed at the time of the conveyance or was then merely in contemplation. *Tucker v. Pennington* (Civ. App.) 45 S. W. 313.

Lands fraudulently conveyed can be subjected to such part of judgment against grantor as represents indebtedness prior to the lien. *Heath v. First Nat. Bank*, 19 C. A. 63, 46 S. W. 123.

Where a defendant in a divorce suit voluntarily conveys his real estate, and one knowing all the facts takes it as security for debts owing by defendant, such conveyance held fraudulent as to the claim of the wife for alimony. *Schultze v. Schultze* (Civ. App.) 66 S. W. 56.

Whether the transaction between a debtor, who executed a deed for the benefit of creditors, and an alleged creditor, was fraudulent, held immaterial to one whose claim against the debtor was fraudulent. *Baum v. Corsicana Nat. Bank*, 32 C. A. 531, 75 S. W. 863.

One not a creditor at the time of a conveyance held not entitled to attack it as fraudulent. *Riske v. Rotan Grocery Co.*, 37 C. A. 494, 84 S. W. 243.

The courts have construed the word "void" used in this article as meaning "voidable." A deed made to defraud creditors is valid between the parties to the deed, and can only be set aside by creditors or purchasers intended to be defrauded. The land conveyed by such deed cannot be recovered from the grantee, without first obtaining a decree annulling such deed in a suit brought for that purpose. *Rutherford v. Carr* (Civ. App.) 84 S. W. 660.

Purchaser of land at execution sale, title to which had been conveyed by judgment debtor to a stranger prior to sale and was of record at the time, held not entitled to defeat record owner's title. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

Where a debtor transfers property with intent to shield it, future, as well as existing, creditors, may have the conveyance set aside as fraudulent. *Maffi v. Stephens*, 49 C. A. 354, 108 S. W. 1008.

One having a claim for unliquidated damages, as for slander, held entitled to protection against fraudulent conveyances. *Robertson v. Hefley*, 55 C. A. 368, 118 S. W. 1159.

22. Validity as between original parties or their representatives.—A conveyance void as to creditors is valid against the vendor, his heirs and representatives. *Danzev v. Smith*, 4 T. 411; *Epperson v. Young*, 8 T. 135; *McClenny v. Floyd*, 10 T. 159; *Wilson v. Trawick*, 10 T. 428; *Hoeser v. Kraeka*, 29 T. 450; *Seligman v. Wilson*, 1 App. C. C. § 896; *Stephens v. Adair*, 82 T. 214, 18 S. W. 102; *Farrell v. Duffy*, 5 C. A. 435, 27 S. W. 20; *Phillips v. Henry* (Civ. App.) 124 S. W. 184; *Emery v. Barfield*, 156 S. W. 311.

Where a deed was made to hinder and delay the vendor's creditors, the title passed to the vendee to be divested only by the creditors of the vendor, or innocent purchasers from him. *Robb v. Robb* (Civ. App.) 41 S. W. 92.

A conveyance sufficient to convey title cannot be attacked by the legal representatives of a grantor because it was made to defraud creditors. *William J. Lemp Brewing Co. v. La Rose* (Civ. App.) 50 S. W. 460.

One who has conveyed his property to another to hinder and delay his creditors cannot afterwards set up the statute of frauds in avoidance of the conveyance, in a suit by his grantee. *Shields v. Ord* (Civ. App.) 51 S. W. 298.

Nor can his wife, who has intervened in the action, making a claim of her separate property, set up the statute of frauds. Such claim can only be made by creditors of the grantor. *Id.*

Administrator cannot assail conveyance by intestate on ground that it was made when insolvent and in fraud of creditors. *Burges v. New York Life Ins. Co.* (Civ. App.) 53 S. W. 602.

Where a debtor conveyed land to defraud his creditors, his devisee cannot impeach such conveyance by proof of such fraud. *Hunter v. Magee*, 31 C. A. 304, 72 S. W. 230.

A deed fraudulent as to creditors held valid as against the grantor's heirs. *Davis v. Davis*, 44 C. A. 233, 98 S. W. 198.

An undisclosed intent of a grantor in a deed, fraudulent as against creditors, not to pass title thereby, held not to invalidate the deed as between the parties. *Id.*

An agreement whereby one party loans money, the lender intending to place such money beyond the reach of his creditors, and the borrower, with knowledge of such intent, agreeing to conceal the transaction, held illegal, and the notes invalid. *Smith v. Carey*, 50 C. A. 117, 110 S. W. 157.

Conveyance by debtor to defraud creditors held binding between the parties. *Robertson v. Hefley*, 55 C. A. 363, 118 S. W. 1159.

Neither one who executes a deed, nor his administrator, can question it on the ground that its purpose was to defraud creditors. *Phillips v. Henry* (Civ. App.) 124 S. W. 184.

A sale by plaintiff to defendant, and his contract in consideration, held binding on defendant, though plaintiff had previously made a fraudulent conveyance of the property to defendant. *Keith v. Aubrey* (Civ. App.) 127 S. W. 278.

A conveyance made by the grantor to defraud his creditors cannot be set aside at the suit of his heirs. *Roth v. Schroeter* (Civ. App.) 129 S. W. 203.

A husband could not impeach the validity of a deed by him to his wife by mere proof that he executed it to defraud creditors. *Brantley v. Brantley* (Civ. App.) 145 S. W. 1024.

Where a husband gives his wife certain horses and brands them with her recorded brand for the purpose of defrauding creditors, neither he nor his heirs can take advantage of his fraud and recover the title from her. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

Where a person conveys land by a deed absolute on its face and without consideration, in fraud of his creditors, although with an understanding that the land is only to be held in trust, neither he nor his heirs can enforce the trust against the grantee or a purchaser from the grantee with notice of the fraud; such conveyances being subject to impeachment only by subsequent creditors and purchasers without notice. *Scarborough v. Blount* (Civ. App.) 154 S. W. 312.

23. Purchasers from grantee.—See notes under Art. 6324.

Neither a fraudulent grantor nor his heirs can enforce a trust in favor of the grantor against a purchaser from the grantee. *Scarborough v. Blount* (Civ. App.) 154 S. W. 312.

24. Property purchased by debtor in the name of another.—A judgment creditor without lien can maintain suit to subject to his judgment land bought by the debtor, the deed for which was taken to another in fraud of creditors. *Arbuckle v. Werner*, 77 T. 43, 13 S. W. 963.

Where A. loans B. money to buy property, and the purchase is made for B., though title is taken in A.'s name for the purpose of protecting the property from B.'s creditors, the property belongs to B., and is subject to his debts. *Jones v. Meyer Bros. Drug Co.*, 25 C. A. 234, 61 S. W. 553.

25. Creditors.—Pending a suit for damages the defendant sold all of his property with the avowed purpose to avoid the payment of the judgment which might be rendered against him. Held, that the plaintiff in the suit was a creditor within the meaning of the statute; and the action can be maintained by such creditor purchasing at the sale under his judgment to cancel and declare void the conveyance made by the defendant in the suit to a third party with notice. *Cox v. Shropshire*, 25 T. 113; *Holden v. Mc-Laury*, 60 T. 228.

Pending a suit for divorce the wife, when asserting her claim for alimony is, within the meaning of the statute, to be deemed a creditor. *Lott v. Kaiser*, 61 T. 665.

The plaintiff in a judgment for damages for cutting and carrying away timber without the consent of the owner is a creditor within the meaning of the statute. *Cole v. Terrell*, 71 T. 549, 9 S. W. 668.

26. Subsequent creditors.—Right of creditor to attach goods fraudulently sold by debtor is limited to goods sold after the debt was contracted. *Bergson v. Dunham* (Civ. App.) 40 S. W. 17.

27. Nullity of transfer.—Finding that a chattel mortgage was made for the purpose of defeating a judgment creditor, and that the mortgagee had notice of such design, held sufficient to sustain a judgment refusing foreclosure. *Cates v. Riley* (Civ. App.) 55 S. W. 979.

As between the fraudulent vendee and the creditor the title remains with the debtor and the transaction is to be treated as if it had never been made and it is void as to creditors. *Rutherford v. Carr*, 99 T. 101, 87 S. W. 816.

28. Rights and liabilities of grantees.—In determining the liability of the purchasing creditor, in a suit by other creditors, if the purchase be deemed fraudulent, the value of the goods transferred in payment of the preferred claim at the time of their transfer and conversion is the measure of the preferred creditor's liability, and not the sum realized afterwards from their sale. *Oppenheimer v. Halff & Bro.*, 68 T. 409, 4 S. W. 562.

If property conveyed to hinder and defraud creditors be seized under legal process to satisfy the debt of the grantor, and it is sold for a grossly inadequate price, under irregular proceedings, the grantee can, by proper proceedings, have the sale set aside. The right of such grantee is subordinate only to that of the creditors, and his participation in the fraud does not place him beyond the pale of protection in reference to their illegal acts. *Miller v. Koertge*, 70 T. 162, 7 S. W. 691, 8 Am. St. Rep. 587.

So far as proceeds of a fraudulent conveyance go to purchase of other lands by the grantee, such lands can be subjected to debts of grantor. *Heath v. First Nat. Bank*, 19 C. A. 63, 46 S. W. 123.

A creditor held to have no cause of action against one who has converted property conveyed to him by the debtor in fraud of creditors. *William J. Lemp Brewing Co. v. La Rose* (Civ. App.) 50 S. W. 460.

A deed executed by an insolvent, without intent to defraud, for a consideration less than the market value, should be treated as a mortgage for the actual sum paid. *Schuster v. Farmers' & Merchants' Nat. Bank*, 23 C. A. 206, 54 S. W. 777.

Disbursements by fraudulent grantee cannot be recovered of creditor who procures conveyance to be set aside. *Cooper v. Friedman*, 23 C. A. 585, 57 S. W. 581.

A grantee of a bankrupt's land fraudulently conveyed held not entitled to an allowance for improvements thereon. *McWilliams v. Thomas* (Civ. App.) 74 S. W. 596.

Fraudulent grantees of land subject to constructive trust in hands of grantor held to take the land subject to the trust, so that a conveyance to an innocent purchaser rendered the fraudulent grantees liable for the value of the land to the cestui que trust. *Schneider v. Sellers*, 98 T. 380, 84 S. W. 417.

A bona fide purchaser for value held not chargeable with fraud, though the vendor was insolvent. *Kopperl v. Standard Distilling Co.* (Civ. App.) 119 S. W. 1169.

Garnishee held liable for value of piling received from third person to whom defendant had made a sham transfer. *Barnett & Record Co. v. Fall* (Civ. App.) 131 S. W. 644.

In action for conversion of goods taken under attachment against third person, whether transfer of land in another state was fraudulent as to creditors held immaterial; the question being whether goods taken in exchange belonged to attachment debtor or plaintiff. *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

In direct proceeding against purchaser of goods from an insolvent debtor with intent to defraud creditors, plaintiff cannot obtain a personal judgment unless he has obtained a lien upon such goods. *McIntosh & Warren v. Owosso Carriage & Sleigh Co.* (Civ. App.) 146 S. W. 239.

In direct proceeding against garnishee, held that judgment could not be rendered for the proceeds of goods sold by him as a trustee for the benefit of creditors where he purchased the goods from the debtor in good faith, and had none of the goods in his possession when the garnishment writ was served. *Id.*

Though defendant purchased the property of an insolvent with the intention of enabling him to defeat plaintiff's claim, yet where it has been resold and cannot be retaken by plaintiff, plaintiff cannot recover a personal judgment, under this article; the statute merely invalidating the sale and authorizing the creditor to seize the property. *May v. Merchants' & Planters' Nat. Bank of Mt. Vernon* (Civ. App.) 152 S. W. 1194.

29. **Reconveyance of property.**—The reconveyance of property held in trust is not fraudulent. *Peck v. Jones*, 10 C. A. 335, 30 S. W. 382. See *Bettes v. Weir Plow Co.*, 84 T. 543, 19 S. W. 705.

The moral obligation under which a fraudulent grantee stood held sufficient consideration to support a deed of reconveyance as against creditors of the grantee, who had not acquired liens. *Bicocchi v. Casey-Swasey Co.*, 91 T. 259, 42 S. W. 963, 66 Am. St. Rep. 875, reversing (Civ. App.) 40 S. W. 209.

Where the fraudulent grantee reconveyed to the grantor, held, that the latter was not estopped to assert title as against creditors of the fraudulent grantee, who gave the credit on the faith of the fraudulent grantee's ownership of the property. *Bicocchi v. Casey-Swasey Co.*, 91 T. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

30. **Assignments for creditors.**—See Title 9.

31. **Registration.**—See Title 118, Chapter 3.

32. **Redemption of incumbered property.**—Debtor, seeking to enforce right to redeem incumbered property bid in by secured creditor, as arising from creditor's estoppel, held not guilty of fraud toward other creditors, precluding exercise of right. *First Nat. Bank v. Moor*, 34 C. A. 476, 79 S. W. 53.

Debtor's intent, in arranging with creditor, secured by trust deed, to bid in property and hold it subject to debtor's right of redemption, to defraud other creditors, held not to prevent his enforcement of the agreement. *Id.*

33. **Rights of mortgagor's creditors.**—A designation to the agent of a mortgagee, of property covered by the mortgage, which remained in the mortgagor's possession commingled with other property, held to sufficiently identify such property as against creditors. *Avery v. Popper* (Civ. App.) 45 S. W. 951.

A creditor of a mortgagor of part of a herd of animals purchasing at his own execution sale is charged with notice of the mortgagee's right to designate which of the animals shall be subject to the lien. *Id.*

34. **Cancellation of fraudulent conveyance.**—A deed made to defraud creditors, which was never delivered, though recorded by one having no authority to do so, will be canceled at suit of administrator of the grantor dying in possession. *Blackman v. Schierman*, 21 C. A. 517, 51 S. W. 886.

35. **Remedies of creditor.**—A creditor may follow property conveyed in fraud of creditors rather than foreclose his lien on property taken in payment therefor. *Holloway Seed Co. v. City Nat. Bank* (Civ. App.) 47 S. W. 77.

The judgment creditor of a fraudulent vendor may sue to set aside the conveyance, or he may levy on the land and sell it for the payment of his debt, and in the latter case the purchaser at execution sale takes the title. *Rutherford v. Carr*, 99 T. 101, 87 S. W. 815.

Under the facts, held, that goods purchased by the vendee and paid for out of the proceeds of sale of the original goods could not be taken by a levy and sale under execution issued on a judgment against the vendor and in favor of a defrauded creditor. *Guyton v. Chasen*, 45 C. A. 354, 101 S. W. 290.

36. **Presumptions, burden of proof and admissibility of evidence.**—See notes under Art. 3687.

37. **Weight and sufficiency of evidence.**—Evidence held to show that certain deeds by debtors were not fraudulent as to creditor. *Duveneck v. Kutzer*, 17 C. A. 577, 43 S. W. 541.

Evidence held sufficient to show knowledge of the fraudulent intent of the mortgagor by the agent of mortgagees. *Frost v. Mason*, 17 C. A. 465, 44 S. W. 53.

Evidence concerning a sale from defendant considered, and sale held fraudulent, regardless of the value of the property. *Hogwood v. Brown* (Civ. App.) 45 S. W. 862.

Evidence held sufficient to support verdict that defendant was not indebted to decedent in any amount. *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

Evidence of good faith of conveyance held insufficient to warrant setting aside verdict of jury finding same fraudulent as to creditors. *Bruce v. Koch* (Civ. App.) 58 S. W. 189.

Evidence held insufficient to show a conveyance fraudulent as in anticipation of future indebtedness. *Moulton v. Sturgis Nat. Bank* (Civ. App.) 65 S. W. 1114.

Evidence held to sustain finding that deed to son was made in fraud of creditors. *Walters v. Cantrell* (Civ. App.) 66 S. W. 790.

In trespass to try title, evidence held to sustain a finding that a transfer of the land by a judgment debtor was fraudulent as against plaintiff. *Tinsley v. Corbett*, 27 C. A. 633, 66 S. W. 910.

In an action by a creditor to recover land claimed to have been fraudulently conveyed, facts held not to authorize an instruction that the sale was fraudulent as a matter of law. *Edwards v. Anderson*, 31 C. A. 131, 71 S. W. 555.

Evidence held to establish that an attempted sale of a merchant's stock of goods was fraudulent as against his creditors. *R. G. Blossman & Co. v. Friske*, 33 C. A. 191, 76 S. W. 73.

Evidence held sufficient to have sustained finding that agreement permitting debtor to redeem incumbered property was not in fraud of other creditors. *First Nat. Bank v. Moor*, 34 C. A. 476, 79 S. W. 53.

A sale of cotton held not fraudulent as to creditors of the vendor under the evidence. *Sparks v. Ponder*, 42 C. A. 431, 94 S. W. 428.

Under the facts held a conveyance was fraudulent. *Stitt v. Stone*, 47 C. A. 93, 103 S. W. 1192.

A recited consideration in comparison with value of land held so small as that it might well be held to furnish sufficient evidence of mala fides. *Parks v. Worthington*, 101 T. 505, 109 S. W. 909.

Where concert of action between an alleged creditor and the judgment defendant appears to defeat a prior deed by the judgment defendant as in fraud of creditors, there should be some further proof of the indebtedness than the judgment against defendant. *Id.*

Evidence in an action wherein plaintiffs attached land claimed to have been fraudulently conveyed to defendant debtor's wife and claimed by the debtor and his wife as a homestead held to sustain a verdict for defendants. *Gaar, Scott & Co. v. Burge*, 49 C. A. 699, 110 S. W. 181.

Fraud as to creditors is always difficult of proof by direct testimony, and circumstantial evidence may be resorted to. *Adams v. Hamilton*, 53 C. A. 405, 116 S. W. 1169.

Certain testimony of grantor held insufficient to show that the transaction was simulated, or that vendee should hold legal title in trust. *Robertson v. Hefley*, 55 C. A. 368, 118 S. W. 1159.

Evidence held to sustain a finding that a grantee of a debtor's land had no knowledge of the debtor's intent to defraud his creditors. *Rogers v. Driscoll* (Civ. App.) 125 S. W. 599.

Evidence held insufficient to show that an alleged fraudulent conveyance was made by a debtor for the bona fide purpose of paying his creditors. *Id.*

In trespass to try title, evidence held to show that plaintiff's grantor did not convey property to plaintiff with intent to hinder, delay, or defraud defendant, who held the property as an attaching creditor, under this article, and that plaintiff had no notice of the fraudulent intent of his grantor, if there was any such intent. *Folkes v. Wyatt* (Civ. App.) 126 S. W. 958.

Evidence in garnishment held to justify a finding that a sale by defendant to a third person was without consideration, and that the facts were known to the agent of the garnishee. *Barnett & Record Co. v. Fall* (Civ. App.) 131 S. W. 644.

Evidence in a suit involving right to sell land on execution held to sustain findings that there had not been a fraudulent conveyance. *Todd & Hurley v. Garner* (Civ. App.) 133 S. W. 314.

In an action to cancel a deed as in fraud of creditors, evidence held insufficient to show notice of grantor's alleged fraudulent intent. *Starkey v. H. O. Wooten Grocery Co.* (Civ. App.) 143 S. W. 692.

In an action to cancel a deed as in fraud of creditors, evidence held insufficient to show lack of consideration. *Id.*

Evidence, in an action to set aside a conveyance as in fraud of creditors, held sufficient to sustain a verdict for plaintiff. *McIlroy v. Stone* (Civ. App.) 143 S. W. 944.

Art. 3967. [2545] [2466] Voluntary conveyances.—Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors, unless it appears that such debtor was then possessed of property within this state subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers. [P. D. 3876, 3877.]

See *Crosby v. Houston*, 1 T. 203; *Fowler v. Stoneum*, 11 T. 478, 62 Am. Dec. 490; *Grumbles v. Sneed*, 22 T. 565; *Lafferty v. Murray*, 27 T. 372; *Evans v. Murray*, 27 T. 383; *Van Bibber v. Mathis*, 52 T. 406.

Transactions between husband and wife.—A deed from the husband conveyed property which the wife had attempted at a former time to convey without being joined by

him. Her conveyance recited a consideration of \$1,500 received by her, and this deed was referred to in a subsequent conveyance by the husband, although his deed recited only a nominal consideration. Held, in proceedings by a creditor attacking the deed from the husband, that prima facie it was based on a consideration deemed valuable in law. *Deutsch v. Allen*, 57 T. 89.

Where at the time of a gift by a husband to his wife the husband had lands subject to execution in excess of his indebtedness, such gift is valid. Nor can such gift be avoided by a subsequent creditor by merely showing that it was without consideration. *Terry v. O'Neal*, 71 T. 592, 9 S. W. 673.

Deed of gift from husband to wife held fraudulent as to community creditors. *New England Loan & Trust Co. v. Avery* (Civ. App.) 41 S. W. 673.

For a gift to a wife by improvements on her separate property with community money to be reached on judgment against the husband and another, it must be shown that judgment creditor was his creditor at time of gift, that the debt exists, and that the gift was fraudulent, all the judgment debtors being insolvent, and remedies at law exhausted. *Maddox v. Summerlin* (Civ. App.) 47 S. W. 1020.

Evidence held to show that a husband was insolvent at the time of a conveyance to his wife, in an action to subject the property to his debts. *Gonzales v. Adoue* (Civ. App.) 56 S. W. 543.

Facts held not to show that a creditor's indebtedness was a continuing debt, so as to entitle him to sue to set aside a voluntary conveyance by the debtor to his wife. *Gonzales v. Adoue*, 94 T. 120, 58 S. W. 951.

A warranty deed of land from a husband to his wife cannot be adjudged to be a conveyance in trust for his benefit, at the suit of a subsequent creditor, unless it is clearly shown that the terms of the deed do not express the real transaction and that the wife accepted the conveyance as in trust. *O'Neal v. Clymer* (Civ. App.) 61 S. W. 545.

Conveyance by an insolvent held not fraudulent as to plaintiff as a gift of property subject to insolvent's debts. *Moulton v. Sturgis Nat. Bank* (Civ. App.) 65 S. W. 1114.

Husband held not to have been indebted to his wife, and assignment of rent executed by him in trust for her benefit held void as to creditors. *Grevils v. Smith*, 29 C. A. 150, 68 S. W. 291.

An instruction that a husband's gift of exempt property to his wife is good, unless made with intent to defraud his creditors, held error. *McClelland v. Barnard*, 36 C. A. 118, 81 S. W. 591.

A creditor of a husband whose debt had been discharged in bankruptcy held not entitled to object that a subsequent gift of money by the husband to his wife was invalid. *Sparks v. Taylor* (Civ. App.) 87 S. W. 740.

A husband's conveyance to his wife, in consideration of love and affection, vested the legal title in her, subject to prior incumbrances and existing debts, if he was insolvent. *Parks v. Worthington* (Civ. App.) 104 S. W. 921.

Money saved by a wife from money allowed her by her husband for household expenses amounted to a gift from the husband as against his creditors. *Zuckerman v. Munz*, 48 C. A. 337, 107 S. W. 78.

A direct gift by a husband to his wife held not absolutely void because existing creditors of the husband will be without means to satisfy their claims. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

On the issue whether a gift by a debtor to his wife was made with the intent to defraud his creditors, evidence held not to show that he did not have other property remaining sufficient to satisfy his creditors, rendering the gift valid. *Id.*

Whether a debtor making a gift to his wife intended thereby to defraud his creditors depends on whether or not he had sufficient property remaining to satisfy his creditors. *Id.*

A bill of sale of corporate stock by a husband to his wife, made to defraud his creditors, and not in satisfaction of a valid debt, does not pass the title to the wife if she knew of his fraudulent purpose. *First Nat. Bank v. Thomas* (Civ. App.) 118 S. W. 221.

Where a husband and wife lived together, the fact that he retained possession of land which he conveyed to her is of little force in determining whether the transaction was simulated. *Robertson v. Hefley*, 55 C. A. 368, 118 S. W. 1159.

An agreement between husband and wife, whereby the wife shall have as her separate property certain cattle and their increase, to be branded as hers, cannot control the statute defining community property, and the agreement can be given no greater effect than to vest in the wife a separate right to all the cattle branded prior to the husband's failure, if any, to be possessed of sufficient property to pay existing debts, and the branding of cattle thereafter is as against existing creditors a gift only. *Cone v. Belcher*, 57 C. A. 493, 124 S. W. 149.

Where defendant conveyed property to another, for the purpose of having it conveyed to his wife, in order to prevent it from being subjected for his debts, his wife would hold the property in trust for defendant, even if it was conveyed in terms to her separate use. *Du Perier v. Du Perier* (Civ. App.) 126 S. W. 10.

Where a husband conveyed his homestead through another to his wife to prevent his creditors from attempting to subject it for debts, but did not intend to abandon his homestead, the husband's intention in conveying was not in fraud of creditors, and would not prevent him from recovering it from his wife as trust property. *Id.*

To enable third persons to attack a deed of gift from husband to wife on the ground that it was without consideration, they must have been creditors of the husband when the deed was executed. *Lane v. Kuehn* (Civ. App.) 141 S. W. 363.

Where a husband gave his wife title to personal property in fraud of his creditors, he could not recover title from her. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

Where an insolvent's wife had not conspired with her husband to conceal community funds invested in permanent improvements on her property, and had not contracted to pay for the improvements, she was not personally liable to his creditors to the amount of funds so invested. *Kane v. Ammerman* (Civ. App.) 148 S. W. 815.

Effect of gift by insolvent debtor.—A gift by an insolvent debtor is void as to prior creditors, but not necessarily so as to subsequent creditors. *Dosche v. Nette*, 81 T. 265, 16 S. W. 1013.

As to pre-existing debts, the gift is by the statute prima facie void, and the property is subject to the payment of the debts of the donor unless the donee should make it appear that he was, at the time the gift was made, possessed of property within this state subject to execution sufficient to pay his existing debts. *Maddox v. Summerlin*, 92 T. 483, 49 S. W. 1033.

A voluntary deed, made in contemplation of insolvency, but not recorded or delivered for more than a year, is fraudulent as to a creditor the debt to whom was contracted in the meantime. *Owen v. Foley*, 30 C. A. 86, 69 S. W. 811.

A voluntary conveyance is invalid against the grantor's creditors without reference to knowledge or want of it on the part of the grantee of the grantor's indebtedness. *Clark v. Bell*, 40 C. A. 39, 89 S. W. 38.

Under this article, a gift of land subject to vendor's lien notes given by the vendee is void as to the holder of the notes, in the absence of a showing that the purchaser had property remaining after the conveyance, sufficient to pay his debts. *Shannon v. Buttery* (Civ. App.) 140 S. W. 858.

Right of subsequent creditors to avoid gift.—One in possession of land under a parol gift, claiming it as his own, and who afterwards receives a deed for the same, cannot be affected by the claim of a creditor of the donor when the credit was extended after the date of the parol gift and after actual occupancy of the donee. *Willis v. McIntyre*, 70 T. 34, 7 S. W. 594, 8 Am. St. Rep. 574.

While a mere voluntary conveyance cannot be attacked by subsequent creditors, yet where such conveyance is shown to have been made with intent to defraud a creditor, such creditor can attack the conveyance, and on showing such fraud the conveyance will be set aside and the property subjected to the judgment. *Cole v. Terrell*, 71 T. 549, 9 S. W. 668.

Where a party, engaged in unlawfully cutting timber upon the lands of another, shows to have contemplated a continuance of such trespasses, makes a voluntary conveyance of all his property, such facts are sufficient to support a finding of the fraudulent intent, and to avoid the conveyance in favor of the owner of the land upon which such trespasses were committed. *Id.*

A trust conveyance by a husband and wife, though voluntary or made with intent to defraud the husband's existing creditors, cannot be impeached by subsequent creditors with record notice. *Monday v. Vance* (Civ. App.) 51 S. W. 346.

A deed of gift by an insolvent to his wife, fraudulent as to his creditors, is not fraudulent as to a subsequent creditor, unless made with a view of contracting the subsequent debt and intent to defraud such creditor. *O'Neal v. Clymer* (Civ. App.) 61 S. W. 545.

Where a husband purchased lots in the name of his wife, and for her benefit, and erected improvements thereon, his subsequent creditors could not sue to subject such property to the payment of the claims. *Kane v. Ammerman* (Civ. App.) 148 S. W. 815.

Right of agent to avoid gift.—An agent through whom a gift is being effectuated cannot, after title has vested in him for that purpose, have the gift declared void, where the effect would be to enable him to keep the property for himself. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

Art. 3968. [2546] [2467] Gift of goods, etc.—No gift of any goods or chattels shall be valid unless by deed or will, duly acknowledged or proven up and recorded, or unless actual possession shall have come to, and remained with, the donee or some one claiming under him. [P. D. 3876.]

What are "goods and chattels."—This article does not apply to an interest in remainder, etc., created by will, or deeds duly proved and recorded in other states, where the property was situated and by the laws of which the title had vested. *Lafferty v. Murray*, 27 T. 372; *Evans v. Murray*, 27 T. 383. See *Chevallier v. Wilson*, 1 T. 161; *Duffell v. Noble*, 14 T. 640; *Hilliard v. Frantz*, 21 T. 192.

Certificates of deposit of money in a bank are not "goods or chattels." They are choses in action. They are an evidence of incorporeal rights, and not in such action corporeal property. A gift of them is not within the meaning of this article. *Cowen v. First Nat. Bank*, 94 T. 547, 63 S. W. 533.

A father holding three notes made by his son, dictated a letter to the son stating that he had given the first note to a daughter, the second to another son, and the third to the son addressed, but this writing was not acknowledged or proven up and recorded. Held, that the words "goods and chattels" did not include choses in action, and that the writing, though not acknowledged or proven, was sufficient to constitute a valid gift of the note. *Schauer v. Von Schauer* (Civ. App.) 138 S. W. 145.

Requisites of gifts.—Where a letter from a son to his mother, referring to the collection of notes which he held against his sister, was so indefinite and unintelligible that it could not be determined from the instrument as it stood whether a gift was intended or whether the son merely gave directions concerning the collection, the instrument cannot be given a meaning by changing the words and punctuation marks. *Merchants v. Rogan* (Civ. App.) 150 S. W. 956.

Delivery.—This article indicates the exclusion of a symbolical delivery or a constructive possession, and the mere act of placing a brand on a calf is not sufficient to constitute a valid gift to an infant. *Love v. Hudson*, 24 C. A. 377, 59 S. W. 1128.

In marking and branding by a father for his minor children cattle which were running on the range with a large herd belonging to himself and others, there was all the delivery the nature of the property under the circumstances was capable of, and it was equivalent to an actual delivery, and nothing more is required by this article to sustain a parol gift. *Coke & Reardon v. Ikard*, 39 C. A. 409, 87 S. W. 869.

Possession.—The provision of the Revised Statutes requiring possession to accompany a gift of goods or chattels does not apply to a gift of a chose in action. *Lord v. New York Life Ins. Co.*, 27 C. A. 139, 65 S. W. 699.

A parol gift is void unless actual possession of the property comes to and remains with the donee. *Eldridge v. McDow*, 46 C. A. 270, 102 S. W. 435.

Under this article, and Art. 7160 providing that no cattle brands, except such as are recorded, shall be recognized as any evidence of ownership, no title passed to cattle which were branded with a peculiar brand by the owner pursuant to his express intention that they and their issue should belong to his niece where the latter never had actual possession of the cattle which continued to run on the donor's range and to be looked after by him, and the brand was not recorded. *Eldridge v. McDow* (Civ. App.) 132 S. W. 516.

Art. 3969. [2547] [2468] Loan of chattels.—Where any loan of goods or chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained for the space of two years without demand made and pursued by due process of law on the part of the pretended lender; or when any reservation or limitation shall be pretended to have been made of a use of property, by way of condition, reversion, remainder or otherwise in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers, of the persons aforesaid so remaining in possession, to be fraudulent within this chapter, and that the absolute property is with the possession, unless such loan, reservation or limitation of use of property were declared by will, or by deed or other instrument in writing, duly acknowledged or proved and recorded.

See *Hastings v. Kellogg* (Civ. App.) 36 S. W. 821.

Loan defined.—The provisions of this statute apply to loans, etc., only. A transaction which does not contemplate the return of specific property and that its use should be gratuitous is not a loan. *Templeman v. Gibbs*, 24 S. W. 792, 86 T. 358.

The word "loan" means a gratuitous bailment, only such creditors can invoke the statute as have acquired a lien on the particular property. *Hunstock v. Roberts* (Civ. App.) 65 S. W. 675.

The purpose of this article is to render chattels subject to it when possessed under the circumstances pointed out by it; and by "loan" is meant where the owner places some specific thing in the lands of a borrower to be used by him without compensation, but at some future time to be returned. *Woodward v. San Antonio Traction Co.* (Civ. App.) 95 S. W. 77, 78.

Law of limitation.—This article is a law of limitation as well as of registration, and the lender can recover the property by proceedings instituted within two years, as prescribed by the statute. *City National Bank v. Tufts*, 63 T. 113.

Application of article to liens reserved.—This article applies to loans of chattels exclusively and has no bearing upon liens reserved. *Eason v. Garrison & Kelly*, 36 C. A. 574, 82 S. W. 801.

Exception of property held under will.—This statute by its terms excepts property held under a will declaring the purpose of its use. Even if this were not true, it could not be given the effect to divest the principal of title to property held by an agent at the suit of the agent's creditors. The application of the statute is limited to the condition stated therein. *Cox v. Patten* (Civ. App.) 66 S. W. 64.

Possession by husband of wife's separate property.—The possession of the wife's separate property by the husband does not raise the presumption of ownership by him. *Gamble v. Dabney*, 20 T. 69. And see *Hendricks v. Snediker*, 30 T. 296; *Bradshaw v. House*, 43 T. 143. See *Grumbles v. Sneed*, 22 T. 565; *Arnold v. Beene*, 30 T. 13.

Effect of delay in collection of note.—Mere indefinite indulgence and delay in the collection by suit of dishonored paper is not a badge of fraud. *Banner v. Robinson* (Civ. App.) 34 S. W. 355; *Eason v. Garrison & Kelly*, 36 C. A. 574, 82 S. W. 800.

Allowing firm to deal with goods as its own.—The owner of a stock of goods intrusting it to a firm, and allowing it to deal with the goods as its own, held estopped as to creditors of the firm from claiming the goods. *Holder v. Shelby* (Civ. App.) 118 S. W. 590.

Art. 3970. [2548] Chattel mortgage void, when.—Every mortgage, deed of trust or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of the possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void. [Acts 1879, p. 60.]

Old Art. 2549 was same as old Art. 3327, and will be found as Art. 5654.

Mortgage distinguished from assignment.—Mortgage distinguished from an assignment. *Taylor v. Mo. Glass Co.*, 25 S. W. 466, 6 C. A. 337. See *National Bank v. Lovenberg*, 63 T. 506; *Duncan v. Taylor*, 63 T. 645.

Validity of mortgage in general.—When a mortgage of goods is executed with a secret agreement that the grantor should remain in the possession of the goods and sell them, and he did so remain in possession with the consent of the grantee, and they were by him exposed for sale, the instrument is within the prohibition. *National Bank of Texas v. Lovenberg*, 63 T. 506; *Duncan v. Taylor*, 63 T. 645.

A chattel mortgage of a stock of goods which by its terms provides that the mort-

gagor shall retain possession of them and expose and sell them at retail, replenishing the stock by purchase on credit from time to time from the mortgagee, and accounting to him for their cost and a former indebtedness, is as to creditors void. *Wilber v. Kray*, 73 T. 533, 11 S. W. 540. But it is not void as between the parties. *Brewing Ass'n v. Manufacturing Co.*, 81 T. 99, 16 S. W. 797.

This article does not apply to a contest between the parties to a mortgage in which other creditors have no interest. *Parker v. Bank* (Civ. App.) 27 S. W. 1071.

Purchase of entire stock.—This article is not applicable to a purchase of the dealer's whole stock in trade, such as lumber, where the purchaser assumes payment of a debt which is a charge on the dealer's property. *Continental State Bank of Beckville v. Trabue* (Civ. App.) 150 S. W. 209.

Mortgage of part of goods.—Mortgage of a part only of a stock of goods is fraudulent and void. *B. F. Avery & Sons v. Waples*, 19 C. A. 672, 49 S. W. 151.

Security for purchase price.—In a sale of goods by a manufacturer to a retail merchant by a written contract wherein it is stipulated that the goods remained the property of the manufacturer until settled for in the manner provided in the contract: Held, that the provisions of the above article do not apply to such goods. *Bowen v. Lansing Wagon Works*, 91 T. 385, 43 S. W. 872.

This article does not apply in a case where the retailer and wholesaler, shipper and buyer, agreed that the property should remain subject to the wholesaler's orders and continue to be his property until the purchase price was paid. *Mansur & Tebbetts Implement Co. v. Beer*, 19 C. A. 311, 45 S. W. 972.

Liens secured by manufacturer by mortgage on merchandise sold to merchant held not within purview of statute invalidating mortgages on merchandise daily exposed for sale. *Hall v. Keating Implement & Machine Co.*, 33 C. A. 526, 77 S. W. 1054.

When goods are sold, the reservation of title in the seller to secure purchase money constitutes a mortgage, but if sold with the understanding that the goods are to be exposed to sale in the regular course of business, and this is done, the mortgage is rendered void. *Wright v. Moline Plow Co.*, 40 C. A. 434, 90 S. W. 907.

Art. 3971. Merchandise, sales in bulk, void when, etc., unless, etc.—Any sale or transfer of any portion of a stock of merchandise, otherwise than in the ordinary course of trade in the usual and regular prosecution of the seller's or transferor's business, or a sale or transfer of an entire stock of merchandise in bulk, shall be void as against creditors of the seller or transferor, unless the purchaser or transferee shall, at least ten days before the sale or transfer, in good faith, make full and explicit inquiry of the seller or transferor as to the name and place of residence or place of business of each and all creditors of the seller or transferor, and the amount owing to each such creditor by the seller or transferor, and obtain from the seller or transferor a written answer to such inquiries, which answers shall be sworn to by the seller or transferor, and unless the purchaser or transferee, at least ten days before the sale or transfer, in good faith, notify or cause to be notified personally, or by registered mail, each of the seller's or transferor's creditors, of whom the purchaser or transferee has knowledge, of said proposed sale or transfer. [Acts 1909, p. 66.]

See *Nash Hardware Co. v. Morris*, 105 T. 217, 146 S. W. 874; *St. Louis S. W. R. Co of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

Construction.—This article gives no preference to any class of creditors, and provides no special remedy for the collection of debts, but leaves each creditor to pursue such course as he may elect; nor does it prefer wholesale merchants as creditors. *Nash Hardware Co. v. Morris*, 105 T. 217, 146 S. W. 874.

Where a trustee of a stock of goods belonging to an insolvent, preferring certain creditors to the exclusion of others, sold the stock, the sale was void under this article. *Terrell Grain & Mercantile Co. v. Young* (Civ. App.) 152 S. W. 671.

Constitutionality.—Under Const. art. 1, § 19, providing that no citizen shall be deprived of life, property, liberty, privileges, or immunities, except by due course of law, this article is invalid, unless it is a reasonable regulation in the exercise of the police power. *Nash Hardware Co. v. Morris*, 105 T. 217, 146 S. W. 874.

This article does not place unreasonable limitations on the power and rights of sellers of merchandise; but it is a reasonable regulation governing selling debtors, and is valid. *Id.*

Title of purchaser.—Under this article, assuming its validity, the purchaser of a dealer's entire stock in trade, as against the creditors of the seller, acquired no title to the goods in excess of the debts owing on the goods and paid by him. *McIntosh & Warren v. Owosso Carriage & Sleigh Co.* (Civ. App.) 146 S. W. 239.

Purchaser not personally liable.—See notes under Art. 3972.

Art. 3972. Purchaser conforming to provisions, not accountable.—Any purchaser or transferee who shall conform to the provisions of article 3971 shall not in any way be held accountable to any creditor of the seller or transferor for any of the goods, wares or merchandise

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that have come into the possession of said purchaser or transferee by virtue of such sale or transfer. [Id. sec. 2.]

See *Nash Hardware Co. v. Morris*, 105 T. 217, 146 S. W. 874.

Purchaser not personally liable.—A purchaser of a stock in bulk, without complying with the Bulk Sales Law, is not liable to a creditor who has not acquired a lien; no personal liability being created by either section 1 or 2 of such law. *Bewley v. Sims* (Civ. App.) 145 S. W. 1076.

Art. 3973. Not applicable in what cases.—Nothing in articles 3971 and 3972 shall apply to sales by executors, administrators, receivers or any public officer conducting a sale in his official capacity, nor to a sale or transfer of stocks of merchandise for the payment of bona fide debts, where all creditors share equally and without preference in the sale or transfer or the proceeds thereof. [Id. sec. 3.]

See *Nash Hardware Co. v. Morris*, 105 T. 217, 146 S. W. 874.

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TITLE 63

GAME, FISH, OYSTERS, ETC.

Chap.	Chap.
1. Game, Fish and Oyster Commissioner.	3. Game.
2. Fish, Oysters, etc.	

CHAPTER ONE

GAME, FISH AND OYSTER COMMISSIONER

Art.	Art.
3974. Office created.	3977. Oath and bond.
3975. Qualifications of.	3978. Seal.
3976. Office, where kept.	3979. General duties and powers.

Article 3974. [2508] Office created.—The office of game, fish and oyster commissioner is hereby created, and the governor is hereby authorized to appoint a competent person as game, fish and oyster commissioner for the state of Texas. [Acts 1895, p. 70.]

Art. 3975. [2509] Qualifications of.—The person appointed to the office of game, fish and oyster commissioner shall be a citizen of the United States and a resident of the state of Texas. He must be familiar with the habits of game, fish and oysters and have some knowledge of navigation. [Acts 1899, p. 312. Acts 1895, p. 70.]

Art. 3976. [2510] Office, where kept.—The game, fish and oyster commissioner shall have his office in the state capitol in the city of Austin, Texas, during the term of his office, which shall be for two years. [Acts 1911, p. 62, sec. 1.]

Explanatory.—Acts 1911, p. 62, sec. 1, amends Art. 2510 of Chapter 175 of the acts of the regular session of the twenty-sixth legislature, so as to read as above. Section 2 repeals laws in conflict, etc.

Art. 3977. [2511] Oath and bond.—The game, fish and oyster commissioner shall file with the secretary of state a good and sufficient bond, to be approved by the secretary of state, in the sum of ten thousand dollars, with two or more good and sufficient sureties, conditioned that he will faithfully perform the duties of his office; and he shall take the oath prescribed for sheriffs; and, when he shall have filed said bond and taken said oath, he shall enter upon the duties of said office. Said bond shall not be void on the first recovery, but may be sued on from time to time in the name of the state or any person injured until the whole amount has been recovered. [Acts 1895, p. 70.]

Art. 3978. [2512] Seal.—The said commissioner shall have a seal, consisting of a star with five points, together with the words "Game, Fish and Oyster Commissioner of Texas." [Acts 1895, p. 70.]

Art. 3979. [2513] General duties and powers.—The duties of the game, fish and oyster commissioner are the execution of the game, fish and oyster laws of this state. In the execution of these laws, he shall exercise the powers and authority given to sheriffs by the laws of this state. [Acts 1895, p. 70. Acts 1905, pp. 128–129.]

CHAPTER TWO

FISH, OYSTERS, ETC.

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| Art. | Art. |
| 3980. Public rivers, etc., property of state, etc.; under jurisdiction of commissioner, etc. | 4009. Weekly reports by deputies; with remittances; annual reports. |
| 3981. Private and public oyster beds defined. | 4010. Commissioner responsible for his deputies. |
| 3982. Riparian rights prescribed. | 4011. Fish and oyster fund. |
| 3983. Special tax on fish, oysters, etc., taken from public coast waters. | 4012. [Superseded.] |
| 3984. Registration of fishermen, etc., in coast waters; application; certificate; fees; marking boats, etc. | 4013. Fines distributed, how. |
| 3985. Permit to sell, with receipt of seizure and sale; proceeds how disposed of. | 4014. Disposition of funds collected by coast deputies. |
| 3986. License to catch or take fish, oysters, etc., prerequisites to issue of. | 4015. Compensation of commissioner. |
| 3987. Licenses to wholesale dealers in fish and oysters; definition. | 4016. Compensation of deputy commissioners. |
| 3988. Application; requisites, agreement for inspection, record, forfeiture, etc. | 4017. Fees of commissioner. |
| 3989. Issuance of license, requirements, fee. | 4018. Commissioners' court may appropriate money for stocking waters with fish; deputy for, etc. |
| 3990. Deposit of estimated amount of tax, etc. | 4019. Improving, etc., the natural oyster beds in Matagorda bay; expenditure authorized, provided, etc. |
| 3991. Location for planting oysters; who may obtain; application; fee. | 4019a. Seines, nets, etc.; inspection; tags, etc. |
| 3992. Examination of location; survey. | 4019b. Person leasing oyster claim, etc.; permission to seine for drum fish, etc.; duty of commissioner; payment to be made, etc.; penalty for violation. |
| 3993. Certificate; requisites; fee. | 4019c. Permission to dredge reef of oysters; duty of commissioner; payment to be made, etc. |
| 3994. Certificate to be filed and recorded, fee, evidence. | 4020-4021. [Repealed.] |
| 3995. Locator protected in possession. | 4021a. Laws repealed. |
| 3996. Location limited: foreign corporations excluded. | 4021b. What included within act, and under management, etc., of game, fish and oyster commission. |
| 3997. Owner of private location and assignee to keep stakes in place; may fence, provided. | 4021c. Certain fresh water lakes shall not be sold; open to public; proviso, etc. |
| 3998. Rents to be paid for locations; forfeitures, etc. | 4021d. Powers of commission; marl, sand, shells, mudshell, oyster beds and fishing waters. |
| 3999. Permit to gather seed oysters, to whom and by whom granted, etc.; on what beds, etc.; fees, etc. | 4021e. Marl, etc., shall not be purchased, taken, carried away, or disturbed, except, etc. |
| 4000. Duties of commissioner. | 4021f. Application to purchase or operate; permit; revocation; no special privilege or exclusive right. |
| 4001. Commissioner to keep record, to show what. | 4021g. Sale of marl, sand, shells or mudshell, when authorized; proceeds, how disposed of, etc. |
| 4002. Commissioner to keep accounts with locators. | 4021h. Commission may locate oyster beds and establish fish hatcheries. |
| 4003. Commissioner to make annual report to governor, to be printed, etc.; requisites; penalty. | 4021i. Permits to counties, cities, towns, etc. |
| 4004. Deputies in coast counties; special deputies over entire coast; appointment, powers. | 4021j. Taking away, disturbing, fishing or operating, etc., without permit misdemeanor. |
| 4005. Deputies in interior counties; appointment, powers, duties, charges. | 4021k. Sand may be taken from Galveston bay without payment, etc. |
| 4006. Qualifications of deputy fish commissioner, etc. | |
| 4007. Oath and bond of deputy commissioner, etc. | |
| 4008. Duties of deputy fish commissioner, etc. | |

Article 3980. Public rivers, etc., property of state, etc.; under jurisdiction of commissioner, etc.—All of the public rivers, bayous, lagoons, lakes, bays and inlets in this state and all that part of the gulf of Mexico within the jurisdiction of this state, together with their beds and bottoms, and all of the products thereof, shall be, continue and remain the property of the state of Texas, except so far as their use shall be permitted by the laws of this state. So far as this use shall relate to the fish and oyster industry, the state game, fish and oyster commissioner shall have jurisdiction and control thereof according to the authority

vested in him by the fish and oyster laws of this state. [Acts 1905, p. 129.]

Right to take oysters in public waters.—The right to take oysters in public waters of the state is not a privilege subject to the bestowal by the state on whom it pleases, but a public right of all the citizens. *Gustafson v. State*, 40 Cr. R. 67, 48 S. W. 518, 43 L. R. A. 615.

Ownership of fish in artificial lake.—Fish confined in an artificial lake belong to the owner of the land covered by the water in which they are found. *Fin & Feather Club v. Thomas* (Civ. App.) 138 S. W. 150.

Defendant held liable for the value of fish willfully brought through fish traps from a portion of an artificial lake belonging to plaintiff into the part belonging to defendant. *Id.*

Art. 3981. [2518/] Private and public oyster beds defined.—All oyster beds shall be public or private; all not designated private shall be public. All natural oyster beds and oyster reefs of this state shall be deemed public, and a natural oyster bed shall be declared to exist when as many as five barrels of oysters may be found therein within twenty-five hundred square feet of any position of said reef or bed; and any lands covered by water containing less oysters than the above amount shall be subject to location at the discretion of the game, fish and oyster commissioner, but this shall not apply to a reef or bed that has been exhausted within a period of eight years. [Acts 1907, p. 236. Acts 1899, p. 314. Acts 1895, p. 70.]

Art. 3982. [2518o] Riparian rights prescribed.—Whenever any creek, bayou, lake or cove shall be included within the metes and bounds of any original grant or location in this State, the lawful occupant of such grant or location shall have the exclusive right to use said creek, lake, bayou, or cove for gathering, planting or sewing oysters, within the metes and bounds of the official grant or patent of said land. Provided, that the fish and oyster commissioner may require the owner of oysters produced on such lands when offered for sale to make an affidavit that such oysters were produced on his land. No person shall locate water or ground covered with water for planting oysters along any bay shore in this state nearer than 100 yards from the shore. [Acts 1913, p. 297, sec. 1.]

Explanatory.—The title, enacting clause, and section of Acts 1913, p. 297, read as follows:

“An Act to amend articles 3982, 3983, 3984, 3986, 3987, 3988, 3990, 3992, 3995, 3998, 3999, 4004, 4005, 4006, 4008, 4009, 4013, 4014, 4016, 4019, and to repeal articles 4020 and 4021, of chapter 2, title 63, Revised Civil Statutes of Texas, so as to provide better protection of the fish and oyster industries of this state, prescribing riparian rights, the prerequisites to the issuance of license to catch fish, oysters, etc.; providing for examination of location, surveys, etc., permit to gather seed oysters and to whom and by whom granted, the distribution of fines collected and the disposition of funds, the size of the meshes of seines, nets, etc., and providing the prerequisites for permission to seine and conditions upon which permission may be granted to use dredges on reefs, providing for deputy fish and oyster commissioners and defining and describing certain duties of the game, fish and oyster commissioner and his deputies, and declaring an emergency.

“Be it enacted by the legislature of the state of Texas:

“Section 1. That articles 3982, 3983, 3984, 3986, 3987, 3988, 3990, 3992, 3995, 3998, 3999, 4004, 4005, 4006, 4008, 4009, 4013, 4014, 4016, 4019, of chapter 2, title 63 of the Revised Civil Statutes of Texas, 1911, be and the same are hereby amended so as to hereafter read as follows:”

Following section 1 appear 38 articles, numbered consecutively 3982 to 4019, both inclusive. Of the articles of the new act 3982 to 4011 both inclusive, correspond in subject-matter to the corresponding articles of the Revised Statutes; 4012 embraces the subject-matter of Arts. 4012 and 4013 of the Revised Statutes; 4013 embraces the subject-matter of Art. 4014 of the Revised Statutes; 4014 embraces the subject-matter of Art. 4015 of the Revised Statutes; 4015 embraces the subject-matter of Art. 4016 of the Revised Statutes; 4016 embraces the subject-matter of Art. 4018 of the Revised Statutes; and 4017, 4018, and 4019 introduce new matters.

If the title and the enacting clause is sufficient to supersede those articles of the Revised Statutes not specifically enumerated, all those articles are dispensed with, except 4017 and 4019 as to which there is no corresponding subject-matter in the new act. The last-named articles have been retained in this compilation. As far as possible the articles of the new act have been given the numbers which they bore in the same or in a modified form in the Revised Statutes. All of the articles of the new act have been placed in this compilation.

Art. 3983. [2514] Special tax on fish, turtle, terrapin, oysters and shrimp taken from the public coast waters.—For the purpose of protecting the fish and improving the natural oyster reefs and protecting

both the natural reefs and private oyster beds and to carry out the fish and oyster laws of the state of Texas and as one of the conditions upon which the state consents to the taking or removing of fish from her waters, or to the fishing or removal of oysters from her natural reefs, or the use and rental of her water bottoms for oyster propagating purposes there shall be and is hereby levied a special tax of one-fifth of one cent per pound on all fish, turtle, terrapin and shrimp taken for market from the public waters within the jurisdiction of this state and a tax of two cents per barrel on each and every barrel of oysters gathered from the said waters of this state, whether from the natural reefs or private oyster beds for sale or shipment, provided that oysters taken from any waters for bedding purposes shall not be subject to this Act until again taken up for sale or shipment. This special tax shall be paid to the fish and oyster commissioner, or his deputy, by the persons bringing said fish, turtle, terrapin, shrimp or oysters to market, whether he be the person who fished said products or his agent, before he shall be allowed to sell same or to consign same to any other party for sale, shipment or storage, and the fish and oyster commissioner may fix times of the day at which inspection and permits shall be made and granted.

For all purposes mentioned in this title a barrel of oysters shall be deemed and taken to consist of three boxes of oysters of the following dimensions: ten inches wide by twenty inches long and thirteen and one-half inches deep inside measurement and rounded off to a height of two and one-half inches in center above the top of the box. [Id.]

See note under Art. 3982.

Constitutionality of act.—This article, and Arts. 3985 and 3986, are not unconstitutional, though the title to the act amending them only refers to the sections amended and does not state the subject of the act. If the articles amended are sufficiently identified by reference in the title, and the articles amended themselves sufficiently indicate the purposes of the amendment, the title of the amendment is sufficient. It is not required that the title should serve as an index to the various provisions of the act. *Raymond v. Kibbe*, 43 C. A. 209, 95 S. W. 728.

Art. 3984. Registration of fish boats, etc., in public waters; application; certificate; fees; marking boats, and providing who shall fish.—Any person who is a citizen of the United States wishing to use a boat in catching or taking fish, green turtle, terrapin or shrimp or gathering oysters for market in the public waters of this state, in accordance with the provisions of the fish and oyster laws of this state, shall apply to the game, fish and oyster commissioner or his deputies for permission to do so. Such applicant will furnish said officer under oath his name, place of residence, the name and kind of boat to be used by him, together with the number of men to be employed by him, thereupon the officer shall register such boat, which register number shall be distinctly painted on each side of the bow of such boat, for which registration he shall pay the said officer one dollar and fifty cents and the said officer shall furnish the applicant with a certificate of such registration. [Id.]

See note under Art. 3982.

Art. 3985. [2514] Permit to sell, with receipts of seizure and sale; proceeds, how disposed of.—When the special tax provided for in article 3983 of this chapter has been paid, it shall be the duty of the game, fish and oyster commissioner, or his deputy, receiving the tax, to give a receipt for same, together with a permit authorizing the holder thereof to dispose of the products on which the special tax has been paid. A duplicate of which receipt and permit shall be retained in the office of said commissioner issuing same. This permit shall be given by the person delivering said products to the person, firm or corporation to whom the products mentioned therein shall be sold or delivered for sale, shipment or storage. Any fish, turtle, terrapin, shrimp or oysters found in the possession of any packer, buyer or commission man, for the disposition of which he can not show the state's permit, shall continue the property of the state, and may be seized by the game, fish and oyster

commissioner, or any of his deputies, and sold, the proceeds thereof to go to the fish and oyster fund of the state. [Id.]

See note under Art. 3982.

Constitutionality of act.—See notes under Art. 3983.

Art. 3986. [2518k] License to catch or take fish, oysters, etc.; prerequisites to issue of.—Any captain or master of any boat wishing to engage in the business of catching or taking any fish, turtle, terrapin, shrimp or oysters from the waters of the state for market shall, before engaging in such business, secure from the game, fish and oyster commissioner, or one of his deputies, a license granting to him permission to take from the waters of the state, fish, turtle, terrapin, shrimp or oysters; provided, that the licensee in exercising the privilege named in this license shall at all times be governed by the fish and oyster laws of this state, for the purpose of obtaining this license the person desiring same must make written application to the game, fish and oyster commissioner or one of his deputies in which he, the applicant, shall set forth under oath that he is a citizen of the United States, the name, class and register number of his boat. If the application be for a license to use seines and nets, the applicant shall state the number, class and length of the seines and nets to be used by him and if the application be for a license to gather oysters, he must state the number of tongs to be used by him and the applicant shall also agree that because of the privilege he shall receive from the state of Texas of taking fish, turtle, terrapin, shrimp or oysters from her waters, all such products at all times shall be subject to inspection by the game, fish and oyster commissioner, or any of his deputies, and that said application shall authorize said commissioner or any of his deputies to enter at any time the boat or any house where he, the applicant, may have such products stored and inspect same; and he, the applicant, shall further agree to pay to the state of Texas a special tax provided for in article 3983 of the fish and oyster laws. This application having been duly executed and handed to the game, fish and oyster commissioners, or any of his deputies accompanied by the applicant's registration certificate and the fee for the license applied for, it shall thereupon be the duty of the game, fish and oyster commissioner, or the deputy receiving the same, to issue to the applicant a license to engage in the business set forth in his application and license shall be subject to such limitations and control as is herein prescribed and as is or may be prescribed by the criminal laws of this state. Said license must be signed by the game, fish and oyster commissioner, or his deputy, stamped with the seal of office and state the name of the licensee, name and class of his boat and the date of issuance. Such license shall be for twelve months if for fishing for fish, turtle or shrimp, and from September the 1st to April the 1st following the date of license if for gathering oysters; and from August the 1st to May the 1st if granted for the purpose of catching terrapins, and for said license the applicant shall pay the sum of one dollar, the license so issued shall be kept on the boat subject to the inspection of the game, fish and oyster commissioner or any of his deputies, and it shall not be good for any other person nor on any other boat than the original named therein without the consent of the game, fish and oyster commissioner, or one of his deputies, having first been had, which consent or assignment shall be written across the face of said license; provided, that if at any time such licensed captain or master of a boat shall violate any of the fish and oyster laws of this state, or shall at any time refuse to comply with any provisions made in his application for license, the game, fish and oyster commissioner is authorized to cancel said license and the boat registration certificate, notice of which shall be given by the fish and oyster commissioner in writing and delivered to the licensee. Any person wishing to engage in the taking or catching of any fish, turtle, terrapin, shrimp or oysters for market as the employé of a crew of any reg-

istered boat, shall procure a license in the same manner and character as the captain or master of any registered boat engaged in taking or catching fish, turtle, terrapin, shrimp or oysters for market, provided that one license so issued under this article shall authorize the licensee to engage in taking or catching of any of the products named herein. [Id.]

See notes under Art. 3982.

Art. 3987. Licenses to wholesale dealers in fish and oysters; wholesale dealer defined.—For the better protection of the fish and oyster industry, any person, firm, or corporation engaged in or who may engage in the business of wholesale dealer or dealers in fish or oysters shall on or before the first day of September of each year secure from the game, fish and oyster commissioner, or one of his deputies, a license granting such person, firm or corporation permission to engage in said occupation. A wholesale dealer in the meaning of this Act is one who is engaged in the fish or oyster business as a dealer supplying the wholesale or retail [retail] trade by sales of quantities of fifty pounds or more of fish, or oysters in quantities or lots of five barrels or more, provided, one who has a license under article 3986 and pays the tax of one-fifth of one per cent per pound on fish caught and sold shall not be considered a wholesale dealer. Provided, that two gallons of shucked oysters shall be considered a barrel of oysters. [Id.]

See note under Art. 3982.

Art. 3988. Application for license; requisites; agreement for inspection, record, forfeiture, etc.—For the purpose of obtaining a wholesale dealer's license, the applicant desiring same, shall make written application to the game, fish and oyster commissioner or one of his deputies in which he, the applicant shall set forth under oath if so required that he is a citizen of the United States and that he does because of the privilege for which he applies for from the state of Texas, agree that all products bought or sold or had for sale by him shall at all times be subject to the inspection of the game, fish and oyster commissioner or any of his deputies, and in said application he shall authorize said commissioner or any of his deputies to enter his place of business or any place where he may have such products stored and inspect same. He shall also agree to keep a correct record of all purchases made by him under this chapter in a book to be furnished by the game, fish and oyster commissioner, and he shall further agree that failure on his part to keep a correct record and comply with all provisions of his application shall be grounds for the forfeiture of his license granted him under the application there aforesaid; and provided, further, that the violation of any of the fish and oyster laws of this state or the violation of any of the rules and regulations of the fish and oyster commissioner of this state, shall be and constitute a forfeiture of said license. [Id.]

See note under Art. 3982.

Art. 3989. Issuance of license; requirements; tax; cancellation of license.—The application for a wholesale dealer's license having been duly executed and delivered to the game, fish and oyster commissioner or any of his deputies, together with the fee for same, it shall then be the duty of the game, fish and oyster commissioner or his deputy to pass upon same, and if said application is found to comply with the law and the rules and regulations of the game, fish and oyster commissioner, a license shall be issued to said applicant permitting such applicant to engage in the business set forth in the application, said license to be signed by the game, fish and oyster commissioner, or one of his deputies, stamped with the seal of office and state the name of the licensee, place of business and the kind of license applied for and shall be good for twelve months following the date of issuance, and for such license the applicant shall pay a tax of one dollar for each one thousand pounds of

fish handled by him and a tax of one cent per barrel of oysters handled by him, which tax shall be paid monthly; the tax to be paid on the first of each month which may be due upon the said products handled during the preceding month, as per the record book hereinbefore mentioned. For the failure or refusal of any licensee to pay said tax, the game, fish and oyster commissioner, or his deputy, shall have authority and it shall be his duty to cancel such license. [Id.]

See note under Art. 3982.

Art. 3990. Deposit of estimated amount of tax, etc.—The applicant for any license under this Act based upon fish and oysters handled, shall upon the issuance of such license, deposit with the game, fish and oyster commissioner an amount of money, to be fixed by the said commissioner, sufficient to cover the estimated amount of tax that would be due by applicant upon the monthly business of applicant, and against which deposit the tax due may be charged by the commissioner, and said applicant shall make additional deposits in sufficient amounts to at all times maintain a deposit sufficient to cover the estimated tax that may be due by applicant, which additional deposit shall be made upon request of the game, fish and oyster commissioner. [Id.]

See note under Art. 3982.

Art. 3991. [2518m] Location for planting oysters, who may obtain; application; fee.—Any person who is a citizen of the United States or any corporation having been chartered in this state, shall have the right of obtaining a location for planting oysters and making private oyster beds within the public waters of this state, by making written application to the game, fish and oyster commissioner or his deputy, describing the location desired. A fee of ten dollars cash must accompany such application. [Id.]

See note under Art. 3982.

Art. 3992. [2518m] Examination of location; survey.—When the application and fee provided for in article 3991 has been placed in the hands of the game, fish and oyster commissioner, it shall then be the duty of the game, fish and oyster commissioner or his deputy to examine thoroughly the location desired as soon as practicable, with tongs, dredge, or any other efficient manner; and if the same be not a natural oyster bed or reef and exempt from location by any section or article of this chapter, he shall have the location surveyed by a competent surveyor. In making said location said surveyor shall plant two iron stakes or pipes on the shore line nearest to the proposed location, one at each end of the proposed location, which said stakes or pipes shall be not less than two inches in diameter and be set at least three feet in the ground. Said stakes or pipes shall be placed with reference to bearings of not less than three natural or permanent objects or land marks. And the locator shall place and maintain under the direction of the game, fish and oyster commissioner, or his deputy, a buoy at each corner of his oyster claim farthest from land. All locations for private oyster beds shall be made outside of the riparian limits, as defined in the laws relating thereto. [Id.]

See note under Art. 3982.

Art. 3993. [2518m] A certificate; requisites; fee.—The game, fish and oyster commissioner, or his deputy, shall give the locator a certificate signed by the game, fish and oyster commissioner and stamped with the seal of his office; such certificate shall show the date of application, date of survey, number, description of metes and bounds with reference to the points of the compass and natural and artificial objects by which the said location can be found and verified; and the locator shall pay to the game, fish and oyster commissioner, or his deputies, a fee of ten dollars for every fifty acres or fractional part thereof, for the examination of said location, including the certificate; provided, that the ten

dollars theretofore paid by the locator with his application shall be deducted from this fee. [Id.]

See note under Art. 3982.

Art. 3994. [2518m] Certificate to be filed and recorded; fee; evidence.—At any time not exceeding sixty days after the date of such certificate of location, the locator must file the same with the county clerk of the county in which the location is situated, who shall record the same in a well-bound book kept for the purpose, and the original with a certificate of registration shall be returned to the owner or locator; the clerk shall receive for the recording of such certificate the same fee as for recording deeds; the original or certified copies of such certificates shall be admissible in evidence under the same rules governing the admission of deeds or certified copies thereof. [Id.]

See note under Art. 3982.

Art. 3995. [2518m] Locator protected in possession.—Any person so locating shall be protected in his possession thereof against trespass thereon in like manner as freeholders are protected in their possessions as long as he maintains all stakes and buoys in their original and correct position and comply with all laws, rules and regulations governing the fish and oyster industries. [Id.]

See note under Art. 3982.

Art. 3996. [2518p] Location limited; foreign corporations excluded.—No person, firm, or corporation shall ever own, lease or otherwise control more than six hundred and forty acres of land covered by water, the same being oyster locations under this chapter, and within the public waters of this state; and any person, firm or corporation that now holds six hundred and forty acres of oyster locations shall not be permitted hereafter to acquire, lease or otherwise control more; provided, that no corporation shall lease or control any such lands covered by water unless such corporation shall be duly incorporated under the laws of this state. [Id.]

See note under Art. 3982.

Art. 3997. [2518n] Owner of private location and assignee to keep stakes in place; may fence, provided.—Any person, firm or corporation who has secured, or may hereafter secure a location for a private oyster bed in this state, shall keep the two iron stakes or pipes and buoys as provided for in article 3992 in place, and shall preserve the marks so long as he is the lessee of said location, and this shall apply also to any person, firm or corporation, acquiring any location by purchase or transfer of any nature; and said locator or the assignee of any locator, shall have the right to fence said location, or any part thereof; provided, that said fence does not obstruct navigation through or into a regular channel or cut leading to other public waters. [Id.]

See note under Art. 3982.

Art. 3998. [2518n] Rents to be paid for locations; forfeitures, etc.—Every locator or assignee of any locator of a location for private oyster beds in this state shall pay the following amounts as rent for his location; in addition to the locating fee of ten dollars as prescribed in article 3993 of this chapter, he shall pay the sum of fifteen cents per acre to the first day of January following the date of application, to be paid to the game, fish any oyster commissioner on receipt of the certificate of location; the rent for next four years from the first day of January above named shall be twenty-five cents per acre per annum; and the rent thereafter shall be seventy-five cents per acre per annum; the rent shall be paid to the game, fish and oyster commissioner, and shall be due on January 1st of each year; and, if not paid by March 1st of the same year, the locator or the assignee of any locator shall forfeit all right to the location, and the same shall revert to the state. Provided a locator shall not sell his oyster claim within a period of four

years from date of location unless he has expended not less than five dollars per acre on such claim. Provided the lessee of any oyster location may forfeit or sell a part of his claim under rules of the game, fish and oyster commissioner, and with his consent. [Id.]

See note under Art. 3982.

Art. 3999. Permit to gather seed oysters, to whom and by whom granted, etc.; on what beds, etc.; fees, etc.—Any person who is a citizen of the state of Texas, or any corporation having been chartered in the state of Texas, wishing to plant oysters on location obtained from the state, or on private property in the state, must make written application to the game, fish and oyster commissioner, or his deputy, for a permit or license, which shall entitle the holder to gather seed oysters from the date of permit to such time as may be designated by the game, fish and oyster commissioner thereafter, by dredge, tongs or hand, without culling, on such reefs or beds as may be designated by the game, fish and oyster commissioner, or his deputy, in said permit; provided, that in no instance can there be designated a bed or reef on which marketable oysters are being gathered in paying quantities or on which marketable oysters have been gathered within two years, but the bed or reef so designated shall be an old or abandoned bed or reef, or one on which oysters do not get in marketable condition during the oyster season or on such reefs where the oysters are so thickly set as to warrant the commissioner in granting a permit to have them thinned, and in taking oysters from such reef or bed, the work shall be done with a view to reclaiming and improving such reef or bed; for the permit above named, the applicant shall pay to the game, fish and oyster commissioner, or his deputy, the sum of five dollars, and shall pay all expenses for examining and locating such reef or beds designated. [Id.]

See note under Art. 3982.

Art. 4000. Duties of commissioner.—It shall be the duty of the game, fish and oyster commissioner, to collect the special tax imposed by this chapter, and enforce its payment, to inspect all products so taxed and verify the weights and measures thereof, to collect all license fees, to collect all rents on locations for planting oysters, to examine, or have examined, all streams, lakes, or ponds, when requested so to do, for the purpose of stocking such waters with fish, best suited to such location, and he shall procure and furnish such stock fish from the nearest fishery, and at the cheapest rate possible to parties applying for same. [Id.]

See note under Art. 3982.

Art. 4001. [2515] Commissioner to keep record, to show what.—The game, fish and oyster commissioner shall keep a record book, which shall be well bound, and in which shall be recorded all special taxes collected, all licenses issued and license fees collected, all certificates issued for locations of private oyster beds, showing the date of certificate and application, when and how the applications were executed and the manner in which the bottoms were examined and rents collected for such locations, showing also all stock fish furnished, to whom furnished, and the cost of same, the streams, lakes or ponds, stocked, number and kinds of fish used in each, and showing all collections and disbursements in and from his office. [Id.]

See note under Art. 3982.

Art. 4002. Commissioner to keep accounts with locators.—The game, fish and oyster commissioner shall keep an account with each and every person, firm or corporation, holding certificates for the location of private oyster beds in this state, showing the amounts received, as rents, etc. [Id.]

See note under Art. 3982.

Art. 4003. [2516] Commissioner to make annual report to governor, to be printed, etc.; requisites; penalty.—The game, fish and oyster

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commissioner shall make, on the thirty-first day of August of each year, or as soon thereafter as practicable, not later than October 1st of each year, a report to the governor, showing the condition of the fish and oyster industry. The report shall show special taxes collected, the number and class of all boats engaged in the fish and oyster trade, the number of licenses issued and license fees collected, the number, place and acreage of private oyster beds, and rents received therefor, and all other amounts collected from whatever source, and the disbursements thereof, as provided for in this chapter with such observations and remarks as pertain to the industry. The report shall also contain a statement of all stock fish furnished, to whom furnished, the cost of same, the streams, lakes, or ponds stocked, the number and kind of fish used in each, and the condition of such plants, with any other data he may obtain on the subject. The governor shall order a sufficient number of copies of such report to be printed and filed in the secretary of state's office, for the purpose of free distribution to parties interested therein. Failing to make such report within the time specified, the said commissioner may, in the discretion of the governor, be dismissed from his office. [Id.]

See note under Art. 3982.

Art. 4004. [2518d] Deputies in coast counties; special deputies over entire coast; appointment; powers.—The game, fish and oyster commissioner is authorized to appoint deputies for each of the vessels owned by the state and employed in the fish and oyster department. Such boat deputies shall have and exercise the same powers and duties as the game, fish and oyster commissioner in the enforcement of the fish and oyster laws; provided, that such deputies shall at all times be subject to the orders of the game, fish and oyster commissioner, and any and all laws, or parts of laws in conflict with the provisions of this article are hereby repealed. [Id.]

See note under Art. 3982.

Art. 4005. [2517] Shore and interior deputies; appointment; powers and duties.—The game, fish and oyster commissioner is authorized to appoint such other shore and interior deputies as he may deem necessary for the enforcement of the law. And such shore deputies and interior deputies shall have and exercise the same powers and duties as the game, fish and oyster commissioner in the enforcement of the law, and be at all times subject to his orders. [Id.]

See note under Art. 3982.

Art. 4006. [2518k] Qualifications of deputy fish commissioner, etc.—No person shall hold the office of deputy fish and oyster commissioner who is not a citizen of the United States and resident of the state of Texas. All deputies shall hold their office at the pleasure of the game, fish and oyster commissioner. [Id.]

See note under Art. 3982.

Art. 4007. [2518g] Oath and bond of deputy commissioner.—Before entering upon the duties of his office, each deputy fish and oyster commissioner, shall file with the fish and oyster commissioner a good and sufficient bond, with two or more sureties, in the sum of one thousand dollars, and take the same oath of office as the game, fish and oyster commissioner, and said bond and oath shall be governed by the provisions of article 3977. [Id.]

See note under Art. 3982.

Art. 4008. [2518f] Duties of deputy fish commissioner, etc.—Each deputy fish and oyster commissioner shall be ex-officio game commissioner, and shall exercise the duties and powers of game commissioners under the direction of the game, fish and oyster commissioner. [Id.]

See note under Art. 3982.

Art. 4009. [2518e] Weekly reports by deputies; with remittances; annual reports.—All deputy fish and oyster commissioners, shall make

a weekly report to the game, fish and oyster commissioner of all funds collected by them, remitting along with said report all sums of money collected by them during the said week, and shall make an annual report to the game, fish and oyster commissioner not later than August first of each year, which report shall set forth in detail such acts as are provided for in article No. 4003, and article 4014. [Id.]

See note under Art. 3982.

Art. 4010. [2518j] Commissioner responsible for his deputies.—The commissioner shall be responsible, on his bond, for the official acts of his deputies. [Id.]

See note under Art. 3982.

Art. 4011. [2518] Fish and oyster fund.—All the money derived by the state from fines for infraction of the fish and oyster laws, fees for licenses, and taxes on private oyster beds, and taxes on fish and oysters, shall be kept by the comptroller separate under the head of, "Fish and Oyster Fund." [Id.]

See note under Art. 3982.

Art. 4012.—Superseded. See Art. 4013.

Art. 4013. Fines distributed, how.—Of all fines collected for infraction of the fish and oyster laws, ten per cent. shall go to the prosecuting attorney and the residue shall go to the fish and oyster fund of the state. [Id.]

See note under Art. 3982.

Art. 4014. [2518c] Disposition of funds collected by deputies.—All funds collected by deputy fish and oyster commissioners along the coast for register certificates, licenses, fees and rents for locating private oyster beds and any other fees that may be prescribed, shall be, by said deputies and each of them, paid over weekly to the game, fish and oyster commissioner. Such funds so collected by the game, fish and oyster commissioner weekly from the deputy game, fish and oyster commissioners, shall be by the game, fish and oyster commissioner deposited monthly in the state treasury, to the credit of the fish and oyster fund. [Id.]

See note under Art. 3982.

Art. 4015. [2517] Compensation of commissioner.—The game, fish and oyster commissioner shall for his services in the fish and oyster department, be allowed the sum of eighteen hundred dollars per annum, to be paid out of any funds in the state treasury not otherwise appropriated, to be paid in the same manner as other officers of the state. He shall also be allowed a sum not to exceed six hundred dollars per annum for office rent, traveling and other expenses, to be paid on vouchers approved by the governor, showing that such amounts have actually been expended in the performance of his duties of said office and he shall be allowed all stationery, books, blanks, tags, state laws and charts necessary to the execution of the duties of his office. [Id. Acts 1895, p. 70. Acts 1899, p. 313.]

See note under Art. 3982.

Art. 4016. [2518c] Compensation of deputy commissioners.—Out of the special fish and oyster funds all deputy fish and oyster commissioners shall be paid their salaries and expenses monthly, on the approval of the game, fish and oyster commissioner; the comptroller drawing his warrant in favor of each of said persons on said special fish and oyster fund as follows:—Deputies on boats shall receive seventy-five dollars per month; deputies on shore and interior shall receive fifty dollars per month when permanently engaged, or two dollars per day for each day's service when specially employed. Provided, that the deputy fish and oyster commissioners in service at Caddo Lake shall receive monthly salaries of seventy-five dollars each. Provided, that the game, fish and oyster commissioner shall appoint when he deems it necessary, a

mate for any of the boats in the service of the state, and such mates shall receive a salary of fifty dollars each per month. Provided, that the deputies shall not be allowed any expenses for provisions. [Id. Acts 1907, p. 234. Acts 1905, p. 130. Acts 1903, p. 190. Acts 1899, p. 313. Acts 1895, p. 70. Acts 1909, S. S., p. 325.]

See note under Art. 3982.

Art. 4017. [2518i] Fees for making arrests, etc.—In making arrests, summoning witnesses and serving processes, the commissioner, or his deputy, shall be allowed the same fees and mileage as sheriffs, the same being charged as costs and collected the same as are sheriff's costs and fees. [Acts 1895, p. 70.]

See note under Art. 3982.

Art. 4018. Commissioners' court may appropriate money for stocking waters with fish; deputy for, etc.—The commissioners' court of any county bordering on any stream or having within its borders any public stream, lake or pond, shall have the right to appropriate a sum not to exceed two hundred dollars per annum, out of the general fund of the county or so much thereof as said court may deem necessary for the purpose of stocking said waters with fish, and at the request and recommendation of said commissioners' court, the state game, fish and oyster commissioner shall appoint a deputy fish commissioner for said county, who shall have charge of all public waters in said county for the purpose of stocking and protecting same, and the commissioners' court shall pay the said deputy for his services such amount as may be agreed upon, not to exceed two dollars and fifty cents per day. [Acts 1913, p. 297, sec. 1.]

See note under Art. 3982.

Art. 4019. Improving, etc., the natural oyster beds of Matagorda Bay; expenditure authorized, provided, etc.—The game, fish and oyster commissioner is hereby authorized to use and expend the sum of three thousand dollars, or as much thereof as may be necessary, out of the fish and oyster fund, for the purpose of improving and reviving the natural oyster beds in Matagorda bay, in the state of Texas, by constructing a canal from the northeast end of said bay, connecting same with the lakes and bayous leading into the San Bernard river, for the purpose of conducting salt water into said bay; and said amount of three thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of said fish and oyster fund for such purpose, said money to be paid out upon the approval of the game, fish and oyster commissioner, and by warrant drawn by the state comptroller on the state treasurer; provided, that in no event shall the state be liable for the payment of any indebtedness created by virtue of this article, and the said game, fish and oyster commissioner shall only create such indebtedness when there are sufficient funds in said fish and oyster fund, not otherwise appropriated, to meet such indebtedness. [Acts 1909, S. S., p. 328.]

Art. 4019a. Seines, nets, etc.; inspection; tags, etc.—The mesh of all seines and nets used for taking fish in salt waters, not including the bag, shall be not less than one and one-half inch square mesh. The mesh of bags and for fifteen feet on each side of the mouth of the bag shall be not less than one and one-fourth inch square mesh. No seine used for taking fish shall be over twelve hundred feet in length. All such seines shall be inspected by the game, fish and oyster commissioner, or one of his deputies, and shall be properly tagged with a metallic tag, which tag shall be provided at the cost of the owner of the same. The mesh of shrimp nets shall be not less than one-half inch square mesh and not more than fifty feet long and four feet deep. The mesh of the turtle nets shall be twelve inches square. [Acts 1913, p. 297, sec. 1.]

See note under Art. 3982.

Art. 4019b. Person leasing oyster claim, etc.; permission to seine for drum fish, etc.; duty of commissioner; payment to be made, etc.; penalty for violation.—Any person leasing an oyster claim or oyster reef in waters where seining is prohibited, may apply to the game, fish and oyster commissioner for permission to seine for drum fish in such waters. In his application he shall make oath that the drum fish are seriously damaging his oysters, and that if he is permitted to seine for such drum fish in such waters, he will not take or destroy any other food fish but will throw them back in the water. If the commissioner is satisfied that such damage is being done, he may grant such permission to the person applying for it, specifying in such permit the length and mesh of the seine to be used, the length of time in which it is to be used, and the claim or reef on which it is to be used. And such commissioner shall assign a deputy fish and oyster commissioner to superintend such seining and no seine shall be dragged except in his presence, and for which, a person obtaining the permission to seine, as set forth above, shall pay to the game, fish and oyster commissioner, \$2.50 per day to be placed in the special fish and oyster fund, for such services. The person granted such permission shall board the deputy fish and oyster commissioner during his superintendence of such seining. If the person obtaining the permission shall violate any of the provisions of this Act, he shall be prosecuted and punished under the criminal laws of this state applicable in such cases. [Id.]

See note under Art. 3982.

Art. 4019c. Permission to dredge reef of oysters; duty of commissioner; payment to be made, etc.—Whenever a reef of oysters is over eight feet below the surface of the waters, the game, fish and oyster commissioner may grant permission, to any one applying for it, to dredge on such reef. And in doing this the commissioner shall state the character and number of dredges to be used and the length of time for which they shall be used. The person to whom such privilege shall be granted shall not dredge except in the presence of a deputy fish and oyster commissioner, assigned to such duty by the game, fish and oyster commissioner. And the person granted such permission shall furnish board to such commissioner on board of the dredge boat or other boat on the reef and shall pay to the game, fish and oyster commissioner \$2.50 for all days or parts of days during such dredging, which money shall be placed in the special fish and oyster fund. [Id.]

Arts. 4020, 4021.—Repealed. See Art. 4021a.

Art. 4021a. Laws repealed.—That articles 4020 and 4021, said title, and all other laws and parts of laws in conflict herewith, be and the same are hereby repealed. [Id. sec. 2.]

Art. 4021b. What included within act, and under management, etc., of game, fish and oyster commission.—All of the islands, reefs, bars, lakes and bays within tidewater limits from the most interior point seaward coextensive with the jurisdiction of this state and such of the fresh water lakes within the interior of this state as may not be embraced in any survey of private land, together with all the marl and sand of commercial value, and all the shells or mudshell, of whatsoever kind that may be in or upon any island, reef or bar, and in or upon the bottoms of any lake, bay or shallow water, and also all fishing waters, fish hatcheries and oyster beds, within the jurisdiction and territory herein defined, are included within the provisions of this Act, and all such islands, reefs, bars, lakes, bays, shallow waters, and the marl, sand, shells, or mudshell and oyster beds and fishing waters and fish hatcheries, located as herein defined, are, for the purpose of this Act, hereby placed under the management, control and protection of the game, fish and oyster commissioner. [Acts 1911, p. 118, sec. 1.]

Art. 4021c. Certain fresh water lakes shall not be sold; open to public; proviso, etc.—Such of the fresh water lakes within this state as may not be embraced in any survey of private land shall not be sold, but shall remain open to the public; provided, should the game, fish and oyster commissioner stock them with fish, he is authorized to protect same for such time and under such rules as he may prescribe. [Id. sec. 2.]

Art. 4021d. Powers of commission; marl, sand, shells, mudshell, oyster beds and fishing waters.—The game, fish and oyster commissioner is hereby invested with all the power and authority necessary to carry into effect the provisions of this Act, and shall have full charge and discretion over all matters pertaining to the sale, the taking, carrying away or disturbing of all marl or sand of commercial value, and all shells or mudshell and oyster beds and fishing waters, and their protection from free use and unlawful disturbing or appropriation of same, with such exceptions and under such restrictions and limitations as may be provided herein. [Id. sec. 3.]

Art. 4021e. Marl, etc., shall not be purchased, taken, carried away, or disturbed, except, etc.—None of the marl or sand or shells or mudshell included within the preceding sections of this Act shall be purchased, taken, carried away or disturbed except as provided in this Act, nor shall any oyster beds, fishing waters or fish hatcheries within the territory included in this Act be disturbed except as herein provided. [Id. sec. 4.]

Art. 4021f. Application to purchase or operate; permit; revocation; no special privilege or exclusive right.—Any one desiring to purchase any of the marl and sand of commercial value and any of the shells or mudshell included within the provisions of this Act, or otherwise operate in any of the waters or upon any island, reef, bar, lake or bay included in this Act, shall first make written application therefor to the game, fish and oyster commissioner, designating the limits of the territory in which such person desires to operate. If the game, fish and oyster commissioner is satisfied the taking, carrying away or disturbing of the marl, sand or shells or mudshell in the designated territory would not damage or injuriously affect any oysters, oyster bed, fish inhabiting the waters thereof or adjacent thereto, and that such operation would not damage or injuriously affect any island, reef, bar, channel used for frequent or occasional navigation nor change or otherwise injuriously affect any current that would affect navigation, he may issue a permit to such person after such applicant shall have complied with all regulations and requirements prescribed by said commissioner. The permit shall authorize the applicant to take, carry away, or otherwise operate within the limits of such territory as may be designated therein, and for such substance or purposes only as may be named in the permit and upon the terms and conditions therein. No permit shall be assignable, and a failure or refusal of the holder to comply with the terms and conditions of the permit shall operate as an immediate termination and revocation of all rights conferred therein or claimed thereunder. No special privilege or exclusive right shall be granted to any person, association of persons, corporate or otherwise, to take or carry away any marl, sand or shell or mudshell from any territory nor to otherwise operate in or upon any island, reef, bar, lake, or bay included in this Act. [Id. sec. 5.]

Art. 4021g. Sale of marl, sand, shells or mudshell, when authorized; proceeds, how disposed of, etc.—The game, fish and oyster commissioner, by and with the approval of the governor, may sell the marl, sand and shells or mudshell, included within this Act, upon such terms and conditions as he may deem proper, but for not less than four cents

per ton, and payment therefor shall be made to said commissioner. The proceeds arising from such sale shall be transmitted to the state treasurer and be credited to the fish and oyster fund, and may be expended by the said commissioner upon itemized accounts sworn to by those performing the service of furnishing the material, and approved by said commissioner. The said accounts shall be filed with the comptroller of public accounts, and he shall draw a warrant therefor upon the state treasurer. [Acts 1911, p. 118, sec. 6. Amended, Acts 1911, S. S., p. 78, sec. 1.]

Art. 4021h. Commission may locate oyster beds and establish fish hatcheries.—So far as the proceeds arising under this Act may be sufficient, the said commissioner may locate suitable places for oyster beds and advise the public of such locations, and may establish fish hatcheries on the coast or elsewhere in the fresh water lakes and streams of the interior upon such terms and conditions as he may prescribe. [Acts 1911, p. 118, sec. 7.]

Art. 4021i. Permits to counties, cities, towns, etc.—If any county, or any subdivision of a county, city or town should desire any marl, sand or shell or mudshell included in this Act for use in the building of any road or street, which work is done by such county, or any subdivision of a county, city or town, such county or any subdivision of a county, city or town may be granted a permit without charge and shall have the right to take, carry away or operate in any waters, or upon any islands, reefs, or bars included in this Act, and this whether such county, subdivision of a county, city or town does the work under its own supervision or by contract, but such county, or any subdivision of a county, city or town shall first obtain from the said commissioner a permit to do so, and the granting of same for the operation in the territory designated by such county, or any subdivision of a county, city or town, shall be subject to the same rules, regulations and limitations and discretion of the said commissioner as are other applicants and permits. [Id. sec. 8.]

Art. 4021j. Taking away, disturbing, fishing or operating, etc., without permit misdemeanor.—If any person, association of persons, corporate or otherwise, shall, for himself or itself, or for or on behalf of or under the direction of another person, association of persons, corporate or otherwise, take or carry away any of the marl, sand or shells or mudshell included in this Act, or shall disturb any of said marl, sand shells or mudshell or oyster beds or fishing waters, or shall fish in any fresh water lake or shall operate in or upon any of said places for any purpose other than that necessary or incident to navigation or dredging under state or federal authority, without having first obtained a written permit from the game, fish and oyster commissioner for the territory in which such operation is carried on, such person, association of persons, corporate or otherwise, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of money not less than ten dollars nor more than two hundred dollars, and one-half of the proceeds arising from such fines shall be appropriated to the road and bridge fund of the county in which the conviction is had and one-half shall be appropriated to the fish and oyster fund. [Id. sec. 9.]

Art. 4021k. Sand may be taken from Galveston bay without payment, etc.—Provided, however, that there may be taken and appropriated from beneath the waters of Galveston bay, sand for filling and raising the grade of Galveston island, without making payment therefor to the game, fish and oyster commission or to the state of Texas. [Acts 1911, p. 118. Amended, Acts 1913, p. 329, sec. 1.]

CHAPTER THREE

GAME

<p>Art. 4022. Wild animals, birds, etc., property of public.</p> <p>4023. Hunting licenses required of non-residents, requisites and duration; fee.</p> <p>4024. Non-resident licensee may take home game lawfully killed, provided, etc.</p> <p>4025. Hunting licenses required of residents, when; requisites; authority given, duration; fee.</p> <p>4026. County clerk to issue local hunting licenses, etc., keep stubs of, etc.</p> <p>4027. County clerk to keep record.</p> <p>4028. Monthly report of licenses by county clerk, in duplicate, to commissioner and comptroller.</p> <p>4029. Commissioner to enforce laws for protection, etc., of wild game, etc., bring actions, etc., for fines, etc.; powers.</p> <p>4030. Power to seize birds and animals, when; disposition of.</p>	<p>Art. 4031. Commissioner to keep record; to contain what.</p> <p>4032. Monthly report by commissioner.</p> <p>4033. Commissioner may appoint chief deputy; office in capitol; oath; duties.</p> <p>4034. Bond of chief deputy.</p> <p>4035. Commissioner may appoint deputy game commissioners; powers.</p> <p>4036. Disposition of fees and fines received by commissioner.</p> <p>4037. Disposition of fines by court or deputy commissioner.</p> <p>4038. Disposition of license fees received by county clerk.</p> <p>4039. Hunting license fund, a separate salary, etc., fund.</p> <p>4040. Compensation of commissioner and deputies.</p> <p>4041. Chief deputy to furnish blank hunting licenses to county clerks; accounts.</p> <p>4042. Commissioner and deputies made fire commissioners; duties.</p>
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Article 4022. Wild animals, birds, etc., property of public.—All the wild deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild ducks, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants or chachalaca and all other wild animals, wild birds and wild fowls found within the borders of this state, shall be, and the same are hereby declared to be, the property of the public. [Acts 1907, p. 278.]

Art. 4023. Hunting licenses required of non-residents; requisites and duration; fee.—It shall hereafter be unlawful for any person who has not been a bona fide inhabitant of, and resident citizen of, this state for six months last past to hunt for or kill any game or birds protected by the laws of this state without first procuring a hunting license from the game, fish and oyster commissioner permitting him to do so, and paying to said commissioner the sum of fifteen dollars. Said license shall be dated when issued and shall remain in force until the first day of September following thereafter. [Acts 1909, 2 S. S. p. 456. Acts 1907, p. 256.]

Art. 4024. Non-resident licensee may take home game lawfully killed, provided, etc.—Any person to whom a non-resident license to hunt for game in this state has been issued may take to his home beyond the boundaries of this state such game as he has himself lawfully killed, not to exceed one day's bag limit, and under such restrictions and regulations as may be prescribed by the game, fish and oyster commissioner. [Acts 1907, p. 256.]

Art. 4025. Hunting licenses required of residents, when; requisites; authority given, duration; fee.—It shall hereafter be unlawful for any person to hunt or kill any game quadrupeds or game birds or wild fowl protected by the game laws of this state, except in the county of his residence or in counties adjoining the county of his residence or on land owned or controlled by him, without first obtaining a state hunting license from the game, fish and oyster commissioner permitting him to do so. Any person who has been a bona fide resident of this state for six months last past may procure a hunting license to hunt outside the boundaries of the county in which he resides, by paying a license fee of

one dollar and seventy-five cents to the county clerk of the county in which he resides, to be dated when issued. Such license shall expire the first day of September of each year following such date. Such license shall authorize the person named therein to use firearms in the hunting or killing of game or game birds during the hunting season of that year, but only in the manner and time prescribed by law. Such license shall limit the number and quantity of game which may be taken or killed, in accordance with the provisions of law governing the subject. [Acts 1907, p. 256. Acts 1909, 2 S. S., p. 456.]

Art. 4026. County clerk to issue local hunting licenses, etc., keep stubs of, etc.—The county clerk of each county in this state is hereby authorized to issue local hunting licenses, under his official seal, to all persons complying with the provisions of this chapter, and shall fill out correctly and preserve the stubs attached thereto. [Acts 1907, p. 256. Id.]

Art. 4027. County clerk to keep record.—The county clerk shall keep a complete and correct record of hunting licenses issued, showing the name and place of residence of each licensee, and the serial number and date of the license so issued, in a book to be furnished by the game, fish and oyster commissioner; which record shall be kept in his office and be open to the inspection of the public at all times during office hours. Said books and license stubs and unused licenses shall always be open to inspection of the game, fish and oyster commissioner or his deputies. [Acts 1907, p. 256. Id.]

Art. 4028. Monthly report of licenses by county clerk, in duplicate, to commissioner and comptroller.—The county clerk shall, within ten days of the close of each calendar month, make out a detailed report in duplicate under the seal of his office, showing the serial number and date of each license issued, and the name and residence of the person to whom issued; he shall forward one copy to the game, fish and oyster commissioner at Austin, and one copy to the comptroller, who shall charge the game, fish and oyster commissioner with the amount so shown to be remitted. [Acts 1907, p. 256. Id. p. 457.]

Art. 4029. Commissioner to enforce laws for protection, etc., of wild game, etc., bring actions, etc., for fines, etc.; powers.—It is hereby made a special duty of the game, fish and oyster commissioner to enforce the statutes of this state for the protection and preservation of wild game and wild birds, and to bring, or cause to be brought, actions and proceedings in the name of the state of Texas to recover any and all fines and penalties provided for in the laws now in force, or that may hereafter be enacted, relating to wild game and wild birds. Said game, fish and oyster commissioner may make complaint and cause proceedings to be commenced against any person for violation of any of the laws for the protection and propagation of game or birds, without the sanction of the county attorney of the county in which such proceedings are commenced; and in such case he shall not be required to furnish security for costs. [Acts 1907, p. 254.]

Art. 4030. Power to seize birds and animals, when; disposition of.—The game, fish and oyster commissioner shall, at any and all times, seize and take possession of all birds and animals that have been caught, taken or killed, or had in possession or under control, or have been shipped contrary to any of the laws of this state, and such seizure may be made without a warrant. All birds or animals seized by the commissioner shall be disposed of in such manner as may be directed by any court having competent jurisdiction to hear and determine cases for violation of the game and bird laws of this state. [Id.]

Art. 4031. Commissioner to keep record; to contain what.—It shall be the duty of the game, fish and oyster commissioner to keep in his office, in the capitol of this state, a well bound book in which he shall keep a complete list of the licenses issued, fines collected and a statement of all prosecutions instituted for violation of the game, fish and oyster laws, and the result of same. Said records shall be kept open for the inspection of the comptroller and the public. [Acts 1907, p. 256. Acts 1909, 2 S. S., p. 457.]

Art. 4032. Monthly report by commissioner.—The game, fish and oyster commissioner, at the close of each calendar month, shall file with the comptroller a report in writing and detail, stating the service performed by him during the last preceding month, including a detailed statement of the suits commenced at his instance and the disposition made of same, all fines, licenses and other fees collected, their disposition, and any other particulars he may deem proper. [Acts 1907, p. 255. Id. p. 455.]

Art. 4033. Commissioner may appoint chief deputy; office in capitol; oath; duties.—The game, fish and oyster commissioner shall have power to appoint a chief deputy, who shall maintain an office in the capitol of the state; said chief deputy shall take the constitutional oath of office and shall act as general assistant to said game, fish and oyster commissioner, and, during the absence, sickness or disability of the commissioner, he shall exercise the duties of said commissioner. Said chief deputy shall devote his entire time to the work of his office. [Acts 1907, p. 255.]

Art. 4034. Bond of chief deputy.—The chief deputy game, fish and oyster commissioner shall, before assuming the duties of his office, file with the secretary of state a good and sufficient bond in the sum of five thousand dollars for the faithful performance of the duties of his office. [Id. p. 256.]

Art. 4035. The commissioner may appoint deputy game commissioners; powers.—The game, fish and oyster commissioner shall also have power to appoint deputy game commissioners, who shall have the same power and authority as herein provided for the game, fish and oyster commissioner himself, subject to the supervision and control of and removal by the said game, fish and oyster commissioner. [Id. p. 255.]

Art. 4036. Disposition of fees and fines received by commissioner.—The game, fish and oyster commissioner shall, at the time of each monthly report required of him by this chapter, pay over to the state treasurer all fines, license and other fees collected by him, which shall be credited to the special fund provided for in this chapter. [Acts 1909, 2 S. S., p. 455.]

Art. 4037. Disposition of fines by court or deputy commissioner.—All fines collected in the county or district courts of this state for violation of the game and bird laws of this state, shall, within thirty days from date of the collection, be forwarded by the court, or the deputy game commissioner, to the game, fish and oyster commissioner, who shall deposit same in the state treasury, and same shall be credited to the special fund provided for the payment of salaries and expenses of deputies appointed under the provisions of this chapter. [Id.]

Art. 4038. Disposition of license fees received by county clerk.—The county clerk shall, with each monthly report required of him by this chapter, remit to the game, fish and oyster commissioner at Austin, all license fees collected by him, less twenty-five cents for each license issued, which he may retain as his fee. Upon the receipt of such report and remittance, the game, fish and oyster commissioner shall deposit

same in the state treasury to the credit of the special fund provided for in this chapter; and the comptroller shall credit said commissioner with the amount of the deposits so made. [Id. p. 457.]

Art. 4039. Hunting license fund; a separate salary, etc.; fund.—All funds paid into the state treasury from the sale of hunting licenses shall be set apart as a special fund for salaries and expenses of the game, fish and oyster commissioner and his various deputies, as provided in this chapter; provided, that the fund derived from the sale of hunting licenses contemplated by this chapter shall never be combined with the fish and oyster fund of the state; nor shall said fish and oyster fund ever be liable for the payment of any of the expenses contemplated by this chapter, but shall be kept intact and for the sole purpose of paying the expenses and maintaining the fish and oyster department of the state, as now provided by law; and the said commissioner and his deputies shall not be paid out of any other funds. [Acts 1907, p. 256.]

Art. 4040. Compensation of commissioner and deputies.—The game, fish and oyster commissioner shall receive, in addition to the salary now paid him for his services in the fish and oyster department, the sum of seven hundred dollars per annum, and his actual and necessary expenses incurred in the discharge of his said duties, to be paid monthly on the warrant of the comptroller, on the approval of his vouchers therefor. The chief deputy shall receive an annual salary of eighteen hundred dollars and his actual and necessary expenses incurred by him in the discharge of the duties of his office, to be paid monthly on the warrant of the comptroller, and on the approval of his accounts and vouchers therefor. Each deputy commissioner shall receive three dollars per day for each day actually spent in the discharge of his duties under the direction of the commissioner, and their actual expenses necessarily incurred when so employed, to be paid monthly on the warrant of the comptroller, on the approval of itemized vouchers verified under oath and certified and approved by the game, fish and oyster commissioner; provided, that the total amount paid out by the warrant of the comptroller for the salaries and expenses of the game, fish and oyster commissioner, his chief deputy and the other deputies provided for in this chapter, shall not exceed the amount received by the state treasurer from the sale of hunting licenses and the collection of fines and penalties in cases for the violation of the game and bird laws of this state. And in no event shall the state ever be liable for the pay of any of the deputy commissioners provided for in this chapter. [Id. pp. 255–256, secs. 5–6.]

Art. 4041. Chief deputy to furnish blank hunting licenses to county clerk; accounts.—It shall be the duty of the chief deputy game, fish and oyster commissioner to prepare and furnish to each county clerk blank hunting licenses with stubs attached, numbered serially. Said chief deputy shall open an account with each county clerk and charge him with the number of licenses furnished said clerk. Said account shall show the serial number of such licenses. [Acts 1909, 2 S. S., p. 456, sec. 10.]

Art. 4042. Commissioner and deputies made fire commissioners; deputies.—The game, fish and oyster commissioner and his deputies appointed under the provisions of this chapter are hereby made fire commissioners, and it shall be their duty, in addition to their duties provided for in this chapter, to caution sportsmen or other persons, while in the woods or marshes or prairies, of the danger from fire, and to extinguish all fires left burning by any one, to the extent of their power, and to give notice to any and all parties interested, when possible, of fires raging and beyond their control, to the end that same may be controlled and extinguished. [Acts 1907, p. 257, sec. 12.]

TITLE 63 A

GOVERNING BOARDS OF STATE INSTITUTIONS

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| <p>Art.
4042a. How composed; qualifications.
4042b. Members of boards of institutions of higher education, how selected,</p> | <p>Art.
nominated and appointed; vacancies; members of existing boards.
4042c. Members divided into classes; terms, etc.; duties of boards.</p> |
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Article 4042a. How composed; qualifications.—The board of regents of the university of Texas shall be composed of nine persons, who shall be qualified voters; the board of directors of the agricultural and mechanical college of Texas shall be composed of nine persons, who shall be qualified voters; the state board of regents of the normal colleges shall be composed of six persons, who shall be qualified voters; the board of regents of the college of industrial arts for women shall be composed of six persons, three of whom may be women; the board of managers of the blind institute, the deaf and dumb institute, the deaf, dumb and blind institute for colored youths, the Confederate home, the Confederate woman’s home, of each of the insane asylums, the epileptic colony and the orphans home, shall each be composed of six members, who shall be qualified voters. [Acts 1913, p. 191, sec. 1.]

Art. 4042b. Members of boards of institutions of higher education, how selected, nominated and appointed; vacancies; members of existing boards.—The members of the governing board of each of the state institutions of higher education mentioned in section 1 [Art. 4042a] shall be selected from different portions of the state, and shall be nominated by the governor and appointed by and with the advice and consent of the senate. In event of a vacancy on said board, the governor shall fill said vacancy until the convening of the legislature and the ratification by the senate. The members of each of said boards who shall be in office at the time this Act takes effect shall continue to exercise their duties until the expiration of their respective terms, as shall be determined according to requirements of section 3 of this Act [Art. 4042c], and additional members shall be appointed in the manner prescribed herein to fill out the membership herein provided for. [Id. sec. 2.]

Art. 4042c. Members divided into classes; terms, etc.; duties of boards.—The following members of the several governing boards shall be divided into equal classes, numbered one, two and three, as determined by each board at its first meeting after this Act shall become a law, these classes shall hold their offices two, four and six years respectively, from the time of their appointment. And one-third of the membership of each board shall hereafter be appointed at each regular session of the legislature to supply the vacancies made by the provisions of this Act and in the manner provided for in section 2 [Art. 4042b], who shall hold their offices for six years, respectively. The duties of the several governing boards shall be determined by law heretofore enacted or that may hereafter be enacted, no changes in the said duties being made by this Act. [Id. sec. 3.]

TITLE 64

GUARDIAN AND WARD

[See title Fees of Office.]

Chap.	Chap.
1. General Provisions.	11. Sales.
2. In What County Proceedings Shall be Commenced.	12. Reports of Sales and Action of the Court Thereon.
3. Commencement of Proceedings.	13. Annual Accounts.
4. Persons Entitled to be Appointed Guardians, and Persons Who are Disqualified.	14. Death, Resignation and Removal of Guardian.
5. Appointment of Guardians.	15. Claims Against the Estate.
6. Temporary Guardian.	16. Guardianship of Persons of Unsound Mind, and Habitual Drunkards.
7. Oath and Bond of Guardian.	17. Non-resident Guardians and Wards.
8. Inventory, Appraisalment and List of Claims.	18. Removal of Guardianship.
9. Powers and Duties of Guardians.	19. Final Settlement.
10. Renting and Leasing Property, and Investing and Loaning Money of Ward.	20. Compensation of Guardians, Expense and Cost of Guardianship.
	21. Appeal, Bill of Review and Certiorari.

CHAPTER ONE

GENERAL PROVISIONS

Art.	Art.
4043. Jurisdiction of county court over.	4051. Provisions governing estates of decedents govern guardianships.
4044. Jurisdiction of district court over.	4052. Contest of proceedings.
4045. Who are minors.	4053. Cases of guardianship shall be called at each term.
4046. Who are persons of unsound mind.	4054. Meaning of "term of court."
4047. Who is an habitual drunkard.	4055. Appeals, etc., may be taken under the rules, etc., provided by law.
4048. Record book of estates shall be used.	
4049. What papers shall be recorded.	
4050. Order, etc., of court shall be at a regular term, unless, etc.	

Article 4043. [2550] [2469] **Jurisdiction of county court over.**—The county court shall appoint guardians of minors, persons of unsound mind and habitual drunkards, settle accounts of guardians, and transact all business appertaining to the estates of minors, persons of unsound mind and habitual drunkards. [Const., art. 5, sec. 16. Act June 16, 1876, p. 19, sec. 4.]

Guardianship of dependent and neglected children.—See Title 38, Chapter 1.

Guardian ad litem.—See Title 37, Chapter 12.

Suit by next friend.—See Title 37, Chapter 22.

Jurisdiction as affected by will.—Provision in will that courts shall have no further jurisdiction than to probate will as applied to guardian held to fail for want of power in testatrix. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

Art. 4044. [2551] [2470] **Jurisdiction of district court over.**—The district court shall have appellate jurisdiction over the county court in all matters of guardianship, and original control and jurisdiction over guardians and wards, under such regulations as may be prescribed by law. [Const., art. 5, sec. 8.]

See, also, notes under Art. 1706.

Jurisdiction to determine custody of minors.—Jurisdiction to determine the right to the custody of a minor is conferred by the constitution upon the district court, and can be invoked only by an original proceeding brought in that court, and cannot be exercised on an appeal in guardianship proceeding begun in a county court. *Estes v. Presswood* (Civ. App.) 137 S. W. 145.

Art. 4045. [2552] [2471] **Who are minors.**—Male persons under twenty-one years of age, and females under twenty-one years of age who have never been married, are minors. [Act Aug. 18, 1876, p. 175, sec. 2.]

Disabilities and privileges of infancy.—See notes at end of Title 94.

Marriage as terminating disability of infancy.—See notes under Art. 4623.

Art. 4046. [2553] [2472] **Who are persons of unsound mind.**—Persons of unsound mind are idiots, lunatics or insane persons. [Id. sec. 3.]

Art. 4047. [2554] [2473] **Who is an habitual drunkard.**—An habitual drunkard is one whose mind has become so impaired by the use of intoxicating liquors or drugs that he is incapable of taking care of himself or property. [Id.]

Art. 4048. [2555] [2474] **Record books of estates shall be used, etc.**—The record books used for the business of estates of decedents shall also be used for the business of guardianships.

Art. 4049. [2556] [2475] **What papers shall be recorded.**—The following papers shall be copied at length into the minutes of the court:

1. All applications, citations and returns upon citations.
2. All notices, whether published or posted, with the returns thereon.
3. All bonds and official oaths.
4. All inventories, appraisements and lists of claims, after the same have been approved by the court.
5. All reports of sales, renting or leasing of property, and of loaning or investing money, after such reports have been approved by the court.
6. All accounts and exhibits of the guardian, after the same have been approved by the court. [Id. p. 191, sec. 186.]

Art. 4050. [2557] [2476] **Orders, etc., of court shall be at regular terms, unless, etc.**—All decisions, orders and judgments of the court in matters of guardianship shall be rendered and entered on the minutes of the court at a regular term thereof, and in open court, except in cases where it is otherwise specially provided.

Entry on records of orders and decrees in guardianship proceedings.—All orders and decrees in probate and guardianship proceedings must be entered upon the records at the term of court at which they are made, and unless so recorded they are nullities. *Teague v. Swasey*, 46 C. A. 151, 102 S. W. 460.

Under Arts. 4091-4096, the power to appoint a temporary guardian is conferred on the judge, while the power to pass on a contest and make a permanent appointment is vested in the court; and an order of the court appointing a permanent guardian must be made in term time and entered in the minutes, as required by Arts. 4050, 4083, and under Arts. 3219, 4050, the appointment is a nullity, unless so entered. *Threatt v. Johnson* (Civ. App.) 156 S. W. 1137.

Art. 4051. [2558] [2477] **Provisions, etc., governing estates of decedents govern guardianships, etc.**—The provisions, rules and regulations which govern estates of decedents shall apply to and govern such guardianships, whenever the same are applicable and not inconsistent with any of the provisions of this title.

Entry on minutes of orders in guardianship proceedings.—This article in connection with Art. 3223 does not change the requirement of Art. 4050 that all orders in matters of guardianship shall be entered on the minutes of the court. Orders not so entered are void. *Blackwood v. Blackwood's Estate* (Civ. App.) 47 S. W. 483.

Removal of money by guardian of nonresident minors.—Under this article and Arts. 3554, 4256-4260 a guardian could not remove money held by a clerk of the probate court paid him in a damage suit which belonged to nonresident minors, unless he complied with the conditions of title 64 by giving bond to secure debts. *Hoffman v. Watkins* (Civ. App.) 130 S. W. 625.

Dismissal of appeal.—See notes under Art. 4055.

Art. 4052. [2559] [2478] **Any person may contest proceedings.**—Any person has the right to appear and contest the appointment of a particular person as guardian, or to contest any proceeding which he deems to be injurious to the ward, or to commence any proceeding which he considers beneficial to the ward, such person being liable for the costs occasioned by him in the case of his failure. [Id. p. 170, sec. 18.]

Contest of appointment.—Where one claiming to be the guardian appointed in another jurisdiction contests the appointment of a subsequent guardian in Texas, the material question is not the right of the contestant to maintain the suit (because under this article any one can do this), but conceding the right to commence the suit whether there is ground for relief. *Hagan v. Snider*, 44 C. A. 139, 98 S. W. 214.

Art. 4053. [2560] [2479] **Case of guardianship shall be called at each term.**—It shall be the duty of the county judge, at each regular term of his court, to call each case of guardianship upon his docket, and

to make such orders therein as may be necessary, and to see that such orders, together with all papers required to be recorded, are entered upon the minutes, and to hold guardians and the officers of his court to a strict accountability for the performance of their duties with reference to guardianships.

Art. 4054. [2561] [2480] Meaning of "term of court."—Whenever a term of the county court is mentioned in this title, it is meant a term of such court held for the transaction of probate business.

Art. 4055. [2562] [2481] Appeals, etc., may be taken under the rules provided by law.—The judgments, orders, decrees and proceedings of the court in relation to guardianships may be appealed from to the district court by any person who may consider himself aggrieved thereby; or the same may be revised and corrected by certiorari, or bill of review, in the manner and under the rules and regulations provided by law.

Parties on appeal.—Where a guardian dies pending an appeal from the probate to the district court, and there being no administration on his estate nor necessity therefor, it is proper to make his heirs parties and prosecute the case in their name. *Magness v. Berry*, 29 C. A. 567, 69 S. W. 987.

Dismissal of appeal.—Under this article and Arts. 4051, 3631, 1889, held error to dismiss an appeal to the district court from a judgment of the probate court approving a guardian's account. *Magness v. Berry*, 29 C. A. 567, 69 S. W. 987.

CHAPTER TWO

IN WHAT COUNTY PROCEEDINGS SHALL BE COMMENCED

<p>Art. 4056. Guardianship of estate of minor shall be commenced where parents reside.</p> <p>4057. Where the parents reside in different counties.</p>	<p style="text-align: right;">Art. 4058. Proceedings for guardianship of orphan commenced, where.</p> <p style="text-align: right;">4059. Persons of unsound mind, etc.</p> <p style="text-align: right;">4060. Where a guardian has been appointed by will.</p>
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Article 4056. [2563] [2482] Guardianship of estate of minor shall be commenced where parents reside.—A proceeding for the appointment of a guardian for the estate of a minor shall be commenced in the county where the parents of such minor reside. [Act Aug. 18, 1876, p. 176, sec. 19.]

Jurisdiction of courts.—Under this article and Arts. 4058, 4077, a proceeding to appoint a guardian of the estate of a minor who has a parent living should be brought in the county of the latter's residence. *Estes v. Presswood* (Civ. App.) 137 S. W. 145.

Persons for whom guardians may be appointed.—Under the act of March 16, 1848 (Early Laws, art. 1853, § 2), it was held that the county court had authority to appoint a guardian for minors, nonresidents of this state, who had estates here, and to order the sale of property as in other cases. *Neal v. Bartleson*, 65 T. 478.

Art. 4057. [2564] [2483] Where parents reside in different counties.—If the parents of the minor do not reside in the same county, the proceedings for such guardianship shall be commenced in the county where the parent who has the custody of the minor resides. [Id. sec. 20.]

Art. 4058. [2565] [2484] Proceedings for guardianship of an orphan shall be commenced, where.—A proceeding for the appointment of a guardian of the person and estate of an orphan, or of either, shall be commenced in the county where the last surviving parent of such orphan resided at the time of the death of such parent, or where such orphan is found, or where the principal estate of such orphan may be. [Id. sec. 21.]

Jurisdiction of courts—Residence of parents.—Under this article and Arts. 4056, 4070, a proceeding to appoint a guardian of the estate of a minor who has a parent living should be brought in the county of the latter's residence. *Estes v. Presswood* (Civ. App.) 137 S. W. 145.

Residence of Infant.—"Residence," in its technical sense, of an orphan is not essential to the power of the probate court to appoint a guardian. The mere presence of an infant might confer jurisdiction. *Hagan v. Snider*, 44 C. A. 139, 98 S. W. 214.

Art. 4059. [2566] [2485] Persons of unsound mind and drunkards.—A proceeding for the appointment of a guardian of the person or estate, or of either, of a person of unsound mind, or an habitual drunkard, shall be commenced in the county where such person of unsound mind or habitual drunkard resides.

Jurisdiction of courts.—The fact that one is confined in an asylum in another county than his residence does not deprive the latter of jurisdiction in matters of guardianship of his estate. The residence is not thereby changed. *Flynn v. Hancock*, 35 C. A. 395, 80 S. W. 246.

Art. 4060. [2567] [2486] Where a guardian has been appointed by will.—Where a guardian has been appointed by will, proceedings for letters of guardianship shall be commenced in the county where the will has been admitted to probate.

Cited, *Munson v. Newson*, 9 T. 109.

CHAPTER THREE

COMMENCEMENT OF PROCEEDINGS

<p>Art. 4061. Commenced by written application. 4062. Who may make application, and what the same shall contain. 4063. Clerk shall issue citation, which shall state what. 4064. Citation shall be served, how.</p>	<p>Art. 4065. Return of citation. 4066. Minor fourteen years old, or over, shall be personally cited. 4067. County judge shall commence proceedings, when.</p>
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Article 4061. [2568] [2487] Commenced by written application.—A proceeding for the appointment of a guardian is commenced by written application, filed in the county court of the county having jurisdiction of the case. [Act Aug. 18, 1876, p. 177, sec. 23.]

Art. 4062. [2569] [2488] Who may make application, and what the same shall contain.—The application may be made by any person, and it shall state:

1. The name, sex, age and residence of the minor.
2. The estate of such minor, if any, and the probable value thereof.
3. Such facts as show the jurisdiction of the court over the case.

[Id. sec. 24.]

Art. 4063. [2570] [2489] Clerk shall issue citation, which shall state, what.—Upon the filing of such application, the clerk shall immediately issue citation, which shall state that an application has been filed, and by whom, for the guardianship of the person or estate, or both, as the case may be, of the minor, naming such minor, and shall cite all persons interested in the welfare of such minor to appear at a term of the court named in such citation, and contest such application if they see proper to do so.

Necessity of citation.—The power of the court to appoint a permanent guardian is statutory, and the citation prescribed by statute is jurisdictional, and an appearance in court does not dispense with the necessity of the citation. *Threatt v. Johnson* (Civ. App.) 156 S. W. 1137.

Art. 4064. [2571] [2490] Citation shall be served, how.—Such citation shall be served by posting copies thereof for not less than ten days before the first day of the term of the court at which the application is to be acted upon, one of which copies shall be posted at the court house, and two other copies at two other public places in the county, not in the same city or town.

Art. 4065. [2572] [2491] Return of citation.—The sheriff or other officer serving such citation shall return the same, stating thereon, in writing, the time and places, when and where, he posted such copies, and shall sign such return officially.

Art. 4066. [2573] [2492] Minor fourteen years old or over shall be personally cited.—If the minor be fourteen years of age or over, such minor shall be personally served with citation to appear and answer such application; or such minor may, by writing filed with the clerk, waive the issuance of such citation, and make choice of a guardian. [Id. sec. 27.]

Art. 4067. [2574] [2493] County judge shall commence proceedings, when.—Whenever it shall come to the knowledge of the county judge that there is within his county any minor without a guardian of his person or estate, he shall cause a citation to be posted to all persons interested in the welfare of such minor to show cause at a regular term of his court why a guardian of such minor should not be appointed; and, if such minor be fourteen years of age or over, he shall be personally cited. [Id. sec. 28.]

Jurisdiction of courts.—Under this article in a proper case the judge can appoint a guardian of a minor, and by virtue of Art. 4245 he has the same right to appoint a guardian of person of unsound mind. *Flynn v. Hancock*, 35 C. A. 395, 80 S. W. 246.

CHAPTER FOUR

PERSONS ENTITLED TO BE APPOINTED GUARDIANS, AND PERSONS WHO ARE DISQUALIFIED

Art.	Art.
4068. Father entitled, where parents live together.	4074. Collateral kin entitled, when.
4069. Parents equally entitled, when.	4075. Where no one who is entitled applies, court shall appoint, etc.
4070. Surviving parent entitled to.	4076. Who entitled in case of persons of unsound mind, etc.
4071. Surviving parent may appoint guardian by will, etc.	4077. Court shall appoint, when.
4072. Who entitled to guardianship of orphans.	4078. Who are not qualified.
4073. Where ascendants are equally entitled.	4079. Minor fourteen years of age may select his guardian.

Article 4068. [2575] [2494] Father entitled, where parents live together.—Where the parents of the minor live together, the father is the natural guardian of the person of the minor children by the marriage, and is entitled to be appointed guardian of their estates. [Act Aug. 18, 1876, p. 175, sec. 8.]

Removal of guardian—Party entitled to ask for.—See notes under Art. 4200.

Art. 4069. [2576] [2495] Parents equally entitled, when.—Where the parents do not live together, their rights are equal; and the guardianship of their minor children shall be assigned to one or the other, according to the circumstances of each case, taking into consideration the interest of the child alone. [Id. sec. 9.]

Effect of award of custody in divorce suit.—When the custody of a child has been given to one of the parents in a suit for divorce under Art. 4641, the court has no authority to grant guardianship to another. *Jordan v. Jordan*, 23 S. W. 531, 4 C. A. 559.

Art. 4070. [2577] [2496] Surviving parent entitled.—Where one of the parents is dead, the survivor is the natural guardian of the persons of the minor children, and entitled to be appointed guardian of their estates. [Id. sec. 10.]

Jurisdiction of courts.—Under this article and Arts. 4056, 4058, a proceeding to appoint a guardian of the estate of a minor who has a parent living should be brought in the county of the latter's residence. *Estes v. Presswood* (Civ. App.) 137 S. W. 145.

Surviving mother after remarriage.—A married woman is not incapacitated from acting as guardian of her infant children by a former marriage, but, on the contrary, is by statute given the preference as guardian of such children. *Wright v. Wright* (Civ. App.) 155 S. W. 1015.

Stepmother as surviving parent.—The stepmother is not a parent within the meaning of this law, so as to give a preference right of appointment as guardian of minor children of her deceased husband over blood relatives of such children. *Heinemier v. Arlitt*, 29 C. A. 140, 67 S. W. 1039, 1040.

Waiver of right to guardianship by surviving parent.—The right of one to letters of guardianship under the statute is waived when at his request another received the ap-

pointment and qualified; and this rule is not affected by the fact that such person is the surviving parent. *Kahn v. Israelson*, 62 T. 221; *Cole v. Dial*, 12 T. 100; *Cook v. Bybee*, 24 T. 280; *Mayes v. Houston*, 61 T. 690.

Art. 4071. [2578] [2497] Surviving parent may appoint guardian by will, etc.—The surviving parent of a minor may, by will or written declaration, appoint any person not disqualified to be guardian of the persons of his or her children after the death of such parent; and such person shall be entitled to be appointed guardian of their estates also after the death of such parent. [Id. sec. 11.]

Appointment by will.—When a guardian of the estate of a minor child has been appointed at the request of the mother, she cannot appoint another by will. *Potts v. Terry*, 28 S. W. 122, 8 C. A. 394.

Art. 4072. [2579] [2498] Who entitled to guardianship of orphans.—Where the minor is an orphan, and no one has been appointed by the parent to be the guardian of such minor, as provided in the preceding article, the nearest ascendant in the direct line of such minor, if not disqualified, is entitled to the guardianship of both the person and the estate of such minor. [Id. sec. 12.]

Art. 4073. [2580] [2499] Where ascendants are equally entitled.—If there be more than one ascendant in the same degree in the direct line, they are equally entitled; and the guardianship shall be given to one or the other, according to circumstances, taking into consideration the interest of the orphan alone. [Id. sec. 13.]

Art. 4074. [2581] [2500] Collateral kin entitled, when.—In case the orphan has no ascendant in the direct line, the guardianship shall be given to the nearest of kin in the collateral line, who comes immediately after the presumptive heir or heirs of the orphan; and, if there be two or more in the same degree, the guardianship shall be given to the one or the other, according to circumstances, taking into consideration the interest of the orphan alone. [Id. sec. 14.]

Art. 4075. [2582] [2501] Where no one who is entitled applies, court shall appoint, etc.—If there be no relative of the minor qualified to take the guardianship, or if no person entitled to such guardianship applies therefor, the court shall appoint some proper person to be such guardian.

Stepparent as relative.—The stepparent is not a relative within the meaning of this law, so as to give such parent right of appointment as guardian over blood relatives of the minors. *Heinemier v. Arlitt*, 29 C. A. 140, 67 S. W. 1039, 1040.

Art. 4076. [2583] [2502] Who entitled in case of person of unsound mind, etc.—In the case of a person of unsound mind, or an habitual drunkard, the nearest of kin to such person, who is not disqualified, shall be entitled to the guardianship; and, where two or more are equally entitled, the guardianship shall be given to one or the other, according to circumstances, taking into consideration the interest of the ward alone. If such ward have a husband or wife who is not disqualified, such husband or wife shall be entitled to the guardianship in preference to any other person.

Art. 4077. [2584] [2503] Court shall appoint proper person, when.—If no person who is entitled to such guardianship and who is qualified shall apply therefor, the court shall appoint some proper person to be such guardian.

Art. 4078. [2585] [2504] Who are not qualified to be guardians.—The following persons shall not be appointed guardians:

1. Minors, except the father or mother.
2. Persons whose conduct is notoriously bad.
3. Persons of unsound mind.
4. Habitual drunkards.
5. Those who are themselves or whose father or mother are parties to a lawsuit, on the result of which the condition of the minor or part of his fortune may depend.

6. Those who are debtors to the minor, unless they discharge the debt prior to such appointment; but this subdivision does not apply to the father or mother of such minor. [Id. sec. 16.]

Persons entitled to appointment.—When one designated by statute as having prior right of guardianship is not disqualified by reason of matters mentioned in this article then he is entitled to be appointed guardian, even though the court might believe that one not given preference by statute would fill the position better. The court has no discretion in the matter. *Heinemier v. Arlitt*, 29 C. A. 140, 67 S. W. 1039, 1040.

Disqualification by interest.—The result of the suit under this subdivision must affect the condition of the minor or part of his estate. A lawsuit against a party who is in no way liable to the minor will not disqualify him from being appointed guardian of the person or estate of the minor. *Davis v. Hammack* (Civ. App.) 107 S. W. 114.

In a proceeding by the adopted mother of a minor ward to be appointed his guardian, judgment was entered removing his acting guardian and appointing her, and pending appeal to the district court the acting guardian suing for the benefit of the ward brought trespass to try title and for rents, the suit resulting in a judgment that buildings erected by her were intended as a gratuity to the ward, and that she was not indebted to him, and thereafter the order removing the acting guardian was affirmed and she was appointed guardian. Held, that under this article the issues in the suit to try title were not material to her competency, since the interests of the ward were fixed by law, and since any ground of objection to her had been removed before her appointment. *Burns v. Parker* (Civ. App.) 155 S. W. 673.

Character of mother.—In a contest between a paternal grandfather and a mother for the custody of an infant, it is error to exclude the issue as to the mother's reputation for chastity and veracity. *Ward v. Ward*, 34 C. A. 104, 77 S. W. 829.

Art. 4079. [2586] [2505] Minor fourteen years of age may select his own guardian.—A minor who is fourteen years of age or over has the right to select a guardian, either of his person or estate, or both; which selection may be made in open court, in person or by attorney; and the person selected, if qualified, shall be entitled to be appointed guardian, except in the case where the surviving parent of such minor has appointed a guardian by will or written declaration; in which case, the person so appointed shall be entitled to the guardianship.

In general.—As to the construction of the provisions of this chapter and this article and Art. 4084, see *Jordan v. Jordan*, 23 S. W. 531, 4 C. A. 559.

Under this article and Art. 4084, the right of a minor to select his own guardian is absolute, if he does not select any of that class of persons excluded by the statute, and the person so selected is suitable and competent. *Burns v. Parker* (Civ. App.) 155 S. W. 673.

CHAPTER FIVE

APPOINTMENT OF GUARDIAN

<p>Art. 4080. Court may appoint, when. 4081. What facts must appear before appointment is made. 4082. Only one guardian of the person or estate shall be appointed, except. 4083. Order of appointment, requisites. 4084. Minor having guardian may select another, when. 4085. Another guardian shall be appointed, when.</p>	<p>Art. 4086. Guardian of minor continues in office, until, etc. 4087. Guardian of person of unsound mind, etc., continues in office, until, etc. 4088. Court may appoint receiver, when. 4089. Guardianship of estate of non-resident minor. 4090. Letters shall issue, when, and shall state, what.</p>
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Article 4080. [2587] [2506] Court may proceed to appoint, when.—At a regular term of the court, after notice shall have been given by citation duly served as required by law, the court may proceed to the appointment of a guardian.

Necessity of citation.—See notes under Art. 4063.

Art. 4081. [2588] [2507] What facts must appear before appointment is made.—Before appointing a guardian, the court must be satisfied:

1. That the person for whom a guardian is sought to be appointed is a minor, a person of unsound mind or an habitual drunkard.
2. That the court has jurisdiction of the case.
3. That the person to be appointed guardian is not disqualified to act as such and is entitled thereto; or, in case no person who is entitled

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thereto applies therefor, that the person appointed is a proper person to act as such guardian.

Art. 4082. [2589] [2508] Only one guardian of the person or estate shall be appointed, except, etc.—Only one guardian can be appointed of the person or estate; but one person may be appointed guardian of the person, and another of the estate, whenever the court shall be satisfied that it will be for the advantage of the ward to do so. Nothing in this article shall be held to prohibit the joint appointment of husband and wife. [Act Aug. 15, 1870. P. D. 6926.]

Number of guardians.—Only one guardian of the estate of a minor can be appointed, and a sale by one claiming to act as guardian while the minor has another lawful guardian is void. *St. Paul Sanitarium v. Crim*, 38 C. A. 1, 84 S. W. 1114.

Art. 4083. [2590] [2509] Order of appointment shall contain what.—The order of the court appointing a guardian shall be entered upon the minutes of the court, and shall specify:

1. The name of the person appointed.
2. The name of the ward.
3. Whether the guardian is of the person, of the estate, or of both the person and estate of such ward.
4. The amount of the bond required by such guardian.
5. If it be the guardianship of the estate, the order shall also appoint three or more discreet and disinterested persons to appraise such estate, and return such appraisal to the court.
6. It shall direct the clerk to issue letters of guardianship to the person appointed when such person has qualified according to law.

Requisites of order of appointment.—The order of the court appointing the guardian must show whether it is of the person or of the estate, or both. *Gill v. Everman* (Civ. App.) 60 S. W. 914.

Time of making and entry.—Under this article and Arts. 3219, 4050, 4091-4096, the power to appoint a temporary guardian is conferred on the judge, while the power to pass on a contest and make a permanent appointment is vested in the court; and an order of the court appointing a permanent guardian must be made in term time and entered in the minutes, and under Arts. 3219, 4050, the appointment is a nullity, unless so entered. *Threatt v. Johnson* (Civ. App.) 156 S. W. 1137.

Setting aside.—If an appointment of guardian is made by a court not having jurisdiction, the order may be set aside by such court on a proper proceeding instituted for that purpose. *Munson v. Newson*, 9 T. 109; *Finch v. Edmonson*, 9 T. 504.

County court, sitting in probate, held to have jurisdiction to entertain a petition to set aside an order appointing a guardian; the ground of objection being that no proper citation was served prior to such appointment. *Arthur v. Reed*, 26 C. A. 574, 64 S. W. 831.

Collateral attack.—A judgment of the county court appointing a guardian for a person of unsound mind cannot be collaterally attacked. *Flynn v. Hancock*, 35 C. A. 395, 80 S. W. 245.

Conclusiveness.—Order appointing third party guardian of certain children held conclusive as to fitness of the third party and unfitness of the mother. *Beardsley v. Thomas*, 31 C. A. 452, 72 S. W. 411.

Art. 4084. [2591] [2510] Minor having guardian may select another, when.—A minor having a guardian of his person or estate, appointed by the court, may, upon attaining the age of fourteen years, by application in writing filed in the court in which such guardianship is pending, select another guardian of his person or of his estate; and, if the court is satisfied that the person selected is suitable and competent, the appointment of such person as guardian shall be made, and the letters of guardianship to the former guardian shall be revoked; except, in the case where such former guardian has been appointed by the will or written declaration of the parent of such minor, in which case the minor shall not be permitted to select another guardian, unless such appointed guardian die, resign or is removed from such guardianship.

Right of infant to select another guardian.—A child 14 years of age cannot at will leave its father's home and choose another person as its guardian, in the absence of essential legal proceedings in the probate court. *Grego v. Schneider* (Civ. App.) 154 S. W. 361.

Under this article and Art. 4084, the right of a minor to select his own guardian is absolute, if he does not select any of that class of persons excluded by the statute, and the person so selected is suitable and competent. *Burns v. Parker* (Civ. App.) 155 S. W. 673.

Under this article the question as between an acting guardian and the one selected by a minor ward is wholly a question of the competency of the guardian selected, and

the fact that the acting guardian had acted at the oral request of the ward's father, that to appoint the guardian selected would place his funds under control of one not related to him, and that the acting guardian had competently and profitably managed his estate were not material to and did not put in issue the competency of the guardian selected. *Id.*

Art. 4085. [2592] [2511] Another guardian shall be appointed, when.—Whenever a person appointed guardian fails to qualify as such, according to law, or dies, resigns, or is removed, the court shall appoint another guardian in his stead.

Art. 4086. [2593] [2512] Guardian of minor continues in office, until, etc.—The guardian of a minor continues in office, unless sooner discharged according to law, until the minor arrives at the age of twenty-one years, or, being a female, marries, or until such minor shall die. [Act Aug. 18, 1876, p. 178, sec. 38.]

Liability of guardian to minor attaining full age.—A guardian was required by order of court to give a new bond but failed to do so, whereupon another guardian was appointed, who qualified, when the minor arrived at full age he sued former guardian for waste committed by him. This he could do regardless of whether the former guardian was removed by order of court above referred to or not. It is not necessary to entitle the minor to sue after he becomes of age, that settlement should first be made and the discharge formally entered of record. *Hix v. Duncan* (Civ. App.) 99 S. W. 422, 423.

Art. 4087. [2594] Guardian of person of unsound mind, etc., continues in office until, etc.—The guardian of a person of unsound mind or an habitual drunkard shall continue in office, unless sooner discharged according to law, until the ward shall be restored to sound mind or to correct, sober habits, as the case may be, or shall die. [Acts 1876, p. 175.]

Art. 4088. [2595] Court may appoint a receiver, when.—When, from any cause, the estate of a minor, person of unsound mind or of an habitual drunkard is without a guardian, and such estate is likely to injure or waste, the county judge shall, upon application or without application, either in term time or in vacation, appoint some suitable person to take charge of such estate, as receiver, until a guardian can be regularly appointed, and shall make such other orders as may be necessary for the preservation of such estate. Such appointment and orders shall be recorded in the minutes of the court, and shall specify the duties and powers of such receiver; and the provisions of the law governing in the case of a temporary administration upon the estate of a decedent shall govern in the case of a receiver appointed under this article, so far as the same are applicable. If, during the pendency of such receivership, the wants of such minor, person of unsound mind or habitual drunkard should require the use of the means of such estate for their subsistence, clothing or education, the county judge is hereby authorized, and it shall be his duty, upon application or without application, either in term time or in vacation, to appropriate by an order entered upon the minutes of his court, out of the effects of such estate, an amount sufficient for such purpose; said amount to be paid by such receiver upon such claims for the subsistence, clothing or education as may have been presented to such county judge and approved, and by him ordered to be paid. If, at any time, the receiver shall have on hand any money belonging to such estate beyond what may be necessary for the present necessities of the beneficiary of said estate and the current expenses thereof, he may, under the direction of the county judge, loan said money for such length of time as said county judge may direct, for the highest legal rate of interest that can be obtained therefor, in the manner and upon the security and terms provided in article 4141. [Acts 1885, p. 81.]

Liability of receiver.—A receiver of money of an infant held liable for interest having converted such funds to his own use. *Brockschmidt v. Becker* (Civ. App.) 132 S. W. 111.

Art. 4089. [2596] [2515] Guardianship of estate of non-resident minor.—When a minor or person of unsound mind resides out of the state and owns property in this state, guardianship of the estate of such minor or person of unsound mind may be granted when it is made to appear that a necessity exists for such guardianship, in like manner as if such minor or person of unsound mind resided in this state; and the court making such grant of guardianship shall take all such action and make all such orders in reference to the estate of the ward, for the maintenance and support or education and care of such ward, out of the proceeds of such ward's estate, in like manner as if the ward had resided in this state and guardianship of the person of said ward had been granted by said court, and the ward had been sent abroad by the order of the court for education or treatment. [Id. p. 176, sec. 22.]

Art. 4090. [2597] [2516] Letters shall issue, when, and shall state, what.—When a person appointed guardian has qualified as such, by taking the oath and giving the bond required by law, the clerk shall issue to him a certificate, attested by the seal of the court, stating the fact of such appointment and qualification and date thereof; which certificate shall constitute letters of guardianship, and be evidence of the authority of the person to whom issued to act as guardian. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Setting aside order.—See notes under Art. 4083.

CHAPTER SIX

TEMPORARY GUARDIAN

Art. 4091. County judge may appoint temporary guardian of person and estate, etc., of minor, when, etc.
4092. Order shall state what.
4093. Court to determine contest; pending what, temporary guardian to act;

Art. exhibit where appointment set aside.
4094. Appointment not effective till oath and bond.
4095. Upon appointment citation to issue; requisites.
4096. Provision of title 51 apply.

Article 4091. County judge may appoint temporary guardian of person and estate of minor, when, etc.—Whenever it may appear to the county judge that the interests of any minor and his or her estate, or either, require immediate appointment of a guardian, he shall, either in open court or in vacation, without citation and with or without written application therefor, appoint some suitable person temporary guardian of the person of such minor and his or her estate, or either, as the case may be; and the appointment so made may be made permanent, as hereinafter provided for. [Acts 1905, p. 18, sec. 1.]

Jurisdiction of court to appoint temporary guardian.—Under this chapter the power to appoint a temporary guardian is conferred on the judge, while the power to pass on a contest and make a permanent appointment is vested in the court; and an order of the court appointing a permanent guardian must be made in term time and entered in the minutes, as required by Arts. 4050, 4083, and under Arts. 3219, 4050, the appointment is a nullity, unless so entered. *Threatt v. Johnson* (Civ. App.) 156 S. W. 1137.

Guardian ad litem.—See Title 37, Chapter 12.

Art. 4092. Order shall state what.—The order of the court in making such appointment shall state that unless the same is contested at the next regular term of the court, after service of citation, the same shall be made permanent. [Id. sec. 2.]

Art. 4093. Court to determine contest; pending what, temporary guardian to act; exhibit where appointment set aside.—In case such appointment is contested, the court shall hear and determine the same as the law and the facts require; and, during the pendency of such contest, the person so appointed as temporary guardian shall continue to

act as such; and, in case such appointment is set aside, the court shall require the person so appointed to make out, and file in court, under oath, a complete exhibit of the condition of such minor's estate, and what disposition, if any, he has made of the same, or any portion thereof. [Id. sec. 3.]

Art. 4094. Appointment not effective till oath and bond.—Such appointments shall not take effect, until the person so appointed has taken the oath and given bond as required by law. [Id. sec. 4.]

Art. 4095. Upon appointment, citation to issue; requisites.—Immediately after such appointment so made, it shall be the duty of the clerk of the court to issue citation; which shall state the name of the person appointed, and when so appointed, and the name of the minor, or minor's estate, or both, as the case may be, and shall cite all persons interested in the welfare of such minor to appear at the term of court named in such citation, and contest such appointment if they so desire; and, that, if such appointment is not contested at the term of court so named in the citation, then the same shall become permanent. [Id. sec. 5.]

Art. 4096. Provisions of title 51 apply.—That all the provisions of this title, relating to the guardianship of the persons and estates of minors shall apply to temporary guardianship of the persons and estates of minors, in so far as the same are applicable and not inconsistent with any of the provisions of this chapter. [Id. sec. 6.]

CHAPTER SEVEN

OATH AND BOND OF GUARDIANS

Art.		Art.	
4097.	Oath of guardian.	4106.	Bond of father or mother under twenty-one years of age valid.
4098.	Bond of guardian of the person.	4107.	New bond may be required, etc.
4099.	Bond of guardian of the estate.	4108.	Guardian shall cease to act as such, when.
4100.	What sureties required.	4109.	Surety may be relieved in same manner, etc.
4101.	Premium on surety company bond to be paid by guardian.	4110.	Oath and bond to be presented within twenty days.
4102.	Surety company bonds validated.	4111.	Oath and bond to be recorded, etc.
4103.	Bond where same person is guardian of both person and estate.	4112.	Sureties released, when, etc.
4104.	No bond required when will, etc., has dispensed with it.		
4105.	Bond of married woman as guardian.		

Article 4097. [2598] [2517] Oath of guardian.—The guardian shall take an oath faithfully to discharge the duties of guardian of the person (or of the estate, or of the person and estate, as the case may be) of the ward, according to law; which oath shall be indorsed on the bond of such guardian, and may be taken before any officer of the county in which the proceedings for such guardianship are pending, authorized to administer oaths generally. [Act Aug. 18, 1876, p. 177, sec. 35.]

Art. 4098. [2599] [2518] Bond of guardian of the person.—The bond of a guardian of the person of a ward shall be in an amount to be fixed by the court granting such guardianship, not to exceed one thousand dollars, and shall be made payable to the county judge of the county where such guardianship is pending, and to be approved by such county judge, conditioned that such guardian will faithfully discharge the duties of guardian of the person of such ward. [Id. sec. 31.]

Art. 4099. [2600] [2519] Bond of guardian of the estate.—The bond of the guardian of the estate of a ward shall be in an amount equal to double the estimated value of the personal property belonging to such estate, plus a reasonable amount, to be fixed at the discretion of

the county judge, to cover rents, revenues and income derived from the renting or use of real estate belonging to such estate, payable to the county judge of the county where such guardianship is pending and to be approved by such county judge, conditioned that such guardian will faithfully discharge the duties of guardian of the estate of such ward according to law; and it shall be the duty of such county judge to annually examine into the condition of the estate of the ward, and the solvency of such guardian's bond, and to require such guardian at any time it may appear that such bond is not ample security to protect such estate and the interest of his ward; to execute another bond in accordance with law. And, in such case, he shall notify the guardian as in other cases; and should damage or loss result to the estate of any ward through the negligence of such county judge, to perform the duties herein prescribed, such county judge shall be liable on his official bond, payable to such ward, in an amount equal to the loss due to such negligence. [Acts 1895, p. 231. Acts 1913, p. 321, sec. 1, amending Rev. St. 1911, Art. 4099.]

Necessity of bond.—One appointed as guardian, but who does not take the oath, give the bond, or file any inventory, and whom the court does not recognize as such, is neither a guardian de jure nor de facto. *Stephens v. Hewett*, 22 C. A. 303, 54 S. W. 301.

Requisites and validity of bond.—Guardian's bond held not invalid, as being more onerous than the law requires. *Frenkel v. Caddou* (Civ. App.) 40 S. W. 638.

A guardian's bond, payable to the county judge, conditioned for the faithful performance of his duties as guardian, and appearing to be the bond of the guardian of certain minors, held a sufficient bond. *Fahey v. Boulmay*, 24 C. A. 279, 59 S. W. 300.

Sureties on a guardian's bond unauthorized under the statute held liable thereon as on a common-law bond. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

— **Bond of guardian of person and estate.**—See notes under Art. 4103.

— **Amount.**—The estimated value of the minor's estate made in the application for letters is not binding on the court but the court can estimate the value, and where the bond is made in double the value of such estimate and the amount of the inventory it is sufficient. *Greer v. Ford*, 31 C. A. 339, 72 S. W. 74.

Under this article the bond must be double the value of all the property, both real and personal. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

An order reducing a bond to less than double the estimated value of the estate is null and void and can be attacked collaterally. *Id.*

Liabilities of sureties.—A guardian who before his appointment obtains illegal possession of the ward's property and disposes of it is required to account therefor after his appointment, and the sureties on his bond would be liable for his default in this respect. *Sargent v. Wallis*, 67 T. 483, 3 S. W. 721.

Where a guardian fails to pay money directed by the court to be paid to a certain person, such person has a right of action at once on his bond. *Fahey v. Boulmay*, 24 C. A. 279, 59 S. W. 300.

Where a father was appointed guardian of his children in 1879, from which time until 1890 their property brought no income, his sureties, in an action on a bond, cannot sue for charges for the support of the wards between these dates, in the absence of an order authorizing such charges by the guardian. *Allen v. Stovall* (Civ. App.) 62 S. W. 87.

Where a guardian received money through the settlement of a legal controversy in which his wards were interested, it cannot be contended that a surety on the guardian's bond was not liable because the guardian had no authority to make the settlement. *Allen v. Stovall*, 94 T. 618, 63 S. W. 863; *Stovall v. Allen*, *Id.*

The fact that a guardian loaned the wards' money without leave of the court did not relieve the guardian or his surety from responsibility therefor. *Freedman v. Vallie* (Civ. App.) 75 S. W. 322.

The fact that a guardian loaned to himself a part of the ward's estate did not pass the same out of his hands as guardian, nor affect the liability of the surety on his bond. *Id.*

A surety on a guardian's bond is not liable for interest, after the death of the guardian, until the ward demands a settlement from the surety. *Id.*

A surety on a guardian's bond is not liable for interest that the guardian could have realized by loaning money before the execution of the bond. *Id.*

A guardian of two wards equally interested in the estate cannot lawfully expend more than half of the estate for one of them, and this the surety is presumed to know. *Id.*

Liability of a surety on a bond of a guardian of two wards whose estates are jointly administered determined. *Id.*

A guardian and her surety held liable for funds of her ward used without order of court, though for the ward's support. *Murph v. McCullough*, 40 C. A. 403, 90 S. W. 69.

The indorsement of a certificate of a bank deposit payable at any time to sureties was equivalent to placing the banker's promissory note due on demand in their hands, and was practically placing that much money with them. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

Though when a guardian returned misappropriated money to the estate he intended to withdraw it again, his surety, having been discharged before it was again misappropriated, was not liable therefor. *Id.*

A guardian's successor having paid a judgment for which neither he nor the ward's estate was liable for the return of the purchase price of an unconfirmed sale of the

ward's real estate, such succeeding guardian could not recover over against the original guardian's sureties either in his own behalf or by subrogation to the rights of the purchaser. *McMinn v. Cope* (Civ. App.) 112 S. W. 809.

— **Payment.**—Where a guardian procured life insurance payable to his ward for the purpose of indemnifying his surety against liability, payment of such insurance to the ward is a satisfaction of the liability of the guardian's estate, or of his surety. *Fidelity & Deposit Co. of Maryland v. Schelper*, 37 C. A. 393, 83 S. W. 871.

Actions on bonds—Jurisdiction.—See notes under Art. 1706.

Articles 2777 and 2778 of the Revised Statutes of 1895 were held unconstitutional, and actions on guardians' bonds must be brought in the county or district court. *Handy v. Woodhouse* (Civ. App.) 25 S. W. 40; *Timmins v. Bonner*, 58 T. 554.

— **Limitations.**—See notes under Title 87, Chapter 2.

— **Equities and defenses.**—Sureties on bond held estopped to assert that the money dealt with by the guardian and court, as property of the wards, belonged to guardian personally. *Frenkel v. Caddou* (Civ. App.) 40 S. W. 638.

Sureties on a guardian's bond held estopped to claim that he held the ward's property, misappropriated by him, as executor. *Gillespie v. Crawford* (Civ. App.) 42 S. W. 621.

Surety on bond held bound, though he stated to the judge that he would sign if other parties would sign, but is told by the judge to sign unconditionally or not at all. *Bopp v. Hansford*, 18 C. A. 340, 45 S. W. 744.

Where the law provided for a new bond by guardian, and it was executed and approved, the sureties cannot, in an action thereon, question its validity because ordered without citation to guardian. *Id.*

Sureties on a guardian's bond held not entitled under the evidence to offset charges for the guardian's maintenance of the wards against damages for a breach of the bond. *Allen v. Stovall*, 94 T. 618, 63 S. W. 863; *Stovall v. Allen*, *Id.*

A surety on a guardian's bond held not entitled to certain credits. *Freedman v. Vallie* (Civ. App.) 75 S. W. 322.

Whatever credits a guardian is entitled to for disbursements may be shown as a defense to an action against the guardian's surety. *Fidelity & Deposit Co. of Maryland v. Schelper*, 37 C. A. 393, 83 S. W. 871.

Where a guardian has converted a portion of the ward's property, to the extent of such conversion the surety of the guardian is not entitled to credit for amounts paid out for the benefit of the ward. *Id.*

Where a guardian was primarily liable on his bond, and on the guardian's death a certain sum was distributed to the ward, the guardian's surety was entitled to set such amount off against its liability for a devastavit committed by the guardian. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 132 S. W. 894.

In an action upon a judgment against a guardian and the sureties on his bond held that defendants were estopped from attacking the validity of orders approving the bond, the guardian's reports, etc. *Minchew v. Case* (Civ. App.) 143 S. W. 366.

— **Parties.**—See notes under Title 37, Chapter 5.

— **Weight and sufficiency of evidence.**—In an action on a guardian's second bond, it being shown that on removal he owed the estate a sum which he failed to pay on order and demand, there being no evidence that the defalcation occurred under the first bond, plaintiff need not show that default occurred on second bond. *Hornung v. Schramm*, 22 C. A. 327, 54 S. W. 615.

The failure of a guardian, or his representatives on his death, to make a proper settlement, is not enough to fix a liability either on the guardian or his surety. *Fidelity & Deposit Co. of Maryland v. Schelper*, 37 C. A. 393, 83 S. W. 871.

— **Conclusiveness of decree against guardian.**—A county court's decree against a guardian as to an amount due by him is binding on the sureties on his bond, though they were not cited in the proceeding. *Fahey v. Boulmay*, 24 C. A. 279, 59 S. W. 300.

Art. 4100. [2601] [2520] What sureties required.—Any bond required by the provisions of this chapter to be given by a guardian shall be subscribed by such guardian, and by at least two good and sufficient sureties, to be approved by the county judge of the county in which the guardianship is pending; or such bond shall be subscribed by such guardian and by one or more corporations authorized and empowered to issue and execute guaranty or indemnity bonds, guaranteeing the fidelity of executors, and administrators and guardians, and authorized to carry on such business in this state by the laws thereof; and where a guardian's bond is made with a corporation or corporations as surety or sureties thereon, the provisions requiring two sureties shall not apply, but the same may be made with one corporation as surety, if the judge of the court shall deem such surety sufficient. [Acts 1897, p. 52. Acts 1876, p. 177. Acts 1899, p. 229.]

Competency of sureties.—A foreign corporation, authorized to do business in this state, may become surety on a guardian's bond. *Less v. Ghio*, 92 T. 651, 51 S. W. 502, overruling *Less v. Ghio* (Civ. App.) 49 S. W. 635.

Bond of guardian of person and estate.—See notes under Art. 4103.

Art. 4101. [2601] [2520] Premium on surety company bond to be paid by guardian.—In all cases where such bond is made by any corporation authorized to issue and execute guaranty or indemnity bonds, the premium on such bond shall be paid by the guardian, and shall not

be paid out of the estate of his ward. [Acts 1897, p. 52. Acts 1876, p. 177. Id.]

Art. 4102. [2601] [2520] Surety company bond validated.—All bonds of guardians heretofore made in this state with a corporation or corporations as surety or sureties thereon are hereby validated and made effectual in like manner to the same extent as if made under the provisions of the two preceding articles. [Acts 1897, p. 52. Acts 1876, p. 177. Id. sec. 2.]

Art. 4103. [2602] [2521] Bond where same person is guardian of both person and estate.—Where the same person is appointed guardian of both the person and estate of a ward, only one bond shall be given by such guardian, varying the form thereof to suit the case. [Acts 1876, p. 177, sec. 34.]

Bond of guardian of persons and estates.—Where one bond is given by a guardian of both the persons and estates of the minors, which is in substantial compliance with Arts. 4099, 4100, it is sufficient to support a judgment against the sureties of such bond. *Hornung v. Schramm*, 22 C. A. 327, 54 S. W. 615.

Art. 4104. [2603] [2522] No bond required when will, etc., has dispensed with it.—When the surviving parent of a minor has provided by will, regularly probated, that a guardian appointed by such will shall not be required to give bond for the management of the estate devised by such will, the direction shall be observed, unless it be made to appear at any time that such guardian is mismanaging the property, or is about to betray his trust; in which case, upon proper proceedings had for that purpose, such guardian may be required by the court to give bond as in other cases. [Id. sec. 33.]

Art. 4105. [2604] [2523] Bond of married woman as guardian.—Where a married woman may be appointed guardian, she may, jointly with her husband, or without her husband, if he be absent from the state or refuse to join in the bond with her, execute such bond as guardian as the law requires, and acknowledge the same before any officer authorized by law to take acknowledgments of married women to written instruments; and such bond shall bind her estate in the same manner as if she were unmarried, but shall not bind her husband as surety unless he sign and be approved as such. [Id. sec. 39.]

Art. 4106. [2605] [2524] Bond of father or mother under twenty-one years of age valid.—A bond executed by the father or mother of a minor, as guardian of such minor, when such father or mother is under twenty-one years of age, shall be as valid as if he or she were of full age. [Id. sec. 40.]

Art. 4107. [2606] [2525] New bond may be required, etc.—The county judge shall have power to require new bonds of guardians in all cases where he has power to require new bonds of executors or administrators, and under the same rules and regulations, and with like effect.

New bond.—As under this statute a new bond of the guardian may be required under the same rules and regulations and with like effect as may be required of executors and administrators, and as, under Art. 3319, sureties on an executor's or administrator's bond may require a new bond to be given, so a new bond may be required of the guardian by his sureties. *Miller v. Miller*, 21 C. A. 382, 53 S. W. 362.

The circumstances under which a new bond may be required of executors and administrators, under Art. 3316, are made to apply to guardians by this article. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

A county judge, under this article and Arts. 3316–3319, has no authority to decrease the amount of a guardian's bond. Id.

Art. 4108. [2607] [2526] Guardian shall cease to act as such, when.—When a guardian has been required to give a new bond, he shall thereafter refrain from acting as such guardian, except to preserve the property committed to his charge, until he has given such new bond and the same has been approved. [Id. sec. 43.]

Art. 4109. [2608] [2527] Surety may be relieved in same manner, etc.—A surety upon the bond of a guardian may be relieved from his

bond, in the same manner and with like effect, as is provided in the case of a surety upon the bond of an executor or administrator. [Id.]

Art. 4110. [2609] [2528] **Oath and bond to be presented within twenty days.**—The oath and bond of a guardian shall be presented to the county judge within twenty days after the order appointing such guardian, either in term time or in vacation, for the action of such judge.

Art. 4111. [2610] [2529] **Oaths and bonds shall be recorded.**—The oaths of guardians and their bonds, when approved, shall be immediately filed with the clerk of the county court and recorded in the minutes of said court and safely preserved.

Art. 4112. [2611] [2530] **Sureties released, when, etc.**—When a new bond has been given and approved, the sureties upon the former bond of such guardian shall not be liable for any misconduct of such guardian occurring after the approval of such new bond, and shall be released from all liability for the acts of such guardian occurring after the approval of such new bond. [Id. sec. 44.]

Discharge of original sureties by approval of new bond.—The sureties on a guardian's bond are not discharged until the new bond is approved. *Miller v. Miller*, 21 C. A. 382, 53 S. W. 362; *Moore v. Hanscom* (Civ. App.) 103 S. W. 669.

Liability of original sureties.—If a guardian returns misappropriated funds to the estate and thus accounts for the ward's property, and his surety is discharged, and another bond is given by the guardian, and he afterwards withdraws the funds from the estate, which he may have intended to do when he borrowed the funds and deposited them with the estate, the surety on the first bond, who had been discharged, is not liable. *Moore v. Hanscom* (Civ. App.) 103 S. W. 669.

As affecting a former surety's liability for a guardian's misappropriation of funds, the succeeding sureties' possession of estate property was the possession of the ward. *Id.*

Release of by ward.—Release by a ward of his deceased guardian's estate without consideration or knowledge of his rights immediately after he became of age held not conclusive against his right to recover on deceased guardian's bond. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 132 S. W. 894.

Release or discharge by court.—Action in reducing a guardian's bond to a sum considerably less than the value of the ward's property being null and void, an order discharging the sureties on the old bond was invalid. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

The bond of a guardian held satisfied by acts of the guardian, so that an order of the court discharging the surety terminated its liability. *Moore v. Hanscom*, 101 T. 293, 106 S. W. 876.

After the death of a guardian, the probate court has no power to release the guardian's estate and his bondsmen from liability on the deceased guardian's bond. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 132 S. W. 894.

CHAPTER EIGHT

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Art. 4113. Inventory shall be returned, when.	Art. 4118. Appraisers to be appointed in such case, when.
4114. List of claims.	4119. Additional inventory to be required, when.
4115. Affidavit of guardian to inventory.	4120. Inventory may be corrected.
4116. Property held in common shall be specified.	4121. Inventories, etc., evidence.
4117. Additional inventory, when.	

Article 4113. [2612] [2531] **Inventory shall be returned in thirty days, etc.**—It shall be the duty of every guardian of an estate, as soon as he shall have collected the estate, and within thirty days after he has taken the oath and given bond, with the assistance of any two of the appraisers appointed by the court, to make and return to the court a true and perfect inventory of all the property, real and personal, belonging to said estate, which has come to the knowledge of such guardian; and each article of such property shall be appraised by such appraisers, and the appraised value thereof stated opposite the same in the inventory; and the same shall be subscribed and sworn to by such appraisers before any officer of the county in which the inventory is made, authorized by law to administer oaths generally. [Act Aug. 18, 1876, p. 179, sec. 50.]

Art. 4114. [2613] [2532] List of claims.—The guardian shall also make out and attach to such inventory and appraisement a list of all claims due or to become due belonging to the estate. Such list shall state:

1. The name of each person indebted to the estate.
2. The nature of such indebtedness, whether by note, bill, bond or other written obligation, or by account or verbal contract.
3. The date of such indebtedness, and the date when the same was due or will be due.
4. The amount of each claim and the rate of interest thereon, and the time for which the same bears interest. [Id. sec. 50.]

Art. 4115. [2614] [2533] Affidavit of guardian to inventory, etc.—The guardian shall annex to the inventory, appraisement, and list of claims, an affidavit in substance as follows: "I, A B, guardian of the estate of C D, do solemnly swear that the inventory and list of claims annexed hereto are a true and perfect inventory and list of all the property, real and personal, belonging to said estate that has come to my knowledge;" which affidavit shall be subscribed and sworn to by such guardian before some officer of the county in which the same is made who is authorized to administer oaths generally.

Art. 4116. [2615] [2534] Property held in common shall be specified.—If any property be held or owned by the ward in common with another or others, it shall be distinctly stated in the inventory or list of claims, as the case may be, the items thereof that are so held or owned, the names and the relationship, if any, of the other part owner or owners, and the interest or share of such ward in such property. [Id. sec. 52.]

Art. 4117. [2616] [2535] Additional inventory, when.—Whenever any guardian of an estate shall discover any property belonging to such estate which has not been inventoried and appraised, or any claim that has not been embraced in the list of claims, he shall forthwith make out and return to the court an additional inventory or list of claims, embracing such property or claims, as the case may be. [Act March 20, 1848. P. D. 3899.]

Additional Inventories.—Under this article and Arts. 4118, 4119, additional inventories are allowed, but in each instance the increase and not the decrease of the value of the estate is contemplated. *Moore v. Hanscom* (Civ. App.) 103 S. W. 671.

Art. 4118. [2617] [2536] Appraisers to be appointed in such case, when, etc.—Where an additional inventory of property has been returned by the guardian, the court shall appoint appraisers to appraise such property, as in the case of original inventories, or such appraisers may be appointed before the return of such additional inventory, either in term time or in vacation, by an order of the court entered upon the minutes.

See notes under Art. 4117.

Art. 4119. [2618] [2537] Additional inventory, etc., may be required, when.—Whenever it shall be shown to the county judge that any guardian has not returned to the court an inventory and appraisement and list of claims of all the property belonging to his ward, such judge shall cause such guardian to be cited, either in term time or in vacation, and require him to return to the court an additional inventory and appraisement, or an additional list of claims, as the case may be, in the same manner as in the case of original inventories and appraisements and lists of claims are required to be returned, and within the same time; but such inventory and appraisement and list of claims shall only embrace such property as has been omitted in previous inventories and appraisements and lists of claims. [Id.]

See notes under Art. 4117.

Art. 4120. [2619] [2538] **Inventories, etc., may be corrected, etc.**—Erroneous inventories, appraisements and lists of claims may be corrected, and new appraisements may be ordered, under the same rules and regulations as are provided in the case of estates of decedents.

Cited, *Tompkins v. Creighton-McShane Oil Co.* (Civ. App.) 143 S. W. 306.

Effect of error in inventory.—Where a father, as guardian of his minor children, included in the inventory his own real estate, he was not thereby divested of title, or estopped to deny the correctness of the inventory. *Koppelman v. Koppelman*, 94 T. 40, 57 S. W. 570.

Art. 4121. [2620] [2539] **Inventories, etc., evidence.**—All inventories, appraisements or lists of claims, when approved by the court, or the record thereof, or copies of the same or of the record thereof, duly certified under the seal of the clerk of the county court having charge thereof, may be given in evidence in any suit by or against such guardian, but shall not be conclusive against the ward, if it be shown that there is other property or claims of such ward not included therein, or that the estate or claims were actually worth more than the value at which they are set down in such inventories, appraisements or lists. [Id. P. D. 3900.]

Cited, *Tompkins v. Creighton-McShane Oil Co.* (Civ. App.) 143 S. W. 306.

CHAPTER NINE

POWERS AND DUTIES OF GUARDIANS

Art.	Art.
4122. Of the person.	4129. May take property for debt due ward, when.
4123. Same subject.	4130. Guardian of estate shall pay to guardian of person, etc.
4124. Guardian of the estate.	4131. Ward's education and maintenance.
4125. Of both person and estate.	4132. Property in common with others.
4126. Guardian of the estate shall manage same prudently.	4133. Guardian shall not dispute ward's title, except, etc.
4127. Duty to collect estate.	
4128. Shall use diligence to collect claims.	

Article 4122. [2621] [2540] **Of the person.**—The guardian of the person is entitled to the charge and control of the person of the ward, and the care of his support and education, and his duties shall correspond with his rights. [Act Aug. 18, 1876, p. 181, sec. 75.]

Rights of parents.—See notes under Title 94.

Art. 4123. [2622] [2541] **Same subject.**—It is the duty of the guardian of the person of a minor to take care of the person of such minor, to treat him humanely, and to see that he is educated in a manner suitable to his condition, and, if necessary for his support, that he learn a trade or adopt some useful profession. [Id. sec. 7.]

Art. 4124. [2623] [2542] **Guardian of the estate.**—The guardian of the estate is entitled to the possession and management of all property belonging to the ward, to collect all debts, rents, or claims due such ward, to enforce all obligations in his favor, to bring and defend suits by or against him; but, in the management of the estate, the guardian shall be governed by the provisions of this title. [Id. sec. 76.]

Possession and management of estate.—The guardian has no authority by special agreement to bind his ward in a partition of the estate in which he is interested, unless ordered or sanctioned by the court. *Rainey v. Chambers*, 56 T. 17.

A guardian cannot contract with an attorney for legal services in the recovery of land to share the recovery with such attorney. *Glassgow v. McKinnon*, 79 T. 116, 14 S. W. 1050.

A guardian cannot convey property to his ward in discharge of debt without his knowledge or assent so as to protect such property against other creditors. *Cabell v. Hamilton-Brown Shoe Co.*, 81 T. 104, 16 S. W. 811.

A guardian has no authority to release a security for a debt due his ward and take other security instead. *Freiberg v. De Lamar*, 27 S. W. 151, 7 C. A. 263.

A contract by a widow as guardian of her children, for location of a headright certificate, held valid. *Stone v. Ellis* (Civ. App.) 40 S. W. 1077.

Contract by guardian for attorney's services, which could be performed by any person of business capacity, held binding only on guardian. *Moore v. Bannerman* (Civ. App.) 45 S. W. 825.

Guardian cannot compromise a claim without authority from court. *Davis v. Beall*, 21 C. A. 183, 50 S. W. 1086.

Art. 4125. [2624] [2543] Of both person and estate.—The guardian of both person and estate has all the rights and powers, and shall perform all the duties of the guardian of the person, and of the guardian of the estate. [Id. sec. 79.]

Powers of guardian, in general.—Powers of guardian limited by the statute. *Freiberg v. De Lamar*, 27 S. W. 151, 7 C. A. 263.

Art. 4126. [2625] [2544] Guardian of the estate shall manage same prudently.—It is the duty of the guardian of the estate to take care of and manage such estate as a prudent man would manage his own property; and he shall account for all such rents, profits and revenues as the estate would have produced by such prudent management. [Id. sec. 77.]

Management of estate.—Under the act of May 18, 1848, containing a similar provision, it was held that a guardian was authorized to employ persons to find and locate a land certificate in consideration of an interest in the land. *Ellis v. Stone*, 23 S. W. 405, 4 C. A. 157; *Wren v. Harris*, 78 T. 349, 14 S. W. 696.

Art. 4127. [2626] [2545] Duty to collect estate.—It is the duty of the guardian of the estate, immediately after receiving letters, to collect, and take into possession, the personal property, books, title papers, and other papers belonging to the estate. [Id. sec. 48.]

Collection of assets.—Where the widow in her own behalf and that of her minor children had by contract which was filed in the case transferred to her attorneys one-half of claim for injuries which caused death of husband and father, the court could not in rendering judgment on verdict of jury giving damages award any part of the recovery in favor of the minors to the attorneys. No one had any right to receive or dispose of the money except a duly appointed guardian who would pay it out under the orders of the probate court. In case of such an erroneous judgment appellate court will set it aside and render proper judgment. *Shippers' Compress & Warehouse Co. v. Davidson*, 35 C. A. 558, 80 S. W. 1036.

Art. 4128. [2627] [2546] Shall use diligence to collect claims, etc.—The guardian of the estate shall use due diligence to collect all claims or debts owing to the ward, and to recover possession of all property to which the ward has a title or claim; provided, there is a reasonable prospect of collecting such claims or debts, or of recovering such property; and, if he neglects to use such diligence, he and his sureties shall be liable for all damages occasioned by such neglect. [Id. sec. 78.]

Collection of claims.—A guardian need not bring suit on his predecessor's bond for money properly expended, though the vouchers are not in proper shape.—*Young v. Gray*, 65 T. 99.

Guardians are not liable for failure to collect claims due the estate unless they neglect to use diligence. *Read v. Henderson* (Civ. App.) 57 S. W. 79.

— **Contracts for.**—A guardian has no power to contract with an attorney to share land recovered in payment for legal services in suit therefor. *Glassgow v. McKinnon*, 79 T. 116, 14 S. W. 1050.

— **Authority to compromise.**—A guardian cannot compromise a claim of his ward without authority of the probate court. *Davis v. Beall*, 32 C. A. 406, 74 S. W. 325.

Property subject to accounting.—A guardian, who before his appointment obtains illegal possession of the ward's property and disposes of it, must account therefor after his appointment. *Sargent v. Wallis*, 67 T. 483, 3 S. W. 721.

— **Authority to discount notes.**—Where a guardian had no authority to discount vendor's lien notes to the maker, such discount did not relieve the latter from liability, nor the land from the lien. *Brown v. Fidelity & Deposit Co. of Maryland* (Civ. App.) 76 S. W. 944.

The maker of vendor's lien notes belonging to a minor's estate, discounted by the guardian without authority, held not entitled to a credit for the amount paid the guardian as a payment on the notes. *Id.*

Individual interest in transaction.—A father's compromise of his own claim against a railroad company for injuries to his minor son for the sum of \$2,500, under an agreement to settle both claims for \$4,000, gave him such an adverse interest as guardian in the settlement of his son's claim as to make such settlement void, though he had received his own money before his appointment as guardian and the court's approval of the settlement of the son's claim. *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

Ratification of unauthorized act.—See notes under Title 94.

Art. 4129. [2628] [2547] May take property for debt due ward, when.—The guardian of the estate may receive property in payment of any debt due to the ward, in all cases where he shall be of the opinion

that the interest of his ward will be advanced thereby, being responsible for a prudent exercise of the discretion hereby conferred. [Id. sec. 92.]

Art. 4130. [2629] [2548] Guardian of estate shall pay to guardian of person, etc.—When different persons have the guardianship of the person and estate of a ward, the guardian of the estate must pay over to the guardian of the person, semi-annually, a sufficient amount of money, to be fixed by the court, for the education and maintenance of the ward, and, on failure, shall be compelled to do so by order of the court, after being duly cited. [Id. sec. 93.]

Art. 4131. [2630] [2549] Education and maintenance of ward.—The court may direct the guardian of the person to expend, for the education and maintenance of his ward, a specific sum, although such sum may exceed the income of the ward's estate; but, without such direction of the court, the guardian shall not be allowed, in any case, for the education and maintenance of the ward, more than the clear income of the estate. [Id. sec. 94.]

In general.—The rule prescribed in this article is mandatory. *Smythe v. Lumkin*, 62 T. 242.

Expenses incurred by guardian for support of ward in excess of income cannot be allowed unless made under direct order of court. *Eastland v. Williams' Estate* (Civ. App.) 45 S. W. 412.

This article is mandatory, and in the absence of previous direction by the court the guardian cannot be allowed to expend more for the education and maintenance of the ward than the clear income of the estate. *Read v. Henderson* (Civ. App.) 57 S. W. 79.

An order authorizing a guardian to expend for the education and maintenance of his wards so much of the corpus of the estate "as may be necessary" for such purpose held void, under this article. *Wheeler v. Duke*, 29 C. A. 20, 67 S. W. 909.

Without an order of court entered upon the minutes the guardian cannot go beyond the clear income for the education and maintenance of the ward. *De Cordova v. Rogers*, 97 T. 60, 75 S. W. 20.

A guardian may not, without leave of court, use the corpus of the ward's estate for his maintenance. *Freedman v. Vallie* (Civ. App.) 75 S. W. 322.

No payments by the guardian for the support of the minor out of the corpus of the estate can be allowed unless an order directing the payment be first entered upon the minutes of the court. In this case the trouble consisted in the absence of the order from the minutes at or before the payment (by the guardian) of the claim, and the entry of the order nunc pro tunc will not affect the fact of payment at such time. Ordinarily a nunc pro tunc order has the effect of speaking from the time it was actually rendered and intended to be entered, but it has no effect upon a transaction which the law did not permit to be done until the order (omitted from the minutes) was entered. *Logan v. Gay* (Civ. App.) 87 S. W. 852.

This article does not apply to claims that have accrued against the estate before the guardian is appointed and which are presented to him for allowance after his appointment. *Logan v. Gay*, 99 T. 603, 90 S. W. 862.

Obligation of parent.—A mother of limited means supporting her minor children can charge funds belonging to them coming into her hands with reimbursing her for such expenses without the orders of the probate court. *Frybe v. Tiernan*, 76 T. 286, 13 S. W. 370.

While it is the duty of the father to support his children out of his own means, still, where they have an estate and he is unable, the court will allow such support out of the estate of the children. *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44.

It is the duty of the father to provide for the support and education of his child out of his own means, and he cannot use the income of the child for that purpose unless authorized by the court. *Moore v. Moore* (Civ. App.) 31 S. W. 532.

Amount of allowance.—Expenses in excess of the income of a ward's estate will not be allowed a guardian except upon previous orders directing such expenses. *Eastland v. Williams' Estate* (Civ. App.) 45 S. W. 412.

The court cannot allow expenditures made by the guardian for the education and maintenance of the ward in excess of the income of the ward's estate except in cases where the court has directed the expenditure of a specific sum. *Blackwood v. Blackwood's Estate*, 92 T. 478, 49 S. W. 1045.

The guardian cannot be allowed for the education and maintenance of the ward, more than the clear income of the estate, without an order of the court. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 157.

Order for allowance—Necessity.—See notes under Art. 4050.

Under this article in connection with Art. 4050, the guardian is not entitled to an allowance for expenses paid out in excess of the income of the ward's estate unless an order authorizing such expenditure is entered upon the minutes of the court. *Blackwood v. Blackwood's Estate* (Civ. App.) 47 S. W. 483.

— **Sufficiency.**—A mere verbal order from the county judge is insufficient. *Jones v. Parker*, 67 T. 76, 3 S. W. 222.

Art. 4132. [2631] [2550] Property held in common with others.—If the ward holds or owns any property in common, or as part owner with another person, the guardian shall be entitled to possession thereof

in common with the other part owner or owners in the same manner as other owners in common, or joint owners, would be entitled. [Id. sec. 49.]

Art. 4133. [2632] [2551] **Guardian shall not dispute ward's title, except, etc.**—The guardian, or his heirs, executors, administrators or assigns shall not dispute the right of the ward to any property that shall have come into the possession of such guardian, as guardian, except such property as shall have been recovered from the guardian, or there be a personal action pending on account of it. [Id. sec. 69.]

CHAPTER TEN

RENTING AND LEASING PROPERTY, AND INVESTING AND LOANING MONEY, OF WARD

Art.	Art.
4134. Guardian may carry on or rent farm, etc., under order of court.	4144. Judge to investigate investment, etc.
4135. Duty of guardian to rent out property, when, etc.	4145. Order of court on such application.
4136. May rent improved property, other than, etc., without order.	4146. Contract of investment must be approved by the court.
4137. Court may order improved property rented.	4147. Title to be made to ward, and property to be inventoried, etc.
4138. Unimproved land may be leased.	4148. Guardian may be cited to show cause why he should not invest funds.
4139. Guardian may be cited to show cause why he should not rent land.	4149. County judge shall see that fund is invested, etc.
4140. Money shall be invested, how.	4150. Guardian's liability for interest.
4141. Security for money loaned; approval by county judge, order, etc.	4151. Shall not be personally responsible for money loaned, when.
4142. County judge not relieved from responsibility on bond.	4152. Shall report renting to court.
4143. Investing money in real estate.	4152a. Guardian may make mineral leases.
	4152b. Application to judge; notice; hearing, approval and order.

Article 4134. [2633] [2552] **Guardian may carry on or rent farm, etc., under order of the court.**—If there be a farm, plantation, manufactory or business belonging to the estate, and if the same be not required to be at once sold for the payment of debts, it shall be the duty of the guardian of such estate, upon an order of the court, to carry on such farm, plantation, manufactory or business or rent the same, as shall appear for the best interest of the estate. In coming to a determination, the court shall take into consideration the condition of the estate, and the necessity that may exist for the future sale of such property for the payment of debts or the education and maintenance of the ward, and shall not extend the time of renting any such property beyond what may consist with the interests of the estate and of the ward. [Act Aug. 18, 1876, p. 182, sec. 86.]

Liability of guardian for rent.—Where a guardian, without order of court, cultivated a farm belonging to the ward, and appropriated the proceeds, he was liable to the estate for the reasonable rental value of the farm. *Parlin & Orendorff Co. v. Webster*, 17 C. A. 631, 43 S. W. 569.

Death of guardian as terminating lease.—A lease of an infant's lands by a guardian of the person, but not of the estate, expires with the death of the guardian. *Maxwell v. Urban*, 22 C. A. 565, 55 S. W. 1124.

Art. 4135. [2634] [2553] **Duty of guardian to rent out property, when, etc.**—When an order of the court is made directing property to be rented, it shall be the duty of the guardian to obey such order and rent the property for the best price that can be obtained therefor, taking good security for the payment of the rent, and that the tenant will not commit, nor permit any other person to commit, waste on the rented premises. [Id. sec. 87.]

Art. 4136. [2635] [2554] **May rent improved property other than, etc., without order.**—The guardian may rent the improved property of the ward, other than such property as is named in article 4134 without

an order of the court authorizing him to do so, and either at public or private renting; but, when he rents without an order of court, he shall be required to account to the estate of the ward for the reasonable value of the rent of such property for the time the same was so rented.

Art. 4137. [2636] [2555] **Court may order improved property rented, etc.**—The court may order the farm, plantation, manufactory, business, or any improved property of the estate to be rented, either at public or private renting, for any length of time, not exceeding one year, and upon such terms and conditions as the court may deem for the best interests of the ward.

Art. 4138. [2637] [2556] **Unimproved land may be leased.**—If the ward own wild or unimproved real property, the guardian may let out the same on improvement leases, under order of the court, for such length of time, and upon such terms and conditions as the court may direct in its order. [Id. sec. 88.]

Art. 4139. [2638] [2557] **Guardian may be cited to show cause why he should not rent land out, etc.**—Any person, upon complaint in writing filed with the clerk of the county court, may cause the guardian of the estate of a ward to be cited to appear at a regular term of the court and show cause why he should not be required to rent out the farm, plantation or other improved property of the ward, or why he should not be required to lease for improvement the wild or unimproved lands of the ward; and, upon the hearing of such complaint, the court shall make such order as may, in his judgment, be for the best interest of the estate.

Art. 4140. [2639] [2558] **Money may be invested, how.**—If, at any time, the guardian of the estate shall have on hand any money belonging to the ward beyond what may be necessary for the education and maintenance of such ward, such guardian shall invest such money in bonds of the United States, of the State of Texas, of any county of the State of Texas, of any district or subdivision of any county of the State of Texas, of any incorporated city or town in the State of Texas or loan the same for the highest rate of interest that can be obtained therefor. [Act Aug. 18, 1876, p. 182, sec. 89. Acts 1913, p. 321, sec. 1, amending Art. 4140, Rev. St. 1911.]

Loans.—Where a guardian deposits money in bank and places the certificate in the hands of surety on his bond to hold while he is on the bond, the county court has the authority to direct the disposition by the guardian, but the guardian has no legal authority to loan or invest it except by direction of the county court. The money belongs to the estate. *Moore v. Hanscom* (Civ. App.) 106 S. W. 888.

That a loan by a guardian was not made and secured strictly according to statute could not prevent a recovery by the guardian on a note given for the loan. *Wright v. Wright* (Civ. App.) 155 S. W. 1015.

Art. 4141. [2640] [2559] **Security for money loaned; examination by attorney.**—When the guardian loans the money he shall take the note of the borrower, the same to be secured by mortgage with power of sale on unincumbered real estate situated in this state, worth at least twice the amount of such note, or on collateral notes secured by vendor's lien notes, as collateral, or may purchase vendor's lien notes; provided, that at least one-half has been paid, in cash or its equivalent, on the land for which said notes were given.

When the guardian loans the money of the ward as provided in this article, or invests the money of the ward as provided in this article or invests the money of the ward as provided in article 4140 of this chapter, as amended, he shall not pay over or transfer any money in consummation of such investment, loan or purchase until he shall have submitted, or caused to have been submitted, all bonds, notes, mortgages, documents, abstracts and other papers pertaining to such investment, loan or purchase to some reputable attorney for examination, and shall have received an opinion in writing from such attorney to the effect

that all papers pertaining to such investment, loan or purchase are regular and that the title to such bonds, notes or real estate is good. That the attorney making such examination shall be paid a reasonable fee, not to exceed one per cent of the amount so invested or loaned, which shall be paid by the guardian out of the funds of the ward. [Acts 1876, p. 182. Acts 1897, p. 196. Acts 1913, p. 321, sec. 1, amending Art. 4141, Rev. St. 1911.]

Art. 4142. County judge not relieved from responsibility on bond.—Nothing contained in the last preceding article shall relieve the county judge from responsibility on his bond as now provided by law. [Acts 1876, p. 182. Acts 1897, p. 196.]

Art. 4143. [2641] [2560] Investing money in real estate.—When the guardian may think it best for his ward to have any surplus money on hand invested in real estate, he shall file an application in writing in the court where the guardianship is pending, asking for an order of such court authorizing him to make such investment. Such application shall state the nature of the investment sought to be made, and the reasons why the guardian is of the opinion that it would be for the benefit of the ward to have the same made. [Act Aug. 18, 1876, p. 182.]

Liability of vendors for unauthorized investment.—When an investment in land has been made without the order of court, the vendors are liable for the funds so received. *Smoot v. Richards*, 8 C. A. 146, 27 S. W. 967.

Art. 4144. [2642] [2561] Judge to investigate investment, etc.—When any such application is filed, the attention of the judge of the court shall be called thereto and he shall take the matter under consideration and proceed to make such investigation as may be necessary to obtain all the facts concerning the investment; but shall not render an opinion or make any order on the application until after the expiration of five days from date of filing. [Acts Aug. 18, 1876, p. 182. Acts 1913, p. 321, sec. 1, amending Art. 4144, Rev. St. 1911.]

Investments—Notice of application for.—Notice of application must be given as required for sale of land. *Hurst v. Marshall*, 75 T. 452, 13 S. W. 33.

Art. 4145. [2643] [2562] Order of the court on such application.—Upon the hearing of any such application, either at a regular term of the court or in vacation, if the court be satisfied that such investment will be beneficial to the ward, an order authorizing the same to be made, shall be entered upon the minutes, which order shall specify the investment to be made, and shall contain such other directions as the court may think it advisable to make. [*Id.*, amending Art. 4145, Rev. St. 1911.]

Art. 4146. [2644] [2563] Contract of investment must be approved by the court.—When any contract has been made for the investment of money in real estate, under order of the court such contract shall be reported in writing to the court by the guardian, and it shall be the duty of the court to inquire fully into the same, and if satisfied that such investment will benefit the estate of the ward, and that the title to such real estate is valid and unincumbered, the court may approve the contract and authorize the guardian to pay over the money in performance of the same; but no money shall be paid out by the guardian on any such contract until such contract has been approved by the court by an order to that effect upon the minutes of the court; and this order may be made at a regular term or in vacation. [*Id.*, amending Art. 4146, Rev. St. 1911.]

In general.—The contract must be approved by the court. *Hurst v. Marshall*, 75 T. 452, 13 S. W. 33.

As to investments of ward's money, see *Smoot v. Richards*, 8 C. A. 146, 27 S. W. 967.

Art. 4147. [2645] [2564] Title to be made to ward and property to be inventoried, etc.—When the money of the ward has been invested in real estate, the title to such real estate shall be made to such ward; and

such real estate shall be inventoried, appraised, managed and accounted for by the guardian as other real estate of the ward.

Art. 4148. [2646] [2565] Guardian may be cited to show cause why he should not invest or loan money.—When there is any surplus money of the estate in the hands of the guardian, any person may, by complaint in writing filed in the court in which such guardianship is pending, cause such guardian to be cited to appear at a regular term of such court, to show cause why such surplus money should not be invested or loaned at interest, in accordance with the provisions of this chapter; and, upon the hearing of such complaint, the court shall enter upon the minutes such order as the law and the facts may require.

Art. 4149. [2647] [2566] County judge shall see that money is invested, etc.—It shall be the duty of the county judge, whenever it is made known to him in any manner that there is surplus money belonging to the ward in the hands of the guardian, to cause such guardian to be cited to appear at a regular term of the court and show cause why said money should not be invested, or why it should not be loaned at interest under the provisions of this chapter.

Art. 4150. [2648] [2567] When guardian is liable for interest.—If the surplus money in the hands of the guardian belonging to the ward can not be invested or loaned at interest as directed in this chapter, after due diligence to do so by the guardian, he shall be liable for the principal only of such money. But, if the guardian neglects to invest such money or loan the same at interest when he could do so by the use of reasonable diligence, he shall be liable for the principal and also for the highest legal rate of interest upon such principal for the time he so neglects to invest or loan the same. [Acts 1876, p. 182, sec. 90.]

Interest on funds of estate.—A guardian is chargeable with legal interest on money belonging to his ward which, by reasonable diligence, he could have invested or loaned. *Smythe v. Lumpkin*, 62 T. 242.

A guardian, failing to lend the ward's money, is liable for 10 per cent. interest, if by ordinary diligence he could have made the loan. *Freedman v. Vallie* (Civ. App.) 75 S. W. 322.

Where a guardian has funds of the estate in his hands which he could have loaned, but did not, he is liable for the highest rate of legal interest (10 per cent.) for the time the money was not loaned. *Logan v. Gay* (Civ. App.) 87 S. W. 853.

A guardian liable for funds of her ward expended without order of court held liable in addition for interest on the money at 10 per cent. from the time when she could have loaned the money, under order of court. *Murph v. McCullough*, 40 C. A. 403, 90 S. W. 69.

It is the guardian's duty to loan the ward's money as required by Art. 4140, and if he neglects to do so, he is liable for the highest rate of interest for the time he neglected to do so. This statute is imperative. *Whitfield v. Burrell* (Civ. App.) 118 S. W. 157.

— **Compound Interest.**—Compound interest is allowed to reach profits. If the trust fund has been used in trade or speculation the guardian will be held to account for the profits or for interest, at the option of the cestui que trust. *Reed v. Timmins*, 52 T. 84.

Art. 4151. [2649] [2568] Shall not be personally responsible for money loaned, when.—The guardian shall not be personally responsible for money loaned under the direction of the court, on security approved by the court, in case of the inability of the borrower to pay the same, and the failure of the security, unless such guardian has been guilty of fraud or negligence in respect to such loan or the collection of the same; in which case, he and the sureties upon his bond shall be liable for whatever loss his ward may have sustained by reason of such fraud or negligence. [Id. sec. 91.]

Liability of guardian for bank deposit.—A guardian, depositing in a bank regarded solvent funds of the ward until invested under order of court, is not liable for a loss of the money through failure of the bank, but is liable for funds deposited in a bank for a fixed period, without an order of the probate court, in case of a loss of the money through a failure of the bank. *Murph v. McCullough*, 40 C. A. 403, 90 S. W. 69.

Art. 4152. [2650] [2569] Shall report renting, etc., to court.—The guardian shall report to the court in writing, and verified by his affidavit, the renting or leasing of property belonging to the estate, or the investment or loaning of money belonging to the estate, within thirty days after any such transaction, stating fully the facts of such transaction.

Art. 4152a. Guardian may make mineral leases.—That guardians of the estates of minors, or of any other persons, appointed under the laws of the state of Texas, which have heretofore been appointed or which may hereafter be appointed, shall have the authority to make mineral leases for the estates of their wards. [Acts 1913, p. 261, sec. 1.]

Art. 4152b. Application to judge; notice; hearing, approval and order.—That whenever a guardian of the estate of any person shall desire to make a mineral lease upon the real estate of his ward, he shall apply to the county judge of the county where such guardianship is pending for authority to make and execute such mineral lease, and such application shall be in writing and sworn to by such guardian, and the county judge shall either in term time or in vacation hear such application, and shall require proof as to the necessity and advisability for such mineral lease, and if he shall approve the same, he shall enter an order on the minutes of the probate court, either in term time or vacation, authorizing the guardian to make such mineral lease, and the terms upon which the same shall be made; provided, that no lease shall extend beyond the time that the ward shall come of age.

Before such application shall be heard by the county judge, notice of such application shall be given by the guardian for one week prior to the time such application shall be heard, by publishing same in some newspaper of the county where said guardianship is pending for one issue of said paper, and such notice shall state when and where such application shall be heard.

It is further provided that after notice and hearing of said application and the granting of the same by the probate court, that said guardian shall be fully authorized to make a mineral lease upon the real estate of his ward in accordance with the judgment of the county court acting upon the same. [Id. sec. 2.]

CHAPTER ELEVEN

SALES

Art.	Art.
4153. Certain property to be sold.	4165. Guardian shall not purchase property belonging to the ward.
4154. Sales of wild stock.	4166. Bidder failing to comply with bid, liable, when.
4155. When real estate may be sold.	4167. Sales may be continued.
4156. Guardian shall apply for order to sell real estate, when.	4168. Guardians' sales governed by the same rules as executions.
4157. Guardian shall be cited, when.	4169. Notice of private sale not required.
4158. Hearing on application for sale of real estate.	4170. Sale of mortgaged property to be under terms as court may direct.
4159. [Repealed.]	4171. Mortgage dischargeable without sale.
4160. Considerations in ordering sale.	4172. Guardian may reduce rate of interest on ward's debts, how.
4161. May be for cash or credit, as court deems the advantage.	4173. Renew evidence of debt, when.
4162. Order of sale shall state, what.	
4163. In what county real estate sold.	
4164. Terms of sale.	

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

Article 4153. [2651] [2570] Perishable property shall be sold.—The guardian of the estate, as soon as practicable after appraisalment, shall apply for an order of the court to sell at public or private sale, for cash or on credit not exceeding six months, all the personal property belonging to the ward that is liable to perish, waste or deteriorate in value, or that will be an expense or disadvantage to the estate to keep on hand. [Act Aug. 18, 1876, p. 181, sec. 80.]

Art. 4154. [2652] [2571] Sales of wild stock.—If the guardian shall represent to the court on oath that there is stock belonging to the estate which he is unable to collect or command, the court may order

that the same be sold at public auction, on such credit as the court may deem reasonable, not exceeding twelve months, taking notes bearing interest at the rate of ten per cent per annum from the day of sale, with good and sufficient security for the purchase money. Such sale shall be advertised, made, returned and acted upon by the court the same as sales of real estate. [Id. secs. 84, 85.]

Art. 4155. [2653] [2572] When real estate may be sold.—When the income of the ward's estate, and the personal property thereof, and the proceeds of previous sales, are insufficient for the education and maintenance of the ward or to pay the debts against the estate, the guardian of the person, or of the estate, or any person holding a valid claim against the estate, may, by application in writing to the court in which such guardianship is pending, ask for an order for a sufficient amount of real estate to be sold to make up the deficiency, or when the property of the ward consists in whole or in part of real estate that is non-revenue bearing property and is not calculated to have any reasonable increase in value or when property of the ward consists in whole or in part of an undivided interest in real estate and the guardian believes it to be to the best interest of the estate of the ward to sell such real estate he may, by application in writing to the court in which such guardianship is pending ask for an order for such real estate to be sold. [Acts Aug. 18, 1876, p. 181, secs. 101, 102. Acts 1913, p. 321, sec. 1, amending Art. 4155, Rev. St. 1911.]

Authority of foreign court.—A curatrix, acting under authority of a probate court of Louisiana, could not make a valid conveyance of land belonging to the ward and situated in Texas. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

Grounds for sale.—Property belonging to minors may be sold for their education and support. *Boulden v. Miller* (Civ. App.) 26 S. W. 133; *Id.*, 28 S. W. 940, 87 T. 359; *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44; *Vogelsang v. Null*, 67 T. 465, 3 S. W. 451.

Sale by person other than guardian.—Filing of transcript showing appointment of foreign guardian held not to authorize domestic tribunal to order sale of ward's realty by person not appointed guardian. *Kelsey v. Trisler*, 32 C. A. 177, 74 S. W. 64.

Property subject to.—Property in the state of minors domiciled in another state may be sold. *Boulden v. Miller* (Civ. App.) 26 S. W. 133; *Id.*, 28 S. W. 940, 87 T. 359; *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44; *Vogelsang v. Null*, 67 T. 465, 3 S. W. 451.

Sale of part or whole of land.—In an action to set aside the sale of land by the guardian of an insane person, where the property sold was in one parcel, the propriety of selling part of it instead of the whole was a question for the county judge in ordering the sale. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

Sale of interests of other tenants in common.—The guardian of a minor tenant in common cannot sell the interests of others in the land merely because all of the interests so held in common are chargeable with common debts. *Broom v. Pearson*, 98 T. 469, 85 S. W. 790.

Disposition of proceeds.—The proceeds of the sales are not to be paid to the wards, but should be paid out by the guardian or his successor under orders of the court for the purposes only which authorize the court to have the land sold. *Fidelity & Deposit Co. v. Schelper*, 37 C. A. 393, 83 S. W. 872.

Art. 4156. [2654] [2573] Guardian shall apply for order to sell real estate, when.—It is the duty of the guardian to apply for such order whenever it appears that a necessity exists therefor, and to set forth fully in his application such necessity, and accompanying the application with an exhibit, under oath, showing fully the condition of the estate. [Act Aug. 18, 1876, p. 181, sec. 105.]

Application in general.—A guardian's sale held not invalid because the application set forth an object not authorized by statute. *Driggs v. Grantham* (Civ. App.) 41 S. W. 408.

Oath.—A sale of land made by a guardian under order of the court held not avoidable on the ground that the oath described him as "guardian," without also reciting "of the person and estate." *Greer v. Ford*, 31 C. A. 389, 72 S. W. 73; *Same v. Morrison*, *Id.*

Art. 4157. [2655] [2574] Guardian shall be cited, when.—When the application for the sale of real estate is made by any other person than the guardian of the estate, the guardian of the estate shall be cited to appear at a regular term of the court and show cause why the order should not be made, and also to present to the court an exhibit, under oath, showing fully the condition of the estate.

Art. 4158. [2656] [2575] Hearing on application for sale of real estate.—Whenever an application for the sale of real estate is filed, it shall be the duty of the clerk to immediately call the attention of the

judge of the court in which such guardianship is pending to the filing of the application, and the judge shall designate a day to hear such application, which may be heard in term time or vacation, provided, such application shall remain on file at least five days before any orders are made and the judge may continue such hearing from time to time until he shall have been satisfied as to the facts concerning the application. [Act Aug. 18, 1876, p. 181, sec. 104. Acts 1913, p. 321, sec. 1, amending Art. 4158, Rev. St. 1911.]

Validity of notice of application.—In an action to set aside a sale of an insane person's land by her guardian, objections that only 15 days had elapsed between posting notice of application for sale and the return thereof, and that reference to the ward's name in the notice of application for sale was somewhat different from the designation of the estate over which the guardianship was exercised, held immaterial. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

Art. 4159. Repealed. See Acts 1913, p. 321, repealing this article and amending articles 4099, 4140, 4141, 4144, 4145, 4146, 4155, 4158, 4161, 4162, 4163, 4164, 4173, 4177, 4181, 4187, 4188, and 4281.

Art. 4160. [2658] [2577] **Advantage of estate to be considered in ordering sale.**—When a sale of real estate is ordered, it shall be of the property which the court may deem most advantageous to the estate to be sold. [Act Aug. 18, 1876, p. 181, sec. 103.]

Art. 4161. [2659] [2578] **May be sold on what terms.**—A sale of real estate may be ordered to be made for cash or for part cash and part credit, at public auction or private sale, as may appear to the court to be to the best interest of the estate. [Acts 1892, S. S., p. 9. Acts 1913, p. 321, sec. 1, amending Art. 4161, Rev. St. 1911.]

Art. 4162. [2660] [2579] **Order of sale shall state what.**—An order for the sale of real estate shall state:

1st. The property to be sold, giving such description of it as will identify it.

2nd. Whether it is to be sold at public auction or at private sale, and, if at public auction, the time and place of such sale.

3rd. The necessity and purpose of such sale.

4th. It shall require the guardian to file a good and sufficient bond, subject to the approval of the court, in an amount equal to twice the amount for which such real estate is sold.

5th. It shall require the sale to be made and the report thereof returned to the court in accordance with law. [Acts 1876, p. 181, sec. 100. Acts 1913, p. 321, sec. 1, amending Art. 4162, Rev. St. 1911.]

Necessity for order.—Where there was no order of the county court for nor confirmation of a sale of land by a guardian and the report of the sale was disaffirmed by the county court, the guardian had no authority to convey the interest of the wards. *Rippy v. Harlow*, 46 C. A. 52, 101 S. W. 851.

An order of sale is essential to the validity of a guardian's sale. *Teague v. Swasey*, 46 C. A. 151, 102 S. W. 458.

Validity in general.—The validity of an order is not affected by the fact that the application therefor cannot be shown. *Robertson v. Johnson*, 57 T. 62.

Order for guardian's sale held irregular, and not void. *Greer v. Ford*, 31 C. A. 389, 72 S. W. 73; *Same v. Morrison*, Id.

Description of property in order.—Under the statute in force in 1860 the validity of a sale of real estate made by the guardian under the order of the probate court was not affected by the failure to accurately describe the land in the order, the statute being merely directory. *Robertson v. Johnson*, 57 T. 62.

Indefiniteness of description of land belonging to a ward, ordered to be sold by his guardian, held not material where the land was ordered sold at private sale. *Jirou v. Jirou* (Civ. App.) 136 S. W. 493.

Extending time of sale.—The court has power to extend the time of sale without a written application therefor. *Butler v. Stephens*, 77 T. 599, 14 S. W. 202.

Order of sale as conclusion of legal necessity therefor.—Construing an order of sale and sale made in 1859, it is held that an order of sale and confirmation of it are conclusive of its legal necessity, and that the sale passed the title. *Weems v. Masterton*, 80 T. 45, 15 S. W. 590; *Butler v. Stephens*, 77 T. 599, 14 S. W. 202.

Title of purchaser.—A purchaser under an order of court for sale of property of an estate need not look beyond such order and inquire as to its regularity, or whether facts exist supporting such order. *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44.

Art. 4163. [2661] [2580] **In what county real estate shall be sold.**—All private sales of real estate shall be made in the county where the

guardianship is pending; all public sales of real estate shall be made in the county where the real estate is situated and such public sales shall be advertised and the sale made as is provided in section 4168 of chapter 11, title 64, Revised Civil Statutes of Texas, 1911. [Acts of 1876, p. 181, sec. 108. Acts 1913, p. 321, sec. 1, amending Art. 4163, Rev. St. 1911.]

Art. 4164. [2662] [2581] Terms of sale.—The terms of sale of real estate when made partly on credit shall be that the cash payment be not less than one-third of the purchase price, and that the purchaser give his note or notes for the deferred payments maturing in equal annual amounts, the last note to mature not later than five years from date of deed, said note to bear interest from date at a rate of interest not less than six per cent, payable annually, and in default of the payment of principal or interest or any part thereof when due shall mature the whole debt; all notes for the deferred payments to be secured by vendor's lien, retained in deed and notes upon the property sold and further secured by deed of trust, upon the property sold, with usual provisions for foreclosure and sale upon failure to make payments provided in deed and notes. [Acts 1892, S. S., p. 9. Acts 1913, p. 321, sec. 1, amending Art. 4164, Rev. St. 1911.]

Amount of cash payment.—In an action to set aside the sale by the guardian of an insane person's property, the fact that one-third of the value of the improved property was not received in cash as required by the statute held not to vitiate the sale where the deferred payments were amply secured. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

A guardian's sale of an insane person's lands under order of court will not be set aside because made on a smaller cash payment than provided by statute, where the estate was not harmed. *Comstock v. Lomax* (Civ. App.) 135 S. W. 185.

Statement of inadequacy of price necessary for disturbance of a guardian's sale of an insane person's land under order of court. *Id.*

Sale for inadequate price.—A guardian of an insane person having right to set aside sale because of inadequacy of price can accept such a sum from the purchaser in addition as would make a fair price for the land. *Fitzwilliams v. Davie*, 18 C. A. 81, 43 S. W. 840.

Art. 4165. [2663] [2582] Guardian shall not purchase property belonging to ward.—It shall not be lawful for the guardian to take the estate of his ward or any part thereof, at its appraised value, or to become the purchaser, either directly or indirectly, of any property of the estate sold by him; and, if any guardian shall, either directly or indirectly, become the purchaser of any property of his ward, at a sale made by such guardian, upon the complaint in writing of any person, and, after service of citation upon such guardian, and upon proof of such complaint, such sale shall be declared void by the court, and shall be set aside, and an order to that effect entered upon the minutes; and the costs of such sale, and of the proceedings to set the same aside, shall be adjudged against such guardian individually.

Applicability of statute in general.—The provisions of this article apply where the property has been conveyed by the guardian to another. *Hampton v. Hampton*, 29 S. W. 423, 9 C. A. 497.

Prior agreement of guardian.—An agreement by a guardian of an insane person with the subsequent purchaser of land of his ward as to the price that he would pay for the property will only vitiate the sale thereof if it appears that such agreement had the effect of preventing the guardian from securing a better price at the sale. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

The prior agreement of the guardian for sale of an insane person's land held not such as to require the sale under order of court to be set aside. *Comstock v. Lomax* (Civ. App.) 135 S. W. 185.

Purchase by judge.—A judge is incapable of purchasing at a guardian's sale, the validity of which must be passed on by him in his official capacity. *Nona Mills Co. v. Wingate*, 51 C. A. 609, 113 S. W. 182.

Sale to guardian's attorney.—A guardian's sale to the attorney of the guardian and minors held, on bill of review, to be set aside; the guardian and attorney having known that part of the proceeds were to be used and appropriated by the guardian. *Parker v. Bowers*, 37 C. A. 252, 84 S. W. 380.

Limitation of action by minor.—See notes under Art. 4178.

Art. 4166. [2664] [2583] Bidder failing to comply with bids shall be liable, etc.—When any person shall bid off property offered for sale by a guardian, and shall fail to comply with the terms of the sale, the facts shall be reported to the court by the guardian; and such person

so failing to comply shall be liable to pay such guardian, for the use of the estate, ten per cent on the amount of his bid; and, also, the deficiency in price on the second sale of such property, if any such deficiency there be, to be recovered by suit in any court of the county where such sale was made having jurisdiction of the amount claimed.

Art. 4167. [2665] [2584] Sale may be continued from day to day.—Public sales may be continued from day to day in case the day set apart for any such sale shall be insufficient to complete the same, by giving public notice verbally of such continuance at the conclusion of the sale each day; and the continued sale shall commence and conclude within the hours prescribed for public sales under execution.

Art. 4168. [2666] [2585] Guardians' sales governed by same rules as execution sales.—The laws regulating sales under execution, so far as the same relate to the advertisement and sale of property and the proceedings incidental thereto, and are not inconsistent with the provisions of this title, shall apply to and govern public sales by a guardian of the property of the ward. [Acts 1876, p. 181, secs. 82–111.]

Notice of sale.—That a notice by a guardian for the sale of land was not published for the length of time prescribed by statute does not render a sale under an order of court made upon such defective citation void as against a purchaser under such order. *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44; *Lyle v. Horstman* (Civ. App.) 25 S. W. 802. See *Fowler v. Simpson*, 79 T. 64, 15 S. W. 687, 23 Am. St. Rep. 370.

Irregularity in notice of sale of land of insane person held not to deprive the court of jurisdiction to make the sale. *Fitzwilliams v. Davie*, 18 C. A. 81, 43 S. W. 840.

Notice of sale.—See notes under Art. 4168.

Art. 4169. [2667] [2586] Notice of private sale not required.—When a private sale of the property of the ward is made by a guardian, notice of such sale is not required to be given.

Art. 4170. [2668] [2587–2588] Sale of mortgaged property to be made on such terms as court may direct.—Any person holding a claim against the estate of a ward, secured by mortgage or other lien, may obtain an order for the sale of the property upon which he has such mortgage or other lien, or so much thereof as may be required to satisfy the claim, by causing citation to be posted and the guardian to be cited to appear at a regular term of the court and show cause why such order should not be made; and such sale shall be made upon such terms as the court may direct; which terms shall be stated in the order of sale; and the notice and other proceedings shall be the same as in other sales by guardians. [Id. secs. 100, 107.]

Art. 4171. [2669] [2589] Mortgage or lien may be discharged without sale.—Should it appear to the court that the discharge of such mortgage or other lien, out of the general assets, would be beneficial to the estate, the payment may be ordered to be so made, instead of ordering a sale of the property. [Id. sec. 106.]

Art. 4172. [2670] Guardian may reduce rate of interest on ward's debts, how.—Should an estate in the hands of a guardian be involved in debt, and, upon proper showing made to the court, it shall appear that the guardian can pay off and discharge existing debts to the advantage of the estate by the hypothecation or mortgage of real estate at a lower rate of interest, or upon more advantageous terms than the old indebtedness, the court may, in its discretion, by order made for that purpose, allow the guardian to pay off and discharge existing debts by the execution of a good and sufficient mortgage or deed of trust upon real estate to secure the person furnishing the money with which to discharge said indebtedness; acts of guardians under this article to be reported to the court and approved as in case of sales; nor shall any guardian renew any indebtedness or evidence thereof except by order of the court, made upon application and notice as in case of sales of land. [Acts of 1892, S. S., p. 10.]

Art. 4173. [2671] May renew debt, when.—Should a guardian not have sufficient funds in hand belonging to the estate of his ward to pay and discharge any existing debt, he may renew the evidence of the same in like manner as his ward could, were he able to act; and such act of the guardian shall have the same force and effect with reference to such novated paper as if done by the ward; provided that no such guardian shall renew the evidences of any debt against the estate of his ward which shall have become barred by the statutes of limitations; nor shall such guardian renew the evidences of any debt that may have been made or contracted by his ward during his minority or other disabilities. [Acts of 1892, S. S., p. 10. Acts 1913, p. 321, sec. 1, amending Art. 4173, Rev. St. 1911.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Liability of purchaser for misapplication of proceeds.—Where wards attack a sale made by their guardian, who made the sale and received the purchase money, they are bound by the act of the guardian in receiving the purchase money, whether it was ever received by them or not. Their relief for the money, if not received, is upon the guardian's bond. *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44. See *Ellis v. Stone*, 23 S. W. 405, 4 C. A. 157.

One buying notes from guardian, which he knows belong to the estate, held liable to the ward if proceeds are misappropriated by the guardian. *Gillespie v. Crawford* (Civ. App.) 42 S. W. 621.

CHAPTER TWELVE

REPORTS OF SALES AND ACTION OF THE COURT THEREON

Art.	Art.
4174. Sales shall be reported, when.	4181. No conveyance until, when.
4175. Report of sale, its requisites.	4182. Penalty for neglect to take note and mortgage.
4176. May be in term time or vacation.	4183. Vendor's lien to be retained.
4177. Action of court upon the report.	4184. When property is not sold at time ordered.
4178. Sale to be set aside, when.	
4179. Conveyance of property sold.	
4180. Conveyance of real estate, etc.	

Article 4174. [2672] [2590] Sales shall be reported in thirty days.—All sales of the property of the ward shall be reported to the court in which the guardianship is pending, by the guardian, within thirty days after the sale is made.

Sale—Report and confirmation of as necessary to passing title.—See notes under Art. 4177.

Failure to report sale as ground for removal.—Where a grandfather, who was guardian of the estate of his minor grandson, failed to file a report of a sale of personal property within the time required by this article, and it was shown that he delayed the report because awaiting a final disposition of proceedings proper for inclusion therein, and that he had never misappropriated any of his ward's funds or been willfully neglectful of his interests, it was not an abuse of the trial court's discretion to refuse to remove him. *Brown v. Brown* (Civ. App.) 142 S. W. 23.

Art. 4175. [2673] [2591] Report of sale and its requisites.—The report of any sale shall be in writing, and shall be subscribed and sworn to by the guardian before some officer authorized to administer oaths. It shall show:

1. The time and place of the sale.
2. The property sold, giving a description of the same.
3. The name of the purchaser of the property.
4. The amount for which each article of property was sold.
5. The date of the order of sale.
6. Whether such sale was at public auction or was a private sale.
7. The terms of the sale.
8. Whether or not the purchaser has complied with the terms of the sale.

"Complied with" construed.—The words "complied with" as used in this article, defined (citing 2 Words and Phrases, p. 1370). *McMinn v. Cope* (Civ. App.) 112 S. W. 809.

Effect of defects in reports.—The validity of a guardian's sale cannot be questioned in a collateral proceeding because of his failure to state the price in his report of the sale. *Taffinder v. Merrell*, 95 T. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

Where a guardian reported the sale of a lot to one person, when one-half had been sold to one and the other half to another, and the sale was confirmed as reported, the conveyance to the actual purchasers of their respective shares should be sustained. *Id.*

Where the purchaser at a guardian's sale paid the full value of the land with property, and the guardian reported the sale as for cash, and it was so confirmed, the title passed to and remained in the purchaser while such order stood unreversed. *Stroud v. Hawkins*, 28 C. A. 321, 67 S. W. 534.

Art. 4176. [2674] [2592] Report may be in term time or vacation.—A report of sale may be made in term time or in vacation, and, when returned, shall be filed by the clerk and the filing thereof noted in the case upon the judge's docket.

Art. 4177. [2675] [2593] Action of the court on the report; proviso.—At any time after the expiration of five days from the filing of a report of sale, it shall be the duty of the court in which the same has been filed to inquire into the manner in which such sale was made, and hear evidence in support of or against such report and, if satisfied that such sale was fairly made and in conformity with law, and that the guardian has filed his bond as required herein, which has been duly approved by the court; the court shall cause to be entered upon the minutes a decree confirming such sale, and order the report of sale to be recorded by the clerk, and the proper conveyance of the property sold be made by the guardian to the purchaser, upon compliance by such purchaser with the terms of sale; provided that in cases pending at the time this law becomes effective and in which the guardian has a satisfactory bond filed, equal to twice the amount of all personal property of the ward and twice the amount of the real estate sold, he shall not be required to file a new bond. [Act Aug. 18, 1876, p. 185, sec. 113. Acts 1913, p. 321, sec. 1, amending Art. 4177, Rev. St. 1911.]

Necessity of confirmation to pass title.—A sale of personal property is not completed unless confirmed. *Harrison v. Ilgner*, 74 T. 86, 11 S. W. 1054. See *Butler v. Stephens*, 77 T. 599, 14 S. W. 202.

A confirmation of the sale of real estate by the court is essential to the validity of the title. *Swenson v. Seale* (Civ. App.) 28 S. W. 143; *McMinn v. Cope*, 112 S. W. 809; *Gillean v. Witherspoon*, 121 S. W. 909.

Where a sale of a ward's land by guardian under order of court was neither reported to, nor confirmed by, the court, and there was no evidence of any act on the court's part which would indicate that it had ever recognized or acquiesced in the sale as a completed act, the sale was invalid; confirmation being necessary to pass title. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

Necessity of confirmation to charge guardian with proceeds.—A guardian is not accountable to the ward's estate for the proceeds of the sale until the sale has been confirmed. *McMinn v. Cope* (Civ. App.) 112 S. W. 811.

Proof of confirmation.—The want of a formal order confirming the sale may be supplied by evidence of such acts upon the part of the court as would satisfy the jury that the court recognized and acquiesced in the sale, and that the purchase money had been paid and deed executed. *Robertson v. Johnson*, 57 T. 62.

Conclusiveness of confirmation.—The confirmation of a sale is conclusive in a collateral proceeding where the record does not affirmatively show that jurisdiction did not attach. *Edwards v. Halbert*, 64 T. 667.

Where a guardian's sale is authorized and confirmed by the court, the decrees are conclusive in a collateral proceeding that the sale was for a lawful purpose, in the absence of evidence to the contrary. *Taffinder v. Merrell*, 95 T. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

Confirmation of a guardian's sale cannot be questioned in trespass to try title to the property so sold. *Stroud v. Hawkins*, 28 C. A. 321, 67 S. W. 534.

Rights of purchaser before confirmation.—If before confirmation of sale of personal property, the property has been delivered and the purchase-money applied to payment of valid claims, in a suit for the property the purchaser may have his equities adjusted or may be subrogated to the rights of the creditors. *Harrison v. Ilgner*, 74 T. 86, 11 S. W. 1054. See *Butler v. Stephens*, 77 T. 599, 14 S. W. 202.

Validity of sales.—A guardian with the means of his ward purchased land and took a deed in his own name. A subsequent guardian obtained a judgment against him for the money invested in the land, to satisfy which the land was sold under an order of the court. In a suit by the ward for the land against a subsequent purchaser who had made improvements in good faith without notice, held, first, the ward was precluded from recovery by the action of the last guardian in obtaining a judgment upon a money demand; second, the ward had no such equity as would enable him to disturb a purchaser in possession. *Clayton v. McKinnon*, 54 T. 206.

In 1868 the wife, joined by her husband, conveyed a tract of land, part of her separate property, to a trustee, for the use and benefit of her minor children. The deed provided that the trustee should have the power to sell the property at the request of the

minors, made through their legal and natural guardians. No guardian was appointed, and in 1871 the trustee, at the request of the parents, sold the land. Held, that under the act of March 14, 1848, the sale was legally made. *Harris v. Petty*, 66 T. 514, 1 S. W. 525.

Validity of decree of confirmation.—Decree of confirmation of sale of ward's property by guardian held void. *O'Connor v. Vineyard* (Civ. App.) 43 S. W. 55.

Where the order confirming a guardian's sale is entered before the expiration of the time required by statute after filing the report, such action does not render the order void. *Taffinder v. Merrell*, 95 T. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

An order confirming a guardian's sale held irregular, and not void. *Greer v. Ford*, 31 C. A. 389, 72 S. W. 73; *Same v. Morrison*, Id.

The confirmation of a guardian's sale of a certificate for land issued to minor heirs, by the judge, who purchased the certificate at the sale, is void, and the deed to him reciting the sale and confirmation is also void. *Nona Mills Co. v. Wingate*, 51 C. A. 609, 113 S. W. 182.

What constitutes confirmation.—An order approving the final report of a guardian held not a confirmation of a void sale by the guardian. *Nona Mills Co. v. Wingate*, 51 C. A. 609, 113 S. W. 182.

A guardian's application to make a specific private sale of his ward's land in accordance with specified terms and the court's order allowing the same held not a confirmation of the sale when completed. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

Art. 4178. [2676] [2594] Sale shall be set aside, when.—If the court is not satisfied that the sale was fairly made and in conformity with law, an order shall be entered upon the minutes setting the same aside, and ordering the property to be again sold, if necessary.

Necessity for returning purchase money.—When jurisdiction is invoked to set aside a sale made by a guardian, the court has the power to attach equitable conditions to such order; e. g., requiring return of purchase-money. *Kendrick v. Wheeler*, 85 T. 247, 20 S. W. 44.

Wards held entitled to recover lands sold by their parents without returning the money received, where it was not shown, that the money was expended for their benefit, or that their parents were unable to support them. *O'Connor v. Vineyard* (Civ. App.) 43 S. W. 55.

Statement of rule for accounting, where a guardian's sale to the attorney of himself and the minors is set aside, because the guardian and attorney knew part of the proceeds were to be appropriated by the guardian. *Parker v. Bowers*, 37 C. A. 252, 84 S. W. 380.

In the absence of evidence that the minor received the benefit of the proceeds from the sale of his property by a guardian unlawfully appointed, he may recover the property, without tender of the price paid at such sale. *St. Paul Sanitarium v. Crim*, 38 C. A. 1, 84 S. W. 1114.

The estate of a ward and his succeeding guardian held liable for so much of the purchase price of an unconfirmed sale of the ward's real estate as was applied directly to the benefit of the ward or his estate. *McMinn v. Cope* (Civ. App.) 112 S. W. 809.

In a suit by a ward after becoming of age to set aside a sale of her real estate by her guardian, she was not required to tender a return of the purchase money as a condition to her right to relief. *Jirou v. Jirou* (Civ. App.) 136 S. W. 493.

— **Allowance for improvements.**—Where the sale of an insane person's land by her guardian was set aside on account of irregularities in the sale, the purchasers at the sale were properly allowed the value of their improvements. *Lomax v. Comstock*, 50 C. A. 340, 110 S. W. 762.

Limitations.—See notes under Art. 5708.

Evidence.—In an action of trespass to try title, a guardian's deed offered by defendant held prima facie proof that the sale was regular, but not presumptive evidence of the existence of all the prerequisites to a valid sale. *Teague v. Swasey*, 46 C. A. 151, 102 S. W. 458.

Though Art. 4155 provides for application by the guardian to the county court for sale of "a sufficient amount of real estate" to pay the debts of the ward's estate, evidence that one acre would have sold for enough, is insufficient to negative the finding of such court of necessity for sale of the entire tract, so as to authorize setting aside of the sale; the tract being small and undivided, so that it might be more advantageous to the estate to dispose of it as a whole. *Comstock v. Lomax* (Civ. App.) 135 S. W. 185.

Evidence on certiorari to avoid a guardian's sale of land of an insane person under order of court held not sufficient to raise the issue of a sale at a grossly inadequate price. Id.

Election of remedies.—Pendency of suits to compel an accounting by a guardian and his bondsmen of the proceeds of a sale of real estate belonging to plaintiff held not an election of remedies precluding plaintiff from maintaining a proceeding to vacate the sale. *Jirou v. Jirou* (Civ. App.) 136 S. W. 493.

Art. 4179. [2677] [2595] Conveyance of property sold.—After a sale has been confirmed by a decree of the court, and after the purchaser has complied with the terms of the sale, the guardian shall execute and deliver to the purchaser a proper conveyance of the property purchased by him. In the case of a sale of personal property, no conveyance shall be necessary; but the decree of the court confirming the sale shall vest the right and title of the ward to the property sold in the purchaser, and

shall be prima facie evidence that all the requirements of the law have been complied with in making such sale.

Art. 4180. [2678] [2596] Conveyance of real estate.—If the property sold be real estate, the conveyance shall be by deed, and shall refer to the decree of the court confirming the sale and ordering the conveyance to be made, by giving the date and term of the court of such order; and such conveyance shall vest the right and title of the ward to such real estate in the purchaser, and shall be prima facie evidence that all the requirements of the law have been complied with in making such sale. [Id. sec. 115.]

Collateral attack of sale.—The sale of land under the order of court cannot be attacked collaterally for fraud. *Weems v. Masterton*, 80 T. 45, 15 S. W. 590; *Bouldin v. Miller*, 28 S. W. 940, 87 T. 359.

Refusal to procure valid deed.—Plaintiff, purchasing land of defendant guardian, held entitled to personal judgment against him for conversion, where he sent him a deed he knew to be void, and refused to return the money or procure a valid deed. *Eversberg v. Miller* (Civ. App.) 56 S. W. 223.

Power of attorney.—A power of attorney signed for an infant by his guardian is not binding upon the infant where the guardian was not authorized to bind him thereby. *Merrill v. Bradley*, 52 C. A. 527, 121 S. W. 561.

Property conveyed.—A guardian's deed made by order of court, setting off to a locator his locative interest, held to convey no interest except that of the ward. *Rhine v. Joyce* (Civ. App.) 50 S. W. 425.

Necessity of proving authority of grantor.—A deed purporting to convey the interest of minors held inadmissible, in the absence of evidence that the grantor was their guardian or had authority to convey. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

Confirmation of deed.—Where a guardian's deed was invalid, the ward, after becoming a married woman, could not ratify and confirm it by accepting a part of the purchase money with full knowledge of the facts. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

Art. 4181. [2679] [2597] No conveyance until terms of sale have been complied with.—No conveyance of real estate sold shall be executed and delivered by the guardian to the purchaser until the terms of sale have been complied with by such purchaser; and when such sale has been made for part cash and part credit, it shall be the duty of the guardian, before delivering a conveyance of the property sold to the purchaser, to take from such purchaser a note or notes for the deferred payment, bearing interest at a rate not less than six per cent per annum, payable annually, secured by the vendor's lien and a deed of trust, with usual provisions for foreclosure and sale, as additional security, and to file such deed of trust for record in the county where such real estate is situated. [Acts 1913, p. 321, sec. 1, amending Art. 4181, Rev. St. 1911.]

Art. 4182. [2680] [2598] Penalty for neglect to take note and mortgage, etc.—Should the guardian neglect to take the note, security and mortgage, and file such mortgage for record in the proper county before delivering to the purchaser a deed, as required by the preceding article, such guardian and the sureties upon his bond shall be liable for whatever loss may accrue to the estate of the ward by reason of such neglect.

Art. 4183. [2681] [2599] Vendor's lien to be retained, when.—All notes executed for the purchase money of real estate, under the provisions of this chapter, shall hold the vendor's lien on the real estate for which such notes were given against all persons having notice, express or implied, in favor of the estate, whether the mortgage be recorded or not; and such lien shall, in no case, be waived.

Art. 4184. [2682] [2600] When property is not sold at the time ordered, etc.—If, from any cause, the guardian shall fail to sell any real estate ordered to be sold, at the time specified in the order, he shall report the facts to the court or judge, accompanied by his affidavit of the truth thereof, and the court or judge, either in term time or vacation, may, by an order entered upon the minutes, appoint another day for such sale, and so on, from time to time, until the sale is completed. [Id. sec. 116.]

CHAPTER THIRTEEN

ANNUAL ACCOUNTS

<p>Art. 4185. Of guardian of the person. 4186. Of guardian of estate. 4187. Annual account shall remain on file five days, etc. 4188. Citation on annual account.</p>	<p>Art. 4189. Account must be proved by vouchers or other evidence. 4190. Action of the court on account. 4191. Citation to return account, when. 4192. Penalty for failing to return. 4193. [Repealed.]</p>
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Article 4185. [2683] [2601] Annual account of guardian of person.
—The guardian of the person, where there is a separate guardian of the estate, shall annually return to the court an account, supported by his affidavit, showing the items of expenditure since the last account for the education and maintenance of the ward. [Act Aug. 18, 1876, p. 186, sec. 120.]

Right to credit for payment of ward's expenses.—In order to entitle a guardian to credit for paying on his own motion the expenses of maintaining his ward from the income of the estate, the income and expenditures must run concurrently. *Logan v. Gay* (Civ. App.) 87 S. W. 852.

Interest charged guardian as income.—Interest charged against a guardian on money in his hands which he should have lent is to be added to the income of the estate. *De Cordova v. Rogers*, 97 T. 60, 75 S. W. 16.

Art. 4186. [2684] [2602] Annual account of guardian of estate.—The guardian of an estate shall annually return to the court an account showing:

1. Any property that may have come to his knowledge belonging to his ward which has not been previously inventoried or listed.
2. Any changes in the property of the ward which have not been previously reported.
3. A complete account of receipts and disbursements since the last annual account.
4. All claims that have been allowed by him against the estate since the last annual account that are still unpaid.
5. All claims that have been rejected by him since the last annual account, and whether the same have been sued upon or not.
6. The money and property still on hand, and the condition of such property, and the use that is being made of the same.
7. Such other facts as may be necessary to show the true and exact condition of the estate.

Annexed to such account, shall be the affidavit of the guardian that it contains a correct and complete statement of the matters to which it relates. [Id. sec. 119.]

Right to charge for improvements.—A widow cannot charge her minor child with improvements made by her on their joint estate. *Calhoun v. Stark*, 13 C. A. 60, 35 S. W. 410.

Art. 4187. [2685] [2603] Annual account shall remain on file five days, etc.—When an annual account is presented, it shall be filed; and the filing thereof noted upon the judge's docket, and, without being acted on, shall remain on file five days. [Act Aug. 18, 1876, p. 186, sec. 121. Acts 1913, p. 321, sec. 1, amending Art. 4187, Rev. St. 1911.]

Art. 4188. [2686] [2604] Hearing on annual account.—At any time after the expiration of five days from the date of the filing of an annual account, the judge may act on such account and may continue the hearing thereon from time to time until fully advised as to all items of such account. [Act Aug. 18, 1876, p. 186, sec. 122. Acts 1913, p. 321, sec. 1, amending Art. 4188, Rev. St. 1911.]

Art. 4189. [2687] [2605] Accounts must be proved by vouchers or other evidence.—The guardian must produce and file proper vouchers for every item of credit claimed by him in his account, or support the

same by other satisfactory evidence. [Act Aug. 18, 1876, p. 186, sec. 124.]

Art. 4190. [2688] [2606] **Action of the court on the account.**—If the account be found incorrect, it shall be correctly stated; and, when so corrected, or if found correct, it shall be approved by an order of the court entered upon the minutes. [Id. sec. 125.]

Orders on accounting.—These orders are not final adjudications. The burden of proof rests upon the party who seeks to review or set aside an order. *Young v. Gray*, 65 T. 99; *Jones v. Parker*, 67 T. 76, 3 S. W. 222; *Oldham v. Brooks* (Civ. App.) 25 S. W. 648.

Art. 4191. [2689] [2607] **Guardian shall be cited to return account, when.**—If the guardian fail to return an annual account, as required by the provisions of this chapter, he shall be cited to return the same at the next term of the court, and show cause for failing to return such account at the proper time. [Id. sec. 128.]

Art. 4192. [2690] [2608] **Penalty for failing to return account.**—If the guardian fail to return such account, after being cited to do so, or fail to show good cause for failing to return such account at the proper time, he may be fined by the court not exceeding five hundred dollars, for the use of the county; and he and his sureties shall be liable for all fines imposed and damages sustained by reason of such failure. [Id. sec. 129.]

Art. 4193.—Repealed. See Acts 1913, p. 321, repealing this article and amending articles 4099, 4140, 4141, 4144–4146, 4155, 4158, 4161–4164, 4173, 4177, 4181, 4187, 4188, and 4281.

CHAPTER FOURTEEN

DEATH, RESIGNATION AND REMOVAL OF GUARDIANS

Art. 4194. When guardian dies.	Art. 4201. Order removing guardian shall state, what.
4195. Resignation of guardian.	4202. Person removed shall not be re-appointed.
4196. Citation in such case.	4203. Procedure on death of guardian.
4197. Service of such citation.	4204. Subsequent guardian shall account for what.
4198. Action of the court upon application and account.	4205. Subsequent guardian.
4199. Removal of guardian without notice, when.	
4200. Removal after citation.	

Article 4194. [2691] [2609] **When guardian dies.**—When a guardian dies the court, on application, shall appoint another. [Act Aug. 18, 1876, p. 179, sec. 54.]

Art. 4195. [2692] [2610] **Resignation of guardian.**—When a guardian wishes to resign, he shall present his application in writing to that effect to the court, and accompany such application with a full and complete account of the condition of the estate and of his guardianship verified by his affidavit. [Id. sec. 55.]

Cited, *Nicholson v. Nicholson* (Civ. App.) 125 S. W. 965.

Art. 4196. [2693] [2611] **Citation in such case.**—Upon the filing of such application and account, the clerk shall issue a citation to all persons interested in such guardianship, which citation shall state:

1. That such guardian has filed his application for leave to resign the guardianship, and has accompanied the same by an account for final settlement thereof.

2. It shall notify all persons interested in the guardianship to appear at a certain term of the court, commencing on such a day and month, and contest the account of the guardian, if they see proper to do so. [Id. sec. 56.]

Art. 4197. [2694] [2612] Service of such citation.—Such citation shall be published once a week for three successive weeks in some newspaper in the county, if there be one regularly printed therein; if not, then such citation shall be duly posted for at least twenty days before the return term thereof; and such citation shall be duly returned by the officer executing the same. [Id. sec. 57.]

Art. 4198. [2695] [2613] Action of court upon application and account.—Upon the hearing of such application and account, if it appear that such guardian has accounted for all the estate according to law, the court shall enter an order upon the minutes that he delivered the estate remaining in his possession, if any there be, or the person of his ward, or both, as the case may be, to some person who shall have been or may be appointed and qualified as guardian in his place; upon compliance with such order and surrender of his letters of guardianship, such guardian shall be permitted to resign his trust and be discharged; and an order to that effect shall be made by the court and entered upon the minutes of the court. [Id. sec. 58.]

Cited, *Nicholson v. Nicholson* (Civ. App.) 125 S. W. 965.

Art. 4199. [2696] [2614] Removal of guardian without notice, when.—Guardians shall be removed in the following cases, without notice, at the regular term of the court:

1. When they neglect to return, within thirty days after qualification, an inventory and list of claims of the property of the estate, as far as such property has come to their knowledge.
2. When they have been required to give a new bond, and neglect to do so within the time prescribed.
3. When they have removed from the state. [Id. sec. 59.]

Removal—Grounds for in general.—The enumeration in Arts. 4199–4201 of grounds for removing guardians excludes the idea of removal on any ground not so named. *Kahn v. Israelson*, 62 T. 221.

A guardian, appointed on a mother's waiver of right to the guardianship of her daughter under 14 years of age, held not removable at the instance of one claiming through a grandmother's waiver of right, after the mother's death. *Polasek v. Janecek*, 22 C. A. 411, 55 S. W. 522.

Discretionary power of court.—In view of Arts. 4185, 4191, the failure of a guardian to file a report of a sale of personal property, as required by Arts. 4174, 4175, is not a mandatory ground for removal, under this article, but the court has discretionary power of removing such guardian. *Brown v. Brown* (Civ. App.) 142 S. W. 23.

Art. 4200. [2697] [2615] Removal after citation.—A guardian may be removed by the court of its own motion, or on the motion of any person interested in the ward, or his estate, after being cited to answer:

1. When he fails to return any account which he is required to return by any of the provisions of this title.
2. When he fails to obey any order of the court or judge, consistent with this title.
3. When there is good cause to believe that he has misapplied, embezzled or removed, or is about to misapply, embezzle or remove from the state, the property committed to his charge, or any part thereof.
4. When he is proved to have been guilty of gross neglect or mismanagement in the performance of any of his duties as guardian.
5. When he becomes of unsound mind, or becomes an habitual drunkard, or is sentenced to imprisonment for a term of years.
6. When, if he be the guardian of the person, he cruelly treats the ward, or neglects to educate and maintain the ward as liberally as the means of such ward and the circumstances of the case demand. [Id. sec. 60.]

Applicability of statute in general.—Subdivision 3 of this article applies as well to guardians of the person as to guardians of the estates of minors. *Parish v. Alston*, 65 T. 194.

Application for removal.—Where a guardian is removed under this article, upon an application which was defective, the error is immaterial. *Cherry v. Wallis*, 65 T. 442.

Estoppel to ask for removal.—Where one entitled to receive an appointment consents to the appointment of another, he cannot be heard to ask the removal of such guardian in order to be appointed in his stead. *Kahn v. Israelson*, 62 T. 221. Citing *Mayer v. Houston*, 61 T. 690; *Cook v. Bybee*, 24 T. 280; *Cole v. Dial*, 12 T. 100.

Art. 4201. [2698] [2616] Order removing guardian shall state what, etc.—The order of the court removing a guardian shall state the cause of such removal, and shall require such guardian to surrender his letters of guardianship, and shall also further require such guardian to deliver the person of the ward, or his estate, or both, as the case may be, to some person who has been appointed guardian and has qualified as such in his place. [Id. secs. 61–2.]

Notice of appointment of successor.—Where a guardian has been appointed on notice, no further application or notice is required for the appointment of his successor on his removal. *Brown v. Fidelity & Deposit Co. of Maryland* (Civ. App.) 76 S. W. 944.

Modification of order.—Where, on removal of guardian, the court orders him to pay a certain sum, being the amount in his hands as set out in his report, such amount may subsequently be increased by the court. *Bopp v. Hansford*, 18 C. A. 340, 45 S. W. 744.

Effect of order.—Where, after conditional discharge of a guardian, the court directed him to sell certain of the ward's land, the order of discharge could not be invoked to annul the order of sale. *Gillean v. Witherspoon* (Civ. App.) 121 S. W. 909.

An order discharging a guardian on payment of court costs held not an absolute or final discharge. *Id.*

Art. 4202. [2699] [2617] Person removed shall not be reappointed.—When any person shall have been removed from the guardianship of the person or estate of a ward, he shall not afterward be reappointed to such guardianship. [Id. sec. 63.]

Art. 4203. [2700] [2618] When guardian dies, etc., estate shall be accounted for and delivered, etc.—If a guardian die, resign, or be removed, he or his legal representatives shall account for, pay and deliver to the person legally entitled to receive the same, all the property of every kind belonging to the estate of the ward at such time and in such manner as the court shall order; and, in case of a refusal to comply with an order of the court to that effect, the same may be enforced by attachment and punishment as for contempt. [Id. sec. 64.]

Conclusiveness of judgment.—The judgment of the court determining what property the guardian had of the ward in his hands is conclusive both against the guardian and the sureties on his bond. *Bopp v. Hansford*, 18 C. A. 340, 45 S. W. 744.

Authority of probate court.—On the death of a guardian, and the appointment of a new guardian, the probate court is without authority to adjudicate matters between the ward and the estate of his former guardian. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 132 S. W. 894.

Art. 4204. [2701] [2619] Subsequent guardian shall account for what.—When a guardian succeeds a former guardian, he shall be required to account for all the estate which came into the hands of his predecessor, and shall be entitled to any order or remedy which the court has power to give, in order to enforce the delivery of the estate, and the liability of the sureties of his predecessor for so much as is not delivered. But such subsequent guardian shall be excused from accounting for such of the estate as he has failed to recover after the use of due diligence. [Id. sec. 65.]

In general.—It has been intimated that this article might authorize a second guardian to go behind and revise the settlement of the first guardian. *Jones v. Parker*, 67 T. 76, 3 S. W. 222; *Young v. Gray*, 65 T. 99; *Oldham v. Brooks* (Civ. App.) 25 S. W. 648.

Remedy of successor.—Such remedy as the county court had power to give should be sought, or it should be shown that it could give no adequate remedy, before the successor of the deceased guardian is authorized to bring an independent action in the district court against the surety on his bond. Yet if the point is not raised in the district court, and the latter's jurisdiction is acquiesced in, the case will be considered as one within the original jurisdiction of the district court. *Fidelity & Deposit Co. v. Schelper*, 37 C. A. 393, 83 S. W. 872.

Art. 4205. [2702] [2620] Subsequent guardian succeeds to what.—A subsequent guardian shall succeed to all the rights, powers and duties of his predecessor, and shall proceed with the guardianship in all respects as if it were a continuation of the same by the same guardian.

CHAPTER FIFTEEN

CLAIMS AGAINST THE ESTATE

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| <p>Art. 4206. Guardian may pay claim without authentication, when.</p> <p>4207. Claim shall not be allowed unless supported by affidavit, etc.</p> <p>4208. Claim not founded on written instrument, affidavit shall state facts.</p> <p>4209. When claim belongs to corporation, who shall make affidavit.</p> <p>4210. Affidavit by officer of corporation, executor, etc., shall state what.</p> <p>4211. Affidavit may be made before what officers.</p> <p>4212. Memorandum of allowance or rejection on claim.</p> <p>4213. Failure to make memorandum.</p> <p>4214. Rejected claim barred, when.</p> <p>4215. Memorandum evidence.</p> <p>4216. When claim is allowed, shall be presented, etc.</p> <p>4217. Claims shall be examined, etc., by the court.</p> <p>4218. Any person may contest claim.</p> <p>4219. Court shall hear evidence on claim.</p> | <p>Art. 4220. Order of approval or disapproval is a judgment.</p> <p>4221. Appeal may be taken from action of court on claim.</p> <p>4222. Action of court on claim.</p> <p>4223. Lost claim, how proved.</p> <p>4224. Claim by guardian established, how.</p> <p>4225. When a claim is "exhibited."</p> <p>4226. When a claim is "established."</p> <p>4227. When claims may be exhibited.</p> <p>4228. Limitation is interrupted, how.</p> <p>4229. Guardian shall not purchase claim.</p> <p>4230. Claim established by judgment shall be filed, etc.</p> <p>4231. Costs incurred in exhibiting, etc., a claim taxed, how.</p> <p>4232. Claim docket.</p> <p>4233. Payment of claims.</p> <p>4234. Order to pay creditor.</p> <p>4235. Execution against guardian.</p> <p>4236. Sureties on guardian's bond shall be cited, when.</p> <p>4237. Citation and judgment in such case.</p> |
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Article 4206. [2703] [2621] Guardian may pay claim without authentication, when.—A guardian may pay any claim against the estate of his ward which he knows to be just, without the authentication thereof. [Id. sec. 95.]

Cited, *Newton v. Easterwood* (Civ. App.) 154 S. W. 646.

Liability of minor.—A minor may be held to his contracts obtained by fraudulent representations which naturally and reasonably induce persons ignorant of his minority to believe he is of full age, and deal with him on that assumption. *Harselm v. Cohen* (Civ. App.) 25 S. W. 977.

Presentation of claims.—As to the necessity of presenting claims before suit, see *Low v. Felton*, 84 T. 378, 19 S. W. 693.

Art. 4207. [2704] [2622] Claim shall not be allowed unless supported by affidavit, etc.—The guardian shall not allow, and the court shall not approve, any claim, except as provided for in the preceding article, unless it be accompanied by an affidavit of the claimant, that the claim is just, that nothing has been paid or delivered toward the satisfaction of such claim, except what is mentioned or credited (if any), that there are no counter claims known to the affiant which have not been allowed, and that the sum claimed is justly due. [Id. sec. 154.]

Pleadings to establish claims.—No formal pleadings to establish a claim in a guardianship matter are required either in the county court or on appeal. It is only necessary to file such papers as the statutes require. *Bradshaw v. Lyles*, 55 C. A. 384, 119 S. W. 918.

Art. 4208. [2705] [2623] Where claim is not founded on written instrument, affidavit shall state facts.—Where the claim is not founded on an instrument in writing or an account, in addition to the statement required by the preceding article, the affidavit must state the facts upon which the claim is founded. [Id. sec. 155.]

Art. 4209. [2706] [2624] When a claim belongs to a corporation, who shall make affidavit.—When a claim belongs to a corporation, the cashier, treasurer or managing agent of such corporation shall make the affidavit required to authenticate it. [Id. sec. 156.]

Art. 4210. [2707] [2625] Affidavit by officer of corporation, executor, etc., shall state what, etc.—When an affidavit authenticating a claim is made by an officer of a corporation, an executor, administrator, trustee, assignee, agent or attorney, it shall be sufficient to state in such affidavit that he has made diligent inquiry and examination and that he does verily believe that nothing has been paid and delivered toward the satisfaction of such claim, except the amount credited (if any), that

there are no counter claims which have not been allowed, and that the sum claimed is justly due. [Id. sec. 157.]

Art. 4211. [2708] [2626] **Affidavit may be made before what officers.**—The affidavit authenticating a claim may be made before any officer authorized to administer oaths. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Art. 4212. [2709] [2627] **Memorandum of allowance or rejection on claim.**—When a claim is presented to the guardian, properly authenticated, he shall indorse thereon or annex thereto a memorandum in writing signed by him, stating the time of its presentment, and that he allows or rejects it, or what portion thereof he allows, if any. [Id. sec. 159.]

Art. 4213. [2710] [2628] **Effect of failure to make memorandum.**—The failure of a guardian to indorse on, or annex to, any claim presented to him, his allowance or rejection thereof, shall be deemed a rejection of such claim; and, in such case, the costs, if the claim be established, shall be adjudged against the guardian to be paid out of his own estate. [Id. sec. 160.]

Art. 4214. [2711] [2629] **Rejected claim, if not sued on in ninety days, barred.**—When a claim, or part thereof, has been rejected by the guardian, the claimant, if he does not submit thereto, shall institute suit thereon within ninety days after such rejection, or the same shall be barred. [Id. sec. 162.]

Art. 4215. [2712] [2630] **Memorandum evidence.**—When a rejected claim is sued upon, the indorsement thereon or annexed thereto of its rejection shall be taken to be true without proof, unless it be denied under oath. [Id. sec. 165.]

Art. 4216. [2713] [2631] **When claim is allowed, shall be presented, etc.**—After a claim has been presented to the guardian and allowed, the claimant shall present it to the clerk of the court in which the guardianship is pending, who shall enter it upon the claim docket. [Id. sec. 161.]

Art. 4217. [2714] [2632] **Claims shall be examined, etc., by the court.**—At each regular term of the court, all claims which have been allowed and entered on the claim docket shall be examined by the court and approved or disapproved, in the same manner as is provided for claims against the estates of decedents. [Id. sec. 164.]

See notes under Art. 4220.

Art. 4218. [2715] [2633] **Any person may contest claim.**—Any person may appear and contest the approval of any claim, or any part thereof, and shall be entitled to process to compel the attendance of witnesses and the production of testimony as in ordinary suits. [Id. sec. 166.]

Art. 4219. [2716] [2634] **Court shall hear evidence on claim.**—Although a claim be properly authenticated and allowed, if the court be not well satisfied it is just, it shall send for persons and papers, and may examine the claimant and the guardian under oath and hear other evidence. If the court be not entirely convinced in such case by evidence other than the testimony of the claimant that the claim is just, it shall be disapproved. [Id. sec. 167.]

Art. 4220. [2717] [2635] **Order of approval or disapproval is a judgment.**—The order of approval or disapproval of a claim has the force and effect of a judgment. [Id. sec. 168.]

Effect of allowance of claim.—Where claims against the estate of a ward are allowed by the guardian and approved by the county judge, but no order to such effect is entered on the minutes, the allowance is a nullity, and not a judgment, and the claims may be struck out on a bill of review. *De Cordova v. Rodgers* (Civ. App.) 67 S. W. 1042.

Under the statutes, an allowance of a claim against the estate of a ward in excess of the income of the ward at the time of its allowance is invalid, unless the claim was created under an order of court authorizing expenditure in excess of such income, even though it is subsequently approved by the court. *Id.*

Where a claim is presented to the guardian and allowed by him and approved by the court and entered on the claim docket and the approval indorsed on the claim, the claim is established as a judgment against the estate and makes it the duty of the guardian to pay, and no order on the minutes in addition to that on the claim docket is required. *Logan v. Gay*, 99 T. 603, 90 S. W. 862.

Art. 4221. [2718] [2636] Appeal may be taken from action of court on claim.—When a claimant or any person interested in a ward shall be dissatisfied with the action of the court in approving or disapproving a claim in whole or in part, he may appeal therefrom to the district court, as in the case of any other judgment rendered by said court.

See notes under Art. 4290.

Art. 4222. [2719] [2637] Action of court shall be indorsed on claim, etc.—When a claim is acted on by the court, the court shall indorse thereon, or annex thereto, a memorandum in writing, signed officially, stating the action of the court upon such claim, and shall also enter such action upon the claim docket.

See notes under Art. 4220.

Art. 4223. [2720] [2638] Lost claim may be proved, how.—When a claim has been lost and can not be produced, the claimant may make an affidavit of the facts and present it to the guardian, with the same effect as the claim itself; but, in such case, the claim must be proved by competent testimony, other than such claimant's affidavit or oath, produced in court or taken by deposition, before it shall be approved by the court. [*Id.* sec. 174.]

Art. 4224. [2721] [2639] Claim held by guardian, established, how.—A claim which the guardian held against the ward at the time of his appointment, or which has since accrued, is exhibited by being filed, verified by the affidavit of the guardian; after which it takes the same course as other claims. [*Id.* sec. 158.]

Cited, *Newton v. Easterwood* (Civ. App.) 154 S. W. 646.

Guardian's claim for expenses.—When the income for the period covered by the guardian's claim for expenditure for education and support has been applied thereon, he may not be allowed the balance of the claim. *De Cordova v. Rogers*, 97 T. 60, 75 S. W. 16.

Art. 4225. [2722] [2640] When claim is said to be exhibited.—A claim is said to be legally exhibited:

1. When it is properly presented to the guardian, and after being allowed by him is filed.
2. When, after being rejected, suit is commenced thereon. [*Id.* sec. 169.]

Art. 4226. [2723] [2641] When a claim is said to be established.—A claim is said to be established:

1. When it has been allowed by the guardian and approved by the court.
2. When, in a suit thereon, it has been sustained by the judgment of the proper court. [*Id.* sec. 170.]

See notes under Art. 4220.

Art. 4227. [2724] [2642] When a claim may be exhibited.—Claims which have not been legally exhibited within the year may be exhibited at any time afterward, before the estate is closed, or suit on such claims would be barred by the general law of limitation. [*Id.* sec. 172.]

Art. 4228. [2725] [2643] Limitation is interrupted, how.—The general law of limitations is interrupted:

1. By filing a claim which has been allowed.
2. By commencing a suit upon a rejected or disapproved claim within ninety days after such rejection or disapproval.

Art. 4229. [2726] [2644] Guardian shall not purchase claim.—It shall not be lawful for a guardian, either directly or indirectly, to purchase for his own use any claim against the estate of his ward; and, upon proof to the satisfaction of the court of the violation of this provision, the court shall disapprove the claim.

Bona fide purchaser of claim.—The doctrine of innocent purchaser does not apply to a purchase of a claim against the estate of a ward, which has been allowed by the guardian and approved by the county court; the court's action being invalid, and not constituting a judgment, because the appeal is not entered of record. *De Cordova v. Rodgers* (Civ. App.) 67 S. W. 1042.

Art. 4230. [2727] [2645] Claim established by judgment shall be filed, etc.—When a claim has been established by judgment, a certified copy of such judgment shall be filed with the clerk of the court in which the guardianship is pending, and entered upon the claim docket as other claims are entered. [Id. sec. 164.]

In general.—This article applies only where a guardianship is actually pending; and hence, in an action against an insane person, it was error to direct payment of judgment in the due course of guardianship proceeding, where it appeared that no guardian had ever been appointed. *James v. Chaney* (Civ. App.) 154 S. W. 679.

Art. 4231. [2728] [2646] Cost incurred in exhibiting, etc., a claim; taxed, how.—The costs incurred in the exhibition and establishment of claims shall be taxed as follows:

1. If a claim be allowed and approved, the estate shall pay the costs.
2. If a claim be allowed, but disapproved, the claimant shall pay the costs.
3. If a claim which has been rejected be established, the estate shall pay the costs. [Id. sec. 190.]

Art. 4232. [2729] [2647] Claim docket.—The claim docket required to be kept in estates of decedents shall be used also for the estates of wards, and under the same rules as far as applicable.

Art. 4233. [2730] [2648] Payment of claims.—It shall be the duty of the guardian to pay all claims against the estate of his ward that have been allowed and approved, or established by suit, as soon as practicable; and the court may, at any time, either in term time or in vacation, by an order entered upon the minutes, direct the order in which the claims against the estate shall be paid, and the amount to be paid on each claim, when the funds are not sufficient to pay them all in full.

Right of bank to apply money on deposit.—Money deposited in a bank by a guardian to his credit as guardian is the property of the ward, and the bank cannot apply it to the payment of any order made by the guardian in any other character than that of guardian. *Moore v. Hanscom*, 101 T. 293, 106 S. W. 876.

Art. 4234. [2731] [2649] Creditor may obtain order for payment of claim.—Any creditor of the estate of the ward whose claim has been approved by the court, or established by judgment, may, upon application in writing to the court in which such guardianship is pending, at a regular term thereof, obtain an order for the payment of such claim, upon proof being made that there are funds in the hands of the guardian subject thereto, or, if there be no funds, or not sufficient for the payment of such claim, and if to await the receipt of funds from other sources would involve an unreasonable delay, an order shall be made for the sale of property of the estate sufficient to pay the debt. [Id. sec. 96.]

Order of payment.—Where an order is secured as provided in this article, but the execution is against the minor's property, instead of against the property of the guardian, it is wholly void and is not a claim on the minor's property, and it is proper to dissolve an injunction to restrain levy of execution. *Thompson v. Gooldsby*, 48 C. A. 23, 106 S. W. 936.

Art. 4235. [2732] [2650] Execution shall issue against guardian, when.—If any guardian shall fail to pay any claim ordered by the court to be paid when demanded, upon affidavit of the demand and failure to pay being filed with the clerk of the court making such order, an execution shall be issued for the amount ordered to be paid such claimant, and for the costs of such proceeding against the property of such guardian. [Id. sec. 97.]

See notes under Art. 4234.

Art. 4236. [2733] [2651] Sureties on guardian's bond shall be cited, when, etc.—If the execution provided for in the preceding article be returned not satisfied, the sureties upon such guardian's bond may be cited to appear at a regular term of the court from which such execution issued, and show cause why judgment should not be rendered against them for such debt, interest and costs. [Id. sec. 98.]

Art. 4237. [2734] [2652] Citation and judgment in such case.—Citation in such case may be issued to any county in the state; and, upon the return thereof duly served, if good cause to the contrary be not shown, the court shall render judgment against the sureties so served in favor of the claimant for the amount of the claim ordered to be paid as aforesaid, and remaining unpaid, and ten per cent damages thereon, together with interest and costs; and execution may issue thereon accordingly. [Id. sec. 99.]

CHAPTER SIXTEEN

GUARDIANSHIP OF PERSONS OF UNSOUND MIND AND HABITUAL DRUNKARDS

Art. 4238. County judge shall issue warrant on information.	Art. 4247. Priority in guardianship.
4239. Duty of county officer to file information, when.	4248. Restraint of enraged ward.
4240. Requisites of information.	4249. Insane person at large.
4241. Jury shall be impaneled.	4250. Who are liable to maintain persons of unsound mind.
4242. Proceedings and trial.	4251. Expenses of confinement.
4243. If verdict is against defendant, guardian shall be appointed.	4252. County may recover expenses.
4244. New trial may be granted, when.	4253. Proceedings to discharge ward from guardianship.
4245. Provisions as to minors apply to persons of unsound mind, etc.	4254. Same subject.
4246. Order for support of ward's family.	4255. Court may discharge from guardianship without jury, when.

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

Article 4238. [2735] [2653] County judge shall issue warrant on information.—If information be given to the judge of the county court that any person of the county is of unsound mind, or is an habitual drunkard, and is without a guardian, such judge, if satisfied that there is good cause for the exercise of his jurisdiction, shall, either in term time or in vacation, issue a warrant to the proper officer commanding that such person be brought before him at a time and place to be named in such warrant. [Act Aug. 18, 1876, p. 187, sec. 141.]

In general.—A proceeding in the county court to have one adjudged a lunatic, cannot be treated as a probate proceeding under this article. *Glenn v. State* (Civ. App.) 107 S. W. 622.

Jurisdiction.—The court of the county of the husband's residence has jurisdiction of proceedings for the appointment of a guardian for an insane wife on the decease of her husband. *Schwartz v. West*, 37 C. A. 136, 84 S. W. 282.

A wife having been regularly adjudged insane, the court of another county in which the husband acquired a residence may assume jurisdiction of her estate and appoint a guardian, without a sworn information showing her to be insane. *Id.*

Art. 4239. [2736] [2654] Duty of county officer to file information, when.—It shall be the duty of any county officer who may discover any person who resides in the county to be of unsound mind, and without a guardian, to file information thereof with the county judge of such county, who shall issue his warrant as provided in the preceding article.

Art. 4240. [2737] [2655] Requisites of information.—The information provided for in the two preceding articles shall be in writing, and shall state the name of the person charged with being of unsound mind or an habitual drunkard, if his name be known, and, if unknown, such person shall be described, and that such person is of unsound mind, or is an habitual drunkard, as the case may be, to the best of the knowl-

edge and belief of the informant; and such information shall be subscribed and sworn to by the informant before some officer of the county authorized to administer oaths.

Art. 4241. [2738] [2656] **Jury shall be impaneled.**—When the person charged is brought before the judge he shall, either in term time or in vacation, cause to be impaneled a qualified jury to try the case and decide whether such person is of unsound mind, or is an habitual drunkard, as charged in the information.

Art. 4242. [2739] [2657] **Proceedings and trial.**—The case shall be docketed in the name of the county as plaintiff, and the person against whom the information is filed as defendant; and the proceedings and trial therein shall be governed by the same rules and regulations that govern in ordinary suits in the county court, unless otherwise provided.

Art. 4243. [2740] [2658] **If verdict is against defendant, guardian shall be appointed.**—If it be found by the jury that the defendant is of unsound mind, or is an habitual drunkard, as charged, the court shall proceed, immediately and without further notice, to appoint a guardian of the person and estate of such defendant in the same manner as in the case of a minor. [Id. sec. 143.]

Effect of adjudication in general.—At common law, a judgment declaring a person a lunatic is, as against strangers to the proceeding, prima facie evidence of such lunacy. *Herndon v. Vick*, 18 C. A. 583, 45 S. W. 852.

An adjudication of insanity held not admissible in a suit to set aside a prior deed of the insane person. *Uecker v. Zuercher*, 54 C. A. 289, 118 S. W. 149.

An adjudication by a court of competent jurisdiction that a person is a lunatic held to fix his status as a lunatic. *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

In a suit to try title by the guardian of a lunatic, proceedings in lunacy held admissible. *Id.*

Presumptions.—See notes under Art. 3637, Rule 12.

Effect of foreign judgment.—A Maine judgment, appointing a guardian for a person adjudged a lunatic, is evidence of lunacy in a suit in Texas involving the lunatic's title to land. *Herndon v. Vick*, 18 C. A. 583, 45 S. W. 852.

Art. 4244. [2741] [2659] **New trial may be granted, when.**—The court may, for good cause shown, at any time within ten days after the verdict has been returned, set aside such verdict and grant a new trial to either party; but, when two juries have concurred in a case, the second verdict shall not be set aside. [Id. sec. 144.]

Art. 4245. [2742] [2660] **Provisions as to minors apply to persons of unsound mind, etc.**—All the provisions of this title relating to the guardianship of the persons and estates of minors shall apply to the guardianship of the persons and estates of persons of unsound mind and habitual drunkards, in so far as the same are applicable and not inconsistent with any provision of this chapter.

Art. 4246. [2743] [2661] **Order for support of ward's family.**—The court by which any person of unsound mind or habitual drunkard is committed to guardianship may make orders for the support of his family and the education of his children when necessary. [Id. sec. 177.]

Art. 4247. [2744] [2662] **Husband or wife first entitled to guardianship.**—If the person committed to guardianship is married, the husband or the wife of such person, as the case may be, shall be entitled first in order to the guardianship.

Art. 4248. [2745] [2663] **When ward is furiously mad.**—If any person shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of the guardian or other person under whose care he may be, and who is bound to provide for his support, to confine him in some suitable place until the first regular term of the county court of his county, when the court shall make such order for the restraint, support and safe-keeping of such ward as the circumstances may require. [Id. sec. 178.]

Art. 4249. [2746] [2664] **When insane person is not confined or in charge of any one.**—If any such person of unsound mind as is specified in the preceding article shall not be confined by those having charge of him, or if there be no person having such charge, any magistrate may cause such insane person to be apprehended and may employ any person to confine him in some suitable place until the county court shall make further order thereon, as provided in the preceding article. [Id. sec. 179.]

Art. 4250. [2747] [2665] **Who are liable to maintain persons of unsound mind, etc.**—Where the person of unsound mind or habitual drunkard has no estate of his own, they shall be maintained:

1. By the husband or wife of such person, if any, if able to do so.
2. By the father or mother of such person, if able to do so.
3. By the children and grandchildren of such person, if able to do so.
4. By the county in which said person has his residence. [Id. sec. 180.]

Art. 4251. [2748] [2666] **Expenses of confinement to be paid, how.**—The expenses attending the confinement of an insane person shall be paid by the guardian out of the estate of the ward, if he has any estate; and, if he has no estate, such expense shall be paid by the person bound to provide for and support such insane person; and, if not so paid, the county shall pay the same. [Id. sec. 181.]

Art. 4252. [2749] [2667] **County may recover back expenses paid.**—In all cases of appropriations out of the county treasury for the support and confinement of any person of unsound mind or habitual drunkard, the amount thereof may be recovered by the county from the estate of such person, or from any person who, by law, is bound to provide for the support of such person, if there be any such person able to pay the same. [Id. sec. 182.]

Art. 4253. [2750] [2668] **Proceedings to discharge ward from guardianship.**—If any person shall allege in writing and under oath that a person who has been adjudged to be of unsound mind, or an habitual drunkard, has been restored to his right mind, or to correct, sober habits, as the case may be, the guardian of the person and of the estate of such ward shall be cited to appear before the county judge on a day and at a place named in such citation, either in term time or in vacation, and show cause why such ward should not be discharged from further guardianship, or the guardian may appear without such citation. [Id. sec. 183.]

Jurisdiction.—A court held to have jurisdiction of the property and person of an insane person with authority to determine whether his reason had been restored. *Ferguson v. Ferguson* (Civ. App.) 128 S. W. 632.

Art. 4254. [2751] [2669] **Same subject.**—If the fact of such alleged restoration be doubtful, the court shall, either in term time or in vacation, cause a qualified jury to be impaneled to try the issue as in the first instance, and if it be found by such jury that the ward has been restored to his right mind, or has reformed, he shall be discharged from guardianship by an order to that effect entered upon the minutes; and the guardian shall immediately settle his accounts and deliver up all the property remaining in his hands to such ward. [Id.]

Art. 4255. [2752] [2670] **Court may discharge from guardianship without jury, when.**—If the fact of such alleged restoration be not doubtful, the court may, without the intervention of a jury, make the order discharging the ward from guardianship, as provided in the preceding article. [Id.]

Conclusiveness of judgment reciting restoration to sanity.—A judgment reciting a person's restoration to sanity is conclusive only of his status at the time the judgment was rendered. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

DECISIONS RELATING TO SUBJECT IN GENERAL

Guardian's release of ward's interest.—An insane person's guardian's release of the ward's interest as an heir in a note held void. *Dealy v. Shepherd*, 54 C. A. 80, 116 S. W. 638.

Recovery by guardian of interest surrendered by executors.—An insane person's guardian held entitled to recover the interest of his ward as an heir, in a note surrendered by the executors without authority. *Dealy v. Shepherd*, 54 C. A. 80, 116 S. W. 638.

Validity of contracts.—The contract of an insane person is voidable only. *Newman v. Taylor* (Civ. App.) 122 S. W. 425; *Lewis v. Blount*, 139 S. W. 7.

In absence of an adjudication of habitual drunkenness, one cannot escape liability on a contract on the ground that he was intoxicated when he executed it. *St. Louis, S. F. & T. Ry. Co. v. Bowles* (Civ. App.) 131 S. W. 1176.

Statement of test of rights of one to avoid on the ground of insanity his contract made after he had been adjudged insane. *Gee v. Johnson* (Civ. App.) 142 S. W. 625.

— **Releases.**—In an action against a railroad for the negligent killing of plaintiff's intestate at a highway crossing, an instrument releasing the railroad from liability held not binding because of the releasor's mental incapacity. *Missouri, K. & T. Ry. Co. v. Brantley*, 26 C. A. 11, 62 S. W. 94.

Where one is mentally incapacitated to transact business when executing a release for damages for personal injuries, the release held not binding on her. *Johnson v. Gulf, C. & S. F. Ry. Co.*, 36 C. A. 487, 81 S. W. 1197.

— **Ratification.**—A person purchasing machinery while insane held to have ratified the contract after regaining his reason. *Newman v. Taylor* (Civ. App.) 122 S. W. 425.

Validity of conveyances.—A lessee may not avoid payment of rent to a grantee of the lessor, accruing subsequent to the conveyance, by showing that the lessor at the time of the conveyance was insane. *Vogel v. Zuercher* (Civ. App.) 135 S. W. 737.

A deed of an insane person is voidable only. *Id.*

Strangers and persons who are merely privies in an estate of an insane grantor may not avoid the deed. *Id.*

A conveyance by an insane person is merely voidable, but the facts that the grantee did not know of the insanity and that the conveyance was obtained without fraud and for an adequate consideration does not prevent an avoidance thereof. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

Validity of power of attorney.—A power of attorney executed by an imbecile is not void, but voidable. *Williams v. Sapieha*, 94 T. 430, 61 S. W. 115.

Liability for amount received under invalid contract.—Conveyance of an incompetent's lands will not be rescinded, in the absence of an offer to place the purchaser in statu quo. *Williams v. Sapieha* (Civ. App.) 59 S. W. 947.

In the absence of proof that an imbecile has the money or property acquired with it, or that it has been expended for necessities, he is not required to return it before rescinding a power of attorney and a deed of land pursuant thereto. *Williams v. Sapieha*, 94 T. 430, 61 S. W. 115.

The contract of a lunatic being voidable only, one of whom he borrows money on his note may recover such portion thereof as he uses for necessities or for the protection and benefit of his estate. *First Nat. Bank v. McGinty*, 29 C. A. 539, 69 S. W. 495.

Actions in general.—Contention that action was brought by lunatic, and not by guardian, held without merit. *Flynn v. Hancock*, 35 C. A. 395, 80 S. W. 245.

Guardian as party to action begun before ward became insane.—When the husband became insane pending suit, it was held that his guardian should be made plaintiff, and the action could not be prosecuted by the wife. *T. & P. Ry. Co. v. Bailey*, 83 T. 19, 18 S. W. 481.

Pleading.—See notes under Art. 1910, § 48.

Evidence.—Where a guardian, suing to set aside his ward's deed, alleged that the ward has always been an incompetent, the defendant can show his treatment by his relatives, and the taking of a judgment against him by his mother. *Williams v. Sapieha* (Civ. App.) 62 S. W. 72.

Evidence in an action for conversion of goods held to justify a finding that plaintiff's intestate was not of unsound mind when he ratified a sale of the goods to defendant. *Denny v. Stokes*, 31 C. A. 425, 72 S. W. 209.

— **Knowledge of incompetency.**—Evidence held to warrant a finding that a purchaser of incompetent's lands bought without knowledge of such incompetency. *Williams v. Sapieha* (Civ. App.) 59 S. W. 947.

Judgment.—A judgment on a note foreclosing a vendor's lien held voidable for fraud at plaintiff's election on his being restored to sanity. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

CHAPTER SEVENTEEN

NON-RESIDENT GUARDIANS AND WARDS

<p>Art. 4256. Non-resident guardian may obtain letters in this state, how.</p> <p>4257. Such guardian may remove property out of state, etc.</p> <p>4258. Resident executor, etc., may be ordered to deliver property.</p>	<p>Art. 4259. Property shall not be removed until debts are paid, etc.</p> <p>4260. Benefits of this chapter shall not extend, etc.</p>
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Article 4256. [2753] [2671] Non-resident guardian may obtain letters in this state, how.—Where a guardian and his ward are non-residents, such guardian may file in the county court of any county a full and complete transcript from the records of a court of competent jurisdiction where he and his ward reside, showing that he has been appointed and has qualified as guardian of the estate of such ward; which said transcript shall be certified by the clerk of the court in which the proceedings were had, under the seal of such court, if there be one, together with a certificate from the judge, chief justice or presiding magistrate of such court, as the case may be, that the attestation to such transcript is in due form; and upon the filing of such transcript the same may be recorded, and the guardian shall be entitled to receive letters of guardianship of the estate of such minor situated in this state, upon filing a bond with sureties, as in other cases, in double the amount of the estimated value of such estate. [Act Aug. 18, 1876, p. 180, sec. 70.]

Ancillary appointment.—On application of nonresident guardian to be appointed guardian of the estate of his ward, a finding that the ward and her father were domiciled in the state of her nonresident guardian held justified by the evidence. *Orr v. Wright* (Civ. App.) 45 S. W. 629.

On application to appoint a nonresident guardian as guardian, evidence that ward's property could not be sold except at a sacrifice held inadmissible. *Id.*

The nonresident applicant for letters of guardianship of estate of minor must show that he has been duly appointed and has duly qualified as guardian of the estate in some other state or country to entitle him to letters in this state. *Gill v. Everman*, 94 T. 209, 59 S. W. 531.

Appointment of a nonresident guardian as guardian in the state, on defective showing as to qualifications, held void, in the absence of a showing that the laws of the foreign state were different from those of this state. *Id.*

— **Statutory provisions.**—Mississippi statutes providing for appointment of a nonresident guardian held similar to the Texas statutes on the same subject, so as to authorize appointment of nonresident guardian in Texas. *Orr v. Wright* (Civ. App.) 45 S. W. 629.

— **Proof of foreign appointment.**—Transcript held insufficient to show that the appointment of a nonresident guardian was of the minor's estate, and not of his person. *Gill v. Everman*, 94 T. 209, 59 S. W. 531.

The transcript must show that the nonresident guardian was appointed and that he qualified before he can, in this state, obtain letters of guardianship of the estate of the minors for the purpose of removing the same out of the state. *Gill v. Everman* (Civ. App.) 60 S. W. 914.

Disposition of property by foreign guardian.—In view of Arts. 3554, 4051, a foreign guardian may not under this chapter remove money of nonresident minor paid the clerk of the probate court in a damage suit, unless he complies with the conditions of this article by giving bond to secure debts. *Hoffman v. Watkins* (Civ. App.) 130 S. W. 625.

Extraterritorial effect of letters.—Letters of guardianship held to have no legal force beyond the territorial limits of the state in which they are granted. *Hoffman v. Watkins* (Civ. App.) 130 S. W. 625.

Art. 4257. [2754] [2672] Such guardian may remove property out of state, etc.—Upon the recovery of the property of the ward, if it be personal property, such guardian may remove the same out of the state, unless such removal would conflict with the tenure of such property, or the terms and limitations under which it is held; and, if it be real property, he may obtain an order for the sale of it and remove the proceeds; such sale shall be made, returned and acted upon by the court as other sales of real estate by a guardian. [Id. sec. 71.]

Art. 4258. [2755] [2673] Resident executor, etc., may be ordered to deliver property.—Any resident executor, administrator or guardian having any of the estate of such ward may be ordered by the court to deliver the same to such non-resident guardian. [Id. sec. 72.]

Art. 4259. [2756] [2674] Property shall not be removed until debts are paid, etc.—There shall be no removal from the state of any of such property, until all the debts known to exist against the estate have been paid, or the payment thereof secured by bond payable to the judge of the county court and approved by the clerk. [Id. sec. 73.]

Art. 4260. [2757] [2675] Benefits of this chapter shall not extend, etc.—The benefit of the provisions of this chapter shall not extend to the residents of any state, territory, district or country in which a similar law does not exist in favor of the residents of this state. [Id. sec. 74.]

Art. 4256
Vernon Sayles
1914
Amended
1, 2 & 3 C. S.
38-L. P. 13

Art. 4257
Vernon Sayles
1914
Amended
1, 2 & 3 C. S.
38 L. P. 13

CHAPTER EIGHTEEN

REMOVAL OF GUARDIANSHIP

<p>Art. 4261. Application to remove guardianship to another county. 4262. Citation to sureties in such case. 4263. Action of court on application.</p>	<p>Art. 4264. Transcript on removal. 4265. When order shall take effect. 4266. Guardianship when removed shall be proceeded with.</p>
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Article 4261. [2758] [2676] Application to remove guardianship to another county.—When a guardian desires to remove the transaction of the business of the guardianship from one county to another, he shall file in the court where such guardianship is pending a written application asking for authority to do so, and state in such application his reasons for desiring such removal. [Act Aug. 18, 1876, p. 185, sec§. 117–18.]

Art. 4262. [2759] [2677] Citation to sureties in such case.—Upon the filing of such application, the clerk shall issue citation to the sureties upon the bond of such guardian, citing them to appear at a regular term of the court, to be named in such citation, and show cause why such application should not be granted. [Id. sec. 118.]

Art. 4263. [2760] [2678] Action of the court on application.—Upon the hearing of the application, if no good cause be shown to the contrary, and if it appear that the removal of the guardianship would be to the interest of the ward, the court shall enter an order upon the minutes authorizing such removal upon the payment of all costs that have accrued.

Art. 4264. [2761] [2679] Transcript to be made and transmitted by clerk, etc.—When such order of removal has been made the clerk shall record all papers of the guardianship required to be recorded, and that have not already been recorded, and shall make out a full and complete certified transcript of all the orders, decrees, judgments and proceedings in such guardianship, and, upon the payment of his fees therefor, shall transmit such transcript, together with all the original papers in the case, to the clerk of the county court of the county to which such guardianship has been removed.

Art. 4265. [2762] [2680] When order of removal shall take effect.—The order removing a guardianship shall not take effect until the transcript provided for in the preceding article has been filed in the office of the clerk of the county court of the county to which such guardianship has been ordered removed, and until a certificate of that fact from the clerk filing the same, under his official seal, has been filed in the court making such order of removal.

Art. 4266. [2763] [2681] Guardianship when removed shall be proceeded with, how, etc.—When a guardianship has been removed from one county to another, in accordance with the provisions of this chapter, it shall be proceeded with in the court to which it has been removed as if it had been originally commenced in said court; but it shall not be necessary to record any of the papers in the case that have already been recorded in the court from which the same has been removed.

CHAPTER NINETEEN

FINAL SETTLEMENT

Art.		Art.	
4267.	Guardianship, when settled.	4274.	Account shall be re-stated, when.
4268.	Guardian shall file account for final settlement; requisites of.	4275.	Must produce vouchers, etc.
4269.	Guardian may be cited to make final settlement, etc.	4276.	Court shall appoint attorney to represent ward, when.
4270.	Citation, when account is filed.	4277.	Debts that could not be collected to be excluded.
4271.	Same subject.	4278.	Labor or service of ward to be accounted for, etc.
4272.	Same subject.	4279.	Guardian may be attached, etc.
4273.	Action of court upon account.		

Article 4267. [2764] [2682] When guardianship shall be settled.—When the ward dies, or, if a minor, arrives at the age of twenty-one years, or, if a female, marries, or, if a person of unsound mind or habitual drunkard, is restored and discharged from guardianship, the guardianship shall be immediately settled and closed and the guardian discharged, as provided in the following articles of this chapter.

In general.—Direction in a will for payment of share of minor devisee upon her marriage, or of what may then be in guardian's possession, or proceeds thereof, held to require guardian to account for proceeds of real estate and moneys collected, if not expended in support and maintenance of ward. *Sutton v. Harvey*, 24 C. A. 26, 57 S. W. 879.

The statute applies to money which the guardian is entitled to hold and does hold during his administration of the estate, and not to that which it is his duty to deliver to his ward immediately upon settlement. When the time comes for delivery, the ward is entitled to demand and receive the money. *Logan v. Gay*, 99 T. 603, 90 S. W. 861.

Under the statute, a guardian must render final settlement when the ward becomes 21 years old, and until he submits the same, is not entitled to an absolute discharge. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

Grounds for rendering final account and discharge of guardian.—Upon the death of a ward the county court has jurisdiction to settle the guardian's account. *Veal v. Fortson*, 57 T. 482.

The guardianship of a female is terminated by her marriage. *Carpenter v. Soloman*, 4 App. C. C. § 34, 14 S. W. 1074.

It would seem that action by the probate court upon the final account and the discharge of the guardian specified in this article was not contemplated until the ward dies, arrives at the age of 21 years or, in the case of a female, marries. *Stewart v. Robbins*, 27 C. A. 188, 65 S. W. 902.

Who must render account.—Person named executrix and guardian of children of testatrix held to have acted as guardian, so as to be liable to account to executor of one of the children. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

Jurisdiction of courts.—The probate court has no jurisdiction to partition the land of minors in a proceeding under this title. *League v. Henecke* (Civ. App.) 26 S. W. 729.

The probate court retains jurisdiction to require final settlement though the ward has become of age. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

An action against a guardian and his sureties for \$950 for the guardian's conversion of the ward's property, brought by the ward after termination of the guardianship, under this article, by the ward attaining full age and by her marriage, is within the jurisdiction of the district court; and an order of the probate court, requiring the guardian to report, does not prevent the maintenance of the action. *Kretzschmar v. Peschel* (Civ. App.) 144 S. W. 1021.

Limitations.—The statute does not begin to run until the guardian's discharge. *Allen v. Stovall*, 94 T. 618, 63 S. W. 866.

Art. 4268. [2765] [2683] Guardian shall file account for final settlement, which shall show, what.—The guardian shall file with the clerk of the court in which the guardianship is pending his account for final settlement of such guardianship; which account shall show fully and completely:

1. The property, rents, revenues and profits received by the guardian and belonging to his ward during his guardianship.
2. The disposition made of such property, rents, revenues and profits.
3. The expenses and debts, if any, against the estate remaining unpaid.
4. The property of the estate remaining in the hands of such guardian, if any.
5. Such other facts as may be necessary to a full and definite understanding of the exact condition of the guardianship.

6. Such account shall be subscribed and sworn to by the guardian before some officer authorized to administer oaths.

Art. 4269. [2766] [2684] **Guardian may be cited to make final settlement, etc.**—Should the guardian fail to file his account for final settlement at the proper time, the court shall, upon its own motion, or upon the complaint in writing of any one interested in the estate, cause such guardian to be cited to appear at a regular term of the court and file such account.

In general.—The proceeding mentioned in this article is not an "action" within Art. 5690, and the four years' statute does not apply. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 155, 156.

Art. 4270. [2767] [2685] **Citation when account is filed.**—Upon the filing of an account for final settlement, the clerk shall, if the ward be living and resident in the state, and his residence be known, issue a citation notifying such ward of the filing of such account, and of the term of court at which the same will be acted upon, and that he may appear and contest such account, if he see proper to do so.

Art. 4271. [2768] [2686] **Same subject.**—If the ward be not living but there is an executor or administrator of his estate legally qualified, such executor or administrator shall be cited, as provided in the preceding article.

Art. 4272. [2769] [2687] **Same subject.**—If the ward be not living, and there be no executor or administrator of his estate, or if the ward be a non-resident of the state, or if his residence be unknown, citation shall be published once a week for three successive weeks, in some newspaper published in the county, if there be one regularly published therein; if not, then such citation shall be duly posted for at least twenty days before the return term thereof.

Art. 4273. [2770] [2688] **Action of the court upon account.**—After citation has been duly served, the court shall proceed to examine the account for final settlement, and to hear all exceptions and objections thereto (if any), and the evidence in support of or against such account, and if the same is found to be fair, just and correct, an order shall be entered upon the minutes approving it, and directing the guardian to deliver the estate remaining in his hands to the ward or other person legally authorized to receive the same; and, upon compliance with such order, the guardian shall be discharged, and such guardianship closed by an order to that effect entered upon the minutes.

Right to inquire into account.—When a guardian renders his final account, the probate court can inquire into it to determine whether it is fair and correct. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

Under this article the court has power to revise the final settlement of a guardian after his discharge at any time after the entry of the order of approval and discharge and before the bar of limitation is complete. *Nicholson v. Nicholson* (Civ. App.) 125 S. W. 905.

Objections to final report.—Allowance of guardian's account before final settlement having been made held not conclusive, on objections to final report. *Eastland v. Williams' Estate* (Civ. App.) 45 S. W. 412.

Conclusiveness of finding.—The recital in a judgment approving the accounts of a guardian and discharging him from the guardianship that the ward had arrived at full age will not, in a suit brought against the guardian by the ward to revise the final settlement, conclude him from showing that he was still a minor when the final settlement was made and the judgment rendered. *Jones v. Parker*, 67 T. 76, 3 S. W. 222.

A recital in a judgment discharging a guardian that the person under guardianship was of age is conclusive until set aside, though the petition contain recitals indicating that she was not. *Stewart v. Robbins*, 27 C. A. 188, 65 S. W. 899.

Validity of judgment.—A judgment discharging a guardian is not a nullity merely because the petition was wanting in some of the formalities prescribed by the statute. *Stewart v. Robbins*, 27 C. A. 188, 65 S. W. 899.

A judgment of probate court approving final account of guardian and discharging him while his ward is still a minor is not absolutely void. *Id.*

Judgment for ward's next friend.—Where on accounting an amount is found due from guardian, judgment should be rendered in favor of the minor's next friend, directing payment to county court, to be held until ward arrives at majority, or some legally authorized person shall apply therefor. *Eastland v. Williams' Estate* (Civ. App.) 45 S. W. 412.

Effect of judgment.—An order approving an account of guardians, including items of their account as administrator, held a final adjudication of the account as guardians. *De Berry v. Wootters* (Civ. App.) 57 S. W. 335.

The decree of the probate court upon final accounting of a guardian, operates as an account stated between the guardian and ward, as well as the formal discharge of the trust relationship. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

Collateral attack on judgment.—The county court in matters of probate being one of general jurisdiction, held, its orders and judgment in settlement of a guardianship and of a decedent's estate cannot be collaterally attacked. *Hassell v. Steinmann* (Civ. App.) 132 S. W. 948.

Presumption from lapse of time as to close of guardianship.—See note under Art. 3687, Rule 12.

Authority to set aside order of discharge.—The order of discharge may be set aside during the term it was made, and no appeal lies therefrom. *Lehman v. Gajasky*, 75 T. 566, 12 S. W. 1122.

Action to set aside order of discharge.—In an action to set aside a judgment discharging a guardian, barred by limitations, evidence held insufficient to warrant setting it aside. *Stewart v. Robbins*, 27 C. A. 188, 65 S. W. 899.

Art. 4274. [2771] [2689] Account shall be re-stated, when.—Should the account be found to be incorrect in any particular, the court shall cause the same to be corrected and re-stated, and make such order in relation thereto as may be necessary to a full and fair settlement of the guardianship.

Art. 4275. [2772] [2690] Guardian must produce vouchers, etc.—The guardian must produce and file proper vouchers for every item of credit claimed by him in his account, or support the same by other satisfactory evidence.

Burden of proof.—See notes under Art. 3687, Rule 12.

Art. 4276. [2773] [2691] Court shall appoint attorney to represent ward, when.—When the ward is dead and there is no executor or administrator of his estate, or when the ward is a non-resident, or his residence is unknown, the court shall appoint an attorney to represent the interest of such ward in the final settlement with the guardian, and shall allow such attorney reasonable compensation for his services out of the ward's estate.

Appearance of minor by next friend.—On citation of guardian to make final report, the minor may appear by her mother, as next friend. *Eastland v. Williams' Estate* (Civ. App.) 45 S. W. 412.

Art. 4277. [2774] [2692] Debts that could not be collected to be excluded.—In the settlement of the account of the guardian, all debts due the estate which the court is satisfied could not have been collected by due diligence, and which have not been collected, shall be excluded from the computation. [Id. sec. 130.]

Art. 4278. [2775] [2693] Labor or services of ward to be accounted for, etc.—In the settlement of any of the accounts of the guardian, he shall account for the reasonable value of the labor or services of his ward, or the proceeds thereof, if any such labor or services have been rendered by such ward; and the guardian shall be entitled to reasonable credits for the board, clothing and maintenance of his ward.

Art. 4279. [2776] [2694] Guardian may be attached, etc., when.—When a guardian who has been ordered by the court, upon final settlement, to deliver the estate to the ward, or other person legally authorized to receive the same, fails to obey such order, he may be attached and punished as for a contempt of court.

Limitations.—See notes under Title 37, Chapter 2.

Judgments against guardians.—See Title 37, Chapter 15.

CHAPTER TWENTY

COMPENSATION OF GUARDIANS, EXPENSES AND COSTS OF GUARDIANSHIP

<p>Art. 4280. Guardian of person serves gratis. 4281. Commissions of guardian. 4282. Extra compensation, when allowed. 4283. Expenses incurred to be allowed. 4284. Pay of appraisers. 4285. Costs shall be adjudged against guardian, when.</p>	<p>Art. 4286. Costs shall be adjudged against applicant, when. 4287. In proceedings against persons of unsound mind, etc. 4288. Same subject. 4289. Cost laws apply to guardianships.</p>
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Article 4280. [2779] [2697] **Guardian of person receives no pay.**—The guardian of the person alone is entitled to no compensation. [Act Aug. 18, 1876, p. 187, sec. 189.]

Art. 4281. [2780] [2698] **Commissions of guardians.**—The guardian of the estate shall not be entitled to or receive any fee or commission on the estate of the ward when first delivered to him; but shall be entitled to a fee of five per cent on the gross income of the ward's estate and five per cent on all money paid out; provided, the term "money paid out" shall not be construed to include money loaned or invested or paid over on the settlement of the guardianship. [Act Aug. 18, 1876, p. 187, sec. 40. Acts 1913, p. 321, sec. 1, amending Art. 4281, Rev. St. 1911.]

Commissions.—The guardian should be allowed commissions only on sums actually paid out. *Reed v. Timmins*, 52 T. 84.

A judgment allowing a guardian commissions held not void for uncertainty, where the account as approved shows the exact amount of receipts and disbursements, and the statute fixes the commission. *Petty v. Petty* (Civ. App.) 57 S. W. 923.

That a judgment allowing a guardian commissions irregularly taxed the commissions as costs of the guardianship held not fatal. *Id.*

The share of the estate of one ward cannot be diminished by guardian's commissions and disbursements made on account of the other ward. *Freedman v. Vallie* (Civ. App.) 75 S. W. 322.

This article determines the amount to be paid executors in a case where the testator provided that the executors should be paid for their services as guardians one-half the fees allowed by law in such cases. *Thomas v. Matthews*, 51 C. A. 304, 112 S. W. 122.

Art. 4282. [2781] [2699] **Extra compensation, when allowed.**—If the guardian manages a farm, plantation, manufactory or other business of his ward, the court may allow him a reasonable compensation for such services. [Act Aug. 18, 1876, p. 187, sec. 40.]

Art. 4283. [2782] [2700] **Expenses incurred to be allowed.**—All necessary and reasonable expenses incurred by the guardian in the preservation and management of the ward's estate, and in the collecting or attempting to collect claims or debts due the ward, and in recovering, or attempting to recover, property to which the ward has a title or claim, and all reasonable attorneys' fees necessarily incurred in the management of such guardianship, shall be allowed the guardian, to be paid out of the estate on satisfactory proof thereof being made to the court. [*Id.* sec. 131.]

Art. 4284. [2783] [2701] **Pay of appraisers.**—Appraisers appointed by the court to appraise the property of the ward shall be allowed two dollars each for every day that they are necessarily engaged in the performance of such duty, to be paid out of the estate.

Art. 4285. [2784] [2702] **Costs shall be adjudged against the guardian, when.**—In all cases where the guardian shall neglect the performance of any duty required of him, and shall be cited to appear before the court on account thereof, he shall pay all costs of such proceeding out of his own estate; and the court shall adjudge the same against him. [*Id.* sec. 191.]

Art. 4286. [2785] [2703] **Costs shall be adjudged against applicant, when.**—In all cases where a party shall make any application or opposi-

tion, and on the trial thereof he shall be defeated, all costs occasioned by such application or opposition shall be adjudged against such party by the court. [Id. sec. 192.]

Costs.—Where a non-resident guardian sues in Texas for guardianship of the estate situated in Texas, and to remove the same (being personal property) out of the State, and the resident guardian opposes the application and is cast in the suit, the costs must be adjudged against him personally. *Lanius v. Fletcher* (Civ. App.) 99 S. W. 170.

Where sureties on guardian's bond voluntarily make themselves parties to suit on the bond and lose in the county and district court, it is proper in the latter court to adjudge costs of both courts against the guardian and themselves. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 157.

Where a stranger volunteers to prevent the father of a non compos mentis from being appointed guardian and seeks the appointment himself and is defeated it is proper to adjudge the costs against him. *Hefley v. Hugen*, 56 C. A. 273, 120 S. W. 957.

Art. 4287. [2786] [2704] In proceedings against persons of unsound mind, etc.—When any person is found to be of unsound mind or to be an habitual drunkard, the cost of the proceeding shall be paid out of his estate; or, if his estate be insufficient to pay the same, such costs shall be paid out of the county treasury, and the judgment of the court shall be accordingly. [Id. sec. 195.]

Art. 4288. [2787] [2705] Same subject.—If the defendant, in the case mentioned in the preceding article, be discharged, the person at whose instance the proceeding was had shall pay the costs of such proceeding; unless the informant be an officer acting in his official capacity in filing the information, in which case the costs shall be paid out of the county treasury. [Id.]

Art. 4289. [2788] [2706] Cost laws apply to guardianships.—The provisions of law regulating costs and security therefor shall apply to matters of guardianship, where the same are not expressly provided for in this title. [Id. sec. 189.]

CHAPTER TWENTY-ONE

APPEAL, BILL OF REVIEW AND CERTIORARI

Art.	Art.
4290. Right of appeal.	4296. Appeal suspends decisions, etc., without bond, when.
4291. Notice of appeal.	4297. Judgment of district court shall be entered of record, etc.
4292. Transcript on appeal.	4298. Judgment dismissing appeal.
4293. Several appeals may be embraced in same transcript, when.	4299. Appeal shall be tried de novo.
4294. Transcript shall be made out, etc., within what time.	4300. Bill of review may be brought.
4295. Appeal shall not suspend decision, etc., unless, etc.	4301. Certiorari.

Article 4290. [2789] [2707] Right of appeal.—Any person who may consider himself aggrieved by any decision, order or judgment of the court, or by any order of the judge thereof, may appeal to the district court as a matter of right, without bond. [Act Aug. 18, 1876, p. 192, sec. 197.]

Cited, *United States Fidelity & Guaranty Co. v. Buhner* (Civ. App.) 132 S. W. 505.

Nature of remedy.—The action of the county court in establishing a claim as a judgment against the estate of a ward can be questioned only by the direct revisory proceeding provided by statute. *Logan v. Gay*, 99 T. 603, 90 S. W. 861.

Jurisdiction.—On appeal in the district court from a judgment of the probate court approving a guardian's account, the jurisdiction of the district court is appellate only. *Magness v. Berry*, 29 C. A. 567, 69 S. W. 987.

Where, in a contest over the appointment of a guardian for an incompetent, the court passed on the father's right to act as guardian, it gave jurisdiction to the district court to revise the proceedings. *Hefley v. Hugen*, 56 C. A. 273, 120 S. W. 956.

Orders appealable.—The appointment of a guardian by a court not having jurisdiction will be revoked on appeal. *Wall v. Clark*, 19 T. 321.

An order discharging a guardian may be set aside at any time during the term, and from such action of the court there is no appeal. *Lehman v. Gajusky*, 75 T. 566, 12 S. W. 1122.

A guardian can appeal from an interlocutory order of the court requiring him to report as to the disposition of property not subject to the jurisdiction of the court. *Halbert v. Alford*, 82 T. 297, 17 S. W. 595.

A nonresident guardian may appeal from an order refusing to appoint him guardian of the estate in Texas without giving bond. *Orr v. Wright*, 45 S. W. 629.

Order of probate court denying application of one to be appointed guardian of the person of an infant, and rescinding a previous order vacating the appointment of another as such guardian, held final order, from which an appeal lies. *Arthur v. Reed*, 26 C. A. 574, 64 S. W. 831.

The legislature, we think, considered that neither this article nor Art. 4300 or 4301 authorized the revision of the order of approval or disapproval of a claim by the several procedures therein mentioned, but their intention manifested by Art. 4221 was to give the right of appeal only. *De Cordova v. Rogers*, 97 T. 60, 75 S. W. 19.

Waiver of right to appeal.—A party held to have waived his right to appeal from a judgment appointing a guardian for an incompetent. *Hefley v. Hugen*, 56 C. A. 273, 120 S. W. 956.

Parties on appeal.—See notes under Art. 4055.

Sufficiency of evidence to support findings.—A finding in proceedings to compel a guardianship accounting, which was supported by the evidence, will not be disturbed on appeal. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

Art. 4291. [2790] [2708] Notice of appeal.—An appeal is taken by causing an entry of notice thereof to be made on the record during the term at which such decision, order or judgment is entered; or, if such decision, order or judgment be made in vacation, by causing the entry of such notice to be made before the close of the next regular term of the court thereafter. [Id. sec. 198.]

Art. 4292. [2791] [2709] Transcript on appeal.—When notice of appeal has been given, a certified transcript of the proceedings shall be made out by the clerk and transmitted to the district court of the county; such transcript shall not contain anything that does not relate to the decision, order or judgment appealed from. [Id. sec. 199.]

Art. 4293. [2792] [2710] Several appeals may be embraced in same transcript, when.—When notice of appeal has been given by the same person from more than one decision, order or judgment of the court in the same guardianship, at the same term, all of the appeals may be embraced in the same transcript. [Id.]

Art. 4294. [2793] [2711] Transcript shall be made out, etc., within what time.—If there be not time to make out such transcript before the first day of the next term of the district court after such appeal is taken, it shall be transmitted to such court within sixty days after such appeal is taken. [Id. sec. 200.]

Art. 4295. [2794] [2712] Appeal shall not suspend decisions, etc., unless, etc.—The appeal shall not suspend the decision, order or judgment, except in the cases mentioned in the succeeding article, unless the appellant, within twenty days after the entry of notice of appeal, shall file a bond in an amount fixed by the court at the time of entry of appeal, signed by two or more good and sufficient sureties, payable to, and approved by, the clerk, conditioned that the appellant shall perform the orders and judgment which the district court may make therein, in case the decision be against him. [Id. sec. 201.]

Art. 4296. [2795] [2713] Appeal suspends decision, etc., without bond, when.—An appeal suspends the decision, order or judgment, without bond:

1. When taken by a claimant from the disapproval of his claim.
2. When taken by the guardian or trustee, except where the controversy is respecting the rights of guardianship or the settlement of an account. [Id. sec. 202.]

Art. 4297. [2796] [2714] Judgment of district court shall be entered of record, etc.—When a certified copy of the judgment of the district court in the case is received, it shall be entered of record upon the minutes of the county court as the judgment of such county court. [Id. sec. 203.]

Art. 4298. [2797] [2715] Judgment dismissing appeal, etc.—Where a certified copy of the judgment of the district court dismissing an appeal or quashing a supersedeas is received, it shall be entered of

record on the minutes of the county court, and the decision, order or judgment of the county court which was appealed from shall stand as if no appeal or supersedeas had been taken or obtained. [Id. sec. 204.]

Art. 4299. [2798] [2716] **Appeal shall be tried de novo.**—Appeals from the decision, order or judgment of the county court or county judge to the district court in cases of guardianship shall be tried in the district court de novo; and the judgment of the district court therein shall be certified to the county court to be carried into effect. [Act May 13, 1846. P. D. 1460.]

Cited, *United States Fidelity & Guaranty Co. v. Buhner* (Civ. App.) 132 S. W. 505.

Evidence.—On appeal from an order allowing in part a claim against an estate in the hands of a guardian, it was not error to permit claimant to read in evidence the account sued on, and the statement filed in the county court, stating in detail the services for which claim was made. *Bradshaw v. Lyles*, 55 C. A. 384, 119 S. W. 918.

Art. 4300. [2799] [2717] **Bill of review may be brought.**—Any person interested may, by a bill of review, filed in the court in which the proceedings were had, have any decision, order or judgment rendered by such court, or by the judge thereof, revised and corrected on showing error therein. But no process or action under such decision, order or judgment shall be stayed except by writ of injunction. [Id. sec. 205.]

See *Best v. Nix*, 25 S. W. 130, 6 C. A. 349; *Oldham v. Brooks* (Civ. App.) 25 S. W. 648.

In general.—In an action to review the final settlement of a guardian, the latter held required to justify an expenditure out of the corpus of the estate by proof of an order of court permitting such use. *Nicholson v. Nicholson* (Civ. App.) 125 S. W. 965.

In an action to review the final settlement of a guardian, the court could not charge the guardian with the difference between the appraised value as shown by the inventory and the value of the property as accounted for in his accounts. *Id.*

In an action to review the final settlement of a guardian, the restatement by the court of the account as to all of the wards held not error, though one of them was not a party to the suit. *Id.*

The statutes do not provide for a bill of review except in guardianship matters, where any person interested may, by such bill filed in the court in which the proceedings were had, have the same revised and corrected, as authorized by this article, and in certain other specified cases. *Robbie v. Upson* (Civ. App.) 153 S. W. 406.

Necessity for first proceeding by bill of review.—See notes under Art. 4301.

Orders or judgments reviewable.—A person may attack orders of probate court directing the sale of his realty while he was under guardianship though such orders are utterly void. *Kelsey v. Trisler*, 32 C. A. 177, 74 S. W. 67.

Under this article an order of approval of an account and discharge of a guardian is an order or judgment within the statute. *Nicholson v. Nicholson* (Civ. App.) 125 S. W. 965.

Grounds for bill of review.—Error in discharging sureties on a guardian's bond before the filing of a new bond may be corrected by bill of review under this article, and a bill of review filed by any person interested in a guardianship will lie for errors of law apparent on the face of the decree. *Miller v. Miller*, 21 C. A. 382, 53 S. W. 362.

Nature of remedy.—When suit is brought under this statute, it is not a collateral, but a direct, attack upon the decision, order or judgment sought to be corrected. *De Cordova v. Rodgers* (Civ. App.) 67 S. W. 1043.

Limitations.—See notes under Title 87, Chapter 2.

Requisites of bill of review.—A bill of review need not conform to the rules, and is not limited by the restrictions of the equity practice as applicable to that remedy. *Jones v. Parker*, 67 T. 76, 3 S. W. 222, citing *Janson v. Jacobs*, 44 T. 573; *Seguin v. Maverick*, 24 T. 526, 76 Am. Dec. 117. And see *Young v. Gray*, 60 T. 541.

Under this article a bill attacking the guardian's accounts both for errors of law apparent on the accounts and on a state of facts, the effect of which was to charge fraudulent conduct, was sufficient. *Nicholson v. Nicholson* (Civ. App.) 125 S. W. 965.

Findings.—The findings of the court on a bill of review to vacate a guardianship settlement should designate the particular items found incorrect and which correct, and should specify the corrections and revisions of accounts made by the court. *Jones v. Parker*, 67 T. 76, 3 S. W. 222.

Jurisdiction of appellate courts.—Under Const. art. 5, § 16, and this article, where a county court rendered judgment against a guardian and the surety on his bond for a devilsavit on a bill in the nature of a bill of review, and defendant surety pleaded a prior proceeding approving the guardian's final account and discharging the surety, an appeal from such judgment should be made to the district court only, and not to the court of civil appeals in the first instance. *United States Fidelity & Guaranty Co. v. Buhner* (Civ. App.) 131 S. W. 808, affirming 132 S. W. 505.

Art. 4301. [2800] [2718] **Certiorari.**—Any person interested may also have any decision, order or judgment of the county court or county judge revised and corrected by writ of certiorari from the district court

under the same rules and regulations as are provided in estates of decedents.

Cited, *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

In general.—A decree confirming a sale of ward's land will not be reviewed on certiorari on the ground of inadequacy of price. *Clopper v. Hutcheson*, 16 C. A. 157, 40 S. W. 604.

Necessity for first proceeding by bill of review.—Though Art. 4300 provides for a bill of review to correct orders and judgments of the probate court, it does not follow that such means of correcting improper judgments should be resorted to before seeking to accomplish the same result by certiorari. *Linch v. Broad*, 70 T. 92, 6 S. W. 751.

Under this and the preceding articles a party interested in a guardianship proceeding in the county court, may, without first proceeding by bill of review in that court, petition the district court for a writ of certiorari. *Jirou v. Jirou*, 104 T. 136, 135 S. W. 114.

TITLE 65

HEADS OF DEPARTMENTS

Chap.

1. Secretary of State.
2. Comptroller of Public Accounts.
3. State Treasurer.
4. Commissioner of the General Land Office.
5. Attorney General.

Chap.

6. Commissioner of Agriculture.
7. Commissioner of Insurance and Banking.
8. State Superintendent of Public Instruction.

CHAPTER ONE

SECRETARY OF STATE

Art.

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4305. His general duties.
4306. Shall receive and bind enrolled bills.
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Art.

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Article 4302. [2801] His appointment and term.—A secretary of state shall be appointed by the governor, by and with the advice and consent of the senate, and shall be continued in office during the term of service of the governor by whom he was appointed, and until his successor is appointed and qualified. [Const., art. 4, sec. 21. Act May 9, 1846. Amended Acts 1899, p. 3. O. & W. 1818.]

Art. 4303. Oath and bond.—He shall, within twenty days after he has received notice of his appointment, and before he enters upon the duties of his office, give a bond, payable to the governor and his successors in office, for the use of the state, in the sum of twenty-five thousand dollars, with not less than six good sureties, to be approved by the governor, conditioned that he will faithfully execute the duties of his office; and shall take and subscribe to the oath prescribed by the constitution, which, together with the bond, shall be deposited in the office of the comptroller of public accounts. [Acts 1899, p. 3.]

Art. 4304. [2802] Shall register governor's acts.—He shall keep a fair register of all the official acts of the governor, and, when required, shall lay the same, and all minutes and other papers in relation thereto, before the legislature, or either branch thereof. [Id. sec. 2. O. & W. 1819.]

Art. 4305. [2803] His general duties.—He shall keep his office at the seat of government or other place where the sessions of the legislature may be held; he shall, in a separate book suitable for the purpose, keep a complete register of all the officers appointed and elected in the state, and commission the same when not otherwise provided for by law; he shall arrange and preserve all the books, maps, parchments, records, documents, deeds, conveyances and other papers belonging to the state that have been, or may be properly deposited there, and sealed with the seal of the state, and also similar copies of any act, law or resolution of the United States, or either of them, from the originals in his office; which copies shall be as legal and conclusive in evidence and to all intents and purposes in the courts of this state as the originals would have been; and he shall, when required, furnish the governor, the legislature

or either branch thereof, with such copies, and shall affix the seal of the state to all certificates of official character that may emanate from his office. [Id. sec. 13. O. & W. 1820.]

Duty to make report.—Secretary of state held required to make report of receipts and expenditures. *Madden v. Hardy*, 92 T. 613, 50 S. W. 926.

Art. 4306. [2804] Shall receive and bind enrolled bills, etc.—He shall attend at every session of the legislature for the purpose of receiving bills which have become laws, and immediately after the close thereof shall cause all such bills and all the enrolled joint resolutions of the legislature to be bound together in a volume to be kept in his office, and the date of the session to be written or stamped thereon, a certified copy of which he shall deliver to the public printer, together with an index of the same, and he shall carefully examine and compare the printed copy with the certified copy and correct all the errors contained in the former. [Id. sec. 4. O. & W. 1821.]

Art. 4307. [2805] Shall forward laws, etc., to certain foreign officials.—The secretary of state shall forward to the librarian of congress and the secretary of state of the United States, the secretary of the treasury of the United States, and the executive departments of all of the states of the union, to each foreign librarian or government with whom a system of library exchange may be established, as he may deem advisable, copies of all laws and judicial reports printed and published by order of the legislature, and at the expense of the state. [Act March 20, 1848. Amended Acts 1909, p. 124. O. & W. 1825.]

Art. 4308. [2806] Disposition of books received.—The secretary of state shall turn over to the person in charge of the state library, immediately upon their receipt, all books, maps, charts or other publications of a political or miscellaneous character received at his office; and he shall, in like manner, turn over to the librarian of the supreme court at the capitol all volumes of reports of the courts of any other state or territory received by him; and he shall, in like manner, turn over to the state library, all printed volumes of the statutes or laws of any nation, state or territory, to be deposited in said state library for the same use and purpose as the other books kept there. [Amended Acts 1909, p. 124, sec. 8.]

Art. 4309. [2807] Copies of reports to be sent to whom.—The secretary of state shall deliver, by mail or otherwise, to each justice of the supreme court, each judge of the courts of appeals, the attorney general, the assistant attorney general, the governor, each district judge of the state, each professor of law of the university of Texas, the librarian of said university, and to the county judge of each county for the use of the counties, one copy of the reports of the supreme court and court of appeals, hereafter issued; also shall furnish to each district judge of the United States for Texas one copy of each of said reports for each branch of his courts; and, when it appears that any of the reports of either of said courts have been heretofore furnished and not returned to the department of state, or when they are hereafter delivered by the state to either of the said officers or authorities, the secretary shall have no authority to send another copy, except on proof that the same have been destroyed by fire, or have been rendered valueless by long use, to be evidenced by the certificate of the officer demanding to be resupplied with such report. [Acts 1887, p. 114.]

Art. 4310. [2808] What officers entitled to receive copies of laws.—The following officers shall be entitled to receive one copy of each of all general and special laws hereafter passed by the legislature, to-wit: The governor and heads of departments, each member of the legislature, the judges of the several courts throughout the state, and the clerks of said courts, and each county attorney. The following officers shall be entitled to receive one copy each of all general laws hereafter passed by

the legislature, to-wit: County treasurer, county surveyor, sheriff, assessor of taxes, collector of taxes, inspector of hides and animals, justice of the peace, constable and county commissioner. [Acts 1885, p. 68.]

Art. 4311. [2809] How distributed.—The secretary of state shall distribute the printed laws of each session of the legislature to the officers named in the preceding article, as follows: He shall mail or deliver in person to the governor and heads of departments, and to all state or district officers, a copy each, as therein provided; and he shall forward to the county judge of each county a sufficient number of said laws to supply each county officer named in the preceding article with a copy. [Act Feb. 2, 1850, p. 99, sec. 3. P. D. 4585.]

Art. 4312. [2810] May sell copies of laws.—The secretary of state is authorized to sell copies of the general and special laws of the state of Texas that have been or may hereafter be published, at a price not to exceed twenty-five per cent above cost of publishing; provided, that a sufficient number of all laws published be reserved from sale for the use of the state; and provided, further, that any money realized in excess of the costs attending such sale shall be placed to the account of the general revenue in the state treasury. [Acts 1883, p. 33.]

Art. 4313. [2811] Legislative journals, how distributed.—He shall distribute to the governor and heads of departments, and to each member of the legislature, a copy of the printed journals of both houses; and he shall also forward to the county judge of each county two copies of said journals, one to be deposited in the office of the clerk of the district court and the other in the office of the clerk of the county court, for the use of said courts respectively. [Id. sec. 4. P. D. 4586.]

Art. 4314. [2812] Digest of laws, how distributed.—Whenever a digest or revision of the laws of the state has been or shall be subscribed for, or published by the state, a sufficient number of copies of each volume thereof shall be forwarded to the county judge of each county to furnish one of said copies to each judge of the supreme and district courts and courts of appeals, to each clerk of the supreme, district and county courts, and courts of appeals, and to each justice of the peace that may be a resident in said county; and it shall be the duty of said county judge to deliver one copy of each of said volumes to each of said officers that may reside in said county. [Id. sec. 5. P. D. 4587.]

Art. 4315. [2813] Executive officers entitled to copies.—The secretary of state shall also deliver to each of the executive officers at the seat of government one copy of each volume of any edition of a digest or revision of the laws of the state, whether such books shall be subscribed for or published by the state, which shall belong to said office; and the officer receiving any such volume shall be bound to deliver it to his successor, and shall be liable to pay his successor the costs and charges that may be necessary to supply the office with any book he may neglect so to deliver. [Id. sec. 7. P. D. 4589.]

Art. 4316. [2814] Officers shall receipt for books.—Whenever any officer shall receive a copy of any report, statute, digest or journal, he shall receipt for the same to the officer distributing it, who shall file such receipt in his office; and said books shall be deemed to belong to the office of said officer to whom they are delivered, and shall, at all reasonable hours, be subject to the inspection and examination of any citizen of this state; and, should any of said officers fail or refuse to deliver any of said books to his successor in office when demanded by him, the officer so failing or refusing shall be liable to pay such successor the costs and charges that may be necessary to supply the office of such successor with any of said books that he shall so fail or refuse to deliver. [Id. sec. 6. P. D. 4588.]

Art. 4317. [2815] Shall distribute United States laws.—The secretary of state shall forward to the clerk of the county court of each county, for the use of the county, one copy of all the acts of the congress of the United States which may be received in his office. [Act May 9, 1846, p. 189, sec. 6. P. D. 4582.]

Art. 4318. [2816] May appoint chief and other clerks.—The secretary of state shall appoint a chief clerk and such number of assistant clerks as may be authorized by law, each of whom shall receive such compensation as may from time to time be fixed by appropriation.

Art. 4319. [2817] Chief clerk may act, when.—In the absence of the secretary of state, or his inability to act from any cause, the chief clerk may perform all the duties required by law of that officer. [Id. sec. 7. P. D. 5094.]

CHAPTER TWO

COMPTROLLER OF PUBLIC ACCOUNTS

[See "Education—Public" Ch. 11.]

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Article 4320. Election and term of office.—That there shall be elected by the qualified voters of this state, at the time and places of election for members of the legislature, a comptroller of public accounts, who shall hold his office for the term of two years, and until the election and qualification of his successor. [Acts 1910, 4 S. S., p. 37, sec. 1.]

Art. 4321. Vacancy, how filled.—In case of a vacancy in the office of comptroller of public accounts, the governor shall fill the same by appointment for the unexpired term; which appointment shall be submitted to the senate for confirmation in accordance with law. [Id. sec. 2.]

Art. 4322. Bond.—The comptroller shall, within twenty days after he shall have received notice of his election or appointment and before he enters upon the duties of his office, give a bond, payable to the governor and his successors in office, for the use of the state, in the sum of seventy-five thousand dollars, with not less than six good sureties, to be approved by the governor, conditioned that he will faithfully execute the duties of his office, and shall take and subscribe to the oath pre-

scribed by the constitution, which, together with the bond, shall be deposited in the office of the secretary of state; which said bond shall not be void on the first recovery of part or of the whole of the penalty, and shall thereafter continue in force for the whole amount of the penalty thereof, and may be sued on from time to time, and shall be deemed to extend to the faithful performance of the duties of his trust until his successor shall be duly qualified, and shall have entered upon the duties of his office. [Id. sec. 3.]

Liability on bond.—The comptroller and his chief clerk are responsible to the state where a deficit of state funds occurs in their department. *Brown v. Sneed*, 77 T. 471, 14 S. W. 248.

Art. 4323. Seal.—He shall procure, at the expense of the state, a seal with the words, "Comptroller's Office, State of Texas," engraved around the margin, and a star with five points in the center thereof, which shall be used as the seal of the comptroller's office in the authentication of all his official acts, except warrants drawn on the treasury of the state. [Id. sec. 4.]

Art. 4324. Accounting officer.—It shall be the duty of the comptroller of public accounts to superintend the fiscal concerns of the state, as the sole accounting officer thereof, and manage the same in the manner required by law; he shall also perform such official acts as were required of the secretary of the treasury of the republic of Texas, when not otherwise provided by law. [Id. sec. 5.]

Art. 4325. Shall keep accounts between state and United States.—He shall keep and state all accounts between this state and the United States, and all other accounts in which the state is interested, including all moneys received by the state as interest and other payments on land and office fees of his and other departments of the state government, and all other moneys received by the state from whatever source and for whatever purpose, and suggest plans for the improvement and management of the public revenue. [Id. sec. 6.]

Art. 4326. Examine accounts of persons indebted to state.—He shall examine and settle the accounts of all persons indebted to the state, and certify the amount or balance to the treasurer, and direct and superintend the collection of all moneys due the state. [Id. sec. 7.]

Art. 4327. Accounts to be verified by affidavit.—He shall require all accounts presented to him for settlement, not otherwise provided for by law, to be made on forms prescribed by him, and all such accounts shall be verified by affidavit taken before some officer authorized to administer oaths, touching the correctness of the same, or by oath or affirmation, which may be administered by himself in any case in which he may deem it necessary; and all such accounts of the same class and kind shall be uniform in size, arrangement, matter and form. [Id. sec. 8.]

Art. 4328. Shall require statements.—He shall require all persons who shall have received any moneys belonging to the state, and shall not have accounted therefor, to settle their accounts; and shall, from time to time, require all persons receiving moneys or having the disposition or management of any property of the state, of which an account is kept in his office, to render statements thereof to him. [Id. sec. 9.]

Art. 4329. Audit claims against state.—He shall audit the claims of all persons against the state in cases where provisions for the payment thereof have been made by law, unless the auditing of any such claim shall be otherwise specially provided for. [Id. sec. 10.]

Usurpation of power.—Usurpation by the state comptroller of powers given another department to review certain accounts, though long continued, cannot give him the right to exercise that power. *Rochelle v. Lane*, 105 T. 350, 148 S. W. 558.

Art. 4330. Certain claims to be presented before legislature convenes.—All sheriffs, attorneys and all other parties holding claims against

the state of Texas, for which no warrants have been issued, and the appropriation for which has been exhausted, shall present the same to the comptroller of the state for his consideration at least thirty days before the meeting of each regular session of the legislature of the state of Texas. [Id. sec. 11.]

Art. 4331. Claims to have priority.—The comptroller of the state of Texas is authorized and directed to audit no claims against the state not presented within the time prescribed in the preceding article of this chapter, until all claims presented prior to that time have been considered and passed upon by him. [Id. sec. 12.]

Art. 4332. Warrants on treasurer.—He shall draw warrants on the treasurer for the payment of all moneys directed by law to be paid out of the treasury; and no warrant shall be drawn unless authorized by law; and every warrant shall refer to the law under which it is drawn; and no warrant shall be issued in favor of any person, or the agent or assignee of any person indebted to the state, until such debt be paid. [Id. sec. 13.]

Art. 4333. No warrants to be drawn, unless.—No warrant shall be drawn on the treasury of this state by the comptroller based alone on the requisition of any individual or board, except as otherwise provided by law; but, in all cases, an account must first be made in pursuance of some specific appropriation, and filed with the comptroller by some one duly authorized and verified by affidavit. [Id. sec. 14.]

Requisition by individuals.—Where claims against the state are based alone on the requisition of an individual—i. e., any person or board authorized by law to make the same—the comptroller is not authorized to draw his warrant on the treasury, unless the claim is made pursuant to some specific appropriation; the comptroller not being clothed, however, with absolute or arbitrary power to withhold his warrant, his duty to issue it being mandatory, if an appropriation for the purpose in question has been made and the requisition follows the appropriation. *Fulmore v. Lane*, 104 T. 499, 140 S. W. 405, 1082.

Art. 4334. Shall prescribe forms.—He shall prescribe and furnish the forms to be used by all persons in the collection of the public revenue and the mode and manner of keeping and stating their accounts, and shall adopt such regulations, not inconsistent with the constitution and laws, as he may deem essential to the speedy and proper assessment and collection of the revenues of the state; and all such forms of the same class, kind and purpose shall be uniform in size, arrangement, matter and form. [Id. sec. 15.]

Art. 4335. Allowance to tax collector.—He shall remit, or make an allowance, to every tax collector in the auditing of his accounts, for all sums of money which, in his judgment, have been illegally assessed. [Id. sec. 15a.]

Art. 4336. Comptroller's account to be approved by secretary of state.—The account of the comptroller against the state shall not be passed to the treasurer until approved by the secretary of state. [Id. sec. 16.]

Art. 4337. Bonds to be deposited in office.—All liens, mortgages, bonds and other securities for money given to this state or any officer, and being for the use of the state, unless otherwise specially directed, shall be deposited in the office of the comptroller. [Id. sec. 17.]

Art. 4338. [2830] Audited claims to be reported to legislature.—The comptroller of the state of Texas shall keep a book for the purpose of registering and indexing all audited claims against the state, and, on the meeting of the regular session of the legislature, shall make a minute report of the same to the two houses thereof, giving the names and amounts of all audited claims. [Acts 1876, p. 281.]

Art. 4339. Accounts to be closed, when.—The accounts of the comptroller shall be annually closed on the last day of August; and he shall exhibit all books, papers, vouchers and all other matters pertaining to

his office, for the examination of either branch of the legislature, or any committee which may be by them appointed, whenever required by them to do so. [Acts 1910, 4 S. S., sec. 18.]

Art. 4340. Shall render account to governor, when.—In addition to the reports required by the constitution, the comptroller shall exhibit to the governor, on the first Monday of November of each year, and at such other times as he shall require, an exact and complete statement of the funds of the state, of its revenues, and of the public expenditures during the preceding year (or for such other times as may be required), with a detailed estimate of the expenditures to be defrayed from the treasury for the ensuing year, specifying therein each object of expenditures and distinguishing between such as are provided for by general or special appropriation, and such as are required to be provided for by law, and showing the means from which such expenditures are to be defrayed. [Id. sec. 19.]

Art. 4341. Shall preserve books, records, etc.—The comptroller of public accounts shall preserve the books, records, papers and other things belonging to his office, and deliver the same, without injury or damage, to his successor. [Id. sec. 20.]

Art. 4342. To be notified of deficiencies, when.—All heads of departments, managers of state institutions or other persons entrusted with the power or duty of contracting for supplies, or in any manner pledging the credit of the state for any deficiency that may arise under their management or control, shall, at least thirty days before such deficiency shall occur, make out a sworn estimate of the amount necessary to cover such deficiency until the meeting of the next legislature; and such estimate shall be immediately filed with the governor of the state, who shall thereupon carefully examine the same and approve or disapprove the same in whole or in part. When such deficiency claim, or any part thereof, has been so approved by the governor he shall indorse his approval thereon, designating the amount and items thereof approved and the items disapproved, and file the same with the comptroller; and the same shall be authority for the comptroller to draw his deficiency warrant for so much thereof as may be approved; but no claim, or any part thereof, shall be allowed or warrants drawn therefor by the comptroller, or paid by the treasurer, unless such estimate has been so approved and filed. If there is a deficiency appropriation sufficient to meet such claim, then a warrant shall be drawn therefor and the same shall be paid; but, if there is no such appropriation, or if such appropriation be so exhausted that it is not sufficient to pay such deficiency claim, then a deficiency warrant shall issue therefor; and such claim shall remain unpaid until provision be made therefor at some session of the legislature thereafter; provided, that the provisions of this section [article] shall not apply to fees and dues for which the state may be liable under the general laws; provided, further, when any injury or damage shall occur to any public property from flood, storm or any unavoidable cause, the estimate may be filed at once, but must be approved by the governor as provided in this section [article].

Art. 4343. Chief clerk.—The comptroller shall appoint a chief clerk, who, before entering upon the duties of his office, shall be required to take the oath prescribed by the constitution, and give bond in the sum of ten thousand dollars, payable in like manner as the bond of the comptroller, conditioned for the faithful performance of his duties, whose duty it shall be to discharge the duties of the comptroller when the comptroller may be unavoidably absent or incapable, from sickness or other cause, to discharge said duties, and, under the direction of the comptroller, to supervise the keeping of the books, records and accounts of the department, and to perform such other duties as may be required

of him by law and by the comptroller; and, in the event the office of the comptroller should become vacant by death, resignation or otherwise, said chief clerk shall act as comptroller until a comptroller is appointed and qualified.

Art. 4344. Deposit warrants.—The comptroller shall have printed uniform deposit warrants, which shall be of four classes: “State revenue,” “available school,” “permanent school,” and “miscellaneous;” and which shall be prepared in triplicate and marked “original,” “duplicate,” and “triplicate,” respectively. Each class shall be separately serially numbered, and shall be on paper of a different color from the other classes. He shall provide for the use of his department a warrant register for each class of deposit warrants, each volume of which shall be appropriately designated by number or otherwise, and the pages of which shall be ruled and the lines numbered consecutively. When a deposit warrant is prepared, it shall be registered in the deposit warrant register for the class to which it belongs and on the line in such register corresponding in number with the number of the deposit warrant registered. A distribution of the amount stated in each deposit warrant shall be posted in detail to the ledger containing accounts for each source of revenue. The triplicate deposit warrant shall be, on receipt by the treasurer of the amount stated therein, receipted by the treasurer and delivered to the person making the deposit, the original to the state treasurer, who shall file the same numerically; and the duplicate shall be, on receipt of the amount stated therein, receipted by the treasurer, and by him returned to the comptroller, who shall file same numerically. The printed forms for these warrants shall be so prepared and arranged that the original, duplicate and triplicate may, by use of carbon sheets, all be prepared at one and the same writing; and no deposit shall be received into the state treasury on any account, except upon a deposit warrant issued as herein provided.

Art. 4345. Deposit receipts.—The comptroller shall have printed uniform deposit receipts, to be issued by the comptroller to cover moneys and other securities received and held by the state treasurer for which no deposit warrant is issued, or the issuance of a deposit warrant for which, if deferred, except office fees of the state treasurer. Such receipts shall be prepared in duplicate and marked “original” and “duplicate,” respectively, and shall be serially numbered; and the printed form for these receipts shall be so prepared and arranged that the original and the duplicate may, by the use of carbon sheets, both be prepared at one and the same writing. The duplicate shall be receipted by the treasurer, and by him returned to the comptroller, and the original delivered to, and retained by, the state treasurer. He shall provide his office with separate registers, prepared in like manner and form, as the register provided for in article 4344 of this chapter, in which he shall register the deposit receipts, issued in like manner as is provided for the registration of deposit warrants, and shall provide a separate ledger in which shall be kept appropriate accounts for all matters for which such deposit receipts are issued.

Art. 4346. Claims and accounts.—All claims and accounts against the state shall be submitted on forms prescribed by the comptroller, and in duplicate, when required by him, and, except claims for pensions, shall be so prepared as to provide for the entering thereon, for the use of the comptroller’s department, as well as other appropriate matters, the following:

- (a) Signature of the head of the department or other person responsible for incurring the expenditure, or of the person on whose account the expenditure was incurred.
- (b) Appropriation number.
- (c) Initials of the person ascertaining if there are funds available.

- (d) Initials of the person auditing the claim.
- (e) Number and date of warrant issued with the initials of the person preparing the warrant.
- (f) Initials of the person posting to ledger.
- (g) Initials of the person comparing the claim and warrant.

Art. 4347. Claims to be classified.—There shall be three classes of claim forms, as follows:

1. "General," which shall consist of: (a) payrolls, covering departmental and institutional services; (b) traveling expense vouchers; (c) purchases and services other than personal; and (d) sheriff and court claims; and under the head of sheriff and court claims the comptroller may provide for different forms, such as those for sheriffs, county attorneys, district attorneys, district clerks, district judges, witnesses and all other like claims relating to the judiciary; but those of the same kind, use and purpose shall be uniform in size, arrangement, matter and form.

2. "Special," covering all claims for which special warrants are issued and all claims and accounts under this head of the same kind, use and purpose shall be uniform in size, arrangement, matter and form.

3. "Pensions." The forms for pensions shall be prescribed by the comptroller, and shall be uniform in size, arrangement, matter and form.

Art. 4348. List of claims to be kept.—When claims and accounts are received, it shall be ascertained if there are funds available therefor; and the persons making the examination shall indicate such fact by marking his initials upon such claim; and, if there are no funds available, that fact shall be written or stamped upon such claim; and the same shall be held to await the authority to issue a proper warrant therefor. When a claim has been audited and warrant drawn therefor, the claim shall be numbered with the same number as the warrant; and such claim shall be filed numerically according to class, "general," "special," and "pension," respectively. There shall be kept, either in book form or in the form of a card index, an alphabetical index of claimants; but, as to pay rolls, the department or institution shall be the claimant. The index shall show only the name of the claimant and the number of the claim. After the expiration of two years, such claims shall be removed from the files and otherwise securely stored and preserved as records.

Art. 4349. Pay warrants.—The comptroller shall have printed uniform pay warrants, which shall be of three classes, "general," "special," and "pension." Such warrants shall be prepared in duplicate, and shall be marked "original," and "duplicate," respectively; and each class shall be serially numbered and shall be of a color of paper different from the other class. Such warrants shall be prepared so as to provide for entering thereon, in addition to other appropriate matter, the following:

- (a) Initials of the person in the comptroller's department comparing the warrant with the claim.
- (b) Initials of the person in the comptroller's department registering the warrant.
- (c) Designation of the fund against which the warrant is drawn.

Art. 4350. Pay warrants registered.—The comptroller shall provide a pay warrant register for each class of pay warrants, each volume of which shall be appropriately designated by number or otherwise, and the pages of which shall be ruled, and the lines numbered consecutively. When a pay warrant is prepared, it shall be registered in the pay warrant register for the class to which it belongs; and such entries in those registers shall be on the line corresponding in number with the number on the pay warrant register; and such registry shall consist only of an entry of the amount and name of the payee of such warrant; and, if a

warrant is erroneously prepared and not issued, or is canceled, or is properly shown to be lost or destroyed, such fact shall be noted in the register opposite the number of such warrant in the register. One person shall be designated by the comptroller as warrant clerk and such person shall prepare or be responsible for the preparation of all pay warrants, and shall be accountable to the comptroller for warrants coming into his possession. No warrant shall be prepared except on presentation to the warrant clerk of a properly verified and audited claim, the proper auditing of which claim shall be evidenced by the initials written thereon by the person auditing the same; and such claim so verified and audited shall be sufficient and the only authority for the preparation of a warrant or warrants. When a warrant has been properly prepared, the claim upon which it was prepared shall be initialed with the initials of the warrant clerk, and such warrant shall be registered as herein provided; and the fact of the registration thereof shall be shown by writing thereon the initials of the person registering the same. When a warrant is properly prepared, it shall be, with the claim upon which it is based, passed to the comptroller for his signature or the signature of such person as may be authorized by law to sign the same in his stead. Such warrant shall then be passed to, and registered in, the treasurer's department and signed by the state treasurer, or some person authorized by law to sign for him, and returned to the comptroller's department. Such warrant shall then be delivered by the comptroller to the person entitled to receive it; and he shall, at his option, take a receipt from such person therefor; which receipt shall be filed in his office. The printed forms for these warrants shall be so prepared and arranged that the original and duplicate may, and the same shall, by the use of carbon sheets, be prepared at one and the same writing.

Art. 4351. Law not to apply to pension warrants.—Applications for pensions and the issuance of pension warrants shall not be subject to the provisions of this chapter. Such warrants shall be separately serially numbered.

Art. 4352. Registration of bonds.—The comptroller shall procure for the use of his department suitable books appropriately ruled and printed, to be known as "bond registers," the volumes of which shall be separately designated by number or otherwise, in which he shall register alphabetically all state, county, school, municipal, and drainage or other such bonds required by law to be registered by him. Neither the bonds nor opinion of the attorney general, nor the record or other papers or documents relative thereto, shall be recorded in full; but only the name of the authority issuing and the names and official capacities of the officers signing such bonds, the date of issue, date of registration, amount of principal, date of maturity, number, time of option of redemption, rate of interest and day of the month of each year when the interest shall fall due, of each bond so registered, shall be entered upon such register; and, on the same line where such entry is made, shall be provided blank spaces in which shall be entered the date of payment or redemption of each bond when the same is paid or redeemed; and, when any bond is paid or redeemed, it shall be the duty of the proper officer of the authority paying such bond to notify the comptroller of the fact and date of such payment or redemption, and for entering the file number of all documents and other papers filed in connection with such bond; and all papers and documents pertaining to such bonds shall be filed and appropriately numbered.

Art. 4353. Account of bonds belonging to each fund to be kept separate.—The comptroller shall keep appropriate accounts by funds, showing a short description of the essential features of each, of each bond or of each purchase of similar or like bonds, or other securities purchased by and belonging to the permanent school and other funds of the state;

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each of which accounts shall be charged with the principal of such bond or purchase; and, with each separate item of interest payments to accrue thereon, and shall be credited with payments as made. He shall also keep controlling or total accounts of such bonds or other securities; which accounts shall be kept with respect to the total amount of bonds or other securities belonging to each separate fund; each of which controlling accounts shall be balanced quarterly at the same time as and the balance of which shall correspond with like accounts kept by the state treasurer.

Art. 4354. State general ledger.—The comptroller shall establish and maintain a double entry system of bookkeeping to be in charge of the chief bookkeeper. The accounts of each of the funds shall be opened in a "state general ledger;" and, at the start, credited with a balance of the funds on hand. An account shall also be opened with the state treasurer and charged with the cash on hand and the balance in depositories. Each charge shall represent the aggregate amount of cash held by him for the various funds. Thereafter, no entry shall be made in the ledger except by means of the double entry system. Warrants issued shall be charged in monthly totals to the fund accounts. Accounts shall be opened for the purpose of showing the amount of outstanding pay warrants from time to time; which accounts shall be credited with the warrants issued and charged with the warrants paid. All outstanding pay warrants, at the time this act shall go into effect, shall be definitely ascertained, and the account started with a credit for the aggregate amount, and the several fund accounts charged with the outstanding pay warrants against said accounts respectively. The comptroller shall charge the state treasurer in totals with all deposit warrants as issued and credit him with warrants paid so that the balance in the treasurer's hands, together with the balance in the state depositories, shall agree with the balance shown by this account.

Art. 4355. Revenue ledger.—The comptroller shall keep a ledger, to be known as "revenue ledger," in which a distribution shall be made of the revenues derived by the state from all sources, and the amount derived from each source, as stated. The sources of revenue printed on the back of the duplicate in each deposit warrant issued therefor by the comptroller shall be posted to the revenue ledger, and its balances periodically agreed with the deposit warrants issued.

Art. 4356. Ledger for accounting of tax collectors.—The comptroller shall keep the accounts of tax collectors in a separate ledger, one for current taxes and the other for delinquent and insolvent taxes, and these ledgers shall be made self-balancing by means of controlling accounts.

Art. 4357. Ledger for account of state treasurer.—The comptroller shall keep a suspense ledger in which the accounts of the state treasurer shall be stated in respect to moneys held by him, pending the issuance of deposit warrants and moneys and securities held, other than those for state purposes, for all of which the comptroller shall issue deposit receipts, posting the same in total to this ledger. It shall also include the accounts of heads of departments for all moneys received by them, and not deposited with the state treasurer; which accounts shall be kept in monthly totals based upon monthly reports furnished to the comptroller by each of the heads of departments.

Art. 4358. Shall keep journals.—The comptroller shall keep journals through which all entries are made in the ledgers.

Art. 4359. Issue duplicate warrants, when.—The comptroller of public accounts, when satisfied that any original warrant drawn upon the state treasurer has been lost, or destroyed, or when any certificate or other evidence of indebtedness approved by the auditing board of the

state has been lost, is authorized to issue a duplicate warrant in lieu of the original warrant or a duplicate or a copy of such certificate, or other evidence of indebtedness in lieu of such original; but no such duplicate warrant, or other evidence of indebtedness, shall issue until the applicant has filed with the comptroller his affidavit, stating that he is the true owner of such instrument, and that the same is in fact lost or destroyed, and shall also file with the comptroller his bond in double the amount of the claim, with two or more good and sufficient sureties, payable to the governor, to be approved by the comptroller, and conditioned that the applicant will hold the state harmless and return to the comptroller, upon demand being made therefor, such duplicates or copies, or the amount of money named therein, together with all costs that may accrue against the state on collecting the same.

Art. 4360. Duty when duplicates are improperly issued.—If, after the issuance of said duplicate or copy, the comptroller should ascertain that the same was improperly issued, or that the applicant or party to whom the same was issued was not the owner thereof, he shall at once demand the return of said duplicate or copy if unpaid, or the amount paid out by the state, if so paid; and, upon failure of the party to return same or the amount of money called for, suit shall be instituted upon said bond in the court having jurisdiction of the amount in controversy, in the city of Austin, Travis county, Texas.

Art. 4361. Comptroller and treasurer to examine and cancel warrants.—The comptroller shall examine the disbursements of the treasurer at the end of each quarter, and shall, together with the treasurer, cancel the warrants which have been paid in such manner as to prevent their future circulation, and shall examine if the receipts acknowledged by the treasurer during the quarter correspond with the deposits, and if the balance of money reported to be in his possession is actually in his hands.

CHAPTER THREE

STATE TREASURER

[See "Education—Public." See "Depositories."]

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Article 4362. [2849] His election and term of office.—There shall be elected by the qualified voters of the state, at the time and places of election for members of the legislature, a state treasurer, who shall hold his office for the term of two years, and until the election and qualification of his successor. [Re-enacted Acts 1909, 2 S. S., p. 438, sec. 1. Const., art. 4, sec. 2.]

Art. 4363. [2850] Vacancies, how filled.—Should a vacancy occur in the office of the state treasurer, the governor shall fill the same by appointment for the unexpired term; which appointment shall be submitted to the senate, if in session, for confirmation. [Re-enacted Acts 1909, 2 S. S., p. 438, sec. 2.]

Art. 4364. [2851] His oath and bond.—The state treasurer shall, within twenty days after he shall have received notice of his election, and before he enters upon the duties of his office, give a bond payable to the governor and his successors in office, for the use of the state, in the sum of seventy-five thousand dollars, with no less than six good sureties, to be approved by the governor, conditioned that he will faithfully execute the duties of his office, and shall take and subscribe the oath prescribed by the constitution, which, together with the bond, shall be deposited in the office of the secretary of state; which said bond shall not be void on the first recovery of part, or of the whole of the penalty, but shall thereafter continue in force for the whole amount of the penalty thereof, and may be sued on from time to time, and shall be deemed to extend to the faithful performance of the duties of his trust, and until his successor shall be duly qualified and shall have entered upon the duties of his office. [Act March 19, 1846, p. 10, sec. 1. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 3. P. D. 5282.]

Art. 4365. [2852] New bond may be required.—It shall be the duty of the attorney general, with the comptroller, on the first days of June and December of every year, to examine the bond of the treasurer and make diligent inquiry into the condition of the sureties on said bond; and, if, in the opinion of the attorney general, said bond is not sufficient, from death, removal, insolvency of said sureties, or from any cause, to secure the state in her rights, then, it shall be the duty of the attorney general to notify said treasurer in writing of the insufficiency of said bond; and, should said treasurer fail, for the space of twenty days from the date of such notice, to furnish a sufficient new bond, it shall be the duty of the governor forthwith to suspend said treasurer from office. [Act May 3, 1873, p. 62, sec. 3. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 4.]

Art. 4366. [2853] Failing to give new bond.—Should the treasurer be suspended from office under the provisions of the preceding article, it shall be the duty of the governor to appoint some suitable person as treasurer, who shall give bond as in other cases, said bond to be approved by the governor; and the appointee shall perform the duties of treasurer until the suspended officer shall give a new bond to be approved by the governor, as in other cases. [Id. sec. 4. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 5.]

Art. 4367. [2854] Shall receive moneys on warrant of comptroller.—The treasurer shall receive, on the warrants of the comptroller of public accounts, all moneys which shall, from time to time, be paid into the treasury of the state, receipting for the same upon duplicate and triplicate warrants; which duplicate shall be deposited with the comptroller, and the triplicate given to the person depositing such moneys. [Act March 19, 1846, sec. 2. P. D. 5283. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 6.]

Art. 4368. [2855] How money to be paid out.—The treasurer shall countersign and pay all warrants drawn by the comptroller of public accounts on the treasury, which are authorized by law; and no money shall be paid out of the treasury except on the warrants of the comptroller. [Id. sec. 3. P. D. 5284. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 7.]

Selling at discount.—Neither the comptroller nor any other state officer is responsible for the deficit when a warrant is sold at a discount for want of funds in the treasury. *State v. Wilson*, 71 T. 291, 9 S. W. 155.

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Art. 4369. [2856] Shall keep strict accounts.—He shall keep true, regular and methodical accounts of the receipts and expenditures of the public moneys of the treasury, and close his accounts annually on the thirty-first day of August, with the proper and legal vouchers for the same, distinguishing between the receipts and disbursements of each fiscal year. [Id. sec. 4. P. D. 5285. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 8.]

Art. 4370. [2858] An account for each appropriation.—He shall also open an account in the treasury for all appropriations of money made by law, so that the appropriations and the application in pursuance thereof may clearly and distinctly appear. [Id. sec. 6. P. D. 5287. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 9.]

Art. 4371. [2859] Shall make an annual exhibit to the governor.—In addition to the reports required by the constitution, the treasurer shall submit to the governor on the first Monday of November of each year, and at such other times as he shall require, an exact statement of the condition and situation of the treasury, and of the balance of money remaining therein to the credit of the state, with a summary of the receipts and payments of the treasury during the preceding year, or for such other period of time as may be specially required, and shall exhibit all books, papers, vouchers and other matters pertaining to his office, for the examination of the legislature, or either branch thereof, or any committee which may be by them appointed, whenever required by them to do so. [Id. sec. 7. P. D. 5288. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 10.]

✓ **Art. 4372. [2860] Public moneys and that only to be kept in the treasury.**—All moneys received by the treasurer shall be kept in the safes and vaults of the treasury; and it shall not be lawful for the treasurer to keep or receive into the building, safes or vaults of the treasury any money, or the representative of money, belonging to any individual, except in cases expressly provided for by law; nor shall it be lawful for said treasurer to appropriate to his own use, or loan, sell or exchange any money, or the representative of money, in his custody or control as such treasurer. [Act May 3, 1873, p. 62, sec. 1. P. D. 5290. Re-enacted Acts 1909, 2 S. S., sec. 11.]

Art. 4373. [2861] May appoint chief clerk, etc.—The treasurer shall appoint a chief clerk, who shall be required to give bond in the sum of twenty thousand dollars, payable to the governor of the state, and conditioned as is the bond of the state treasurer, and shall appoint such other employes as may be authorized by law; each and all of whom shall receive such compensation as may from time to time be appropriated by law for that purpose. [Amended Acts 1909, 2 S. S., sec. 12.]

Art. 4374. [2862] Chief clerk may act, when and how.—The chief clerk of the treasurer's office shall, whenever by reason of sickness, unavoidable absence or other cause, the treasurer is not able to act, sign his own name as acting treasurer, and do such other acts and things as the treasurer himself might legally do; and the legal acts and signatures of such chief clerk as acting treasurer shall be as valid as the acts and signatures of the state treasurer himself. [Amended Acts 1909, 2 S. S., sec. 13.]

Art. 4375. [2863] Shall turn over to his successor.—The treasurer shall, at the close of his term of office, deliver into the possession of his successor the moneys, securities and all other property of the state, together with books, vouchers, papers and evidences of property in his possession, and all other matters and things which pertain to the office of state treasurer. [Act March 19, 1846, p. 10, sec. 8. P. D. 5289. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 14.]

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Art. 4376. [2863a] Custodian of school fund bonds.—The treasurer of the state of Texas is hereby made the custodian of all bonds in which the school funds of the state of Texas have been, or may hereafter be, invested; and it is hereby made his duty to keep said bonds in his custody until the same shall be paid off, discharged, or otherwise disposed of by the proper authorities of said state. [Acts 1895, p. 9. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 15.]

Art. 4377. [2863b] Duty with respect thereto.—Said treasurer shall, upon the payment of any installment of interest, see that the proper credit is given, and that the coupons on said bonds, when paid, shall be properly separated therefrom and canceled by said treasurer. [Id. Re-enacted Acts 1909, 2 S. S., p. 438, sec. 16.]

Art. 4378. Certain money returned to counties.—Whenever there is money in the state treasury placed there to pay off any of the obligations due by any county, city or town, and it is made to appear to the comptroller, by certified copy of the records of county commissioners' court, or by other satisfactory evidence, that said obligations are no longer outstanding against such county, city or town, then it shall be the duty of the comptroller to draw a warrant on the state treasury in favor of such county, city or town for the amount of money so remaining in the treasury; and the state treasurer shall pay such money on said warrant of the comptroller to the treasurer of such county, city or town, for the benefit of the general fund of such county, city or town. [Acts 1901, p. 19.]

Art. 4379. Deposit warrant register.—The state treasurer shall cause to be prepared a deposit warrant register designed with columns for state revenue, available school fund, and miscellaneous; all warrants to be entered consecutively and distributed to the proper columns. [Acts 1909, 2 S. S., p. 438, sec. 17.]

Art. 4380. Shall post daily totals.—The state treasurer shall cause the daily totals of state revenue and all available school deposit warrants to be posted to the fund accounts in the ledger, and the items in the miscellaneous column to be posted in detail, except that deposit warrants for bonds sold or redeemed shall be posted in a bond book. [Id. sec. 18.]

Art. 4381. Register of warrants issued.—The state treasurer shall keep registers of warrants issued, one for general warrants, and one for special warrants. In the case of pensions, the comptroller shall furnish a list of those issued; which list shall be compared with the warrants and shall constitute the treasurer's register of pension warrants issued. The date of payment of all warrants shall be stamped on the above registers. The state treasurer shall keep a "warrants paid register" with columns headed "general," "special," and "pensions." In this register, the general and special warrants shall be entered when paid in detail and the pension warrants in one daily total. [Id. sec. 19.]

Art. 4382. Certain other accounts.—The state treasurer shall keep accounts called "warrants payable, general," "warrants payable, special," and "warrants payable, pensions," to which, when opened, shall be credited the daily totals of the several registers of warrants issued and charged with the daily total of warrants paid of each class, so that the balance of these accounts shall represent the aggregate amount of outstanding warrants. [Id. sec. 20.]

Art. 4383. Outstanding warrants.—Outstanding warrants shall be listed each month from the registers of warrants issued, and a list thereof sent to the comptroller for his record. With this list, the state treasurer shall furnish a statement showing the aggregate amount of general, special and pension warrants paid during the month. [Id. sec. 21.]

Art. 4384. General revenue account.—The state treasurer shall charge the daily totals of the general warrants issued from the register to “general revenue” account in the ledger. The daily total of pension warrants issued shall be similarly treated; while the special warrants issued shall be charged to the fund account to which they apply, except that those issued for bonds purchased shall be posted to the bond book. [Id. sec. 22.]

Art. 4385. Appropriation ledger.—The state treasurer shall charge all pay warrants issued under the authority of appropriations in detail to the “appropriation ledger,” an account being kept for each appropriation, which shall be credited with the amount of the appropriation. The total of the appropriation so credited shall be charged to an account called “appropriation voted.” The daily totals of the general warrants issued shall be credited to this account, so that the balance shall represent the aggregate amount of unused appropriation. [Id. sec. 23.]

Art. 4386. Daily statement from land office.—The state treasurer shall receive daily from the general land office a detailed list of remitters of money for interest, principal and leases of school, university and asylum lands, together with the actual remittances, which he shall cash and deposit in his vault, if the necessity arises. A deposit receipt shall be issued by the comptroller for the daily total of such remittances; and the cashier of the treasurer’s department shall keep a cash book, to be called “suspense cash book,” in which to enter these deposit receipts, and any others issued for cash received for which no deposit warrants can be issued, or when their issuance is delayed. When deposit warrants are issued, they shall be credited in this cash book, as well as any refunds; and the balance shall represent the aggregate of items still in suspense. Refunds shall be made in a manner similar to that in present use, except that they shall all be made on the comptroller’s authority. [Id. sec. 24.]

Art. 4387. Office fee book.—The state treasurer shall keep an office fee book in which shall be entered in detail all fees earned by the treasury department; which fees shall be deposited into the treasury to the credit of the general revenue at the end of each month on a deposit warrant issued by the comptroller. [Id. sec. 25.]

Art. 4388. Cash balancing book.—The treasurer shall keep a book, to be called “cash balancing book,” for the purpose of arriving at the daily cash balance, in which shall be entered the daily totals of all receipts and disbursements. [Id. sec. 26.]

Art. 4389. Ledger to contain what.—The ledger kept by the state treasurer shall contain accounts for each fund, which shall be credited with the existing balances and with the daily totals of deposit warrants except those issued for bonds. The pay warrants issued, except those for bonds, shall be charged to the several fund accounts from the warrant register in daily totals. [Id. sec. 27.]

Art. 4390. Bond book.—The state treasurer shall keep a bond book, with columns for each fund, which shall start with the aggregate amount of bonds now held and be charged with all subsequent additions and credited with all bonds sold or redeemed. The entries in the bond book shall be posted from the deposit warrant and special warrant registers, being the deposit warrants issued for bonds sold or redeemed and special warrants for bonds purchased. The treasurer shall also keep a bond register, in which shall be entered the essential details of all bonds held by him and belonging to any state fund. [Id. sec. 28.]

Art. 4391. Bond, etc., register.—The state treasurer shall keep a suitable register in which to enter all bonds, cash and other securities lodged with him by bond investment, surety and insurance companies,

and state depository banks, and all other bonds lodged with him under the provisions of the statutes, the registration of which is not otherwise provided for by law. The relinquishment of these securities shall be on the authority of the comptroller. The state treasurer shall keep a separate bond book in which to enter all these transactions consecutively, posting each item to the register; which book shall be opened with the aggregate of securities now held. [Id. sec. 29.]

CHAPTER FOUR

COMMISSIONER OF THE GENERAL LAND OFFICE

[See "Public Lands"—Ch. 2.]

<p>Art. 4392. His election, term of office. 4393. Vacancies, how filled. 4394. His bond and oath. 4395. Seal of office. 4396. General duties. 4397. To give information to the governor, etc. 4398. Chief clerk, his bond, etc. 4399. May act as commissioner, when. 4400. Spanish translator. 4401. His duties.</p>	<p>Art. 4402. Receiving clerk. 4403. Shall receive and receipt for money. 4404. Shall register receipts and payments. 4405. Shall report to the governor. 4406. If defaulting, to be removed. 4407. Chief and other draftsmen. 4408. Appointment of clerks. 4409. Salary of chief draftsman, etc. 4410. All employés may be removed by the commissioner.</p>
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Article 4392. [2864] His election and term.—There shall be elected by the qualified voters at the time and places of election for members of the legislature, a commissioner of the general land office, who shall hold his office for the term of two years, and until the election and qualification of his successor in office, and shall reside at the capital during his continuance in office. [Const., art. 4, secs. 2, 23.]

Art. 4393. [2865] Vacancies, how filled.—In case of a vacancy in the office of commissioner of the general land office, the governor shall fill the same by appointment, which shall be submitted to the senate, if in session, for confirmation; and the person so appointed shall hold said office for the unexpired term.

Art. 4394. [2866] His bond and oath.—The commissioner of the general land office shall, before he enters upon the discharge of the duties of his office, enter into a bond with three or more sureties, in the sum of fifty thousand dollars, payable to the governor and his successors in office, for the use of the state, conditioned for the faithful discharge of his official duties, and take and subscribe the oath prescribed by the constitution; which bond, after being approved by the governor, shall, together with the oath, be filed in the office of the secretary of state. [Act May 12, 1846, p. 232, sec. 5. P. D. 4096.]

Art. 4395. [2867] Seal of office.—The commissioner of the general land office shall procure a seal of office with the words, "General Land Office, the State of Texas," engraved around the margin, and such other device as the governor shall approve; which approval shall be certified and recorded in the office of the secretary of state. [Id. sec. 6. P. D. 4089.]

Art. 4396. [2868] His general duties.—It shall be the duty of the commissioner to superintend, control and direct the official conduct of all subordinate officers of the general land office, and to execute and perform all acts and things touching or respecting the public land of the state of Texas, or rights of individuals in relation thereto, as may be required of him by law. [Id. sec. 1. P. D. 4091.]

Art. 4397. [2869] Give information to the governor, etc.—The commissioner of the general land office shall give information to the

governor, or either branch of the legislature, concerning the public lands, or the general land office, from time to time, as may be required. [Id. sec. 12. O. & W. 1155.]

Art. 4398. [2871] Chief clerk.—The commissioner of the general land office shall appoint a chief clerk, who shall hold his office at the pleasure of the commissioner, and shall enter into bond, with three or more sureties, in the penal sum of twenty thousand dollars, payable to the governor and his successors in office, for the use of the state, and conditioned for the faithful discharge of the duties of his office; which bond shall be approved by the governor and filed in the office of the secretary of state. [Acts 1846, p. 232, sec. 4. P. D. 4094.]

Art. 4399. [2872] May act as commissioner, when.—In case of sickness, absence, death or resignation of the commissioner of the general land office, it shall be lawful for the chief clerk to perform all the duties required of the commissioner. [Id. sec. 4. P. D. 4095.]

Art. 4400. [2873] Spanish translator.—The commissioner of the general land office shall appoint a translator who shall thoroughly understand the Spanish and English languages, and who shall, before he enters upon the duties of his office, take and subscribe the oath of office prescribed by the constitution, and give bond, with three or more good sureties, in the penal sum of twenty thousand dollars, payable to, and to be approved by, the governor, and conditioned for the faithful discharge of the duties of his office. [Id. sec. 3. Act Dec. 14, 1837, p. 62, sec. 33. P. D. 4094, 4097.]

Art. 4401. [2874] His duties.—It shall be the duty of said translator to translate into the English language, and record in a book to be kept by him for that purpose, all the laws and public contracts relating to titles of lands which are written in the Spanish or Castilian language, and also to translate and record in like manner all original titles or papers relating thereto which are written in said language, and which may be on file in the general land office. [Id. sec. 34. P. D. 4098.]

Art. 4402. [2875] Receiving clerk.—The commissioner of the general land office shall, with the consent and approval of the governor, appoint a suitable person to act as receiving clerk for the land office; and the person thus appointed shall, before entering upon the duties of his office, qualify and execute a bond in the sum of twenty-five thousand dollars, payable to the governor and approved by him, conditioned as other official bonds for a faithful discharge of the duties of his office; which bond shall be filed in the office of the secretary of state. [Act Nov. 10, 1866, p. 161, sec. 1.]

Art. 4403. [2876] Shall receive and receipt for money.—It shall be the duty of the receiving clerk to receive all funds that are required to be paid to the commissioner by existing laws, and to give to the person depositing money a certificate of deposit stating the amount, name of party, and character of claim upon which deposited; and, if any funds are received of a general character in advance of fees and dues, it shall be so stated; and the receiving clerk shall be responsible therefor to the state or individual. [Id. p. 162, sec. 2.]

Art. 4404. [2877] Shall register receipts and payments.—The receiving clerk shall keep a book or books, in which he shall enter each deposit separately, giving name of party, number of claim and situation of land sought to be perfected, and shall keep all letters and other vouchers filed in neat and regular order and number corresponding with his books, and shall make a report to the treasurer on the last day of each month of all funds in his hands due the state, paying the same in and taking the receipt in his own name in the same manner as heretofore required by law of the commissioner. [Id.]

Art. 4405. [2878] Shall report to the governor, etc.—It shall be the duty of the receiving clerk to furnish the governor, through the commissioner of the general land office, on or before the meeting of the legislature, a correct report of the condition of his office, the money received, giving character of claim, the money paid out and character of payment; and it shall be his duty to keep separate columns in his books, showing the amount of specie or the amount of currency or other funds paid in; and, in his reports to the treasury he shall pay in kind all funds in his hands that belong to the state of Texas, and, upon his removal or resignation, shall turn over his books, accounts and money in hand to his successor, when properly qualified, or to the commissioner, taking a receipt for the same. [Id. sec. 3.]

Art. 4406. [2879] If defaulter, to be removed.—The commissioner shall from time to time examine the books and accounts of the receiving clerk and note that they are properly kept, and, if any defalcation is found, shall report the same to the governor at once, who shall suspend him from office until an examination is made, and, if found guilty, he shall be removed and proceedings instituted upon his bond to recover whatever deficit may occur. [Id.]

Art. 4407. [2880] Chief and other draftsmen.—The commissioner of the general land office shall appoint one chief draftsman, and such number of compiling or assistant draftsmen as may from time to time be authorized by law, whose duty it shall be to make out and complete maps of all surveys made in the several counties and districts from the maps furnished by county and district surveyors; and they shall from time to time, as surveys are made in the several counties and land districts and forwarded to the general land office, as required by law, plat such surveys upon the proper county or district maps. Such chief draftsman and other draftsmen shall also perform all drafting and other duties as may be required of them by the commissioner of the general land office, for the benefit of the state or individuals. [Act Feb. 5, 1841, p. 150. P. D. 4100.]

Art. 4408. [2881] Appointment of clerks.—The commissioner of the general land office shall appoint such number of clerks as may from time to time be authorized by legislative appropriation or other law of the state; and such clerks and the compiling and assistant draftsmen provided for in the preceding article, shall receive such compensation for their services as may be appropriated for that purpose.

Art. 4409. [2882] Salary of chief clerk, etc.—The chief clerk, translator, receiving clerk and chief draftsman shall receive such compensation for their services as may from time to time be appropriated by law for that purpose.

Art. 4410. [2883] All employés may be removed by the commissioner.—All clerks, draftsmen or other employés of the general land office, including the chief clerk, translator, receiving clerk and chief draftsman, shall hold their offices and positions, at the pleasure of the commissioner, and may be removed by him at any time for satisfactory cause.

CHAPTER FIVE

ATTORNEY GENERAL

[See "Lands—Public." Ch. 10.]

Art.	Art.
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4412. Vacancies, how filled.	4420. Represent state at sales.
4413. Shall represent state in higher courts.	4421. To execute deeds, when.
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4416. Shall require and make reports of suits.	4424. Sale of judgments against insolvents.
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4418a. Shall advise heads of departments, district and county attorneys; legal authorities, with respect to issuance of bonds, etc.; shall prosecute suits to recover properties escheated; shall not advise other officials.	4427. Enforce forfeitures of charters, when.
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Article 4411. [2884] His election, term.—There shall be elected by the qualified voters, at the time and places of election for members of the legislature, an attorney general, who shall hold his office for the term of two years, and until the election and qualification of his successor in office. [Const., art. 4, secs. 1, 2, 22.]

Art. 4412. [2885] Vacancies, how filled.—In case of a vacancy in the office of attorney general, the governor shall fill such vacancy by appointment, which shall be submitted to the senate, if in session, and the person so appointed shall hold his office until the next succeeding general election for members of the legislature and the qualification of his successor.

Art. 4413. [2886] Shall represent state in higher courts.—It shall be the duty of the attorney general to prosecute and defend all actions in the supreme court or courts of appeals in which the state may be interested, and also to perform such other duties as may be prescribed by the constitution and laws. [Act May 11, 1846, p. 206, sec. 1. P. D. 198.]

History of act.—This article has not been amended since the reorganization of the courts, except by the substitution of "courts of appeals" for "court of appeals." See Const., art. 4, § 22.

Official duties.—The official duties of the attorney-general are defined by the constitution, Art. 4, § 22. He cannot institute suits when private rights alone are involved. *State v. Loan & Trust Co.*, 81 T. 530, 17 S. W. 60. See *Kempner v. Comer*, 73 T. 196, 11 S. W. 194; *State v. Thompson*, 64 T. 691; *State v. Moore*, 57 T. 307.

Art. 4414. Superseded. See Art. 4418a.

Art. 4415. [2888] Shall transmit state demands for suit.—He shall transmit to the proper district or county attorneys, with such instructions as he may deem necessary, all certified accounts, bonds or other demands which may have been delivered to him by the comptroller of public accounts for prosecution and suit. [Id. sec. 6. P. D. 203.]

Art. 4416. [2889] Shall require and make reports of suits.—He shall require the several district and county attorneys to report to him semi-annually, at the close of the courts of their respective districts or counties, in such form as he may prescribe, precise information of the situation of all suits instituted by them for the collection of public money; and he shall report to the comptroller of public accounts annually, on the last day of October and at such other times as the comptroller may request, a full and correct statement of the situation of all suits instituted for the collection of public money. [Id. secs. 7, 8. P. D. 204, 205.]

Art. 4417. [2890] Prepare forms for contracts, etc.—He shall, whenever requested by the comptroller of public accounts, prepare prop-

er forms for contracts, obligations and other instruments which may be wanted for the use of the state. [Id. sec. 10. P. D. 207.]

Art. 4418. [2891] **Shall advise the governor, etc.**—At the request of the governor or the heads of departments at the capitol, he shall give them legal advice in writing upon any question touching the public interest or concerning their official duties. [Id. sec. 9. P. D. 206. Acts 1879, ch. 117, p. 127.]

Art. 4418a. **Shall advise heads of departments, district and county attorneys, legal authorities, with respect to issuance of bonds, etc.;** shall prosecute suits to recover properties escheated; shall not advise other officials.—That in addition to the duties now or that may hereafter, be imposed upon the attorney general by law, he shall, at the request of the governor or the heads of the departments of the state government, including the heads and boards of penal and eleemosynary institution, and all other state boards, regents, trustees of the state educational institutions, and committees of either branch of the legislature, give them advice in writing upon any question touching the public interest, or concerning their official duties. He shall counsel and advise the several district and county attorneys of the state, in the prosecution and defense of all actions in the district or inferior courts, wherein the state is interested whenever requested by them, after said attorney shall have investigated the question, and shall with the question presented to the attorney general submit his brief also. He shall counsel and advise the proper legal authorities in regard to the issuance of all bonds that the law requires shall be approved by him, and it shall also be his duty to institute and prosecute, or cause to be instituted and prosecuted, all suits and proceedings necessary to recover for and on behalf of the State all properties, real, personal or mixed, that have heretofore escheated or that may escheat to this state under the provisions of title 51 of the Acts of 1911, or under any other law now in existence, or that may hereafter be enacted, and the attorney general is hereby prohibited from giving legal advice or written opinions to any other than the public officials named above. [Acts 1913, p. 48, sec. 1.]

Art. 4419. [2892] **Shall inspect accounts in offices of treasurer and comptroller.**—He shall at least once a month inspect the accounts in the offices of the state treasurer and the comptroller of public accounts, of all officers, and of individuals charged with the collection or custody of funds belonging to the state, and shall proceed immediately to institute, or cause to be instituted, against any such officer or individual, who is in default or arrears, suit for the recovery of funds in his hands; and he shall also institute immediately criminal proceedings against all officers or persons who have violated the laws by misapplying, or retaining in their hands, funds belonging to the state.

Art. 4420. [2893] **Required to attend sales and bid in land.**—In any case wherein any property shall be sold by virtue of any execution or order of sale issued upon any judgment in favor of the state, except executions issued upon judgments in cases of scire facias, the agent or attorney representing the state, by and with the advice and consent of the attorney general of the state, is hereby authorized and required to attend such sales, and bid on, and buy in, for the state said property, when it shall be deemed proper to protect the interest of the state in the collection of such judgment; provided, that in no case shall the amount bid by him exceed the amount necessary to satisfy said judgment and all costs due thereon. [Acts 1879, S. S. pp. 9–10.]

Art. 4421. [2894] **To execute deeds.**—In all cases where property is so purchased by the state, the officer selling the same shall execute and deliver to the state a deed of conveyance to the same, such as is prescribed for individuals in similar cases. [Id. sec. 2.]

Art. 4422. [2895] May sell such property, how.—The agent or attorney of the state buying for the state any such property at such sale shall be authorized, by and with the advice and consent of the attorney general, at any time to sell or otherwise dispose of said property so purchased in the manner and upon such terms and conditions as he may deem most advantageous to the state; and, if sold or disposed of for a greater amount than is necessary to pay off the amount due upon the judgment and all costs, the remainder shall be paid into the state treasury and placed to the credit of the general revenue; and when such sale is made the attorney general shall, in the name of the state, execute and deliver to the purchaser a deed of conveyance to said property, which deed, when so signed by him, shall vest all the right and title to the same in the purchaser thereof. [Id. sec. 3.]

Art. 4423. [2896] Agent of county authorized to bid in for county and to sell same.—When any such property is sold under execution or order of sale issued upon any judgment in favor of the county, including executions issued upon judgments in cases of scire facias in the name of the state, the attorney or agent so representing the county, by and with the advice and consent of the commissioners' court, shall have the same authority to buy and dispose of such property for the county as the agent or attorney for the state is given in this chapter in similar cases; and, when any property is so purchased by the agent or attorney of the county, the officer so selling the same shall execute and deliver to the county a deed of conveyance to the same; and, whenever the property so bought in for the county is sold, the county commissioners' court shall execute and deliver to the purchaser thereof a deed of conveyance in the name of the county to such property. [Id. sec. 4.]

Art. 4424. [2897] Sale of judgments against insolvents.—Whenever the principal and sureties upon any judgment held by the state are insolvent, so that under any existing process of law said judgment or any part thereof can not be collected, there shall be, and is hereby constituted, a board consisting of the attorney general, comptroller and treasurer of the state, who are hereby empowered and authorized by such advertising as they may deem necessary to offer for sale at public outcry, or by private sale, as they may deem to the best interest of the state, all the right of the state to such judgment; and, if by public sale, if the amount bid on the same should not be deemed sufficient, they shall refuse to accept the same, and dispose of the same in any manner deemed by them most advantageous to the interest of the state, and upon sale shall make a proper assignment of said judgment to the purchaser. [Id. sec. 5.]

Cited, *Ft. Worth & D. C. Ry. Co. v. Mapes* (Civ. App.) 156 S. W. 528.

Art. 4425. [2898] Register of official acts.—The attorney general shall keep in proper books, to be provided for that purpose at the expense of the state, a register of all his official acts and opinions, of all actions and demands prosecuted or defended by him or any district or county attorney, in which any portion of the revenue of the state is involved, and of all proceedings had in relation thereto, and shall deliver the same to his successor in office. [Acts 1846, p. 204. Id. sec. 12. P. D. 209.]

Art. 4426. [2899] Shall pay over collections immediately.—All money received by the attorney general for debts due or penalties forfeited to the state, shall be paid by him into the treasury immediately after the receipt thereof. [Id. sec. 11. P. D. 208.]

Art. 4427. [2900] Enforce forfeiture of charters, etc.—It shall be the duty of the attorney general, unless otherwise expressly directed by law, whenever sufficient cause exists therefor, to seek a judicial forfeiture of the charters of private corporations; and he shall at once take steps

to seek such forfeiture in all cases where satisfactory evidence is laid before him that any corporation receiving state aid has, by the non-performance of its charter conditions or the violations of its charter, or by any act or omission, misuser or non-user, forfeited its charter or any rights thereunder. [Act Aug. 21, 1876, p. 312, sec. 1.]

Art. 4428. [2901] And inquire into all charter rights.—He shall also especially inquire into the charter rights of all private corporations and, from time to time, in the name of the state, take such legal action as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. [Const., art. 4, sec. 22.]

Art. 4429. [2902] No admission to prejudice.—No admission, agreement or waiver, made by the attorney general, in any action or suit in which the state is a party, shall prejudice the rights of the state. [Act May 11, 1846, p. 206, sec. 14. P. D. 211.]

Art. 4430. [2903] Office, where kept.—The attorney general shall reside and keep his office at the seat of government. [Id. sec. 15. P. D. 212.]

Art. 4431. First office assistant to act, when.—In case of the absence or inability to act of the attorney general, the first office assistant of the attorney general shall discharge the duties which devolve by law upon the attorney general. [Act 1903, p. 117, sec. 1.]

Art. 4432. [2904] Assistant attorney general.—The governor shall appoint, by and with the advice and consent of the senate, if in session, an officer to be styled the assistant attorney general, who shall hold his office for the term of two years, and until the election and qualification of his successor. The assistant attorney general shall assist the attorney general in representing the interests of the state in all suits, pleas and prosecutions in the supreme court and courts of appeal. [Acts March 15, 1875, p. 179. Acts 1903, p. 117.]

Special attorney—When state officer.—In order to constitute an attorney employed by the attorney general an officer of the state, his appointment and continuance in office must be coterminous with the term of office of the attorney general. *Terrell v. Sparks*, 104 T. 191, 135 S. W. 519.

Where an attorney appointed by the attorney general to represent the state in litigation did not take an oath of office or qualify, held, that he was not an officer of the state. *Id.*

— **Employment contract.**—A contract of employment by an attorney general held a contract of the state. *Terrell v. Sparks*, 104 T. 191, 135 S. W. 519.

Art. 4433. [2906] Further duties.—The assistant attorney general shall represent the state in all cases in the district or inferior courts of any county when required so to do by the governor or attorney general; and he shall, in addition thereto, perform such other duties as may be required of him by law or by the governor or attorney general. [Id.]

Art. 4434. [2907] Governor authorized to order civil suits, when.—The governor is authorized to order through the proper officials the institution, prosecution or defense of any civil action or suit whenever he deems such course proper for the assertion or defense of any right of the state, and to render to said officials such assistance as to him may seem necessary or expedient. [Acts 1887, p. 138.]

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CHAPTER SIX

COMMISSIONER OF AGRICULTURE

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Article 4435. Election and qualification.—A commissioner of agriculture shall be elected by the people at the same time and in the same manner, who shall qualify and assume office, as all other state officers. He shall be an experienced and practical farmer, and shall have knowledge of agriculture, manufacture and general industry. [Acts 1907, p. 127, sec. 1.]

Art. 4436. Term of office.—The term of office of said commissioner shall be two years, and until his successor shall have been elected and qualified. Any vacancy occurring in said office shall be filled for the unexpired term by appointment of the governor. [Id. sec. 2.]

Art. 4437. Oath and bond.—Before entering upon the duties of his office, he shall take the oath of office prescribed by the constitution, and shall execute a bond in the sum of five thousand dollars, with two or more good and sufficient sureties, payable to the state of Texas, to be approved by the governor, and conditioned for the faithful discharge of the duties of his office, which oath and bond shall be filed in the office of the secretary of state. [Id. sec. 4.]

Art. 4438. Location of office.—The office of the commissioner shall be located in the city of Austin. [Id. sec. 6.]

Art. 4439. Chief clerk.—Said commissioner shall appoint one chief clerk, who shall possess a practical knowledge of agriculture, horticulture, manufacturing and kindred industries, and the proper methods of marketing the products of said industries. He may appoint such other clerks as the labors of his office may require, and all clerks shall be removable at the pleasure of the commissioner. [Id. sec. 7.]

Art. 4440. Chief clerk shall act, when.—The chief clerk shall possess all the powers and perform all the duties attached by law to the office of commissioner during the necessary or unavoidable absence of the commissioner, or his inability to act for any cause. The commissioner shall be responsible for the acts of his chief clerk, who shall, before entering upon the duties of his position, take the oath required of the commissioner, and shall enter into bond in the sum of three thousand dollars with two or more sureties to be approved by the governor, and payable to the state of Texas, conditioned for the faithful performance of his duties. [Id. sec. 8.]

Art. 4441. Same.—The chief clerk shall discharge such duties as may be prescribed by the commissioner; his annual salary shall not exceed fifteen hundred dollars per annum, payable monthly on certificate of the commissioner, and his expenses while traveling on the business of the office, under the direction of the commissioner, shall be paid by the state. [Id. sec. 9.]

Art. 4442. Seal.—The commissioner shall have and may use a seal of office, the design of which shall consist of a star with five points, surrounded by a wreath of olive and live oak; said seal shall not be less than one and a half and not more than two inches in diameter, and on the margin thereof around the wreath shall be inserted the words, "Commissioner of Agriculture, State of Texas," or some intelligible abbreviation thereof. [Id. sec. 10.]

Art. 4443. Duties.—The duties of the commissioner shall be as follows:

1. He shall cause to be executed all laws in relation to agriculture.
2. He shall encourage the proper development of agriculture, horticulture and kindred industries.
3. He shall encourage the organization of agricultural societies; and, for the benefit of the agricultural communities, he shall cause to be held farmers' institutes at such times and at such places throughout the state as will best promote the advancement of agricultural knowledge and the improvement of agricultural methods and practices. He shall publish and distribute such papers and addresses read or delivered at these institutes as he shall deem to be of value to the farming interest.
4. He shall investigate the subject of sub-soiling, the problems of drainage and of irrigation, their relation to agriculture, with a view to extending the area of the same, and the best modes of effecting each in the different portions of the state.
5. He shall investigate and report upon the question of broadening the market and of increasing the demand for cotton goods and all other agricultural and horticultural products, both in the United States and in foreign countries. Further, it shall be his duty to compile the statistics showing from abroad the number of bales of cotton consumed by the spinners, and demands for our cotton, the methods and course that sales to foreign countries now take, showing the purchasers, brokers, etc., through whose hands the cotton largely passes after leaving the producers, likewise showing in what countries an increased trade could be worked up, and thereby giving a better outlet for the trade and the best method to bring consumer and purchaser together, and all other information beneficial to farmers.
6. He shall cause to be investigated the diseases of grain, cotton, fruit, and other crops grown in this state, with a view to discovering remedies for such diseases. He shall also investigate the habits and propagation of the various insects that are injurious to the crops of this state, and the best methods for their destruction. The protection of fruit trees, shrubs and plants shall be under his direct supervision and control, and he shall have and exercise all the powers and perform all the duties in relation thereto, conferred or imposed by law.

7. He shall investigate the subject of grasses and report upon their value and the cultivation of the varieties best adapted to the different sections of the state. He shall also collect and publish information relating to forestry, tree planting, the best means of preserving and replenishing forests, and shall encourage the planting and culture of nut trees and recommend such legislation as may be necessary for the protection, restoration and preservation of the forests of this state.

8. He shall inquire into the subjects connected with stockraising, dairying and poultry; the obtaining and rearing of such domestic animals and fowls as are of most value, and the breeding and improvement of the same. He shall encourage the raising of fish and the culture of bees.

9. He shall investigate and report upon the growing of wool, and the utility and profit of sheep raising; he shall also inquire into the culture of silk, its preparation for market and its manufacture.

10. He shall correspond with the department of agriculture at Washington, and with the departments of agriculture of the several states and territories of the United States, and, at his option, with those of foreign countries, and with the representatives of the United States in foreign countries, with the view of gathering facts and information that will aid and advance the interests of agriculture in Texas. He may also, for the same purpose, correspond with such organizations, societies, associations and individuals in the state as he may choose, having for their object the promotion of agriculture in any of its branches.

11. He shall collect and publish statistics and such other information regarding such industries of this state and of other states as may be considered of benefit in developing the agricultural resources of this state. He shall cause a proper collection of agricultural statistics to be made annually; and, to this end, he shall furnish blank forms to the tax assessors of each county before the first of January of each year, including forms as to the acreage in cotton, grain and other leading products of the state, to be filled out by persons assessed for taxes, together with such instructions as will properly direct said assessor in filling them out. It is hereby made the duty of said tax assessor to return said blanks, with accurate answers, to the commissioner of agriculture on or before the first day of June following. It is further made the special duty of the said tax assessor to forward by registered mail to the commissioner of agriculture lists of the names and addresses of all ginner within their counties when asked to do so by the commissioner. It shall be the duty of the commissioner to furnish to every ginner blank forms for reports, which forms shall be filled out by said ginner as the commissioner may direct, and returned by them to the commissioner. In order to facilitate the collection and collation of accurate information concerning the various subjects treated of in this chapter, the heads of the several state departments, and of the state institutions, are hereby required to furnish accurately such information as may be at their command whenever called upon for same by said commissioner. In the prosecution of his work, the commissioner is hereby empowered to enter manufacturing establishments chartered or authorized to do business in this state, and said corporations shall furnish such information as said commissioner may request of them.

12. He shall make and publish such rules and regulations as he may deem necessary to carry into effect the provisions of this chapter. [Id. sec. 11.]

Art. 4444. Shall be member of board of directors of A. & M. college.—The commissioner of agriculture shall be ex officio a member of the board of directors of the agricultural and mechanical college of the state, and shall be allowed all necessary expense in attending the meetings of said board. [Id. sec. 12.]

Art. 4445. Shall make report.—The commissioner shall make and submit to the governor, on or before the first day of November of each year, a full and comprehensive report showing the work and expenditures of his office during the fiscal year preceding, which report shall be transmitted by the governor to the legislature. [Id. sec. 13.]

Art. 4446. Report printed and distributed.—Under the direction of the commissioner, the public printer shall print annually not to exceed ten thousand copies of the annual report of said commissioner, said report to be distributed to the farmers through the farmers' institutes and other agricultural organizations or otherwise, at the discretion of the commissioner. [Id. sec. 14.]

Art. 4447. Commissioner shall co-operate with A. & M. college.—No provision of this chapter shall be construed as to in any way conflict with the scope and character of the work of the agricultural and mechanical college or of the agricultural experiment stations, but the said commissioner shall co-operate with the said agricultural and mechanical college and said agricultural experiment stations in all lines looking toward the agricultural and horticultural interest of the state. [Id. sec. 15.]

Art. 4448. Duties as to irrigation.—It shall be the duty of the commissioner of agriculture to prepare and make public reports on the present system of irrigation now in operation in this state, the cost of maintenance and operation of same, the character and kind of irrigation plants which result in the greater saving to the users of water, the class and character of water contracts entered into by the various canal companies; he shall also inquire into the reasonableness and fairness of rates being charged for water by the various canal companies in this state, and, from time to time, shall make public the result of his inquiries; he shall collect and publish statistics and other information regarding the irrigation of rice and other crops as may be of benefit in developing and collaborating a more efficient system of laws safeguarding and defining the rights of users and sellers of water for irrigating purposes; and he shall make up and file an annual report on same with such recommendations as he may deem beneficial to the industry, which report shall be filed with the governor and transmitted to the legislature. [Act 1909, p. 353, sec. 1.]

Art. 4449. To employ engineers.—The commissioner of agriculture is hereby empowered and authorized to employ a competent engineer and expert, possessing a practical knowledge of the application of irrigation to the raising of rice and other crops, for the purpose of assisting him in performing the duties required of him in the preceding article. [Id. sec. 2.]

BUREAU OF COTTON STATISTICS

Art. 4450. Shall maintain bureau of cotton statistics.—The commissioner shall maintain in the department of agriculture a bureau of cotton statistics, as hereinafter provided. [Acts 1907, p. 313.]

Art. 4451. Public ginners, who are; to obtain certificate.—All custom ginners of seed cotton in this state are declared to be public ginners. Any person or persons, firm or corporation in this state, before engaging in the business of public ginners, shall obtain from the county clerk of the county in which gin is located a certificate after the following form:

Number

This is to certify that
of county, Texas, has this day filed
affidavit required by law of all public ginners in this state.

(Seal.)

.....,
County clerk of county, Texas.

[Id. sec. 1.]

Art. 4452. Affidavit.—The form of affidavit to be made to, and filed with, the county clerk shall be as follows:

I, of county, Texas, do solemnly swear that I will, so long as I may operate a public gin, make and forward a true and correct report of the number of bales of cotton ginned by me to the commissioner of agriculture at Austin, as required by law. [Id. sec. 2.]

Art. 4453. Certificate furnished commissioner.—The county clerk shall number each certificate issued by him consecutively, beginning at number one, and shall immediately forward to the commissioner of agriculture the name and postoffice address to whom certificate was issued. The clerk shall issue certificates to all ginners and shall take the affidavits as herein required without cost to ginners. [Id. sec. 3.]

Art. 4454. Commissioner to furnish blanks.—The commissioner of agriculture, upon receipt of information of the issuance of a ginner's certificate from any county clerk in this state, shall immediately forward all necessary blanks to the public ginner for making official cotton report, which shall consist of the following:

Envelopes addressed to the commissioner of agriculture, Austin, Texas; and there shall be printed upon the upper left hand corner the words, "Official Cotton Report of County," also blanks, to-wit:

Official Cotton Report.
Certificate No. 19...

Commissioner of Agriculture,
Austin, Texas.

Sir: This is to certify that I have ginned bales of cotton from the day of 19....., to the day of 19.....

(Signed) [Id. sec. 4.]

Art. 4455. Ginners to report to commissioner.—All public ginners shall make and forward reports to the commissioner of agriculture on the blanks furnished them, by the third of each month, stating the exact number of bales ginned by them the preceding calendar month. This report must be made by all ginners, unless they have ceased to operate, the notice of which must be forwarded to the commissioner of agriculture. These reports must be securely sealed by ginners. [Id. sec. 5.]

Art. 4456. Reports opened and made public, when.—The commissioner of agriculture shall open, on the eighth of each month, and tabulate the official cotton reports of the various counties in the presence of three credible witnesses, who shall be appointed by the governor. The complete report, showing total number of bales of cotton ginned, shall be given out to the public, including the press, at eleven o'clock a. m., on the ninth of each month. [Id. sec. 6.]

Art. 4457. Revealing contents of reports punishable.—If the commissioner of agriculture, his assistants, or any one else connected with the opening and tabulating of these official cotton reports, or any other person, shall give out any information as to the number of bales of cotton ginned before the time specified by this act, shall, upon conviction, be punished as provided by the Criminal Code. [Id. sec. 7.]

PROTECTION OF FRUIT TREES, SHRUBS AND PLANTS

Art. 4458. Shall supervise protection of trees, etc.—The protection of fruit trees, shrubs and plants shall be under the supervision and con-

trol of the commissioner of agriculture, and the same shall be regulated as provided in the ensuing articles. [Acts 1909, p. 316.]

Art. 4459. Proceedings where diseased trees, etc., are found.—No person in this state shall knowingly or wilfully keep any peach, almond, apricot, nectarine or other trees affected with the contagious disease known as yellows. Nor shall any person keep for sale any apple, peach, plum or other tree affected with nematode galls, crown galls, or root rot. Nor shall any person knowingly or wilfully keep any plum, cherry or other trees affected with the contagious disease or fungus known as black knot; nor any tree, shrubs or plant infested with or by the San Jose scale or other insect pest dangerously injurious to, or destructive of, trees, shrubs or other plants; nor any orange or lemon trees, citrus stocks, cape jasmines or other trees, plants or shrubs infested with "white fly," or other injurious insect pests or contagious diseases of citrus fruits; nor subtropical plants, shrubs, evergreens or ornamentals; nor any china, forest or other trees, shrubs or plants, infested with injurious insect pests or contagious diseases. Every such tree, shrub or plant shall be a public nuisance, and as such it shall be the duty of the commissioner of agriculture, or his representatives, to abate it; and no damage shall be awarded for entering upon the premises upon which there are trees, shrubs or plants infected with yellows, black knot, crown gall or other infectious or dangerous disease, or infested with San Jose scale or other dangerous insect pest, for the purpose of legally inspecting the same; nor shall any damages be awarded for the treatment by the commissioner of agriculture, or his duly authorized agents or representatives, of such trees, shrubs or plants, or for altogether destroying such trees if necessary to suppress such insect pest or disease, if done in accordance with the provisions of this article. But the owner of the trees, shrubs or plants shall be notified immediately upon its being determined that such trees, shrubs or plants should be destroyed, by a notice in writing signed by the commissioner, or the person or persons representing him; which said notice in writing shall be delivered in person to the owner of such trees, shrubs or plants, or left at the usual place of residence of such owner, or, if such owner be not a resident of the locality, to notify by leaving such notice with the person in charge of the premises, trees, shrubs or plants, or in whose possession they may be. Such notice shall contain a brief statement of the facts found to exist, whereby it is necessary to destroy such trees, shrubs or plants, and shall call attention to the law under which it is proposed to destroy them, and the owner shall, within ten days from the date upon which such notice shall have been received, remove and burn all such diseased or infected trees, shrubs or plants. If, however, in the judgment of said commissioner, or person representing him, any tree, shrub or plant infested with any disease, or infested with dangerously injurious insects, can be treated with sufficient remedies, he may direct such treatment to be carried out by the owner under the direction of the commissioner, agent, employé or representatives. In case of objections to the findings of the chief inspector, employés or representatives of the commissioner, an appeal may be made to the commissioner, whose decision shall be final. An appeal must be taken within five days from service of said notice, and shall act as a stay of proceedings until it is heard and decided. When the commissioner, or chief inspector, or employer or representative appointed by him, shall determine that any tree or trees, shrub or other plants must be treated or destroyed forthwith, he may employ all necessary assistance for that purpose; and such representative or representatives, agent or agents, employé or employés, may enter upon any or all premises necessary for the purpose of such treatment, removal or destruction. But such commissioner, or the person representing him, shall, before such treatment or destruction, first require the

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owner or person in charge of the trees, shrubs or plants, to treat or destroy same, as the case may be; and, upon the refusal or neglect upon the part of said owner or person in charge to so treat or destroy such trees, plants or shrubs, then such commissioner, chief inspector, or person or persons representing him, shall treat or destroy such trees, shrubs or plants; and all charges and expenses thereof shall be paid by such owner or person in charge of said trees, shrubs or plants, and shall constitute a legal claim against such owner or person in charge, which may be recovered in any court having jurisdiction, upon the suit of such commissioner, or chief inspector, or the county attorney of the county where the premises are situated, together with all costs, including an attorney fee of ten dollars, to be taxed as other costs. [Id. sec. 1.]

Art. 4460. Nurseries to be examined and certificates issued.—The commissioner of agriculture shall cause an examination to be made at least once each year of each and every nursery or other place where trees, shrubs or plants, commonly known as nursery stock, are grown or exposed for sale, for the purpose of ascertaining whether the trees, shrubs or plants therein kept or propagated for sale are infected with contagious disease or diseases, or infested with insect pests. If, after such examination, it is found that the said trees, shrubs or other plants so examined are apparently free in all respects from any contagious or infectious disease or diseases, dangerously injurious insect pest or pests, the said commissioner shall issue to the owner or proprietor of the stock so examined a certificate setting forth the fact that the stock so examined was at the time of such examination apparently free from any and all such disease or diseases, insect pest or pests. No such certificate shall be negotiable or transferable, and shall be void if sold or transferred. Any such act or sale or transference shall be punishable as provided by this law. [Id. sec. 2.]

Art. 4461. Shipments of nursery stock to be accompanied by certificate.—All nursery stock consigned for shipment, or shipped by freight, express or other means of transportation, shall be accompanied by a copy of said certificate attached to each car, box, bale, bundle or package. When such box, bale, bundle or package, contains nursery stock to be delivered to more than one individual, partnership, or corporation, each portion of such nursery stock to be delivered to such individual, partnership or corporation, shall also bear a copy of the certificate of inspection issued as provided in the preceding article. [Id. sec. 2.]

Art. 4462. Nursery stock shipped into state; certificate of inspection.—No individual, partnership or corporation outside the state shall be permitted to ship nursery stock into this state without first filing with the commissioner of agriculture a certified copy of his or their certificate of inspection issued by the proper authorities in the state in which the proposed shipment originates. This certificate must show that the stock to be shipped has been examined by the proper officer of inspection in that state or province, and that the stock is apparently free from all dangerous insect pests or contagious diseases; and, when fumigation is required by the commissioner of agriculture, that the stock has been properly fumigated. Immediately upon receipt of the filing with the commissioner of agriculture of this certificate, he shall, in addition, make further investigation as to the moral standing and integrity of the applicant as will satisfy him that the applicant is entitled to receive a certificate. A fee of five dollars shall be required from the applicant, upon receipt of which the commissioner of agriculture may issue a certificate permitting the applicant to ship into the state. Each box, bale or package of nursery stock from outside the state shall bear a tag on which is printed a copy of the certificate of this state, and also a copy of the certificate of the state in which it originates. [Id. sec. 3.]

Art. 4463. Transportation companies not liable, when.—No transportation company or common carrier shall be liable for damages to the consignee or consignor for refusing to receive for transportation or deliver such trees, packages, bales, bundles or boxes when not accompanied by copies of the certificates provided for in the preceding article. The agent of such companies or common carriers shall report any such shipment to the commissioner of agriculture immediately. Shipments of nursery stock into this state, or originating within the state, without tags or proper certificates as provided for in article 4462 shall be dealt with as in article 4459. [Id. sec. 3.]

Art. 4464. Commissioner to revoke certificate, when.—The commissioner shall have power to revoke any certificate which has been issued when he shall find that false representations have been made by the party or parties to whom certificates have been issued, or who have refused to comply with the law, instructions, rules and regulations given by the commissioner of agriculture as required by the provisions of this chapter and its enforcement. [Id. sec. 4.]

Art. 4465. Provisions, how enforced.—The commissioner of agriculture shall enforce the provisions of the foregoing articles, and make and enforce such rules and regulations, not inconsistent with such articles, as may be deemed necessary for carrying the same into effect, including the provisions relating to the inspection of nurseries, orchards, forest trees, greenhouses, and all other products originating from the same, within the meaning of these articles. He shall also appoint one person who shall be designated as chief inspector, whose duty it shall be to inspect, or cause to be inspected, under the directions of the commissioner of agriculture all trees, plants and shrubs of every kind whatsoever, grown, produced or offered for sale by any nursery, dealer, individual or corporation in this state, and also to inspect, or cause to be inspected, all orchards provided for above, and may employ such other person or persons, expert or experts, as may be necessary from time to time for administering and carrying into operation and enforcing these provisions; provided, the chief inspector shall not, during the time of such service, be interested in or connected with any nursery business whatsoever. The said commissioner shall fix and collect reasonable fees for the inspection provided for, and not less than two dollars and fifty cents nor more than fifteen dollars shall be charged for each inspection. All fees collected shall be paid to the department of agriculture and credited to the fund provided for administering this law. Any persons or experts employed by the commissioner of agriculture for the purpose of administering the provisions, rules and regulations hereof shall be paid a salary. Such salary shall not exceed the sum of five dollars per diem and traveling expenses while actually engaged in performing their duties, the same to be paid out of any fund made available to the department of agriculture for the enforcement of this law. [Id. sec. 5.]

Art. 4466. Provisions, how enforced by prosecution.—To enforce the provisions hereof, and the rules and regulations of the commissioner of agriculture in reference thereto, suit shall be entered by the county attorney in any court having jurisdiction, and the sheriff or peace officer of any such court shall perform his usual duties in enforcing the provisions hereof. Any moneys appropriated for the department of agriculture for the administration of these provisions shall be available for use to the amount necessary for the enforcement hereof, as indicated herein; provided, that all fines collected from proceedings hereunder shall revert to the available school fund of the county in which the prosecution originates and is tried. [Id. sec. 7.]

Art. 4467. Terms defined.—The term "nursery stock," within the meaning of these articles, shall include all fruit trees and vines, shade

trees and forest trees, whether such shade or forest trees be especially grown for sale in a nursery or taken from the forests and offered for sale; all scions, seedlings, roses, evergreens, shrubbery or ornamentals, also such greenhouse plants, or propagation stock, all classes of berry plants, cut flowers taken from plants, bushes, shrubs or other trees growing in this state, which may be a medium for disseminating injurious insect pests and contagious diseases. The term "nursery" shall be construed to mean any grounds or premises on which nursery stock is grown, or exposed for sale. "Being in the nursery business" applies to any individual, partnership or corporation which may either sell or grow, or both grow and sell, nursery stock regardless of the variety or quantity of nursery stock sold or grown. The term "dealer" shall be construed to apply to any individual, partnership or corporation not growers of nursery stock, but who buy and sell nursery stock for the purpose of reselling and reshipping under their own name or title, independently of any control of those from whom they purchase. An "agent of a nursery or dealer" shall be construed to apply to any individual, partnership or corporation selling nursery stock, either as being entirely under the control of the nursery or dealer with whom the nursery stock offered for barter and traffic originates, or some co-operative basis for handling nursery stock with the grower or dealer, as specified in this article. Any such agent shall have proper credentials from the dealer he represents or co-operates with, and, failing in that, any such agent shall be classed as a dealer, and subject to such rules and regulations as may be adopted relative to them, and shall be amenable to the same penalties for violations of any provisions of these articles, or the rules and regulations of the commissioner. [Id. sec. 8.]

Art. 4468. Rules and regulations by commissioner.—The commissioner of agriculture shall prepare suitable rules and regulations for the traffic of cape jasmine cut flower shipments, also for the shipment of such greenhouse and floral plants as may require control, in order that the purposes for which this law is established may be accomplished. He shall also provide such rules and regulations concerning city, private or public parks, avenues of shade trees, shrubbery and ornamentals along the streets of cities, for city residences, and city property generally, as will secure a protection and immunity from insect pests and contagious diseases intended to be provided for by this law. It shall be the duty of city administrations through their proper officers, the duty of owners of parks, of city residence or other city property, to obey these rules and regulations, and co-operate with the commissioner of agriculture, or his representatives, in enforcing such rules and regulations, or any provisions of this law. [Id. sec. 9.]

BOLL WEEVIL—REWARD FOR EXTERMINATION

Art. 4469. Reward.—The sum of fifty thousand dollars is appropriated out of any money in the treasury not otherwise appropriated for the purpose of discovering a practical remedy for the destruction of the boll weevil, said money to be used as hereinafter set forth, to-wit: That said money be held in the state treasury subject to a warrant drawn thereon signed by the governor, president of agricultural and mechanical college and the commissioner of agriculture of Texas. That said persons shall constitute a board whose duty it shall be to offer, in the name of the state of Texas, the said named fifty thousand dollars to any person or persons who shall discover and furnish a practical remedy for the destruction of the cotton boll weevil in Texas. That said money shall not be drawn from the treasury until it has been thoroughly proven as hereinafter provided that the person or persons in whose favor the warrant is drawn have produced a practical remedy that will destroy

the cotton boll weevil. Said board of three as aforesaid shall act jointly with a committee of five practical farmers to be appointed by the governor from five representative districts of the cotton producing belt of the state where the cotton boll weevil is prominent. [Acts 1903, p. 72, sec. 1.]

Art. 4470. Expenses and claim for reward.—The sum of two thousand five hundred dollars, or so much thereof as is necessary, be and the same is hereby appropriated to pay the expenses and per diem of the board appointed to pass on the remedy produced, said money to be used out of any money not otherwise appropriated and paid out under direction of the governor; provided, that each member shall be allowed five dollars per day for his services. The persons presenting their claims for said reward must subscribe to the following oath, to wit: "I,, have discovered a practical method by which the cotton boll weevil can be destroyed at a cost of not more than one dollar per acre per annum, and cause no bad effect to the cotton. My method is so economical that it can be used by all cotton planters." [Id. sec. 2.]

Art. 4471. Farmers to make affidavit.—Said five practical farmers, reputable citizens, shall subscribe to the following oath: "I,, swear (or affirm) that I have witnessed experiments and applications of Mr. in the destruction of the cotton boll weevil at I further swear (or affirm) that this method of destroying the weevil is so economical and practical that, if followed as directed by, will effectually destroy the weevil affecting cotton. That I have witnessed the test made for the destruction of the cotton boll weevil, that I have not received anything, or been offered anything, of value to secure my vote or influence in securing the reward for the party or parties claiming the same, and I do further swear (or affirm) that, to the best of my judgment, that the method offered by, which I have seen tested, is economical, practical and will destroy the cotton boll weevil, if followed as directed." [Id. sec. 3.]

Art. 4472. Discoverer to report to governor.—After the person or persons claiming said reward have complied with the above demands, he or they shall report to the governor that he or they have discovered a practical remedy for the destruction of the cotton boll weevil. [Id. sec. 4.]

Art. 4473. Farmers appointed to experiment.—It shall then be the duty of the governor to appoint five practical farmers, of good character and reputation, as aforesaid, selecting one from each of five representative districts of the cotton producing belt of Texas, who shall assemble at a place designated by the governor, where experiments will be carried on by the party or parties claiming said reward, and, in case of refusal, resignation or disqualification of any member of the committee, the governor shall appoint another from the representative district so vacated to fill his place. [Id. sec. 5.]

Art. 4474. Oath; preliminaries before payment of reward.—Those who have been selected by the governor to pass upon the practicability and expediency of the method by which he or they propose to kill or destroy the cotton boll weevil shall subscribe to the following oath: "I,, do solemnly swear that I am not related to the party or parties who are now claiming said reward, neither am I in any way interested in his patent or proposed means of destroying the cotton boll weevil." After a fair test or tests covering all points claimed by the inventor or discoverer of a practical remedy for the destruction of the cotton boll weevil have been made, or may be made from time to time covering two consecutive years, to satisfy fully all members of the committee appointed by the governor, commissioner of agriculture, and the president of the agricultural and mechanical college, that the remedy

proposed by the party or parties having been given a fair test for two consecutive years under every requirement of the committee appointed by the governor, and having been by them declared to be so economical, practical and effective and that the cost of same does not exceed one dollar per acre per annum, will so report to the governor, in writing, giving in full the details of the experiment witnessed, and recommending that the governor, commissioner of agriculture and the president of the agricultural and mechanical college pay to the party or parties who have made the test the reward offered by the state of Texas. [Id. secs. 6, 7.]

Art. 4475. Same.—After the aforesaid board of practical farmers, acting jointly with the governor, commissioner of agriculture and president of the agricultural and mechanical college of Texas, have passed on the claims of all who make application for the aforesaid reward, and have decided upon the most meritorious claim presented as hereinbefore required, then shall a period of two successive years elapse in which the people may put into practical application the remedy recommended. And, if at the expiration of the two years it has, in the judgment of the aforesaid board, proven a success, the fifty thousand dollars shall be awarded to the person or persons discovering or inventing said remedy. Provided, that the insecticide, device or machine, if patented, or, if any insecticide, the formulæ of same shall be conveyed to the state of Texas before said party competing for the prize shall have the right to have same tested by the board free of charge; provided, further, this remedy shall not interfere with the discovery of any remedy by the state of Texas in the experimental station or by the agricultural and mechanical college; and provided, also, no man shall receive any benefit until he first proves that he was the first discoverer of such remedy; and the governor shall have the right at any time to suspend this appropriation provided a satisfactory remedy has in his judgment been discovered by the state experimental board. [Id. sec. 8.]

AGRICULTURAL AND EXPERIMENTAL STATIONS

Arts. 4476–4483.—Superseded. See Acts S. S. 1913, p. 98 [Arts. 140–14vv], amending Acts 1913, p. 339. The last-named act amended Acts 1909, p. 332, which was incorporated into Rev. Civ. St. 1911, as Arts. 4476–4483.

Art. 4484. Board of directors of A. & M. college to assist U. S. government in maintaining stations.—The board of directors of the agricultural and mechanical college of Texas are authorized and directed to assist the national government in maintaining an experiment station for the purpose of conducting experimental culture of tobacco and carrying on researches and experiments in tobacco growing under the direction of the national government's expert in the seventeenth representative district. [Act 1909, p. 278, sec. 1.]

CHAPTER SEVEN

COMMISSIONER OF INSURANCE AND BANKING

[See also Title "Banks & Banking."]

Art. 4485. Appointment of.	Art. 4490. Chief clerk, duties of.
4486. Term of office.	4491. Shall be styled commissioner of insurance and banking, and have a seal.
4487. Vacancies in office, how filled	4492. Ineligibility of certain persons.
4488. Oath and bond.	
4489. Clerks, may appoint.	

<p>Art. 4493. Duties of commissioner—</p> <ol style="list-style-type: none"> 1. Shall execute the laws. 2. File articles of incorporation and other papers. 3. Shall calculate net value of policies. 4. Shall see that company has net value of policies on hand. 5. May accept the valuation of commissioners of other states. 6. Shall see that companies furnish certificate. 7. Shall calculate the reserve on fire insurance. 8. Shall charge premiums in marine and inland insurance. 9. Duties when company's capital is impaired. 10. Shall publish result of examination. 11. Shall suspend or revoke certificate of authority. 12. Shall report to attorney general. 13. Shall furnish blanks. 14. Shall keep records. 15. Shall give certified copies. 16. Shall report annually to governor. 17. Shall send copy of reports to. 18. Shall report laws to commissioners of other states, when. 19. Shall see that no company does life business, when. 20. Shall admit mutual companies, when. 	<p>Art. 4494. May change form of annual statement.</p> <p>4495. Duties when parties refuse to appear and testify.</p> <p>4496. Sheriff and other peace officers shall execute service.</p> <p>4497. Shall issue certificate of authority, when; shall revoke certificate when suit removed to federal court.</p> <p>4498. Shall compute reserve liability of companies.</p> <p>4499. Shall calculate reinsurance reserve.</p> <p>4500. Shall examine companies, have free access to books, may revoke or modify certificate, expenses for examinations.</p> <p>4501. Powers and duties of commissioner in cases of examination.</p> <p>4502. Transfer of securities, must be countersigned.</p> <p>4503. State treasurer, duty in regard to transfers.</p> <p>4504. Free access to records, books, etc., given to commissioner and state treasurer.</p> <p>4505. Instruments executed and copies of papers made evidence.</p> <p>4506. Commissioner authorized to make inquiries of companies.</p> <p>4507. Commissioner's report.</p> <p>4508. Valid final judgment, insurance company's certificate of authority revoked, when.</p>
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Article 4485. [2908] Appointment by the governor.—The governor shall appoint, by and with the advice and consent of the senate, a commissioner of insurance and banking, who shall be a citizen of the state and experienced in matters of insurance. [Act Aug. 21, 1876, p. 219, sec. 2; Acts 1887, p. 99; Acts 1889, pp. 53-54; Const., art. 16, sec. 38.]

Art. 4486. [2909] His term of office.—The commissioner of insurance and banking shall hold his office for the term of two years, and until the appointment and qualification of his successor. [Id. secs. 2, 5.]

Art. 4487. [2910] Vacancies in office, how filled.—The governor may fill any vacancy occurring in the office of commissioner of insurance and banking, and report the name of the person so appointed to the senate, if in session, or at the next succeeding session of the legislature. Should the senate fail to confirm the appointment made by the governor within ten days after being advised thereof, then the said office shall be deemed vacant and a new appointment shall be made until the office is filled. [Id. sec. 27.]

Art. 4488. [2911] Oath and bond.—Within fifteen days after notice of his appointment, and before entering upon the duties of his office, he shall take the oath of office prescribed by the constitution, and shall give a bond to the state of Texas in the sum of five thousand dollars, with two or more good and sufficient sureties, to be approved by the governor, and conditioned for the faithful discharge of the duties of his office, which oath and bond shall be filed in the office of the secretary of state. [Id. p. 219, sec. 3.]

Art. 4489. [2912] May appoint clerks.—Said commissioner may appoint a competent chief clerk and such other clerks as the labors of his office may require; and all clerks shall be removable at the pleasure of the commissioner. [Sen. Jour., 1895, p. 478.]

Art. 4490. [2913] Chief clerk, duties of.—The chief clerk shall possess all the power and perform all the duties attached by law to the office of commissioner during the necessary or unavoidable absence of the

commissioner, or his inability to act from any cause. The commissioner shall be responsible for the acts of his chief clerk, who shall, before entering upon the duties of his position, take the oath required of the commissioner; he may also be required by the commissioner to enter into bond with security, payable to said commissioner, for the faithful performance of the duties of his position. [Id.]

Art. 4491. Title and seal of office.—The said commissioner shall be styled, the commissioner of insurance and banking, and shall have a seal of office, the design of which shall consist of a star with five points, with letters composing the word "Texas," arranged between the respective points thereof; said seal to be not less than one and a half and not more than two inches in diameter, and on the margin, "Department of Insurance and Banking," or an intelligible abbreviation thereof. Such seal thus formed and impressed shall be the seal of office of the department of insurance and banking. [Acts of 1889, p. 53. Acts 1907, p. 127, sec. 16.]

Art. 4492. [2915] Ineligibility of certain persons.—No person who is a director, officer or agent of, or directly or indirectly interested in, any insurance company, except as insured, shall be a commissioner or clerk; and it shall be unlawful for such commissioner, or any person employed by him or in any way connected with his office, to purchase all or any part of any mine or mineral land, to be in any manner interested in such purchase, during the term of his office or employment. [Acts of 1887, p. 99. Acts 1888, p. 10.]

Art. 4493. [3050] Duties of commissioner.—In addition to the duties required of the commissioner of insurance and banking, he shall perform other duties as follows:

1. **Shall execute the laws.**—To see that all laws respecting insurance and insurance companies are faithfully executed.

2. **File articles of incorporation and other papers.**—To file and preserve in his office all acts or articles of incorporation of insurance companies and all other papers required by law to be deposited with him, and, upon application of any party interested therein, to furnish certified copies thereof upon payment of the fees prescribed by law. [Acts 1909, p. 192, sec. 59, par. 2.]

3. **Calculate net value of policies.**—He shall, as soon as practicable in each year, calculate or cause to be calculated in his office, by an officer or employé of his department, the net value on the thirty-first day of December of the previous year of all the policies in force on that day in each life or health insurance company doing business in the state, upon the basis and in the manner prescribed by law. [Id. par. 3.]

4. **Shall see that the company has net value of policies on hand.**—Having determined the net value of all the policies in force, it shall be his duty to see that the company has in safe securities of the class and character required by the laws of this state the amount of said net value of all its policies, after all its debts and claims against it and at least one hundred thousand dollars of surplus to policy holders have been provided for. [Id. par. 4.]

5. **May accept the valuation of commissioners of other states.**—He may accept the valuation made by the insurance commissioner of the state under whose authority a life insurance company was organized, when such valuation has been properly made on sound and recognized principles, as a legal basis as above; provided, the company shall furnish to him a certificate of the insurance commissioner of such states, setting forth the value calculated on the data designated above of all the policies in force in the company on the previous thirty-first day of December, and stating that, after all other debts of the company and

claims against it at that time, and one hundred thousand dollars surplus to policy holders, were provided for, the company had, in safe securities of the character required by the laws of this state, an amount equal to the net value of all its policies in force, and that said company is entitled to do business in its own state. [Id. par. 5.]

6. **Shall see that company furnishes certificate.**—Every life insurance company doing business in this state during the year for which the statement is made that fails promptly to furnish the certificate aforesaid shall be required to make full detailed lists of policies and securities to the insurance commissioner, and shall be liable for all charges and expenses consequent upon not having furnished said certificates. [Id. par. 6.]

7. **Shall calculate the reserve on fire insurance.**—For every company doing fire insurance business in this state, he shall calculate the reinsurance reserve for unexpired fire risks by taking fifty per cent of the premiums received on all unexpired risks that have less than one year to run, and a pro rata of all premiums received on risks that have more than one year to run; provided, that, when the reinsurance reserve, calculated as above, is less than forty per cent of all the premiums received during the year, the reinsurance reserve in this case shall be the whole of the premiums received on all of its unexpired risks. For every company transacting any kind of insurance business in this state, for which no basis is prescribed by law, he shall calculate the reinsurance reserve upon the same basis prescribed in this section [article] as to companies transacting fire insurance business. [Id. par. 7.]

8. **Shall charge premiums.**—In marine and inland insurance, he shall charge all the premiums received on unexpired risks as a reinsurance reserve. [Id. par. 8.]

9. **Duties when company's capital is impaired.**—Having charged against a company other than life, the reinsurance reserve, as prescribed by the laws of this state, and adding thereto all other debts and claims against the company, he shall, in case he find the capital stock of the company impaired to the extent of twenty per cent, give notice to the company to make good its whole capital stock within sixty days, and, if this is not done, he shall require the company to cease to do business within this state, and shall thereupon, in case the company is organized under authority of the state, immediately institute legal proceedings to determine what further shall be done in the case. [Id. par. 9.]

10. **Shall publish results of investigation.**—The commissioner shall publish the result of his examination of the affairs of any company whenever he deems it for the interest of the public. [Id. par. 10.]

11. **Shall suspend or revoke certificate.**—He shall suspend the entire business of any company of this state, and the business within this state of any other company, during its non-compliance with any provision of the laws relative to insurance, or when its business is being fraudulently conducted, by suspending or revoking the certificate granted by him; and he shall give notice thereof to the insurance commissioner or other similar officer of every state, and shall publish notice thereof; provided, that he shall give such company at least ten days notice in writing of his intention to suspend its right to do business or revoke the certificate of authority granted by him, stating specifically the reason why he intends to so suspend or revoke such certificate of authority. [Id. par. 11.]

12. **Shall report to attorney general.**—He shall report promptly and in detail to the attorney general any violation of law relative to insurance companies or the business of insurance. [Id. par. 12.]

13. **Shall furnish blanks.**—He shall furnish to the companies required to report to him the necessary blank forms for the statements required. [Id. par. 13.]

14. **Shall keep records.**—He shall preserve in a permanent form a full record of his proceedings and a concise statement of the condition of each company or agency visited or examined. [Id. par. 14.]

15. **Give certified copies.**—At the request of any person, and on the payment of the legal fee, he shall give certified copies of any record or papers in his office, when he deems it not prejudicial to public interest, and shall give such other certificates as are provided for by law. [Id. par. 15.]

16. **Report annually to governor.**—He shall report annually to the governor the names and compensations of his clerks, the receipts and expenses of his department for the year, his official acts, the condition of companies doing business in this state, and such other information as will exhibit the affairs of said department. [Id. par. 16.]

17. **Send copies of reports to.**—He shall send a copy of such annual report to the insurance commissioner or other similar officer of every state and to each company doing business in the state. [Id. par. 17.]

18. **Report laws to commissioners of other states.**—On request, he shall communicate to the insurance commissioner or other similar officer of any other state, in which the substantial provisions of the law of this state relative to insurance have been, or shall be, enacted, any facts which by law it is his duty to ascertain respecting the companies of this state doing business within such other state. [Id. par. 18.]

19. **See that no company does business, when.**—He shall see that no company is permitted to transact the business of life insurance in this state whose charter authorizes it to do a fire, marine, lightning, tornado or inland insurance business, and that no company authorized to do a life or health insurance business in this state be permitted to take fire, marine or inland risks. [Id. par. 19.]

20. **Admit mutual companies, when.**—The commissioner of insurance and banking shall admit into this state mutual insurance companies organized under the laws of other states and who have two hundred thousand dollars assets in excess of liabilities engaged in cyclone, tornado, hail and storm insurance. [Id. par. 20.]

Art. 4494. May change form of annual statement.—The commissioner of insurance and banking may, from time to time, make such changes in the forms of the annual statements required of insurance companies of any kind, as shall seem to him best adapted to elicit a true exhibit of their condition and methods of transacting business; provided, that such terms and requirements shall elicit only such information as shall pertain to the business of the company. [Id. sec. 60.]

Art. 4495. Duty when parties refuse to appear and testify.—Whenever any person shall refuse to appear and testify or to give information authorized by this chapter to be demanded by the commissioner of insurance, such commissioner may file his application under oath with any district judge or district court within this state, where said witness is summoned to appear; and it shall be the duty of said judge to summon said witness, administer oaths as required by law and require answers to such questions; and such judge or court shall have power to punish for contempt as now provided by law. [Acts 1909, p. 192, sec. 63.]

Art. 4496. Sheriffs, etc., shall execute service.—Sheriffs and other peace officers of this state shall execute process directed to them by the commissioner of insurance and make return thereof to him, as in the case of process issued from any of the courts. [Id. sec. 64.]

Art. 4497. Shall issue certificate of authority, when; revoke certificate, when.—Should the commissioner of insurance and banking be satisfied that any company applying for a certificate of authority has in all respects fully complied with the law, and that, if a stock company,

its capital stock has been fully paid up, that it has the required amount of capital or surplus to policy holders, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insurance business, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the last day of February next following the date of such certificate. And, if any such insurance company organized under the laws of any state or country, after having obtained a certificate of authority from the commissioner of insurance and banking, or other officer authorized to issue such permit to do business in this state, shall bring in any federal court any suit or action against any citizen of this state, or shall remove any suit or action heretofore or hereafter commenced in any court of this state, to which it is a party, to any federal court, the commissioner of insurance and banking shall forthwith revoke and recall the certificate of authority of such insurance company to do and transact business in this state; and no renewal of authority shall be granted to such insurance company to do business in this state for a period of three years after such revocation; and such insurance company shall thereafter be prohibited from transacting any business in this state until again duly authorized by law. [Id. sec. 40.]

Compelling issuance of certificate.—See notes under Title 89.

Refusal of permit—Grounds.—Where the commissioner of insurance is empowered to revoke an existing permit issued to an insurance company because it violates the law, he may refuse to grant a permit for the same reason. *Glens Falls Ins. Co. v. Hawkins*, 103 T. 327, 126 S. W. 1114.

Art. 4498. Shall compute reserve liability of companies.—It shall be the duty of the commissioner of insurance and banking, as soon as practicable in each year, to compute the reserve liability on the thirty-first day of December of the preceding year of every company organized under the laws of this state, or authorized to transact business in this state, which has outstanding policies of insurance on the lives of citizens of this state, in accordance with the following rules:

1. The net value on the first day of December of the preceding year of all outstanding policies of life insurance in the company issued prior to the first day of January, 1910, shall be computed according to the terms of said policies on the basis of the American experience table of mortality, and four and one-half per cent interest per annum.

2. The net value on the last day of December, of the preceding year, of all policies of life insurance issued after the thirty-first day of December, 1909, upon the basis of the actuary's or combined experience table of mortality, with four per cent interest per annum; provided, that the policies of any such life insurance company thereafter issued upon the reserve basis of an interest rate lower than four per cent shall be computed upon the basis of the American experience table of mortality with interest at such lower rate per annum; provided, that any company which, on January 1, 1909, was writing policies on the basis of four and a half per cent, may continue on that basis until January 1, 1912, and its policies shall be so valued.

3. In every case in which the actual premium charged for an insurance is less than the net premium for such insurance computed according to its respective tables of mortality and rate of interest aforesaid, the company shall also be charged with the value of annuity, the amount of which shall equal the difference between the premium charged and that required by the rules above stated, and the term of which in years shall equal the number of future annual payments due on the insurance at the date of the valuation. [Id. sec. 15.]

Art. 4499. Shall calculate reinsurance reserve.—On the thirty-first day of December of each and every year, or as soon thereafter as may be practicable, the commissioner of insurance and banking shall have calculated in his office the reinsurance reserve for all unexpired risks

of all insurance companies organized under the laws of this state, or transacting business in this state, transacting any kind of insurance other than life, fire, marine, inland, lightning or tornado insurance, by taking fifty per cent of the gross premiums on all unexpired risks that have less than one year to run and a pro rata of all premiums received on risks that have more than one year to run. [Id. sec. 53.]

Art. 4500. Shall examine companies, have free access to books, etc.—The commissioner of insurance and banking shall, at the end of each two years, or oftener if he deems necessary, in person or by one or more examiners, commissioned in writing, visit each company organized under the laws of this state, and examine its financial condition and its ability to meet its liabilities. He shall have free access to all the books and papers of the company or agents thereof relating to the business and affairs of such company, and shall have power to summon and examine under oath the officers, agents and employes of such company and any other person within the state relative to the affairs of such insurance company. He may revoke or modify any certificate of authority issued by him when any conditions or requirements prescribed by law for granting it no longer exist; provided, that he shall give such company at least ten days notice in writing of his intention to revoke or modify such certificate of authority issued by him, stating specifically the reasons why he intends to revoke or modify such certificate. The expense of every such examination shall be paid by the company so examined, but the commissioner shall not make any charge for services except for traveling or other actual expenses and shall furnish the company with an itemized statement of such expenses. [Id. sec. 41.]

Art. 4501. Powers and duties of commissioner in case of examination.—The commissioner of insurance and banking, for the purpose of examination authorized by law, has power either in person or by one or more examiners by him commissioned in writing:

1. To require free access to all books and papers within this state of any insurance companies, or the agents thereof, doing business within this state.

2. To summon and examine any person within this state, under oath, which he or any examiner may administer, relative to the affairs and conditions of any insurance company.

3. To visit at its principal office, wherever situated, any insurance company doing business in this state, for the purpose of investigating its affairs and conditions, and shall revoke the certificate of authority of any such company in this state refusing to permit such examination. The reasonable expenses of all such examinations shall be paid by the company examined.

4. He may revoke or modify any certificate of authority issued by him when any conditions prescribed by law for granting it no longer exist.

5. He shall also have power to institute suits and prosecutions, either by the attorney general or such other attorney as the attorney general may designate, for any violations of the law of this state relating to insurance; and no action shall be brought or maintained by any person other than the commissioner of insurance and banking for closing up the affairs or to enjoin, restrain or interfere with the prosecution of the business of any such insurance company organized under the laws of this state. [Id. sec. 66.]

Art. 4502. [3054] Transfer of securities by commissioner not valid unless countersigned by treasurer.—No transfer by the commissioner of securities of any kind, in any way held by him in his official capacity, shall be valid unless countersigned by the treasurer of the state. [Acts 1879, p. 224, sec. 13.]

Art. 4503. [3055] Duty of treasurer in regard to such transfers.—It is the duty of the state treasurer:

1. To countersign any such transfer presented to him by the commissioner.
2. To keep a record of all transfers, stating the name of the transferee, unless transferred in blank, and a description of the security.
3. Upon countersigning, to advise by mail the company concerned, the particulars of the transaction.
4. In his annual report to the legislature, to state the transfers and the amount thereof, countersigned by him. [Id.]

Art. 4504. [3056] Free access to records, books, etc., given to commissioner and treasurer.—For the purpose of verifying the correctness of records, the commissioner of insurance shall be entitled to free access to the treasurer's records, required by the preceding article, and the treasurer shall be entitled to free access to the books and other documents of the insurance department relating to securities held by the commissioner. [Id. sec. 14.]

Art. 4505. [3057] Instruments executed by commissioner, and copies of papers in his office made evidence.—Every instrument executed by the commissioner of insurance of this state, or of any other state, in which the substantial provisions of the laws of this state relating to insurance have been, or shall be, enacted, pursuant to authority conferred by law, and authenticated by his seal of office, shall be received as evidence; and copies of papers and records in his office certified by him, and so authenticated, shall be received as evidence with the same effect as the originals. [Id. p. 223, sec. 11.]

Papers deposited in commissioner's office.—An undertaking by defendant was attached to the bond of a foreign insurance company filed with the commissioner of insurance and banking, which undertaking reinsured the surety on such bond, and provided that it was agreed by defendant that the reinsurance should inure to the benefit of the commissioner of insurance and banking, "and to any and every party who may be a beneficiary under said bond," and that an original action against defendant might be maintained "upon said bond and this contract just as if [defendant] had signed said original bond." Held that defendant by such undertaking made itself a party to the original bond filed with the commissioner of insurance and banking as if it had originally signed the bond, so that an authenticated copy of such bond was admissible in evidence in an action against defendant by a policy holder in the insurance company, under this article. *Southwestern Surety Ins. Co. v. Anderson* (Civ. App.) 152 S. W. 816.

Art. 4506. [3058] Commissioner authorized to make inquiries of company, etc.—The commissioner of insurance is authorized to address any inquiries to any insurance company in relation to its business and condition, or any matter connected with its transactions which he may deem necessary for the public good or for a proper discharge of his duties; and it shall be the duty of the company so addressed to promptly answer such inquiries in writing. [Act Feb. 17, 1875, p. 39, sec. 18.]

Art. 4507. [3059] Annual statement to be tabulated and submitted to legislature by commissioner.—It shall be the duty of the commissioner to cause the information contained in the annual statements of companies to be arranged in tabular form and prepare the same in a single document for printing, and submit the same to the legislature as a portion of his regular report to that body. [Id. p. 43, sec. 28.]

Art. 4508. [3060] Insurance company's certificate of authority to transact business to be revoked, when.—Should any insurance company fail or neglect to pay off and discharge any execution, issued upon a valid final judgment against said company, within thirty days after the notice of the issuance thereof, then in that event the certificate of authority of said company to transact business of insurance shall be revoked, canceled and annulled, and said company shall be prohibited from transacting business of insurance in this state until said execution be satisfied. [Acts 1879, ch. 144, p. 159.]

CHAPTER EIGHT

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

Art.		Art.	
4509.	Election of.	4516.	Governor shall lay such report before legislature.
4510.	General duties.	4517.	School officers to make reports to state superintendent.
4511.	Instructions binding.	4518.	Reports to be filed.
4512.	Shall note educational progress.	4519.	Shall pro rate available funds monthly.
4513.	Shall have school laws printed.	4520.	Shall disburse warrants drawn by comptroller.
4514.	Shall furnish plans for school buildings.		
4515.	Shall make report.		

Article 4509. Election of.—There shall be elected, at each general election for state and county officers, a state superintendent of public instruction, who shall hold his office for a term of two years, and until his successor is elected and qualified, and shall receive an annual salary of twenty-five hundred dollars, and may employ as many clerks as may be necessary to perform the duties of his office; provided, that no greater number shall be employed than the legislature has appropriated salaries for. The superintendent shall take the oath of office prescribed by the constitution, and shall perform such duties as may be prescribed by law. Appeal shall always lie from the rulings of the state superintendent to the state board of education. [Acts 1905, p. 263, sec. 24.]

Art. 4510. General duties.—The superintendent of public instruction shall be charged with the administration of the school laws and a general superintendency of the business relating to the public schools of the state. He shall hear and determine all appeals from the rulings of the decisions of subordinate school officers, and all such officers and teachers shall conform to his decisions, unless they are reversed by the state board of education. He shall prescribe suitable forms for reports required of subordinate school officers and teachers, and blanks for their guidance in transacting their official business and conducting public schools, and shall, from time to time, prepare and transmit to them such instructions as he may deem necessary for the faithful and efficient execution of the school laws, and by whatsoever is so communicated to them, shall they be bound to govern themselves in the discharge of their official duties. He shall examine and approve all accounts of whatsoever kind against the school fund that are to be paid by the state treasurer, and, upon such approval, the comptroller shall be authorized to draw his warrant. [Id. sec. 25.]

General supervision.—Where the state superintendent decides a teacher's contract valid in an action by her to compel recognition, the defense that other contracts were made which, if enforced, would create a deficiency, cannot be raised. *Town of Pearsall v. Woolls* (Civ. App.) 50 S. W. 959.

The state superintendent has general supervision over county superintendents. *Watkins v. Huff* (Civ. App.) 63 S. W. 924.

Appellate powers.—A county superintendent held to have lost his right to appeal from a decision of the state superintendent to the state board of education by failing to take his appeal with due diligence. *Watkins v. Huff* (Civ. App.) 63 S. W. 922.

Appeal must first be made to superintendent of public instruction in school matters before resort is had to civil courts. *McCullum v. Adams* (Civ. App.) 110 S. W. 527.

Under this article an appeal to, and a decision by, the superintendent is a condition precedent to a right of any party complaining of the decisions of a subordinate officer to bring the matter in controversy before the courts. *Trustees of Chillicothe Independent School Dist. v. Dudley* (Civ. App.) 142 S. W. 1007.

Art. 4511. Instructions binding.—The state superintendent shall advise and counsel with the school officers of the counties, cities and towns and school districts as to the best methods of conducting the public schools, and shall be empowered to issue instructions and regulations, binding for observance on all officers and teachers in all cases wherein the provisions of the school law may require interpretation in order to carry out the designs expressed therein, also in cases that may arise in which the law has made no provision, and where necessity requires

some rule in order that there may be no hardships to individuals, and no delays or inconvenience in the management of school affairs. [Id. sec. 27.]

Art. 4512. Shall note educational progress.—It shall be the duty of the state superintendent of public instruction to inform himself concerning the educational progress of the different parts of this state and of other states. In so far as he may be able, he shall visit different sections of this state and address teachers' institutes, associations, summer normals and other educational gatherings, to instruct teachers and arouse educational sentiment; and the legislature shall make adequate appropriation for necessary traveling expenses, or those of his representative, when in the service of the state. [Id. sec. 29.]

Art. 4513. Shall have school laws printed.—He shall cause to be printed for general distribution such number of copies of school laws as may at any time be necessary, to be determined by the state board of education. [Id. sec. 28.]

Art. 4514. Shall furnish plans for school buildings.—It shall be the duty of the state superintendent of public instruction to prepare as many as three sets of plans for public school buildings, the said plans being designed to meet the needs of rural schools of various sizes, and, upon request of the trustees of any school district, shall furnish copies of such plans and specifications. [Id. sec. 81. Amended Act 1909, p. 21.]

Art. 4515. Shall make report.—The state superintendent shall, one month before the meeting of each regular session of the legislature and ten days prior to any special session thereof, at which, under the governor's proclamation convening the same, any legislation may be had respecting the public schools, make a full report to the board of education of the condition of the public schools throughout the state. Such report shall give all the information called for by the board of education, and contain such other matters as the state superintendent shall deem important. [Id. sec. 46. Acts 1905, p. 263.]

Art. 4516. Governor shall lay report before legislature.—The governor shall lay such report before the legislature, and two thousand copies of said report shall be printed in pamphlet form for the use of the legislature and for distribution among the various school officers and libraries within the state, and the superintendents of public schools of other states and territories of the United States and Canada, and the bureau of education at Washington city. [Id. sec. 47.]

Art. 4517. School officers to make reports to state superintendent.—The state superintendent shall require of county judges, county, city and town superintendents, county and city treasurers and treasurers of school boards, and other school officers and teachers, such school reports relating to the school fund and other school affairs as he may deem proper for collecting information and advancing the interests of the public schools, and shall furnish the county, city and town superintendents, and other school officers and teachers, for the use of such officers and teachers, the necessary blanks and forms for making such reports and carrying out such instructions as may be required of them; and any county judge, or county, city or town superintendent, assessor, treasurer or teacher, who shall wilfully fail to make such report within twenty days after the same shall have been required by the state superintendent to be filed, shall be deemed guilty of a misdemeanor, and shall on conviction be fined as provided in the Penal Code; and said fine shall be paid, when collected, to the available school fund. [Id. sec. 48.]

Art. 4518. Reports to be filed.—The state superintendent shall file all reports, documents and papers transmitted to him and the state board of education by county or city school officers, and from all other sources,

pertaining to public schools, and keep a complete index of the same. [Id. sec. 26.]

Art. 4519. Shall pro rate available funds monthly.—On the first day of each month, the state superintendent of public instruction shall pro rate to the several counties, cities and towns and school districts constituting separate school organizations, according to the scholastic population of each, the available school money collected during the preceding month and then on hand as shown by the certificate issued that day to him by the comptroller, and shall thereupon certify to the comptroller the total sum pro rated to each; and such certificate shall be authority for the comptroller to draw his warrant in favor of the treasurer of each such county, city or town or school district for the amount stated in such certificate. [Acts 1909, 2 S. S., p. 432, sec. 5.]

Cited, Ft. Worth & D. C. Ry. Co. v. Mapes (Civ. App.) 156 S. W. 528.

Art. 4520. Shall disburse warrants drawn by comptroller.—He shall receive from the state treasurer all warrants drawn by the comptroller in favor of the treasurer of the available school fund of each county, city or town, and each school district having control of its public school, and shall transmit such warrants to the respective treasurers in favor of whom they are drawn. [Id. sec. 5.]

TITLE 66

HEALTH—PUBLIC

Chap.

1. Texas State Board of Health.
2. Sanitary Code.
3. Pollution of Waters.
4. Charbon Districts.

Chap.

5. Special Quarantine Regulations.
6. Pure Food Regulations.
7. Embalming Board.

CHAPTER ONE

TEXAS STATE BOARD OF HEALTH

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| <p>Art.
4521. Texas state board of health; how constituted.</p> <p>4522. Salaries and expenses of president and members.</p> <p>4523. Time and place of meeting of board.</p> <p>4524. Officers and assistants appointed; salaries and duties.</p> <p>4525. Members of board to qualify; commissions to issue.</p> <p>4526. Bond of the president.</p> <p>4527. President shall have charge of state quarantine.</p> <p>4528. General powers and duties of the state board of health.</p> <p>4528a. Dissemination of information for prevention of communicable disease; bulletins; free lectures and exhibits; employment of assistants; expenses; encouragement of local societies.</p> <p>4528b. Free transportation on railroads.</p> <p>4528c. Expenditures by counties and cities.</p> <p>4528d. State health officer may accept donations.</p> <p>4528e. Appropriation; expenditures subject to approval of governor.</p> <p>4529-4533. [Superseded.]</p> <p>4534. [Repealed.]</p> <p>4535. Perform duties of state health officers.</p> <p>4536. Members of board may enter, examine and inspect, etc.</p> <p>4537. Investigations by board; powers of and duties of court.</p> | <p>Art.
4538. Office of county physician abolished; office of county health officer substituted.</p> <p>4539. Qualification, appointment and compensation of county health officer.</p> <p>4540. Office of city health officer substituted for city physician.</p> <p>4541. City health officer.</p> <p>4542. City health officers to be appointed by board, when.</p> <p>4543. Duties of county health officer.</p> <p>4544. County health officer under direction of the board; proceedings against for failure in duty.</p> <p>4545. Duties of health officers as to indigent consumptives.</p> <p>4546. County health officers under direction of the board; proceedings against for failure in duty.</p> <p>4547. No cost or appeal bond required of board.</p> <p>4548. Duties of health officer enumerated.</p> <p>4549. City health officer may be removed, when and how.</p> <p>4550. Board to file charges against city health officer; proceedings.</p> <p>4551. Compensation of city health officer.</p> <p>4552. Annual conference of county and city health officers.</p> <p>4553. Legal proceedings in name of board; duty of attorney general in regard to.</p> |
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[In addition to the notes under the particular articles, see also notes on subject of police power.]

Article 4521. Texas state board of health; how constituted.—The Texas state board of health shall consist of seven members, who shall be legally qualified practicing physicians, who shall have had at least ten years experience in actual practice of medicine within the state of Texas, of good professional standing, who shall be graduates of reputable medical colleges, to be appointed biennially by the governor on or before the tenth day of March following his inauguration. One member of said board, who shall be appointed by the governor and confirmed by the senate, shall be designated by the governor as state health officer, and who shall be president and executive officer of the board. The members of said board shall hold their office for a term of two years, and until their successors shall be appointed and qualified, unless sooner removed for cause. [Acts 1909, p. 340, sec. 1.]

Art. 4522. Salaries and expenses of president and members.—The president of said board shall receive annually a salary of two thousand five hundred dollars. The other six members of said board shall receive no salary, but each of said members shall be allowed for each and every

day he shall be in attendance upon the meetings of the board the sum of ten dollars, including the time spent in travel, and three cents per mile going and coming for actual expenses, to be paid on their vouchers when approved by the president of the board and the governor, by warrant drawn by the comptroller against the general appropriation provided by law for that purpose; provided, no member shall receive more than five hundred dollars annually. [Id. sec. 2.]

Art. 4523. Time and place of meeting of board.—A majority of the members of the board shall constitute a quorum for the transaction of business. The board shall meet at Austin quarterly on a day to be fixed by the board, or hear and determine all appeals from the rulings and decisions of subordinate as often and at such time and places as such meetings shall be deemed necessary for the board. Timely notice of such meetings shall be given to each member of the board by the president thereof. The board shall be convened on call of the president, or on demand of three members of said board made in writing to the president. The office of said board shall be in the capitol, at Austin; and the said board shall be furnished with all necessary equipment and supplies, including laboratory supplies, books, stationery, blanks, furniture, etc., as other offices of the state are furnished, including suitable rooms for its offices and laboratories, necessary for carrying on the work of the board, and to be provided in the capitol building, or other suitable buildings, to be designated by the governor. [Id. sec. 3.]

Art. 4524. Officers and assistants appointed; salaries and duties.—The president of the board shall appoint, with the approval of the governor, the following officers and assistants:

1. An assistant state health officer, who shall be a legally qualified practitioner of medicine under the laws of the state of Texas, and who shall have had five years experience in the practice of medicine in this state, whose duty it shall be to assist the president of the board in a general supervision of the affairs of his office and in the enforcement of quarantine and sanitation throughout the state. Said assistant state health officer shall receive an annual salary of two thousand and four hundred dollars.

2. A registrar of vital statistics, whose duty it shall be to correct, record, compile and tabulate the vital and mortuary statistics of the state as provided by law, and shall also be secretary of the board, and perform such other duties as may be directed by the president of the board, and he shall receive an annual salary of one thousand and eight hundred dollars.

3. A chemist and bacteriologist, who shall be learned in chemistry, pathology, and bacteriology and he shall receive a salary of one thousand and eight hundred dollars per annum. He shall make examinations and analyses of such things and matters as may be submitted to him by the board, or the state health officer, and shall report results of such examinations in such manner and form as may be directed by the board.

4. One stenographer and bookkeeper combined, at a salary of one thousand and two hundred dollars per annum.

5. One inspector, at a salary of one thousand and eight hundred dollars per annum. It shall be the duty of such inspector to conduct such inspection as required by the board and the president of the board, and to assist in the enforcement of all sanitary and quarantine laws of the state, and to perform such other necessary services as may be prescribed by the president of the board. [Id. sec. 4.]

Art. 4525. Members of board to qualify; commissions to issue.—Members of the board shall qualify by taking the constitutional oath of office before an officer authorized to administer oaths within this state. Upon presentation of oaths and their certificates of appointment signed by the governor, the secretary of state shall issue commissions to them

under the seal of the state, which shall be evidence and be authority to act as such members of the board. [Id. sec. 5.]

Art. 4526. Bond of the president.—The president of the board shall execute bond in the sum of ten thousand dollars, with two or more good and sufficient sureties, payable to the governor and his successors in office, conditioned for faithful performance of his official duties, to be approved by the governor, and filed in the office of the secretary of state. [Id. sec. 6.]

Art. 4527. President shall have charge of state quarantine.—The president of the board shall, besides his other duties, have charge of and superintend the administration of all matters pertaining to state quarantine. [Id. sec. 7.]

Art. 4528. General powers and duties of the state board of health.—The state board of health shall have general supervision and control of all matters pertaining to the health of citizens of this state, as provided herein. It shall make a study of the causes and prevention of infection of contagious diseases affecting the lives of citizens within this state and except as otherwise provided in this Act shall have direction and control of all matters of quarantine regulations and enforcement and shall have full power and authority to prevent the entrance of such diseases from points without the state and shall have direction and control over all sanitary and quarantine measures for dealing with all diseases within the state and to suppress same and prevent their spread. [Acts 1913, p. 147, sec. 1, amending Acts 1909, p. 340, sec. 9, thus superseding Art. 4528, Rev. St. 1911.]

Art. 4528a. Dissemination of information for prevention of communicable disease; bulletins; free lectures and exhibits; employment of assistants; expenses; encouragement of local societies.—The state health department shall disseminate information concerning the cause, nature, extent and prevention of communicable disease and shall arrange for free lectures and health exhibits, and shall cause to be printed and distributed free of cost to the people, bulletins, pamphlets, circulars, leaflets, cards, and other printed matter, printed in English, Spanish and German, containing useful information for the protection of the individual and the public health. The state health department shall send a public health exhibit in a railway car or cars over the lines of railroads in the state of Texas and shall cause the exhibit to be displayed in the cities and towns on railway lines. With the display of the exhibit there shall be given free lectures and talks to the people, illustrated, where possible, with stereopticon and moving pictures, and printed matter containing useful information pertaining to the protection of health and prevention of disease shall be distributed. The details of the work shall be planned by the state health department and the state health officer may employ assistants to carry on the work, for such periods of time as may be necessary and shall fix their salaries, provided that the salary of the director of the work shall not exceed \$200.00 a month and the salaries of traveling representatives shall not exceed \$125.00 a month and the salaries of other employees shall not exceed \$100.00 a month. Necessary expenses of such employees shall be paid in the same manner that expenses of other employees of the state are paid. The state health officer may designate any employee as a health officer, and during their term of service, employees so designated shall have the power and authority of a health officer.

The state health department shall encourage the organization of county and city societies and committees for the prevention of disease and protection of the public health and may co-operate with any corporation organized under the laws of Texas for benevolent and charitable purposes, in the movement to disseminate information concerning the

cause, nature, extent and prevention of communicable disease. [Acts 1913, S. S., p. 191, sec. 1.]

Art. 4528b. Free transportation on railroads.—It shall be lawful for any railroad company to furnish free of charge a car or cars for the display of the public health exhibit and to furnish free transportation to the persons actually engaged in the work in connection with the display of the public health exhibit. [Id. sec. 2.]

Art. 4528c. Expenditures by counties and cities.—It shall be lawful for the commissioners' court of any county or of the city council of any city or the city commissioners of any city or other governing body of any city or town to contribute to the local expense of the display of the public health exhibit. [Id. sec. 3.]

Art. 4528d. State health officer may accept donations.—It shall be lawful for the state health officer to accept donations and contributions to the expense of the display of the public health exhibit. [Id. sec. 4.]

Art. 4528e. Appropriation; expenditures subject to approval of governor.—There is hereby appropriated, to be disbursed at the discretion of the state health officer, for the purposes mentioned in section 1 of this Act, in the same manner as other expenses of his office, the sum of \$2000.00 for the cost of preparation of the exhibit, \$3000.00 for the expenses of the work until September 1st, 1913, and \$10,000 for the expenses of the work from September 1st, 1913, to September 1st, 1914, and \$10,000 for the expenses of the work from September 1st, 1914 to September 1st, 1915. Provided no obligation shall be incurred nor money expended under the provisions of this Act unless first approved by the governor. [Id. sec. 5.]

Arts. 4529–4533.—Superseded. Acts 1911, p. 173, amends section 10 of chapter 30 of the Acts of the 31st Legislature. Section 10 is embraced in Arts. 4529–4533, Rev. St. 1911. The Revised Statutes mistakenly ascribes Articles 4530, 4531, and 4532 to section 7 of the act referred to. The result is that Articles 4529–4533 are superseded. See Art. 4553a.

Cited; *Ex parte Wade* (Cr. App.) 146 S. W. 179.

Art. 4534.—Repealed. See Acts 1911, p. 173 [Art. 4553a.]

Art. 4535. Perform duties of state health officer.—It shall be the duty of said Texas state board of health to perform all functions and duties now imposed by existing laws upon the state health officer; and whenever state health officer is mentioned in the present laws, the Texas state board of health shall be deemed to succeed in purpose and effect, whenever such statutes are not in conflict with this chapter. [Acts 1909, p. 340, sec. 12.]

Art. 4536. Members of board may enter, examine and inspect, etc.—The members of the board of health and every person duly authorized by them, upon presentation of proper authority in writing, are hereby empowered, whenever they may deem it necessary in pursuance of their duties, to enter into, examine, investigate, inspect and view all ground, public buildings, factories, slaughter houses, packing houses, abattoirs, dairies, bakeries, manufactories, hotels, restaurants and all other public places and public buildings where they may deem it proper to enter for the discovery and suppression of disease and for the enforcement of the rules, regulations and ordinances of the sanitary code for Texas after it has been adopted, promulgated and published by the board for the enforcement of any and all health laws, sanitary laws or quarantine regulations of this state. [Id. sec. 14.]

Art. 4537. Investigations by board; powers and duties of court.—The members of said board of health and its officers are severally authorized and empowered to administer oaths and to summon witnesses and compel their attendance in all matters proper for the said board to

investigate, such as the determination of nuisances, investigation of public water supplies, investigation of any sanitary conditions within the state, investigation of the existence of infection, or the investigation of any and all matters requiring the exercise of the discretionary powers invested in said board and its officers and members, and in the general scope of its authority invested by this chapter. The several district judges and courts are hereby charged with the duty of aiding said board in its investigations and in compelling due observance of the provisions of this chapter; and, in the event any witness summoned by said board or any of the officers or members of the same shall prove disobedient or disrespectful to the lawful authority of such board, officer or member, such person shall be punished by the district court of the county in which such witness is summoned to appear as for contempt of said district court. [Id. sec. 15.]

Art. 4538. Office of county physician abolished; office of county health officer substituted.—The office of county physician is abolished within the several organized counties of this state, and instead the office of county health officer is created; and such office of county health officer shall be filled by a competent physician legally qualified to practice under the laws of the state of Texas and of reputable professional standing. [Id. secs. 17–18.]

Art. 4539. Qualification, appointment and compensation of county health officer.—It is hereby made the duty of the commissioners' court by a majority vote in each organized county to appoint a proper person for the office of county health officer for his county, who shall hold office for two years and until his successor shall be appointed and qualify, unless sooner removed for cause. Said county health officer shall take and subscribe to the constitutional oath of office, and shall file a copy of such oath of office and a copy of his appointment with the Texas state board of health; and, until such copies are so filed, said officer shall not be deemed legally qualified. Compensation of said county health officer shall be fixed by the commissioners' court; provided, that no compensation or salary shall be allowed, except for services actually rendered. [Id. sec. 19.]

Art. 4540. Office of city health officer substituted for city physician.—The office of city physician for the several incorporated cities and towns within this state is abolished, and instead created the office of city health officer; and such office of city health officer shall be filled by a competent physician, legally qualified to practice medicine within this state, of reputable professional standing. [Id. secs. 20, 21.]

Art. 4541. City health officer.—The city council or the city commissioners, as the case may be, of each incorporated city and town within this state shall elect a qualified person for the office of city health officer by a majority of the votes of the city council or city commission, as the case may be, except in cities which may be operated under a charter providing for a different method of selecting city physicians, in which event the office of city health officer shall be filled as is now filled by the city physician, but in no instance shall the office of city health officer be abolished. The city health officer, after appointment, shall take and subscribe to the constitutional oath of office, and shall file a copy of such oath and a copy of his appointment with the Texas state board of health, and shall not be deemed to be legally qualified until said copies shall have been so filed. [Id. sec. 22.]

Status of officer.—The health officers of a city are officers of the state, their functions are governmental and are conferred in the interest of the public at large. *White v. City of San Antonio*, 94 T. 313, 60 S. W. 427.

Art. 4542. City health officers to be appointed by board, when.—In case the authorities hereinbefore mentioned shall fail, neglect or refuse to fill the office of county or city health officer as in this chapter pro-

vided, then the Texas state board of health shall have the power to appoint such county or city health officer to hold office until the local authorities shall fill such office, first having given ten days notice in writing to such authority of the desire for such appointment. [Id. sec. 23.]

Art. 4543. Duties of county health officer.—Each county health officer shall perform such duties as have heretofore been required of county physicians, with relation to caring for the prisoners in county jails and in caring for the inmates of county poor farms, hospitals, discharging duties of county quarantine and other such duties as may be lawfully required of the county physician by the commissioners' court and other officers of the county, and shall discharge any additional duties which it may be proper for county authorities under the present laws to require of county physicians; and, in addition thereto, he shall discharge such duties as shall be prescribed for him under the rules, regulations and requirements of the Texas state board of health, or the president thereof, and is empowered and authorized to establish, maintain and enforce quarantine within his county. He shall also be required to aid and assist the state board of health in all matters of local quarantine, inspection, disease prevention and suppression, vital and mortuary statistics and general sanitation within his county; and he shall at all times report to the state board of health, in such manner and form as it shall prescribe, the presence of all contagious, infectious and dangerous epidemic diseases within his jurisdiction; and he shall make such other and further reports in such manner and form and at such times as said Texas state board of health shall direct, touching such matters as may be proper for said state board of health to direct; and he shall aid said state board of health at all times in the enforcement of its proper rules, regulations, requirements and ordinances, and in the enforcement of all sanitary laws and quarantine regulations within his jurisdiction. [Id. sec. 24.]

Art. 4544. County health officer under direction of board; proceedings against for failure in duty.—In all matters with which the state board of health may be clothed with authority, said county health officer shall at all times be under its direction; and any failure or refusal on the part of said county health officer to obey the authority and reasonable commands of said state board of health shall constitute malfeasance in office, and shall subject said county health officer to removal from office at the relation of the state board of health; and pending charges for removal said county health officer shall not receive any salary or compensation; which cause shall be tried in the district court of the county in which such county health officer resides. [Id. sec. 25.]

Art. 4545. Duty of health officers as to indigent consumptives.—Hereafter, when any indigent person suffering from tuberculosis is sojourning in any other county than his residence makes application for financial relief to any county health officer or commissioners' court of any county in this state, or the mayor or health officer of any city in this state, before any relief is granted, he shall make an affidavit that he is indigent and unable to provide for himself. When such affidavit is made, it shall be the duty of the county health officer, mayor, city health officer or county judge to forthwith notify the state health officer of the case, giving the name of the patient and the place of his residence. If such patient is a bona fide citizen of any county within the state of Texas, it shall be the duty of the state health officer, and he shall have the power, to purchase a ticket for said patient and furnish him with sufficient additional means to purchase food en route to his former home, and return such patient thereto. [Id. sec. 1.]

Art. 4546. County health officers under direction of board; proceedings against for failure of duty.—In the event any county health officer

shall fail or refuse to properly discharge the duties of his office, as prescribed by this chapter, the state board of health shall file charges with the commissioners' court for the proper county, specifying wherein such officer has failed in the discharge of his duties; and at the same time the state board of health shall file a protest with the county clerk and the county treasurer against the payment of further fees, salary or allowance to said county health officer; and, pending such protest and charges, it shall not be lawful for such county health officer to be paid or to receive any subsequently earned salary, fees or allowances on account of his office, unless such charges are shown to be untrue and are not sustained. After five days notice in writing to said county health officer, the commissioners' court shall hear the charges, at which hearing the county judge shall preside, and the state board of health may be represented. Either party, the state board or the county health officer, may appeal from the decision of said court to the district court of the county; and, pending such appeal, no salary, fees or allowance shall be paid to said county health officer for any subsequent earned salary; and, in the event the charges shall be sustained, the county health officer shall be charged to pay all costs of court, and shall forfeit all salary, fees and allowances earned subsequent to the date of filing the charges and protests. [Id. sec. 26.]

Art. 4547. No cost or appeal bond required of board.—No bond for costs, or bond on appeal, or writ of error shall be required of the state board of health or state officials in any actions brought or maintained under this chapter. [Id. sec. 27.]

Art. 4548. Duties of city health officer enumerated.—Each city health officer shall perform such duties as may now or hereafter be required by the city councils and ordinances of city physicians, and such duties as may be required of him by general law and city ordinances with regard to the general health and sanitation of towns and cities, and perform such other duties as shall be legally required of him by the mayor, councils, commissioners or the ordinances of his city or town. He shall, in addition thereto, discharge and perform such duties as may be prescribed for him under the directions, rules, regulations and requirements of the state board of health and the president thereof. He shall be required to aid and assist the state board of health in all matters of quarantine, vital and mortuary statistics, inspection, disease prevention and suppression and sanitation within his jurisdiction. He shall at all times report to the state board of health, in such manner and form as shall be prescribed by said board of health, the presence of all contagious, infectious and dangerous epidemic diseases within his jurisdiction, and shall make such other and further reports in such manner and form and at such times as said state board of health shall direct, touching all such matters as may be proper for the state board of health to direct, and he shall aid said state board of health at all times in the enforcement of proper rules, regulations and requirements in the enforcement of all sanitary laws, quarantine regulations and vital statistics collection, and perform such other duties as said state board of health shall direct. [Id. sec. 28.]

Art. 4549. City health officer may be removed, when and how.—In all matters in which the state board of health may be clothed with authority, said city health officer shall at all times be governed by the authority of said board of health, and failure or refusal on the part of said city health officer to properly perform the duties of his office as prescribed by this chapter shall constitute malfeasance in office, and shall subject said city health officer to removal from office at the relation of the state board of health, which cause shall be tried in the district court of the county in which such city health officer resides. [Id. sec. 28.]

Art. 4550. Board to file charges against city health officer.—In the event of a failure or refusal of said city health officer to properly discharge his duties of his office, the state board of health shall file charges against said city health officer with the council or city commission of the proper town or city, which shall specify in what particulars said city health officer has failed in respect to the discharge of his duties, and shall at the same time file a protest with the city secretary and city treasurer against the payment to said city health officer of further fees, salary or allowance; and, pending such charges and protest, no further salary, fees or allowance shall be paid to said city health officer, unless such charges are shown to be untrue and not sustained. After five days notice in writing to said city health officer, the charges shall be heard before the mayor and council, or the mayor and commission, of the town or city in which said city health officer shall reside, at which hearing the state board of health may be represented, and either the city health officer or the state board of health shall have the right of appeal to the county court of the county in which the city or town is situated; and, if said charges be sustained, said city health officer shall be adjudged to pay all costs of court, and shall forfeit all salary, fees and allowances accrued subsequent to the date of filing of the charges and protest originally and which may be due him on account of his office. [Id. sec. 28.]

Art. 4551. Compensation of city health officer.—The compensation of city health officer shall be fixed by the mayor and council, or the mayor and commissioners, of the respective towns and cities within this state. [Id. sec. 29.]

Art. 4552. Annual conference of county and city health officers.—There shall be an annual conference of county health officers and city health officers of this state at such time and place as the state board of health shall designate, at which conference the president or some member of the state board of health shall preside. The several counties, towns and cities may provide for and pay the necessary expense of its county health officer or city health officer for attendance upon said conference. [Id. sec. 30.]

Art. 4553. Legal proceedings in name of board; duty of attorney general in regard to.—In all matters wherein the board of health shall invoke the assistance of the courts, the action shall run in the name of the state of Texas; and the attorney general shall assign a special assistant to attend to all legal matters of the board; and, upon demand of the board, it shall be the duty of the attorney general to promptly furnish the necessary assistance to the board to attend to all its legal requirements. [Id. sec. 31.]

POLICE POWER

Health regulations.—Things susceptible to use to the injury of health can be regulated under the police power. *Hernandez v. State* (Civ. App.) 135 S. W. 170.

CHAPTER TWO

SANITARY CODE

Art. 4553a. Sanitary Code.

QUARANTINE AND DISINFECTION

- Rule 1. Physicians shall report contagious and pestilential diseases and deaths from same.
2. Local health authority means city or county health officer or local board of health.
 3. "Contagious diseases" shall include asiatic cholera, etc., and

- be reported to the president of the state board of health.
4. City and county health officers to keep record of contagious diseases.
 5. Rules and regulations as to quarantine and disinfection to be observed by health authorities, etc.
 6. Disinfection shall be done according to direction of state board of health.

Art. 4553a. Sanitary Code—Cont'd.

- Rule 7. Health authority shall placard all houses where contagious diseases exist.
8. Persons forbidden going to or leaving quarantined premises.
 9. Persons affected or exposed to contagious diseases shall obey health authority.
 10. Persons having certain diseases shall not be allowed on thoroughfares.
 11. Placard shall not be destroyed or removed.
 12. Quarantinable pestilential diseases; absolutely quarantined.
 13. Quarantinable dangerous contagious diseases; modified quarantine.
 14. Non-quarantinable contagious diseases.
 15. Quarantinable for school purposes; barred from school twenty-one days.
 16. Minor diseases to be excluded during illness.
 17. Above rules not to abrogate other measures.
 18. Health authorities to investigate reported cases.
 19. Health authority shall see that quarantine and disinfection is carried out.
 20. Premises occupied by persons with contagious diseases to be disinfected before reoccupied.
 21. On failure to disinfect premises they shall be placarded.
 22. Nurses and midwives shall report redness of eyelids or inflammation to health authority.
 23. Householders or heads of families to report contagious diseases.
 24. Persons suffering from reportable diseases shall not work where food products are produced.
 25. Health authority shall send attending physician printed matter.
 26. Persons with trachoma or contagious catarrhal conjunctivitis to be excluded from schools.
 27. Schools temporarily closed and disinfected.
 28. School may be reopened after disinfection and vaccination.
 29. Health authority to notify superintendents of pupils from infected houses.
 30. Children with contagious diseases shall not attend school.
 31. Health authorities to assume control of quarantine in their jurisdiction.
 32. These rules not to prevent local rules of quarantine if no conflict.
 33. Health authorities may pass through quarantine lines.

VITAL STATISTICS

34. Physicians, surgeons, midwives and parents shall report births.
35. Undertakers shall report deaths.
36. City and county "registrar."
37. In incorporated cities and towns, city health officer to act as city registrar, etc.
38. Form of certificate.
39. Undertaker shall fill out certificate and obtain particulars.

- Rule 40. Physicians shall promptly give medical particulars to undertaker.
41. Physician last in attendance shall report rural deaths.
 42. Coroner shall give information, also head of house.
 43. Superintendents of hospitals to give information.
 44. Undertakers shall report physicians for neglect of giving information.
 45. Stillborn or those dead births of seven months gestation to be reported.
 46. Clerks shall record all statistical data.
 47. Sextons shall keep record.
 48. State registrar shall supply blanks, etc.
 49. City and county registrars shall furnish blanks to those required to report.
 50. City and county registrars examine all certificates of birth and death.

DEPOTS, RAILWAY COACHES AND SLEEPING CARS

51. Contagious diseases barred from public vehicles.
52. Depots, etc., to be ventilated and heated.
53. Cuspidors to be provided, disinfected, etc.
54. Dry cleaning prohibited.
55. Coaches to be cleaned after each trip; how cleaned.
56. Railway stations to be cleaned.
57. Dining cars, etc., to be thoroughly cleaned.
58. Interurban and street cars to be washed, disinfected, etc.
59. Sleeping cars to be cleaned; disinfected.
60. Record of disinfection to be kept and signed.
61. Water coolers to be provided; manner of cleaning.
62. Expecterating on floors prohibited.
63. Expecterating in basins prohibited.
64. Separate compartments for negro porters.
65. Negro porters prohibited from sleeping in.
66. Certain floor covering prohibited.
67. Water closets to be provided.
68. Railway premises shall be drained.
69. All cisterns, etc., shall be screened.

GOVERNING THE PREPARATION OF TRANSPORTATION OF DEAD BODIES

70. Bodies dead of pestilential diseases.
71. Bodies dead of dangerous contagious diseases.
72. Bodies dead of non-quarantinable contagious diseases.
73. Bodies dead of other diseases.
74. Persons accompanying bodies dead of contagious diseases.
75. Bodies not shipped by express.
76. Bodies shipped by express.
77. Disinterrad bodies treated as contagious.
78. Transfer of dead bodies in transit.
79. Certificate furnished by undertaker.

Article 4553a. Sanitary code.—The following rules are hereby enacted as the "Sanitary Code for Texas," adopted for the promotion and protection of the public health and for the general amelioration of the sanitary and hygienic condition within this state, for the suppression and prevention of infectious and contagious diseases, and for the proper enforcement of quarantine, isolation and control of such diseases, to wit:

QUARANTINE AND DISINFECTION

Rule 1. Physicians shall report contagious and pestilential diseases and deaths from same.—Every physician in the state of Texas shall report in writing or by an acknowledged telephone communication to the local health authority, immediately after his or her first professional visit, each patient he or she shall have or suspect of suffering with any contagious disease, and if such disease is of a pestilential nature, he shall notify the president of the state board of health at Austin by telegraph, or telephone at state expense, and he or she shall report to the said health authority every death from such disease immediately after it shall have occurred. The attending physician is authorized and it is made his duty to place the patient under restrictions of character described hereinbelow in the case of each and every respective disease.

Rule 2. Local health authority means city or county health officer or local board of health.—For the purpose of these regulations, the phrase "local health authority" shall be held to designate the city or county health officer, or local board of health, within their respective jurisdictions.

Rule 3. "Contagious diseases" shall include Asiatic cholera, etc., and be reported to the president of the state board of health.—The phrase "contagious disease" as used in these regulations shall be held to include the following diseases, whether contagious or infectious; and as such shall be reported to all local health authorities and by said authorities reported in turn to the president of the state board of health: Asiatic cholera, bubonic plague, typhus fever, yellow fever, leprosy, smallpox, scarlet fever (scarlatina), diphtheria (membranous croup), epidemic cerebro-spinal meningitis, dengue, typhoid fever, epidemic dysentery, trachoma, tuberculosis and anthrax.

Rule 4. City and county health officers to keep record of contagious diseases.—City and county health authorities shall keep a careful and accurate record of all cases of contagious diseases as reported to them, with the date, name, age, sex, race, location and such other necessary data as may be prescribed by the state board of health. And they shall also make a monthly report of all contagious diseases, of which they may be cognizant, to the president of the state board of health, before the fifth of the following month, upon blank forms provided by the state board of health. The reports on tuberculosis are to be privately kept and are to be considered in the light of a confidential communication, not for the purpose of isolation, but with the object of education in sanitary precautions, and to supply literature of the state board of health.

Rule 5. Rules and regulations as to quarantine and disinfection to be observed by health authorities, etc.—The following rules of instruction for the regulation of quarantine, isolation and disinfection in the several contagious diseases, hereinbefore mentioned, are to be observed by all boards of health, health officers, physicians, school superintendents and trustees, and others. All health authorities of counties, cities, and towns in this state are hereby directed and authorized to establish local quarantine, hold in detention, maintain isolation and practice disinfection as hereinafter provided for, of all (such infected) per-

sons, vehicles or premises which are infected or are suspected of being infected with any of the above named diseases whenever found.

(a) Absolute quarantine includes, first, absolute prohibition of entrance to or exit from the building or conveyance except by officers or attendants authorized by the health authorities, and the placing of guards if necessary to enforce this prohibition; second, the posting of a warning placard stating "contagious disease," in a conspicuous place or places on the outside of the building or conveyance; third, the prohibition of the passing out of any object or material from the quarantined house or conveyance; fourth, provision for conveying the necessities of life under careful restrictions to those in quarantine.

(b) Modified quarantine includes, first, prohibition of entrance and exit, and in absolute quarantine except against certain members of the family authorized by the health authorities to pass in and out under certain definite restrictions; second, the placing of a placard as before; third, isolation of patient and attendant; fourth, prohibition of the carrying out of any object or material unless the same shall have been thoroughly disinfected.

(c) Absolute isolation includes, first, the confinement of the patient and attendants to one apartment or suite of apartments, to which none but authorized officers or attendants shall have admission; second, screening of room and entire house if necessary with not less than 16-mesh wire gauze; third, the prohibition of passing out of the sick room of any object or material until the same has been thoroughly disinfected; fourth, protection of the air of the house by hanging a sheet, kept constantly moist with a disinfectant solution, over the doorway of the patient's room or rooms and reaching from the top of the floor; fifth, if in the opinion of the local health authority the patient can not be treated, with reasonable safety to the public, at home, the removal of the patient and exposures to a contagious disease hospital or pest house.

(d) Modified isolation includes the confinement of the patient and attendants to one room or suite of rooms, to which none but authorized officers or attendants shall have admission, but allowing the attendants to pass out of the room after disinfection of person and complete change of clothing; second, screening as above mentioned; third, the prohibition of passing any object or material out of the sick room until it has been disinfected; fourth, protection of the doorway as before.

(e) Special isolation includes, first, prohibition of patient from attending any place of public assemblage; second, the providing of separate eating utensils for the patient; third, prohibition of sleeping with others or using the same towels or napkins.

(f) By complete disinfection is meant disinfection during illness, under direction of attending physician, of patient's body, of all excretions or discharges of patient and of all articles of clothing and utensils used by patient, and after recovery, death or removal, the disinfection of walls, woodwork, furniture, bedding, etc.

(g) By partial disinfection is meant disinfection of discharges or excretions of patients and their clothing and the room or rooms occupied by the patient during illness.

Rule 6. Disinfection shall be done according to direction of state board of health.—All disinfection prescribed in these regulations shall be a part of the control of the disease, and shall be done according to the direction of the Texas state board of health in its circular on disinfection.

Rule 7. Health authority shall placard all houses where contagious diseases exist.—Upon notice that smallpox, diphtheria, scarlet fever, or other quarantinable disease exists within his jurisdiction, it shall be the duty of the local health authority to have the house in which such disease prevails placarded by placing a yellow flag or card not less

than eight inches wide and twelve inches long with the words "contagious disease" and the quarantine regulations printed thereon in a conspicuous place on said house.

Rule 8. Persons forbidden going to or leaving quarantined premises.—After the house is flagged, or placarded, all persons, except the attending physician or health officer, are forbidden from going in or leaving such premises, without the permission of the local health authority, and the carrying off, or causing to be carried off, of any material whereby such disease may be conveyed, is prohibited until after the disease has abated and the premises, dwelling and clothing have been disinfected and cleaned as the local health authority may direct.

Rule 9. Person affected or exposed to contagious diseases shall obey health authority.—It shall be the duty of all persons infected with any contagious disease, or who, from exposure to contagion from such disease, may be liable to endanger others who may come in contact with them to strictly observe such instructions as may be given them by any health authority of the state, in order to prevent the spread of such contagious disease, and it shall be lawful for such health authorities to command any person thus infected or exposed to infection to remain within designated premises for such length of time as such authority may deem necessary.

Rule 10. Persons having certain diseases shall not be allowed on thoroughfares.—All persons having any quarantinable disease are prohibited from riding on any public vehicle or conveyance, and from being upon public thoroughfares or in public assemblages.

Rule 11. Placard shall not be destroyed or removed.—No person, or persons, shall alter, deface, remove, destroy or tear down any card posted by a local health authority. The occupant or person having possession or control of a building upon which a quarantine notice has been placed shall within twenty-four (24) hours after the destruction or removal of such notice by other than the proper health authority, notify the local health authority of such destruction or removal.

Rule 12. Quarantinable pestilential diseases; absolutely quarantined.—In the management and control of the following pestilential diseases: cholera, plague, typhus fever and yellow fever, the house must be placarded, premises placed in absolute quarantine, patient in absolute isolation and a complete disinfection done upon death or recovery taking place.

Rule 13. Quarantinable dangerous contagious diseases; modified quarantine.—In the management and control of leprosy, smallpox, scarlet fever (scarlatina), diphtheria (membranous croup), and dengue, it is required that the house be placarded, premises placed in modified quarantine, patient in modified isolation, and complete disinfection done upon death or recovery.

Rule 14. Non-quarantinable contagious diseases.—The management and control of typhoid fever, cerebro-spinal meningitis (epidemic), epidemic dysentery, trachoma (acute catarrhal conjunctivitis), tuberculosis and anthrax require special isolation and partial disinfection.

Rule 15. Quarantinable for school purposes; barred from school twenty-one days.—Persons suffering from measles, whooping cough, mumps, German measles (rotheln) and chickenpox, shall be required to be barred from school for twenty-one days (at the discretion of the local health officer) from date of onset of the disease, with such additional time as may be deemed necessary, and may be readmitted on a certificated [certificate] by him attesting to their recovery and non-infectiousness.

Rule 16. Minor diseases to be excluded during illness.—Those actually suffering from tonsillitis, scabies (itch), impetigo contagiosa,

favus, shall be excluded from school during such illness and be readmitted on the certificate of the attending physician attesting to their recovery and non-infectiousness.

Rule 17. **Above rules not to abrogate other measures.**—Provided, that the above requirements shall in no sense be construed as abrogating any additional precautionary measures enforced by local health authorities, but it is expected that additional restrictive measures will be taken, at the discretion of the local health authorities when the necessity arises, more especially in the more densely populated cities and towns, or when violations of quarantine occur.

Rule 18. **Health authorities to investigate reported cases.**—Whenever a local health authority is informed or has reason to suspect that there is a case of smallpox, scarlet fever, or other reportable disease within the territory over which he has jurisdiction, he shall immediately examine into the facts of the case and shall adopt the quarantine or employ the sanitary measures as herein provided.

Rule 19. **Health authority shall see that quarantine and disinfection is carried out.**—Within his jurisdiction, each and every local health authority shall see that the quarantining or disinfection of any house, building, car, vessel, or vehicle, or any part thereof and of any articles therein likely to retain infection, is carried out, and that all persons who have been in quarantine, are required to take a disinfecting bath before the same are released. And in the event of the disease having been smallpox, all persons exposed shall be isolated for eighteen days from the time of last exposure unless successfully vaccinated.

Rule 20. **Premises occupied by persons with contagious diseases to be disinfected before reoccupied.**—No person shall offer for hire or cause or permit any one to occupy apartments previously occupied by a person ill with smallpox, scarlet fever, diphtheria, or tuberculosis, or any quarantinable disease, until such apartments shall have been disinfected under the supervision of the local health authority.

Rule 21. **On failure to disinfect premises they shall be placarded.**—Whenever these rules and regulations, or whenever the order or direction of the local health authority requiring the disinfection of articles, premises or apartments, shall not be complied with, or in case of any delay, said authority shall forthwith cause to be placed upon the door of the apartment or premises a placard as follows: "These apartments have been occupied by a patient suffering with a contagious disease and they may have become infected. They must not be again occupied until my orders directing the renovation and disinfection of same have been complied with. This notice must not be removed, under penalty of the law, except by an authorized health official."

Rule 22. **Nurses and midwives shall report redness of eyelids or inflammation to health authority.**—Whenever any nurse, midwife or other person not a legally qualified practitioner of medicine shall notice inflammation of the eyes or redness of the lids in a new-born child under his or her care, it shall be the duty of such person to report the same to the local health authority, or in his absence, any reputable physician, within twelve hours of the time the disease is first noticed.

Rule 23. **Householders or heads of families to report contagious diseases.**—Every hotel proprietor, keeper of a boarding house or inn, and householder or head of a family in a house wherein any case of reportable contagious disease (including tuberculosis) may occur, shall report the same to the local health authority within twelve hours of the time of his or her first knowledge of the nature of such disease, unless previous notice has been given by the physician in attendance; and in cases of quarantinable diseases until instructions are received from the said local health authority shall not permit any clothing or other article which may have been exposed to infection to be removed from the house;

nor shall any occupant of said house change his residence elsewhere without the consent of the said local health authority.

Rule 24. Persons suffering from reportable diseases shall not work where food products are produced.—No person suffering with any reportable disease, or who resides in a house in which there exists a case of smallpox, scarlet fever, diphtheria, or typhoid fever, shall work or be permitted in or about any dairy, or any establishment for the manufacture of food products, until the local health authority has given such a person a written certificate to the effect that no danger to the public will result from his or her employment or presence in such establishment.

Rule 25. Health authority shall send attending physician printed matter.—Immediately after being notified of any case of smallpox, scarlet fever, diphtheria [diphtheria], typhoid fever, or tuberculosis, the local health authority shall send to the attending physician, or with his approval directly to the patient the printed matter published by the state board of health relative to the prevention and control of such diseases.

Rule 26. Persons with trachoma or contagious catarrhal conjunctivitis to be excluded from schools.—Persons afflicted with trachoma, granulated lids, or contagious catarrhal conjunctivitis must be excluded from schools, public assemblages, and from close association with other individuals, unless they are under the constant care and strict supervision of a competent physician, and hold a certificate from said physician stating that active inflammation has subsided, said certificate to be countersigned by a local health authority.

Rule 27. Schools temporarily closed and disinfected.—A school house wherein a child suffering from smallpox, scarlet fever or diphtheria has been present, shall be deemed infected and must be temporarily closed and thoroughly disinfected and cleaned under the supervision of the local health authority before the reopening of the school.

Rule 28. School may be reopened after disinfection and vaccination.—In the event of the aforementioned disease being smallpox and in case the board of trustees having passed a regulation requiring a successful vaccination of all teachers and pupils, the school may be reopened immediately after the disinfection and cleaning, and all teachers and pupils who have been successfully vaccinated may return; otherwise the school shall be kept closed eighteen days or until the local health authority directs otherwise.

Rule 29. Health authority to notify superintendents of pupils from infected houses.—The local health authority shall notify the superintendent or principal of any school of the locations of quarantinable diseases, and if the superintendent or principal finds any attendants in such school who live in said houses, he shall deny them admission to the said schools, only admitting them again upon presenting a certificate from the attending physician, countersigned by the local health authority, that there is no longer danger from contagion.

Rule 30. Children with contagious diseases shall not attend school.—No superintendent, principal or teacher of any school, and no parent, master or guardian of any child or minor, having the power and authority to prevent, shall permit any child or minor, having any quarantinable disease, or any child residing in any house in which any such disease exists or has recently existed, to attend any public, private, parochial, church or Sunday school until the requirements of these rules shall have been complied with.

Rule 31. Health authorities to assume control of quarantine in their jurisdiction.—In all incorporated cities and towns the city health authorities shall assume control and management of contagious diseases and exposures and practice quarantine, isolation and disinfection as herein provided. In those portions of all counties in this state, outside

of incorporated cities and towns, the county health officer shall assume management and control of contagious diseases and exposures and practice quarantine, isolation and disinfection as herein provided.

Rule 32. These rules not to prevent local rules of quarantine if no conflict.—Nothing contained in these regulations shall be construed to prevent any city, county or town from establishing any quarantine which they may think necessary for the preservation of the health of the same; provided, that the rules and regulations of such quarantine be not inconsistent with the provisions of these regulations and be consistent with and subordinate to said provisions, and the rules and regulations prescribed by the governor and state board of health. It shall be the duty of the local health authority to at once furnish the president of the state board of health with a true copy of any quarantine orders and regulations adopted by said local authorities.

Rule 33. Health authorities may pass through quarantine lines.—All health authorities shall have the privilege and shall be allowed to pass through all quarantine lines, whether instituted at the instance of state or local authorities, they first requesting permission and acquainting the officers or guards in charge with the fact of their being properly authorized health officers, and with the additional statement that they are fully acquainted with the nature of the disease that they are visiting, and further that they will take proper precautions to prevent carrying the infection themselves.

VITAL STATISTICS

Rule 34. Physicians, surgeons, midwives and parents shall report births.—All physicians, surgeons or accoucheurs (midwives) who may attend at the birth of a child, or, in the absence of such attendance, either parent of the child, shall report the fact, together with all statistical data relating thereto, within five days from time of the birth to the city or county registrar as hereinafter provided for.

Rule 35. Undertakers shall report deaths.—Every person acting as undertaker shall file with the proper registrar a certificate of death and all persons furnishing a coffin or box in which to bury the dead shall be deemed undertakers.

Rule 36. City and county "registrar."—For the purposes of these rules and regulations the phrase "county registrar" shall be held to designate the clerk of the county court, when a birth or death is returnable from a county, outside of incorporated cities or towns; and in all such incorporated cities and towns the term city registrar shall be held to designate the city health officer or other city official, acting as registrar for said city, and all returns of births and deaths accruing [occurring] outside of incorporated cities and towns shall be made to the county registrar of the county in which said births and deaths occur; all returns of births and deaths occurring within any incorporated city or town shall be made to the city registrar of the city or town in which said births and deaths occur, and all returns of deaths where the bodies are buried within any incorporated city or town shall be made to the city registrar.

Rule 37. In incorporated cities and towns, city health officer to act as city registrar, etc.—Each and every incorporated city or town in the state of Texas shall constitute a primary registration district. In such incorporated city or town, the city health officer shall be and shall be known as the city registrar. Each city registrar shall appoint a deputy whose duty it shall be to act in his stead in case of absence, illness or disability, and both city registrar and his deputy shall be subject to all rules and regulations herein mentioned. Provided, that in cities or towns where the city secretary or other city officials are, at the date of

promulgation of the sanitary code for Texas, officiating as registrars of births and deaths under local ordinances which require a burial permit, based upon a duly accredited death certificate, before allowing the dead to be buried, such officers shall be continued as city registrars in and for such cities and towns, but shall be subject to the rules and regulations herein contained. That the body of any person whose death occurs in any said registration district shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed or transported from said registration district until a permit for burial, removal or other disposition shall have been properly issued by the city registrar of the registration district in which the death or interment occurs. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate and return of the death has been filed with him as hereinafter provided. Provided, that a transit permit issued in accordance with the law and health regulations of the place where death occurred, whether in Texas or outside of the state, may be accepted by the city registrar of the district where the body is to be interred or otherwise finally disposed of, as a basis upon which he shall issue a local burial permit, in the same way as if the death occurred in his city, but shall plainly enter on the face of the copy of the record which he shall make for return to the state registrar the fact that it was a body shipped in for interment, and give the actual place of death. But when a body is removed from a district in Texas to an adjacent or nearby district for interment, not requiring the use of a common carrier or the issue of a transit permit, then the city registrar's burial permit from the district where death occurred may be accepted as authority for burial. It shall be the duty of the aforementioned city registrar to record in a permanently bound book, which shall be secured from the city for that purpose, all births and deaths which shall occur within their respective cities and towns, together with such statistics and data as shall be furnished him by the birth certificates and death certificates herein elsewhere provided for, and it shall be the duty of said city registrar to transmit all such original birth and death certificates received during the preceding month to the state registrar of vital statistics at Austin on or before the tenth day of the following month.

Rule 38. Form of certificate.—All certificates of births and deaths shall be made in the manner prescribed by the state board of health and in the form of certificate prescribed by the state registrar to the aforementioned registrars.

Rule 39. Undertaker shall fill out certificate and obtain particulars.—In case of death (including stillbirths) in which any undertaker buries the dead or assists at such burial, it shall be the duty of such undertaker to accurately and properly fill out the death certificate as provided by the state registrar, in so far as regards the "personal and statistical particulars," and further, he shall obtain from the physician or coroner the answers to questions under the heading of "medical particulars" of the death certificate; said death certificate to be mailed or handed in by the undertaker to the county registrar within five days after said death occurs; provided, that in case the undertaker can not communicate with the physician or coroner within the five days specified, he shall mail the death certificate to such physician or coroner, as accurately and properly filled out as possible, for such physician or coroner to complete the "medical particulars" of the death certificate, in which event the aforesaid physician or coroner shall make report to the proper registrar.

Rule 40. Physicians shall promptly give medical particulars to undertaker.—It shall be the duty of every physician in the event of a death (including stillbirths) occurring in any case at which said physician is the last in attendance, to promptly and accurately fill out the

questions in the "medical particulars" of the death certificate when the death certificate is presented by the undertaker.

Rule 41. Physician last in attendance shall report rural deaths.—In the event of a death occurring in the rural districts of the state and no undertaker being in attendance or responsible for the report of the death, the physician last in attendance or the coroner, in the event of his being called in, shall accurately and completely fill out the certificate of death and transmit it to the county registrar.

Rule 42. Coroner shall give information, also head of house.—In case of death (including stillbirths) where a coroner shall hold an inquest to ascertain the cause of death, the said coroner shall answer the questions (medical particulars) as in rule 39 to be answered by the attending physician, and answer them in as full and complete manner as the information from such coroner's inquest will permit; and when a person dies without medical attendance and does not require the attendance of a coroner, the head of the household where such death occurs, or the next of kin, shall immediately notify the local health authority who shall, after proper investigation, and, if deemed necessary by him, after an autopsy to determine the cause of death, issue a certificate of death.

Rule 43. Superintendents of hospitals to give information.—If the deceased died in a hospital or other institution, the person acting as undertaker shall present the certificate to the superintendent or head of such institution for the special information indicated on the blank for such cases. The undertaker shall then fill in the other information above required and transmit the complete certificate to the proper registrar.

Rule 44. Undertakers shall report physicians for neglect of giving information.—In the event of the neglect or refusal of the physician, coroner, superintendent or person in charge of any hospital or other institution to promptly and accurately fill out the death certificate as above required, and sign it, when so requested by an undertaker, the same shall be immediately reported by the undertaker to the state registrar for the purpose of prosecution.

Rule 45. Stillborn or those dead births of seven months gestation to be reported.—All stillborn children (those dead at birth after seven months gestation) shall be registered as births and also as deaths, and a certificate of both the birth and the death shall be filed with the proper registrar, in the usual form and manner, the certificate of birth to contain in place of the name of the child, the word "stillborn." The "medical particulars" of the death certificate shall be signed by the attending physician, if any, or midwife, and shall state the cause of death as "stillborn," with the cause of the stillbirth, if known, whether a premature birth, and, if born prematurely, the period of uterine gestation, in months, if known.

Rule 46. Clerks shall record all statistical data.—The clerk of the county court in every county in the state of Texas shall record all statistical data relating to such births and deaths as are reported to him from his county outside incorporated cities and towns in a permanently bound book which he shall secure and keep for that purpose, in form as supplied by the state registrar, and shall transmit the original certificates to the state registrar by the tenth of each month following the month in which they are received.

Rule 47. Sextons shall keep record.—All sextons or superintendents of cemeteries are required to file all burial permits received and to record in a permanently bound book, the names of all persons interred, date of interment, place of burial, number of the grave or section of cemetery where buried and name of undertaker; and shall before the tenth of the following month make a report to the state Registrar of all deceased persons deposited in their respective cemeteries during the preceding month.

Rule 48. State registrar shall supply blanks, etc.—The state registrar shall prepare, print and supply to all city and county registrars all blanks and forms used in reporting births and deaths or in otherwise carrying out the purposes of this regulation, and each county shall print and supply their county registrar and each city council supply their city registrar with a permanently bound book, in form prepared by the state registrar for recording all statistical data relating to births and deaths in their respective jurisdictions; and the state registrar shall prepare and issue such detailed instructions as may be required to secure the uniform observance of its provisions and the maintenance of a perfect system of registration. He shall carefully examine all certificates received and if any such are incomplete or unsatisfactory he shall require such further information to be furnished as may be necessary to make the record complete and satisfactory. And all physicians, midwives, informants or undertakers connected with any case, and all other persons having knowledge of the facts, are hereby required to furnish such information as they may possess regarding any birth or death upon demand of the state registrar, in person, by mail, or through the county or city registrar. He shall further arrange, bind and permanently preserve the certificates in a systematic manner.

Rule 49. City and county registrars shall furnish blanks to those required to report.—It shall be the duty of the city and county registrars to supply blank forms of certificate and such instructions as are applied to them by the state registrar to all in their respective jurisdictions who are required to make reports under these regulations.

Rule 50. City and county registrars examine all certificates of birth and death.—Each city and county registrar shall carefully examine each certificate of birth or death when received, and if any such are incomplete or unsatisfactory, he shall require such further information to be furnished as may be necessary to make the record complete and satisfactory. He shall number consecutively the certificates of birth and death, in two separate series, beginning with the "number one" for the first birth and first death in each calendar year.

DEPOTS, RAILWAY COACHES AND SLEEPING CARS

Rule 51. Contagious diseases barred from public vehicles.—No person known to be suffering from any contagious disease such as smallpox, scarlet fever, diphtheria, measles or whooping cough shall be allowed to enter or ride in any day coach, sleeping car, interurban car or street car, and when any such person is discovered to be in any car as mentioned above, it shall be the duty of the conductor or other individual in charge of said car to notify the nearest or most accessible county or city health officer and the latter shall remove and isolate said patient as is proper in such case or circumstance.

Rule 52. Depots, etc., to be ventilated and heated.—Each depot, railway coach, sleeping car, interurban car and street car while in use for the accommodation of the public shall be properly ventilated, and, if necessary, heated, and a sufficient amount of heat shall be furnished in time of need so that fresh air can be supplied without causing it to become unduly or uncomfortably cold; and the janitor, conductor, caretaker or other person in charge shall see to it that the air is replenished with fresh air from time to time as needed to prevent the same from becoming foul, unsanitary or oppressive.

Rule 53. Cuspidors to be provided, disinfected, etc.—Cuspidors must be provided in adequate numbers in all waiting rooms of depots and railway stations; each day coach shall be provided with one cuspidor for each seat or every two chairs, and two in each smoking apartment; except that in each parlor car there may be as few as one cus-

pidor to every three seats and two cuspidors used in the smoking apartment; in each sleeping car shall be placed one cuspidor to each section and three cuspidors in the smoking apartment, one of which cuspidors, in the absence of a dental lavatory, shall be of an unusually large size and placed near the wash basin for use in washing the teeth; each aforementioned cuspidor shall contain not less than one-third of a pint of an approved disinfectant solution, and the cuspidor shall be emptied, washed in a similar solution and replenished each trip or every twenty-four hours.

Rule 54. Dry cleaning prohibited.—Dry dusting and dry sweeping is prohibited at all times in waiting rooms of depots and railway stations, or in railway coaches, sleeping cars, interurban cars and street cars.

Rule 55. Coaches to be cleaned after each trip; how cleaned.—Railway day coaches shall be thoroughly cleaned at the end of each trip, and in no instance shall the day coach go uncleaned longer than two days when such coach is in use; the thorough cleaning of day coaches shall consist as follows:

(a) Windows and doors shall be first opened and the aisle-strip, if there be any, removed, and, when possible, thoroughly sunned.

(b) All upholstery shall be dusted and brushed, using the vacuum process cleaning apparatus whenever possible.

(c) Floor mopped or swept, after it has been sprinkled with an approved disinfectant solution, or preferably cleaned by sprinkling with sawdust moistened with said approved disinfectant and sweeping. After cleaning, as described, the floor must be scrubbed with soap and water to which may be added the same disinfectant solution.

(d) Closet floors, urinals, toilet bowls, and walls must be cleaned by washing, scouring and wiping with an approved disinfectant solution, to which soda ash or other cleansing agent may be added.

(e) All arms of seats and window ledges must be wiped free of dust with a damp cloth (preferably one wet with disinfectant solution).

(f) Provided, that where the vacuum cleaning apparatus is installed and coaches are thoroughly cleaned with this method daily, the aforementioned method of brushing, cleaning and scrubbing may be used as seldom as once in each period of seven days.

Rule 56. Railway stations to be cleaned.—The sanitary method of cleaning as prescribed in the foregoing rule must be followed in the sanitation of waiting rooms of depots and railway stations once in every twenty-four hours.

Rule 57. Dining cars, etc., to be thoroughly cleaned.—Parlor, buffet and dining cars must be cleaned at cleaning terminals, as set forth in rule 55 of this chapter. Carpets and draperies to be removed, dusted, sunned and aired. Food boxes, refrigerators, closets, drawers, and cupboards to be cleaned, scalded and treated with a solution containing 2 per cent formaldehyde, or other approved disinfectant.

Rule 58. Interurban and street cars to be washed, disinfected, etc.—Interurban cars and street cars must be washed with a hose and scrubbed thoroughly once every twenty-four hours, and must be disinfected with formaldehyde gas under the supervision of the local health authority immediately after any case of contagious disease has been discovered therein.

Rule 59. Sleeping cars to be cleaned; disinfected.—All sleeping cars shall be cleaned at cleaning terminals according to the methods set forth in rule 55 above, at least twice during a period of every seven days; shall be disinfected with formaldehyde gas at least twice during a period of seven days; upon routes designated by the president of the state board of health, all sleeping cars shall be disinfected as seldom as once during a period of seven days. In addition to the foregoing, all sleeping

cars shall be disinfected immediately after any case of contagious or infectious disease is discovered therein. All blankets used in sleeping cars must be thoroughly sterilized and washed at intervals of not more than ninety days.

Rule 60. Record of disinfection to be kept and signed.—On each passenger car operated in the state of Texas a disinfection record must be kept and preserved, and on same the following records are to be entered and kept, viz:

1. Place and date of each disinfection.
2. Length of time devoted to each such thorough disinfection.
3. Each item in said record shall be inserted immediately after each act recorded, and the signature of the person or persons doing said cleaning or disinfection must appear beneath the said records.

Rule 61. Water coolers to be provided; manner of cleaning.—All depots, railway coaches, sleeping cars, or interurban cars must be provided with a water cooler for the use of patrons and the traveling public; such water cooler must be so constructed as to be easily removed for the purpose of cleaning; must be emptied, rinsed and cleaned, and must be scalded and sunned when possible once in each period of twenty-four hours, and must be filled with good and wholesome drinking water when in service. Ice for use in water coolers must not be dumped on floors, sidewalks or car platforms. It must be washed and must be handled with ice-tongs.

Rule 62. Expecting on floors prohibited.—Expecting on the floor or walls or furniture of any waiting room in any depot, on any depot platform, in any railway coach, sleeping car, interurban car, or street car in this state, is prohibited. Placards calling attention of passengers and employes shall be hung in a conspicuous place in each of the aforementioned rooms and cars.

Rule 63. Expecting in basins prohibited.—Brushing of teeth or expecting in basins used for lavatory purposes is prohibited, and placards calling attention of passengers and employes shall be hung in a conspicuous place in the dressing room of passenger coaches.

Rule 64. Separate compartments for negro porters.—Sleeping car companies shall provide compartments and bedding for their negro porters separate from those provided for their white passengers.

Rule 65. Negro porters prohibited from sleeping in.—Negro porters shall not sleep in sleeping car berths nor use bedding intended for white passengers.

Rule 66. Certain floor covering prohibited.—No waiting room in any depot or railway station shall be floored in part or entirely with burlap, cocoa matting, or sacking cloth.

Rule 67. Water closets to be provided.—All depots and railway station shall provide adequate urinals and water closets for patrons and the traveling public; must keep them in proper sanitary condition, and if within five hundred feet of any public sewer, must make permanent sanitary connection with same. Any privy or box closet furnished by any such railway company shall be protected from flies by screening or other effective method, including hinged lids or other device for covering the opening in the seats of said closets. Such privies and closets as are not in connection with a sanitary sewer shall be provided with a watertight box, or other receptacle underneath, and when full or at any time when its condition shall create a nuisance or become unsanitary, and in no instance shall such box-closet go longer than one month before it must be emptied and disinfected with 5 per cent carbolic acid solution or other approved disinfectant solution.

Rule 68. Railway premises shall be drained.—The premises of all depots and railway stations shall be thoroughly drained, so that no stagnant water will collect on said premises.

Rule 69. **All cisterns, etc., shall be screened.**—All cisterns, fire water barrels, or other water containers upon the premises of any depot or railway station shall be screened with not less than 16-mesh wire gauze.

GOVERNING THE PREPARATION FOR TRANSPORTATION OF DEAD BODIES

Rule 70. **Bodies dead of pestilential diseases.**—No body of any person dead of Asiatic cholera, bubonic plague, typhus fever or small-pox shall be transported except in a hearse or undertaker's wagon unless said body shall have been cremated.

Rule 71. **Bodies dead of dangerous contagious diseases.**—The bodies of those who have died of diphtheria (membranous croup), scarlet fever (scarlatina, scarlet rash), glanders, anthrax or leprosy, shall not be accepted for transportation unless prepared for shipment by being thoroughly disinfected by (a) arterial and cavity injection with an approved disinfectant fluid, (b) disinfecting and stopping all orifices with absorbent cotton, and (c) washing the body with the disinfectant, all of which must be done by a licensed embalmer, holding a certificate as such. After being disinfected as above, such body shall be encased in an air-tight zinc, tin, copper or lead-lined coffin, or iron casket, all joints and seams hermetically soldered, and all enclosed in a strong, tight wooden box. Or, the body being prepared for shipment by disinfecting as above, may be placed in a strong coffin or casket, and said coffin or casket enclosed in an air-tight copper or tin case, all joints and seams hermetically soldered and all enclosed in a strong outside wooden box.

Rule 72. **Bodies dead of non-quarantinable contagious diseases.**—The bodies of those dead of typhoid fever, puerperal fever, erysipelas, tuberculosis and measles, or other dangerous communicable disease, other than those specified in rules 70 and 71, may be received for transportation when prepared for shipment by filling cavities with an approved disinfectant, washing the exterior of the body with the same, and stopping all orifices with absorbent cotton and encased in an air-tight coffin or casket; provided, that this shall apply only to bodies which can reach their destination within forty-eight hours from time of death. In all other cases such bodies shall be prepared for transportation in conformity with rule 71. But when the body has been prepared for shipment by being thoroughly disinfected by an embalmer holding a certificate, as in rule 71, the air-tight sealing may be dispensed with.

Rule 73. **Bodies dead of other diseases.**—The bodies of those dead of diseases that are not contagious, infectious or communicable may be received for transportation when encased in a sound coffin or casket and enclosed in a strong outside box; provided, they reach their destination within thirty hours from time of death. If the body can not reach its destination within thirty hours from time of death, it must be prepared for shipment by filling cavities with an approved disinfectant, washing the exterior of the body with the same, and stopping all orifices with absorbent cotton, and encased in an air-tight coffin or casket. But when the body has been prepared for shipment by being thoroughly disinfected by a licensed embalmer as in rule 71, the air-tight sealing may be dispensed with.

Rule 74. **Persons accompanying bodies dead of contagious diseases.**—In cases of contagious or infectious diseases, the body must not be accompanied by persons or articles which have been exposed to the infection of the disease, unless certified by the health officer as having been properly disinfected; and before selling passage tickets, agents shall carefully examine the transit permit and note the name of the passenger in charge, and of any other proposing to accompany the body,

and see that all necessary precautions have been taken to prevent the spread of disease. The transit permit in such cases shall specifically state who is authorized by the health authorities to accompany the remains. In all cases where bodies are forwarded under rule 71, notice must be sent by telegraph to health officer at destination, advising the date and train on which the body may be expected. This notice must be sent by or in the name of the health officer at the initial point, and is to enable the health officer at destination to take all necessary precautions at that point.

Rule 75. Bodies not shipped by express.—Every dead body not shipped by express must be accompanied by a person in charge, who must be provided with a passage ticket and also present a full first-class ticket marked "corpse" for the transportation of the body, and a transit permit showing physician's or coroner's certificate, name of deceased, date and hour of death, age, place of death, cause of death, and if of a contagious or infectious disease, the point to which the body is to be shipped, and when death is caused by any of the diseases specified in rule 71, the names of those authorized by the health authorities to accompany the body. The transit permit must be made in duplicate, and the signatures of the physician or coroner, health officer and undertaker must be on both the original and duplicate copies. The undertaker's certificate and paster of the original shall be detached from the transit permit and pasted on the end of the coffin box. The physician's certificate and transit permit shall be handed to the passenger in charge of the corpse. The whole duplicate copy shall be sent to the official in charge of the baggage department of the initial line and by him to the secretary of the state board of health at Austin.

Rule 76. Bodies shipped by express.—When dead bodies are shipped by express, the whole original transit permit shall be pasted upon the outside box, and the duplicate forwarded by the express agent to the secretary of the state board of health at Austin.

Rule 77. Disinterred bodies treated as contagious.—Every disinterred body, dead from any disease or cause, shall be treated as contagious or dangerous to the public health and shall not be accepted for transportation unless said removal has been approved by the state or local health authorities having jurisdiction where such body is disinterred, and the consent of the health authorities of the locality to which the corpse is consigned has first been obtained; and all such disinterred remains shall be enclosed in a hermetically sealed (soldered) zinc, tin or copper-lined coffin or box. Bodies deposited in receiving vaults shall be treated and considered the same as buried bodies.

Rule 78. Transfer of dead bodies in transit.—When it may become necessary to transfer dead bodies in transit from one railway train to another, or from one station to another, or from a station to a ferry, the affidavit of the undertaker and permit of the local health officer accompanying the remains shall be in all cases sufficient authority for such transfer.

Rule 79. Certificate furnished by undertaker.—No common carrier shall accept for transportation any body unless a certificate is furnished by the undertaker preparing such body for shipment to the effect that the foregoing rules have been complied with in the preparation for transportation of said body.

Any person who shall violate any of the rules, regulations or provisions of the sanitary code of Texas, as herein set forth, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than ten dollars and not more than one thousand dollars.

Provided, this Act shall not be construed to repeal any of the laws of this state now in force affecting the public health, which are not

clearly in conflict herewith, but shall be construed to be cumulative to said laws. [Acts 1911, p. 173, sec. 1, amending Acts 1909, p. 340, sec. 10, and superseding Arts. 4529–4533, Rev. St. 1911.]

See notes under Arts. 4529–4533.

Art. 4553aa
Vernon-Styles
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CHAPTER THREE

POLLUTION OF WATERS

Art.
4553b. Polluting certain waters unlawful;
penalty for violation, etc.
4553c. Enjoining pollution; penalty for vio-
lation of injunction, etc.

Art.
4553d. Certain cities, towns, persons, etc.,
to have three years to make ar-
rangements for sewerage.
4553e. State board of health to enforce; in-
spector, how appointed; duties.

Article 4553b. Polluting certain waters unlawful; penalty for violation, etc.—That it shall be unlawful for any person, firm or corporation, private or municipal, to pollute any water course or other public body of water, from which water is taken for the use of farm live stock and for drinking and domestic purposes, in the state of Texas, by the discharge, directly or indirectly, of any sewage or unclean water or unclean or polluting matter or thing therein, or in such proximity thereto as that it will probably reach and pollute the waters of such water course or other public body of water from which water is taken for the use of farm live stock and for drinking and domestic purposes. A violation of this provision shall be punished by a fine of not less than one hundred dollars and not more than one thousand dollars. When the offense shall have been committed by a firm, partnership or association, each member thereof who has knowledge of the commission of such offense, shall be held guilty. When committed by a private corporation, the officers and members of the board of directors, having knowledge of the commission of such offense, shall each be deemed guilty; and when by a municipal corporation, the mayor and each member of the board of aldermen or commission, having knowledge of the commission of such offense, as the case may be, shall be held guilty, as representatives of the municipality; and each person so indicated, as above, shall be subject to the punishment provided hereinabove. Provided, however, that the payment of the fine by one of the persons so named shall be a satisfaction of the penalty as against his associates for the offenses for which he may have been convicted. Provided, the provisions of this Act shall not apply to any place or premises located without the limits of an incorporated town or city, nor to manufacturing plants whose effluents contain no organic matter that will putrify, or any poisonous compounds, or any bacteria dangerous to public health or destructive of the fish life of streams or other public bodies of water. [Acts 1913, p. 90, sec. 1.]

Art. 4553c. Enjoining pollution; penalty for violation of injunction, etc.—Upon the conviction of any person under section 1 of this Act [Art. 4553b], it shall be the duty of the court, or judge of the court, in which such conviction is had, to issue a writ of injunction, enjoining and restraining the person or persons or corporation responsible for such pollution from a further continuance of such pollution; and for a violation of such injunction, the said court and the judge thereof shall have the power of fine and imprisonment, as for contempt of court, within the limits prescribed by law in other cases; provided, that this remedy by injunction and punishment for violation thereof shall be cumulative of the penalty fixed by section 1 of this Act; and the assessment of a fine for contempt shall be no bar to a prosecution under section 1; neither shall a conviction and payment of fine under section 1, be a bar to contempt proceedings under this section. [Id. sec. 2.]

Art. 4553d. Certain cities, towns, persons, etc., to have three years to make arrangements for sewerage.—Any city or town of this state, with a population of more than fifty thousand inhabitants, which has already an established sewerage system dependent upon any water course or other public body of water, from which water is taken for the use of farm live stock and for drinking and domestic purposes, or which discharges into any water course or other public body of water, from which is taken for the use of farm live stock and for drinking and domestic purposes shall have three years from and after the taking effect of this Act within which to make other provisions for such sewage. Cities and towns of less population than fifty thousand inhabitants shall have three years within which to make other arrangements for the disposal of such sewage. Any person, firm or corporation, private or municipal, coming under or affected by the terms of this bill or any independent contractor having the disposal of the sewage of any city or town, shall have three years within which to make other arrangements for the disposal of such sewage, or other matter which may pollute the water, as defined in this bill. [Id. sec. 3.]

Art. 4553e. State board of health to enforce; inspector, how appointed; duties.—The Texas state board of health is authorized, and it is hereby made its duty, to enforce the provisions of this Act; and to this end, the governor shall appoint, by and with the consent of the senate, an inspector, to act under the direction of the said board of health and the state health officer, making such investigations, inspections and reports, and performing such other duties in respect to the enforcement of this Act as the said board of health and the state health officer may require. [Id. sec. 4.]

CHAPTER FOUR

CHARBON DISTRICTS

<p>Art. 4553f. Charbon districts. 4553g. Cases of animals suffering from charbon or anthrax to be reported; failure to report misdemeanor. 4553h. State board of health to employ bacteriologist; duties; salary; appropriation. 4553i. Duties of board; isolation of stock. 4553j. Carcasses to be destroyed; failure misdemeanor. 4553k. Powers and duties of county health officer; isolation or quarantine</p>	<p>Art. proclamation; penalty for failure to obey. 4553l. Proclamation, when sufficient. 4553m. May prohibit running at large of animals; submission to voters; ballots, etc.; commissioners' court to issue proclamation when vote in favor of prohibiting. 4553n. Permitting animals to run at large upon proclamation unlawful; penalty, etc. 4553o. Laws repealed and unrepealed.</p>
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Article 4553f. Charbon districts.—That all of that portion of the state of Texas in which charbon or anthrax has heretofore been prevalent or any district of the state of Texas in which charbon or anthrax may become prevalent, shall be known as charbon districts and shall be subject to the provisions hereof. [Acts 1913, p. 147, sec. 2 (10a).]

Art. 4553g. Cases of animals suffering from charbon or anthrax to be reported; failure to report misdemeanor.—That each person residing in a district where charbon or anthrax is prevalent or where the same is supposed to be prevalent shall report in writing to the county health officer, who in turn shall report in writing to the president of the state board of health at Austin, all cases where an animal or animals are suffering with charbon or anthrax or supposed to have such disease, and each physician practicing in the state of Texas shall report in writing to the president of the state board of health all persons suffering from charbon or anthrax or supposed to be suffering from same and in case of failure to do so any person so failing shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less

than \$10.00 nor more than \$25.00 and each case of which no report is made shall constitute a separate offense. [Id. (10b).]

Art. 4553h. State board of health to employ bacteriologist; duties; salary; appropriation.—That the state board of health shall employ a bacteriologist at a salary of not more than \$300.00 per month and during the time that charbon or anthrax is prevalent he shall make an examination and analysis and a scientific research for the purpose of combating with said disease and said bacteriologist may be kept in the district affected by charbon as many months each as the state board of health deems necessary and for the purpose of carrying out the provisions of this Act the sum of four thousand (\$4000.00) dollars or so much thereof as may be necessary is hereby appropriated out of the general revenue not otherwise appropriated which shall be paid out on warrant drawn by the president of the state board of health and attested by the secretary of said board. [Id. (10c).]

Art. 4553i. Duties of board; isolation of stock.—That the state board of health acting through one of the members or through the local health office in the county where charbon is reported to be prevalent shall in person or through some one employed by them, visit all stock reported to have charbon or anthrax and see that proper steps be taken for the isolation of same from other stock and also isolate other stock which have been exposed to said disease and so keep same isolated for such a period as it may deem necessary. [Id. (10d).]

Art. 4553j. Carcasses to be destroyed; failure misdemeanor.—That carcasses of stock which have died from charbon or anthrax shall be destroyed by burning by the owner or person in charge within 24 hours after death and any owner or person having charge of said animals who should fail to destroy said carcasses as herein provided shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than \$25.00 nor more than \$100.00 and each 24 hours after the first 24 hours that said carcass is permitted to remain undestroyed shall be considered a separate offense. [Id. (10e).]

Art. 4553k. Powers and duties of county health officer; isolation or quarantine proclamation; penalty for failure to obey.—The county health officer shall be the exclusive judge of the necessity of isolation or quarantine of all animals infected therewith and when in the judgment of said county health officer there exists a necessity thereof [therefor] said county health officer shall issue a proclamation directing that all animals of certain classes which he may specify in the infected district, in either the entire county or any political subdivision thereof, shall be placed and kept in an enclosure by the owners or keeper thereof, and any owner, or keeper of such animals for the owners, who shall fail or refuse to obey the requirement of such proclamation shall be fined in any sum not less than \$10.00 nor more than \$50.00 and where any owner or keeper for the owner shall have more than ten animals subject to the quarantine regulations herein provided the fine shall be doubled and each day that any owner or keeper for such owner shall fail to comply with the proclamation of said county health officer, shall constitute a separate offense and such quarantine shall continue and be in effect as long as in the judgment of such county health officer it may be necessary to prevent the spread of charbon or anthrax. [Id. (10f).]

Art. 4553l. Proclamation, when sufficient.—The proclamation of the county health officer provided for in section 10f of this Act [Art. 4553k] shall be sufficient, if it name the kinds or classes of stock to which it shall apply and it shall be published in some newspaper published in the county if there be one; and if there be no newspaper it shall be posted in three public places in said county one of which shall be at the court house door of such county if the proclamation pertains to the whole

county, but if only to a subdivision of the county, then in any three public places in such subdivision, and one insertion in a newspaper shall be sufficient, and such proclamation shall be effective three days after such notice is given. [Id. (10g).]

Art. 4553m. May prohibit running at large of animals; submission to voters; ballots, etc.; commissioners' court to issue proclamation when vote in favor of prohibiting.—In all counties now affected with charbon or anthrax, or which may hereafter become affected, the qualified voters of such county or any political subdivision thereof may, in the manner hereinafter provided, prohibit the running at large of cattle, horses, sheep, goats and hogs or any of such animals within such county or subdivision thereof; provided that, upon the petition of ten per cent of the qualified voters of such county or subdivision, thereof presented to the commissioners' court of such county in open session, requesting such court to order an election to be held in such county or political subdivision thereof said petition to state the territory within which an election is requested and the kinds of animals to be effected and also for what portions of the year it is desired to prohibit such stock from running at large, or whether the entire year, it shall be the duty of said commissioners' court to order such election to be held within such territory as may be petitioned for, naming the kinds of animals to be affected thereby and as designated in the order for such election; and such commissioners' court shall also designate in said order of election the time within which such stock is to be prohibited from running at large, whether for the entire year or for portions thereof; which the said court is hereby authorized to do in accordance with the petition therefor. Such commissioners' court is hereby authorized and it is made its duty to provide for the holding of such elections and compensation of officers thereof, provided that the expense of such election shall be borne by the county wherein such election is ordered and held; and provided further that in any such election so to be held the ballots shall read as follows:

“For the Running at Large of Domestic Animals,” and
“Against the Running at Large of Domestic Animals.”

Returns of such election shall be made by the presiding officers of the precinct or precincts of the county where such election is held, to the county judge of such county, whose duty it shall be to forthwith call the commissioners' court together for the purpose of canvassing the returns; and if it shall be found by the commissioners' court, upon a canvass of such returns, that a majority of the qualified voters of the county or subdivision thereof wherein such election was held, is in favor of prohibiting the running at large of such domestic animals as hereinbefore named, then it shall be the duty of the commissioners' court of such county to forthwith declare the result of said election and give public notice thereof by proclamation of such court to be issued and posted within three public places of the county or subdivision thereof in which such election has been held. [Id. (10h).]

Art. 4553n. Permitting animals to run at large after proclamation unlawful; penalty, etc.—From and after the issuance and posting of the proclamation hereinabove provided for, it shall be unlawful for any owner or keeper of such animals hereinabove designated or any of them to permit such animals as have been voted upon to run at large within such county or subdivision thereof at any time within which the same has been prohibited; and in case of failure or refusal of any owner or keeper of such stock or any of them to comply with such proclamation he shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than five dollars (\$5.00) nor more than fifty dollars (\$50.00) and each day that any owner or keeper for such owner shall fail to comply with the law as herein provided for, shall constitute a separate offense.

The venue of such prosecution shall lie in the counties where the offense is committed. [Id. (10i).]

Art. 4553o. Laws repealed and unrepealed.—This Act shall not be construed to repeal the laws of this state now in force affecting the public health, which is not clearly in conflict herewith but shall be construed to be cumulative to the said law but all laws in conflict herewith are hereby repealed. [Id. (10j).]

CHAPTER FIVE

SPECIAL QUARANTINE REGULATIONS

<p>Art. 4554. Governor may issue proclamation. 4555. Proclamation as to yellow fever and other diseases. 4556. Local quarantine. 4557. Local authorities to be subordinate to state, when. 4558. Shelter to persons detained. 4559. Expenses. 4560. Stations to be provided, etc. 4561. Governor to appoint local health officer. 4562. Incoming vessels. 4563. Vessels from infected ports. 4564. Payment of fine, etc.</p>	<p>Art. 4565. Expenses to be itemized. 4566. When corporate authorities may establish quarantine. 4567. Authorities may co-operate. 4568. Commissioners may direct, etc., to declare quarantine. 4569. Bond of health officer at Galveston. 4570. Rules to be prescribed. 4571. Sale of condemned property. 4572. Vessels to be disinfected; fees of quarantine officer, etc. 4573. Persons to disinfect at their own expense. 4574. In case of irreconcilable conflict.</p>
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[In addition to the notes under the particular articles, see also notes on the subject in general at end of chapter].

Article 4554. [4321] Governor empowered to issue proclamation, when.—The governor is empowered to issue his proclamation declaring quarantine on the coast, or elsewhere within this state, whenever in his judgment quarantine may become necessary; and such quarantine may continue for any length of time as in the judgment of the governor the safety and security of the people may require. [Acts 1891, p. 188.]

Notice of proclamation.—The governor is empowered to quarantine against any point when he has reason to believe that there is danger from yellow fever or other contagious or infectious disease, and when he issues his quarantine proclamation every citizen is charged with knowledge of it, and if a buyer orders goods at a time when the customary route of shipment is quarantined, he is in no position to claim damages for a deviation in the shipment from the accustomed route. *Mobile Fruit & Trading Co. v. Boero* (Civ. App.) 55 S. W. 361.

Art. 4555. [4324] May issue proclamation, when.—Whenever the governor has reason to believe that the state of Texas is threatened at any point or place on the coast, border or elsewhere within the state with the introduction or dissemination of yellow fever contagion, or any other infectious and contagious disease that can and should, in the opinion of the Texas state board of health, be guarded against by state quarantine, he shall, by proclamation, immediately declare said quarantine against any and all such places, and direct the Texas state board of health to promptly establish and enforce the restrictions and conditions imposed and indicated by said quarantine proclamation; and when from any cause the governor can not act, and the exigencies of the threatened danger require immediate action, the Texas state board of health is empowered to declare quarantine as prescribed in this article, and maintain the same until the governor shall officially take such action as he may see proper. [Acts 1891, p. 188, sec. 4.]

Art. 4556. [4326] Local quarantine.—The law in regard to local quarantine by the inhabitants of any point or points on the coast or elsewhere in the state shall remain in full force when in conformity with this title; provided, that in all differences and disputes between any such points, contiguous or remote, within this state, such differences and disputes shall be immediately by the local health authorities, if any, and if

none, by the inhabitants themselves, reported and submitted to the governor; and, on the receipt of such report, he shall forthwith order the state health officer to such points with instructions to investigate the same and report the exact condition of things, and upon investigation of such report shall issue his proclamation declaring the determination of the issue, and by said proclamation the aforesaid differences shall be governed and determined. [Id. sec. 6.]

Art. 4557. [4328] Local to be subordinated to state authorities.—Whenever quarantine is declared by the governor or by any county or corporate authorities in the state, it shall be the duty of such authorities to establish a quarantine station or stations where any person may be detained for such length of time as, in the discretion of the quarantine officers, the public safety may demand; provided, that all county and municipal quarantine shall be subordinate, subject to and regulated by such rules and regulations as may be prescribed by the governor or Texas state board of health. [Id. sec. 8.]

Art. 4558. [4329] Shelter, etc., to be furnished by health officer to persons detained.—It shall be the duty of the Texas state board of health to furnish persons detained by them with necessary shelter and subsistence (not including crews of vessels, except such as are removed by the quarantine officers from infected vessels), and to provide all other things essential for the protection and comfort of those held in quarantine, and all such expenses authorized by the Texas state board of health and approved by the governor shall be paid by the state. [Id. sec. 9.]

Art. 4559. [4330] Expenses, etc.—All the costs and expenses of enforcing and maintaining the general quarantine, or such as are ordered by the governor or Texas state board of health shall be paid out of the fund appropriated for quarantine purposes. All quarantine officers appointed by the governor shall be selected and commissioned by the governor of the state, and shall be paid by the state, and all health authorities of the state, or of any county or city thereof, shall obey the rules and regulations prescribed by the governor or Texas state board of health. The regular officers in charge of regular established quarantine stations on the coast shall be allowed one hundred and fifty dollars per month while on duty at their respective stations; provided, that the provisions of this chapter shall not apply to the port of Galveston; and provided, that the officer in charge of said station shall receive two hundred dollars per month. Temporary officers, or those commissioned by the governor to guard against threatened epidemics, and those stationed at railway crossings on the Rio Grande shall receive one hundred and fifty dollars per month while on duty, and such other pay for extra expenses actually incurred as may be deemed just by the governor and Texas state board of health. All quarantine officers, whether of towns, cities, counties or state, shall be authorized to administer oaths to any person or persons suspected of violating any quarantine regulations; and any person or persons swearing falsely shall be punished according to the provisions of the Penal Code. [Acts 1895, p. 142.]

Art. 4560. [4331] Stations to be provided.—It is hereby made the duty of any county, town or city authority upon the coast or elsewhere in Texas, at as early a day as practicable after the promulgation of the governor's proclamation declaring quarantine, to provide suitable stations where they are not now provided, at sufficient distance from the usual places of landing of vessels, or the depots of railroads coming into their respective counties, towns or cities, and to select, appoint and employ a competent physician as health officer, subject to the approval of the governor, at such stations, and to furnish said officer with such guards, employes and other things as may be necessary to render such quarantine effective; and said county, town or city authorities may pro-

vide for the establishment and maintenance of quarantine, subordinate, subjected to, and regulated by, such rules and regulations as the governor and Texas state board of health may prescribe. [Acts 1883, p. 17.]

Art. 4561. [4332] Governor may appoint local health officer, when.—Whenever, on the coast of Texas or elsewhere in this state, the authorities of any county, town or city fail, refuse or neglect to establish quarantine as provided in the preceding article, then and in that event the governor shall have the power, and it shall be his duty, to appoint a health officer and to prescribe such regulations for the government of the same as he may deem necessary. [Acts 1891, p. 186.]

Art. 4562. [4333] Incoming vessels to be stopped.—It shall be the duty of all health officers and all quarantine authorities to stop each and every vessel from any infected port or district, notwithstanding the said vessel may have a clean bill of health, if deemed necessary, (and such health officers or quarantine authorities shall have power so to do) to take the affidavit of the master of said vessel as to the health of himself and crew from the time of sailing from said infected port or district; and such officers and authorities shall detain said vessel at quarantine for such length of time as may be prescribed by the governor and Texas state board of health in their rules and regulations governing quarantine; and all such officers and authorities may use force if necessary in order to discharge the duties imposed upon them by the provisions of this title and the rules and regulations of the governor and Texas state board of health. [Acts 1883, p. 17.]

Art. 4563. [4334] Vessels from infected ports.—Any vessel arriving at any of the quarantine stations of this state, designated by the proper authorities, from any infected port or district, without a clean bill of health from the proper officers from said port or district, shall be taken possession of by the health officer or other quarantine authority at the station at which said vessel arrives, and be held by the same until all fines that may have been assessed against the master of said vessel for a violation of the quarantine laws, rules and regulations have been paid, or until said vessel shall have been replevied in accordance with law. [Acts 1891, p. 188, sec. 12.]

Art. 4564. [4335] Payment of fine, etc.—The payment of the fine which may be assessed against the master of such vessel shall not operate as a release or discharge of the vessel from quarantine, but the same rules shall apply as in case of other vessels placed in quarantine. [Id. sec. 13.]

Art. 4565. [4336] Expenses to be itemized.—It shall be the duty of the county, town or city authorities aforesaid, as soon as quarantine ceases to exist, to forward to the comptroller of the state an itemized account of all receipts and expenditures made by them, and when approved by the governor and Texas state board of health, said comptroller shall draw his warrant upon the treasurer for the payment of any balance that may be due said authorities, or either of them, and pay into the treasury any excess of receipts over expenditures as a credit to the quarantine fund. [Acts 1883, p. 18.]

Art. 4566. [4337] Corporate authorities may establish quarantine, when.—Nothing contained in this title shall be construed to prevent any town, city or county from establishing any quarantine which they may think necessary for the preservation of the health of the same; provided, that the rules and regulations of such quarantine be not inconsistent with the provisions of this title, and be consistent with, and subordinate to, said provisions and the rules and regulations prescribed by the governor and Texas state board of health. [Id.]

Art. 4567. [4338] Municipal authorities may co-operate, how.—The municipal authorities of towns and cities, and commissioners' courts

of the counties wherein such towns and cities are situated, may co-operate with each other in making such improvements connected with said towns, cities and counties as may be deemed by said authorities and courts necessary to improve the public health and to promote efficient sanitary regulations; and, by mutual agreement, they may provide for the construction of said improvements and the payment therefor. [Acts 1879, S. S. p. 9.]

Art. 4568. [4340] Commissioners' court may direct county physician to declare quarantine, when.—Whenever the commissioners' court of any county has reason to believe that they are threatened at any point or place within or without the county limits with the introduction or dissemination of a dangerous, contagious or infectious disease that can and shall be guarded against by quarantine, they may direct their county health officer to declare and maintain said quarantine against any and all such dangerous diseases; to establish, maintain and supply stations or camps for those held in quarantine; to provide hospitals, tents or pest houses for those sick of contagious and infectious disease; to furnish provisions, medicine and all other things absolutely essential for the comfort of the well and the convalescence of the sick. The county physician shall keep an itemized account of all lawful expenses incurred by local quarantine, and his county shall assume and pay them as other claims against the county are paid. Chartered cities and towns are embraced within the purview of this article, and the mere fact of incorporation does not exclude them from the protection against epidemic diseases given by the commissioners' court to other parts of their respective counties. The medical officers of chartered cities and towns can perform the duties granted or commanded in their several charters, but must be amenable and obedient to rules prescribed by the Texas state board of health. This article, however, must not be construed as prohibiting any incorporated town or city from declaring, maintaining and paying for local quarantine. [Id. sec. 15.]

Location of pest-house.—The commissioners' court can be enjoined from establishing a smallpox pest-house in close proximity to a public schoolhouse, because such house is a nuisance and the court has no authority to maintain a nuisance. *Thompson v. Kimbrough*, 23 C. A. 350, 57 S. W. 328.

Maintenance and supplies to inmates.—A county whose commissioners' court has determined that they are threatened with the introduction or dissemination of a dangerous, contagious or infectious disease, that can and should be guarded against by quarantine and has directed the county physician to declare and maintain such quarantine, should furnish to those thus detained, such provisions, medicines and other things as are absolutely essential to their comfort and convalescence, and is legally liable therefor. It is not optional with the county to assume the duty of supplying these things. Nor is a county excused because there is no county physician to keep an itemized account of expense incident to the quarantine. *King County v. Mitchell*, 31 C. A. 171, 71 S. W. 611.

Expenses—Liability of county.—Where a ranchman and his employés were in quarantine, expenditures necessarily made by him in supplying their needs were not voluntary, so as to preclude recovery from the county. *King County v. Mitchell*, 31 C. A. 171, 71 S. W. 610.

Art. 4569. [4341] Bond of health officer at Galveston.—The quarantine or health officer at Galveston, Texas, shall give bond, with two or more good and sufficient sureties, payable to the governor, in the sum of ten thousand dollars, conditioned for the care and preservation of any steam vessel or vessels belonging to the state at his station, and for the faithful performance of his duty. [Id. sec. 16.]

Art. 4570. [4342] To prescribe rules, etc.—It is hereby made the duty of the governor and Texas state board of health, upon completion of the disinfecting warehouse at Galveston or any port on the coast of Texas, to prescribe such rules and regulations as may be necessary for the disinfection of all vessels and their cargoes and passengers arriving at said ports from any infected port or district, the object of such rules and regulations being to provide safety for the public health of the state without unnecessary restrictions upon commerce and travel. [Id. sec. 17.]

Art. 4571. [4342a] Sale of condemned property.—The state health officer be and is hereby authorized, with the advice and consent of the governor, to sell to the best advantage of the state, for cash, any property in the quarantine service that is useless, and to apply the proceeds thereof to the general revenue of the state of Texas, and make due report of said sale or sales to the governor. [Acts 1895, p. 2.]

Art. 4572. Vessels to be disinfected; fees of quarantine officer, etc.—Any vessel arriving at a port of this state, and required to be disinfected by the terms of the governor's quarantine proclamation, shall be disinfected by the quarantine officer of such port and shall pay to such quarantine officer such fees as may be prescribed by the governor, before being released from quarantine. All vessels boarded by the quarantine officer of any port shall pay to such officer such fees as are prescribed by the governor. The quarantine officer receiving such fees shall give bond in such sum as may be prescribed by the governor for the safe keeping of such collection, and shall report and remit them to the Texas state board of health at least once every month. [Acts 1901, p. 266.]

Art. 4573. Persons to disinfect at their own expense.—Every person having control of any public building, railway company, sleeping car company, or other corporation, company or individual, or the receiver thereof, engaged in the carrying of passengers in this state, shall, at their own expense, within a prescribed time after receiving notice of the promulgation of the rules and regulations of the state board of health in relation thereto, carry the same into effect, or be punished as prescribed in the Penal Code. [Acts 1903, p. 180.]

Art. 4574. In case of irreconcilable conflict.—Any provisions of this chapter which may irreconcilably conflict with the provisions of the foregoing chapter, shall yield to such provisions.

DECISIONS RELATING TO SUBJECT IN GENERAL

Liability for spread of contagion.—Railroad company, taking charge of an employé afflicted with smallpox, held to owe to each individual member of the community the duty to prevent the spread of the disease, and hence liable to a person injured by the failure to perform such duty. *Missouri, K. & T. Ry. Co. of Texas v. Wood*, 95 T. 223, 66 S. W. 449, 56 L. R. A. 592, 93 Am. St. Rep. 834.

Person afflicted with contagious disease held to be under the control of person having him in charge while delirious, so that the latter was liable for damages arising from failure to exercise due care in preventing him from going at large. *Id.*

Railroad company held not relieved from liability for damages resulting from the spread of contagion by a smallpox patient, with whose custody it was charged, by reason of the fact that the city in which the patient became ill would not be liable for failing to maintain an effectual quarantine. *Id.*

In an action for injuries to plaintiff's child from defendant's negligence in allowing smallpox patient, whom it had charge of, to escape, plaintiffs held not guilty of contributory negligence in not having the child vaccinated. *Missouri, K. & T. Ry. Co. of Texas v. Wood* (Civ. App.) 68 S. W. 802.

In an action for injuries from negligence in allowing smallpox patient, whom defendant had charge of, to escape, evidence held to show negligence. *Id.*

CHAPTER SIX

PURE FOOD REGULATIONS

Art.	Art.
4576. Appointment, salary and bond of dairy and food commissioner.	4580. Expenses of department provided for and limited.
4576. May be removed and vacancy, how filled.	4581. Department located, where.
4577. Appointment, salary and bond of assistant chemist.	4582. Rights and duties of commissioner.
4578. Appointment and salary of stenographer.	4583. Unlawful for officers to issue certificates, in what cases.
4579. Inspectors; appointment, duties and salary.	4584. Annual report of commissioner, contents.
	4585. Shall issue bulletins and notices of judgments; proceedings in case of seizures by commissioner.

<p>Art. 4585a. Condemnation, confiscation and forfeiture of articles adulterated or misbranded; suit; how brought; judgment; duties and fees of district and county attorneys; bond for delivery to owner.</p> <p>4585b. Names and addresses of manufacturers and vendors to be registered with commissioner; fees; pure food fund.</p> <p>4585c. Additional assistants; compensation.</p> <p>4585d. Dairy and food department to assist.</p>	<p>Art. 4586. Manufacture and sale of misbranded and adulterated foods prohibited.</p> <p>4587. Drugs, confectionery and food, when deemed adulterated.</p> <p>4588. Term "misbranded" defined.</p> <p>4589, 4590. [Repealed.]</p> <p>4591. Manufacture and sale of certain foods discolored and adulterated, prohibited.</p> <p>4592. Baking powder to be labeled, how.</p> <p>4593. Sale of impure milk prohibited.</p> <p>4594. [Repealed.]</p> <p>4595. Exemptions from prosecutions.</p>
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Art. 4575 etc.
Vernon Sayles
1914
Amended
37 L. P. 14

Article 4575. Dairy and food commissioner; appointment, salary and bond.—Immediately after the taking effect of this Act, or as soon thereafter as practicable, the governor shall appoint a suitable person to be dairy and food commissioner, who shall be a practical analytical chemist and bacteriologist, which office is hereby created, and which commissioner so appointed shall hold office for a term of two years or until his successor is appointed and qualified. Said commissioner shall receive an annual salary of \$2000.00. Before entering upon the duties of his office he shall subscribe and file in the office of the secretary of state an oath of office in the form prescribed by law, and shall enter into bond with the state of Texas, in the sum of \$10,000.00, with sureties to be approved by the governor, conditioned upon the faithful performance of his duties. [Acts 1911, p. 76, sec. 9.]

Note.—Acts 1911, p. 76, sec. 26, repeals chapter 94, Acts 31st Leg., and all other laws in conflict, and hence supersedes Arts. 4575-4595, Rev. St. 1911. Acts 1911, p. 76, sec. 22, made an appropriation to carry into effect the act for the remainder of the year ending August 31, 1911. Sections 2 and 19 of Acts 1911, p. 76, are purely criminal, and hence are here omitted.

Constitutionality of act.—The pure food law is not unconstitutional as to one charged with violating the act because the title does not specifically refer to and describe the offense, which is done in the body of the act. *Focke v. State* (Cr. App.) 144 S. W. 267.

The pure food law is not unconstitutional as to one charged with selling fruit not protected from flies, dust, and dirt, because the offense charged is not contained or disclosed in the caption, but in the body of the act. *Green v. State* (Cr. App.) 148 S. W. 311.

Art. 4576. May be removed; vacancy, how filled.—The governor shall have the power to remove such commissioner at any time in his discretion and in case of a vacancy in the office of commissioner from any cause, the governor may appoint another person to fill the same. [Id. sec. 10.]

Art. 4577. Assistant chemists; appointment; salary; bond.—The said commissioner is hereby authorized and empowered, with the advice and consent of the governor, to appoint two assistant chemists. The salary of the assistant chemists shall be \$1500.00 per annum each. The assistant chemists shall each enter into bond with the state of Texas for the sum of \$5000.00, with sureties to be approved by the governor, conditioned for the faithful performance of their duties. [Id. sec. 11.]

Art. 4578. Stenographer; appointment and salary.—The commissioner shall appoint one stenographer for the transaction of the business of his office. Said stenographer shall receive an annual salary of \$900.00. [Id. sec. 12.]

Art. 4579. Inspectors; appointment; duties; salary.—The commissioner shall have power to appoint two inspectors at a salary of not to exceed \$1200.00 per annum each, whose duties it shall be to collect samples of foods and drugs, and places where foods and drugs are manufactured, or kept for sale, and to perform such other duties as may be prescribed and directed by the commissioner, according to his rules and regulations. [Id. sec. 13.]

Art. 4580. Expenses of department provided for.—The actual and necessary expenses of the dairy and food commissioner and his assistants and deputies in the performance of their official duties shall be paid by

the state. The amounts for the same shall be audited by the comptroller and upon his warrant drawn upon the state treasury. [Id. sec. 14.]

Art. 4581. Office and laboratory.—The office and laboratory of the dairy and food commissioner shall be at the state capitol, and office and laboratory room shall be furnished in the capitol building. [Id. sec. 15.]

Art. 4582. Duties and powers of commissioner.—It shall be the duty of the dairy and food commissioner, or any inspector or deputy appointed by him, to carefully inquire into the quality of the foods and drug products manufactured or sold or exposed for sale, or offered for sale in this state, and they may in a lawful manner procure samples of the same and make due and careful examination and analysis of all or of any such food and drug products, to discover if the same are adulterated, or misbranded, impure, or unwholesome, in contravention of this Act, and it shall be the duty of the commissioner to make complaint against the manufacturer or vender thereof, in the proper county, and furnish the evidence thereon and thereof to obtain a conviction for the offence charged. The dairy and food commissioner, or his inspectors, or any person by him duly appointed for that purpose, shall make complaint and cause proceedings to be commenced against any person for the violation of any of the laws relative to adulterated, misbranded, impure or unwholesome food, and in such case he shall not be obliged to furnish security for costs; and he shall have power in the performance of his duties to enter into any creamery, factory, store, salesroom, drug store or laboratory, or place where he has reason to believe foods or drugs are made, prepared, sold or offered for sale or exchange, and to open any cask, tub, jar, bottle or package containing or supposed to contain any article of food or drug and examine or cause to be examined the contents thereof, and take therefrom samples for analysis. The persons making such inspection shall take such sample of such article or product and he shall mark or seal such sample and shall tender at the time of taking it to the manufacturer or vender of such product or to the person having the custody of the same the value thereof, and a statement in writing of the reason for taking such sample. It shall also be the duty of the dairy and food commissioner to formulate, publish and enforce such rules and regulations as may be necessary to enforce this Act, and he shall adopt the standards for foods, food products, beverages, drugs, etc., and the methods of analysis authorized as official by the United States department of agriculture in so far as they are applicable in the light of modern discovery and scientific research. [Id. sec. 16.]

Art. 4583. Unlawful for officers to issue certificates in what cases.—It shall be unlawful for the dairy and food commissioner or his deputy or assistants while they hold office to furnish to any individual, firm or corporation any certificate as to the purity or excellence of any article manufactured or sold to or by them to be used as food or drug or in the preparation of foods or drugs. [Id. sec. 17.]

Art. 4584. Annual report of commissioner; contents.—The commissioner shall make an annual report to the governor on or before the 31st day of August in each year which shall be printed and published at the expense of the state, which report shall cover the entire work of his office for the preceding year, and shall show, among other things, the number of manufactories and other places inspected and by whom, the number of specimens of food and drug articles analyzed, and the number of complaints entered against any person or persons for the violation of the laws relative to the adulteration of foods and drugs, the number of convictions had and the amount of fines imposed therefor, together with such recommendations relative to the statutes in force as his experience may justify. [Id. sec. 18.]

Art. 4585. Bulletins; notices of judgments.—The commissioner is hereby empowered with authority to issue bulletins quarterly, or as often as in his judgment he may deem advisable, showing the work of the commissioner. And he shall give notices of the judgments of the courts, by publication, in such manner as he may prescribe by the rules and regulations, and the expenses of such publications shall be paid by the state. [Id. sec. 20.]

Art. 4585a. Condemnation, confiscation and forfeiture of articles adulterated or misbranded; suit, how brought; judgment; duties and fees of district and county attorneys; bond for delivery to owner.—That any article of food or drug that is adulterated or misbranded within the meaning of this Act shall be liable to be condemned, confiscated and forfeited by a suit, to be brought in the district court of the county where said article of food or drug is located, by a suit to be filed in said court in the name of the state of Texas as plaintiff, and in the name of the owner thereof as defendant, if said owner be known; if he be unknown, then in the name of said article of food or drug, and service shall be obtained in said cases in the same manner that the law provides that service shall be obtained in civil cases. That upon a trial of said case, if it be determined by the court or jury trying said case that said article of food or drug is misbranded or adulterated, or of a poisonous or deleterious character within the meaning of this Act, the same shall be disposed of by destruction or sale in accordance with the judgment of the court, and the proceeds thereof, if sold, less the legal cost and charges, shall be paid into the treasury of this state. And it is hereby made the duty of the different district and county attorneys in this state to file forfeiture and condemnation suits under this Act at the request of the dairy and food commissioner, and said district or county attorneys, as the case may be, shall be entitled to a fee of \$15.00, to be paid out of the proceeds arising from the sale of the property condemned, said fee to be in addition to all other fees allowed by law, and shall be over and above the fees allowed under the general fee act of this state. It is further provided, that upon payment of the costs of such forfeiture or condemnation proceeding by the owner of the property proceeded against and by his executing and delivering a good and sufficient bond in double the value of the goods proceeded against, payable to the state of Texas, conditioned that said articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, the court may by order direct that said goods be delivered to the owner thereof. In all proceedings begun under this section, either party may demand trial by jury, of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the state of Texas. [Id. sec. 21.]

Art. 4585b. Names and addresses of manufacturers and vendors to be registered with commissioner; fees; pure food fund.—All manufacturers of foods and drugs doing business in the state of Texas, or all such persons as shall bring into and offer for sale within the state any article of food or drug, shall annually register their firm names and addresses with the dairy and food commissioner and shall pay to said commissioner a fee of \$1.00 for such registration on or before the first day of September of each year. Such fees shall be turned over by the commissioner to the state treasurer and set apart as a fund to be known as "The Pure Food Fund," which fund, or as much thereof as may be necessary, may, with the advice and consent of the governor, be used by the commissioner for paying the expenses of the dairy and food department. The amounts for such expenses shall be audited by the comptroller upon his warrant drawn upon the state treasury. [Id. sec. 23.]

Art. 4585c. Additional assistants; compensation.—The said dairy and food commissioner shall be authorized to appoint, such additional inspectors, chemists, clerks and other additional assistants as in his

judgment may be necessary, whose compensation shall be paid out of the registration fees and penalties collected by the commissioner. [Id. sec. 24.]

Art. 4585d. Dairy and food department to assist.—The dairy and food department shall assist the state board of health in such manner and at such times as may be necessary for protecting the public health of the state. [Id. sec. 25.]

Art. 4586. Manufacture and sale of adulterated and misbranded foods prohibited.—That no person, firm or corporation, shall within this state manufacture for sale, have in his possession with the intent to sell, offer or expose for sale, or sell or exchange any article of food, or drug which is adulterated or misbranded within the meaning of this Act. The term "food" as used herein shall include all articles used for food, drink, flavoring, confectionery or condiment, by man, whether simple, mixed or compounded. That the term "drug" as used in this Act shall include all medicines and preparations for internal or external use recognized in the United States Pharmacopœia or National Formulary, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or animal. [Id. sec. 1.]

Art. 4587. Drugs, confectionery and foods, when deemed adulterated.—That for the purposes of this Act an article shall be deemed to be adulterated: (a) In the case of drugs; (1) if, when sold under or by a name, recognized in the eighth decennial revision of the United States Pharmacopœia or in such United States Pharmacopœia as was official at the time of labeling it, or in the National Formulary, it differs from the standard strength, quality or purity laid down therein; (2) if, when sold under or by a name not recognized in the eighth decennial revision of the United States Pharmacopœia, but which is found in some other Pharmacopœia or other standard work on materia medica, it differs materially from the standard of strength, quality or purity laid down in such work; (3) if its strength, quality or purity falls below the professed standard under which it is sold. (b) In the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredients deleterious or detrimental to health or any vinous, malt or spirituous liquor or compound, or narcotic drug. (c) In the case of food; (1) if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; (2) if any substance has been substituted wholly or in part for the article; (3) if any valuable constituent of the article has been wholly or in part abstracted, or if the product be below that standard of quality, quantity, strength or purity represented to the purchaser or consumer; (4) if it be mixed, colored or powdered, coated or stained in a manner whereby damage or inferiority is concealed; (5) if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption; (6) if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal or vegetable unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. For the purpose of this Act, the term "filthy" shall be deemed to apply to food not securely protected from flies, dust, dirt, and as far as may be necessary by all reasonable means from all foreign or injurious contaminations. [Id. sec. 2.]

Art. 4588. Term "misbranded" defined.—That the term "misbranded," as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular. That for the purposes of this Act an article shall also be deemed to be misbranded: (a) In the case of drugs; (1) if it be an imitation of or offered for sale under the name of another article; (2) if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any morphine, phenacetin, opium, cocaine, heroin alpha, or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid or any derivative or preparation of any such substances contained therein. (b) In the case of food: (1) if it be an imitation of or offered for sale under the distinctive name of another article; (2) if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin alpha, or beta eucaine, phenacetin, chloroform, cannabis indica, chloral hydrate or acetanilid, or any derivative or preparation of any of such substances contained therein; (3) if in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package; (4) if the package containing it or its labels bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases: First in case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced; second, in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends; that the term "blend," as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose or coloring and flavoring only; and provided, further, that nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding. [Id. sec. 3.]

Arts. 4589, 4590. Repealed. See note under Art. 4575. The provision of Art. 4589 has been carried into section 2 of the new act (Art. 4587).

Constitutionality of act.—See note under Art. 4575.

Art. 4591. Manufacture and sale of certain foods, discolored and adulterated, prohibited.—It shall be unlawful for any person to manufacture, sell, offer or expose for sale or exchange any article of food to which has been added formaldehyde, boric acid or borates, benzoic acid or benzoate sulphurous acids or sulphites, salicylic acid or salicylates, abraltal, beta naphthal, fluorine compounds, dulcin, glucin cocaine, sulphuric acid or other mineral acid except phosphoric acid, any prepara-

tion of lead or copper or other ingredient injurious to health; provided, that nothing in this Act shall be construed as prohibiting the sale of catsups, sauces, concentrated fruits, fruit juices, and like substances preserved with one-tenth of one per cent of benzoate of soda, or the equivalent benzoic acid, when a statement of such fact is plainly indicated upon the label; provided, further, that the oxides of sulphur may be used for bleaching, clarifying and refining food products. [Id. sec. 4.]

Art. 4592. Baking powder to be labeled, how.—Whoever manufactures for sale within this state, or offers or exposes for sale or exchange or sells any baking powder or compound intended for use as a baking powder under any name or title whatsoever shall securely affix or cause to be securely affixed to the outside of every box, can or package containing such baking powder or like mixture or compound a label distinctly printed in plain capital letters in the English language, containing the name and residence of the manufacturer or dealer, and the ingredients of the baking powder. Baking powder containing less than 10 per cent of available carbon dioxide shall be deemed to be adulterated. [Id. sec. 5.]

Art. 4593. Sale of impure milk prohibited.—That it shall be unlawful for any person either by himself or agent to sell or expose for sale or exchange any unwholesome, watered, adulterated or impure milk or swill milk or colostrum, or milk from cows kept upon garbage, swill or any other substance in a state of putrefaction or other deleterious substances, or from cows kept in connection with any family in which there are infectious diseases, or from sick or diseased cows; provided, "skim milk" may be sold if on the can, or package from which such milk is old, the words "skim milk" are distinctly painted in letters not less than one inch in length. [Id. sec. 6.]

Art. 4594. Repealed. See note under Art. 4575.

Art. 4595. Exemptions from prosecutions.—That no dealer shall be prosecuted under the provisions of this Act, when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing within this state or in the United States from whom he purchases such article, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties, which would attach, in due course to the dealer under the provisions of this act. [Id. sec. 7.]

Art. 4592a
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Added
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CHAPTER SEVEN

EMBALMING BOARD

Art.	Art.
4596. Embalming board; how constituted; terms of office; qualifications, how removed.	4601. Renewal of license, fee for.
4597. Board, when appointed; vacancies, when filled.	4602. License to be revoked, when, how.
4598. Certificates of appointment, members qualify.	4603. Department to be self-sustaining; moneys received, how appropriated.
4599. Duties and powers of board.	4604. Unlawful to practice without license.
4600. Application to engage in business, fee; skill required.	4605. Provisions of chapter do not apply to what.

Article 4596. Embalming board; how constituted; terms of office; qualifications, how removed.—The state board of embalming shall consist of five members to be appointed by the state board of health, and all vacancies occurring in the board shall be filled by the said board for the

unexpired term. The term of each member of said board shall be for two years. The members of said board shall be practical embalmers, having experience in said business, and the care of, and the disposition of, dead human bodies. The members of said board shall be citizens of this state. The appointing board shall remove any member of said board for neglect of duty, incompetency or improper conduct. [Acts 1903, p. 123, sec. 1.]

Art. 4597. Board, when appointed; vacancies, when filled.—The board shall be appointed on or before the first day of June, and all vacancies occurring by the expiration of their respective terms of office shall be filled annually on the aforesaid date. [Id. sec. 2.]

Art. 4598. Certificates of appointment; members qualify.—The state board of health shall furnish each person appointed to serve on the state board of embalming a certificate of appointment, and such appointee shall qualify by taking the usual oath of office before any officer authorized by law to administer oaths in this state, within ten days after said appointment has been made, and this fact shall be noted on the certificate of appointment, and shall be filed with the board of embalmers. [Id. sec. 3.]

Art. 4599. Duties and powers of board.—The board of embalming shall have the power and it shall be its duty:

1. To prescribe a standard of proficiency as to the qualifications of those engaged, and who may engage, in the practice of embalming in connection with the care and disposition of dead bodies in this state.

2. To meet at least once in each year, and oftener, as the proper and efficient discharge of its duties may require. At least fifteen days' notice of the time and place of meeting of said board shall be given by publication in at least three daily newspapers published in different towns and cities of the state. Three members of the board shall constitute a quorum for the transaction of all its business and the performance of all its duties.

3. To elect a president and secretary from the members of said board, who shall serve for one year, or until their successors shall be elected and qualified.

4. To adopt a common seal.

5. To adopt rules and regulations and by-laws from time to time not inconsistent with the laws of the state or the United States, whereby the performance of all the duties of said board and the practice of embalming dead human bodies shall be regulated. [Id. sec. 4.]

Art. 4600. Application to engage in business; fee; skill required.—Every person engaged or desiring to engage in the practice of embalming in connection with the care and disposition of dead human bodies within the State of Texas shall make a written application to the state board of embalming for a license, accompanying the same with a license fee of five dollars, whereupon the applicant as aforesaid shall present himself or herself before said board at a time and place to be fixed by said board; and, if the board shall find upon examination that the applicant is of good moral character, possessed of the knowledge of the venous arterial system, the location of the heart, lungs, bladder, womb and other organs of the human body, and the location of abdominal, pleural and thoracic cavities, location of the carotid, brachial, radial, ulnar, femoral and tibial arteries, a knowledge of the science of embalming and the care and disposition of the dead, and has a reasonable knowledge of sanitation and the disinfection of bodies of diseased persons, and the apartment, clothing and bedding in case of death by infectious or contagious diseases, the board shall issue to said applicant a license as a duly licensed embalmer, authorizing him to practice the science of embalming. Such license shall be signed by a majority of the

board and attested by its seal. All persons receiving license under the provisions of this chapter shall have said license registered in the county clerk's office in the county in the jurisdiction of which it is proposed to carry on said practice, and shall display said license in a conspicuous place of business of said person so licensed. [Id. sec. 5.]

Art. 4601. Renewal of license; fee for.—Every registered embalmer, who desires to continue the practice of his profession, shall annually thereafter, during the time he shall continue in such practice, on such date as said board may determine, pay to the secretary of said board a fee of two dollars for the renewal of said license. [Id. sec. 6.]

Art. 4602. License to be revoked, when, how.—The state board of embalming shall be and is hereby authorized to revoke any license issued by them for good and sufficient cause, subject to the right of appeal to the state board of health, whose decision shall be final. [Id. sec. 7.]

Art. 4603. Department to be self-sustaining; moneys received, how appropriated.—All expense, salaries, and per diem to members of this board shall be paid from fees received under the provisions of this chapter, and shall in no manner be an expense to the state. All moneys received in excess of per diem allowance, and other expenses provided for, shall be held by the secretary of said board as a special fund for meeting the expenses of the board. [Id. sec. 8.]

Art. 4604. Unlawful to practice without license.—It shall be unlawful for any person not a registered embalmer to embalm or pretend to practice the science of embalming in connection with the care and disposition of the dead, unless said person is a registered embalmer, within the meaning of this chapter. [Id. sec. 9.]

Art. 4605. Provisions do not apply to what.—Nothing in this chapter shall apply to, or in any manner interfere with, the duties of any municipal, county and state officer, or state institution, nor apply to any person simply engaged in the furnishing of burial receptacles for the dead, but only to such person or persons engaged in the business of embalming in connection with the care and disposition of the dead. [Id. sec. 10.]

DECISIONS IN GENERAL

Removal of county physicians.—Where county removes physician appointed for stated time at stated salary without cause, held liable for salary less what he was able to earn because of release from duties as county physician. *Galveston County v. Ducle*, 91 T. 665, 45 S. W. 798.

Art. 4601
Vernon Sayles
1914
Amended
37 L. P. 180

TITLE 67

HOLIDAYS—LEGAL

[For institution of suits on, see Art. 1816].

Art.
4606. What are legal holidays.

Art.
4607. Arbor day.

Article 4606. What days are legal holidays.—The first day of January, the twenty-second day of February, the second day of March, the twenty-first day of April, the third day of June, the fourth day of July, the first Monday in September, the twelfth day of October, and the twenty-fifth day of December, of each year, and all days appointed by the president of the United States, or by the governor, as days of fasting or thanksgiving, and every day on which an election is held throughout the state, are declared holidays, on which all the public offices of the state may be closed, and shall be considered and treated as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange. [Acts 1893, p. 4. Acts 1911, p. 52, sec. 1, amending Art. 2939, Rev. St. 1895, as amended by Acts 1905, p. 14.]

Effect in general.—The statute does not require the public offices of the state to be closed on legal holidays, nor prohibit the courts from transacting business. In enumerating what is forbidden to be done on a holiday, and leaving the performance of other things discretionary, it is manifest that judicial acts, not specially prohibited, which are performed on that day, are not void. *Houston & E. & W. Tex. Ry. Co. v. Harding*, 63 T. 162; *Williams v. Verne*, 68 T. 414, 4 S. W. 548.

The provision that all public offices of the state may be closed on legal holidays is not mandatory. While a court may adjourn if it sees fit or may take no action on a legal holiday, yet any action taken by it would not be illegal. An indictment found by a grand jury impaneled on a legal holiday is not therefore invalid. *Webb v. State* (Cr. App.) 40 S. W. 989.

Sunday.—See notes under Art. 1816.

Judicial proceedings.—See notes under Art. 1816.

Art. 4607. [2940] Arbor day.—The twenty-second day of February of each year, the same being a legal holiday, is further set apart and designated as "Arbor Day," to be devoted to the planting and cultivation of forest, shade and ornamental trees throughout the state, and to be observed for that purpose in such manner as may seem best to the people of each community. [Acts 1889, p. 78.]

TITLE 68

HUSBAND AND WIFE

Chap.

1. Celebration of Marriage.
2. Marriage Contracts.

Chap.

3. Rights of Married Women.
4. Divorce.

CHAPTER ONE

CELEBRATION OF MARRIAGE

Art.

4608. Who are authorized to celebrate rites.
4609. Who are not permitted to marry.
4610. License.
4611. Consent of parent or guardian.
4612. Record and return of license.

Art.

4613. Certain intermarriages prohibited.
4614. Marriage by bond, etc., validated.
4615. Issue legitimated.
4616. Cohabitation of certain persons considered as marriage.

Article 4608. [2954] Who authorized to celebrate rites.—All regular licensed or ordained ministers of the gospel, Jewish rabbis, judges of the district and county courts, and all justices of the peace of the several counties are authorized to celebrate the rites of matrimony between all persons legally authorized to marry. [Act Nov. 1, 1866, p. 72. Acts 1891, p. 96. P. D. 7119.]

Applicability of statute in general.—The statute is merely directory, and the fact that the minister celebrating a marriage was not ordained as provided by law does not render the marriage void, provided there was a valid common-law marriage. *Holder v. State*, 35 Cr. R. 19, 29 S. W. 793.

Ceremonial marriage in general.—See Early Laws, arts. 212, 290, 1002.

A marriage duly solemnized in Texas, while subject to the laws of Mexico, though the husband might have had a former wife living, imposed upon the second wife, if ignorant of this fact, all the obligations and invested her with all the rights of a lawful wife, so long as this ignorance continued. *Smith v. Smith*, 1 T. 621, 46 Am. Dec. 121.

Recitals of the will of a mother held sufficient evidence, where undisputed, to prove coverture of a daughter at the time a cause of action arose and was instituted, and to prevent the bar of limitation. *Summerhill v. Darrow*, 94 T. 71, 57 S. W. 942.

Where a man and woman, after being married once, have a second ceremony performed, the first marriage not being dissolved, the second marriage, though of no effect if the first was legal, will be effective if the first was void. *Knapp v. State*, 54 Cr. R. 633, 114 S. W. 836, 130 Am. St. Rep. 903.

Certain facts held to raise a presumption that a ceremonial marriage was valid. *Clayton v. Haywood* (Civ. App.) 133 S. W. 1082.

In an action for partition, evidence held to show a ceremonial marriage between plaintiff's parents. *Id.*

Where a formal marriage is proved, evidence simply that the parties were reputed in the locality to be unmarried is insufficient as a matter of law to disprove the marriage. *Id.*

Marriage may be contracted without complying with the statutes, and without any ceremony by an officer or minister of the gospel. *Grigsby v. Reib* (Sup.) 153 S. W. 1124.

Nature of marriage.—As to marriages in Texas prior to the adoption of the common law, see *Smith v. Smith*, 1 T. 621, 46 Am. Dec. 121; *Yates v. Houston*, 3 T. 433; *Nichols v. Stewart*, 15 T. 226; *Wheat v. Owens*, 15 T. 241, 65 Am. Dec. 164; *Lee v. Smith*, 18 T. 141; *Carroll v. Carroll*, 20 T. 731; *Rice v. Rice*, 31 T. 174; *Lewis v. Ames*, 44 T. 319; *Routh v. Routh*, 57 T. 589.

In Protestant countries marriage is regarded as a civil contract, subject to the control and regulation of the law of the state; nothing more is needed to constitute it a valid contract than capacity to contract, and mutual consent and mutual wills, expressed in the manner prescribed for its proper attestation and authentication. *Rice v. Rice*, 31 T. 174; *First Nat. Bank v. Sharpe*, 12 C. A. 223, 33 S. W. 676.

Under the law of Mexico in force in Texas prior to the revolution, marriage was regarded as a civil contract, but it was not constituted by mere cohabitation without an intention to enter into a state of matrimony and assume its duties and obligations. *Lewis v. Ames*, 44 T. 319.

The relation of husband and wife, and the rights, privileges, duties, and obligations arising therefrom, are precisely the same whether the marriage was a common-law or statutory one. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

Husband and wife are living together when they occupy the same dwelling, eat at the same table, hold themselves to the world, and conduct themselves as husband and wife. *Levy v. Goldsoll* (Civ. App.) 131 S. W. 420.

Marriage is not a contract, but a status created by the mutual consent of one man and one woman. *Grigsby v. Reib* (Sup.) 153 S. W. 1124.

— **As abating suit.**—See notes under Title 37, Chapter 7.

Common-law marriage—Requisites and validity.—A marriage regularly made according to the common law without observing the statute regulations is a valid marriage. *Holden v. State*, 35 Cr. R. 19, 29 S. W. 793. See *Telegraph Co. v. Proctor*, 25 S. W. 811, 6 C. A. 300; *Chapman v. Chapman*, 11 C. A. 392, 32 S. W. 564.

Evidence held to show a common-law marriage. *Simmons v. Simmons* (Civ. App.) 39 S. W. 639; *Edelstein v. Brown*, 95 S. W. 1126; *Harlan v. Harlan*, 125 S. W. 950; *Schwingle v. Keifer*, 135 S. W. 194.

A marriage under common law or license regularly issued is valid. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

Sufficiency of evidence to show marriage reviewed. *Cuneo v. De Cuneo*, 24 C. A. 436, 59 S. W. 284.

Where a man and woman commenced to cohabit at a time when the woman was the wife of another, subsequently holding themselves out as husband and wife held not to establish a common-law marriage. *Edelstein v. Brown*, 35 C. A. 625, 80 S. W. 1027.

A common-law marriage is valid. *Burnett v. Burnett* (Civ. App.) 83 S. W. 238; *Harlan v. Harlan*, 125 S. W. 950. And sufficient to sustain a conviction of bigamy. *Burks v. State*, 50 Cr. R. 47, 94 S. W. 1040.

The rule as to the evidence required to show a common-law marriage stated. *Edelstein v. Brown* (Civ. App.) 95 S. W. 1126.

On an issue as to whether defendant had been the husband of a certain woman, evidence held to justify a finding that on the granting of a divorce to the woman from another she and defendant had agreed to become husband and wife. *Id.*

If the parties are within the marriageable age, a common-law marriage is valid. *Jackson v. Banister*, 47 C. A. 317, 105 S. W. 66.

Living together as man and wife under a mutual agreement to live in the relation constitutes a common-law marriage. *Knight v. State*, 55 Cr. R. 243, 116 S. W. 56.

A common-law marriage should be satisfactorily proved. *Bargna v. Bargna* (Civ. App.) 127 S. W. 1156.

Consent of the parties to be husband and wife, and not merely living together, constitutes a common-law marriage. *Id.*

A common-law marriage exists when a man and woman enter into an agreement to become husband and wife, and in pursuance of such agreement to live together and cohabit as husband and wife, and hold each other out to the public as husband and wife. *Wofford v. State*, 60 Cr. R. 624, 122 S. W. 929; *Berger v. Kirby*, 105 T. 611, 153 S. W. 1130.

Evidence, in an action to recover personalty belonging to a decedent, on the ground that plaintiff was his wife, held to sustain a finding that she made no agreement to become decedent's wife, or that any agreement made was not made in good faith with intention to cohabit thereunder. *Grigsby v. Reib* (Civ. App.) 139 S. W. 1027.

Marriage by cohabitation and reputation.—Where the only evidence relied on to prove marriage is of cohabitation and repute, then reputation inconsistent with the matrimonial character of the parties is sufficient to make an issue of fact. *Clayton v. Haywood* (Civ. App.) 133 S. W. 1082.

To establish a marriage by reputation, there must be a consensus of opinion that the parties living together are husband and wife. *Schwingle v. Keifer* (Civ. App.) 135 S. W. 194.

A marriage held not a putative marriage. *Walker v. Walker's Estate* (Civ. App.) 136 S. W. 1145.

Consent of parties in general.—The mutual consent of the parties is necessary to the creation of the marriage relation; the contract being a civil contract in that a church ordinance or rite is not required. *Grigsby v. Reib* (Sup.) 153 S. W. 1124.

Marriage by mutual agreement.—A contract per verba de presenti or per verba de futuro cum copula is a valid common-law marriage. *Bargna v. Bargna* (Civ. App.) 127 S. W. 1156.

A mere agreement to become husband and wife without a present intention to assume that relation does not constitute a marriage. *Grigsby v. Reib* (Civ. App.) 139 S. W. 1027.

A present agreement to be husband and wife, not followed by cohabitation, does not constitute a valid marriage. *Grigsby v. Reib* (Sup.) 153 S. W. 1124.

To constitute a valid marriage by agreement, the cohabitation must be professedly as husband and wife, so that the parties may be known as husband and wife by their conduct. *Id.*

An agreement between a man and woman that they would live together so long as they desired but either could dissolve the marriage at any time, did not constitute a lawful marriage by agreement. *Schwingle v. Keifer*, 105 T. 609, 153 S. W. 1132.

Pleading allowing proof of common-law marriage.—See notes under Art. 1827, § 114½.

Duress.—A marriage consummated while the man is under arrest for seducing the woman, and on the advice of the officers of the law and bystanders that, by marrying, the party under arrest would be relieved from further prosecution, is not void on the ground of duress. *Johns v. Johns*, 44 T. 40.

Certain facts held not to show a marriage under duress. *Merrell v. Moore*, 47 C. A. 200, 104 S. W. 514.

Ratification.—One held to have ratified a marriage entered into under duress. *Merrell v. Moore*, 47 C. A. 200, 104 S. W. 514.

Effect of informal or invalid marriage.—See notes under Arts. 4621, 4622.

Art. 4609. [2955] Who not permitted to marry.—Males under sixteen and females under fourteen years of age shall not marry. [*Id.*]

Persons who may marry.—Bigamy is prohibited, but a person is not punishable therefor whose husband or wife has been continually remaining out of the state, or shall have voluntarily withdrawn from the other and remained absent for five years, the person marrying again not knowing the other to be living within that time. **Divorced persons**

may marry. A man cannot marry his mother, his father's sister or half-sister, his mother's sister or half-sister, his daughter, the daughter of his father, mother, brother or sister, or of his half-brother or sister, the daughter of his son or daughter, his father's widow, his son's widow, his wife's daughter, or the daughter of his wife's son or daughter. A woman cannot marry her father, her father's brother or half-brother, her own brother or half-brother, her son, the son of her brother or sister, or of her half-brother or half-sister, the son of her son or daughter, her mother's husband after the death of her mother, her daughter's husband after the death of her daughter, her husband's son, the son of her husband's son or daughter. P. C. 481-485.

A female under eighteen years of age married without the consent of her parents, the license having been procured by her husband by fraudulent representation and false swearing. On information thereof and before cohabitation, she repudiated the ceremony, abandoned her husband and brought suit for divorce. Held, that the marriage was properly declared to be void. *Robertson v. Cole*, 12 T. 356.

A husband and wife separated in 1829. They lived at places remote from each other, and the wife married again in 1835, and the husband in 1837. The husband and last wife lived together as man and wife until his death in 1853. In a controversy between a child by the first wife and the second wife and her children, it was held that the second marriage of the husband was valid without proof of a divorce, although the second wife knew of the first marriage of her husband, the first wife living, but again married. *Carroll v. Carroll*, 20 T. 731.

Even if a woman married her putative husband in good faith, believing that he had been divorced, he being in fact married at the time, her marriage to him was void. *Midleton v. Johnston* (Civ. App.) 110 S. W. 789.

An agreement to live together as husband and wife, made during the lifetime of the wife of one of the parties, was void and could not constitute a marriage. *Grigsby v. Reib* (Civ. App.) 139 S. W. 1027.

In view of this article, the offense of seduction, which consists of having carnal knowledge of a female with her consent, obtained under a promise of marriage, may be committed with a girl under 15 years of age at the time, and the fact that, as the girl had not arrived at the age of 15 years, the offender might be guilty of rape, does not affect the state's right to prosecute for seduction. *Murphy v. State* (Cr. App.) 143 S. W. 616.

— Liability of minor for breach of contract.—See notes under Title 94.

— Presumptions and burden of proof.—See notes under Art. 3687, Rule 12, and Art. 5707.

Art. 4610. [2956] License.—Any person desirous of marrying shall apply to the clerk of the county court, and shall receive from him a license directed to all persons authorized by law to celebrate the rites of matrimony, which shall be sufficient authority for any one of such persons to celebrate such marriage. [Act June 5, 1837. P. D. 4666.]

Licenses and licensing officers—Failure to procure license.—It is not a prerequisite to the validity of a marriage that a license issue. *Chapman v. Chapman*, 11 C. A. 392, 32 S. W. 564; *Burks v. State*, 50 Cr. R. 47, 94 S. W. 1040.

— Authority to issue license.—See Art. 1752.

A deputy county clerk held authorized to issue marriage licenses. *Mahon v. State*, 46 Cr. R. 234, 79 S. W. 28.

— Duty and liability of officers.—In action by a father against a clerk for illegal issuance of a marriage license to his minor daughter, plaintiff held estopped, by statement made to daughter, from saying she did not have his consent. *Evans v. Johnson* (Civ. App.) 61 S. W. 143.

When application is made to clerk for marriage license it is his duty to ascertain whether he is authorized to issue license. *Id.*

A clerk who issued a marriage license to a girl but a few months over 14 years of age held not liable to the parent for the loss of the daughter's services. *Jackson v. Banister*, 47 C. A. 317, 105 S. W. 66.

Art. 4611. [2957] Consent of parent or guardian, etc.; consent of county judge when no parent or guardian.—No clerk shall issue a license without the consent of the parent or guardian of the parties applying, if there be a legally appointed guardian of either party to such license, said consent to be given in person or in writing, signed and acknowledged by said parent or guardian before an officer authorized to take acknowledgements, unless the parties so applying shall be, in case of the male twenty-one years of age, and in case of the female eighteen years of age, and if there be any doubt in the mind of the clerk of the county court issuing such license, he shall not issue said license unless there shall be presented to him a certificate under oath from their parent or guardian or some person other than the contracting parties that the contracting parties have attained the ages aforesaid; provided, further, that nothing in this Act shall be construed to affect the issuance of marriage license in seduction prosecution. Provided, that in cases where any minor has neither parent nor guardian, then the clerk shall not issue a license without the consent of the county judge of the county

of the residence of such minor, such consent to be in writing and signed and acknowledged by such county judge. [Acts 1911, p. 63, sec. 1, amending Art. 2957, Rev. St. 1895.]

Art. 4612. [2958] Record and return of licenses.—The said clerk shall record all licenses so issued by him in a well-bound book kept for that purpose; and it shall also be the duty of the persons solemnizing the rites of matrimony to indorse the same on the license and make return of the same to the office of the clerk of the county court within sixty days after the celebration aforesaid; which return shall also be recorded as aforesaid. [P. D. 4668.]

Return and record of licenses.—The return on a marriage license is admissible to prove the date of marriage. *Stoker v. Patton* (Civ. App.) 35 S. W. 64.

A marriage license is an instrument authorized to be recorded, and a certified copy thereof is inadmissible in evidence in a trial for bigamy, unless it has been filed among the papers in the case three days before the trial. *Burton v. State*, 51 Cr. R. 196, 101 S. W. 228.

The record of a marriage license and the return thereof is not constructive notice to a third person dealing with either spouse, of his or her relation to the other. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

Art. 4613. [2959] Certain intermarriages prohibited.—It shall not be lawful for any person of Caucasian blood or their descendants to intermarry with Africans or the descendants of Africans; and, should any person as aforesaid violate the provisions of this article, such marriage shall be null and void. [P. D. 4670. P. C. 326.]

Presumptions arising from cohabitation.—As the laws forbid the intermarriage of the white and black races, such marriage will not be presumed from the cohabitation, as man and wife, of a white man with a mulatto woman, from 1837 until his death in 1868. *Oldham v. McIver*, 49 T. 556, citing *Clements v. Crawford*, 42 T. 601, and overruling *Honey v. Clark*, 37 T. 686.

Marriage of slaves.—As to marital rights of persons held in slavery, see *Honey v. Clark*, 37 T. 686; *Clements v. Crawford*, 42 T. 601; *Oldham v. McIver*, 49 T. 556; *Kinlow v. Kinlow*, 72 T. 639, 10 S. W. 729.

Where slaves cohabiting together continued to live together as man and wife after their emancipation, their marital status became legal, entitling the wife and her children to property acquired during the existence of such relation. *Waff v. Sessums*, 28 C. A. 183, 66 S. W. 865.

Art. 4614. [2960] Marriages by bond, etc., validated.—Whereas, many persons heretofore, previous to the passage of an act approved June 5, 1837, regulating marriages, and for other purposes, had, for the want of some person legally qualified to celebrate the rites of matrimony, resorted to the practice of marrying by bond, and others have been married by various officers of justice not authorized to celebrate such marriages, and whereas, public policy and the interest of families require a further legislative action on the subject, therefore, all such marriages are declared legal and valid to all intents and purposes, and the issue of such persons are declared legitimate children and capable of inheritance. [Act Feb. 5, 1840. P. D. 4671.]

Legalizing marriages.—By the ordinance and decree of 1836 (1 Early Laws, art. 212), marriages under existing laws were declared legal. After that date marriages could be celebrated by judges, alcaldes, commissaries and ministers of the gospel.

By the act of June 5, 1837 (1st Cong., p. 233; 1 Early Laws, art. 290), former marriages were legalized on condition that the parties publicly solemnized the rites before a proper officer within six months from the passage of the law. All former marriages where either party died while living as husband or wife with the other were declared legal, and the children were legitimized.

In 1832 A. and B. contracted marriage by bond and lived together a few months. In 1834 C. and B., living together as man and wife, and having a child about six months old, contracted marriage by bond, A. and B. having previously canceled their bond. A short time afterwards C., while living with B. as man and wife, died. Held, that the second marriage was legalized by legislation on that subject, and the issue of C. and B. legitimated. *Nichols v. Stewart*, 15 T. 226.

A man married a wife in Texas before an alcalde in 1831. The marriage, not having been solemnized by a Catholic priest, was void. In 1834 he separated from his wife and was married to another by a person without official authority, and continued to live with the second wife until 1857, when he deserted her and married a third wife. Held, that the second marriage was legalized by the acts of 1836, 1837 and 1841, and the first and third marriages were void. *Rice v. Rice*, 31 T. 175.

Marriages by bond.—Parties were married in Texas by bond on the 23d of July, 1830, but separated prior to the death of the husband in 1835. The question being whether a child born of the marriage was the legal heir of the father and could inherit his estate, it was held that the contract of marriage evidenced by the bond above mentioned was valid. *Sapp v. Newson*, 27 T. 537.

Art. 4615. [2961] Issue legitimated.—In cases where persons have so intermarried agreeably to the custom of the times, and where husband or wife has since died, then and in that case the issue of such marriages are hereby legitimated. [Act Jan. 20, 1840. P. D. 4672.]

Art. 4616. [2962] Cohabitation of certain persons considered as marriage.—All persons who at any time heretofore have lived together as man and wife, and both of whom, by the laws of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married, and the issue of such cohabitation is declared legitimate; and all such persons as were so living together in such relation on the fifteenth day of August, 1870, shall be considered as having been legally married, and the children heretofore or hereafter born of such cohabitations are declared legitimate. [Act Aug. 15, 1870, p. 127. P. D. 7120.]

See notes under Art. 4608.

Hearsay evidence of marriage.—See notes under Art. 3687, Rule 85.

CHAPTER TWO

MARRIAGE CONTRACTS

Art. 4617. What stipulation may be made.
4618. How authenticated.

Art. 4619. Can not be altered after marriage.
4620. Reservation by wife to be recorded.

Article 4617. [2963] What stipulations may be made.—Parties intending to enter into the marriage state may enter into what stipulations they please, provided they be not contrary to good morals or to some rule of law; and in no case shall they enter into any agreement, or make any renunciation, the object of which would be to alter the legal orders of descent, either with respect to themselves, in what concerns the inheritance of their children or posterity, which either may have by any other person, or in respect to their common children; nor shall they make any valid agreement to impair the legal rights of the husband over the person of the wife, or the persons of their common children. [Act Jan. 20, 1840. P. D. 4632.]

Registration of marriage contract.—See notes under Title 118.

Art. 4618. [2964] How authenticated.—Every matrimonial agreement must be acknowledged before some officer authorized by law to take acknowledgments to deeds, and attested by at least two witnesses; the minor capable of contracting matrimony may give his consent to any agreement which this contract is susceptible of, but such agreement must be made by the written consent of both parents, if both be living; if not, by that of the survivor; if both be dead, then by the written consent of the guardian of such minor. [P. D. 4633.]

Art. 4619. [2965] Can not be altered after marriage.—No matrimonial agreement shall be altered after the celebration of the marriage.

Postnuptial acts or agreements.—A postnuptial agreement between husband and wife cannot change their property rights to that of partners, or convert community property into separate property. Cannon v. Boutwell, 53 T. 626; Cox v. Miller, 54 T. 16; Green v. Ferguson, 62 T. 525; Miller v. Marx, 65 T. 131; Graham v. Stuve, 76 T. 533, 13 S. W. 381; Proetzell v. Schroeder, 83 T. 684, 19 S. W. 292; Engleman v. Deal, 14 C. A. 1, 37 S. W. 652.

A postnuptial contract between husband and wife, renouncing her interest in the community property which they possess or may thereafter acquire, is a nullity. Proetzell v. Schroeder, 83 T. 684, 19 S. W. 292.

Art. 4620. [2966] Reservation by wife must be recorded.—When the wife, by a marriage contract, may reserve to herself any property, or rights to property, whether such rights be in esse or expectancy, such

reservation, to be valid as to the subsequent purchasers or creditors of her husband, must be acknowledged and recorded as provided by law. [P. D. 4635.]

CHAPTER THREE

RIGHTS OF MARRIED WOMEN

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| <p>Art.
4621. Separate property; management; joinder of husband; permission by district court where husband refuses to join, etc.; wife's property not subject to husband's debts; conveyance of homestead.</p> <p>4622. Community property; what property should be under control, etc., of wife; bank deposits.</p> <p>4623. Presumption as to community property.</p> <p>4624. What property subject to debts of wife; husband must join in certain contracts.</p> | <p>Art.
4625. Judgment and execution in such cases.</p> <p>4626. Husband failing to support wife.</p> <p>4627. Community property liable for debts.</p> <p>4628. Female under twenty-one emancipated, when.</p> <p>4629. Rights of persons married elsewhere.</p> <p>4629a. May apply to district court to become feme sole for mercantile and trading purposes, how.</p> <p>4629b. Petition; contents.</p> <p>4629c. Hearing on petition.</p> <p>4629d. Decree declaring married woman feme sole for mercantile and trading purposes; effect of decree.</p> |
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[In addition to the notes under the particular articles, see also notes of decisions in general, at end of chapter.]

Article 4621. [2967] Separate property; management; joinder of husband; permission by district court where husband refuses to join, etc.; wife's property not subject to husband's debts; conveyance of homestead.—All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessities furnished herself and children after her marriage with him. All property of the wife both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired be shall be the separate property of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal, and the wife shall have the sole management, control and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this Act; provided, also, that if the husband shall refuse to join in such encumbrance, or conveyance, or transfer of such property the wife may apply to the district court of the county of her residence, and it shall be the duty of the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interest of the wife, to make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, in which event she may encumber, convey or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband. The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the

Art. 4621
Vernon-Sayles
1914
Amended
35 L. P. 436

Art. 4621
Vernon Sayles
1914
Amended
37 L. P. 251

joint conveyance of both the husband and the wife. [Act March 13, 1848. P. D. 4641. Const., art. 16, sec. 15. Acts 1913, p. 61, sec. 1, amending Art. 4621, Rev. St. 1911.]

See Arts 1114, 1115.

1. Applicability in general.
2. Definitions — "Acquired"—"Claim" — "Owned or claimed."
3. "All property, both real and personal."
4. — "Increase."
5. Adverse possession between husband and wife.
6. Separate estate of husband in general.
7. Foreclosure—Judgment against wife.
8. Conveyances or gifts by wife to or for husband.
9. Conveyances in trust.
10. Conveyances of husband's separate estate.
11. Actions by husband.
12. Abandonment by husband as affecting rights of parties.
13. Separate property and rights of husband and wife in general.
14. Separate estate of wife in general.
15. What law governs.
16. Conveyances or gifts to or for use of wife as her separate property.
17. — Right to question validity of conveyances from husband to wife.
18. Property acquired by husband for wife as her separate property.
19. Trusts in favor of wife.
20. — What law governs.
21. — Enforcement.
22. — Conveyance of beneficial interest.
23. Proceeds or increase of or interest on separate property.
24. Damages recovered by wife.
25. Right of action.
26. Estoppel of wife to claim property.
27. Presumptions and burden of proof.
28. Evidence.
29. Management of separate estate of wife.
30. Contracts—Acknowledgment.
31. — Ratification.
32. — Authority of husband after separation.
33. — Authority of wife after separation.
34. Conveyance of homestead.
35. Conveyance of separate estate of wife.
36. — Parties in suits for wife's separate property.
37. — Measure of damages for wrongful conveyance.
38. — Rights of creditors.
39. — Joinder of wife as waiver of interest in land received.
40. — Consideration.
41. — Mortgage—Liability on.
42. — Conveyance after wife's death.
43. — Title of purchaser.
44. — Burden of proof.
45. Authority of wife to give or sell her personal estate.
46. — Forms of conveyances.
47. Gifts causa mortis.
48. Rights and liabilities of heirs.
49. Liability of husband or wife.
50. — Enforcement.
51. — Preferences.
52. Agency of wife for husband.
53. — Ratification or repudiation of agency.
54. — Evidence of agency.
55. — Authority as agent.
56. Agency of husband for wife.
57. — Personal liability of husband or wife.
58. Revocation of agency by marriage.
59. Revocation of power of testamentary trustee.
60. Bond of married woman as executor as binding her estate.
61. — Bond as guardian.
62. Descent and distribution.
63. Allowance to widow and children.
64. Contracts for arbitration of property rights.

1. **Applicability in general.**—This article applies to real estate owned by nonresidents. *Heldenheimer v. Loring*, 6 C. A. 560, 26 S. W. 99.

2. **Definitions—"Acquired"—"Claim"—"Owned or claimed."**—Under this article and Art. 4621, ownership resting in adverse possession for 10 years, existing in part before marriage and in part after marriage, is community property; the word "acquired" denoting all property coming to husband or wife during coverture by title, other than by gift, devise, or descent; and the word "claim," when applied to land, importing a legal or equitable right to the land; and the words "owned or claimed" signifying a legal or equitable ownership, or legal or equitable right to demand the land. *Sauvage v. Vauhoh* (Civ. App.) 143 S. W. 259.

3. **"All property, both real and personal."**—There being no statute limiting the power of a married woman in the conveyance of any of her separate property, if joined by her husband, and the phrase, "all property, both real and personal," as used in the statute as designating the property that shall constitute separate property, being used in a general sense, a married woman, joined by her husband, can make a valid conveyance of her expectancy in the community estate of her mother. *Daggett v. Barre* (Civ. App.) 135 S. W. 1099.

4. — **"Increase."**—Profits arising from the sale of the lands of a married woman, the husband as her agent continuing to buy with her funds and sell, are within the term "increase" in this article. *Evans v. Purinton*, 12 C. A. 158, 34 S. W. 350.

5. **Adverse possession between husband and wife.**—See, also, notes under Art. 5681. Where a wife went into adverse possession before marriage, and the title ripened by limitation during marriage, held, the land is her separate property. *Texas & N. O. R. Co. v. Speights* (Civ. App.) 59 S. W. 572.

Where title to land occupied by a husband and wife is perfected by adverse possession after his death, the land becomes the wife's separate estate. *Cook v. Houston Oil Co.* (Civ. App.) 154 S. W. 279.

6. **Separate estate of husband in general.**—Whether a grant of land to a colonist was separate or community property is determined as follows: If the surviving husband received the grant by reason of his immigration, etc., independent of his status as a married man at the date of his wife's death, it was his separate property. If an increased quantity was given to the survivor by reason of the fact that at the date of the death of the wife he was then a married man it was community property. *Hodge v. Donald*, 55 T. 344; *Wimberly v. Pabst*, 55 T. 587. See *Durst v. Dougherty*, 81 T. 650,

17 S. W. 388; *Proetzel v. Schroeder*, 83 T. 684, 19 S. W. 292; *Stiles v. Japhet*, 84 T. 91, 19 S. W. 450; *Gaston v. Wright*, 83 T. 282, 18 S. W. 576.

Land acquired by a surviving husband under an act of the legislature granting land to settlers in Peters' colony, passed after the death of the wife, is the separate property of the husband. *McReynolds v. Bowlby*, 1 U. C. 452.

Evidence held to establish that a business of the husband was his separate property. *Holloway v. Shuttles*, 21 C. A. 188, 51 S. W. 293.

Land in the state purchased by a married man with money earned during coverture in Massachusetts is his sole property, and the wife on divorce is not entitled to one-half thereof. *Blethen v. Bonner* (Civ. App.) 52 S. W. 571.

Land purchased by a husband before his marriage is his separate property, and, if paid for with community funds, the community estate is entitled to a reimbursement. *Hillen v. Williams*, 25 C. A. 268, 60 S. W. 997.

A husband, by purchasing an outstanding title to the wife's property with community property, acquired no interest therein. *Gebhart v. Gebhart* (Civ. App.) 61 S. W. 964.

An insurance policy on the life of the wife, paid for with community funds, on the death of the wife becomes the separate property of the husband. *Martin v. McAllister*, 94 T. 567, 63 S. W. 625.

Where a husband furnished \$1,500 of the purchase price of certain land out of his separate property, to that extent the land became his separate estate. *Letot v. Peacock* (Civ. App.) 94 S. W. 1121.

Where a husband who had been occupying public land with his wife applied after her death for a survey, and obtained patent, the land is his separate land, and no interest vested in the wife. *Simpson v. Oats* (Civ. App.) 109 S. W. 940.

An interest in real estate inherited by a man is his separate property. *Sauvage v. Wauhup* (Civ. App.) 143 S. W. 259.

If an assignment of a headright certificate to an assignee, who obtained a patent in 1852, was prior to the holder's divorce from his wife, the title to the whole land passed to the assignee, and third persons could acquire no title under the wife. *Steddum v. Kirby Lumber Co.* (Civ. App.) 154 S. W. 273.

7. Foreclosure—Judgment against wife.—The court in a suit to foreclose a mortgage executed by a mortgagor who was single at the time held not authorized to render judgment against his wife. *Adams v. Bartell*, 46 C. A. 349, 102 S. W. 779.

8. Conveyances or gifts by wife to or for husband.—A wife, joined by her husband, can convey her separate property to a third person, who may convey to the husband. *Riley v. Wilson*, 24 S. W. 394, 86 T. 240.

Facts held not to raise a presumption that a wife had made a gift to her husband. *Tilson v. Gass*, 46 C. A. 163, 102 S. W. 751.

Conveyances held not to make land the separate property of the husband, and the conveyances were only valid in so far as they subjected the land to the payment of money borrowed. *Shook v. Shook* (Civ. App.) 125 S. W. 638.

9. Conveyances in trust.—Under wife's conveyance of her separate estate to her husband as trustee, with power to use and invest at such times as he in his discretion may see proper, after investing in land, he had power to sell and reinvest. *Scottish-American Mortg. Co. v. Massie*, 94 T. 339, 60 S. W. 544.

10. Conveyances of husband's separate estate.—Land, title to which is in the husband before marriage, is his separate property, and may be conveyed without his wife's consent, where it has not become their homestead. *Wright v. Barnett* (Civ. App.) 48 S. W. 1096.

11. Actions by husband.—In a suit by a husband for value of timber cut from land which is his separate property, his wife is neither a necessary nor proper party. *Railway Co. v. Starr*, 22 C. A. 353, 55 S. W. 393.

In an action of trespass to try title by the husband and wife, an appeal can be prosecuted by him from a judgment rendered in favor of defendants. *Corley v. Renz* (Civ. App.) 24 S. W. 935.

12. Abandonment by husband as affecting rights of parties.—A husband, having unjustifiably abandoned his wife, held not entitled to any part of the rental value of his property in his wife's possession during her life, but was entitled to one-half of the rents accruing therefrom thereafter. *Cervantes v. Cervantes* (Civ. App.) 76 S. W. 790.

13. Separate property and rights of husband and wife in general.—Money or property received for the sale of, or in exchange for, the separate property of either husband or wife, remains separate property. *McIntyre v. Chappell*, 4 T. 187; *Love v. Robertson*, 7 T. 6, 56 Am. Dec. 41; *Huston v. Curl*, 8 T. 239, 58 Am. Dec. 110; *Rose v. Houston*, 11 T. 324, 62 Am. Dec. 478; *Chapman v. Allen*, 15 T. 278; *Schneider v. Fowler*, 1 App. C. § 856; *Smith v. Bailey*, 66 T. 553, 1 S. W. 627; *Bank v. Weems*, 69 T. 499, 6 S. W. 802, 5 Am. St. Rep. 85; *Cabell v. Mencer* (Civ. App.) 35 S. W. 206.

A husband and wife, as regards their individual property, are separate and distinct persons. He cannot bind her separate property, dispose of it, subject it to the payment of debts, or renew a debt for which it was bound, so as to prevent the bar of the statute of limitations. *Read v. Allen*, 56 T. 176; *Milburn v. Walker*, 11 T. 344; *McGee v. White*, 23 T. 180.

An annuity due a person before marriage and payable thereafter is separate property. *Krohn v. Krohn*, 23 S. W. 848, 5 C. A. 125.

Where the origin of the title precedes the marriage, land acquired during the marriage is the separate property of the spouse in whom the title originates. *Welder v. Lambert*, 91 T. 510, 44 S. W. 281.

Where a husband and wife actually separate for good, a division of their community property fairly consummated is effectual, and what each obtains becomes separate property. *Batla v. Batla* (Civ. App.) 51 S. W. 664.

Where a husband and wife, who had permanently separated, divided their community estate, in a suit by the wife to set aside the settlement as having been procured by fraud the husband's relation to her should be considered, in connection with the circumstances surrounding the transaction, in determining its character. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 992.

Where a deed was intended as a joint gift to a husband and wife, they were each invested with an undivided half of the land as their separate property. *King v. Summerville* (Civ. App.) 80 S. W. 1050.

The rule that a title when perfected, relates back to and takes effect from the time of its origin, and that the status of property, as separate or community, is determined by the character of the right in which it had its inception, does not apply where a claim to property rests on adverse possession, partly before and partly during marriage, but applies only where the right to the land is referred, in the first instance, to some legal or equitable claim before marriage. *Sauvage v. Wauhop* (Civ. App.) 143 S. W. 259.

Where property is purchased partly with the separate estate of the wife and partly with community funds, the wife acquires a separate interest proportionate to the amount of her separate estate. *Texas Moline Plow Co. v. Clark* (Civ. App.) 145 S. W. 266.

In a controversy to which the state is not a party, whether public land purchased from the state in the name of either husband or wife is community property or separate property must be determined by the character of the right by which the title thereto had its inception. *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

14. Separate estate of wife in general.—A wife, by purchase or gift from her husband or others, can acquire property in her own right without the intervention of a trustee. *Reynolds v. Lansford*, 16 T. 286; *Smith v. Strahan*, 16 T. 314, 67 Am. Dec. 622; *Story v. Marshall*, 24 T. 305, 76 Am. Dec. 106; *Price v. Cole*, 35 T. 461; *Ryan v. Ryan*, 61 T. 473; *Peters v. Clements*, 46 T. 125; *Baldrige v. Scott*, 48 T. 178; *Hall v. Hall*, 52 T. 294, 86 Am. Rep. 725; *McCormick v. McNeel*, 53 T. 15.

A non-negotiable note given for the separate property of the wife and payable to her order is her separate property. *Hamilton v. Brooks*, 51 T. 142; *Morris v. Edwards*, 1 App. C. C. § 548; *Kemper v. Comer*, 73 T. 196, 11 S. W. 194.

The mere deposit of money by a husband to the account of his wife, a receipt for the same being taken in her name, does not of itself show that it was intended as a gift to the wife as her separate property. *Wellborn v. O. F. B. & E. C.*, 56 T. 501, citing *Mitchell v. Marr*, 26 T. 329; *Huston v. Curl*, 8 T. 239, 58 Am. Dec. 110; *Veramendi v. Hutchins*, 48 T. 531.

When property is purchased partly with the means of the wife, her interest is proportionate to the amount paid by her. *Cleveland v. Cole*, 65 T. 402, citing *Love v. Robertson*, 7 T. 6, 56 Am. Dec. 41; *Claiborne v. Tanner*, 18 T. 68; *Zorn v. Tarver*, 45 T. 519; *Battle v. John*, 49 T. 203; *Braden v. Gose*, 57 T. 37.

The right of a married woman to own property is as absolute as that of her husband. *Montgomery v. Brown*, 1 App. C. C. § 1304.

A stock of goods, the separate property of the husband at the date of his marriage, was from time to time replenished and increased until the wife's death. The property to the extent of the value of the goods at the date of the marriage was protected against those claiming through the deceased wife. *Schmidt v. Huppmann*, 73 T. 112, 11 S. W. 175.

A contract to acquire land by a married woman by means of a land certificate held by her as her separate property may be by parol. *Ikard v. Thompson*, 81 T. 285, 16 S. W. 1019; *Bennett v. Virginia Ranch, Land & Cattle Co.*, 21 S. W. 126, 1 C. A. 321.

The earnings of the wife, as between her and her husband, are her separate property. *Cavil v. Walker*, 26 S. W. 854, 7 C. A. 305.

Where separate funds of the wife and community funds are used for the purchase of land, she has an equitable interest in the land proportioned to her investment. *Godard v. Reagan*, 28 S. W. 352, 8 C. A. 272.

If a husband conveys community property to his wife, this converts it into her separate property. *Hunter v. Hunter* (Civ. App.) 45 S. W. 820.

When the policy is payable to the wife, the obligation which it evidences is her separate property, and when the note, to secure which the policy has been transferred, becomes barred, the wife can plead the statute of limitation, the husband being dead, in a suit on the note. *Washington Life Ins. Co. v. Gooding*, 19 C. A. 490, 49 S. W. 123.

A conveyance by husband and wife of property in trust for the support of the wife and children, and education of the latter, but does not prescribe how the property will devolve after the trust is executed, carves out of the estate a usufructuary interest in favor of the wife and children and leaves the remainder unaffected, and hence subject to alienation by the grantors. *Monday v. Vance*, 92 T. 423, 49 S. W. 516.

A married woman, with consent of her husband, may settle on public lands. *Barnett v. Murray* (Civ. App.) 54 S. W. 784.

Property purchased and paid for with the wife's own money would be separate property. *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899.

Where a married woman and her husband bought a home partly with money which the wife owned in her separate right, subsequently mortgaged the home, in litigation which ensued the husband deposited in court the amount due on the mortgage to avoid foreclosure, a large part of which was furnished by the wife's son with the understanding that on a sale of the home it should be paid to her for her separate use, and upon a sale in which she joined on her husband's promise to reimburse her for the amounts which she put into the home and which her son advanced, the husband deposited such amounts in a bank in her name, the deposit was her separate estate and was not subject to her husband's debt to the bank. *Farmers' Nat. Bank of Center v. Hill* (Civ. App.) 133 S. W. 526.

That a wife permitted a strip of land owned individually by her in a city to be platted and used by the tenants occupying adjoining lots owned by her husband did not affect her separate title as against the husband's heir. *Burns v. Parker* (Civ. App.) 137 S. W. 705.

Where a husband and wife agree that certain horses and their increase shall be the wife's separate property, and he brands them with her recorded brand, the agreement is binding upon him and his heirs and invalid only as to community creditors. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

Where a married woman's money is invested in land in her husband's name, she owns, in her separate right, a part of the land proportionate to the amount of her funds

invested therein. *Kingman-Texas Implement Co. v. Herring Nat. Bank* (Civ. App.) 153 S. W. 394.

Where title to land occupied by a husband and wife is perfected by adverse possession after his death, the land becomes the wife's separate estate. *Cook v. Houston Oil Co. of Texas* (Civ. App.) 154 S. W. 279.

A married woman with her husband's consent may purchase public school land from the state. *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

Where a third person agreed to give a wife money to buy land from the state, the first payment was made out of money so given, and it was intended that deferred payments would be so made, the land was her separate property, though the husband joined in notes for such deferred payments, and a judgment against the husband was not a lien thereon. *Id.*

15. **What law governs.**—Evidence held not to show that common-law rule as to marital rights of wife in respect to her separate estate prevailed in foreign state. *Clardy v. Wilson*, 24 C. A. 196, 58 S. W. 52.

16. **Conveyances or gifts to or for use of wife as her separate property.**—Land conveyed to a married woman by a deed of gift is her separate property. *Fisk v. Flores*, 43 T. 340; *Ames v. Hubby*, 49 T. 710; *Samuelson v. Bridges*, 25 S. W. 636, 6 C. A. 425.

Property conveyed to a wife "to her sole and separate use" becomes her separate property, whether the consideration was paid with separate or community funds. *Morrison v. Clark*, 55 T. 437.

A husband can make a conveyance to the wife of his separate property, or of the community property, so as to vest the title in her as separate property, provided the rights of creditors are not encroached upon. *Brown v. Brown*, 61 T. 56; *Rily v. Wilson*, 24 S. W. 394, 86 T. 240.

A husband, being indebted to the wife, conveyed to her a certain tract of land for the purpose of discharging said debt, but without the knowledge or consent of the wife. At the time of the delivery of the deed to the wife she was informed by her husband that he had previously conveyed the land to his father by a deed then unrecorded. Held, that the wife could not, as a bona fide purchaser, hold the land against the prior unrecorded deed. *Pearce v. Jackson*, 61 T. 642.

A husband, being indebted to the wife on account of her separate funds used by him, in pursuance of an agreement between them, paid for a tract of land, which by his direction was conveyed to the wife in payment of such indebtedness. Held, that the land was her separate property. *McKamey v. Thorp*, 61 T. 648; *Ross v. Kornrumpf*, 64 T. 390.

The application of the separate funds of a wife in part payment of a tract of land, with her approval, gives her a proportional interest in the land, and, when the deed is taken by the husband in his name, the trust in favor of the wife is created, and she becomes the equitable owner of such proportional interest. *Blum v. Rogers*, 71 T. 669, 9 S. W. 595.

A deed to a married woman, "her heirs and assigns, to her proper use, benefit and behoof forever in fee simple," with warranty against all debts, etc., and against the lawful claims of all persons whatsoever to the said grantee, does not indicate that it is the wife's separate estate, or put a purchaser upon inquiry as to her equities. *Stiles v. Japhet*, 84 T. 91, 19 S. W. 450.

A conveyance of land by a husband to the wife for a valuable consideration vests title in her without the recital that it was intended for her separate use. *Swearingen v. Reed*, 21 S. W. 383, 2 C. A. 364.

Property purchased with the separate means of the wife, part cash and part in notes, is her separate property. *Parker v. Fogarty*, 23 S. W. 700, 4 C. A. 615.

A conveyance to a wife, for cash and on credit, the funds so used being her separate estate, vests title in her. *Sinsheimer v. Kahn*, 24 S. W. 533, 6 C. A. 143.

As to deed of the husband to his wife, see *Frank v. Frank* (Civ. App.) 25 S. W. 819.

As to deed to married woman, part payments being out of community funds, see *Cavil v. Walker*, 26 S. W. 854, 7 C. A. 305.

Gift by the husband to his wife of the income to accrue from her separate property is valid as between themselves. *Bruce v. Koch* (Civ. App.) 40 S. W. 626.

A wife cannot make land her separate property, where the purchase is entirely on credit. *Harrison v. Mansur-Tibbetts Implement Co.*, 16 C. A. 630, 41 S. W. 842.

Land conveyed by heirs to a wife in consideration of the release of the claim she has as sole legatee against the estate of the ancestor is her separate estate. *O'Connor v. Vineyard*, 91 T. 488, 44 S. W. 485.

Evidence held not to show that land conveyed absolutely to a wife was on a parol trust for the husband's benefit. *Hunter v. Hunter* (Civ. App.) 45 S. W. 820.

Where land is bought with separate funds of the wife, and the deed taken in her name, the fact that subsequent improvements are paid for out of community funds does not divest her of title. *Schwartzman v. Cabell* (Civ. App.) 49 S. W. 113.

Conveyance to wife to take effect after husband's death, whether construed as a will or deed, held not to vest any interest in the wife; both having conveyed to a third party during the husband's life. *Phillips v. Phillips*, 23 C. A. 532, 57 S. W. 59.

An intention of the husband to convey property to his wife in her separate right may be shown by recitals in the deed of a consideration which, if moving from her, would give such a character to the property. *Kahn v. Kahn*, 94 T. 114, 58 S. W. 825.

In an action for divorce, held proper to award land to the wife as her separate property. *Gebhart v. Gebhart* (Civ. App.) 61 S. W. 964.

Property devised to a woman for life, "to receive for her sole and separate use, and no other," the rents and profits thereunder are her separate property. *Sullivan v. Skinner* (Civ. App.) 66 S. W. 680.

Property deeded to a wife in consideration of her relinquishment of rights in a homestead became hers, and the lien of a judgment against the husband could not attach thereto. *Drake v. Davidson*, 28 C. A. 184, 66 S. W. 889.

Money borrowed by a wife after her marriage, for the purpose of paying taxes on her separate property, did not belong to her separate estate. *Grevils v. Smith*, 29 C. A. 150, 68 S. W. 291.

Deed to a married woman construed, and held to convey land as her separate estate. *Laufer v. Powell*, 30 C. A. 604, 71 S. W. 549; *Merriman v. Bialack*, 56 C. A. 594, 121 S. W. 552.

A deed from a husband to a wife is sufficient to vest the title in her, without any recital that it was to become her separate estate. *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 258.

Land purchased by husband and wife, to which title was taken in wife's name in consideration of her signing a deed to other land, held to be the wife's separate estate, irrespective of proportion of purchase price contributed by her or intention of husband. *McKinney v. McKinney* (Civ. App.) 87 S. W. 217.

A conveyance of real estate by a husband to his wife makes the land conveyed her separate estate, irrespective of whether the deed specifically so declares. *Jones v. Humphreys*, 39 C. A. 644, 88 S. W. 403.

Title to land conveyed to a married woman while sole, and held by her and her husband for the period of limitations, held vested in her as her separate property. *Alford Bros. & Whiteside v. Williams*, 41 C. A. 436, 91 S. W. 636.

The fact that a husband bought land with his separate means, and had the deed made to his wife, as between the parties, was sufficient to show that he intended it as a gift to her. *Tison v. Gass*, 46 C. A. 163, 102 S. W. 751.

An agreement between a creditor and the debtor and his wife held to constitute a gift of real estate to the wife. *Sullivan v. Fant*, 51 C. A. 6, 110 S. W. 507.

Land purchased by a married woman held her separate property so far as the land was paid for out of her separate funds, and community property so far as it was paid for by funds borrowed by her on a note by herself and husband. *Barr v. Simpson*, 54 C. A. 105, 117 S. W. 1041.

A deed from a husband, directly conveying land to the wife, vests title thereto in her as her separate estate. *Kin Kaid v. Lee*, 54 C. A. 622, 119 S. W. 342; *Same v. Buck* (Civ. App.) 119 S. W. 345.

A conveyance, directly from the husband to the wife, of property standing in his name, acquired since the marriage, prima facie vests title in her as her separate estate. *Du Perier v. Du Perier* (Civ. App.) 126 S. W. 10.

A married woman may buy property for part cash and part notes where the payments are to be made out of her separate estate. *McBride v. Witwer* (Civ. App.) 127 S. W. 902.

A conveyance to grantor's daughter-in-law held to vest the property in the grantee's separate right and not to convey a community interest. *Anderson v. Casey-Swasey Co.*, 103 T. 466, 129 S. W. 349.

Conveyance from husband to wife held to invest in her separate interest in land whether husband paid therefor separate funds of wife or community funds or both. *Bott v. Wright* (Civ. App.) 132 S. W. 960.

A warranty deed by a husband of his right to real estate held to give the wife separate property therein, so that she cannot be disturbed in her possession except by some one showing title in himself. *Bishop v. Gesteau* (Civ. App.) 136 S. W. 1141.

A conveyance from a husband to wife held to give her a separate estate. *Emery v. Barfield* (Civ. App.) 138 S. W. 419.

A wife purchasing free school land purchased from the state by her vendor acquired an undivided interest by virtue of the payment by her of a part of the price. *Texas Moline Plow Co. v. Clark* (Civ. App.) 145 S. W. 266.

The wife's signing of a deed to the marital homestead is a valuable consideration supporting an agreement by the husband to convey the property purchased with the proceeds to the wife's separate estate. *Jones v. Jones* (Civ. App.) 146 S. W. 265.

An agreement between husband and wife that certain horses and their increase should be her separate property held binding on him. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

Land purchased by the wife in her name, the first payment being out of her separate funds, with the understanding between the husband and wife that it is to be paid for out of her separate estate and held as her separate property, does not become community property because the notes for deferred payments are executed by the husband. *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

A conveyance by a husband to his wife vests the separate estate in her as between the parties and their heirs, and this is true whether the conveyance so limits the estate or not. *Emery v. Barfield* (Civ. App.) 156 S. W. 311.

17. — Right to question validity of conveyances from husband to wife.—No one but a creditor of the husband, or a subsequent purchaser without notice, can question the validity of a conveyance from the husband to the wife. *De Garza v. Galvan*, 55 T. 53.

18. Property acquired by husband for wife as her separate property.—Land conveyed to a husband for a money consideration, paid and to be paid out of the separate estate of the wife, is her separate property. *Carter v. Bolin* (Civ. App.) 30 S. W. 1084; *Cobb v. Trammell*, 30 S. W. 482, 9 C. A. 527; *Goddard v. Reagen*, 28 S. W. 352, 8 C. A. 272.

Where a husband bought land in his own name with his separate means or with community property, his mere intention to hold the land for his wife did not create a resulting trust. *Johnson v. First Nat. Bank* (Civ. App.) 40 S. W. 334.

A trust will not result from a purchase of land by a husband with money borrowed from his wife. *Levy v. Williams*, 20 C. A. 651, 49 S. W. 930, 50 S. W. 528.

Land purchased by a married man with money earned in a state where such money was his separate property, the wife is not entitled to half of it in a divorce proceeding. *Blethen v. Bonner* (Civ. App.) 52 S. W. 571.

Land purchased by a husband with his wife's funds for her benefit, under an agreement that it is to be her separate property, held her separate property, though the deed is taken in his name. *Hunt v. Matthews* (Civ. App.) 60 S. W. 674.

Where, with his wife's money, a man purchases land, taking the title in his own name, the land is her separate estate, and, if sold by him after her death, the proceeds belong to her heirs. *Oaks v. West* (Civ. App.) 64 S. W. 1033.

Evidence held to show that land conveyed to a husband was purchased for the bene-

fit of his wife as her separate property out of the earnings of their minor son, and that the husband assented to such use of the earnings, and therefore that it belonged to her. *Goldstein v. Cockrell* (Civ. App.) 66 S. W. 878.

Where a husband invested money of his and of his wife in shares of stock, taking the certificate in his own name, and he disposes of more than his share, held that, as against his creditors she has only an undivided interest in those remaining. *Mathis v. Hoopes* (Civ. App.) 67 S. W. 544.

A wife, furnishing from her separate estate a part of the purchase price of land purchased by her husband, held to acquire an equitable title in the land to the extent of such payment. *Strnad v. Strnad*, 29 C. A. 124, 68 S. W. 69.

Under the uncontradicted testimony of a wife as to land bought for her by her husband, held, that the deed vested in her the separate right and estate to the land, and that his heirs had no interest therein. *Hardin v. Jones*, 29 C. A. 350, 68 S. W. 836.

Where title to property bought by a husband would otherwise vest in him alone, held that the wife acquires no title therein because he bought it with money she loaned him. *Blethen v. Bonner*, 30 C. A. 585, 71 S. W. 290.

Facts held to establish that a wife was the equitable owner of certain land, purchased by her husband with her funds under an agreement to take title in her name, which he violated. *Sparks v. Taylor* (Civ. App.) 87 S. W. 740.

Husband held to hold title to certain land paid with his wife's money in trust for the wife. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

Property purchased by a husband, title to which is taken in his own name, and which he subsequently pays for out of his wife's money, becomes her separate property. *L. W. Levy & Co. v. Mitchell*, 52 C. A. 189, 114 S. W. 172.

Land paid for with funds of the wife is a part of her separate estate, though the deed thereto was taken in the husband's name. *Ligon v. Wharton* (Civ. App.) 120 S. W. 930.

If a wife's separate funds are used by her husband in paying for land, the equitable title to the extent of the amount paid vested in her, and she is entitled to have a resulting trust in her favor to that extent established therein. *Heintz v. Heintz*, 56 C. A. 403, 120 S. W. 941.

Where a married woman's money is invested in land in her husband's name, she owns, in her separate right, a part of the land proportionate to the amount of her funds invested therein. *Kingman-Texas Implement Co. v. Herring Nat. Bank* (Civ. App.) 153 S. W. 394.

19. **Trusts in favor of wife.**—When the husband takes a bond for title to himself for the conveyance of a tract of land paid for in part with the separate means of the wife, and with the intention that the balance should be paid with her separate means, a resulting trust in favor of the wife is created, superior to the claim of a creditor of the husband, who purchased the land at a sale under an execution against him, the amount bid for the land being credited on the execution. *McBride v. Banguss*, 65 T. 174; *Stoker v. Bailey*, 62 T. 299.

A married woman joined by her husband can convey her separate real estate to a trustee to apply the rents and profits to her support. *Shepflin v. Small*, 23 S. W. 432, 4 C. A. 493; *Monday v. Vance*, 11 C. A. 374, 32 S. W. 559.

A resulting trust arises in favor of the wife, irrespective of the existence of any contract, where property is purchased by the husband with his wife's funds, and title is taken in his name. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

In trespass to try title, evidence held to sustain a finding that the lands in controversy were located by virtue of certificates paid for with money belonging to the separate estate of the wife of the person in whose name title was taken. *Id.*

Certain facts held immaterial on the issue of the wife's rights in land purchased by a husband and in part paid for with the wife's money. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

An agreement between a husband and wife, whereby the wife paid the note given by the husband for the price of land in consideration that the land should be hers, held not to create a resulting trust in the wife's favor. *Allen v. Allen*, 101 T. 362, 107 S. W. 528, reversing (Civ. App.) 105 S. W. 53.

A title to property deeded to a husband in trust for his wife for life, and for her children after her death cannot be arbitrarily divested nor disturbed except according to the terms of the deed. *Arnold v. Southern Pine Lumber Co.* (Civ. App.) 123 S. W. 1162.

One who unlawfully cohabited with a married man held deemed, on his death, to hold land, purchased by them, in trust for the lawful wife. *Watson v. Harris* (Civ. App.) 130 S. W. 237.

A wife had equitable title in land, purchased by her husband with her money, the title to which was taken in his name contrary to express contract between them, though only part was paid down; the balance being paid from sales of parcels of the land. *Hines v. Sparks* (Civ. App.) 146 S. W. 289.

20. — **What law governs.**—Whether the relation of debtor and creditor, or trustee and cestui que trust, existed between a husband and wife with reference to a contract to purchase land in Texas with funds raised by mortgage on the wife's separate property in Ohio, where she resided, held governed by the laws of Ohio. *Sparks v. Taylor* (Civ. App.) 87 S. W. 740.

21. — **Enforcement.**—Where a wife had been in continuous possession of land purchased by her husband in his own name, her right to assert an equitable title against the husband's heirs was not a stale demand. *Houston, E. & W. T. Ry. Co. v. Charwaine*, 30 C. A. 633, 71 S. W. 401.

22. — **Conveyance of beneficial interest.**—A wife cannot convey her beneficial interest in property conveyed in trust for her support, though the deed does not restrict alienation by her since it would be destructive of the trust. *Monday v. Vance*, 92 T. 428, 49 S. W. 516.

23. **Proceeds or Increase of or Interest on separate property.**—A transfer to a married woman by her husband of a part of the proceeds of their homestead to induce her to join in the conveyance is valid. *Waco State Bank v. Stephenson Mfg. Co.*, 23 S. W. 234, 4 C. A. 137.

Interest on the wife's money borrowed by the husband with an agreement that it should be paid to her use is her separate property. *Hamilton-Brown Shoe Co. v. Whitaker*, 23 S. W. 520, 4 C. A. 330.

A note, executed for a part of the price of land conveyed by husband and wife, held the wife's separate property. *Templeman v. McFerrin* (Civ. App.) 113 S. W. 333.

In an action against a bank for converting money deposited to account of wife, to payment of bank's claim against the husband, held that the money was not community property, but was the separate property of the wife. *Farmers' Nat. Bank of Center v. Hill* (Civ. App.) 133 S. W. 526.

24. Damages recovered by wife.—A wife, on recovering by suit her personal property, is entitled to damages for its hire, and the defendant cannot offset against such hire a debt due to him from her husband. *Carr v. Tucker*, 42 T. 330.

Where a creditor of the husband, by vexatious proceedings and threats, prevented the payment of a note due the wife for the purchase-money of her land, the interest accumulating thereon is not subject to the payment of her husband's debts. *Carlisle v. Sommer*, 61 T. 124.

When a tort is inflicted upon a wife by the husband and another, the damages recovered become her separate property. *Nickerson v. Nickerson*, 65 T. 281.

Damages for mental suffering by the wife, caused by the negligence of the defendant in delaying a telegram announcing serious injury to her husband, who afterwards died therefrom, is not community property. *Telegraph Co. v. Kelly* (Civ. App.) 29 S. W. 408.

Money collected by an attorney on a judgment in favor of a wife against a saloon keeper for illegal sale of liquor to her husband held the separate property of the wife. *Hahn v. Goings*, 22 C. A. 576, 56 S. W. 217.

A claim for unliquidated damages for suffered indignities against a carrier by an unmarried woman, does not become community property on her marriage, but remains her separate property. *St. L. S. W. Ry. Co. v. Wright*, 33 C. A. 80, 75 S. W. 565.

25. Right of action.—A married woman abandoned by her husband can maintain an action for damages resulting from personal injuries. *Railway Co. v. Gillum* (Civ. App.) 80 S. W. 697.

26. Estoppel of wife to claim property.—Married woman held not estopped to set up equitable title to realty. *Cauble v. Worsham*, 96 T. 86, 70 S. W. 737, 97 Am. St. Rep. 871.

To estop a married woman from asserting claim to real estate, it is essential that she be guilty of some fraud, or something equivalent to fraud. *Williamson v. Gore* (Civ. App.) 73 S. W. 563; *Franklin v. Texas Savings & Real Estate Inv. Ass'n*, 119 S. W. 1166; *Gillean v. Witherspoon*, 121 S. W. 909.

In an action by a surety to foreclose vendor's lien notes, executed to his principal's wife and held in pledge for the surety, held, that a contention of the wife that the land for which the notes were given was her separate property could not be sustained. *Ramsey v. Eskridge*, 33 C. A. 373, 76 S. W. 763.

Wife held estopped from setting up title against a purchaser at a guardian's sale of land deeded by her to her children. *Morrison v. Balzer*, 35 C. A. 247, 80 S. W. 248.

Improvements placed on land in reliance on a parol gift thereof do not estop a married woman, of whose separate estate the land is a part, nor her grantee, to assert the invalidity of the gift. *Tannery v. McMinn* (Civ. App.) 86 S. W. 640.

A married woman held not estopped from asserting her interest in property by the acts of her husband, nor can she be estopped, unless she is guilty of fraud. *Harle v. Texas Southern Ry. Co.*, 39 C. A. 43, 86 S. W. 1048.

Married woman held not estopped to assert her interest in land purchased by husband with her money and sold on execution for his debt. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

A married woman, having authorized the application of her separate property to the purchase of merchandise by her husband, held not entitled to recover back money so applied. *Alford Bros. & Whiteside v. Williams*, 41 C. A. 436, 91 S. W. 636.

Married woman held not estopped, under the circumstances, from asserting title to railroad property claimed by a railroad company. *Texas Southern Ry. Co. v. Harle* (Civ. App.) 101 S. W. 878.

Use of a strip of land owned individually by a married woman held not to affect her title as against her husband's heir. *Burns v. Parker* (Civ. App.) 137 S. W. 705.

A deed by a widow who has remarried and the surviving daughter, also married, to a one-seventh interest in land described as having descended to their decedent, whereas only a one-fourteenth interest descended to him, passes a one-fourteenth interest only; the warranty not operating against the grantors. *Pritchard v. Fox* (Civ. App.) 154 S. W. 1058.

27. Presumptions and burden of proof.—See notes under Art. 3687, Rule 12.

28. Evidence.—Evidence held not to show that a husband had given a house and lot to his wife as a marriage settlement. *Branham v. Scott* (Civ. App.) 51 S. W. 38.

Evidence held to show that real property was the separate estate of a wife. *Dyer v. Pierce* (Civ. App.) 60 S. W. 441.

Evidence held not to show an intention on the part of defendant and wife to make certain land the wife's separate property. *Hirsch v. Howell* (Civ. App.) 60 S. W. 887.

Evidence held not to show that land purchased by a married woman was paid for with money constituting her separate estate. *Zuckerman v. Munz*, 48 C. A. 337, 107 S. W. 78.

Evidence held to show that land belonged to a married woman as her separate property under a gift from her father. *Morgan v. Tutt*, 52 C. A. 301, 113 S. W. 958.

Evidence held to show that money lent a husband and wife was not used for the improvement or benefit of the wife's separate property. *Stroter v. Brackenridge*, 51 C. A. 170, 118 S. W. 632.

Evidence held to sustain a finding that a sale of land to a wife was made with the understanding that it should be her separate property. *McBride v. Witwer* (Civ. App.) 127 S. W. 902.

Evidence in trespass to try title in which defendant claimed under a deed from his mother, held to show that his mother owned the property as her separate property. *Conroy v. Sharman* (Civ. App.) 134 S. W. 244.

Evidence in proceedings to garnishee money deposited in a bank held to sustain a finding that the money was deposited as the separate property of the wife of the judgment debtor. *Kingman-Texas Implement Co. v. Herring Nat. Bank* (Civ. App.) 153 S. W. 394.

29. Management of separate estate of wife.—The authority conferred on a husband of managing the wife's separate property gives him the power to bind the same for expenses incident to its proper management and preservation. *Milburn v. Walker*, 11 T. 329.

A husband, during marriage, has the management of the wife's separate property. *Clay v. Power*, 24 T. 304; *Holloway v. Holloway*, 30 T. 164; *Mabry v. Harrison*, 44 T. 286; *Hemmingway v. Mathews*, 10 T. 207; *Wells v. Cockrum*, 13 T. 127.

A nonnegotiable promissory note, given for the separate property of the wife, and payable to her order, cannot be transferred by the husband without her authority, and parties having notice of her rights would acquire no title thereto by such unauthorized act of her husband. *Hamilton v. Brooks*, 51 T. 142; *Morris v. Edwards*, 1 App. C. C. § 548; *Kempner v. Comer*, 73 T. 196, 11 S. W. 194.

A husband cannot bind the wife and her separate property, unless the same is done with her knowledge and by her authority and consent. *Adamson v. Shiel*, 4 App. C. C. § 294, 18 S. W. 464.

When the wife's separate estate consists of securities which may be legally converted into money, the husband cannot, after conversion, appropriate it to the payment of debts for which the wife's separate estate is not liable, or mingle it with funds belonging to himself or the community estate, or invest it in his own name, without rendering his estate liable for its repayment. *Richardson v. Hutchins*, 68 T. 81, 3 S. W. 276.

A husband has a right to check out of a bank money deposited by the wife as her separate property. He has authority also to collect the purchase money of the wife's separate estate. *Coleman v. First National Bank*, 17 C. A. 132, 43 S. W. 938.

That officers of a bank knew her husband to be a man of dissolute habits would not make the bank liable for checks drawn by him against his wife's money deposited in her name. *Id.*

A pledge of a stock certificate bought with the separate funds of the pledgor's wife, to one having no notice thereof, is valid. *Anderson v. Waco State Bank*, 92 T. 506, 49 S. W. 1030, 71 Am. St. Rep. 867.

Where a husband deposited his wife's separate money on the understanding that he is to draw it out, the bank is bound to pay his checks drawn on the fund. *Coleman v. First Nat. Bank*, 94 T. 605, 63 S. W. 868, 86 Am. St. Rep. 371, affirming (Civ. App.) 64 S. W. 93.

Payments of rent by a lessee to a husband under a lease of the wife's separate property, while the husband was apparently in the rightful custody of her separate property, is a bar to a recovery of such rents by the wife. *Dority v. Dority*, 30 C. A. 216, 70 S. W. 338.

Where a debtor assigned certificates of stock to a husband for the benefit of the wife, the assent of the husband to the assignment was binding on the wife. *South Texas Nat. Bank v. Texas & L. Lumber Co.*, 30 C. A. 412, 70 S. W. 768.

Where a husband appropriated the entire income of his wife's separate estate to his own benefit, contributing nothing to her support, nor paying taxes, he may be enjoined from interfering with such estate, and the management and control thereof be given to her. *Dority v. Dority*, 96 T. 215, 71 S. W. 950, 60 L. R. A. 941.

Though a lease of a wife's separate estate was originally void because of her failure to join therein, it was rendered valid and binding, when, with full knowledge of the facts, she afterwards assigned, and acknowledged an assignment with the lease contract annexed. *Ascarete v. Pfaff*, 34 C. A. 375, 78 S. W. 974.

A husband has no right to convert to his use the separate estate of the wife, and she can maintain against him a suit to recover her separate estate by him wrongfully converted, and can have a resulting trust declared in her favor in land held by him in his own name and paid for in whole or in part by her separate funds. *Heintz v. Heintz*, 56 C. A. 403, 120 S. W. 942.

Under this article, that a debtor, after transferring a growing crop of rice to his wife, remains in possession of and manages it, and that accounts with the owner of the land on which the crop transferred was raised was kept in the name of the husband as they had been kept previous to the transfer, does not indicate that the transfer was simulated and fraudulent. *Broussard v. Lawson* (Civ. App.) 124 S. W. 712.

This article does not invest a husband with a right of property in the wife's separate property, nor give him the right of disposition thereof; and he has not, by reason of such possession, the right to mortgage the property to his creditor, though the wife has failed to file a schedule of her property, as provided by Arts. 6845, 6848. *Walker v. Farmers' & Merchants' State Bank* (Civ. App.) 146 S. W. 312.

The husband has the right of possession, management, and control of the wife's separate property, but without her consent he has no power to dispose of it. *Givens v. Carter* (Civ. App.) 146 S. W. 623.

This article invests a husband with such control of his wife's separate property as is necessary to the proper exercise of the right, and completely suspends her management thereof during marriage so as to permit him to deal with it as with his own, notwithstanding any agreement by him with her to the contrary, except that he cannot incumber or convey it to persons having notice of her ownership, and hence though money belonging to a wife's separate estate was deposited in a bank by the wife with her husband's apparent consent under a contract with the bank, as evidenced by the passbook, that only the depositor could withdraw it, the husband could afterwards withdraw such deposit without making the bank liable therefor to the wife in the absence of intervening rights of third parties; the husband's action in withdrawing the money being a resumption of his management of the property which revoked his wife's implied agency for him in depositing the money. *Wagoner Bank & Trust Co. v. Warren* (Civ. App.) 152 S. W. 691.

30. **Contracts—Acknowledgment.**—Contract between husband and wife and a third person held not binding when not acknowledged by wife. *Gilbough v. Stahl Bldg. Co.*, 16 C. A. 448, 41 S. W. 535.

31. — **Ratification.**—Where a married woman and her husband affirm her contract, the other party cannot avoid it because of her incapacity. *Stringfellow v. Early*, 15 C. A. 597, 40 S. W. 871.

32. — **Authority of husband after separation.**—A husband, after separation, will not be permitted to manage the wife's separate property. *Dority v. Dority*, 30 C. A. 216, 70 S. W. 338.

33. — **Authority of wife after separation.**—When a husband has deserted the wife, is separated from her, or confined in the penitentiary, she is authorized to manage her separate property, and to make contracts as a feme sole. *Walker v. Stringfellow*, 30 T. 570; *Blanchet v. Dugat*, 5 T. 507; *Wright v. Hays*, 10 T. 130, 60 Am. Dec. 200; *Fullerton v. Doyle*, 18 T. 3; *Ann Berta Lodge v. Leverton*, 42 T. 18; *Carothers v. McNese*, 43 T. 221; *Zimpleman v. Robb*, 53 T. 274; *Davis v. Saladee*, 57 T. 326; *Wright v. Blackwood*, 57 T. 644; *Ezell v. Dodson*, 60 T. 331; *Black v. Black*, 62 T. 296; *Heidenheimer v. Thomas*, 63 T. 287; *Siator v. Neal*, 64 T. 222; *Clements v. Ewing*, 71 T. 370, 9 S. W. 312.

A wife held entitled to maintain a suit to cancel leases of her separate property fraudulently executed by the husband after permanent separation. *Dority v. Dority*, 30 C. A. 216, 70 S. W. 338.

34. **Conveyance of homestead.**—See notes under Art. 1115.

35. **Conveyance of separate estate of wife.**—See notes under Art. 1114.

A husband has no authority to convey title to his wife's separate property without her consent. *Coleman v. First National Bank*, 17 C. A. 132, 43 S. W. 938; *Givens v. Carter* (Civ. App.) 146 S. W. 623; *Waggoner Bank & Trust Co. v. Warren* (Civ. App.) 152 S. W. 691.

Without her consent, a wife's separate property cannot be appropriated by others with her husband's permission. *Therriault v. Compere* (Civ. App.) 47 S. W. 750.

A sale by the husband of his wife's personal property is invalid, unless he had express authority from her to sell or unless she ratified the sale. *Hudspeth v. State*, 54 Cr. R. 371, 112 S. W. 1069, 130 Am. St. Rep. 894.

A deed by a widow, who has remarried, and the surviving daughter, also married, to a one-seventh interest in land described as having descended to their decedent, whereas only a one-fourteenth interest descended to him, passes a one-fourteenth interest only: the warranty not operating against the grantors. *Pritchard v. Fox* (Civ. App.) 154 S. W. 1058.

36. — **Parties in suits for wife's separate property.**—See notes under Title 37, Chapter 5.

37. — **Measure of damages for wrongful conveyance.**—Measure of recovery by wife on account of her husband's act in taking title to and disposing of land purchased with her money, stated. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

38. — **Rights of creditors.**—A husband's interest, under a deed to him as trustee for his wife, held but a personal trust, and if he conveyed to her, it did not become an estate which might be subjected to the claims of creditors on her death. *Arnold v. Southern Pine Lumber Co.* (Civ. App.) 123 S. W. 1162.

39. — **Joinder of wife as waiver of interest in land received.**—Joinder of a wife in conveyance of land held to waive her interest in land received therefor by the husband, which was subject to his debts on his death. *Phillips v. Phillips*, 23 C. A. 532, 57 S. W. 59.

40. — **Consideration.**—A conveyance of a large amount of the wife's property and small amount of the husband's, for a consideration of one dollar paid by each to the other, to a trustee to reconvey to the husband to be held as community property, is without consideration. *Kellett v. Trice*, 95 T. 160, 66 S. W. 51.

41. — **Mortgage—Liability on.**—A wife's separate property mortgaged for money loaned to him became liable on the same principle as a surety, and anything which would operate as a discharge for a surety would release the lien on the property. *Red River Nat. Bank v. Bray* (Civ. App.) 132 S. W. 968.

An unauthorized extension by a husband and his creditor of time of payment of a debt secured by deed of trust on the wife's separate property released the lien on the property. *Id.*

42. — **Conveyance after wife's death.**—Where, after the death of the wife, her husband sells her separate property, and with the proceeds buys land, taking the title in his name, he holds as trustee for her heirs, and a purchaser from him with notice takes charged with such trust. *Oaks v. West* (Civ. App.) 64 S. W. 1033.

43. — **Title of purchaser.**—The holder of a note payable to a married woman, transferred by the husband in due course of trade without notice that it was in fact the wife's separate property, takes a superior separate title thereto. *James v. Jacques*, 26 T. 320, 82 Am. Dec. 613; *Chapman v. Allen*, 15 T. 283; *Love v. Robertson*, 7 T. 9, 56 Am. Dec. 41; *Fox v. Brady*, 1 C. A. 590, 20 S. W. 1024.

A purchaser from a husband of land acquired during marriage, the deed to which is made to the wife, is not thereby put upon inquiry as to any equity she might have in respect to it, but is protected if he buys in ignorance of her claim to it as separate property. The rule is otherwise if the deed show that the consideration paid was the wife's separate estate or that the purchase was designed for her separate benefit. And so the purchaser acquires no title if at the date of his purchase he has reasonable information of these facts. *Kirk v. Navigation Co.*, 49 T. 213; *Cooke v. Bremond*, 27 T. 457, 86 Am. Dec. 626; *Veramendi v. Hutchins*, 48 T. 531; *French v. Strumberg*, 52 T. 92; *McDaniel v. Weiss*, 53 T. 256; *Wallace v. Campbell*, 54 T. 87; *Cline v. Upton*, 56 T. 319; *Parker v. Coop*, 60 T. 111; *McKamey v. Thorp*, 61 T. 648; *Ross v. Kornrumpf*, 64 T. 390; *McBride v. Banguss*, 65 T. 174.

A married man to whom a deed for land was made, paid for with the money of his wife, is her trustee, and a purchaser from him with notice acquires no title. *Parker v. Coop*, 60 T. 114; *McKamey v. Thorp*, 61 T. 652; *Blum v. Rogers*, 71 T. 668, 9 S. W. 595; *Ross v. Kornrumpf*, 64 T. 394; *Cobb v. Trammell*, 30 S. W. 482, 9 C. A. 527.

A purchaser from a woman, to whom a patent for the land sold issued after the

death of her husband, takes title as against the heirs of the deceased husband, unaffected by his community interest, in the absence of notice of its existence. *Wren v. Peel*, 64 T. 374.

If title to property be in the name of the husband alone, a purchaser from him who has paid value without actual notice of the wife's interest will be protected against her claim or the claim of her heirs. *Edwards v. Brown*, 68 T. 329, 4 S. W. 380, 5 S. W. 87.

A bona fide purchaser for value from the husband of land apparently community property will be protected against the undisclosed claims of separate ownership by the wife. *Malry v. Grant* (Civ. App.) 48 S. W. 614.

Deed from purchaser at execution sale construed, and held to vest the beneficial interest in the grantee, as well as the legal title, under certain facts. *Williamson v. Gore* (Civ. App.) 73 S. W. 563.

Where the legal owner of land dies, leaving three children and a wife, who remarries and has a child from such marriage, and after the death of the mother one of the three children of the legal owner dies, a purchaser must take notice of the child of the second marriage, who is an heir to the child who died, and will be deemed to have notice of the right of such child to share in the equitable marital interest held by the mother. *Woodburn v. Texas Town Lot & Improvement Co.* (Civ. App.) 153 S. W. 365.

44. — **Burden of proof.**—See notes under Art. 3687, Rule 12.

45. **Authority of wife to give or sell her personal estate.**—A wife's right of disposition of personal property is as unrestricted as if she were a feme sole, and her separate acknowledgment of a mortgage of such property is not required by the statute. *Wilkinson v. Rowland*, 3 App. C. C. § 11; *Bledsoe v. Fitts*, 47 C. A. 578, 105 S. W. 1142, et seq.

46. — **Forms of conveyances.**—Such contracts of a married woman made in 1855 as she could properly make by parol for the acquisition of land or for its partition may equally well be proved by her written declarations, even when not acknowledged by her in the manner that the statute requires to make effectual her conveyance of real estate. *Ikard v. Thompson*, 81 T. 285, 16 S. W. 1019.

It has been held under the act of 1846 that a wife could convey separate personal property without writing subscribed and privy acknowledgment. *Ballard v. Carmichael*, 83 T. 355, 18 S. W. 734.

Under the act of April 30, 1846 (*Sayles' Early Laws*, art. 1670), a conveyance of personal property by a married woman must be by a written instrument privily acknowledged. *McDaniel v. Garrett*, 11 C. A. 57, 31 S. W. 721.

47. **Gifts causa mortis.**—The statute authorizing a married woman to dispose of her separate property by will without the consent of her husband is inapplicable to the right of the wife to make a gift of her separate property causa mortis without the consent of the husband. *Bledsoe v. Fitts*, 47 C. A. 578, 105 S. W. 1142.

48. **Rights and liabilities of heirs.**—An agreement between husband and wife that certain horses and their increase should be her separate property held binding on his heirs. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

49. **Liability of husband or wife.**—A husband is liable for exemplary as well as actual damages for slanderous words uttered by the wife. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

Where a husband converts the wife's separate estate into money or other property and appropriates that to the benefit of himself or to the benefit of the community, he is liable to the wife or to her estate or heirs for its value. *Tison v. Gass*, 46 C. A. 163, 102 S. W. 751.

A husband is not personally liable on a building contract made by his wife before marriage for the benefit of her separate estate. *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683.

A wife is not liable personally for rents collected by her husband after sequestration of land which had been her separate property. *Grayson County Nat. Bank v. Wandelohr* (Sup.) 146 S. W. 1186.

Where a husband sold grass from his wife's land but failed to deliver the same, he was liable for breach of contract regardless of his ownership or right to sell. *Kreisle v. Wilson* (Civ. App.) 148 S. W. 1132.

In an action on a note, in which defendant relied on coverture, a decree of divorce is admissible in evidence to show that she was a feme sole at the time of the suit, and had ratified the contract made while she was a feme covert. *Peck v. Morgan* (Civ. App.) 156 S. W. 917.

A woman conducting her own business, buying furniture with her separate property, at a time when she was permanently separated from her husband, and only two months before she was divorced from him, and who ratified the sale after divorce by payments thereon, cannot rely on coverture to defeat the sale. *Id.*

50. — **Enforcement.**—A wife may maintain against her husband a suit by attachment levied on their community property, to secure payment of a debt which is her separate property, due from the husband. *Ryan v. Ryan*, 61 T. 473. And see *Black v. Black*, 62 T. 296.

A wife, who is a creditor of her husband, has no greater remedial rights than other creditors. *Holloway v. Schuttles*, 21 C. A. 188, 51 S. W. 293.

51. — **Preferences.**—See notes under Art. 3966, § 14.

52. **Agency of wife for husband.**—A husband can constitute his wife an attorney in fact to dispose of his property. *Presnall v. McLeary* (Civ. App.) 50 S. W. 1066.

The failure to deliver a telegram to a wife of the sendee, in the absence of the latter, held, not to render the company liable for damages, marriage not making her such an agent. *Western Union Tel. Co. v. Moseley*, 28 C. A. 562, 67 S. W. 1059.

A policy of insurance, providing that it should be void if insured obtained other insurance without written consent, held not affected by the unauthorized act of insured's wife in insuring her piano included in the policy. *National Fire Ins. Co. v. Wagley* (Civ. App.) 68 S. W. 819.

A married woman held not liable for architect's services obtained by her as agent for her husband, though without authority. *Edwards v. Annan* (Civ. App.) 127 S. W. 299.

A broker employed by a wife, as agent of her husband, to sell the homestead, held entitled to his commissions. *Hamill v. Samuels* (Civ. App.) 135 S. W. 746.

A wife cannot legally pledge the goods of her husband to secure a debt due from him, unless she acts as his agent. *Souther v. Hunt* (Civ. App.) 141 S. W. 359.

The wife of a contractor who, with his consent, was in active charge of the erection of a building was his agent in all things pertaining thereto, and authorized to execute transfers of money to materialmen from the funds due. *A. A. Fielder Lumber Co. v. Smith* (Civ. App.) 151 S. W. 605.

53. — **Ratification or repudiation of agency.**—Husband held to have ratified purchase by his wife so as to render him liable. *Wright v. Couch* (Civ. App.) 113 S. W. 321.

54. — **Evidence of agency.**—See notes under Art. 3687, Rule 12.

55. — **Authority as agent.**—During the absence of a husband, the wife, as his agent, is authorized to do such acts as are necessary for the proper care of the estate, and for her support according to the station and means of the husband. *Cheek v. Bellows*, 17 T. 613, 67 Am. Dec. 686; *McAfee v. Robertson*, 41 T. 355; *Kelley v. Whitmore*, 41 T. 647; *Sorrel v. Clayton*, 42 T. 188.

56. **Agency of husband for wife.**—The acts or declarations of a husband touching his wife's title to her separate property cannot prejudice her rights. *Blair v. Finlay*, 75 T. 983, 12 S. W. 983.

Where the trustee of a trust deed, with knowledge of its satisfaction, buys in the land for his wife, she takes it tainted with his fraud. *Allen v. Garrison*, 92 T. 546, 50 S. W. 335.

A husband held not invested with authority to agree, without his wife's consent, that a judgment in her favor might be set aside, and entered in favor of her adversary. *Winter v. Texas Land & Loan Co.* (Civ. App.) 54 S. W. 802.

The agency of a husband to employ an attorney for his wife will not be presumed from the mere fact that he is her husband and made the contract for the benefit of her separate estate. *Cushman v. Masterson* (Civ. App.) 64 S. W. 1031.

Where a husband participated with his wife in fraudulent representations as to the amount of land conveyed by her to plaintiff, he was liable therefor, though he acted as her agent. *Lewis v. Hoeldtke* (Civ. App.) 76 S. W. 309.

Where, in an action for breach of contract to sell cattle, the evidence showed that defendant had authority to sell, the issue whether the cattle were the separate property of his wife held immaterial. *Gibbens & Roundtree v. Hart* (Civ. App.) 117 S. W. 168.

Evidence held to show that a husband was authorized to place his wife's property with one charged with its embezzlement. *Henderson v. State*, 55 Cr. R. 640, 117 S. W. 825.

Though a husband may be appointed by his wife as her agent, the relation must be proved, not being presumed. *Id.*

A husband may be the agent of his wife to make contracts binding her separate estate, but the agency will not be presumed from the marital relation. *Smith v. Olivarri* (Civ. App.) 127 S. W. 235.

A wife held bound by a contract made with her husband as her agent. *Id.*

A wife obtaining possession of real estate, pursuant to a contract made with a husband as her agent, cannot approve the agreement so far as it relates to her advantage, and reject the part which imposes a burden on her. *Id.*

Husband held to have implied authority to make stipulations relating to delivery of deed of wife's separate property which shall not be violative of her instructions or in fraud of her rights. *Bott v. Wright* (Civ. App.) 132 S. W. 960.

It is not presumed that a husband acts as agent for his wife in extending time of payment of a debt for security of which her separate property is mortgaged. *Red River Nat. Bank v. Bray* (Civ. App.) 132 S. W. 968.

A husband, being the agent of his wife, is entitled to receive and receipt for her share in the surplus proceeds of the sale of land sold under foreclosure sale. *Shannon v. Buttery* (Civ. App.) 140 S. W. 858.

A wife is not liable personally for rents collected by her husband after sequestration of land which had been her separate property. *Grayson County Nat. Bank v. Wandelohr*, 105 T. 226, 146 S. W. 1186.

Where a wife agreed that a note payable to her might be pledged to secure a loan to her husband but did not consent to sale, and did not indorse the note, a transfer by him was beyond the scope of his agency. *Morgan v. Hays* (Civ. App.) 147 S. W. 315.

Where a husband had knowledge of the dissolution of a partnership, his wife would also be charged with notice. *Thompson v. Harmon* (Civ. App.) 152 S. W. 1161.

57. — **Personal liability of husband or wife.**—A wife held not bound by the false representations of her husband as to her land to induce a sale thereof. *Lewis v. Hoeldtke* (Civ. App.) 76 S. W. 309.

Where a husband, who acted for his wife in the sale of her land, represented as a fact that the tract contained more land than it did, he was liable in deceit, though he was merely mistaken. *Id.*

58. **Revocation of agency by marriage.**—Where a woman, after executing a power of attorney to sell her interest in land and before a sale was made by the agent, married, the marriage revoked the power. *Gilmer v. Veatch*, 56 C. A. 511, 121 S. W. 545.

59. **Revocation of power of testamentary trustee.**—Where a wife by her husband's will became trustee of the estate with power to sell, as well as executrix, her subsequent marriage did not ipso facto terminate such power of sale, whatever the effect of the marriage on her relation as executrix. *Holman v. Houston Oil Co. of Texas* (Civ. App.) 152 S. W. 885.

60. **Bond of married woman as executor as binding her estate.**—See Art. 3314.

61. — **Bond as guardian.**—See Art. 4105.

62. **Descent and distribution.**—See notes under Title 45.

63. **Allowance to widow and children.**—See notes under Title 52, Chapter 17.

64. **Contracts for arbitration of property rights.**—Contract of married woman with husband to arbitrate property rights held void. *Crouch v. Crouch*, 30 C. A. 288, 70 S. W. 595.

Art. 4622. [2968] Community property; what property shall be under control, etc., of wife; bank deposits.—All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only, provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written; and further provided, that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account. [Acts 1913, p. 61, sec. 1.]

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1. **Applicability in general.**—This article applies to real estate owned by nonresidents. *Heidenheimer v. Loring*, 6 C. A. 560, 26 S. W. 99.

2. **Validity of marriage affecting property rights.**—Land granted to a married man as a colonist is the community property of himself and wife. A reputed wife, not legally married, but living with her husband in Texas at the date of the grant, is entitled to one-half of the land on the death of the husband. *Babb v. Carroll*, 21 T. 765.

A. and B. married in Illinois in 1839 and separated in 1845 without a divorce. A. came to Texas in 1844, returned to his former home in the spring of 1845, and in the fall returned to Texas with his three children of a former marriage and with the avowed purpose of abandoning his wife, who remained in Illinois with her children, never having removed to Texas. In 1852 A. married T. in Texas, with whom he lived as his wife until his death in 1864. T. had no knowledge of A.'s former marriage. The property in controversy situated in Texas was acquired after the last marriage. Held, in a contest between B., the first wife, and a child of A. by his last wife, that B. was entitled to one-half of the property acquired by A. in Texas. The court expresses no opinion as to the rights of the last wife in property acquired during the last marriage. *Routh v. Routh*, 57 T. 589.

A putative wife held entitled to one-half of the property jointly acquired during the cohabitation. *Lawson v. Lawson*, 30 C. A. 43, 69 S. W. 246.

Where a husband married his wife at a time when she was mentally incompetent, the marriage was void, and he acquired no rights in her property by virtue thereof. *Holland v. Riggs*, 53 C. A. 367, 116 S. W. 167.

The rights of a woman marrying a man in good faith who has a former wife living stated as to the community property. *Ft. Worth & R. G. Ry. Co. v. Robertson*, 55 C. A. 309, 121 S. W. 202.

3. **Community property in general.**—Whether a grant of land to a colonist was separate or community property is determined as follows: If the surviving husband received the grant by reason of his immigration, etc., independent of his status as a married man at the date of his wife's death, it was his separate property. If an increased quantity was given to the survivor by reason of the fact that at the date of the death of the wife he was then a married man, it was community property. *Hodge v. Donald*, 55 T. 344; *Wimberly v. Pabst*, 55 T. 587. See *Durst v. Dougherty*, 81 T. 650, 17 S. W. 388; *Proetzel v. Schroeder*, 83 T. 684, 19 S. W. 292; *Stiles v. Japhet*, 84 T. 91, 19 S. W. 450; *Gaston v. Wright*, 83 T. 282, 18 S. W. 576.

Merchandise purchased by a wife with money borrowed on the faith of her separate property as security is community property. *Heidenheimer v. McKeen*, 63 T. 229.

Where property purchased by a wife is to be paid for out of proceeds of crops on her land, it is community property. *Cleveland v. Cole*, 65 T. 402; *Connor v. Hawkins*, 66 T. 639, 2 S. W. 520.

Property purchased by a wife on credit is community property. *Epperson v. Jones*, 65 T. 425; *Smith v. Bailey*, 66 T. 553, 1 S. W. 627.

The grant of a headright certificate in 1838 to a married man, reciting that fact and the date of his immigration to Texas, does not constitute such certificate community property when the grantee had immigrated with his children, and had married subsequent to his arrival in Texas, although the parties were living together as husband and wife at the date of the certificate. *Boone v. Hulsey*, 71 T. 176, 9 S. W. 531.

Bounty land warrants under ordinance of December 5, 1835, granted to a married man are community property. *Nixon v. Wichita L. & C. Co.*, 84 T. 408, 19 S. W. 560.

A cause of action for a wrong to a wife is common property. *Telegraph Co. v. Kerr*, 23 S. W. 564, 4 C. A. 280.

Money collected upon an endowment insurance policy upon the life of the husband, payable as directed by will, is community property, and the surviving wife is entitled to one-half of the proceeds. *Martin v. Moran*, 11 C. A. 509, 32 S. W. 904.

If the husband did not, with his separate means, pay for land acquired after marriage, his wife was a tenant in common with him. *House v. Williams*, 16 C. A. 122, 40 S. W. 414.

A wife held to acquire no community interest in land conveyed to her husband without consideration to enable him to qualify as surety. *Crenshaw v. Harris*, 16 C. A. 263, 41 S. W. 391.

Money derived by mortgage of wife's separate lands is community property. *Canfield v. Moore*, 16 C. A. 472, 41 S. W. 718.

Where a husband and wife separated for good and divided their community property, the mere fact that they years afterwards began living together again did not convert it into community property. *Batla v. Batla* (Civ. App.) 51 S. W. 664.

Property purchased with community funds conveyed to wife continues community property. *Kahn v. Kahn* (Civ. App.) 56 S. W. 946.

Lands purchased in part with funds from community estate of husband, and partly with separate estate of wife, is community property to extent of investment of community funds. *Clardy v. Wilson*, 24 C. A. 196, 58 S. W. 52.

Evidence held to establish a resulting trust in favor of the community estate of husband and wife in property purchased at foreclosure, which was not changed by subsequent payments made to the purchaser out of the separate estate of the wife. *Hirshfeld v. Howard* (Civ. App.) 59 S. W. 55.

Where a life tenant of land executed a deed of her interest to plaintiff, the holder of the fee-simple title, and her husband, at the same time that plaintiff deeded her interest in other land to the life tenant, and the deeds did not show that the consideration for them was the exchange of lands, the interest conveyed to plaintiff became community property. *Scales v. Marshall* (Civ. App.) 60 S. W. 336.

That a surviving spouse purchases land with money secured from community property after the death of the other spouse does not impress the character of community property on the land so purchased. *Griffin v. McKinney*, 25 C. A. 432, 62 S. W. 78.

Proceeds of insurance policy on wife's life, payable to the husband, held to be the latter's separate property, and not community property. *Martin v. McAllister*, 94 T. 567, 63 S. W. 624.

If land purchased by husband and wife was bought partly for cash and partly on credit, and the cash was paid out of community funds, the land was community property, and, if the husband paid the balance, the property was chargeable therewith. *Moore v. Moore*, 28 C. A. 600, 68 S. W. 59.

Lands in Texas bought by a married man, with money which was his separate property, under the laws of the state where he earned it, held not community property. *Blethen v. Bonner*, 30 C. A. 585, 71 S. W. 290.

In an action to subject community lands in payment of note, wife's answer held not to show that title had been divested out of community estate and invested in her. *Teague v. Lindsey*, 31 C. A. 161, 71 S. W. 573.

Land purchased with the separate funds of a wife held not community property, subject to the husband's debts. *Hall v. Levy*, 31 C. A. 360, 72 S. W. 263.

A land certificate, transferred to a husband during coverture, becomes community property. *Booth v. Clark*, 34 C. A. 315, 78 S. W. 392.

Where a deed on a pecuniary consideration conveyed land to husband and wife, its legal effect was to convey the property to them as a community. *King v. Summerville* (Civ. App.) 80 S. W. 1050.

Deed to wife, consideration for which is paid in community funds, held to convey title to the community, and place the lands under the husband's control. *Newman v. Newman* (Civ. App.) 86 S. W. 635.

A ring purchased by a wife during coverture is community property, in the absence of evidence that it was purchased with her separate funds. *Sweeney v. Taylor Bros.*, 41 C. A. 365, 92 S. W. 442.

The property acquired by husband and wife during marriage, otherwise than by gift, devise, or descent, held community property. *Merrell v. Moore*, 47 C. A. 200, 104 S. W. 514.

A second wife held to have, as to the property acquired during the continuance of the relation existing between herself and a man not divorced from former wife, the rights of a lawful wife. *Allen v. Allen* (Civ. App.) 105 S. W. 53.

Land conveyed to a married woman becomes community property unless paid for by her separate means, or unless the title was placed in her own name for the purpose of making a gift to her. *Wade v. Wade* (Civ. App.) 106 S. W. 188.

Where a man and wife settle on 160 acres of public land for the purpose of securing the land as a homestead, under the statute, and the wife dies in about a year, and the man marries again, and he and his second wife are living on the land when occupancy

ripens into title, the land is the community property of the second marriage. *Creamer v. Briscoe* (Civ. App.) 107 S. W. 636.

Land acquired as a donation homestead held to belong to the community estate of the husband's first marriage, and not to the community estate of his second marriage. *Creamer v. Briscoe*, 101 T. 490, 109 S. W. 911, 17 L. R. A. (N. S.) 154, 130 Am. St. Rep. 869.

Even if application for a survey of public land were made by a husband during his wife's lifetime, if she dies before patent issues, she has obtained no community interest in the land. *Simpson v. Oats* (Civ. App.) 109 S. W. 940.

Land acquired during the existence of a second marriage, by the exchange of land which constituted community property of the first marriage, does not become community property of the second marriage. *Haring v. Shelton* (Civ. App.) 114 S. W. 389.

A wife held not entitled to premiums on or proceeds of life policy taken out by her husband for his children by a former marriage, premiums of which had been paid from community funds. *Rowlett v. Mitchell*, 52 C. A. 589, 114 S. W. 845.

Part of proceeds of fraternal life insurance held to have become community property. *Wooden v. Wooden* (Civ. App.) 116 S. W. 627.

All property conveyed to either a husband or wife during the marriage relation will, in the absence of a showing to the contrary, be presumed to be community property. *Kin Kaid v. Lee*, 54 C. A. 622, 119 S. W. 342; *Same v. Buck* (Civ. App.) 119 S. W. 345.

Property purchased on credit and afterward paid for with proceeds of the sale or mortgage of the wife's separate estate is not community property. *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899.

The rights acquired under a tax deed conveying property to the husband was community property. *Callen v. Collins*, 56 C. A. 620, 120 S. W. 546.

Land purchased by the husband during marriage is part of the community estate. *Edwards v. White* (Civ. App.) 120 S. W. 914.

A chose in action accruing to either spouse during the marriage by reason of an injury to the person is community property. *Ft. Worth & R. G. Ry. Co. v. Robertson*, 55 C. A. 309, 121 S. W. 202.

Where a woman marries in ignorance of the fact that the man she marries has another wife living, and lives with him until his death in ignorance of the existence of the former wife, she is entitled to the rights of a lawful wife in the property acquired by them or either of them during their marriage, regardless of whether she contributed anything to the community property. *Id.*

Even though a deed by its terms conveyed to a wife in her separate right, it could be shown that she took title under an express trust for the benefit of the community or her husband. *Du Perier v. Du Perier* (Civ. App.) 126 S. W. 10.

Where a deed from a third party to a wife does not in terms convey the property to her separate use, or show that the consideration was paid out of her separate estate, title vests *prima facie* in the community. *Id.*

That the apparent title to lots was in a married woman does not of itself authorize a finding that they were her separate property. *Keith v. Aubrey* (Civ. App.) 127 S. W. 278.

Where a wife purchased goods on credit to enable her to conduct a mercantile business in her own name, such goods became community property, so as to make her husband liable for the price, whether or not he knew that she purchased them on credit for her store. *Richburg v. McIlwaine, Knight & Co.* (Civ. App.) 131 S. W. 1166.

A contract by a husband for the purchase of state school land held a community obligation through which the wife acquires a half interest in the land. *Ericksen v. McWhorter* (Civ. App.) 132 S. W. 847.

Though, under this article and Art. 4623, a house purchased by the husband with his earnings after marriage, and the deed taken in the name of the wife, is community property, an indictment for a criminal burning of the house properly alleged the ownership to be in the husband, and proof that the property was purchased with the husband's earnings, and that the deed was taken in the name of the wife did not establish a variance. *Pinckard v. State*, 62 Cr. R. 602, 138 S. W. 601.

Property acquired by limitation by a married person becomes community property. *Mitchell v. Schofield* (Civ. App.) 140 S. W. 254.

Under this article, a debt in favor of both for merchandise sold and delivered and a debt due the wife for personal services constitute community property, even if it was agreed that part of the proceeds when collected should belong to the wife. *Gentry v. McCarty* (Civ. App.) 141 S. W. 152.

Unimproved land purchased by a husband during the life of his first wife, which was improved by buildings, and which the family was occupying as a homestead before her death, is community property, even though no part of the purchase price had been paid, and the wife's interest therein descended and vested in her children, subject to the homestead rights of her husband, and charged with the unpaid purchase price, which was a community debt. *Richmond v. Sims* (Civ. App.) 144 S. W. 1142.

A wife cannot claim the proceeds of an insurance policy on the life of her husband, even though the premium be paid out of their community estate, unless the payments are made with intent to defraud her. *Jones v. Jones* (Civ. App.) 146 S. W. 265.

Where the money of a married woman was used to purchase land, title being taken in the name of the husband, and afterwards the husband and wife sold the property and with the proceeds purchased land, title to which was taken in the name of the wife, the equitable title to the land last purchased was in the wife, and it did not belong to the community, though there were no recitals in the deed that the consideration was paid by the wife from her separate means, or that the same was her separate estate. *Aycock v. Thompson* (Civ. App.) 146 S. W. 641.

Shares of stock purchased from separate means of a married woman did not become community property. *Gale Mfg. Co. v. Dupree* (Civ. App.) 146 S. W. 1048.

Community property assigned for the benefit of creditors and purchased by H. in trust for the wife, on being repurchased by her with borrowed money, held to have again become community property of the debtor and his wife. *Schutz v. Harris* (Civ. App.) 149 S. W. 242.

Real estate, the legal title to which was acquired by a husband during marriage, is community property, and a mere payment by him of the price out of his separate funds after his wife's death does not make him the sole owner, in the absence of any appropriation by him. *Miller v. Odom* (Civ. App.) 152 S. W. 1185.

Land conveyed to a wife in consideration of the payment of an outstanding note to secure which a lien is retained is the community property in the absence of any provision in the deed that it shall be the wife's separate property. *Cockburn v. Cherry* (Civ. App.) 153 S. W. 161.

In a controversy to which the state is not a party, whether public land purchased from the state in the name of either husband or wife is community property or not must be determined by the character of the right by which the title thereto had its inception. *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

An instruction that all property deeded to either husband or wife during marriage and all effects possessed at the death of either is presumed to be community property, unless the contrary be "satisfactorily proven," was not erroneous as on the weight of the evidence in view of this article, and the following article. *Wood v. Dean* (Civ. App.) 155 S. W. 363.

Property purchased on credit for a business carried on by a husband on the wife's property and paid for out of the proceeds of such business is community property and not the separate property of the wife. *Farmers' State Bank of Quanah v. Farmer* (Civ. App.) 157 S. W. 283.

4. Equitable title.—Equitable title defined. *Edwards v. Brown*, 68 T. 329, 4 S. W. 380, 5 S. W. 87; *Patty v. Middleton*, 82 T. 586, 17 S. W. 909; *Hall v. Gwynne*, 23 S. W. 289, 4 C. A. 109; *Brackenridge v. Rice* (Civ. App.) 30 S. W. 588; *Cumby v. Henderson*, 25 S. W. 673, 6 C. A. 519.

Where land is conveyed to a husband, no beneficial interest of the wife appearing upon the face of the deed, her interest in the same by virtue of the marital community is equitable, the entire legal title being vested in the husband; and upon her death her heirs succeed to no such legal title or interest in the land as would defeat the rights of an innocent purchaser from the husband. *Woodburn v. Texas Town Lot & Improvement Co.* (Civ. App.) 153 S. W. 365.

5. Right of second community.—A second community cannot acquire an interest in land of which the wife is a tenant for life as survivor of the first community or create a charge against it by placing improvements thereon. *Oar v. Davis* (Civ. App.) 135 S. W. 710.

6. Life insurance.—Where a husband and wife assigned an insurance policy as collateral, the wife's death prior to that of her husband defeated the assignment and all rights predicated thereon. *Stevens v. Germania Life Ins. Co.*, 26 C. A. 156, 62 S. W. 824.

A wife cannot claim the proceeds of an insurance policy on the life of her husband, even though the premium be paid out of their community estate, unless the payments are made with intent to defraud her. *Jones v. Jones* (Civ. App.) 146 S. W. 265.

7. Interest, increase, rents, profits and products of separate property.—Interest accruing on the separate funds of the wife is community property. *Braden v. Gose*, 57 T. 37; *Cabell v. Meinczer* (Civ. App.) 35 S. W. 206; *Farrish v. Williams*, 53 S. W. 79.

Profits derived from an investment of the wife's separate estate are community property. *Epperson v. Jones*, 65 T. 425; *Heidenheimer v. Felker*, 1 App. C. C. § 362; *Ratto v. Holland*, 2 App. C. C. § 469.

Crops grown on the land of a wife, though the labor and other means used in their production are of her separate estate, became community property. *Connor v. Hawkins*, 66 T. 639, 2 S. W. 520; *Cleveland v. Cole*, 65 T. 402; citing *De Blane v. Lynch*, 23 T. 25; *Forbes v. Dunham*, 24 T. 611; *Carr v. Tucker*, 42 T. 330; *Seligson v. Staples*, 1 App. C. C. § 1071; *Hayden v. McMillen*, 23 S. W. 430, 4 C. A. 479.

While the increase of cows, the separate property of the wife, becomes community property, a lien upon the unborn calves cannot be obtained by a levy of an execution upon the cows. *Blum v. Light*, 81 T. 414, 16 S. W. 1090.

Lumber sawed in a mill, the separate property of the wife, from trees grown on her separate property, the rents accruing on her realty, are community property. *Hayden v. McMillen*, 23 S. W. 430, 4 C. A. 479.

Rents of wife's separate property belong to the community. *Schepflin v. Small*, 23 S. W. 432, 4 C. A. 493.

Goods purchased with the profits of the wife's separate money, and on credit, are community property. *Hamilton-Brown Shoe Co. v. Lastinger* (Civ. App.) 26 S. W. 924.

Offspring of wife's animals held community property. *Avery v. Popper* (Civ. App.) 45 S. W. 951.

The increase of live stock during the existence of the married relation is community property, though it is the increase of stock which is the separate property of the husband or wife. *Wolford v. Melton*, 26 C. A. 486, 63 S. W. 543.

The rents of a married woman's separate estate are community property, and, where assigned as security by husband and wife for the former's debt, are not discharged by an extension of time of payment given to the husband. *De Berrera v. Frost*, 33 C. A. 580, 77 S. W. 637.

The increase of cattle given to a married woman is community property. *Barr v. Simpson*, 54 C. A. 105, 117 S. W. 1041.

An interest in real estate inherited by a man is his separate property; but an interest purchased during his marriage is presumptively community property. *Sauvage v. Wauhop* (Civ. App.) 143 S. W. 259.

Though the increase of live stock owned by the wife and existing before the death of her husband is community property in the absence of an agreement otherwise between them, the increase of her live stock after his death is not community property. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

A crop of hay grown on the land of the wife is community property and subject to sale by the husband. *Kreisle v. Wilson* (Civ. App.) 148 S. W. 1132.

8. Improvements on separate property.—A house constructed on the separate property of the wife, and paid for with community funds, remains part of the community. *Maddox v. Summerlin*, 92 T. 483, 49 S. W. 1033, 50 S. W. 567.

Where a wife used community funds to make improvements and pay taxes on her husband's separate property, such property was liable to the wife's heirs for one-half of the cost of the improvements and taxes. *Cervantes v. Cervantes* (Civ. App.) 76 S. W. 790.

Where improvements on land owned separately by husband and wife were erected with community funds, such improvements became community property. *King v. Summerville* (Civ. App.) 80 S. W. 1050.

In an action by a wife for her separate property and for a half of the community property, the husband held not entitled to be reimbursed for improvements made on the separate property of the wife. *Watkins v. Watkins* (Civ. App.) 119 S. W. 145.

If a wife inherited a lot from her father and her husband erected improvements thereon, the improvements would be community property, so that the husband would have an interest in the property. *Brady v. Maddox* (Civ. App.) 124 S. W. 739.

The general rule that property acquired during marriage is presumptively that of the community does not apply to improvements made upon realty shown to be the separate estate of one of the spouses; and, in an action between a surviving husband and a daughter of his deceased wife to determine whether certain property was separate or community property, a showing by the surviving husband, to the satisfaction of the jury, that a particular piece of property belongs to him individually makes a prima facie case of his ownership of the improvements, and it devolves upon the daughter to rebut the case thus made, in order to establish her claim for reimbursement for one-half of the value of the improvements. *Darden v. Taylor* (Civ. App.) 126 S. W. 944.

9. Earnings of husband or wife.—A husband held entitled to have money earned by the wife and paid on debts contracted by her for loans and for necessities applied first to the necessities. *Cline v. Hackbarth*, 27 C. A. 391, 65 S. W. 1086.

Money earned by a married woman by teaching school is community property in the absence of an agreement between herself and husband that it shall be her separate estate. *Barr v. Simpson*, 54 C. A. 105, 117 S. W. 1041.

The earnings of a husband and wife belong to the community estate, and are under the control of the husband. *Lilly v. Yearly* (Civ. App.) 152 S. W. 823.

10. Partnership.—As to rights and liabilities of a married woman as partner in a mercantile business, see *Middlebrook v. Zapp*, 73 T. 29, 10 S. W. 732.

11. Damages for injuries to husband or wife.—Damages recovered for a tort inflicted upon a wife becomes community property. *Gallagher v. Bowie*, 66 T. 265, 17 S. W. 407.

Damages recovered for personal injuries to a married person are community property. *Rice v. Railway Co.*, 27 S. W. 921, 8 C. A. 130; *Railway Co. v. Barnett*, 61 T. 638; *Ezell v. Dodson*, 60 T. 331. See *Nickerson v. Nickerson*, 65 T. 281, where the damages accruing resulted from the wrongful act of the husband. *Pac. Express Co. v. Black*, 27 S. W. 830, 8 C. A. 363.

Money obtained by a husband as damages for personal injuries sustained subsequent to marriage is community funds. *Bohan v. Bohan* (Civ. App.) 56 S. W. 959.

A right of action against a railroad for personal injuries to a husband held community property, one-half of which might be set apart to the wife on divorce. *Ligon v. Ligon*, 39 C. A. 392, 87 S. W. 838.

Damages for a wife's loss of credit as a merchant and destruction of her business are community property and recoverable only by her husband. *Ainsa v. Moses* (Civ. App.) 100 S. W. 791.

Damages for personal injuries to either husband or wife are community property. *City of San Antonio v. Wildenstein*, 49 C. A. 514, 109 S. W. 231.

Damages recovered by a widow and children for a malicious criminal prosecution against the husband and father being community property, damages recovered will be equally divided between the widow and children. *Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Civ. App.) 134 S. W. 736.

Damages sustained by a husband and wife for injuries to the wife, being community property, it was not material that a single verdict, including damages to both, was allowed. *Posener v. Long* (Civ. App.) 156 S. W. 591.

12. — Apportionment of damages.—Apportionment of damages between plaintiffs held erroneous for want of evidence to sustain it. *Houston & T. C. R. Co. v. Buchanan*, 48 C. A. 129, 107 S. W. 595.

13. What law governs.—Where the husband received money belonging to the wife at their marriage, which became his by the common law, and afterwards he invested the money in land in Texas, held, that such land was not community property. *McDaniel v. Harley* (Civ. App.) 42 S. W. 323.

Under the Spanish law, property held by either spouse before marriage, remains the separate property of such consort, and the status of the property is to be determined by the origin of the title. *Welder v. Lambert*, 91 T. 510, 44 S. W. 281.

Facts held not to show one was domiciled in Texas, and was temporarily absent, so that the laws of Texas would determine his marital rights to property earned while absent. *Blethen v. Bonner*, 30 C. A. 585, 71 S. W. 290.

14. Existence of community.—A woman who marries a man holding a divorce, without knowing that such divorce is void, is entitled to a partnership or community interest in property jointly acquired during the time she lives with him as his wife, and she can assert her rights thereto against the lawful wife and her children after the husband's death. *Morgan v. Morgan*, 1 C. A. 315, 21 S. W. 154.

That plaintiff, while maintaining illicit relations with deceased, worked for him without receiving specific wages, is insufficient to give her a community interest in deceased's property. *Harris v. Hobbs*, 22 C. A. 367, 54 S. W. 1085.

A putative wife, so long as she acts innocently, has the rights of a lawful wife as to the property acquired by her and her supposed husband, in analogy to the rule which governs the rights of copartners. *Middleton v. Johnston* (Civ. App.) 110 S. W. 789.

15. Presumptions.—See notes under Art. 4623.

16. Evidence—Sufficiency of.—Proof that at the marriage the husband had much money and the wife nothing, and that during the marriage their property decreased, does not rebut the presumption that the property belongs to the community. *Schmeltz v. Garey*, 49 T. 49.

That part of the purchase money for land purchased by a husband during the life of the first wife was paid during the life of his second wife is not sufficient evidence that the money so paid was the community of the husband and the second wife. *Medlenka v. Downing*, 59 T. 32.

The testimony of a husband that property possessed jointly by himself and wife when she died was her separate property cannot control the legal effect which attaches to the detail of facts connected with its acquisition, which impress it with the character of community property. *Peet v. Railway Co.*, 70 T. 522, 8 S. W. 203.

Where, at the time property was sold, the husband's separate property, if any, was commingled with the community property beyond recognition, any presumption that might arise from statements in deeds that the real estate which was purchased by a part of the proceeds of sale was his separate property is rebutted, and its status as community property is established. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 992.

Direct testimony of an intention to make land separate property of wife held necessary to prevent the legal presumption that it was community property. *Hirsch v. Howell* (Civ. App.) 60 S. W. 887.

Evidence held not to support a verdict that property was community property. *Riddle v. Riddle* (Civ. App.) 62 S. W. 970.

Testimony held not to contradict evidence that property was not community property. *Gilbert v. Edwards*, 32 C. A. 460, 74 S. W. 959.

On issue as to whether certain lands were community property, the presumption that they were held rebutted. *Thayer v. Clarke* (Civ. App.) 77 S. W. 1050.

The presumption that property conveyed to a wife is community property may be overcome by proof showing that it is the wife's separate property. *Hames v. State*, 46 Cr. R. 562, 31 S. W. 708.

The presumption that land conveyed to a husband during marriage was purchased with community funds may be rebutted by showing that as a matter of fact he bought the land and paid for it out of his separate funds. *York v. Hilger* (Civ. App.) 84 S. W. 1117.

Where a homestead is acquired ten years after marriage, so strong is the presumption that it is community, that strong and satisfactory evidence will be required to destroy its community character. *Smith v. Smith* (Civ. App.) 91 S. W. 815.

In trespass to try title, evidence held not to rebut the presumption of community interest in the property. *Henry v. Vaughan*, 46 C. A. 531, 103 S. W. 192.

The proof rebutting the presumption that property acquired during coverture is community, and to establish its separate character, must be clear and satisfactory. *Watkins v. Watkins* (Civ. App.) 119 S. W. 145.

Where community property was involved, evidence held to show that the wife was the mother of four children. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

Evidence held to justify a finding that real estate was community property of a husband and wife. *Wing v. Red* (Civ. App.) 145 S. W. 301.

Where a wife living with her husband purchased land from the state in her name, pursuant to an agreement with a third person that he would give the wife the money to cover the expenses and pay for the land, the first payment, interest, and taxes were paid by her out of money so given her, the husband and wife both expected that deferred payments would be met by means of such gifts, and neither had any reasonable expectation or hope that they would be able to finish paying for the land unless such gifts were made as promised, the facts overcame the presumption that land purchased by the husband or wife while living together is community property, although the husband joined in the notes for the deferred payments, and hence, the land being her separate property, a purchaser from the husband and wife took it free from a lien of a judgment against the husband. *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

17. Management conveyances, Incumbrances or gifts of community property before separation of parties.—While the husband may convey property to his wife to reimburse her for appropriating her separate estate to either himself or for community purposes, or may make her a gift of his interest in the community property, yet he cannot convey to his wife his community interest, which is subject to the payment of community debts, so as to withdraw it from the reach of creditors. The gift passes to her his community interest, but he cannot so contract that the future gains and profits thereof shall be exempt from the payment of community debts existing, or which may be afterwards contracted. *Green v. Ferguson*, 62 T. 525.

A wife, joined by her husband, can convey the community property to a third person, who may convey to the husband. *Riley v. Wilson*, 24 S. W. 394, 86 T. 240.

As to conveyance of community property by the husband to defraud the community estate, see *Smitheal v. Smith*, 10 C. A. 446, 31 S. W. 422.

A pre-existing debt is a sufficient consideration of a trust deed on community property. *Boehm v. Beutler*, 16 C. A. 380, 41 S. W. 658.

Joinder of a wife is not necessary to a trust deed given by the husband on community property. *Id.*

A conveyance by a husband to his wife of community property converts it into her separate property. *Hunter v. Hunter* (Civ. App.) 45 S. W. 820.

On a husband's sale of community property to pay a community debt, the question whether the buyer was an innocent purchaser in paying for the property with a pre-existing debt did not arise. *Therriault v. Compere* (Civ. App.) 47 S. W. 750.

A deed by a wife held to convey a community estate. *Maxson v. Jennings*, 19 C. A. 700, 48 S. W. 781.

Husband held to have a community or separate estate in separate lands, so that deed without wife's signature vests his estate in the grantee. *Phoenix Ins. Co. v. Neal*, 23 C. A. 427, 56 S. W. 91.

Conveyances construed, and held void, as attempts to transform wife's separate estate into community property. *Kellett v. Kellett*, 23 C. A. 571, 56 S. W. 766.

In the absence of fraud on the rights of his wife, a purchaser of land may renew the original purchase-money note after it is barred by limitations, and thereby bar her rights in the premises, though the land is his homestead. *Jackson v. Bradshaw*, 24 C. A. 30, 87 S. W. 878.

Where a note reserving a vendor's lien, executed to a husband and wife for the purchase price of realty, is transferred by them to a third party in an action on the note, it is error to decree an undivided half of the lot to the wife free from the lien, and foreclose the lien as to the husband. *Noel v. Clark*, 25 C. A. 136, 60 S. W. 356.

Under the facts, a husband's fraudulent conduct, creating a charge on community property, held not to bind the wife. *Cetti v. Dunman*, 26 C. A. 433, 64 S. W. 787.

A deed by a husband of an undivided 110 acres out of a 310-acre tract owned by him and his wife as community property, and occupied by them as a home, will pass the title thereto, though the wife does not join therein. *Mass v. Bromberg*, 28 C. A. 145, 66 S. W. 468.

Where two-thirds of the land on which a lake was situated was community property, whether a grant of water rights, executed by husband and wife, was properly executed by the wife, held immaterial. *Gulf, C. & S. F. Ry. Co. v. Fenn*, 33 C. A. 352, 76 S. W. 597.

A wife's contract for the sale of community property in payment of community debts held binding on her and on her children. *Hughes v. Landrum*, 40 C. A. 196, 89 S. W. 85.

A wife alone with the assent of her husband may make a valid conveyance of community real estate. *Roos v. Basham*, 41 C. A. 551, 91 S. W. 656.

A husband may sell or pledge community property purchased by the wife. *Sweeney v. Taylor Bros.*, 41 C. A. 365, 92 S. W. 442.

A married woman, seeking to set aside a deed of community property on the ground of the fraud of the grantee, her son, held not entitled to recover all the land; the son owning an interest by inheritance from her husband. *Wade v. Wade* (Civ. App.) 106 S. W. 188.

A husband may convey community property without the wife joining in the deed. *Zuckerman v. Munz*, 43 C. A. 337, 107 S. W. 78.

A deed from a husband alone held sufficient to convey the title to community property other than homestead. *Best v. Kirkendall* (Civ. App.) 107 S. W. 932.

A deed given by a husband to his wife with her consent of a life estate in community land, with remainder to certain of their children, held to convey the entire estate, and not merely the husband's interest therein. *Lindly v. Lindly* (Civ. App.) 109 S. W. 467, judgment affirmed (Sup.) 113 S. W. 750. And the wife may not claim title to half the land as her community interest therein, on the theory that the transaction was governed by the doctrine of election. *Id.*

In an action to try title to land in which defendant claimed an interest as the putative wife of plaintiff's grantor, evidence held to warrant a finding that defendant did not in good faith believe that she was lawfully married to plaintiff's grantor, or that she was his wife at the time title to the property was acquired by him. *Middleton v. Johnston* (Civ. App.) 110 S. W. 789.

A married woman's deed of gift to her children held to convey her interest in the community estate, though her husband's name does not appear as grantor in the deed and he held the record title. *Couch v. Schwalbe*, 51 C. A. 94, 111 S. W. 1046.

A husband may convey a life estate in community property to his wife with remainder to their children. *Lindly v. Lindly*, 102 T. 135, 113 S. W. 750, affirming *Lindly v. Lindly* (Civ. App.) 109 S. W. 467.

The husband cannot by gift to himself convert community property into his separate property, neither during his lifetime nor by will. *Rowlett v. Mitchell*, 52 C. A. 589, 114 S. W. 845.

The absolute right of a husband to dispose of community property held to end with the termination of the marriage relation. *Id.*

A man, while a widower took out a policy in W. O. W. for benefit of his children by first marriage. After second marriage he continued to pay premiums on policy from community funds of second marriage without intent to defraud second wife. This he could do because his right to dispose of community funds is absolute so long as it is not exercised for the purpose of defrauding his wife. *Id.*

Where the boundary between land constituting the community and homestead of a husband and wife and the land of the adjacent owner is in dispute, an agreement between the adjacent owner and the husband alone, fixing the boundary, is valid. *Moreno v. Salazar* (Civ. App.) 116 S. W. 391.

Land conveyed by a married woman and her husband held not subject to a levy under execution issued under a judgment against the husband. *Barr v. Simpson*, 54 C. A. 105, 117 S. W. 1041.

A pretended sale of a stock of merchandise by one to his wife held ineffectual. *Dawson v. Baldrige*, 55 C. A. 124, 118 S. W. 593.

Conveyances held not to make land the community estate of husband and wife, and the conveyances were only valid in so far as they subjected the land to the payment of money borrowed. *Shook v. Shook* (Civ. App.) 125 S. W. 638.

That husband and wife, contributing community property, jointly made a contract of partnership with another does not invalidate the contract as between the husband and the third person, who understood he was dealing only with the husband, and the wife not engaging in the conduct of the business. *Keith v. Aubrey* (Civ. App.) 127 S. W. 278.

Though a husband can dispose of community property without his children's consent or without his wife's consent when not in fraud by her rights, he cannot give her interest to a stranger. *Watson v. Harris* (Civ. App.) 130 S. W. 237.

A married man may without consent of his wife make partition with one to whom he and his wife have conveyed an undivided half of community property, so long as her homestead rights are respected. *Paschall v. Brown* (Civ. App.) 133 S. W. 509.

A parol agreement by a wife and children to release their claim in community estate in consideration of the husband and father conveying to them other land is not enforceable, though the conveyances were made. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

A grantee of a purchaser of state lands who agrees to pay the state a specified sum per acre, and who moves on the land with his wife and family, may, during the life of

his wife, convey without her consent, in order to relieve himself of his burden to the state, or he may forfeit the land to the state. *Jones v. Harris* (Civ. App.) 139 S. W. 69.

Under the constitutions of 1845 and 1866, held, that a husband's trust deed of community property, subject to a homestead, without the wife's consent, became an effective trust deed on the death of the wife. *Wiener v. Zwieb*, 105 T. 262, 141 S. W. 771, 147 S. W. 867.

An absolute deed of a husband to community property held to vest the title. *Snipes v. Morton* (Civ. App.) 144 S. W. 286.

A husband, in the absence of fraud on the rights of his wife, was competent to convey community land, no homestead rights being involved, without joinder of the wife. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 152 S. W. 856.

A husband's power to convey community property, not burdened with homestead rights, in the absence of fraud on the rights of the wife, without her joining, conferred by this article, continues until the marriage relation is legally dissolved. *Id.*

A conveyance by a husband alone of community property passes title. *Watts v. Snodgrass* (Civ. App.) 152 S. W. 1149.

18. — **Recovery for ouster.**—A wife cannot sue for damages for being ousted from land purchased by her husband, and upon which she was living with him at the time of such ouster. *Jackson v. Bradshaw*, 28 C. A. 394, 67 S. W. 438.

19. — **Trusts in favor of wife.**—Rents of a wife's separate property belong to the community and may be conveyed to a trustee to apply to her support. *Schepflin v. Small*, 23 S. W. 432, 4 C. A. 493.

20. — **Sale of expectancy in community estate.**—A wife's expectancy in the community estate of her living mother is, after the death of her father, the subject of sale by her. *Barre v. Daggett*, 105 T. 572, 153 S. W. 120.

21. — **Insanity of wife.**—When the wife is hopelessly insane the husband can alone convey the homestead, which is community property. In this case, even if insanity of the wife does not give the husband the right to convey alone, the deed is effective because at time of sale the homestead had been abandoned. *Aultman, Miller & Co. v. Shields*, 20 C. A. 345, 50 S. W. 219.

22. — **Insanity of husband.**—A wife whose husband is insane may not convey community property constituting the homestead and make contracts as a feme sole. *Heidenheimer v. Thomas*, 63 T. 287. See *Forbes v. Moore*, 32 T. 195.

23. — **Evidence.**—Evidence held to support a finding that the use by a husband of community funds of his second marriage to pay premiums on a life policy in favor of the children of his first marriage was not with intent to defraud his second wife. *Rowlett v. Mitchell*, 52 C. A. 589, 114 S. W. 845.

In trespass to try title, evidence held to sustain a finding that defendant in purchasing was put on inquiry as to plaintiffs' claim to the land as community property. *Ross v. Martin* (Civ. App.) 128 S. W. 718.

Evidence that it was generally known that husband and wife were separated, and that property conveyed by his separate deed was community property, held insufficient to justify an inference of fraud, or charge the purchaser with notice of the husband's fraudulent intent to deprive his wife of her interest. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 152 S. W. 856.

24. **Abandonment or separation or dissolution of community as affecting title of parties.**—As to the property rights of a married woman abandoned by her husband. *Insurance Co. v. May* (Civ. App.) 35 S. W. 829.

When a decree of divorce is entered, and no order is made touching community property, the husband and wife become tenants in common of the community interest. *Southwestern Mfg. Co. v. Swan* (Civ. App.) 43 S. W. 813; *Roemer v. Traylor* (Civ. App.) 123 S. W. 685.

In an action to subject community lands to payment of a debt, cross-action set up by wife held not maintainable, in that it sought a partition of community property, in which proceeding plaintiff had no concern. *Teague v. Lindsey*, 31 C. A. 161, 71 S. W. 573.

Statement of right of husband, who has deserted his wife, to dispose of community property. *King v. King*, 41 C. A. 473, 91 S. W. 633.

The right of a wife to her share in the community property acquired by her husband held not forfeited, where the husband abandoned the wife and a child, and the wife, erroneously believing that he had obtained a divorce, married. *Merrell v. Moore*, 47 C. A. 200, 104 S. W. 514.

A wife having been abandoned by her husband held entitled to collect and expend for her necessities wages earned by the husband, and to receipt therefor to the husband's employer. *Irwin v. Irwin* (Civ. App.) 110 S. W. 1011.

25. — **Abandonment or separation as affecting right to manage, Incumber or convey.**—When a husband has deserted the wife, is separated from her, or confined in the penitentiary, she is authorized to manage community property and to make contracts as a feme sole. *Walker v. Stringfellow*, 30 T. 570; *Blanchet v. Dugat*, 5 T. 507; *Wright v. Hays*, 10 T. 130, 60 Am. Dec. 200; *Fullerton v. Doyle*, 18 T. 3; *Ann Berta Lodge v. Leverton*, 42 T. 18; *Carothers v. McNese*, 43 T. 221; *Zimpelman v. Robb*, 53 T. 274; *Davis v. Saladee*, 57 T. 326; *Wright v. Blackwood*, 57 T. 644; *Ezell v. Dodson*, 60 T. 331; *Black v. Black*, 62 T. 296; *Heidenheimer v. Thomas*, 63 T. 287; *Slator v. Neal*, 64 T. 222; *Clemens v. Ewing*, 71 T. 370, 9 S. W. 312.

Where a husband abandons his wife she may assert her rights in the community property and may intervene in a suit against the husband by his creditors for her own protection. *Cullers v. James*, 66 T. 494, 1 S. W. 314.

After abandonment of a husband by his wife without the intention of returning held, that the husband had a right to incumber the community property and to pass a fee-simple title thereto. *Mabry v. Kennedy*, 49 C. A. 45, 108 S. W. 176.

A deed of a wife to community property held admissible in trespass to try title on a showing of abandonment by her husband. *Snipes v. Morton* (Civ. App.) 144 S. W. 286.

In trespass to try title against a husband and wife, evidence held to show an abandonment by the husband of the wife, so as to clothe her with power to sell community property. *Id.*

That husband and wife were living apart, and had been separated for several years, did not of itself deprive the husband of the authority to convey community real property by separate deed, nor was it sufficient to show that such conveyance was fraudulent as to the wife. But evidence that it was generally known in the neighborhood that the husband and wife were separated, and that the land was community property, was insufficient to raise an inference of fraud or charge the purchaser with notice of a fraudulent intent of the husband to deprive the wife of her interest therein. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 152 S. W. 856.

26. — **Divorce as affecting right to manage, incurber or convey.**—After divorce the husband can only bind his half interest in property by a new contract. A sale of one-half interest in community land would convey his entire interest therein. The remaining half, if the sale by metes and bounds made an equitable division, would be the property of the wife, with legal title in the husband or his heirs. In absence of any connection by the defendants with the equitable title of the wife, the plaintiffs holding the legal title, can recover the land. *Goode v. Jasper*, 71 T. 48, 9 S. W. 132.

After divorce, if the community property is not disposed of by the decree, the former husband and wife are tenants in common of such property, and the former husband no longer represents the former wife or the community estate. *Roemer v. Traylor* (Civ. App.) 128 S. W. 685.

27. — **Authority, interest and liability of survivor.**—See notes under Art. 2469 and Title 52, Chapter 29.

28. — **Presumptions.**—See notes under following article and Art. 3637, Rule 12.

29. **Actions for community property.**—A husband's right to sue for money alleged to be community property may be defeated by proof under a general denial, that it was his wife's separate property. *Michael v. Rabe*, 56 C. A. 441, 120 S. W. 565.

The husband alone can sue for community property. *Cone v. Belcher*, 57 C. A. 493, 124 S. W. 149.

While suit to recover on an account due a community should be brought by the husband, that the wife was made party plaintiff was no ground for dismissing the cause; dismissal of the wife on timely exception being the proper remedy. *Gentry v. McCarty* (Civ. App.) 141 S. W. 152.

Since the damages sustained by husband and wife for personal injuries to the wife are community property, it was no objection, in a suit by both to recover damages, that the verdict made a single allowance for both. *Posener v. Long* (Civ. App.) 156 S. W. 591.

30. — **Right of action by abandoned wife against husband.**—An abandoned wife held not entitled to recover a personal judgment against her husband for an alleged fraudulent disposition by him of wages constituting community property. *Irwin v. Irwin* (Civ. App.) 110 S. W. 1011.

31. — **Quietling husband's title.**—The husband's title to community property will not be quieted against the unfounded verbal assertion of the wife to title. *Newman v. Newman* (Civ. App.) 86 S. W. 635.

32. **Rights and liabilities of heirs.**—See notes under Art. 2469 and Title 52, Chapter 29.

33. **Limitations.**—See notes under Title 87.

34. **Redemption of community from liens.**—In a suit to enforce a vendor's lien, the wife of the vendee, being entitled to a community interest in the land, held entitled to redeem. *Cavin v. Wichita Valley Townsite Co.*, 36 C. A. 336, 82 S. W. 342.

35. **Administration of community property.**—See notes under Title 52, Chapter 29.

36. **Allowance to widow and children.**—See notes under Title 52, Chapter 17.

37. **Descent and distribution.**—See notes under Art. 2469.

Art. 4623. [2969] Presumption as to community property.—All the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. [Act Jan. 20, 1840. P. D. 4638.]

Applicability in general.—The presumption which obtains when the marriage is dissolved, that property in the possession of either spouse belongs to the community, applies to dissolution by divorce as well as by death. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 996.

Presumptions and burden of proof.—Property found in the possession of either husband or wife at the time the marriage is dissolved is presumed to be community estate. *Wright v. Wright*, 3 T. 179; *Cox v. Miller*, 54 T. 16; *Heidenheimer v. Loring*, 26 S. W. 99, 6 C. A. 560; *McCelvey v. Cryer* (Civ. App.) 37 S. W. 175; *Perkins v. Adams*, 17 C. A. 331, 43 S. W. 529; *Edelstein v. Brown* (Civ. App.) 95 S. W. 1126.

Property acquired by purchase, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is prima facie presumed to belong to the community. *Lott v. Keach*, 5 T. 394; *Huston v. Curl*, 8 T. 239, 58 Am. Dec. 110; *Hemingway v. Mathews*, 10 T. 207; *Wells v. Cockrum*, 13 T. 127; *Chapman v. Allen*, 15 T. 278; *Smith v. Strahan*, 16 T. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 T. 389, 70 Am. Dec. 394; *Mitchell v. Marr*, 26 T. 329; *Cooke v. Bremond*, 27 T. 457, 86 Am. Dec. 626; *Stanley v. Epperson*, 45 T. 645; *Johnson v. Harrison*, 48 T. 257; *Veramendi v. Hutchins*, 48 T. 531; *McDaniel v. Weiss*, 53 T. 259; *Cox v. Miller*, 54 T. 16; *Wallace v. Campbell*, 54 T. 87; *Parker v. Coop*, 60 T. 111; *Collins v. Turner*, 1 App. C. C. § 517; *Edwards v. Brown*, 68 T. 335, 4 S. W. 380, 5 S. W. 87; *Finn v. Williamson*, 75 T. 336, 12 S. W. 852; *Proetz v. Schroeder*, 83 T. 684, 19 S. W. 292; *Stiles v. Japhet*, 84 T. 91, 19 S. W. 450; *Swink v. League*, 25 S. W. 807, 6 C. A. 309; *Ingersol v. McWillie*, 30 S. W. 56, 9 C. A. 543; *Keyser v. Clifton* (Civ. App.) 50 S. W. 957; *Schneider v. Sellers*, 25 C. A. 226, 61 S. W. 541; *Clardy v. Wilson*, 27 C. A. 49, 64 S. W. 489; *Blackwell v. Mayfield* (Civ. App.) 69 S. W. 659; *Flannery v. Chidgey*, 33 C. A. 638, 77 S. W. 1034; *Thayer v. Clarke* (Civ. App.) 77 S. W. 1050; *Hoopes v. Mathis*, 40 C. A. 121, 89 S. W. 36; *Henry v. Vaughan*, 46 C. A. 531, 103 S. W. 192; *Parks v. Worthington* (Civ. App.) 104 S. W. 921; *O'Farrell v. O'Farrell*, 56 C. A. 51, 119 S. W. 899; *Ross v. Martin*, 104 T. 558, 140 S. W. 432, 141 S. W. 518; *Sauvage v. Wauhup* (Civ. App.) 143 S. W. 259; *Aycock v. Thompson*, 146 S. W. 641.

The presumption in favor of the community, resulting from a deed made to either husband or wife, may be rebutted by proof that it was bought with the separate funds of either. When the deed is made to the wife, it may be shown to be for her benefit, not only from the advance by her of the purchase money, but if the funds be advanced from the separate means of the husband, the presumption of a gift arises, and if from the community fund, it may be proven that the husband intended a gift, and directed the deed to be made in her name. *Dunham v. Chatham*, 21 T. 231, 73 Am. Dec. 228; *Smith v. Strahan*, 16 T. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 T. 389, 70 Am. Dec. 394; *Story v. Marshall*, 24 T. 305, 76 Am. Dec. 106; *Hatchett v. Conner*, 30 T. 104; *Tucker v. Carr*, 39 T. 98. Such a trust cannot be ingrafted on a deed to the prejudice of creditors or purchasers without notice; and the fact that a conveyance is made to a married woman does not put the purchaser upon inquiry. *Cook v. Bremond*, 27 T. 457, 86 Am. Dec. 626; *Flanagan v. Oberthier*, 50 T. 379; *Alstin v. Cundiff*, 52 T. 453; *McDaniel v. Weiss*, 53 T. 257; *Wallace v. Campbell*, 54 T. 87.

Plaintiff, suing as a feme sole, alleged that she was the owner and entitled to possession, and that she held by regular chain of title, which she fled. One of the deeds was made whilst her husband was living. Held, that there was no error in refusing to charge that presumptively the land was community property. Distinguished from *Hatchett v. Connor*, 30 T. 104.

One who bought from the state school lands in the name of his wife, in pursuance of a contract with other parties, by the terms of which they also should purchase other sections, all of which were to be used for mining purposes, must be presumed, in the absence of evidence, to have used community funds in acquiring the lands patented to her. If, at the time of the application to purchase, it was the intention of the husband that the land should belong to her, then, as to the husband and his heirs, and those claiming under him with notice, the land would be regarded as the separate property of the wife. *Edwards v. Brown*, 68 T. 329, 4 S. W. 380, 5 S. W. 87.

That a wife joins in a conveyance (not properly acknowledged by her) does not raise a presumption that the land was community property. *Bassett v. Martin*, 83 T. 339, 18 S. W. 587.

Where land purchased by a husband was paid for with his separate property, the equitable title conferred by statute on the wife on his death presumptively existed, in the absence of anything to the contrary in the deed to the husband. *Kirby v. Moody*, 84 T. 201, 19 S. W. 453.

Where a deed is made to the wife, and there is no language in the deed tending to show that the property is the separate property of the wife, the presumption is that it is community property. *Fox v. Brady*, 1 C. A. 590, 20 S. W. 1024; *McKinney v. Nunn*, 82 T. 44, 17 S. W. 516.

A conveyance to a wife without a recital that it is intended for her separate use does not destroy the presumption that it is community property. *Sinsheimer v. Kahn*, 6 C. A. 143, 24 S. W. 533; *Cooke v. Bremond*, 27 T. 459, 86 Am. Dec. 626; *French v. Strumberg*, 52 T. 109; *Parker v. Coop*, 60 T. 112.

Presumptions will not be indulged in violence of the recitals in a conveyance. *Mari-posa L. & C. Co. v. Silliman*, 26 S. W. 978, 87 T. 142.

A married woman's recorded brand on cattle raises the presumption that they are community property, if acquired during coverture, unless the record shows contrary. *Rhodes v. Alexander*, 19 C. A. 552, 47 S. W. 754.

Deeds to and by the wife held not to destroy the presumption that the land acquired during coverture was community estate. *Maxson v. Jennings*, 19 C. A. 700, 48 S. W. 781.

Where property is purchased with community funds, and the deed taken in the wife's name, there is no presumption that it was to become her separate estate by gift from the husband. *Schwartzman v. Cabell* (Civ. App.) 49 S. W. 113.

No presumption arises that land was purchased with the wife's separate means because the conveyance, made after the husband's death, recites that the consideration was paid by her. *Clark v. Clark*, 21 C. A. 371, 51 S. W. 337.

Where a deed executed by the surviving wife of one who during his life held the title is more than 30 years old, it should be presumed that the land was community property. *Wolf v. Gibbons* (Civ. App.) 69 S. W. 238.

Personal property, acquired during marriage, is presumed to have been earned by one or the other, or both, members of the community. *Thayer v. Clarke* (Civ. App.) 77 S. W. 1050.

Facts held to give rise to presumption that land conveyed to a husband during marriage was purchased with community funds. *York v. Hilger* (Civ. App.) 84 S. W. 1117.

The court may assume, when there is nothing to show when the property of deceased was acquired, that it was acquired during the existence of the marriage relation. *Stein v. Mentz*, 42 C. A. 38, 94 S. W. 449.

The legal presumption that land purchased by a husband and wife during the existence of the marriage is community property prevails in the absence of proof to the contrary. *Letot v. Peacock* (Civ. App.) 94 S. W. 1121.

In an action by the children and heirs at law of a deceased woman to recover her community interest from her surviving husband, the burden of proof was on defendant to satisfactorily prove that the property acquired during the marriage was his separate property. *Edelstein v. Brown* (Civ. App.) 95 S. W. 1126.

A sale of land by a trustee to his wife, held presumed to have become the common property, and cannot be held against an application to set aside the sale accompanied by an offer to do equity. *Parks v. Worthington*, 101 T. 505, 109 S. W. 903.

The consideration for land conveyed to husband during lifetime of wife being cash, in the absence of evidence that the money was the separate property of the husband, the presumption is that the land at the death of the husband was community. *Frey v. Meyers* (Civ. App.) 113 S. W. 593.

Where land is "reciprocally possessed" at the dissolution of the marriage by the death of one of the parties, it must be regarded as common effects or gains unless the contrary is satisfactorily proved. *Phillips v. Palmer*, 56 C. A. 91, 120 S. W. 912.

The rule that property acquired during marriage is presumptively that of the community held not to apply to improvements made upon realty shown to be the separate estate of one of the spouses. *Darden v. Taylor* (Civ. App.) 126 S. W. 944.

Where, on a wife securing a divorce, her husband testified that he had separate property prior to the marriage, but that after the marriage he kept no separate account of the funds, but made a "Duke's Mixture" of the whole thing, and he made no attempt to trace the changes and mutations of the property, a decree dividing it as community estate was proper. *Ervin v. Ervin* (Civ. App.) 128 S. W. 1139.

It is presumed that property acquired during a first marriage belonged to the community estate of that marriage. *Lynch v. Lynch* (Civ. App.) 130 S. W. 461.

The presumption that property acquired during the existence of the relation of husband and wife was community property is rebuttable, and may be overcome by a showing that the consideration was from the separate means of one of the spouses. *Winfield v. Rilling* (Civ. App.) 132 S. W. 828.

Property sued for by a husband will be presumed to be community property of both husband and wife. *Ellerd v. Randolph* (Civ. App.) 138 S. W. 1171.

Real estate acquired during marriage and occupied by the parties is presumptively community property, and on the death of the husband, leaving no children living at the time of his death, the title vests in the surviving wife. *Ross v. Martin*, 104 T. 558, 140 S. W. 432, 141 S. W. 518.

A payment by a husband on community property soon after the death of his wife does not raise a presumption that the money belonged to his separate estate. *Richmond v. Sims* (Civ. App.) 144 S. W. 1142.

Where a woman executed a deed as survivor of the community estate, and marriage, death of the husband, and destruction of county records were shown, the facts justified a presumption that the property was community property and that the grantor had authority to sell. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

Public land purchased from the state in the name of either husband or wife while they are living together is prima facie community property, but the presumption may be overcome by proof that, as between the husband and wife, such land is the separate property of one or the other. *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

An instruction that all property deeded to either husband or wife during marriage and all effects possessed at the death of either is presumed to be community property, unless the contrary be "satisfactorily proven," was not erroneous as on the weight of the evidence in view of this article and Art. 4622. *Wood v. Dean* (Civ. App.) 155 S. W. 363.

Art. 4624. What property subject to debts of wife; husband must join in certain contracts.—Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to the payments of debts contracted by the wife, except those contracted for necessaries furnished her or her children; provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract. [Act March 13, 1848. P. D. 4643. Acts 1913, p. 61, sec. 1 amending Art. 4624, Rev. St. 1911.]

Authority to contract in general.—When a husband has deserted the wife, is separated from her, or confined in the penitentiary, she is authorized to manage the community property and her separate property, and to make contracts as a feme sole. *Walker v. Stringfellow*, 30 T. 570; *Blanchet v. Dugat*, 5 T. 507; *Wright v. Hays*, 10 T. 130, 60 Am. Dec. 200; *Fullerton v. Doyle*, 18 T. 3; *Ann Berta Lodge v. Leverton*, 42 T. 13; *Carothers v. McNese*, 43 T. 221; *Zimpleman v. Robb*, 53 T. 274; *Davis v. Saladee*, 57 T. 326; *Wright v. Blackwood*, 57 T. 644; *Ezell v. Dodson*, 60 T. 331; *Black v. Black*, 62 T. 296; *Heidenheimer v. Thomas*, 63 T. 287; *Slater v. Neal*, 64 T. 222; *Clemens v. Ewing*, 71 T. 370, 9 S. W. 312.

The laws of another state authorizing a married woman to contract debts as a feme sole, a debt contracted by her in that state can be sued on in this state. *Merrielles v. State Bank*, 24 S. W. 564, 5 C. A. 483.

A married woman has power to compromise a suit and agree on a judgment in person or by attorney. *Cordray v. City of Galveston* (Civ. App.) 26 S. W. 245.

A married woman can contract for the purchase of property, part in cash and part on time. For the deferred payment her separate property cannot be held liable, but she would be protected to the extent of the cash consideration paid out of her separate estate. *Pitt v. Elser*, 7 C. A. 47, 32 S. W. 146.

Parties under coverture are bound by their agreements made in the course of judicial proceedings and upon which a judgment is entered. *Blagge v. Shaw* (Civ. App.) 41 S. W. 756.

Since no cause of action exists against a married woman as a partner in a mercantile firm, a garnishment against her alone, in an action against the firm, is properly quashed. *Cleveland v. Spencer* (Civ. App.) 50 S. W. 405.

A check signed by a wife alone, with her husband's consent, is valid. *Ragsdale v. Groos* (Civ. App.) 51 S. W. 256.

A widow who has remarried may renew a note given by her former husband and herself as part of the price of property and thereby extend the time in which to pay the price. *Proetzel v. Rabel*, 21 C. A. 559, 54 S. W. 373.

The debts named may be contracted by the wife without reference to abandonment by the husband. *Palmer v. Coghlan* (Civ. App.) 55 S. W. 1122.

A judgment cannot be rendered against a married woman on notes not executed for necessities furnished to her or family, or for the preservation of her separate estate. *Noel v. Clark*, 25 C. A. 136, 60 S. W. 356.

Where plaintiff kept house, and nursed and cared for an invalid wife, under promise of a legacy, which was not given, the fact that the invalid's husband lived with her,

and hence necessarily received benefit from the service, did not affect plaintiff's right to compensation from the wife's estate. *Von Carlowitz v. Bernstein*, 28 C. A. 8, 66 S. W. 464.

An agreement by a married woman for division of property, as between herself and husband on the one side, and her adult children on the other side, is valid. *Crouch v. Crouch*, 30 C. A. 288, 70 S. W. 595.

The authority granted the wife by this article is strictly construed, and no appeal to the equitable powers of the court can be made to bind the wife not executed under the provisions of the statute. *Flannery v. Chidgey*, 33 C. A. 638, 77 S. W. 1035.

The purchaser of a note signed by a wife, must take notice of her coverture, and of the existence or nonexistence of the circumstances and facts, that would authorize her to execute a contract such as is authorized by this article. *Haas v. American Nat. Bank*, 42 C. A. 167, 94 S. W. 439, 440.

The common law has been so far modified as to permit the wife to contract debts for necessaries furnished herself and children, and for expenses incurred for benefit of her separate property. This is the extent of her right to contract in this state, unless her husband joins her in the contract, or she has been abandoned by him. *Lane v. Moon*, 46 C. A. 625, 103 S. W. 215.

One held not entitled to defeat recovery for a married woman's services on the ground that she was not authorized by her husband to contract therefor. *O'Connell v. Storey* (Civ. App.) 105 S. W. 1174.

A wife held not personally liable for a piano not purchased for her separate estate. *Wright v. Couch* (Civ. App.) 113 S. W. 321.

A married woman is not liable on her note, where the consideration was a previous debt due from her husband. *Burnham-Hanna-Munger Dry Goods Co. v. Carter*, 52 C. A. 294, 113 S. W. 782.

A married woman cannot bind herself for debts by ordinary contract, except as authorized by this article, and is not liable on a contract to pay a commission for the sale of her separate property, which was not signed by the husband nor acknowledged by the wife. *Billingsly v. Swenson Land Co.* (Civ. App.) 123 S. W. 194.

A partnership contract between husband and wife jointly with a third person held not invalid on that account between the husband and third person. *Keith v. Aubrey* (Civ. App.) 127 S. W. 278.

A married woman because of her coverture was not liable on notes given by her for the price of a piano. *Hall v. Decherd* (Civ. App.) 131 S. W. 1133.

A wife has no legal capacity to make a contract to sell her separate property, either directly or indirectly, or to authorize her husband to do so, where there is no evidence that the contract is for necessaries or for the benefit of her separate property. *Bott v. Wright* (Civ. App.) 132 S. W. 960.

A married woman is not bound by a parol contract for the payment of commissions for the sale of land. *Caldwell v. Scott Bros.* (Civ. App.) 143 S. W. 1192.

A rental contract of a farm constituting the separate property of a married woman, which gives to the lessee the use of the farm for his own benefit for a year in consideration of a stipulated rental in money, is not a contract for the benefit of the separate property of the wife within this article, and she is not bound thereby. *Taylor v. Thomas* (Civ. App.) 145 S. W. 1061.

A married woman's contract for a purpose other than such as is expressly authorized by statute is void. *Thompson v. Morrow* (Civ. App.) 147 S. W. 706.

In general, a married woman cannot make a contract or be bound by one made for her, or under her authority, not for necessaries, or for the benefit of her separate property. *Lemons v. Biddy* (Civ. App.) 149 S. W. 1065.

The petition in an action by a married woman, in which her husband joined, alleged the making of a contract with defendant, a real estate broker, by the wife in the husband's presence, and with his consent, by which she was to have a share of the broker's commissions on sales to purchasers sent him by her. An amended petition, filed after a new action would have been barred by limitations, in which the husband was named as sole plaintiff, alleged the making of the contract by him. Held, that the contract alleged in both petitions was the same; and hence the cause was not barred by limitations, since the contract alleged in the original petition was the husband's contract, made by the wife as agent, in view of this article, which is the only statute authorizing a married woman to contract. *Lilly v. Yearly* (Civ. App.) 152 S. W. 823.

A married woman has no power, except such as is given by statute, to bind herself personally by a contract. *Id.*

— **Abandonment by husband.**—Wife held competent to lease premises in absence of husband, where judgment in action of forcible entry and detainer had been rendered. *Golden v. City of Galveston*, 20 C. A. 584, 50 S. W. 416.

A wife who has been abandoned by her husband can execute a valid mortgage to secure a debt theretofore incurred for necessaries. *Fermier v. Brannan*, 21 C. A. 543, 53 S. W. 699.

When abandoned by the husband a wife's contracts are treated as those of a feme sole, and she can make contracts, not only concerning her separate estate, but in certain instances as to the community estate. *Palmer v. Coghlan* (Civ. App.) 55 S. W. 1122.

Where a married woman has been abandoned, she may contract without joining her husband. *Heagy v. Kastner* (Civ. App.) 138 S. W. 788.

A wife who has been abandoned by her husband may act as a feme sole, pay community debts, and convey community property, either for that purpose or to secure necessities for herself and family, as the survivor of the connubial partnership, and is authorized to bind herself by a note executed to secure an extension of the community debt. *Crowder v. McLeod* (Civ. App.) 151 S. W. 1166.

A woman conducting her own business, buying furniture with her separate property, at a time when she was permanently separated from her husband, and only two months before she was divorced from him, and who ratified the sale after divorce by payments thereon, cannot rely on coverture to defeat the sale. *Peck v. Morgan* (Civ. App.) 156 S. W. 917.

— **Avoidance of contract with wife.**—Though a married woman is not bound by her contract, the other party to the contract cannot refuse to perform it. *J. B. Watkins Land Mortg. Co. v. Campbell* (Civ. App.) 81 S. W. 560.

One cannot avoid a contract to purchase because made with a married woman. *Frazier v. Lambert*, 53 C. A. 506, 115 S. W. 1174.

Necessaries and family expenses as charges.—To charge the estate of a wife with a debt contracted under this article, it must be shown that it was contracted by herself or by her express authority, for necessaries for herself or children, or for the benefit of her separate property, and that the charges were reasonable and proper. *Harris v. Williams*, 44 T. 124; *Warren v. Smith*, 44 T. 245; *Christmas v. Smith*, 10 T. 123; *Butler v. Robertson*, 11 T. 142; *Milburn v. Walker*, 11 T. 329; *Rhodes v. Gibbs*, 39 T. 432; *Trimble v. Miller*, 24 T. 214; *Hutchinson v. Underwood*, 27 T. 255; *Covington v. Burleson*, 28 T. 368; *Menard v. Sydnor*, 29 T. 257; *Lee v. Crosby*, 1 App. C. C. § 140; *Searcy v. Mealler*, 1 App. C. C. § 929; *Rosenbaum v. Harloe*, 1 App. C. C. § 850; *Eager v. Morris*, 1 App. C. C. § 177; *Kelley v. Embree*, 1 App. C. C. § 192; *Wheeler v. Burks* (Civ. App.) 31 S. W. 434; *Finks v. Thompson* (Civ. App.) 32 S. W. 711. Contra, see *McFadden v. Crumpler*, 20 T. 374; *Christmas v. Smith*, 10 T. 123; *Brown v. Ector*, 19 T. 346; *Haynes v. Stovall*, 23 T. 635. And see *George v. Stevens*, 31 T. 670; *Magee v. White*, 23 T. 180; *Stansbury v. Nichols*, 30 T. 145.

Evidence held sufficient proof of possession of separate estate by wife to support judgment against her for necessaries. *Palmer v. Coghlan* (Civ. App.) 55 S. W. 1122.

In an action against the estate of a wife for necessary personal services rendered to her, it is not necessary to show that her husband was unable or refused to pay for such services. *Von Carlowitz v. Bernstein*, 28 C. A. 8, 66 S. W. 464.

A note executed by a married woman partly for necessaries for herself and children held enforceable against her separate property. *Hild v. Hellman* (Civ. App.) 90 S. W. 44.

A married woman's note after the death of her husband held not enforceable against her unless it was for necessaries, or she had converted community property. *J. B. Newton & Sons v. Puente* (Civ. App.) 131 S. W. 1161.

— **What are necessaries.**—When husband and wife have lived in one place and in rented property, and for the benefit of the wife's health have moved to another place and lived in rented property for a while, and then the wife concludes to build a home, the house so purchased is not such a necessary as will bind the wife's separate property for its payment. *Bexar Building & Loan Ass'n v. Heady*, 21 C. A. 154, 50 S. W. 1079, 57 S. W. 583.

An attorney at law can maintain an independent suit against the husband for legal services rendered the wife in divorce proceedings against him, as for necessaries furnished the wife. An agreed fee cannot be collected unless it was reasonable. *Bord v. Stubbs*, 22 C. A. 242, 54 S. W. 633.

Attorneys employed by a wife to prosecute a divorce can recover from the husband therefor only on a showing that the suit was instituted by the wife in good faith and for probable cause. *Dodd v. Hein*, 26 C. A. 164, 62 S. W. 811.

Under the facts, held, that a wife had no authority to bring a child into the family without her husband's consent, and to execute a note for the tuition of such child in a business college. *Haas v. American Nat. Bank*, 42 C. A. 167, 94 S. W. 439.

A wife purchasing the articles will be the judge of what are necessary for herself and children, subject to decision of court and jury as to whether they are reasonable and proper. *Desmond v. Dockery* (Civ. App.) 116 S. W. 115.

— **Husband's liability for necessaries.**—A husband is liable for necessaries furnished the wife after he has abandoned her. *Palmer v. Coghlan* (Civ. App.) 55 S. W. 1122.

Debts or liabilities charged on separate estate.—A married woman is not personally liable for the unpaid purchase money of land conveyed to her by direction of the husband. *Lynch v. Elkes*, 21 T. 229; *Farr v. Wright*, 27 T. 96; *Trimble v. Miller*, 24 T. 214; *Covington v. Burleson*, 28 T. 368; *Menard v. Sydnor*, 29 T. 257.

A married woman, by mortgage or deed of trust executed by herself and husband, and duly acknowledged under the statute, can encumber her separate property for the prior debts of her husband. *Trimble v. Miller*, 24 T. 214; *Covington v. Burleson*, 28 T. 368; *Menard v. Sydnor*, 29 T. 257; *Lynch v. Elkes*, 21 T. 229; *Rhodes v. Gibbs*, 39 T. 432; *Hollis v. Francois*, 5 T. 195, 51 Am. Dec. 760; *Shelby v. Burtis*, 18 T. 644; *Wiley v. Prince*, 21 T. 637; *Hall v. Dotson*, 55 T. 520; *Wilkinson v. Rowland*, 3 App. C. C. § 11. In such a case the property conveyed stands as surety for the debt, and whatever will discharge an individual surety will, under similar circumstances, discharge the property; as, that an action on the debt is barred as to her. *Wofford v. Unger*, 55 T. 480.

A wife is liable for the value of materials used in beneficial improvements of her separate property, the title to which is in a trustee, when, by the wife's consent, the trustee permits the husband, as his agent, to manage the property and contract debts in the trustee's name. *Perkins v. Baker*, 38 T. 45.

A married woman, the owner of a ferry, is not liable for damages occasioned by the negligence of her husband or his servants. *Henry v. Voltz*, 1 App. C. C. § 775.

A married woman, who voluntarily pays her money or other personal property upon a contract made by her, or in any way that would bind a man, cannot recover it back simply upon the ground that she is a married woman. If she repudiates her contract she must return what she has received. *Pitts v. Elser*, 28 S. W. 513, 87 T. 347.

When the wife signs notes with her husband for his debt, and executes a mortgage on her separate property to secure the same, she occupies the position of a surety for the debt, and any fact that will ordinarily release a surety will release her property, and an extension of the time of payment of the notes without the consent of the wife will release her property. *Beattie v. Keller* (Civ. App.) 49 S. W. 408.

Allegations that creditors, secured by a deed on community property and also separate property of the debtor's wife, permitted the community property to be squandered, held to charge laches on their part constituting cause for relief to parties claiming the separate property through a conveyance from the wife. *Schneider v. Sellers*, 25 C. A. 226, 61 S. W. 541.

Where services were rendered married woman in behalf of her separate estate, held unnecessary to show that they benefited such estate. *Emerson v. Kneezell* (Civ. App.) 62 S. W. 551.

Where a debtor conveys property to a wife to satisfy a debt due her separate estate, and she assumes payment of debts due other creditors, the conveyance vests title in the property in her, and imposes on her the obligation of paying the debts assumed. *Hugo & Schmeltzer Co. v. Hirsch* (Civ. App.) 63 S. W. 163.

In order to enforce a note for attorney's fees against a wife's separate property, it must appear that she made the contract of employment herself, or that she authorized her husband to make it. *Cushman v. Masterson* (Civ. App.) 64 S. W. 1031.

Property devised to a woman for life, "to receive for her sole and separate use, and no other," the rents and profits thereunder, is her separate property, so that rents are not liable for husband's debts. *Sullivan v. Skinner* (Civ. App.) 66 S. W. 680.

The separate estate of a wife is not liable for services rendered in nursing her deceased husband, though contracted for by her. *Flannery v. Chidgey*, 33 C. A. 638, 77 S. W. 1035.

The land of a married woman, hypothecated for an obligation of her husband, held not bound; the agreement under which it was hypothecated not having been complied with. *Schneider v. Sellers* (Civ. App.) 81 S. W. 126.

Release of community property of husband and wife by creditor held to release lien of trust deed on real estate of wife securing husband's debt. *Schneider v. Sellers*, 98 T. 380, 84 S. W. 417, affirming (Civ. App.) 81 S. W. 126.

The wife is jointly liable with her husband for torts committed by her, and her separate property may be subjected to a judgment rendered against her therefor. *Magerstadt v. Lambert*, 39 C. A. 472, 87 S. W. 1068.

The insolvency of a husband does not affect the rule that a contract or extension of his debt, not participated in by the wife, discharges her property which stands as surety for the debt. *De Barrera v. Frost*, 39 C. A. 544, 88 S. W. 476.

A husband has no authority to extend any indebtedness secured by a mortgage on the wife's separate property. *Id.*

A deed of trust given by a husband and wife on her separate property to secure his debt held not to have authorized him to make extensions so as to deprive her of any rights she might have the reason of an extension not participated in by her. *Id.*

A judgment over against a married woman in favor of a surety in a mortgage held erroneous. *Littler v. Dielmann*, 48 C. A. 392, 106 S. W. 1137.

Where the contract provided that the money loaned the husband and wife was to be expended in making an improvement upon the wife's separate property, but it was not so used the wife's separate property cannot be held for the debt, though she joined her husband in giving a lien on her property to secure the debt. To hold her liable on the contract it must be shown that the labor was furnished or improvement made for the purpose of benefiting her separate property. *Stroter v. Brackenridge*, 51 C. A. 170, 118 S. W. 633; *Id.*, 102 T. 386, 118 S. W. 634.

Where a debt was contracted by a wife, or by her authority, and was for the benefit of her separate estate, she and her separate estate were bound therefor. *Teel v. Blair* (Civ. App.) 128 S. W. 478.

Where a part of a loan evidenced by a note executed by a husband and wife secured by deed of trusts on her separate property was used as intended to pay prior liens on the property and taxes and premiums for insurance on the property, the property was primarily liable for such part under this article, and a change in the contract made by the creditor and the husband, who was the principal debtor, did not release the property from liability for such part. *Dearing v. Jordan* (Civ. App.) 130 S. W. 876.

An unauthorized extension by a husband and his creditor of time of payment of a debt secured by deed of trust on the wife's separate property released the lien on the property. *Red River Nat. Bank v. Bray* (Civ. App.) 132 S. W. 968.

A married woman is not bound by a parol contract for the payment of commissions for the sale of land. *Caldwell v. Scott Bros.* (Civ. App.) 143 S. W. 1192.

Where a married woman, to whom property had been devised for life, with remainder in fee to her children, after the probate court had set aside and canceled the will, brought an action to construe the will, such action was for the benefit of her separate estate; and hence she was liable for the allowance therein made to the guardians ad litem for the infant defendants, though the court held that she was not entitled to maintain such action. *Thompson v. Morrow* (Civ. App.) 147 S. W. 706.

A married woman's contract for a purpose other than such as is expressly authorized by statute is void. *Id.*

Where a contract for the building of a house was for the benefit of the separate estate of the wife, who signed with her husband, a judgment in an action for the debt was properly entered as personal against both husband and wife, as a married woman is authorized so to contract. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

A contract by a married woman for the construction of a well on her separate property for a reasonable price was valid without the acquiescence or consent of the husband. *Lemons v. Biddy* (Civ. App.) 149 S. W. 1065.

Where property of a married woman had been sold under a trust deed and title taken in the name of the mortgagee, under an express agreement, of record, that it might be redeemed upon paying the indebtedness for which it had been sold, the payment of such indebtedness was not a "purchase of property," so as to be forbidden as a purpose for which she could borrow money. *Blair v. Teel* (Civ. App.) 152 S. W. 878.

A part of a loan to a married woman, not used for the benefit of her separate estate, cannot be made a charge on such estate except as to the property upon which she has executed a deed of trust to secure its payment. *Id.*

A married woman's note for borrowed money is not binding upon her, unless the money borrowed was used for the benefit of her separate estate. *Id.*

— **Mercantile business and partnerships.**—A wife cannot become a partner in business with her husband or any one else. Neither the wife nor husband can invest her separate property in a mercantile business, and thereby become entitled to the profits arising therefrom as part of her separate estate. Her separate estate cannot be subjected to the

debts of the pretended partnership, but she would be a creditor of the firm to the extent of her separate property thus invested. If such an arrangement was formed by the wife with the assent of her husband, he would become liable as partner by reason of his interest in the profits created by the investment of the wife's money. *Miller v. Marx*, 65 T. 131; *Wallace v. Finberg*, 46 T. 35; *Cox v. Miller*, 54 T. 25; *Brown v. Chancellor*, 61 T. 437; *Green v. Ferguson*, 62 T. 525; *Cockrum v. McCracken*, 1 App. C. C. § 65; *Ratto v. Holland*, 2 App. C. C. § 469.

A wife may become a merchant, but she must conduct the business with goods which are her separate property, and must not invest the community estate or the credit of her husband in the purchase of goods, if she wishes them to be exempt from her husband's debts. She cannot purchase on credit, but must buy for cash only, and be ready to show that the money so used is her separate means. The profits become community property. If profits are mixed with her separate money used in their purchase, she must be prepared to show how much of her own money entered into the purchase. The burden of proving this is not upon the creditor who seizes the goods for her husband's debt. *Epperson v. Jones*, 65 T. 425. Citing *Cleveland v. Cole*, 65 T. 402; *Braden v. Gose*, 57 T. 41; *Green v. Ferguson*, 62 T. 529.

A married woman is not bound for debts contracted for carrying on a mercantile business. *Steinback v. Weill*, 1 App. C. C. § 936; *Cockrum v. McCracken*, 1 App. C. C. § 65.

When the wife's separate means are used as the capital stock of a partnership, she becomes a creditor of the concern for the amount contributed. *Smith v. Bailey*, 66 T. 553, 1 S. W. 627.

Assent of husband to wife charging her separate estate.—The assent of the husband is unnecessary to enable the wife to charge her separate estate with debts contracted under this article. *Booth v. Colton*, 13 T. 359.

Liability of husband.—The husband is liable with the wife on a joint contract executed by them for the improvement of the wife's separate property. *Smotridge v. Lovell*, 35 T. 58, citing *Cartwright v. Hollis*, 5 T. 152; *Haynes v. Stovall*, 23 T. 627; *George v. Stevens*, 31 T. 673.

Horse purchased by wife for use in business of her own is not a necessary for which husband is liable. *Palmer v. Coghlan* (Civ. App.) 55 S. W. 1122.

Both husband and wife are liable for necessaries furnished the wife after abandonment by the husband. *Id.*

Where a married woman, amply provided for, left her husband, he was not liable for her debts for necessaries, unless she left with his consent. *Cline v. Hackbarth*, 27 C. A. 391, 65 S. W. 1086.

Mere failure of a husband to give notice of his wife's separation from him held not to render him liable for goods purchased by her. *Sanger v. Bernay* (Civ. App.) 71 S. W. 606.

A husband held not liable on notes given by his wife without his knowledge to enable the wife's sons to carry on a business. *Richburg v. Sherwood*, 101 T. 10, 102 S. W. 905.

A husband is not liable on notes given by his wife, without his knowledge, for goods purchased for a business conducted by their sons in her name, nor for the debt evidenced by the notes, though he did not protest upon learning of the transaction. *Richburg v. Sherwood* (Civ. App.) 105 S. W. 524.

Enforcement.—Mortgagor held entitled to foreclose on the husband's life interest in the wife's separate property covered by the deed. *Dearing v. Jordan* (Civ. App.) 130 S. W. 876.

Where a piano was not purchased by a husband or by his wife as his agent, nor for the community estate, but by the wife individually, neither the husband nor the estate were liable on notes given by the wife for the price. *Hall v. Decherd* (Civ. App.) 131 S. W. 1133.

A note of a married woman cannot be enforced against her after the death of her husband, unless it was for necessaries or unless she has converted property of the community estate which was subject to the payment of community debts. *J. B. Newton & Sons v. Puento* (Civ. App.) 131 S. W. 1161.

A personal judgment was improperly rendered against wife, in an action against husband and wife, to recover the balance due for materials for erecting a house on the homestead lot; there being no showing that the homestead selected was necessary as a home for the wife, and it only appearing that the husband contracted for the erection of the building upon their homestead with the wife's consent. *Howell v. McMurry Lumber Co.* (Civ. App.) 132 S. W. 848.

A contract by a married woman for the drilling of a well on her separate real property for a reasonable price was for the improvement thereof, and was enforceable against her. *Lemons v. Biddy* (Civ. App.) 149 S. W. 1065.

— **Parties to actions.**—See notes under Arts. 1839-1841.

Art. 4625. [2971] Judgment and execution in such cases.—Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff. [P. D. 4644.]

In general.—Although the debt sued for may be for the benefit of the wife's separate property, yet if it was not contracted for by herself or her authority, her separate estate cannot be held liable. *Parker v. Wood* (Civ. App.) 61 S. W. 941.

Verdict.—A general verdict for plaintiff under this article is sufficient, without reciting in the verdict finding of facts. The verdict, when construed with reference to the pleadings, implies that the jury found the facts. *Evans v. Gray*, 38 C. A. 442, 86 S. W. 376, contra, see *Powers v. Parks* (Civ. App.) 33 S. W. 712.

Form of judgment and execution.—A judgment against the husband and wife on a debt properly contracted by them for the benefit of her separate property may direct execution to be levied on the community property, or on her separate property, at the discretion of the plaintiff. *Grant v. Whittlesey*, 42 T. 320.

A judgment against a husband and wife for services rendered for the benefit of the separate estate of the wife should order payment out of their community estate, or from her separate estate. *Evans v. Breneman* (Civ. App.) 46 S. W. 80.

In a suit against husband and wife for debt contracted by wife for benefit of her separate estate a charge authorizing verdict against the husband is harmless in view of the fact that the judgment restricts levy of execution to wife's separate property and her community interest and provides that no execution shall issue against husband's separate property. *Emerson v. Kneezell* (Civ. App.) 62 S. W. 551.

Injunction will not lie to restrain execution against a wife's separate property on a judgment against husband and wife on a joint note, on the contention that the note was not given for necessities, or for expenses incurred for her separate estate, or for any tort committed by her. *Walters v. Cantrell* (Civ. App.) 66 S. W. 790.

It was not necessary that a judgment against a husband and wife state specifically that the separate property of the wife was liable therefor. *Smith v. Ridley*, 30 C. A. 158, 70 S. W. 235.

The failure of a judgment against a husband and wife to specifically authorize execution against the wife's separate property does not invalidate it or prevent satisfaction thereof out of such property. *Love v. McGill*, 41 C. A. 471, 91 S. W. 246.

A debt incurred on a contract to give a minor girl a year's course at a business college, under some circumstances may be a necessary, and reasonable and proper within this article. *Haas v. American Nat. Bank*, 42 C. A. 167, 94 S. W. 441.

A statutory judgment rendered against a married woman on her replevy bond held a nullity and may be directly attacked in a suit to vacate the same and enjoin the execution thereof. *Lane v. Moon*, 46 C. A. 625, 103 S. W. 211.

A valid judgment against a married woman may be collected out of either her separate or community estate. *Id.*

Where a piano was purchased by a married woman for her minor sons, and a chattel mortgage given by her to secure the purchase money notes the seller was entitled to a foreclosure of his lien. *Hall v. Decherd* (Civ. App.) 131 S. W. 1133.

A contract by a married woman for the drilling of a well on her separate real property for a reasonable price was for the improvement thereof, and was enforceable against her. *Lemons v. Biddy* (Civ. App.) 149 S. W. 1065.

The error in a judgment against a married woman arising from its failure to specifically award execution against the wife's property, as provided by this article, does not render the judgment subject to collateral attack. *White v. Cowles* (Civ. App.) 155 S. W. 982.

Art. 4626. [2972] Husband failing to support wife, etc.—Should the husband fail or refuse to support his wife from the proceeds of the lands she may have, or fail to educate her children as the fortune of the wife would justify, she may, in either case, complain to the county court, which, upon satisfactory proof, shall decree that so much of such proceeds shall be paid to the wife for the support of herself and for the nurture and education of her children, as the court may deem necessary. [Act Jan. 20, 1840. P. D. 4637.]

In general.—When the husband has assumed a power of disposition or control over her property inconsistent with her rights, this action of itself affords a sufficient reason for omitting to join him in an action which has for its object a restoration or preservation of the rights of which he has sought to deprive her. In such case the district court has jurisdiction. It is not a proceeding contemplated by this article, and an unsuccessful proceeding under this article would not be res adjudicata of a proper suit in district court. *Dority v. Dority*, 30 C. A. 216, 70 S. W. 340.

Agency of wife to purchase necessities.—Marriage alone confers on the wife an agency to purchase necessities for herself and children, if her husband fails to supply them. Whether goods purchased are necessities is a question for the jury. *Walling v. Hannig*, 73 T. 580, 11 S. W. 547; *Clements v. Ewing*, 71 T. 370, 9 S. W. 312.

Effect of abandonment of wife by husband.—The right of a married woman to support by the husband is not lost by reason of his abandonment of her. *Railway Co. v. Spicker*, 61 T. 427, 48 Am. Rep. 297; *Clements v. Ewing*, 71 T. 370, 9 S. W. 312.

Action by wife for support and alimony.—A wife cannot maintain an action against her husband to require him to support her, except by suit for divorce or a proceeding under this article. *Burns v. Burns* (Civ. App.) 126 S. W. 333.

Decrees.—A decree under this article in favor of the wife is conclusive of the rights of the wife. *Young v. Willis*, 63 T. 388.

Action against husband.—In a suit against a husband, the wife is neither a necessary nor proper party when there is no prayer to subject the separate property of the wife to the payment of the debt. *Walling v. Hannig*, 73 T. 580, 11 S. W. 547.

In an action against a husband for rent of rooms let to his wife and for the price of rugs, etc., sold to her, evidence held not to show that defendant failed to provide his wife with a home furnished according to his position in life and circumstances. *Fields v. Florence* (Civ. App.) 123 S. W. 187.

Art. 4627. [2973] Community property liable for debts.—The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law. [Act Aug. 26, 1856.]

Community debts—What are.—Land standing in name of husband and wife held subject to mechanic's lien of materialman who had no notice that wife claimed it as separate property.

rate estate, and who was informed by the husband that it was his property. *Hord v. Owens*, 20 C. A. 21, 48 S. W. 200.

Where a husband and wife were living together on school land when a purchase was made by the wife, and continued to live thereon until a litigation arose, the presumption is that the purchase was made by the husband's consent, and the obligation for the purchase price is a valid community debt. *Neighbors v. Anderson*, 94 T. 487, 61 S. W. 145, 62 S. W. 417.

Neither party owning community property can create debts and make them a charge on the property, nor use the proceeds of the property in the payment of such debts, after a decree of partition has been rendered. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

Where a husband and wife separately owned an undivided half of certain real estate, a debt created by them for the erection of improvements on the land was a community debt. *King v. Summerville* (Civ. App.) 80 S. W. 1050.

A debt incurred by the husband during the existence of the marriage relation is *prima facie* a debt of the community. *Dever v. Selz*, 39 C. A. 558, 87 S. W. 891.

Evidence held to show that a husband gave his separate property to his children, and executed a note and deed of trust to secure his obligation to the children on account thereof, so as to make the obligation enforceable against community property. *Word v. Colley* (Civ. App.) 143 S. W. 257.

A "community debt" is a liability made by a husband during marriage; and the husband surviving the wife may renew the community obligation and make it a charge on community property. *Id.*

A deed, dated November 1, 1902, conveying property for a consideration named, payable in cash, and promissory notes given for the remainder, was *prima facie* evidence of an existing community debt. *Norwood v. King* (Civ. App.) 155 S. W. 366.

— **Consideration.**—Extension of time secured by a wife who had been abandoned by her husband by the execution of her sole note for the payment of a community debt constituted a sufficient consideration for the note. *Crowder v. McLeod* (Civ. App.) 151 S. W. 1166.

Community and separate debts—Property liable for.—Community property is liable to execution for the debts of the wife contracted before marriage. *Taylor v. Murphy*, 50 T. 291.

Where judgment is recovered against the husband and wife for a debt contracted by her before marriage, the judgment may direct that execution shall be levied upon her separate property only. *Muse v. Burns*, 3 App. C. C. § 77; *Tarlton v. Weir*, 1 App. C. C. § 145, citing *Nash v. George*, 6 T. 236; *Booth v. Cotton*, 13 T. 359; *Rountree v. Thomas*, 32 T. 288.

Crops raised on land on separate property of the wife and children, who by agreement paid debts created by them for their separate use, are not subject to the debts of the husband. *Nelson v. Frey*, 4 App. C. C. § 248, 16 S. W. 250.

The separate estate of one member of the community must reimburse the community for any proper improvements made in good faith upon the separate estate with community funds. *Furrh v. Winston*, 66 T. 521, 1 S. W. 527, citing *Rice v. Rice*, 21 T. 66; *Bond v. Hill*, 37 T. 626.

Judgment against husband for community debt held superior to a prior judgment in favor of the husband's interest in the community property. *Ghent v. Boyd*, 18 C. A. 88, 43 S. W. 891.

A sale under a judgment on a note given by a husband for the price of land purchased by him passes whatever community interest the wife has in the land. *Culmore v. Medlenka* (Civ. App.) 44 S. W. 676.

A wife's land cannot be subjected to the husband's debts, unless the improvements were made with his or community funds, to defraud creditors, in which she participated. *Maddox v. Summerlin*, 92 T. 483, 49 S. W. 1033, 50 S. W. 567.

A judgment creditor may sell merely the interest of the husband in the community property, where the husband does not object, notwithstanding the wife's share is liable under the judgment. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

Where husband uses his wife's separate funds to improve his property, it becomes liable for such funds so long as it remains in his hands or in the hands of his heirs. *Parish v. Williams* (Civ. App.) 53 S. W. 79.

Creditor, having notice that land was purchased with intention that it should become separate estate of wife, cannot subject same to judgment against husband. *Clardy v. Wilson*, 24 C. A. 196, 53 S. W. 52.

An agreement by a married woman, together with her husband, that her cattle should be held as security for community debts to be incurred by him, was valid. *Word v. Kenon* (Civ. App.) 75 S. W. 365.

The separate property of a wife cannot be sold to reimburse the community estate for improvements made out of community funds. *Collins v. Bryan*, 40 C. A. 88, 88 S. W. 432.

Community property is subject to a judgment founded on the wife's torts, even though it includes exemplary damages. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

A wife who advanced to her husband money owned in her own name could not complain of a judgment after his death, which treated the advancement as a charge against the community estate of the parties. *Goldstein v. Susholtz*, 46 C. A. 582, 105 S. W. 219.

In an action by a wife for her separate property and for a half of the community property, the husband held not entitled to recover for improvements made on the property. *Watkins v. Watkins* (Civ. App.) 119 S. W. 145.

A wife's separate property would only be bound for the payment of a community debt by reason of a mortgage executed thereon by her for that purpose. *Berry v. Hindman* (Civ. App.) 129 S. W. 1181.

Evidence, in an action on a note, brought against a married woman and her husband, to charge her separate property, held sufficient to sustain allegations that upon the first application for the loan it was represented that they wanted the money to improve her separate estate, and afterwards, and before the money was loaned, that it was wanted to pay off debts for which her separate estate was liable, and that it was used. *Blair v. Teel* (Civ. App.) 152 S. W. 878.

All community property of an estate, except the homestead, is liable for community debts. *Williamson v. McElroy* (Civ. App.) 155 S. W. 998.

Parties liable for.—When the wife purchases goods for the use of herself and husband, he is charged with her contract, if he does not promptly repudiate her action and restore the goods. *Walling v. Hannig*, 73 T. 580, 11 S. W. 547; *Hamilton v. Peck* (Civ. App.) 38 S. W. 403.

The fact that improvements on the wife's separate property are paid for with community funds does not give community such interest in the property as can be taken by execution against the husband. *Schwartzeman et ux. v. Cabell et al.* (Civ. App.) 49 S. W. 113.

Where a piano was purchased by the wife individually, neither the husband nor the community estate were liable on notes given by her for the purchase. *Hall v. Decherd* (Civ. App.) 131 S. W. 1133.

Goods, purchased by a wife on credit to be resold in her store held community property, so as to make her husband liable for their price. *Richburg v. McIlwaine, Knight & Co.* (Civ. App.) 131 S. W. 1166.

A husband is not liable for the ordinary general community debts contracted by his wife without his authority. *Jones v. O. W. Lyman Millinery Co.* (Civ. App.) 132 S. W. 864.

A wife is not personally liable for the community debts contracted by her husband. *Vinson v. Whitfield* (Civ. App.) 133 S. W. 1095.

A wife who has been abandoned by her husband can bind herself by the execution of a note for the settlement of community debts. *Crowder v. McLeod* (Civ. App.) 151 S. W. 1166.

Conveyance of community property by survivor in payment of debts.—See notes under Title 52, Chapter 29.

Presumptions.—See notes under Art. 3687, Rule 12.

Rights and remedies of creditors.—After death of one spouse, see notes under Title 52, Chapter 29.

It is no defense to an action on a note representing a debt chargeable against community property that such property has been exhausted or appropriated. *Brown v. Adams* (Civ. App.) 55 S. W. 761.

Where a husband and wife agreed that certain horses and their increase should be the wife's separate property, the agreement was invalid as to community creditors. *Jordan v. Marcantell* (Civ. App.) 147 S. W. 357.

Art. 4628. [2974] Female under 21 emancipated by marriage.—Every female under the age of twenty-one years, who shall marry in accordance with the laws of this state, shall, from and after the time of such marriage, be deemed to be of full age, and shall have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age. [Act March 13, 1848. P. D. 4642.]

In general.—Only those females under 21 who had never been married being minors, disability of minority is removed by marriage. *Grayson v. Lofland*, 21 C. A. 503, 52 S. W. 121.

Termination of guardianship.—The guardianship of a female is terminated by her marriage. *Carpenter v. Soloman*, 4 App. C. C. § 34, 14 S. W. 1074.

Limitations.—Despite this statute, the marriage of a woman under 21 years of age will not start the running of the statute of limitations until she reaches her majority. *Gibson v. Oppenheimer* (Civ. App.) 154 S. W. 694.

Art. 4629. [2975] Rights of persons married elsewhere.—The marital rights of persons married in other countries, who may remove to this state, shall, in regard to property acquired in this state during the marriage, be regulated by the laws of this state. [P. D. 4639.]

In general.—Parties married in Tennessee at a time when the common law was in force which declared that marriage operated as a gift from the wife to the husband of all personalty reduced to possession by the husband during marriage. They afterwards removed to Texas and the husband invested the money his wife had at her marriage in land here. Held, the land was the husband's separate property. *McDaniel v. Harley* (Civ. App.) 42 S. W. 323.

Art. 4629a. May apply to district court to be feme sole for mercantile and trading purposes, how.—Any married woman within this state may, with the consent of and joined by her husband, apply to the district court of the county in which she may be a bona fide resident for judgment or order of the said court removing her disabilities of coverture and declaring her feme sole for mercantile and trading purposes. [Acts 1911, p. 92, sec. 1.]

Art. 4629b. Petition; contents.—Said application shall be in the form of a petition in writing, addressed to said court, setting out the cause or causes which make it desirable or advantageous to said married woman to be so declared feme sole. [Id. sec. 2.]

Art. 4629c. Hearing on petition.—Upon the filing of said petition same shall be docketed as in other cases, and at any time thereafter the

district court may, in term time, take up and hear said petition and evidence in regard thereto. [Id. sec. 3.]

Art. 4629d. Decree declaring married woman feme sole for mercantile and trading purposes; effect of decree.—If upon a hearing of said petition, and evidence relating thereto, it should appear to the court that it would be to the interest and advantage of the said married woman so applying, then said court shall enter its order or decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter the said married woman may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the exemption laws of Texas, shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be as binding on her as if she were a feme sole. Provided, however, that no married woman shall convey or encumber her separate real property except as now provided by law. [Id. sec. 4.]

DECISIONS IN GENERAL

Right of action by husband for damages to wife.—Husband may recover damages for the physical and mental suffering of his wife, caused by the negligence of the defendant. *Pacific Express Co. v. Black*, 27 S. W. 830, 8 C. A. 363.

A husband, in an action for a nuisance causing the sickness of his wife, may recover for the loss of the society and the comfort of the wife. *Neville v. Mitchell*, 28 C. A. 89, 66 S. W. 579.

CHAPTER FOUR

DIVORCE

[For change of name, see Title 95.]

Art.	Art.
4630. Marriage may be annulled, when.	4636. Legitimacy of children, etc.
4631. Divorce may be granted in what cases.	4637. Debts and alienations after suit.
4632. Plaintiff must be resident in state and county.	4638. Inventory and appraisement, etc.
4633. Husband and wife may testify.	4639. Temporary orders, etc.
4634. Division of property.	4640. Alimony.
4635. Connivance and collusion.	4641. Custody of children.
	4642. Costs.

Article 4630. [2976] Marriage may be annulled, when.—The district court shall have power to hear and determine suit for the dissolution of marriage, where the causes alleged therefor shall be natural or incurable impotency of body at the time of entering into the marriage contract, or any other impediment that renders such contract void, and shall have power and authority to decree the marriage to be null and void. [Act Jan. 6, 1841. P. D. 3449.]

See *McNeill v. Casey* (Civ. App.) 135 S. W. 1130; *Dillingham v. Kerr*, 139 S. W. 911.

Art. 4631. [2977] Divorce may be granted in what cases.—A divorce by separation from the bonds of matrimony may be decreed in the following cases:

1. Where either the husband or wife is guilty of excesses, cruel treatment or outrages toward the other, if such ill treatment is of such a nature as to render their living together insupportable.

2. In favor of the husband, where his wife shall have been taken in adultery, or where she shall have voluntarily left his bed and board for the space of three years with the intention of abandonment.

3. In favor of the wife, where the husband shall have left her for three years with intention of abandonment, or where he shall have abandoned her and lived in adultery with another woman.

4. In favor of either the husband or wife, when the other shall have been convicted, after marriage, of a felony and imprisoned in the state prison; provided, that no suit for divorce shall be sustained because of

the conviction of either party for felony until twelve months after final judgment of conviction, nor then if the governor shall have pardoned the convict; provided, that the husband has not been convicted on the testimony of the wife, nor the wife on the testimony of the husband. [Act May 27, 1876, p. 16. P. D. 3451.]

See Art. 4632 for additional grounds for divorce.

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| 1. In general. | 11. Abandonment—Elements of. |
| 2. Cruelty—Acts constituting. | 12. — Offer of renewal of cohabitation. |
| 3. — Question for jury. | 13. — Agreements for separation. |
| 4. — Provocation. | 14. — Pleading. |
| 5. — Condonation. | 15. — Evidence. |
| 6. — Recrimination. | 16. Imprisonment for felony. |
| 7. — Allegations of cruelty. | 17. Failure to support. |
| 8. — Evidence. | 18. Grounds existing at time of marriage. |
| 9. — Answer as evidence. | 19. Judgment—Validity in part. |
| 10. — Instructions. | 20. Change of name. |

1. In general.—The power to grant divorces for causes arising after marriage is restricted to those enumerated in the statute. *Wright v. Wright*, 6 T. 3; *Sharman v. Sharman*, 18 T. 521.

2. Cruelty—Acts constituting.—A series of studied vexations and deliberate insults and provocations, without apprehension of personal violence, is sufficient ground for divorce. *Sheffield v. Sheffield*, 3 T. 79; *Wright v. Wright*, 3 T. 168; *Pinkard v. Pinkard*, 14 T. 356, 65 Am. Dec. 129.

Words and acts which affect the mental feelings enter into the definition of legal cruelty. *Wright v. Wright*, 6 T. 3; *Nogees v. Nogees*, 7 T. 538, 58 Am. Dec. 78.

Cruel treatment is ground for divorce, when it is of such a character as to create a reasonable apprehension of danger to the physical safety of the party complaining. *Huilker v. Huilker*, 64 T. 1; *Sheffield v. Sheffield*, 3 T. 79; *Wright v. Wright*, 6 T. 3.

That a wife at one time expressed fear that her husband would poison her is not cause for divorce. After the act alleged as grounds for divorce, the fact that the husband seeking the divorce endeavored to induce the wife to live with him negatives the allegation that the act was such as to render their living together insupportable. *Sapp v. Sapp*, 71 T. 348, 9 S. W. 258.

Religious opinions, doctrines or practices which are not immoral cannot be made a ground for divorce. *Haymond v. Haymond*, 74 T. 414, 12 S. W. 90.

A single act of personal violence by the husband to the wife, as a blow with the fist in the face, or an act creating a reasonable apprehension of personal safety, may be a sufficient cause for divorce against the husband. *Miller v. Miller*, 72 T. 250, 12 S. W. 167; *Huilker v. Huilker*, 64 T. 1.

In absence of physical violence by the husband, such cruel treatment to the wife must be shown as will produce a degree of mental distress threatening to impair her health. *Eastman v. Eastman*, 75 T. 473, 12 S. W. 1107; *Bush v. Bush* (Civ. App.) 103 S. W. 217.

Where the wife made a false statement as to where she had been, in response to a question put by the husband, held, that an accusation imputing misconduct on her part, in the absence of any explanation by her, could not be considered malicious. *Loring v. Loring*, 17 C. A. 95, 42 S. W. 642.

A husband held justified in using reasonable and necessary force to protect himself against the wife's interference while he was properly chastising their child. *Id.*

Refusal of wife to grant husband intercourse held not cruel treatment, when he is old and his virility impaired. *Varner v. Varner*, 35 C. A. 381, 80 S. W. 386. Nor is the unjustifiable refusal of a spouse to engage in sexual intercourse a ground. Nor is refusal of a wife to engage in sexual intercourse save under conditions a ground. *Lohmuller v. Lohmuller* (Civ. App.) 135 S. W. 751.

The act of the husband in taking from the mother the infant child and going with it out of the country, and keeping it from the mother for the space of more than a year, and not returning it at all, is not in terms a ground of divorce, and is not such "cruel treatment or outrages" as will authorize a divorce under this subdivision and article. *Slaughter v. Slaughter* (Civ. App.) 118 S. W. 194.

A husband, pursuing a course of harsh conduct toward his wife, violently threatening to assault her, cursing and abusing her, and using insulting epithets, and falsely charging her with want of chastity, and thereby rendering it unsafe for her to live with him, is guilty of cruelty justifying a divorce. *Shook v. Shook* (Civ. App.) 125 S. W. 638.

In an action for divorce for cruel treatment, a requested charge requiring plaintiff to prove by a preponderance of evidence that defendant on one occasion seized her by the hair, snatched her around, and slammed her head and body violently against the bedstead many times, was objectionable, as the substance of the issue would have been established by proof that defendant slammed her head, but not her body, or her body and not her head, against the bedstead once, and not several times. *Allen v. Allen* (Civ. App.) 128 S. W. 697.

Untrue charges by a husband of unchastity and infidelity against his wife constitute cruel treatment entitling the wife to a divorce. *Aycock v. Aycock* (Civ. App.) 131 S. W. 1139; *Jones v. Jones*, 60 T. 451; *Bahn v. Bahn*, 62 T. 513, 50 Am. Rep. 539; *Williams v. Williams*, 67 T. 198; 2 S. W. 823; *Scott v. Scott*, 61 T. 119. Though the charges do not have the effect of seriously impairing the physical health of the wife. *Rivers v. Rivers* (Civ. App.) 133 S. W. 524. But the mere charge of adultery on part of the husband, made by the wife, though repeatedly made and false, is not ground for divorce in favor of husband. *McAllister v. McAllister*, 71 T. 695, 10 S. W. 294.

A wife who without provocation abuses the husband's daughter of a former marriage, defames the memory of the husband's deceased wife, wantonly assails his character, publishes him as indolent and good for nothing, demands his expulsion from a benevolent

society as unworthy of membership, assaults him, constantly abuses him, applies to him in the hearing of others opprobrious epithets, excludes him from his dwelling, and ceases to perform the duties of a wife, thereby rendering his living with her unendurable, is guilty of excesses and cruel treatment, justifying a divorce. *Dawson v. Dawson* (Civ. App.) 132 S. W. 379.

A wife's surveillance of her husband does not constitute cruel and inhuman treatment, entitling him to divorce, if caused by his matrimonial misconduct. *Dickinson v. Dickinson* (Civ. App.) 138 S. W. 205.

Mere profane and abusive language, not involving an attack on a wife's chastity, at intervals, is not sufficient cruel and inhuman treatment to justify a divorce. *Bingham v. Bingham* (Civ. App.) 149 S. W. 214.

The enormity of alleged cruel and inhuman treatment, consisting of words and abusive language, should be considered in the light of the environment and circumstances surrounding the parties. *Id.*

That a faithful wife disturbed by jealousy, on learning of the infidelity of her husband, called him names which, in English amount to no more than "poor person" or "tramp" held not such cruel treatment as afforded ground for divorce. *De Fierros v. Fierros* (Civ. App.) 154 S. W. 1067.

3. — **Question for jury.**—See notes under Art. 1971.

4. — **Provocation.**—Misconduct of plaintiff, to defeat the right to a divorce for cruelty, need not equal defendant's, but must be reasonably calculated to have provoked defendant's misconduct. *Bohan v. Bohan* (Civ. App.) 56 S. W. 959.

5. — **Condonation.**—Condonation or reconciliation is not a bar to complaint as to past outrages, etc., where there has been subsequent ill treatment or reasonable apprehension of further violence. *Wright v. Wright*, 6 T. 3; *Nogees v. Nogees*, 7 T. 538, 58 Am. Dec. 78.

Evidence of cruel treatment of husband held inadmissible, as having been condoned. *Dority v. Dority* (Civ. App.) 62 S. W. 106.

Dismissal of suit for divorce, and return of plaintiff to live with defendant, at his request and on his promise to abstain from repetition of the offense and to treat her as a husband should, does not prevent consideration in a subsequent suit for divorce of his acts prior to the bringing of the first suit; he having after the reunion repeated the acts of cruelty complained of before, or been guilty of some other like cause for divorce. *Oster v. Oster* (Civ. App.) 130 S. W. 265.

The doctrine of condonation applies as well to cruelty as other grounds of divorce. *Bingham v. Bingham* (Civ. App.) 149 S. W. 214.

6. — **Recrimination.**—Mutual recrimination, quarreling and fighting will defeat an action for divorce, except where the provocation is great and the retaliation is slight. *Beck v. Beck*, 63 T. 34; *Jones v. Jones*, 60 T. 451; *Hale v. Hale*, 47 T. 336, 26 Am. Rep. 294.

In a suit for divorce for cruelty, it was error to refuse to instruct that, if the parties were equally at fault, verdict should be for defendant; there being evidence raising an issue of recrimination not submitted. *Bohan v. Bohan* (Civ. App.) 56 S. W. 959.

Failure to submit an issue of recrimination in a suit for divorce for cruelty held not justified by the fact that there was evidence raising no such issue as to one of the specified acts charged in the petition. *Id.*

If recrimination on the part of an injured spouse is insignificant as compared with great provocation on the part of the other, a divorce may be granted. *Staples v. Staples* (Civ. App.) 136 S. W. 120.

7. — **Allegations of cruelty.**—See notes under Art. 1827, § 114½.

8. — **Evidence.**—Evidence held not to justify a divorce for husband on ground of cruelty. *Cunningham v. Cunningham*, 22 C. A. 6, 53 S. W. 75.

Nor to justify a divorce for wife on ground of conduct by husband, rendering living with him unsupportable. *Id.*

Evidence held not to sustain decree of divorce for cruelty. *Dority v. Dority* (Civ. App.) 62 S. W. 106; *Ingle v. Ingle*, 131 S. W. 241; *Bingham v. Bingham*, 149 S. W. 214.

Proof that defendant called plaintiff a bitch on one occasion, and used other abusive language toward her, held not in itself to entitle her to a divorce for cruel treatment. *Bush v. Bush* (Civ. App.) 103 S. W. 217.

A divorce on the ground of cruelty held properly refused. *Ryan v. Ryan* (Civ. App.) 114 S. W. 464.

A husband held guilty of cruelty justifying a divorce. *Shook v. Shook* (Civ. App.) 125 S. W. 638.

A decree denying a divorce on the ground that the proof was not full and satisfactory was proper. *Ingle v. Ingle* (Civ. App.) 131 S. W. 241.

9. — **Answer as evidence.**—Allegations of answer charging plaintiff with adultery, in view of its plea of the general issue, held not evidence of a ground of divorce in that he had accused her of adultery. *Oster v. Oster* (Civ. App.) 130 S. W. 265.

10. — **Instructions.**—See notes under Art. 1971.

11. **Abandonment—elements of.**—Separation and abandonment must concur for the full period of three years. *Pinkard v. Pinkard*, 14 T. 355, 65 Am. Dec. 129; *McGowen v. McGowen*, 52 T. 667; *Besch v. Besch*, 27 T. 392; *Johnson v. Johnson* (Civ. App.) 23 S. W. 1022; *Hannig v. Hannig* (Civ. App.) 24 S. W. 695.

Occasional or habitual intoxication of the husband, if the latter is not continued for great length of time, and of such a character as to justify the wife for abandonment, is not ground for a divorce. *Camp v. Camp*, 18 T. 528.

Abandonment is not necessarily implied from separation, but a jury may find the intention of abandonment upon proof of unexplained continued absence for more than three years. *Besch v. Besch*, 27 T. 390; *Hare v. Hare*, 10 T. 355.

To constitute a voluntary separation with the intention of abandonment, it must appear that the plaintiff neither caused, procured, nor consented to the separation. *McGowen v. McGowen*, 52 T. 657.

A statement by a wife to her husband which induced a voluntary separation held not such excessive cruelty as relieved him from the effects of such separation and entitled him to a divorce for desertion. *Gray v. Gray*, 43 C. A. 348, 95 S. W. 46.

Facts held to entitle a wife to a divorce for abandonment. *Johnson v. Johnson* (Civ. App.) 102 S. W. 943.

Where a husband deserted his wife, and, without intending to resume the marital relation, induced, her to cohabit with him under the belief that the marital union had been restored, and again abandoned her, the period of desertion essential to a divorce was not interrupted. *Womble v. Womble* (Civ. App.) 152 S. W. 473.

12. — **Offer of renewal of cohabitation.**—An offer to return before the expiration of three years, after a voluntary abandonment, precludes the granting of a divorce on that ground. *McGowan v. McGowan* (Civ. App.) 50 S. W. 399.

Where a husband repents his wrongful desertion, and returns, intending to resume marital relations, the wife's failure to do so puts her in the wrong, and makes her the deserting party. *Womble v. Womble* (Civ. App.) 152 S. W. 473.

13. — **Agreements for separation.**—The conduct of the offending spouse may be such that the other will be justified in not objecting to a separation. *Wright v. Wright* (Civ. App.) 143 S. W. 720.

14. — **Pleading.**—See notes under Art. 1827, § 114½.

15. — **Evidence.**—Evidence held to entitle plaintiff to a decree on the ground of abandonment. *Ervin v. Ervin* (Civ. App.) 128 S. W. 1139; *Ogden v. Ogden*, 144 S. W. 355.

16. **Imprisonment for felony.**—The commission of a felony, where there has been no conviction, is not a statutory ground for divorce; but the killing of the child of the wife by the husband may be such an outrage as to authorize a divorce. *Wright v. Wright*, 6 T. 3.

The commutation of the punishment adjudged against one convicted of a felony is not equivalent to a pardon. *Young v. Young*, 61 T. 191.

17. **Failure to support.**—Mere failure to support wife and family is not ground for divorce, where the husband endeavors in good faith to procure employment, although unsuccessful. *Loring v. Loring*, 17 C. A. 95, 42 S. W. 642.

Failure to support his wife is not of itself ground for divorce from the husband. *Barrett v. Barrett* (Civ. App.) 131 S. W. 821.

18. **Grounds existing at time of marriage.**—A husband cannot have the marriage annulled because the wife was with child by him at the date of the marriage. *McCulloch v. McCulloch*, 69 T. 682, 7 S. W. 593, 5 Am. St. Rep. 96.

A divorce will not be granted for antenuptial incontinence. *Griggs v. Griggs* (Civ. App.) 61 S. W. 941.

That a wife, before marriage, falsely represented to her husband that she was pregnant, thereby inducing the marriage, is not ground for divorce. *Young v. Young* (Civ. App.) 127 S. W. 898.

Antenuptial pregnancy, followed by the birth of an illegitimate child of which the husband is not the father, is ground for a divorce, unless followed by condonation on the husband's part. *Johnson v. Johnson* (Civ. App.) 152 S. W. 661.

19. **Judgment—Validity in part.**—See notes under Art. 1994.

20. **Change of name.**—See Art. 5954.

Art. 4632. Plaintiff must be resident; suit not to be heard within 30 days; remarriage; divorce where marriage was to escape penalties for seduction; additional ground for divorce.—No suit for divorce from the bonds of matrimony shall be maintained in the courts of this state unless the petitioner for such divorce shall at the time of exhibiting his or her petition, be an actual bona fide inhabitant of the state for a period of twelve months, and shall have resided in the county where the suit is filed six months next preceding the filing of the suit; provided, that such suit shall not be heard or divorce granted before the expiration of thirty days after the same is filed; and provided, further, that neither party to a divorce suit, wherein a divorce is granted upon the ground of cruel treatment, shall marry any other person for a period of twelve months next after such divorce is granted, but the parties so divorced may marry each other at any time upon obtaining a license as provided in article 4610; provided that where a man marries the woman whom he seduces to escape penalties of the law punishing for seduction, the man shall not be entitled to a divorce for any cause within three years after such marriage, provided that this Act shall not apply to any case where either the husband or wife is insane.

Provided further that in addition to the grounds for divorce now provided by statute, that where any husband and wife have lived apart without co-habitation for as long as ten years, the same shall be sufficient grounds for divorce. [Act May 27, 1873, p. 117. P. D. 3459. Acts 1913, p. 183, sec. 1, amending Art. 4632, Rev. St. 1911.]

See *Young v. Young* (Civ. App.) 127 S. W. 898.

Residence of plaintiff.—Suit may be brought by the wife in the county where she permanently resides, without reference to his residence or the place where the offense for which divorce is sought was committed. *Jones v. Jones*, 60 T. 451.

A continuous, actual residence in the county is required, and a constructive residence while the plaintiff lives in another or is bodily present there does not meet the requirements of the statute. It was intended by this statute not only to compel an

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actual good faith inhabitancy of this state, but an actual residence in the county where the suit for divorce is instituted, and not a constructive or imaginary residence. *Michael v. Michael*, 34 C. A. 630, 79 S. W. 75.

Plaintiff in a divorce action must at the time of exhibiting his petition be an actual inhabitant of the state and have resided in the county where the suit is filed six months next preceding the filing of the petition. *Brashear v. Brashear* (Civ. App.) 99 S. W. 568.

The temporary absence of a wife from the county of her residence held not to defeat her residence in that county for the purposes of venue of a subsequent action for divorce. *McLean v. Randell* (Civ. App.) 135 S. W. 1116.

This article demands an actual and continuous, as distinguished from a legal, residence; and, while it is not necessary that every day or every week must be passed in the county, the bulk of the time must be passed there. *Dickinson v. Dickinson* (Civ. App.) 138 S. W. 205.

And a divorce decree recovered without actual, continuous residence by petitioner in the state and county for the time required, is void, and may be set aside for fraud in a direct proceeding though jurisdiction appears on the face of the proceedings. *Id.*

— **Acquisition of domicile for purpose of divorce.**—After a husband had abandoned his wife, for which she demanded a divorce, her residence could not be regarded as the residence of her husband, but depended on the place where she actually resided. *Michael v. Michael*, 34 C. A. 630, 79 S. W. 74.

A wife on abandoning her husband held entitled to choose her residence for purposes of venue of a subsequent action for divorce. *McLean v. Randell* (Civ. App.) 135 S. W. 1116.

— **Suit against nonresident.**—A suit for divorce may be brought against a non-resident defendant, where the marriage was solemnized and the grounds for divorce occurred in Texas. *Trevino v. Trevino*, 54 T. 261.

A decree of divorce held conclusive on the parties, though one of them was a non-resident of the state. *Stuart v. Cole*, 42 C. A. 478, 92 S. W. 1040.

Allegation and proof of residence.—See, also, notes under Art. 1824, § 19, and Art. 1827, §§ 114, 114½.

Residence in the county where the suit is brought for six months next preceding the bringing of the suit, as required by this article and Art. 1830, must be alleged and proved. *McLean v. Randell* (Civ. App.) 135 S. W. 1116.

A defendant, who defends the suit and who files a cross-bill, need not allege in the cross-bill that he has been a resident of the county in which the suit is pending for six months immediately preceding, notwithstanding this article which is applicable only to plaintiff instituting the suit. *Charlton v. Charlton* (Civ. App.) 141 S. W. 290.

Findings on jurisdictional questions.—Where a divorce case is submitted upon special issues, held, the jury must make findings as to jurisdictional questions to support the judgment. *Bruner v. Bruner* (Civ. App.) 43 S. W. 796.

Evidence that plaintiff had lived in Texas all her life held to sustain a finding that she was a bona fide inhabitant of the state when she sued for divorce. *Gamblin v. Gamblin*, 52 C. A. 479, 114 S. W. 408.

Judgment—Collateral attack.—See notes under Art. 1994.

— **Conclusiveness.**—See notes under Art. 1994.

Art. 4633. [2979] Husband and wife competent witnesses.—In all suits and proceedings for divorce from the bonds of matrimony, the defendant shall not be compelled to answer upon oath, nor shall the petition be taken as confessed for want of answer, but the decree of the court shall be rendered upon full and satisfactory evidence, upon the verdict of a jury, if a jury shall have been demanded by either party, and if not, upon the judgment of the court affirming the material facts alleged in the petition. In all such suits and proceedings the husband and wife shall be competent witnesses for and against each other, but neither party shall be compelled to testify as to any matter that will criminate himself or herself; and where the husband or wife testifies, the court or jury trying the case shall determine the credibility of such witness, and the weight to be given such testimony; but no divorce shall be granted upon the evidence of either husband or wife, if there be any collusion between them. [Acts 1897, p. 49.]

See *Lohmuller v. Lohmuller* (Civ. App.) 135 S. W. 751; *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

Former law.—Before the amendment of the statute, neither party was a competent witness in regard to matters affecting the right to divorce. *Stafford v. Stafford*, 41 T. 111; *Cornish v. Cornish*, 56 T. 564.

In a suit by a wife, admissions by the husband that he gave the wife a venereal disease are not admissible. But on such issue it may be shown that he sent her a package of medicine with instructions how to use it. *Hanna v. Hanna*, 3 C. A. 51, 21 S. W. 720.

Admissions in pleadings as dispensing with proof.—An admission of the marriage in the answer does not dispense with its proof by competent evidence. *Simons v. Simons*, 13 T. 468; *Wright v. Wright*, 6 T. 3; *Stafford v. Stafford*, 41 T. 111.

Right of nonanswering defendant.—A defendant failing to answer is not precluded from resisting a divorce and can insist that the case shall be called in due order. *Bostwick v. Bostwick*, 73 T. 182, 11 S. W. 178.

Evidence.—See notes under Art. 3687.

Witnesses—Examination of.—Where in a suit for divorce both parties were represented by attorneys, and defendant's attorney declined to cross-examine a witness for plaintiff, the court was authorized to cross-examine the witness in order to bring out all the facts and avoid collusion, subject only to review for abuse of discretion. *Ingle v. Ingle* (Civ. App.) 131 S. W. 241.

Weight and sufficiency of evidence.—Suspicion as to the fidelity of the wife is not sufficient to authorize a divorce. *Trevino v. Trevino*, 54 T. 261; *Burney v. Burney*, 11 C. A. 174, 32 S. W. 328.

The proof to justify a decree of divorce should be full and satisfactory. No less as to the means of knowledge of the witnesses than to their credibility. *Gardell v. Gardell*, 42 C. A. 202, 94 S. W. 458.

The weighing of the testimony of a party to a divorce action is governed by the same considerations as that of other witnesses, the credibility of such witness being for the jury in view of the interest of the witness and other circumstances tending to weaken or strengthen his testimony. *Rivers v. Rivers* (Civ. App.) 133 S. W. 524.

A divorce cannot be granted upon the uncorroborated testimony of the one seeking it. *Lohmuller v. Lohmuller* (Civ. App.) 135 S. W. 751.

Discretion of court.—The judge may refuse to render a judgment for divorce if the evidence is not satisfactory to him. *Moore v. Moore*, 22 T. 237; *Haygood v. Haygood*, 25 T. 576.

The trial court has a wide discretion in determining whether the testimony warrants a divorce. *Duffer v. Duffer* (Civ. App.) 144 S. W. 354.

The court must grant a divorce when it clearly appears from the undisputed testimony that plaintiff is entitled to one. *Ogden v. Ogden* (Civ. App.) 144 S. W. 355.

Conclusiveness of findings of jury.—The verdict of the jury is not binding on the court on appeal in a divorce suit. *Lohmuller v. Lohmuller* (Civ. App.) 135 S. W. 751.

In suits for divorce, the trial court is not bound by the finding of the jury upon questions of fact, but may render the judgment that justice requires. *De Fierros v. Fierros* (Civ. App.) 154 S. W. 1067.

Vacation of decree for fraud.—A decree of divorce procured by perjury or fraud will not be set aside therefor, unless the perjury or fraud consists of intrinsic acts not examined and determined in the divorce proceedings. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

Review on appeal.—The action of the court denying a divorce is subject to revision on appeal. *Jernigan v. Jernigan*, 37 T. 420; *Huilker v. Huilker*, 64 T. 1; *Paulson v. Paulson* (Civ. App.) 21 S. W. 778.

Where plaintiff's evidence in a suit for divorce is conflicting, a decree for defendant will not be disturbed. *Barrett v. Barrett* (Civ. App.) 61 S. W. 951.

Judgment refusing a divorce on the ground of abandonment will not be reversed, where the plaintiff was the only witness to the fact of abandonment. *Seago v. Seago* (Civ. App.) 64 S. W. 941.

An assignment that the court erred in granting a divorce, because there was no proof on the record that plaintiff was a bona fide resident of the state, or that she had resided in the county for six months, will not be reviewed, where the motion for new trial failed to call the question to the attention of the trial court. *Wetz v. Wetz*, 27 C. A. 597, 66 S. W. 869.

A verdict in a divorce proceeding will not be set aside on appeal, though resting alone on the testimony of one of the parties. *Barrow v. Barrow* (Civ. App.) 97 S. W. 120.

If the jury determined that the testimony of a party to a divorce action was credible and based their verdict thereon, the court of civil appeals cannot disturb their verdict, especially where it was approved by the trial court. *Rivers v. Rivers* (Civ. App.) 133 S. W. 524.

A finding of the trial court denying a divorce will be disturbed only when it clearly appears that the court has erred, and not when the right to divorce depends wholly upon the testimony of the plaintiff. *Duffer v. Duffer* (Civ. App.) 144 S. W. 354.

In suits for divorce, the court of civil appeals is not bound by the finding of the jury upon questions of fact, but may render the judgment that justice requires. *De Fierros v. Fierros* (Civ. App.) 154 S. W. 1067.

Art. 4634. [2980] Division of property.—The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court, shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest himself or herself of the title to real estate. [P. D. 3452.]

Jurisdiction of court to order division in general.—The court granting a divorce has authority to partition the separate from the community property and divide the latter. *Rice v. Rice*, 21 T. 58.

Where prayer for alimony is stricken, and nothing is left but suit for divorce, a money judgment is not justified. *Boyd v. Boyd*, 22 C. A. 200, 54 S. W. 380.

Where a wife sues for partition of real property, the court has no jurisdiction of property outside of the state to adjudge that it is community property and decree its partition. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 992.

In a suit for divorce, jurisdiction to enforce certain claims of the husband's creditors out of property delivered to the wife pending investigation held to attach as incidental to the main suit, regardless of amount or value. Also held error to strike out certain pleas of the husband's creditors as foreign to the issues in the suit. *Bradley v. Ramsey* (Civ. App.) 65 S. W. 1112.

The court has jurisdiction to inquire into the community property of the plaintiff and defendant, and to make disposition of the same between them. *Ex parte Latham*, 47 Cr. R. 208, 82 S. W. 1046.

In decreeing divorce to the wife, the court has power to make such a decree as will properly protect the wife and minor children in the use of community property which constitutes a homestead. *Holland v. Zilliox*, 38 C. A. 416, 86 S. W. 36.

Variance between the averment as to ownership of property in a citation and in a petition for divorce, and to adjudicate property rights, held not so misleading as to render the citation insufficient to support a judgment giving the property to plaintiff. *Sperry v. Sperry* (Civ. App.) 103 S. W. 419.

The district court has jurisdiction to try a divorce proceeding, and, if the divorce is granted, to decree as to the property rights of the parties; but, if divorce is denied, the court has no power to adjust the property rights of the parties otherwise than fixed by law. *Burns v. Burns* (Civ. App.) 126 S. W. 333.

In a suit by a wife for divorce, the character and quantity of community property being shown, but not its value, the court was authorized to direct partition by commissioners. *Allen v. Allen* (Civ. App.) 128 S. W. 697.

The court may adjust property rights in a divorce action, but cannot subject husband's interest in the homestead to debts due the wife. *Shook v. Shook* (Civ. App.) 145 S. W. 682.

Parties.—The statute does not prohibit a joint owner of lands that might be in controversy between the husband and wife to become a party to a proceeding looking towards the partition of such land. *Weaver v. Manley*, 46 C. A. 133, 101 S. W. 848.

Property subject to division.—Land held by wife in trust for children cannot be partitioned in divorce suit to which they are not parties. *Jones v. Jones* (Civ. App.) 41 S. W. 418.

Disposition of separate property.—As a general rule, the separate property should be restored to its owner. *Fitts v. Fitts*, 14 T. 443.

In a proper case the separate property may be placed in the hands of a trustee to pay the rents, etc., to the husband, wife and children in such proportions as the court may direct without divesting the owner of the title. *Fitts v. Fitts*, 14 T. 443. Or place it in the hands of a trustee, to be under the supervision of the court, for the support and education of minor children; but the title of either party to real estate cannot be divested. *Rice v. Rice*, 21 T. 53.

A husband having, during marriage, by deed of gift, conveyed certain property to his wife for the purpose of defrauding his creditors, the property was decreed to the wife as her separate property. *Stafford v. Stafford*, 41 T. 111.

That there is a probability of an after-born child does not justify a court in granting permanent alimony to a wife out of the husband's separate property. *Boyd v. Boyd*, 22 C. A. 200, 54 S. W. 380.

A wife, paying premiums on a policy on the life of her husband assigned to her by the husband during the existence of the marriage relation, is, on the divorce of the parties, entitled to a lien on the policy for such premiums. *Hatch v. Hatch*, 35 C. A. 373, 80 S. W. 411.

But a money judgment against the husband, does not give the wife any right in or lien on a policy on the life of the husband assigned to the wife. *Id.*

Property purchased by a husband with his separate funds and its proceeds, and property in which the same is invested, should be regarded as his separate property in a division in divorce proceedings. *Williams v. Williams* (Civ. App.) 125 S. W. 937, 1199.

And an instruction limiting the jury's consideration of plaintiff's separate property to property paid for by him out of his separate means acquired prior to marriage held erroneous. *Id.*

Where after a default divorce decree in favor of a husband in which no disposition of the children nor provision for their support was made, no mention of either children or property having been made in the case, the husband brought habeas corpus against his former wife to obtain the custody of the children which was denied on account of their tender age, a judgment, on the wife's application, appointing a trustee of that part of certain of the husband's lands which were rented, to receive the rents and pay over a stated monthly sum to the former wife for the support of herself and the children, was proper, though the husband had remarried and occupied part of the lands as his homestead. *Bemus v. Bemus* (Civ. App.) 133 S. W. 503.

Disposition of community property.—Such a division of the community property may be made as may be equitable and just, having reference to the condition of the parties and the support and education of the children. *Trimble v. Trimble*, 15 T. 18; *Fitts v. Fitts*, 14 T. 443; *Simons v. Simons*, 23 T. 344; *Young v. Young* (Civ. App.) 23 S. W. 83.

Where the circumstances require it, the community property may be placed in the hands of a trustee, to be under the supervision of the court, for the support and education of the minor children. *Rice v. Rice*, 21 T. 53.

It is error to divest either party of all title in the community property. *Craig v. Craig*, 31 T. 203.

A wife, in whose favor a decree of divorce is made, is entitled to satisfaction out of the mass of community property for such portion of her interest as she does not obtain in kind, and this as against a purchaser with notice, pending suit. *Moore v. Moore*, 59 T. 54.

The community homestead can be sold and the proceeds partitioned. *Kirkwood v. Domnau*, 80 T. 645, 16 S. W. 428, 26 Am. St. Rep. 770. But an order directing a sale thereof, for partition, is not a divestiture of title, but merely provides for a division of the property under this article. *Smith v. Smith* (Civ. App.) 91 S. W. 815.

The court may by decree provide for the use of the homestead by the wife and children. *Kirkwood v. Domnau*, 80 T. 645, 16 S. W. 428, 26 Am. St. Rep. 770.

The court may apportion to the wife her interest in the community estate free of any charge on account of the husband's liability for the community debts. *Hubbard v. Hubbard* (Civ. App.) 38 S. W. 388.

The husband held chargeable with rents of community estate and with community in his hands. *Stone v. Stone* (Civ. App.) 40 S. W. 1022; *Williams v. Williams* (Civ. App.) 125 S. W. 937, 1199. But he is not chargeable with rent of the residence nor the business homestead. And the husband is entitled to credits on community funds for alimony paid, and for payments on community debts and taxes, and expenses of manag-

ing community property; and is not entitled to compensation for the management of the property. *Stone v. Stone* (Civ. App.) 40 S. W. 1022; *Williams v. Williams*, 125 S. W. 937, 1199. And the wife should be charged with one-half of the community funds taken by her when she separated from her husband. *Williams v. Williams* (Civ. App.) 125 S. W. 937, 1199.

Where divorce decree provided for sale of husband's interest in community property, either by selling his individual interest or by selling whole property for partition, held, that sale of his individual interest was permissible, though sale of whole would have been more beneficial to him. *Boyd v. Ghent* (Civ. App.) 53 S. W. 704.

On partition of community property under a decree in a wife's favor, it is error to leave to commissioners of partition the determination of the amount of the income thereof received by her husband. *Bohan v. Bohan* (Civ. App.) 56 S. W. 959.

Where a wife who petitions for a partition of community property is not sufficiently acquainted with the property to describe it in her petition, and the husband refuses to answer interrogatories seeking to obtain a description of the property, the court may ascertain its description and embody it in the decree. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 992.

The power given the court on pronouncing decree of divorce, to order a division of the property in such a way as seems just and right, does not alter the presumption as to community property. *Id.*

A judgment awarding the entire community estate to one party in a decree of divorce is erroneous. The proper judgment in case where the wife secures judgment in divorce suit, if the facts warrant it, is to give her judgment for one half of the community lands in fee and the use of the entire property for life, and the husband the other half subject to the said use. *Long v. Long*, 29 C. A. 536, 69 S. W. 429.

In an action to recover certain rents under a divorce decree, defendant held not entitled to object that such decree was erroneous, in that community debts exceeded the community property given him. *Connellee v. Werenkiold* (Civ. App.) 87 S. W. 747.

A right of action against a railroad for personal injuries to a husband held community property, one-half of which might be set apart to the wife on divorce. *Ligon v. Ligon*, 39 C. A. 392, 87 S. W. 838.

Where, in divorce, the wife petitioned for partition of the community property, it appearing that the husband had converted the property and had the money, the court had authority to decree a partition of the money as well as the property. *Owens v. Owens*, 40 C. A. 641, 90 S. W. 664.

A decree giving the wife one-half of the rents of the estate pending partition thereof protected her rights. *Smith v. Smith* (Civ. App.) 91 S. W. 315.

Failure to decree a division of community funds in plaintiff's possession held error. *Id.*

Where the community property is adjudged to the wife by a divorce decree, the husband as between the two no longer has any interest therein, and, if a creditor of the community seeks to subject the interest of the former husband as it existed at the time of the divorce decree to payment of his claim, he can do so only in a proceeding to which the former wife is a party, and it is immaterial that the creditor had no knowledge of the divorce decree, since, the divorce proceeding being in rem, he was affected with notice without actual knowledge, and hence, where a divorce decree adjudged community property to the wife, the subsequent levy of execution on cattle, which had been community property, to satisfy a judgment rendered in an action against the former husband alone after the divorce decree, and the sale thereunder of the husband's alleged interest in the community property, was void, where the former husband had not acquired any interest in the cattle since the divorce decree. *Roemer v. Traylor* (Civ. App.) 128 S. W. 685.

The court, in awarding a divorce to a wife, with half of the community estate exempt from execution, held not required to render judgment for the husband for the amount of the community debts. *Franks v. Franks* (Civ. App.) 138 S. W. 1110.

In an action for divorce and partition of the community property, if the homestead of the parties is not susceptible of partition, it will be sold. *Shook v. Shook* (Civ. App.) 145 S. W. 682.

A divorce decree, charging plaintiff with the care and custody of minor children, awarding her 200 acres of land, one half in fee and the other half for life, and giving the defendant a 53.1-acre tract of land, one half in fee and the other half for life, and all the personal property in the community estate, worth about 9,000—was not inequitable, though it charged him with the total community debts, amounting to about \$1,900. *Huntsman v. Huntsman* (Civ. App.) 147 S. W. 351.

— Judgment.—Where property questions were submitted on special issues, and the verdict found the monthly rental value of real estate, but not the time it was rented, a judgment thereon held erroneous. *Stone v. Stone* (Civ. App.) 40 S. W. 1022.

Judgment awarding personal property to defendant in a divorce action held not indefinite in specifying it. *Gebhart v. Gebhart* (Civ. App.) 61 S. W. 964.

— Effect of disposition as against children or creditors.—A levy of execution upon community property after divorce of the owners thereof and sale thereunder held void. *Roemer v. Traylor* (Civ. App.) 128 S. W. 685.

A judgment in a divorce suit held not to divest a child of the parties of any interest he might have in the land independent of a trust conveyance to him. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

— Enforcement of order.—In a divorce case, court held to have power to commit defendant to jail for indefinite time to compel compliance with order in relation to adjustment of community property rights of plaintiff and defendant, notwithstanding inapplicability of statute with reference to punishment for contempts. *Ex parte Latham*, 47 Cr. R. 208, 82 S. W. 1046.

Permanent alimony.—There is no such thing in the state as permanent alimony. *Bond v. Bond*, 41 C. A. 129, 90 S. W. 1128.

Right of wife to compel husband to support her.—A wife cannot maintain an action against her husband to require him to support her, except by suit for divorce or a proceeding under Art. 4626. *Burns v. Burns* (Civ. App.) 126 S. W. 333.

Vacation of division of property.—In suit by divorced wife to set aside partition of community property made under agreement with husband, objection that she did not offer to return property received under the partition cannot be raised by general demurrer to petition. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 992.

Where a wife sues to set aside a partition of community property, it is only necessary, as regards the benefits received under the partition, that she manifest in her petition a willingness to restore the property received by her, or have it considered by the court in the partition. *Id.*

In a suit by a wife to set aside a partition of community property, findings held to sustain judgment that the agreement and settlement was procured by fraud of husband. *Id.*

Where a divorced wife seeks to set aside in favor of her decree for alimony a mortgage by her husband to take up a prior mortgage and a new loan, it is not error, on setting aside the mortgage, to subordinate her claim to the prior mortgage. *Schultze v. Schultze* (Civ. App.) 66 S. W. 56.

Where, in a suit by divorced wife to set aside decree of divorce in so far as it affected her property rights, the jury found that certain property awarded the husband was community property, and fixed its value, the husband held not entitled to take such property upon payment of one-half of the value fixed by the jury. *Bracht v. Bracht* (Civ. App.) 107 S. W. 895.

Property not disposed of by judgment of divorce.—If partition is not made of community property, either party may afterwards bring suit to recover his or her interest. *Whetstone v. Coffee*, 48 T. 269; *Wimberly v. Pabst*, 55 T. 587; *Murray v. Murray*, 66 T. 207, 18 S. W. 506; *Gray v. Thomas*, 83 T. 246, 18 S. W. 721; *Henry v. Forshee*, 84 T. 185, 19 S. W. 381.

In an action by a husband divorced against the divorced wife for property in Texas, the courts of Texas will apply the laws of this state without proof of the law of Massachusetts. *Blethen v. Bonner*, 93 T. 141, 53 S. W. 1016.

Where a divorce was granted to a wife because of wrongs inflicted on her by her husband, he will not be heard to say, in a subsequent proceeding by the wife for partition of the community property, that her conduct was such as to deprive her of an equal share of the property. *Moor v. Moor*, 24 C. A. 150, 57 S. W. 992.

A husband and wife, after divorce, became tenants in common of the community property, and either may recover the entire interest as against a trespasser. *Williamson v. Gore* (Civ. App.) 73 S. W. 563. The former husband no longer represents the former wife nor the community estate. *Roemer v. Traylor* (Civ. App.) 128 S. W. 685.

Defendant having consented to a part of a divorce decree, requiring payment of certain rents in D. county, held bound thereby, though no such relief was prayed in the pleadings. *Connellee v. Werenskiold* (Civ. App.) 87 S. W. 747.

The right of the community estate to claim the benefit of the wife's adverse possession of land conveyed to the husband under a tax deed held not destroyed by the subsequent divorce of the wife and an unexecuted order for partition of the property then made. *Callen v. Collins*, 56 C. A. 620, 120 S. W. 546.

A husband, supporting a stepchild during marriage, held not entitled to judgment against the wife, obtaining a divorce, with alimony. *Franks v. Franks* (Civ. App.) 138 S. W. 1110.

Support of children.—A divorced wife cannot assert homestead rights in the separate estate of her husband. But as guardian of their children she may prosecute their rights in their father's homestead after his death. Their homestead rights are not affected by the fact that their custody had been awarded to the mother. *Hall v. Fields*, 81 T. 553, 17 S. W. 82.

The only authority for making provision for the children in the final decree in a divorce case is the general power given in this article which does not go further than to authorize the court to do so out of the property of the parties. *Ligon v. Ligon*, 39 C. A. 392, 87 S. W. 839.

The rights of the children of the union ought to be conserved, not by a fixed charge against either the father or the mother, but in the division of the estate between the parties. *Bond v. Bond*, 41 C. A. 129, 90 S. W. 1128.

Where the court on granting a divorce to a wife held that all the property owned and possessed by the husband was his separate property, and awarded the custody of the children to the wife, the court had no jurisdiction to order the husband to pay to the clerk \$15 a month for the benefit of the children, and to make such allowance a lien on the husband's real estate, etc. *Barry v. Barry* (Civ. App.) 131 S. W. 1142.

The duty of a father to support his children is not terminated by a decree of divorce obtained by him in a suit in which the question was not raised, nor will an order in habeas corpus awarding their custody to the mother impose the burden of support solely on her, especially where she and they are wholly without means of support except her earnings, so that a clause was properly inserted in the habeas corpus order providing for their support from the income of property owned by the husband. *Bemus v. Bemus* (Civ. App.) 133 S. W. 503.

Where a judgment of divorce was secured by a husband in the absence of the wife, on his pleadings, in which he did not inform the court of either children or property, the court could at a later time appoint a trustee of the father's property for the maintenance of these children. *Id.*

Art. 4635. [2981] Condonation, connivance and collusion.—In any suit for divorce for the cause of adultery, if it shall be proved that the complainant has been guilty of the like crime, or has admitted the defendant into conjugal society or embraces after he or she knew the criminal fact, or that the complainant, if the husband, connived at his wife's prostitution, or exposed her to lewd company, whereby she became en-

snared to the crime aforesaid, it shall be a good defense and a perpetual bar against said suit; or if it appears that the adultery complained of is occasioned by collusion of the parties, and done with intention to procure a divorce, or where both parties shall be guilty of adultery, then no divorce shall be decreed. [P. D. 3460.]

Adultery as bar to action.—A decree of divorce is properly refused, where it is shown that both parties have been guilty of adultery. *Haines v. Haines*, 62 T. 216.

Plaintiff's adultery is a bar to her action of divorce for any cause. *Oster v. Oster* (Civ. App.) 130 S. W. 265.

Condonation.—A finding in a suit by the husband for divorce held a finding that he had condoned the wife's misconduct. *Hill v. Hill* (Civ. App.) 125 S. W. 91.

The doctrine of condonation applies as well to cruelty and other grounds for divorce as to adultery, except that the act of cruelty is condoned only until the particular act is repeated; the condonation, however, being conditional that the injured party is to be treated with conjugal kindness and consideration in the future, and, if this is not accorded, the former act of cruelty is revived, providing the last act is not produced by the offensive conduct of the party complaining. *Bingham v. Bingham* (Civ. App.) 149 S. W. 214.

Collusion.—Where, in divorce, the court does not pass on the merits, but denies a decree on the ground of collusion, on reversal the cause will be remanded without rendering a decree for either party. *Erwin v. Erwin* (Civ. App.) 40 S. W. 53.

Art. 4636. [2982] Legitimacy of children; parties may marry again.—A divorce from the bonds of matrimony shall not in any wise affect the legitimacy of the children thereof; and either party may, after the dissolution of the marriage, marry again. [P. D. 3453.]

See Art. 4632, which modifies this article as to right to remarry.

Liability for support of children after divorce.—The liability of a father for necessities for his children continues to exist after he is divorced from his wife. *Ligon v. Ligon*, 39 C. A. 392, 87 S. W. 838.

The duty to support children held not terminated by a divorce obtained by the father, nor cast on the mother by the award of their custody to her in proceedings after the decree. *Bemus v. Bemus* (Civ. App.) 133 S. W. 503.

Where the court appointed a trustee of a divorced father's lands for the support of the children, the order directing the trustee to pay a specified monthly sum for their support held proper. *Id.*

Right to marry.—An implied prohibition against a second marriage resulting from a decree of divorce not expressly authorizing it will not be given extraterritorial effect. *Wingo v. Rudder* (Civ. App.) 120 S. W. 1073.

Art. 4637. [2983] Debts and alienations after suit filed.—On and after the day on which the action for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife. [P. D. 3457.]

Applicability in general.—This article is applicable in a case in which divorce proceedings were pending in which the right to the property owned by the husband and wife was not put in issue. The general rule which makes the right of a purchaser pendente lite to depend on the result of litigation in which the right to the property sold was in controversy applies. *Berg v. Ingalls*, 79 T. 522, 15 S. W. 579.

The court will not construe this article in a case where a deed is made by the husband on the same day that a suit for divorce is filed by the wife, when the evidence does not show that the suit was filed at an hour prior to the making and recording the deed. If the wife claims that the suit was filed before the deed was made, she should have shown that fact by evidence. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 487, 488, 6 L. R. A. (N. S.) 381.

A sale of a former husband's alleged interest in community property held properly enjoined. *Roemer v. Traylor* (Civ. App.) 128 S. W. 685.

For a conveyance to be void the property conveyed need not be community property, but may be separate property of the husband or property which he holds in trust for his wife. *Hines v. Sparks* (Civ. App.) 146 S. W. 289.

Definition—"Community property."—"Community property" includes the interest remaining in property purchased by a husband in his own name mainly with his wife's money subsequent to their marriage, after allowing his wife an interest proportionate with the part of the purchase price paid by her. *Hines v. Sparks* (Civ. App.) 146 S. W. 289.

Validity of conveyances.—A deed was void which was executed by a husband after action brought by his wife for divorce, and which was fraudulently dated back and entered of record as of the day that the divorce action was brought. *Hines v. Sparks* (Civ. App.) 146 S. W. 289.

Previous service of process on the husband is not essential to make void a conveyance made by him on or after the day the suit for divorce is brought. *Id.*

A conveyance made in violation of this statute was void regardless of the fact that the divorce action was subsequently dismissed. *Id.*

Rights of purchasers.—The purchasers of property sold by a husband in violation of this statute were entitled, in the wife's action against them, to protection by a lien

or partition to the extent of the taxes paid by them and of the husband's separate interest in the proceeds of the sale of the land. *Hines v. Sparks* (Civ. App.) 146 S. W. 289.

Conclusiveness of judgment.—Where, pending a divorce suit by a wife, her husband was defendant in an action to cancel a deed to property claimed as community property, the record title to which was in him, of which action the wife had notice, and, after the wife had obtained her divorce, a judgment against the husband, canceling the deed, was binding on her. *Gabb v. Boston* (Civ. App.) 149 S. W. 569.

Art. 4638. [2984] Inventory and appraisement; injunction.—At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restraining him from disposing of any part thereof in any manner. [P. D. 3458.]

Injunctive relief.—Divorce proceedings limit the authority of the husband over community property only when exercised for fraudulent purposes. If the wife require further protection an injunction must be invoked. *Moore v. Moore*, 73 T. 382, 11 S. W. 396.

A wife, on averment that the husband, pending suit, is likely to dispose of the property, is, it seems, entitled to an injunction. *Turner v. Turner*, 47 C. A. 391, 105 S. W. 237.

The rights given in divorce cases by statute to sequester the property and to an injunction to restrain defendant from disposing of the property held not exclusive and to preclude the appointment of a receiver. *Shaw v. Shaw*, 51 C. A. 55, 112 S. W. 124.

Dissolution of injunction.—Where a temporary injunction has been granted the wife in a divorce suit to restrain the husband from disposing of the community property, pending the suit, it is error to dissolve the injunction before the rights of the parties are adjudicated. *Turner v. Turner*, 47 C. A. 391, 105 S. W. 238.

Art. 4639. [2985] Temporary orders.—Pending any suit for a divorce the court, or the judge thereof, may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable. [P. D. 3454.]

In general.—Under this article the court can appoint a receiver to take charge of the wife's interest pending a divorce suit. The fact that the husband's interest in the real property which he has been enjoined from disposing of, is sufficient to protect the wife from damage for mismanagement or fraudulent disposition of the personal property, will not defeat the wife's right to have a receiver appointed to take charge of said personal property. *Shaw v. Shaw*, 51 C. A. 55, 112 S. W. 128.

Appointment of receiver pending appeal.—Where defendant appealed from a judgment for divorce which also divided community property, and executed a supersedeas bond, it was not within the jurisdiction of the district court thereafter to interfere with the community property by appointing a receiver for the conservation of plaintiff's interest. *Williams v. Williams* (Civ. App.) 125 S. W. 937, 1199.

And defendant was entitled to possession and control of the property pending appeal, and was responsible for plaintiff's interest in the property and in the rents and revenues. *Id.*

Art. 4640. [2986] Alimony.—If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case. [P. D. 3456.]

Definition—"Final decree."—The term "final decree," as used in this article, means a decree finally terminating the action, and not a decree of the district court from which an appeal has been perfected by supersedeas, and hence the wife is entitled to alimony pending such appeal. *Williams v. Williams* (Civ. App.) 125 S. W. 937.

Jurisdiction of court in general.—Application for divorce gives the court jurisdiction to hear the question of alimony. *Burns v. Burns* (Civ. App.) 126 S. W. 333.

The rule that final judgments cannot be altered after the term at which they are rendered does not necessarily prevent the court from thereafter making further orders not inconsistent with the judgment, and under this article the fact that judgment was rendered granting a divorce to the husband without providing for the wife's maintenance would not prevent the trial court, after final adjournment for the term, from allowing alimony pending an appeal from the decree, on the ground that the husband had voluntarily provided for the support of his wife and children until the decree was rendered, and expressed his willingness when testifying to continue to do so, but after rendition of the decree granting the divorce and awarding the children to his wife and after the appeal therefrom, refused to do so; the court having such power until final adjudication on appeal. *Ex parte Lohmuller*, 103 T. 474, 129 S. W. 834, 29 L. R. A. (N. S.) 303.

Claim to and award of alimony.—On appeal the decree of the district court as to alimony was reversed and rendered for a different amount, and the defendant was enjoined from disposing of his property for the purpose of avoiding payment. *Wiley v. Wiley*, 33 T. 358.

It was error to adjudge plaintiff entitled to one-half the income of the community estate accruing pendente lite, where there is nothing in the pleading or evidence on which to base it. *Bohan v. Bohan* (Civ. App.) 56 S. W. 959.

The mere filing of a motion by a husband, instituting a suit for divorce, to dismiss the action does not destroy the claim of the wife for alimony and attorney's fees. *Varn v. Varn* (Civ. App.) 125 S. W. 639.

— **Attorney's fees as alimony.**—Where a divorce as prayed for by both husband and wife was refused, attorney's fees in favor of the wife against the husband were not recoverable as alimony. *Hill v. Hill* (Civ. App.) 125 S. W. 91.

— **Duration of liability.**—A dismissal of the suit or a judgment refusing a divorce annuls the order for alimony made pending suit for the instalments remaining due and unpaid. *Wright v. Wright*, 6 T. 29; *O'Haley v. O'Haley*, 31 T. 502.

An appeal from a judgment granting or refusing a divorce does not suspend the operation of the order for alimony. *Williams v. Williams* (Civ. App.) 125 S. W. 937.

— **Accountability on partition for alimony received.**—A wife on partition of the community property should be charged with alimony received pendente lite. *Williams v. Williams* (Civ. App.) 125 S. W. 937.

— **Enforcement.**—On refusal of husband to pay alimony fixed by the court, the court can adjudge him to be in contempt, and can order him to be confined in the county jail until he complies with the order of the court. *Ex parte Davis*, 101 T. 607, 111 S. W. 394, 17 L. R. A. (N. S.) 1140.

Where there is no community property, the husband in a suit for divorce is bound to pay alimony for the maintenance of his wife out of his separate estate. *Williams v. Williams* (Civ. App.) 125 S. W. 937, 1199.

The enforcement of an order for alimony is not suspended by an appeal from a judgment granting or refusing divorce. *Id.*

Appeal.—An order granting alimony is not appealable. *Williams v. Williams* (Civ. App.) 125 S. W. 937, 1199.

Art. 4641. [2987] Custody of children.—The courts aforesaid shall have power, in all cases of separation between man and wife, to give the custody and education of the children to either father or mother, as to the said court shall seem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the child or children, to be determined and decided on the petition of either party; and in the meantime to issue any injunction or make any order that the safety and well being of any such children may require. [P. D. 3461.]

Power of court in general.—The court may award the custody of the children to either parent. *Norris v. Norris* (Civ. App.) 46 S. W. 405.

In divorce cases the jurisdiction of the court over the custody and support of minor children is a continuing one. *Plummer v. Plummer* (Civ. App.) 154 S. W. 597.

Procedure, trial by court or submission to jury.—The court does not decide the question whether the trial court can submit the question of the custody of a child in a divorce case but decides that the trial court can submit the question on a special issue for the purpose of aiding him in making proper disposition of the child and upon their finding can make the disposition. The party complaining not having objected to the submission of the special issue waives his right to have the matter determined by the court without submitting it to the jury. *Wright v. Wright*, 50 C. A. 459, 110 S. W. 159, 160.

Grounds for award of custody.—The custody of the minor children is a question of the welfare of the children rather than of deference to the affections or feelings of the parents. *Haymond v. Haymond*, 74 T. 414, 12 S. W. 90; *Trimble v. Trimble*, 15 T. 18.

In granting a divorce to a wife for cruelty, held not error to give the husband the custody of a four year old daughter. *Norris v. Norris* (Civ. App.) 46 S. W. 405.

In a suit for divorce, the custody of the children, who were more than 14 years of age, and who expressed a desire to live with their mother, held properly awarded to her. *Johnson v. Johnson* (Civ. App.) 102 S. W. 943.

In an action for divorce, evidence that plaintiff was without means, and if their child was awarded to her she and the child would be compelled to live with her father, who was a man of bad moral character, a drunkard, and a gambler, held admissible. *Bush v. Bush* (Civ. App.) 103 S. W. 217.

Evidence that if their child was awarded to defendant it would be cared for by his unmarried sister, who was competent and had affection for the child, held admissible. *Id.*

A husband, obtaining a divorce and the custody of a minor child, is entitled to retain the custody, where he is a man of good moral character and has an income amply sufficient to enable him to care for the child, and where he has at all times well cared for the child. *Morrison v. Miller* (Civ. App.) 128 S. W. 480.

Judgment.—An award of the custody of the children is conclusive in any subsequent proceeding. *Jordan v. Jordan*, 23 S. W. 536, 4 C. A. 559.

Where a decree of divorce awards the custody of a child to the wife, and awards alimony for the child's support, such decree is conclusive, if not appealed from. *Schultze v. Schultze* (Civ. App.) 66 S. W. 56.

Where a divorce decree was tainted with fraud, in so far as it awarded the custody of minor children to the husband, the doctrine of *res adjudicata* was not applicable. And the wife was entitled to have the custody of such children awarded to her. *Trammell v. Trammell* (Civ. App.) 80 S. W. 119.

A judgment of divorce awarding to the wife the custody of the children held a mere judicial determination that she shall have the preference legal right to their custody. *Sykes v. Speer* (Civ. App.) 112 S. W. 422.

Modification of judgment.—Courts of equity have jurisdiction over the question of the custody of minors, their decrees always being subject to modification or change upon proper showing; the courts retaining jurisdiction over the child. *Hall v. Whipple* (Civ. App.) 145 S. W. 303.

The burden is on one claiming that fact to show that conditions have so changed since a judgment of divorce awarding the custody to one parent as to render such parent an improper custodian, requiring that custody be given to another. *Grego v. Schneider* (Civ. App.) 154 S. W. 361.

The court may modify or alter its order as new issues or changed circumstances require. *Plummer v. Plummer* (Civ. App.) 154 S. W. 597.

Where a wife, who when her husband obtained a divorce and the custody of their child refused to perform the duties of a mother and was without a permanent home, subsequently acquired a home, with permanent employment and with opportunity to care for the child, and actually cared for the child, there was a changed condition sufficient to authorize the court to award to her the custody of the child. *Ex parte Boyd* (Civ. App.) 157 S. W. 254.

— **Of foreign judgment.**—Foreign decree, determining the custody of a minor child in a divorce suit, held not a bar to a subsequent proceeding to modify it, on proof that the situation and character of the respective parties had changed. And evidence as to the conduct and situation of the parties prior to such foreign decree held admissible in corroboration. *Wilson v. Elliott*, 96 T. 472, 73 S. W. 946.

Though an order of court awarding to a spouse obtaining a divorce the custody of a child of the parties must be given full faith and credit by the courts of another state, it is *res judicata* only so long as the circumstances existing at the time of the order remain unchanged. *Ex parte Boyd* (Civ. App.) 157 S. W. 254.

Order for support.—Where the court had denied a husband a divorce, and granted the custody of a child to the wife, order cannot be entered against the husband for a monthly payment for the child's support. *Defee v. Defee* (Civ. App.) 51 S. W. 274.

The statute does not authorize a decree compelling the husband to pay a monthly allowance to support a minor child whose custody is awarded to the wife. *Ligon v. Ligon*, 39 C. A. 392, 87 S. W. 839.

The power conferred by the latter clause of this article to make provision for the children was for exercise *pendente lite* as is clear from the use of the words "in the meantime." *Id.*

Where a child is awarded to either party upon the dissolution of the marriage, the court cannot fix a charge against the other for its support, maintenance and education, until it arrives at a certain age. The child must be provided for in the division of the estate of the parties. *Bond v. Bond*, 41 C. A. 129, 90 S. W. 1128.

The court, having granted a divorce to a wife and found that the husband's property was separate property, had no jurisdiction to order a monthly payment by the husband for the benefit of the children, and make same a lien on the husband's realty. *Barry v. Barry* (Civ. App.) 131 S. W. 1142.

The court held entitled, in proceedings by a divorced husband to obtain custody of the children, on awarding the children to the mother, to appoint a trustee of the father's lands to receive the rents and apply a part thereof to their support, "though a part of the lands were occupied by the father as a homestead." *Bemus v. Bemus* (Civ. App.) 133 S. W. 503.

A wife, upon being granted a divorce, held not entitled to recover from her husband amounts expended from her earnings in supporting minor children taken with her, while the parties lived apart. *Rivers v. Rivers* (Civ. App.) 133 S. W. 524.

The court has no power, on granting a wife a divorce, to award alimony to the wife for the support of a child, whether it be temporary in its nature, or without any condition that the child shall live. *Martin v. Martin* (Civ. App.) 148 S. W. 344.

— **Duration of liability imposed.**—Where a decree of divorce awards the custody of a child to the wife, and requires a payment by the husband for its support, but does not make such allowance a lien on his property, such allowance ceases on his dying testate, leaving such child sole legatee. *Schultze v. Schultze* (Civ. App.) 66 S. W. 56.

— **Modification of order.**—In trespass to try title by children of a former marriage against minor children for whose benefit a trust was declared by a divorce decree in land separately owned by the father, the former cannot complain of a judgment making their title subject to the terms of the divorce decree; the decree being subject to modification on their application, if circumstances warrant modification. *Plummer v. Plummer* (Civ. App.) 154 S. W. 597.

The court may modify its decree as to the support of children as new issues or changed circumstances require. *Id.*

— **Enforcement of order.**—Provision, inserted by agreement in decree for divorce, for payment in support of minor child, is enforceable only by execution. *Ex parte Gerish*, 42 Cr. R. 114, 57 S. W. 1123.

Appeal.—Assignment that court erred in awarding custody of children to wife on granting her a divorce, without hearing evidence as to who was best fitted to care for them, held not supported. *Wetz v. Wetz*, 27 C. A. 597, 66 S. W. 869.

Discretion and review.—In cases of the custody and support of the children of a divorced couple, the law having committed such matters to the district judge's sound discretion, his findings of fact are conclusive on appeal, unless an abuse of this discretion appears. *Bemus v. Bemus* (Civ. App.) 133 S. W. 503.

Art. 4642. [2988] Costs.—The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable.

Costs in general.—In a suit for divorce, judgment against defendant, settling property rights, casts the costs on him. *Stone v. Stone* (Civ. App.) 40 S. W. 1022.

Attorney's fees as costs.—Attorney's fees cannot be taxed as costs on behalf of the wife; but when the wife is without fault, her reasonable attorney's fees are chargeable to the husband. *McClelland v. McClelland* (Civ. App.) 37 S. W. 350.

Where a divorce was refused, attorney's fees held not recoverable as costs of the suit. *Hill v. Hill* (Civ. App.) 125 S. W. 91.

Under the circumstances, held not just to allow the wife reasonable attorney's fees in a divorce action. *Rivers v. Rivers* (Civ. App.) 133 S. W. 524.

Charge against husband's interest.—The court can make costs in divorce by the wife a charge against the community interest of the husband. *Ghent v. Boyd*, 18 C. A. 88, 43 S. W. 891.

Liability for attorney's fees.—Husband held liable for attorney's fees of wife, where she has no separate property, and suit is dismissed by agreement of parties. *Ceccato v. Deutschman*, 19 C. A. 434, 47 S. W. 739.

In an action against a husband for attorney's services rendered the wife in divorce proceedings, plaintiff may recover if he show there was probable cause for divorce, and need not show that the divorce proceedings were necessary for the legal protection of the wife. But evidence of services rendered her in a suit against the husband for assault is irrelevant. And the complaint in the suit against the husband for aggravated assault on the wife is irrelevant, while the petition filed for divorce is admissible to prove that such suit had been filed. *Bord v. Stubbs*, 22 C. A. 242, 54 S. W. 633.

The husband and wife are both liable for reasonable counsel fees of attorneys prosecuting her suit for divorce, when it appears that the facts alleged were probably true and constituted such cruelty as rendered cohabitation insupportable. *Hicks v. Stewart & Templeton*, 53 C. A. 401, 118 S. W. 206.

The husband and wife are liable for reasonable attorney's fees necessarily incurred in her suit for divorce, regardless of her mental capacity to contract. *Id.*

The court refusing to grant a divorce held not entitled to render judgment for the wife against the husband for attorney's fees. *Hill v. Hill* (Civ. App.) 125 S. W. 91.

Attorney's fees, incurred by the wife in a divorce suit, held recoverable from the husband if such costs were necessities. *Id.*

A husband is liable for attorney's fees incurred by the wife in prosecuting a suit for divorce, whether prayed for by the wife in the suit for divorce, or sued for by her attorney in a separate action. *Varn v. Varn* (Civ. App.) 125 S. W. 639.

The mere filing of a motion by a husband suing for divorce, to dismiss the action, does not destroy the claim of the wife for alimony and attorney's fees. *Id.*

In a divorce suit by a wife, where a probable cause exists that she was entitled thereto, her husband is liable for attorney's fees contracted by the wife. *McLean v. Randell* (Civ. App.) 135 S. W. 1116.

Procedure for recovery of fees.—There being no statutory provision for attorney's fees, proceedings to recover them of the husband held not ancillary to the main suit. *Ceccato v. Deutschman*, 19 C. A. 434, 47 S. W. 739.

Where a husband sued for divorce, and the wife answered and claimed attorney's fees, the court, dismissing the action on the motion of the husband, could in the same proceeding render judgment against the husband for attorney's fees. *Varn v. Varn* (Civ. App.) 125 S. W. 639.

Appeal.—On appeal in divorce, the appellate court will not determine the amount of attorney's fees where no finding in respect thereto was made below. *Aycock v. Aycock* (Civ. App.) 131 S. W. 1139.

TITLE 69

INJUNCTIONS

[For injunctions to restrain infringement of trade marks, etc., see Art. 705.]

Art.	Art.
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Article 4643. [2989] Writs of injunction granted, when.—Judges of the district and county courts shall, either in term time or vacation, hear and determine all applications and may grant writs of injunctions returnable to said courts in the following cases:

1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

2. Where, pending litigation, it shall be made to appear that a party doing some act respecting the subject of litigation, or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant, which act would tend to render judgment ineffectual.

3. In all cases where the applicant for such writ may show himself entitled thereto under the principles of equity, and as provided by statutes in all other acts of this state, providing for the granting of injunctions, or where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation, having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. Provided, that no district judge shall have the power to grant any writ of injunction returnable to any other court than his own, unless the application or petition therefor shall state that the resident judge, that is, the judge in whose district the suit is, or is to be brought is absent from his district, or is sick and unable to hear or act upon the application, or is inaccessible, or unless such res-

ident judge shall have refused to hear or act upon such application for the writ of injunction, or unless such judge is disqualified to hear or act upon the application; and the facts of, and relating to, such judge's absence, or sickness and inability, or disqualification, or inaccessibility, or refusal to act, must be fully set out in the application for the writ, or in an affidavit accompanying said application; and, in case of such absence or sickness and inability or inaccessibility or disqualification of the resident judge, or in case of his refusal to hear or act upon such application, no district judge shall have the power to grant the writ when the application therefor shall have once been acted upon by a district judge of the state; provided, that when the judge applied to shall have refused to hear or act upon such application he shall indorse thereon, or annex thereto, his refusal to hear or act upon such application, together with his reason therefor; provided, that nothing herein shall apply to the granting of writs of injunction by non-resident judges to stay execution or to restrain foreclosures, or to restrain sales under deeds of trust, or to restrain trespasses, or to restrain the removal of property, or to restrain acts injurious to or impairing riparian or easement rights where proof is made to the satisfaction of such non-resident judge that it is impracticable for the applicant to reach the resident judge and procure his action in time to effectuate the purpose of the application. A resident judge shall be deemed inaccessible, within the meaning of this act, when, by the ordinary and available means and modes of travel and communication, he can not be reached in sufficient time to effectuate the purpose of the writ of injunction sought. Whenever an application or petition for the writ of injunction shall be made to a non-resident judge upon the ground that the resident judge is inaccessible as hereinbefore defined, the party making such application, or his attorney, shall make and file with the application, as a part thereof or annexed thereto, an affidavit setting out fully the facts showing that the resident judge is inaccessible, and the efforts made by the applicant to reach and communicate with said resident judge, and the result of said efforts in that behalf; and, unless it appears from said affidavit that the applicant has made a fair and reasonable effort to procure the action of the resident judge upon said application, no non-resident judge shall have the power to hear said application upon the ground of inaccessibility of the resident judge; and should any non-resident judge hear said application upon said ground of inaccessibility of the resident judge, and should grant the writ of injunction prayed for, said injunction so granted shall be dissolved upon it being shown that the petitioner has not first made reasonable effort to procure a hearing upon said application before the resident judge. [Const., art. 5, secs. 8, 16. Amended Acts 1909, p. 354.]

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| 1. Repeal of former act. | 19. Injury to defendant. |
| 2. Infringement of trade-mark. | 20. Defenses in general. |
| 3. Nature and purpose of injunction in general. | 21. Laches. |
| 4. Nature of right protested. | 22. Possession to support suit. |
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| 12. — Trespass and injury to real property. | 30. Proceedings which may be restrained in general. |
| 13. — Collection of taxes. | 31. Civil actions. |
| 14. — Judgment and execution. | 32. — Preventing multiplicity of suits. |
| 15. — Keeping bawdy house. | 33. Criminal prosecutions. |
| 16. — Waiver of objection. | 34. Criminal acts. |
| 17. — Pleading inadequacy of remedy at law. | 35. Foreclosure proceedings. |
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- 39. Violation of contract in general.
- 40. Breach of covenant.
- 41. Sale of corporation stock for assessments.
- 42. Interference with franchise.
- 43. Acts of public officers, boards and municipalities.
- 44. — Levying and collecting tax.
- 45. — Acts relating to roads or streets.
- 46. — Appointment and removal of and interference with officers.
- 47. — Publishing election returns.
- 48. Enforcement of void ordinance.
- 49. Publication of libel.
- 50. Nuisance.
- 51. — Public or private injury.
- 52. — Operation of railroads.
- 53. Calling state convention.
- 54. Enforcement of resolution by insurance society.
- 55. Cancellation of or change in beneficiary certificate.
- 56. Sale of note.
- 57. Sale of community property.
- 58. Fraudulent transfer of property.
- 59. Interference with corporate management.
- 60. Use or control of live stock.
- 61. Building party wall.
- 62. Communicating with plaintiff's wife.
- 63. Selling railroad tickets.
- 64. Erection or maintenance of levee or dam.
- 65. Interference with right to water.
- 66. Pollution of water.
- 67. Operation of mill.
- 68. Hearing and determination of application for injunction.
- 69. Decree.
- 70. — Order for payment of deposit in court.
- 71. — Decree on sustaining demurrer to bill.
- 72. — Uncertainty.
- 73. — Modification.
- 74. Recovery of damages and continuation of injunction.
- 75. Defense in action for wrongful injunction.
- 76. Evidence.
- 77. Judgments and orders appealable.
- 78. Assignments of error.
- 79. "Vacation" defined.

See *Duncan v. Herder*, 57 C. A. 542, 122 S. W. 904; *Hamner v. Garrett* (Civ. App.) 132 S. W. 951; *Clarey v. Hurst*, 136 S. W. 840; *Cowan v. Dupree*, 139 S. W. 887; *Ware v. Welch*, 149 S. W. 263.

1. **Repeal of former act.**—Pen. Code, arts. 503-505, authorizing suit to restrain the keeping of a disorderly house to be brought by any citizen, without showing that he is personally injured by the acts complained of, is not repealed by subdivision 3 of this article as amended by Acts 31st Leg. p. 354, c. 34, which has reference largely to the practice with reference to granting writs, hearing thereof, and appeals and orders granted therein, but does not by its terms or necessary implication repeal the former provision. Ex parte *Morgan*, 57 Cr. R. 551, 124 S. W. 99, 136 Am. St. Rep. 996.

2. **Infringement of trade-mark.**—See Title 19.

3. **Nature and purpose of injunction in general.**—Remedy of sureties on forthcoming replevin bond, on entry of judgment without notice, is not by injunction. *Cabell v. Floyd*, 21 C. A. 135, 50 S. W. 478.

Where it is doubtful whether an action is one at law or equity, injunction may issue therein and must be obeyed until dissolved. Ex parte *Warfield*, 40 Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

The appropriate function of the writ of injunction held to afford preventive relief only. *Norwood v. Leeves* (Civ. App.) 115 S. W. 53.

A writ whereby persons were restrained from intruding themselves on the county committee of the Democratic party, and members of the committee were restrained from attempting to include the intruders as members, held an injunction. *Ware v. Welch* (Civ. App.) 149 S. W. 263.

4. **Nature of right protected.**—The violation of an abstract right is not cognizable in any court much less in a court of equity, unless injury and damages are alleged and proved to have resulted therefrom. *Foust v. Warren* (Civ. App.) 72 S. W. 406.

5. **Discretion of court.**—The right to relief by injunction against a nuisance is not an absolute right, but one resting in the sound discretion of the court. *Gose v. Coryell* (Civ. App.) 126 S. W. 1164.

No abuse of discretion held to appear in denying a mandatory injunction to compel defendant to fill up a ditch which drained the boundary between his and plaintiff's land. *Simon v. Nance* (Civ. App.) 142 S. W. 661.

The granting of an injunction is not as a rule a matter of absolute right, but of discretion. *Id.*

6. **Jurisdiction.**—See, also, notes under Art. 4653.

The execution of a judgment can only be enjoined by the court in which it was rendered. *Bell v. York* (Civ. App.) 43 S. W. 68.

An injunction will lie to restrain the collection of a judgment void for want of jurisdiction in the court rendering the same. *Tucker v. Williams* (Civ. App.) 56 S. W. 585.

✓ The district court of one county can enjoin the execution of a writ of possession issued by the district court of another county, while allowing the execution of an order of sale as to the same property. *Modisette v. National Bank*, 23 C. A. 589, 56 S. W. 1007.

Action to restrain sale of land under judgment need not be brought in court where judgment was rendered, where no attack is made on validity of judgment. *Corbett v. Provident Nat. Bank*, 23 C. A. 602, 57 S. W. 61.

✓ The court in which a judgment was originally rendered is the court in which an injunction restraining an execution of the judgment is returnable, and a suit brought in the district court of another county, where a levy was made on land, to enjoin its sale and to set aside the judgment of the court of civil appeals affirming the judgment of the district court, was properly dismissed for want of jurisdiction. *Ellis v. Harrison*, 24 C. A. 13, 57 S. W. 984.

The fact that the court was without jurisdiction to hear and determine the issue of a suit when it issued a temporary restraining order did not render its action in hearing a motion to dissolve, and rendering a judgment dissolving the injunction, void, thereby leaving the injunction still in existence. *Id.*

Where two petitioners in a suit to enjoin the sale of land levied on under an execution were not parties to the action from which the execution issued, but joined their co-

plaintiffs in the execution of a supersedeas bond on appeal of the case, they were not such strangers to the judgment of the district court as to entitle them to maintain a suit in another county, where levy was made on their land, to enjoin its sale and set aside the judgment of the court of civil appeals affirming the judgment of the district court. *Id.*

A county court of one county has not jurisdiction of a suit to enjoin execution of a judgment of a county court of another county. *Aultman, Miller & Co. v. Higbee*, 32 C. A. 502, 74 S. W. 955.

In order to prevent a multiplicity of suits, equity will take cognizance of a controversy, determine the rights of the parties, and grant the relief required to meet the ends of justice. *Steger & Sons Piano Mfg. Co. v. MacMaster*, 51 C. A. 527, 113 S. W. 337.

A court of equity never aids in the commission of a wrong, nor in protecting or preserving an unjust advantage obtained. *Sanders v. Cauley*, 52 C. A. 261, 113 S. W. 560.

The facts showing the inaccessibility of the resident judge, and the efforts made to reach him must be fully stated, in order that the judge to whom the application is presented may determine whether a fair and reasonable effort has been made to reach the resident judge. Unless this is done the affidavit is fatally defective. *Lee v. Broocks*, 54 C. A. 220, 118 S. W. 165.

Under this article and Art. 4664, which provides that motions to dissolve injunctions without determining the merits may be heard after answer filed in vacation as well as in term time on at least 10 days' notice to the opposite party, or his attorney, the word "vacation," as so used, meant the vacation of the district court of the county wherein the case was pending, in which an injunction was awarded, and hence, there being no statute fixing the place for hearing motions to dissolve, a judge granting an injunction in vacation may hear a motion to dissolve it in a county other than that in which the suit is pending. *Wier v. Hill* (Civ. App.) 125 S. W. 366.

The county court rendering a judgment on appeal from a justice's court which was not void has alone authority to issue an injunction enjoining the judgment. *Moore v. Vogt* (Civ. App.) 127 S. W. 234.

Where the order of a judge to whom application was made for an injunction restraining sale of a homestead on execution in a county other than that to which the writ was returnable recited that the judge of the district court of the county to which it was returnable was inaccessible, and the truth of the recital was not questioned, the judge could grant the injunction under this article. *Parsons v. McKinney* (Civ. App.) 133 S. W. 1084.

Under this article, where a decree had been rendered by a district court, and an application had been made to the judge thereof for an injunction restraining the levy of an execution based thereon, and had been denied, the judge of another district, though of concurrent jurisdiction and holding court in the same county, had no jurisdiction to grant the writ. *Dawson v. Dawson* (Civ. App.) 136 S. W. 1149.

Under Const. art. 5, §§ 8, 16, relating to the jurisdiction of the county and district courts in the issuance of executions, and this article and Art. 4653, providing that injunction to stay execution should be returnable to and tried in the court where such writ is pending, or such judgment rendered, and in other cases in the district or county court of the county of domicile, according to the amount in controversy, a district judge might, where the equities warranted, enjoin execution of a judgment of the county court, though he could not finally dispose of the injunction proceeding, which should be finally disposed of in the county court. *Baker v. Crosbyton Southplains R. Co.* (Civ. App.) 146 S. W. 569.

A special judge elected by the practicing attorneys to hold court and conduct the business thereof in the absence of the regular district judge has no authority to issue a writ of injunction returnable to another county of the same judicial district. *Wynn v. R. E. Edmonson Land & Cattle Co.* (Civ. App.) 150 S. W. 310.

7. — **Adjudication of all issues.**—The court, having acquired jurisdiction, can adjudicate all the issues in the case. *Willis v. Gordon*, 22 T. 243; *Witt v. Kaufman*, 25 T. 384; *Stein v. Frieberg*, 64 T. 271.

Where the district court has obtained jurisdiction by reason of an injunction sued out to restrain the sale of property levied under execution, it rightfully retains the cause for the purpose of decreeing damages for detention of property by the officer and plaintiff in execution. *Chambers v. Cannon*, 62 T. 293.

Where a defendant in a judgment obtains an injunction restraining its execution on the ground that the judgment is void, the court will retain jurisdiction and render judgment on the original cause of action, if the plaintiff in execution is legally entitled to it on the merits. *Witt v. Kaufman*, 25 T. 384; *Willis v. Gordon*, 22 T. 241; *Bourke v. Vanderlip*, 22 T. 221; *Masterson v. Ashcom*, 54 T. 324; *Hale v. McComas*, 59 T. 484; *Stein v. Frieberg*, 64 T. 271.

Equity, having obtained jurisdiction to enjoin an enforcement of certain void judgments by laborers for conversion of rice on which they claimed a lien, it was error to refuse to retain such jurisdiction to determine the existence of such lien. *Houston Rice Milling Co. v. Hankamer*, 43 C. A. 576, 97 S. W. 119.

Where a court takes jurisdiction of a proceeding to enjoin execution on a dormant judgment, it may, having taken such jurisdiction, proceed to determine all of the issues between the parties. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

8. **Jurisdiction dependent on nature of subject-matter and amount in controversy.**—See notes under Arts. 1705, 1713, 1764, 1772.

9. **Venue.**—See notes under Art. 4652.

10. **Petition.**—See, also, notes under Art. 4649.

Where the court on appeal vacated an injunction restraining a judgment creditor of plaintiff's grantor from selling under execution realty held by plaintiff under a conveyance duly recorded before the levy, it will permit plaintiff on remand to amend the petition so as to bring a case within subdivision 3 of this article. *Latham Co. v. Shelton*, 57 C. A. 122, 122 S. W. 941.

The petition for injunction permitted by this article, "where a cloud would be put on the title of real estate being sold under execution against a person * * * having no interest in such real estate subject to the execution at the time of sale, or irreparable

injury to real estate is threatened," should show absence of such interest in such person, or that such injury would be done by the execution sale. *S. K. McCall Co. v. Page* (Civ. App.) 155 S. W. 655.

11. **Inadequacy of remedy at law.**—The execution of a judgment will not be restrained on the ground that the court had refused a continuance, the party having a remedy by appeal. *Western v. Woods*, 1 T. 1.

An application for injunction to restrain the execution of a judgment of a justice of the peace and to remove the same to the district court for a new trial on account of error in the decision will not be granted, where the party applying, through negligence, has failed to prosecute a certiorari within the time prescribed by law. *Fitzhugh v. Orton*, 12 T. 4; *Rotzeln v. Cox*, 22 T. 62; *Musgrove v. Chambers*, 12 T. 32. But see *Manning v. Hunt*, 36 T. 118; *Garner v. Smith*, 40 T. 505; *Jordan v. Corley*, 42 T. 284; *Railway Co. v. Dowe*, 70 T. 1, 6 S. W. 790.

An injunction to restrain the prosecution of an action of forcible entry and detainer before a justice of the peace, on the ground that plaintiff had no title to the land, or possession, or right to possession thereof, but that title and possession are with defendant, will be refused, as these facts could be set up as a defense to the action. *Chadoin v. Magee*, 20 T. 476. And, if it fails, defendant has his remedy by certiorari. *Smith v. Ryan*, 20 T. 661; *Gibson v. Moore*, 22 T. 611.

A judgment will not be enjoined where the party has a remedy by appeal. *Windisch v. Gussett*, 30 T. 744; *Robinson v. Sanders*, 33 T. 774; *Jordan v. Corley*, 42 T. 284; *Roundtree v. Walker*, 46 T. 200.

A party seeking possession of or protection against injury to land, in an action of trespass to try title or to foreclose a mortgage, must resort to the writ of sequestration. Injunction is not the remedy. *Bateson v. Choate*, 85 T. 239, 20 S. W. 64.

An injunction will not be granted where the law provides a full, complete, and adequate remedy. *Railway Co. v. Wright* (Civ. App.) 29 S. W. 1134; *Id.*, 88 T. 346, 31 S. W. 613, 31 L. R. A. 200; *Railway Co. v. Ellisor*, 14 C. A. 706, 37 S. W. 972; *Lightfoot v. Murphy*, 47 C. A. 112, 104 S. W. 511; *Frazier v. Coleman* (Civ. App.) 111 S. W. 662.

Injunction will not issue against the publication of the result of a local option election, since the statute points out a different remedy for contesting the same. *Ex parte Mayes*, 39 Cr. R. 36, 44 S. W. 831.

Equity will grant an injunction to enforce a covenant not to engage in a particular business, since there is no adequate remedy at law. *Anderson v. Rowland*, 18 C. A. 460, 44 S. W. 911.

Where city owning waterworks wrongfully refuses to furnish water to citizen, he has no adequate remedy at law, and may sue in equity. *Dittmar v. City of New Braunfels*, 20 C. A. 293, 48 S. W. 1114.

An injunction against the removal of a schoolhouse will not be dissolved on the ground that sequestration was an adequate legal remedy. *Green v. Gresham*, 21 C. A. 601, 53 S. W. 382.

Injunction suit by mayor to restrain oyster from office held improper; remedy at law being adequate. *Riggins v. Thompson*, 30 C. A. 242, 70 S. W. 578.

Failure to pursue remedy by appeal or certiorari gives no right to substitute a suit by injunction. *Kyle v. Richardson*, 31 C. A. 101, 71 S. W. 399.

Suits for injunction may be maintained in cases where the applicant is entitled to the relief demanded, although there may be an adequate remedy at law. *Sullivan v. Dooley*, 31 C. A. 589, 73 S. W. 83, 84.

A railroad company held to have no adequate remedy at law to prevent a trespasser from using its track on which to operate a railroad velocipede, and hence was entitled to an injunction to restrain such use. *Gulf, C. & S. F. Ry. Co. v. Puckett* (Civ. App.) 82 S. W. 662.

Adjoining property owners held without any adequate remedy at law to restrain a railroad's unlawful use of a street as a switchyard, and, therefore, were entitled to an injunction. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 93 S. W. 177.

Temporary injunction held properly dissolved; there being other adequate remedy. *Josey v. Peristein*, 48 C. A. 355, 107 S. W. 558.

Equity will not aid a party, if his claim grows out of, or depends on, or is inseparably connected with, his own prior fraud or misconduct, but will leave him to his remedies and defenses at law. *Sanders v. Cauley*, 52 C. A. 261, 113 S. W. 560.

That a note executed by plaintiff was obtained through the fraudulent representations of defendant is available as a defense in an action on the note, and therefore is not ground for the issuance of a writ of injunction restraining the enforcement of the note. *Turner v. Patterson*, 54 C. A. 581, 118 S. W. 565.

An injunction against maintaining an action cannot be made to serve the purpose of an appeal. *Id.*

It is always necessary to exhaust all legal remedies before an injunction will be granted. *Gulf, C. & S. F. Ry. Co. v. Shields*, 56 C. A. 7, 120 S. W. 222.

A party held not entitled to an injunction restraining a justice of the peace on the ground that he had not exhausted his legal remedy. *Jones v. Curtis*, 56 C. A. 181, 120 S. W. 530.

In courts administering both law and equity the rules denying injunction, where there is a remedy at law should not be applied as rigidly as at common law. *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Civ. App.) 132 S. W. 868.

Interference with a telephone company's right to erect poles in a street leaves it without adequate remedy at law, where its line is completed to the city, and it is threatened with arrest of its employes if they proceed with the work. *City of Brownwood v. Brown Telegraph & Telephone Co.* (Civ. App.) 152 S. W. 709.

Under this article one showing itself entitled to injunction under the principles of equity is entitled to the writ, where it is threatened with irreparable injury to its property rights independent of whether it has an adequate legal remedy. *Id.*

12. — **Trespass and injury to real property.**—An injunction may be issued under this article to prevent defendant in trespass to try title from inclosing the land and removing timber, though sequestration under article 7094 is an adequate legal remedy.

Mitchell v. Burnett, 57 C. A. 124, 122 S. W. 937. But see Frazier v. Coleman (Civ. App.) 111 S. W. 663.

Under this article, as amended by Acts 31st Leg. p. 355, c. 34, § 2, authorizing the judges of the district courts to grant injunctions where irreparable injury to realty is threatened, irrespective of any legal remedy, that the applicant has an adequate remedy at law would not prevent the granting of an injunction to prevent irreparable injury to realty if he is otherwise entitled thereto under equitable principles. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

Where the destruction of shade or ornamental trees situated in a city sidewalk abutting on property of a private owner is not necessary in the furtherance of a public service, equity will restrain a threatened destruction thereof, though the owner may have an adequate remedy at law as defined by the rules of the common law; this article giving the remedy by injunction where an applicant may show himself entitled thereto under the principles of equity. *Southwestern Telegraph & Telephone Co. v. Smithdeal*, 104 T. 258, 136 S. W. 1049.

In an action for cutting and removing timber from plaintiff's land and mingling and confusing it with defendant's own timber, where it was shown that defendant was threatening to, and unless restrained would, remove the property from the county and dispose of it, that he was insolvent, and irresponsible, and that unless defendant was restrained from removing the logs, plaintiff would lose their value, plaintiff was entitled to a temporary injunction, against the removal and disposal of the logs, pending the action under this article, as amended by Acts 31st Leg. 1st Ex. Sess. c. 34, authorizing the issuance of injunctions, where irreparable injury to personal property is threatened, irrespective of any legal remedy at law, and was not confined to the remedy by sequestration or attachment. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 154 S. W. 337.

13. — Collection of taxes.—Several suits to collect taxes against the property of several owners should not be enjoined at the joint suit of such owners on grounds which are available as defenses in such suits. *McMickle v. Hardin*, 25 C. A. 222, 61 S. W. 322.

An injunction will not lie against the state treasurer, comptroller and attorney general to restrain them from performing their duties under Acts 1905, c. 141, on the ground that the statute is unconstitutional, as the railroad company which seeks the injunction has an adequate remedy at law. *Stephens v. Texas & P. Ry. Co.*, 100 T. 177, 97 S. W. 309.

The collection of taxes will not be restrained by injunction, except where there is no adequate legal remedy. *Cole v. Porto* (Civ. App.) 155 S. W. 350.

Persons who own the same kind of property, and who are affected in the same way by taxes imposed by the same officers, and whose rights are identical, may join in a suit to restrain the collection of taxes, though they have an adequate remedy at law, under the express provisions of this article. *Porter v. Langley* (Civ. App.) 155 S. W. 1042.

14. — Judgment and execution.—Injunction will not lie to restrain the enforcement of a judgment which can be reviewed by certiorari. *Railway Co. v. Ware*, 74 T. 47, 11 S. W. 918; *Same v. Wright*, 88 T. 346, 31 S. W. 613; *San Antonio & A. P. R. Co. v. Glass* (Civ. App.) 40 S. W. 339.

Where goods are wrongfully taken under execution, the trial of right of property does not afford an adequate remedy and hence the sale may be enjoined. *Sumner v. Crawford* (Civ. App.) 41 S. W. 825.

A surety on a bond in a claimant's suit cannot, by a separate action, restrain enforcement of a judgment entered therein by stipulations between the principal parties; his remedy being by appeal. *Johnson v. Blum*, 17 C. A. 260, 42 S. W. 791.

Injunction will not issue to prevent execution sale of real property, where parties have adequate remedy at law. *Modisette v. National Bank*, 23 C. A. 589, 56 S. W. 1007.

Injunction against a judgment and execution held improperly refused on the ground of adequate remedy at law. *Crook v. Lipscomb*, 30 C. A. 567, 70 S. W. 993.

Injunction will not lie to restrain the sale of land, where there is an adequate legal remedy. *Hahn v. P. J. Willis & Bro.*, 31 C. A. 643, 73 S. W. 1084.

An injunction will not lie to restrain execution of a justice's judgment, rendered in a suit of which he had jurisdiction, where the amount involved was insufficient to sustain an appeal. *St. Louis, I. M. & S. Ry. Co. v. Coca Cola Co.*, 32 C. A. 611, 75 S. W. 563.

The remedy for the error in computing interest accrued on a demand or otherwise, so that the judgment is rendered for an excessive sum, is by appeal or certiorari, and not by injunction. *Kansas City Life Ins. Co. v. Warbington* (Civ. App.) 113 S. W. 988.

The owner of land, holding it under a deed duly recorded prior to a levy to satisfy a judgment against another, has an adequate remedy at law, and the sale of the property under the levy will not be enjoined. *Latham Co., Bankers, v. Shelton*, 57 C. A. 122, 122 S. W. 941.

Injunction does not lie to restrain a sale under an execution on the ground of errors in the rendition of the judgment, but the remedy is by appeal. *Denson v. Taylor* (Civ. App.) 132 S. W. 811.

Where a stock of goods levied on as that of a husband in fact belongs to the wife, equity will restrain the enforcement of the judgment, as by a proceeding at law to try the right of property the damages against the sheriff, both as to the goods seized and the remainder, would be released, the goods would have to be returned to the custody of the officer until the determination of the right thereto and would be subject to such other writs as might have been levied before the trial, and the wife would be deprived of the right to have the goods replaced and sold with the stock, so that the remedy at law would not be plain and adequate. *Slayden-Kirksey Woolen Mill v. Robinson* (Civ. App.) 143 S. W. 294.

The execution of a judgment taken in justice's court on imperfect service, or no service at all, will not be enjoined, where defendant has a remedy by appeal or writ of certiorari. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

15. — Keeping bawdyhouse.—See notes under Art. 4639.

16. — Waiver of objection.—Where an injunction suit was instituted April 2, 1906, an objection that complainant had an adequate remedy at law, first made in an amended answer filed May 26, 1909, held waived by delay. *Rogers v. Driscoll* (Civ. App.) 125 S. W. 599.

17. — **Pleading inadequacy of remedy at law.**—See notes under Art. 4649.

18. **Injunction ineffectual or not beneficial.**—A taxpayer cannot enjoin the issue of bonds voted by a city, but which would be void even in the hands of a bona fide purchaser, since neither he nor the city could suffer any injury from the issue. *Bolton v. City of Antonio* (Civ. App.) 21 S. W. 64.

Where, pending suit to enjoin an execution, a levy thereunder is released, and the execution is returned with the release indorsed thereon, the injunction will be denied. *Thompson v. Goolsby*, 48 C. A. 23, 106 S. W. 936.

A person is not entitled to an injunction to restrain a threatened injury, if the execution of the threats is such action as cannot be appropriately controlled by injunction. *Royal Fraternal Union v. Lundy*, 51 C. A. 637, 113 S. W. 185.

A court will not grant injunctive relief or a mandatory decree which it could not enforce because the party cast is a nonresident of the state. *Gaines v. Farmer*, 55 C. A. 601, 119 S. W. 874.

A temporary injunction will not issue to restrain city officers from paying interest warrants after they have paid the same. *Heuermann v. Church* (Civ. App.) 150 S. W. 212.

Temporary injunction against sale and delivery of municipal bonds does not lie if they were delivered before the application for the injunction was heard. *Simpson v. City of Nacogdoches* (Civ. App.) 152 S. W. 858.

19. **Injury to defendant.**—An injunction to restrain a nuisance held properly granted, notwithstanding its effect would be seriously injurious to defendant. *Galveston, H. & S. A. Ry. Co. v. De Groff* (Civ. App.) 110 S. W. 1006.

The court, in determining the propriety of restraining a railway company from using its tracks in a street for railway purposes, on the ground that the same creates a nuisance to the injury of an individual, held required to consider the relative injury to the individual and that which would be inflicted on the company and the public by granting the injunction. *Galveston, H. & S. A. Ry. Co. v. De Groff*, 102 T. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749.

Where, in a suit between irrigation companies to enjoin defendant from taking water, the issuance of the injunction would have greatly injured the crops of defendant's tenants, and it is not clearly shown that it would have appreciably increased plaintiff's water supply or that its tenants needed a greater amount, a temporary injunction was properly denied. *Matagorda Canal Co. v. Markham Irr. Co.* (Civ. App.) 154 S. W. 1176.

If more damage is likely to result from granting a temporary injunction than by refusing it, it should not be granted, but any doubt as to whether greater injury will result in refusing than in granting it should be resolved in plaintiff's favor. *Id.*

20. **Defenses in general.**—In a suit by commissioned branch pilots to restrain a defendant from acting as a branch pilot, it is no defense that plaintiffs have confederated together to prevent him from becoming a branch pilot and from pursuing his occupation as a pilot. *Olsen v. Smith* (Civ. App.) 68 S. W. 320.

Plaintiff in suit for injunction against nuisance, held not to have so conducted himself as to bar injunctive relief. *Faulkenbury v. Wells*, 28 C. A. 621, 68 S. W. 327.

The fact that plaintiffs, while in the control of a corporation, made unlawful contracts in restraint of trade, does not prevent them after their control has expired to sue to restrain the performance of such contracts. *Lone Star Salt Co. v. Blount*, 49 C. A. 138, 107 S. W. 1163.

Where the rights of the parties in an action for an injunction are doubtful, the court should look at the balance of convenience, and act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction. *Jeff Chalson Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 C. A. 611, 121 S. W. 716.

In order to constitute an "estoppel in pais," on the part of one who seeks to enjoin the continuance of a nuisance, it must be shown that the matters claimed to constitute an estoppel have in some material respect influenced the conduct of the party invoking the estoppel. *Gose v. Coryell* (Civ. App.) 126 S. W. 1164.

In an action to enjoin a nuisance, prescription held not available as a defense. *Id.*

21. **Laches.**—Suit to enjoin default judgment obtained against plaintiff in 1889 held not barred under the facts, though not brought until 1900. *Dashner v. Wallace*, 29 C. A. 151, 68 S. W. 307.

One entitled to an injunction restraining a railway company from continuing a nuisance by using streets for switching purposes held required to act within a reasonable time after the creation of the nuisance. *Galveston, H. & S. A. Ry. Co. v. De Groff*, 102 T. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749.

That a levee obstructing the usual flow of the waters of a stream forming a boundary between adjacent land was allowed to remain for over 25 years without complaint was a bar to equitable relief to enjoin its continuance. *Knight v. Durham* (Civ. App.) 136 S. W. 591.

Long-continued acquiescence and lapse of time, independent of statute, will defeat the right to injunctive relief. *Simon v. Nance* (Civ. App.) 142 S. W. 661.

Taxpayers held not to have lost the right to bring a suit to restrain the collection of an invalid tax levy by delaying such action until an attempt or threat to enforce collection of the tax. *Petty v. McReynolds* (Civ. App.) 157 S. W. 180.

22. **Possession to support suit.**—A private corporation given the exclusive possession and control of property owned by the state, charged with its care and maintenance, has the right to defend its possession as against a trespasser by action to enjoin the trespass, and need not show express statutory authority, since the statute carried with it the grant of every power needed to carry its purpose into effect. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

23. **Right of individual to restrain acts against public welfare.**—No action lies to restrain an interference with a mere public right, at the suit of one who has not suffered from or been threatened with a damage peculiar to himself. *San Antonio v. Strumbers*, 70 T. 366, 7 S. W. 754.

Where the collection of an illegal tax is about to be enforced, one or more persons against whom the tax is levied may enjoin its collection. *Morris v. Cummings*, 91 T. 618, 45 S. W. 383.

Performance of illegal contract by city will not be enjoined at suit of one not showing that he is injuriously affected, or that he has no adequate remedy at law. *Wood v. City of Victoria*, 18 C. A. 573, 46 S. W. 284.

A lot owner cannot restrain destruction of trees on land dedicated for public park, where he sustains no special injury. *Hulse v. Powell*, 21 C. A. 471, 51 S. W. 862.

The fact that plaintiff was a citizen, voter, and taxpayer in the school district in which a local option election was held did not entitle him to maintain an action to restrain the commissioners' court from declaring the result. *Hill v. Roach*, 26 C. A. 75, 62 S. W. 959.

Plaintiff, engaged in the sale of intoxicating liquors, held not entitled to enjoin the court from declaring a local option election valid. *Harding v. Commissioners' Court of McLennan County*, 27 C. A. 25, 65 S. W. 56.

A private citizen cannot enjoin an appointee from discharging the duties of health officer. *Brumby v. Boyd*, 28 C. A. 164, 66 S. W. 874.

A city taxpayer may enjoin the city from entering into a wrongful contract involving an expenditure of municipal funds. *City of Austin v. McCall*, 95 T. 565, 68 S. W. 791.

In an action by a city and others to enjoin removal of defendant railroad's offices and shops from the city, individual plaintiffs held to occupy no better position than plaintiff city as to relief prayed. *City of Tyler v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 87 S. W. 238.

A railroad's use of a street in the heart of a city as a switchyard held a taking for a private use which could be restrained at the suit of an adjoining property owner. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 93 S. W. 177.

A hotel owner held to have the right to restrain the unlawful use of a city street by a railroad company for switching purposes. *Galveston, H. & S. A. Ry. Co. v. De Groff* (Civ. App.) 110 S. W. 1006.

An individual held not entitled to maintain a suit for an injunction to restrain a railway company from using tracks in a street, but the individual should be remitted to his action for damages. *Galveston, H. & S. A. Ry. Co. v. De Groff*, 102 T. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749.

The organization of an unorganized county cannot be restrained at the suit of a private citizen. *Oden v. Barber* (Civ. App.) 126 S. W. 676.

Complainants held to have suffered special damages different from that suffered by the public from the obstruction of a street by a board fence surrounding the building in process of erection, and were, therefore, entitled to maintain an injunction to restrain its continuance. *American Const. Co. v. Seelig* (Civ. App.) 131 S. W. 655.

The court at the suit of a private citizen and taxpayer will not enjoin one from maintaining a saloon without first applying for a license in the manner required by Arts. 7433 and 7435, where he has a license which is duly posted as required by law. *Doyle v. Scott* (Civ. App.) 134 S. W. 829.

A taxpayer held not entitled to sue to restrain a street railway company from constructing a switch in a street, on the ground that it interfered with the public safety. *Acheson v. Denison & S. Ry. Co.* (Civ. App.) 140 S. W. 467.

To entitle a private person to restrain the obstruction of a public road, he must show special injuries, peculiar to himself, from the obstruction, differing from the injury to the public generally, since otherwise suit must be brought by the proper public officers. *Owens v. Varnell* (Civ. App.) 145 S. W. 256.

Discontinuance of street car line may be enjoined at the suit of a landowner who had dedicated streets in consideration of an agreement to operate a line thereon, where its operation would not prevent the company from performing its duties to the public. *Houston Electric Co. v. Glen Park Co.* (Civ. App.) 155 S. W. 965.

24. Proceedings in aid of which injunction is authorized.—Injunction held not to lie in aid of jurisdiction to issue the writ of habeas corpus in favor of persons held under criminal process. *Denton v. McDonald*, 104 T. 206, 135 S. W. 1148, 34 L. R. A. (N. S.) 453.

25. Costs.—Plaintiffs held liable for costs on dissolution of injunction to restrain execution of an order for sale of real estate. *Modisette v. National Bank*, 23 C. A. 589, 56 S. W. 1007.

Owner of land taken for a public road held not entitled, on dissolution of an injunction restraining the road overseers from removing certain obstructions which the owner had placed in the road, to costs of the action up to the time of a correction of the award of damages. *Dunman v. Nall* (Civ. App.) 87 S. W. 177.

Award of costs on perpetuating an injunction held proper. *Pickereil v. Irby* (Civ. App.) 125 S. W. 332.

Where defendant improperly sued out execution on a dormant judgment, the costs in a proceeding to enjoin execution on the judgment, although it had not been discharged, and might be revived, will be taxed against defendant. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

26. Grounds for granting or denying temporary injunction.—Certain facts held to warrant granting of a temporary prohibitive injunction forbidding interference with canal. *Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 C. A. 611, 121 S. W. 716.

Where a petition against a water company supplying the inhabitants of a city under a franchise is based on the theory that the water company is a public service corporation and, as such, compelled to furnish water at a reasonable rate, alleging the unreasonableness of the rates charged and a threatened irreparable injury by shutting off petitioner's water supply, a case is made for a preliminary injunction restraining the shutting off of the supply. *Ball v. Texarkana Water Corporation* (Civ. App.) 127 S. W. 1068.

Temporary injunction against interference by city with construction of a railroad in new location held properly refused under the circumstances. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 137 S. W. 724.

Lessee of ice cream privilege at park held entitled, on payment of arrears of weekly rentals, to temporary injunction against forfeiture of lease. *Creamery Dairy Co. v. Electric Park Co.* (Civ. App.) 138 S. W. 1106.

Where the court properly refused an application to file an information in quo warranto, the refusal to grant a preliminary injunction sought as ancillary held proper. *State v. Wilkinson* (Civ. App.) 140 S. W. 826.

An application for a preliminary injunction held properly refused on the ground that it would accomplish the whole purpose of the suit without a trial on the merits. *Ort v. Bowden* (Civ. App.) 148 S. W. 1145.

A temporary injunction is properly granted to protect members of the executive committee of a national party from disturbance by intruders who have no right or title to the office, and to restrain members of such committee from attempting to include the intruders as members; the proceeding not being one to try title to the office. *Ware v. Welch* (Civ. App.) 149 S. W. 263.

27. **Duration of preliminary injunction.**—A preliminary injunction continues in force until the matter is finally heard and determined, in the absence of a motion to dissolve. *Ex parte Roper*, 61 Cr. R. 68, 134 S. W. 334.

Temporary restraining order pending the hearing on an order to show cause why a writ of injunction should not issue held to expire on the date fixed for the hearing, whether any action was then taken by the trial judge or not. *Cole v. Forto* (Civ. App.) 155 S. W. 350.

28. **Mandatory injunction.**—An injunction will be granted to compel the holder of a negotiable note to indorse a payment thereon. *Kopplin v. Koplin*, 28 S. W. 220, 8 C. A. 625.

A contractor who has paved a street under a contract to repair defects caused by wear or any imperfections, and who has given a bond for faithful performance, cannot be compelled to repair by mandatory injunction. *Franklin Fireproofing Co. v. City of Dallas*, 29 C. A. 448, 68 S. W. 820.

If the railroad company fails to construct sufficient culverts and sluices, and damage results from such failure, injunction will lie to compel such construction; and if a dam has been constructed across the channel of a stream over which the road passes, and the dam creates a nuisance by diverting the water from its natural channel and causing it to overflow and injure land of adjacent owners, an injunction will lie in favor of such owners to compel the removal of the dam. *G., C. & S. F. Ry. Co. v. Harbison* (Civ. App.) 88 S. W. 454.

Though a decree that a party open a public highway across its property made no provision for the contingency of noncompliance, the court is not powerless to extend relief and a mandatory order will lie. *Santa Fé Townsite Co. v. Norvell*, 55 C. A. 488, 118 S. W. 762.

Scope of remedy by mandatory injunction stated. *Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 C. A. 611, 121 S. W. 716.

Where interference of defendant's telegraph and telephone lines with trees in front of plaintiff's premises could be obviated without great expense or inconvenience, the issue of a mandatory injunction is proper. *Southwestern Telegraph & Telephone Co. v. Smithdeal* (Civ. App.) 126 S. W. 942.

Proceedings for an order compelling defendant to furnish water to irrigate plaintiff's crop held one for mandamus and not injunction. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 133 S. W. 494.

An owner of property abutting on a street recovering damages for injury caused by the maintenance of telegraph and telephone wires in the street held not entitled to a mandatory injunction. *Southwestern Telegraph & Telephone Co. v. Smithdeal*, 104 T. 258, 136 S. W. 1049.

Mandatory injunctions are not issued unless extreme or very serious damage will ensue from withholding relief. *Id.*

An owner of shade or ornamental trees held entitled to a mandatory injunction for the removal of telegraph and telephone lines threatening to destroy the trees. *Id.*

Plaintiff held not entitled to mandatory injunction, requiring the board of trustees of an independent school district to recognize his right to act as superintendent of the schools, and to control them; he having refused to perform his contract with the trustees. *Young v. Dudley* (Civ. App.) 140 S. W. 802.

Great caution is exercised in issuing a mandatory injunction, plaintiff being required to make out a clear case, and one must show that he would receive substantial injury if the writ were refused, to be entitled to a mandatory injunction. *Simon v. Nance* (Civ. App.) 142 S. W. 661.

A mandatory injunction will not generally be granted until final hearing on the merits, unless on a showing of a clear right, and a case of necessity or extreme hardship. *Ort v. Bowden* (Civ. App.) 148 S. W. 1145.

As a general rule, a mandatory injunction should not be ordered before a final hearing and to execute the judgment. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

Where a railroad company willfully fails to comply with Const. art. 10, § 9, requiring railroads to pass through county seats within three miles of their line, the court can enforce obedience thereto by mandatory injunction. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

29. — **Transfer of possession.**—Trustee in possession of firm goods to be sold to pay debts held entitled to injunction compelling restoration of goods seized on execution against one partner. *Sumner v. Crawford*, 91 T. 129, 41 S. W. 994.

Doctrine that it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title does not apply where the effect of the injunction is only to restore plaintiff's possession, which had been forcibly invaded, and preserve the status until the party's rights could be determined. *Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 C. A. 611, 121 S. W. 716.

A mandatory injunction may be granted in a proper case without notice, even for the purpose of restoring to the owner possession of the premises of which he has been deprived by trespass. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

Grounds for granting a preliminary injunction to transfer the possession of land

from one person to another stated. *Simms v. Reisner* (Civ. App.) 134 S. W. 278; *Montgomery County Development Co. v. Miller-Vidor Lumber Co.*, 139 S. W. 1015.

A temporary injunction cannot be used to divest property from one party to another; the only legitimate scope of such a remedy being to preserve the status quo of the parties' rights until the determination of the litigation. *Mendelsohn v. Gordon* (Civ. App.) 156 S. W. 1149.

30. Proceedings which may be restrained in general.—An injunction will not be granted to control the proceedings of courts on the ground of errors of law or judgment, where no appeal is allowed. *Railway Co. v. Dowe*, 70 T. 1, 6 S. W. 790; *Id.*, 70 T. 5, 7 S. W. 368.

An injunction will be granted to restrain the sale of property in the hands of a receiver, seized under a writ of attachment. *Railway Co. v. Lewis*, 81 T. 5, 16 S. W. 647, 26 Am. St. Rep. 776.

31. Civil actions.—An injunction will be granted to restrain the collection of a negotiable note given for land to which the vendor had no title. *Bedwell v. Thompson*, 25 T. Sup. 247.

Where plaintiff and defendant are subject to the jurisdiction of the court, the former may obtain an injunction to restrain the defendant from prosecuting a garnishment suit in another state, when no law exists in the state where the suit was begun which affords the protection given by the laws of Texas. *Moton v. Hull*, 77 T. 80, 13 S. W. 849, 8 L. R. A. 722.

An injunction granted by the district court restraining a party from prosecuting a suit in the county court infringes on the jurisdiction of the county court. *Gulf, C. & S. F. Ry. Co. v. Cleburne Ice & Cold Storage Co.*, 37 C. A. 334, 83 S. W. 1100.

The general rule stated as to when equity will not enjoin an action at law. *Steger & Sons Piano Mfg. Co. v. MacMaster*, 51 C. A. 527, 113 S. W. 337.

Negligent failure to interpose defenses in an action held not ground for restraining the prosecution of the action. *Turner v. Patterson*, 54 C. A. 581, 118 S. W. 565.

Petitioner held entitled to enjoin defendant from maintaining an action in a justice's court for loss of property of the value of \$20, which property was covered by a judgment against petitioner in a former action by defendant. *Engleman v. Missouri, K. & T. Ry. Co.* (Civ. App.) 118 S. W. 1089.

A complainant in an interpleader suit may enjoin proceedings in another court against him for the same debt, fund, or duty that the entire litigation may be drawn into one principal action. *Rochelle v. Pacific Express Co.*, 56 C. A. 142, 120 S. W. 543.

Where a court of equity has jurisdiction of the person of the defendants, it may restrain them from prosecuting actions in another state or a foreign country, although the actions involve property located in such other country. *Nelson v. Lamm* (Civ. App.) 147 S. W. 664.

Injunction does not lie to stay prosecution of a suit merely because there is no cause of action to sustain it or to enjoin assertion of a cross-action where no fraud in prosecuting it is claimed. *Courchesne v. Santa Fé Fuel Co.* (Civ. App.) 155 S. W. 684.

That judgments of a justice court or of a county court would be final in certain suits brought in justice court does not authorize the county court to enjoin prosecution of such suits. *Id.*

32. — Preventing multiplicity of suits.—Injunction will be granted to restrain successive suits on the same cause of action. *Cannon v. Hendrick*, 5 T. 339; *Railway Co. v. Dowe*, 70 T. 5, 7 S. W. 368.

Where the rights of a large number of persons are involved, or a multitude of suits may be avoided and great individual loss and damage prevented, a court of equity may interfere to prevent the collection of a tax, if its validity may be considered and determined by the court just as consistently with public policy before as after its collection. *George v. Dean*, 47 T. 73.

An injunction will be granted to restrain a multiplicity of suits when the causes of action may be joined. *Railway Co. v. Dowe*, 70 T. 1, 6 S. W. 790; *Id.*, 70 T. 5, 7 S. W. 368.

An action for an injunction held not maintainable on the ground of preventing a multiplicity of suits. *Hammer v. Garrett* (Civ. App.) 133 S. W. 1058.

In the absence of any alleged defense avoiding the policy, or any denial of liability thereon, equity will not enjoin insured, under a health and accident policy providing monthly indemnity for disability, from bringing suits for each part of the indemnity as it became due. *Rau v. American Nat. Ins. Co.* (Civ. App.) 154 S. W. 645.

33. Criminal prosecutions.—Injunction will not lie to restrain a tax collector from instituting criminal proceedings against one pursuing occupation without paying the tax. *Yellowstone Kit v. Wood*, 18 C. A. 683, 43 S. W. 1068.

Equity had no jurisdiction to entertain a suit for injunction to restrain the county attorney from prosecuting plaintiff's salesman for sales of alcohol to druggists. *Greiner-Kelley Drug Co. v. Truett*, 97 T. 377, 79 S. W. 4.

A person threatened with prosecution for violation of municipal ordinance held not entitled to relief by injunction. *City of Tyler v. Story*, 44 C. A. 250, 97 S. W. 856.

Prosecution of plaintiff for alleged violation of city ordinance will not be enjoined, he having an adequate remedy at law. *City of Galveston v. Mistrot*, 47 C. A. 63, 104 S. W. 417.

Injunction will not lie to enjoin the enforcement of an ordinance enforceable only by criminal prosecution. *Kissinger v. Hay*, 52 C. A. 295, 113 S. W. 1005.

Equity deals only with civil and property rights, and an injunction will not be granted to restrain the prosecution of criminal acts. *McDonald v. Denton* (Civ. App.) 132 S. W. 823.

A liquor dealer held to have no property right in a license which will entitle him to enjoin criminal proceedings thereon. *Lane v. Schultz & Buss* (Civ. App.) 146 S. W. 1009.

Injunction held not to lie to prevent a comptroller and county judge from bringing criminal proceedings for doing business under a void liquor license. *Id.*

34. **Criminal acts.**—Where property rights are involved, courts will issue an injunction, although it may embrace the restraint of a crime. *Ex parte Allison*, 48 Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684.

Plaintiff's right to cultivate land held a property right which equity would protect by injunction from threatened violence to plaintiff, if he cultivated it. *Ramon v. Saenz* (Civ. App.) 122 S. W. 928.

35. **Foreclosure proceedings.**—An injunction to restrain the sale of land under a deed of trust on the ground of usury will be refused, except as to the usurious interest. *Spann v. Stern's Adm'rs*, 18 T. 556.

An injunction will be granted to restrain the prosecution of a suit to foreclose a lien on land, where the debt may be extinguished as a stale demand. *Mott v. Maris* (Civ. App.) 29 S. W. 825.

Lessor held entitled to enjoin foreclosure sale of permanent improvements made by lessee. *Hammond v. Martin*, 15 C. A. 570, 40 S. W. 347.

A daughter, who bought out her father's undivided interest in land, held not entitled to enjoin a foreclosure of mechanic's lien against such interest. *J. H. Baxter Lumber Co. v. Nickell*, 24 C. A. 519, 60 S. W. 450.

✓ An injunction to restrain a sale of cattle under a junior mortgage until the equities of the parties could be determined on final trial held properly awarded at the instance of a senior mortgagee. *Citizens' State Bank v. First Nat. Bank*, 56 C. A. 515, 120 S. W. 1141.

Injunction by a vendee of land to restrain the vendor from selling under deed of trust on the ground of defects in title held not to lie under the facts. *Dealey v. Lake* (Civ. App.) 131 S. W. 441.

In an action to restrain the sale of bonds, plaintiff held not entitled to set off a certain claim against defendant's claim for interest on bonds, so as to prevent a foreclosure for default in payment of interest. *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Civ. App.) 132 S. W. 868.

✓ An injunction to restrain the foreclosure of vendor's lien notes held properly denied. *Frantz v. Masterson* (Civ. App.) 133 S. W. 740.

An injunction to restrain a sale of personal property to satisfy a landlord's lien held not allowable at the suit of a purchaser who bought with knowledge of the lien. *Ingraham v. Rich* (Civ. App.) 136 S. W. 549.

A maker of notes secured by a trust deed cannot enjoin a sale thereunder for the entire debt on the ground that attorney's fees and commissions are extortionate. *Corbett v. Sweeney* (Civ. App.) 151 S. W. 858.

36. **Trespass or injury to real property.**—Injunction will not be granted to prevent a trespass, unless irreparable injury is shown. *Lutcher v. Norsworthy* (Civ. App.) 27 S. W. 630.

Plaintiff in trespass to try title held entitled to temporarily enjoin defendant from interfering with his use of wells, etc., on the land, used in watering about 1,000 cattle in pasture adjoining such land. *Buchanan v. Wilburn* (Civ. App.) 105 S. W. 841.

Complainants, having illegally removed a schoolhouse from land dedicated for school purposes, held not entitled to an injunction to restrain defendants from removing the house from the place complainants had located it. *Sanders v. Cauley*, 52 C. A. 261, 113 S. W. 560.

The trustees of a church owning and in possession of a house of worship held entitled to sue in equity to restrain a former member of the church from interfering with the building. *Knox v. Askew* (Civ. App.) 131 S. W. 230.

To enjoin one from trespassing upon land, the right of possession of complainant must be superior to that of him against whom the relief is sought. *Paul v. City of El Paso* (Civ. App.) 131 S. W. 438.

A showing that its possession had been invaded and injured entitled a corporation in custody and control of property to an injunction restraining trespass. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

A railroad company is entitled to perpetually enjoin lunch vendors from going upon its depot platform or upon its right of way at, or adjacent to, its passenger station, as well as from going upon its passenger coaches, to sell articles of food. *Ft. Worth & D. C. Ry. Co. v. White* (Civ. App.) 156 S. W. 241.

37. — **Erection of buildings.**—An adjacent property owner held entitled to restrain the construction of a building of combustible material, in violation of an ordinance, and the erection of other buildings of combustible material, in violation of an ordinance, cannot preclude him from restraining the construction of such building contiguous to his property. *Chimene v. Baker*, 32 C. A. 520, 75 S. W. 330.

Where the owner of a lot adjoining other vacant lots before building a residence on his lot obtains from the owner of the adjoining lots an assurance that he will not erect on his lot a wagon and feed yard, after the erection of the residence, he has an equitable right by estoppel to enjoin the erection of the objectionable structures. *Woods v. Lowrance*, 49 C. A. 542, 109 S. W. 419, 420.

38. — **Stay of waste.**—In a suit to quiet title, plaintiff in possession under a claim of ownership held entitled to an injunction pendente lite to protect the property against injury and waste. *Chancey v. Allison*, 48 C. A. 441, 107 S. W. 605.

Injunction is proper in trespass to try title to stay waste which would result in irreparable injury to property pending the action. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

Where plaintiff sought an injunction on the ground that the tenant and subtenant were committing waste, and intended to carry on an obnoxious business, he could not obtain relief against the subtenant on the ground that the lease stipulated against subletting without written consent. *Fred v. Moseley* (Civ. App.) 146 S. W. 343.

39. **Violation of contract in general.**—Plaintiff need not show damages to obtain an injunction to enforce a covenant to refrain from engaging in a particular business. *Anderson v. Rowland*, 18 C. A. 460, 44 S. W. 911.

The violation of a contract by which one sells his business and agrees not to engage therein in that place, binding himself to pay a stipulated sum on violation of the con-

tract as liquidated damages, will not be enjoined. *Rucker v. Campbell*, 35 C. A. 178, 79 S. W. 627.

Where, for a valuable consideration, a railroad company has contracted to establish its general offices and locate its machine shops and roundhouses in a town or city, an injunction will lie to prevent their removal by the company from said town or city, and the company cannot by amending its charter acquire the right of removal of its offices, machine shops, etc. *City of Tyler v. St. L. S. W. Ry. Co.*, 90 T. 491, 91 S. W. 4, 13 Ann. Cas. 911.

One brother held not entitled to enjoin another from violating a contract to support their sister on the theory that a nuisance would result to plaintiff in being compelled to care for her. *Caruth v. Caruth* (Civ. App.) 144 S. W. 300.

Where the discontinuance of operation of a street car line in violation of contract would result in serious damage while it did not appear that its operation would damage the company, held that a temporary injunction would be sustained. *Houston Electric Co. v. Glen Park Co.* (Civ. App.) 155 S. W. 965.

40. Breach of covenant.—That plaintiff recovered damages already suffered for a breach of the contract not to reopen business is no reason for refusing an injunction protecting him for the future. *Welsh v. Morris*, 81 T. 159, 16 S. W. 744, 26 Am. St. Rep. 301.

An injunction will be granted to enforce a covenant not to engage in a particular business, although the plaintiff does not show any damages. *Anderson v. Roland*, 18 C. A. 460, 44 S. W. 911.

A covenant in a deed limiting the use of the land conveyed will be enforced in equity by injunction, though the covenant is not of the class technically running with the land. *Woods v. Lowrance*, 49 C. A. 542, 109 S. W. 418.

41. Sale of corporation stock for assessments.—An injunction will be granted to restrain the sale of nonassessable stock in a corporation for assessments illegally made. *San Antonio Ry. Co. v. Adams* (Civ. App.) 25 S. W. 639.

42. Interference with franchise.—Where a telephone company, pursuant to its franchise, erected poles and strung wires thereon, an electric light company, whose franchise was granted afterwards, will be enjoined from placing its wires in such close proximity as to impair the efficiency of the telephone service. *Paris E. L. R. Co. v. S. W. Tel. Co.* (Civ. App.) 27 S. W. 902.

43. Acts of public officers, boards, and municipalities.—Injunction will lie to restrain the illegal seizure or use of books and papers pertaining to any public office, the illegal expenditure of county funds or the illegal issue and delivery of county bonds. *Caruthers v. Harnett*, 67 T. 127, 2 S. W. 523.

Sureties on a city treasurer's bond may by injunction protect themselves against a misappropriation of the city funds in the hands of such treasurer. *City of Bonham v. Taylor*, 81 T. 59, 16 S. W. 555.

To authorize an injunction restraining the council of a city organized under the general laws of the state in the exercise of the powers conferred by statute, the complainant must show himself injured by the impairment or deprivation of some vested right. *Wootters v. City of Crockett*, 11 C. A. 474, 33 S. W. 391. See *Conner v. City of Paris*, 27 S. W. 88, 87 T. 32.

A city should not be enjoined from interfering with a lot when it has only attempted to remove fences from the adjoining street. *City of San Antonio v. Campbell* (Civ. App.) 56 S. W. 97.

Courts held to have no power to enjoin the officers of a state, unless they are about to take some act under an unconstitutional law, which constitutes an unlawful interference with the rights of complainant. *Missouri, K. & T. Ry. Co. of Texas v. Shannon*, 100 T. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681.

Where a tax levied by a school district was illegal because excessive, bonds proposed to be issued upon such illegal levy will be enjoined. *Snyder v. Baird Independent School Dist.*, 102 T. 4, 113 S. W. 521.

A railway company may restrain the enforcement of an unreasonable order of the railroad commission, requiring the company to erect and maintain a depot at a place designated. *Railroad Commission of Texas v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 114 S. W. 192.

Courts will not enjoin adoption of an ordinance within the legislative discretion of the governing body of a municipal corporation. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

A court of equity cannot enjoin peace officers from enforcing a valid criminal statute. *Id.*

Where a railroad has not for five or six years used a portion of its track, which the erection of a sea wall by a city renders it impracticable to rebuild, a temporary injunction against interference by the city with the construction of a track on a new location, which would accomplish the whole purpose of the suit without a trial upon the merits, is properly refused. *Galveston & W. R. Co. v. City of Galveston* (Civ. App.) 137 S. W. 724.

In mandamus to compel the county commissioners' court to take certain sections of land out of the E. school district, where they had been fraudulently placed by the commissioners in dividing the county into common school districts, and permit them to be annexed to the C. independent district, the petition alleged that E. school district bonds were about to be issued, and would be signed by the county judge and treasurer on a certain day, and that, upon the issuance and sale of the bonds, they would become liens on the E. school district, including the sections sought to be withdrawn, for 30 years, and prayed that the county judge and treasurer be restrained from signing the proposed bonds, and that the commissioners' court be restrained from buying them with county funds until they have been approved by the attorney general. Under this article and Const. art. 5, § 8, as amended in 1891, giving a district court general supervisory control over the commissioners' courts, and general original jurisdiction over all causes of action whatever for which a remedy is not provided, a temporary injunction was properly granted as prayed. *McLaughlin v. Smith* (Civ. App.) 140 S. W. 248.

Where the validity of evidences of indebtedness issued by the court of county com-

missioners to pay for the construction of a courthouse was doubtful, it being questionable whether they were bonds under Acts 1889, c. 149, the issuance of such indebtedness will not be enjoined at the suit of taxpayers. Commissioners' Court of Floyd County v. Nichols (Civ. App.) 142 S. W. 37.

The question of the building of a courthouse rests in the discretion of the county commissioners, and hence, though the majority of the taxpaying voters are opposed, they are not entitled to an injunction to prevent the building of a courthouse according to plans selected by the court. *Id.*

44. — **Levying and collecting tax.**—It is not sufficient ground for an injunction restraining the collection of a tax upon an assessment actually made, that it has not been correctly described on the assessment rolls prepared from the assessment actually made. *Prima facie*, the tax is due upon the assessment, and equity will not aid one who is himself in default. *Harrison v. Vines*, 46 T. 15.

A misdescription of the property of a taxpayer by the assessor, or a mere irregularity in his entry of it upon the assessment list or roll, furnishes no sufficient ground for enjoining the collection of a tax for which the plaintiff was justly liable, and with which his property had been legally assessed by the proper officer charged with this duty. *George v. Dean*, 47 T. 73.

Injunctions granted to restrain the sale of property levied on to satisfy a tax illegally assessed. *George v. Dean*, 47 T. 84; *Bank v. Rogers*, 51 T. 606; *Court v. O'Connor*, 65 T. 339; *Davis v. Burnett*, 77 T. 3, 13 S. W. 613; *Schmidt v. Railway Co.* (Civ. App.) 24 S. W. 546.

Where cattle properly assessed for taxation in one county were also assessed in another county, it was not necessary, before applying for an injunction against the latter assessment to seek relief from the board of equalization, or other officers having control in matters of taxation, and unimportant whether the taxes in the former county were paid before or after the levy which was sought to be enjoined. It was sufficient if the right to the taxes had fully accrued to that county, and this was effected by the previous assessment made thereon. *Court v. O'Connor*, 65 T. 334; *Hardesty v. Fleming*, 57 T. 400.

The acts of an assessor listing land in the wrong county and selling the same do not cast a cloud upon the title thereto which would authorize an injunction to restrain the collection of the tax. *Chisholm v. Adams*, 71 T. 678, 10 S. W. 336.

The collection of illegal taxes will be restrained by injunction. *Davis v. Burnett*, 77 T. 3, 13 S. W. 613; *Court v. O'Connor*, 65 T. 334. See *Rosenberg v. Weekes*, 67 T. 578, 4 S. W. 899; *Cook v. Railway Co.*, 24 S. W. 544, 5 C. A. 644.

An injunction will not be granted to prohibit a tax collector from demanding an occupation tax. *Yellowstone Kit v. Wood*, 18 C. A. 683, 43 S. W. 1068.

A property owner may be required to pay the legal tax before being granted equitable relief against an excessive tax. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

In the absence of a showing that school trustees did not act for the best interests of the districts, their acts in changing the location of the school building are no ground for restraining levy taxes ordered by the district. *Boesch v. Byrom*, 37 C. A. 35, 83 S. W. 18.

The levy of a tax voted by a school district will not be restrained because the call for the election to authorize such tax was participated in by *de facto* trustees. *Id.*

Action against state officers to enjoin collection of tax held not a suit against state. *Galveston, H. & S. A. Ry. Co. v. Davidson* (Civ. App.) 93 S. W. 436; *Texas & P. Ry. Co. v. Stephens, Id.*; *Gulf, C. & S. F. Ry. Co. v. Davidson, Id.*; *Missouri, K. & T. Ry. Co. of Texas v. Same, Id.*; *International & G. N. R. Co. v. Stephens, Id.*; *St. Louis Southwestern Ry. Co. of Texas v. Davidson, Id.*; *State v. Galveston, H. & H. Ry. Co. of 1882*, 93 S. W. 460, 469; *Texas & P. Ry. Co. v. State*, 93 S. W. 461, 469; *St. Louis Southwestern Ry. Co. of Texas v. Same, Id.*; *Missouri, K. & T. Ry. Co. of Texas v. Same*, 93 S. W. 462, 469; *Houston, E. & W. T. Ry. Co. v. Same, Id.*; *Houston & T. C. R. Co. v. Same*, 93 S. W. 463, 469; *Texas & N. O. R. Co. v. Same, Id.*; *Galveston, H. & S. A. Ry. Co. v. Same*, 93 S. W. 464, 469; *International & G. N. R. Co. v. Same*, 93 S. W. 465, 469; *Ft. Worth & D. C. Ry. Co. v. Same, Id.*; *Chicago, R. I. & G. Ry. Co. v. Same*, 93 S. W. 466, 469; *San Antonio & A. P. Ry. Co. v. Same, Id.*; *State v. St. Louis, B. & M. R. Co.*, 93 S. W. 467, 469; *Gulf, C. & S. F. Ry. Co. v. Same, Id.*; *Texas Midland R. Co. v. Same*, 93 S. W. 468, 469.

A suit against state officials to restrain them from collecting a privilege tax imposed by Acts 29th Leg. p. 358, c. 148, re-enacted with modifications in 1907 and embodied in title 126, chapter 2, is a suit against the state and cannot be maintained without its consent. *Producers' Oil Co. v. Stephens*, 44 C. A. 327, 99 S. W. 157; *Texas Co. v. Stephens* (Civ. App.) 99 S. W. 160. *Contra*, see *Galveston, H. & S. Ry. Co. v. Davidson* (Civ. App.) 93 S. W. 436.

Action for injunction held not maintainable by a county tax collector to enjoin collection of a judgment for delinquent taxes recovered by the county by persons unauthorized by law to receive it. *Stringer v. Holle*, 47 C. A. 632, 105 S. W. 1146.

An action to restrain an independent school district from issuing bonds to raise money for school purposes and from levying a tax on the property in the district to pay the same held not objectionable as a collateral attack on the corporate existence of the district. *Parks v. West*, 102 T. 11, 111 S. W. 726.

A railroad company held not entitled to an injunction restraining the collection of taxes because of an unfair valuation of its property. *Missouri, K. & T. Ry. Co. of Texas v. Hassell*, 57 C. A. 522, 123 S. W. 190.

Where national bank stock was assessed in a county at 85 per cent. valuation, while all other property was assessed at a 41 per cent. valuation, there was discrimination and the stockholders might enjoin the collection of the excessive tax. *Langley v. Smith* (Civ. App.) 126 S. W. 660.

Where a school district has been organized under color of statutory authority, its corporate existence and the rights of the trustees to exercise their functions cannot be inquired into in a collateral proceeding to restrain a threatened levy and collection of taxes upon the property of plaintiffs. *Coffman v. Goree Independent School Dist.* (Civ. App.) 141 S. W. 132.

A property owner who has not paid taxes assessed against him, nor offered to pay them, cannot sue to enjoin an excessive levy. *McMahan v. Morgan* (Civ. App.) 151 S. W. 1123.

On suit to restrain the collection of taxes, that excessive property was levied on is not available to plaintiff. *Id.*

A suit against officers of a county to restrain the collection of taxes assessed against property is not a suit against the state, so as to require the consent of the Legislature to its institution. *Porter v. Langley* (Civ. App.) 155 S. W. 1042.

45. — **Acts relating to roads or streets.**—Injunction will lie to restrain the opening of a public road not legally established. *Floyd v. Turner*, 23 T. 292. But an injunction was refused when applied for on the ground that insufficient damages were awarded. *Duer v. Police Court of Austin City*, 34 T. 283.

Injunction will lie to restrain the opening of a public road under an order made without notice. Pending such injunction new proceedings may be taken to open such road, which would be a defense to the injunction, but costs will be allowed plaintiff up to date of regular condemnation. *Evans v. Live Stock & Land Co.*, 81 T. 622, 17 S. W. 232.

The owner of a lot abutting on an alley held entitled to an injunction against the obstruction of the alley by another abutter, under authority of the city. *Kalteyer v. Sullivan*, 18 C. A. 488, 46 S. W. 288.

After a city has condemned one's property for the purpose of opening a street, and time for appealing therefrom has lapsed, and an ordinance is passed changing the street through the property, an injunction will lie to prevent the opening without new condemnation proceedings. *City of San Antonio v. Sullivan*, 23 C. A. 658, 57 S. W. 45.

Opening a public road by county commissioners' court will not be restrained, because of irregular proceedings, at the instance of one who consented to its selection and urged his claim for damages, which are not shown to be insufficient or ineffectively provided for. *Allen v. Parker County*, 23 C. A. 536, 57 S. W. 703.

Injunction to prevent opening a road, because of irregular proceedings, held not to lie at the suit of one who alleges no damage, and is only interested through residence in the neighborhood and recommendation of another route. *Id.*

A property owner is entitled to an injunction to restrain the opening of a contemplated road over his land, where there has been no valid condemnation of such land for the road. *Plowman v. Dallas County* (Civ. App.) 88 S. W. 252.

Where gates have been constructed across a third-class road under a statute permitting them when the right of way was granted to the county without compensation, held, that an injunction would lie to restrain their removal by the county authorities. *Adkins v. Bumgardner* (Civ. App.) 99 S. W. 132.

An owner of land sought to be taken for a public highway held not entitled to enjoin the taking for want of just compensation on the ground that the jurors appointed to award the compensation did not possess the proper qualifications. *Midleton v. Presidio County* (Civ. App.) 129 S. W. 637.

An allegation that the commissioners' court did not after full investigation find that the public interest would be served by the alteration of a highway would not be ground for an injunction restraining the taking of land for that purpose. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 590.

Owners of land through which a proposed road was laid held not entitled to resort to equity to restrain the opening of the road. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

A number of residents and owners of land on a highway, who were similarly affected by a threatened discontinuance of the highway, could join in suing to restrain the discontinuance. *Porter v. Johnson* (Civ. App.) 140 S. W. 469.

46. — **Appointment and removal of and interference with officers.**—An injunction will be granted to restrain the usurpation of the office of county clerk by one claiming under an appointment by the commissioners' court, which did not have authority to determine whether or not a vacancy existed. *Ehlinger v. Rankin*, 29 S. W. 240, 9 C. A. 424.

A municipal officer de jure or de facto is entitled to an injunction to restrain the city authorities from unlawfully appointing a successor and dispossessing him of his office and property thereof. *Callaghan v. McGown* (Civ. App.) 90 S. W. 319; *Same v. Tobin*, 40 C. A. 441, 90 S. W. 328; *Same v. Irvin*, 90 S. W. 335.

One elected a member of the board of education of a city at a regular election for a specified term held entitled to an injunction to prevent one from wrongfully ousting him from office. *Bonner v. Belsterling* (Civ. App.) 137 S. W. 1154.

The superintendent of the public schools of a city, holding office for a specified term to which is attached a salary not due, is entitled to restrain persons usurping the office of board of education from removing him from his office or interfering with him in the discharge of his office. *Lefevre v. Belsterling* (Civ. App.) 137 S. W. 1159.

In a suit by a de facto incumbent of the office of chief of police of a city to determine the right to the office, the court, on an application by plaintiff for a temporary injunction, could not properly grant defendant a temporary injunction on his cross-bill. *Perrett v. Wegner* (Civ. App.) 139 S. W. 984.

Injunction held the proper remedy of a school superintendent to compel the school trustees to recognize his right to the office, and to prevent them from interfering therewith. *Young v. Dudley* (Civ. App.) 140 S. W. 802.

47. — **Publishing election returns.**—Publication of the result of a local option election cannot be enjoined. *Ex parte Mayes*, 39 Cr. R. 36, 44 S. W. 831.

Petition for injunction to restrain the publication of the result of a local option election, on the ground of the unconstitutionality of the law, held to state a cause of action within the cognizance of a court of equity. *Sweeney v. Webb*, 33 C. A. 324, 76 S. W. 766.

An injunction does not lie to restrain the commissioners' court from canvassing the returns and publishing notice of the result of a local option election. *Robinson & Watson v. Wingate*, 98 T. 267, 83 S. W. 182.

An injunction will not lie to restrain the declaration of the result of an election locating a county seat. *Townsen v. Mersfelder*, 49 C. A. 289, 109 S. W. 420.

48. **Enforcement of void ordinance.**—Injunction will lie to restrain the enforcement of an ordinance of a city which is void. *City of Austin v. Austin City Cemetery Ass'n*, 28 S. W. 528, 87 T. 330, 47 Am. St. Rep. 114.

The enforcement of a void ordinance, not resulting in irreparable injury to vested property rights, cannot be restrained. *Wade v. Nunnally*, 19 C. A. 256, 46 S. W. 668.

One held not entitled to maintain a suit to restrain the enforcement of a void ordinance where no property rights will be affected by the enforcement thereof. *Robinson v. City of Galveston*, 51 C. A. 292, 111 S. W. 1076.

Where the enforcement of a void ordinance regulating plumbers will injure the business of a firm engaged in the plumbing business, injunction will lie to restrain the enforcement of the ordinance. *Id.*

Where the attempted enforcement of an invalid ordinance would constitute an invasion of property rights, its enforcement will be enjoined. *Goar v. City of Rosenberg*, 53 C. A. 218, 115 S. W. 653.

Injunction lies to protect private rights against an illegal ordinance. *Hatcher v. City of Dallas (Civ. App.)* 133 S. W. 914.

The rule that equity will not interfere by injunction to prevent criminal prosecutions under a void city ordinance is subject to the rule that equity will grant relief where there is not a plain, adequate, and complete remedy at law, and when it is necessary to prevent irreparable injury. *City of Houston v. Richter (Civ. App.)* 157 S. W. 189.

Equity, at the suit of numerous journeymen plumbers of a city suing for themselves and others similarly situated, may restrain by injunction the enforcement of a void ordinance, requiring journeymen plumbers to procure a city license and give a bond. *Id.*

49. **Publication of libel.**—The general rule is that injunction will not lie to restrain publication of a libel, especially in view of the guaranty of liberty of speech in Const. art. 1, § 8. *Mitchell v. Grand Lodge, Free & Accepted Masons*, 56 C. A. 306, 121 S. W. 178.

50. **Nuisance.**—An injunction will be granted to restrain the establishment of a nuisance. *Jung v. Neraz*, 71 T. 396, 9 S. W. 344; *Waters-Pierce Oil Co. v. Cook*, 26 S. W. 96, 6 C. A. 573.

Where a barn and barnyard, used as a breeding ground and for dairy purposes, constitute a nuisance, an injunction will lie. *Hockaday v. Wortham*, 22 C. A. 419, 54 S. W. 1094.

Where a city granted a franchise to construct a sewer, and provided for its terminal on a creek flowing through plaintiff's land, which polluted the stream, an injunction restraining the maintenance of the terminal held properly granted. *Donovan v. Royall*, 26 C. A. 248, 63 S. W. 1054.

Where a cotton gin near a residence is a nuisance, in that it interferes with the comfortable enjoyment of the residence, the owner, though not residing there, is entitled to injunction against the nuisance. *Faulkenbury v. Wells*, 28 C. A. 621, 68 S. W. 327.

The mere proximity of a proposed cemetery to residence property, and the consequent depreciation of its value, affords no right of action to restrain the establishment of the cemetery. *Elliott v. Ferguson*, 37 C. A. 40, 83 S. W. 56.

Where an injunction was asked to restrain defendants from establishing a cemetery where it would pollute plaintiff's wells and springs held, that the rule as to the balance of convenience did not apply. *Elliott v. Ferguson (Civ. App.)* 103 S. W. 453.

The right to abate nuisances is a well-established doctrine of equity courts, based on the maxim that the owner of property must so use it as not to materially injure another. *Hamm v. Gunn*, 51 C. A. 424, 113 S. W. 304.

In an action to abate a nuisance caused by noxious vapors arising upon the land of another, it must be shown that the injury visibly diminishes the value of plaintiff's property and the comfort and enjoyment of it. *Boyd v. Schreiner (Civ. App.)* 116 S. W. 100.

When the cause of annoyance and discomfort arising from a nuisance is continuous equity will restrain it. *Id.*

Injury to the business of keeping a hotel occasioned by a nuisance held susceptible to ascertainment and satisfaction in money so that an injunction would not lie to restrain the nuisance. *Galveston, H. & S. A. Ry. Co. v. De Groff*, 102 T. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749.

Residents of cities, towns, or villages must of necessity submit to consequences resulting from occupations and pursuits carried on in the immediate neighborhood which are lawful and necessary for trade and commerce; and matters which, though in themselves annoying, are in the nature of ordinary incidents of city or town life, cannot be abated as nuisances. *Gose v. Coryell (Civ. App.)* 126 S. W. 1164.

An injunction against the maintenance of a cotton gin alleged to constitute a nuisance should not be granted, unless, in addition to the proof ordinarily necessary to establish the existence of a nuisance, it appears that in maintaining the gin where located defendant is acting unreasonably; such question being one of fact to be determined from all the testimony. *Id.*

Locality is to be considered in determining whether a certain use of property is a nuisance, and, if so, whether relief should be awarded by injunction or the injured party be restricted to an action for damages. *Id.*

Before equity will enjoin the construction of works not per se a nuisance, it must clearly appear that the operation thereof will create a nuisance. *Robinson v. Dale (Civ. App.)* 131 S. W. 308.

Under subdivision 1 of this article, authorizing the court to restrain an act prejudicial to the applicant therefor, one aggrieved by a nuisance seriously affecting his health and life, and the comfortable enjoyment of his home, may sue in equity to abate the nuisance, though the person causing the nuisance is financially responsible for the damages incurred for the injury caused thereby one for which there is no adequate remedy at law. *Stark v. Coe (Civ. App.)* 134 S. W. 373.

Owners of lots abutting upon a public square dedicated for county courthouse purposes held entitled to enjoin its use for the construction of a public comfort station by the town. *Clement v. City of Paris (Civ. App.)* 154 S. W. 624.

51. — **Public or private injury.**—An injunction will be granted in behalf of the state to abate a public nuisance which is an injury to the property or civil rights of the public at large and which it is her duty, as agent of the public, to prevent. *State v. Goodnight*, 70 T. 682, 11 S. W. 119; *City of Belton v. Central Hotel* (Civ. App.) 33 S. W. 297; *State v. Patterson*, 14 C. A. 465, 37 S. W. 478.

This article does not authorize the court to enjoin a public nuisance created by one pursuing the business of selling intoxicating liquor without a license, but the party seeking the remedy must show himself entitled to the writ under the general principles of equity unless he brings himself by pleading and proof clearly within the letter of some statute enlarging the remedy. *Spence v. Fenchler* (Civ. App.) 151 S. W. 1094.

52. — **Operation of railroads.**—An injunction to restrain a freight street railway company from operating its road held properly denied, on the ground that the injury was not irreparable. *Rische v. Texas Transp. Co.*, 27 C. A. 33, 66 S. W. 324.

Where a street railway company, incorporated for transportation of freight, has obtained the sanction of the municipal authorities, an abutting property owner cannot restrain its use of the street. *Id.*

A railroad company has the right to acquire all the lands that it needs in the construction and operation of its road, and a private citizen cannot enjoin the company from building and operating necessary round houses, machine shops, water tanks, coal bins, etc., on its property, because these things disturb him in his home near by, and depreciate the value of his property, although he may have a cause of action for damages thereby occasioned. *Rainey v. Red River, T. & S. Ry. Co.* (Civ. App.) 80 S. W. 95.

A railroad company cannot select its location for machine shops arbitrarily and without reference to damage to property or to the discomfort of persons living nearby. In a proper case it can be enjoined. If it is not proper to enjoin, the injunction should be denied and the party complaining left to his action for damages. *Rainey v. Red River, T. & S. Ry. Co.*, 99 T. 276, 89 S. W. 772, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622, 13 Ann. Cas. 580.

Vibration and noises caused by a railroad using city streets lawfully for making up trains, switching, etc., do not constitute such a nuisance as can be prohibited by injunction. *Galveston, H. & S. A. Ry. Co. v. De Groff* (Civ. App.) 110 S. W. 1006.

Facts held to show special injury to a hotel keeper by the operation of railroad trains in a city street, such as to authorize its restraint as a private nuisance. *Id.*

53. **Calling state convention.**—An illegal call for a state convention will not be enjoined by a court of equity, since such relief would be purely for the protection of a political right. *McDonald v. Lyon*, 43 C. A. 484, 95 S. W. 67.

54. **Enforcement of resolution by insurance society.**—Where the executive officers of a mutual benefit society attempt to enforce an unauthorized resolution, the member's remedy is by injunction. *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Civ. App.) 131 S. W. 92.

55. **Cancellation of or change in beneficiary certificate.**—A mutual benefit association cannot be enjoined from issuing a new certificate changing the beneficiary as requested by the member, notwithstanding alleged equitable rights of plaintiff. *Grand Lodge A. O. U. W. of Texas v. Jones*, 47 C. A. 533, 106 S. W. 184.

Unless the threat by officers of an association to cancel complainant's certificate, if executed, will produce substantial injury, it is no ground for injunction. *Royal Fraternal Union v. Lundy*, 51 C. A. 637, 113 S. W. 185.

56. **Sale of note.**—An injunction will be granted to restrain the negotiation of negotiable promissory notes obtained by fraud. *Bedwell v. Thompson*, 25 T. Sup. 247.

In a suit to restrain the sale of a vendor's lien note held by defendant against plaintiff, an objection to the complaint held untenable. *Neal v. Whitlock*, 45 C. A. 457, 101 S. W. 284.

57. **Sale of community property.**—Pending suit for divorce the plaintiff, being a married woman, may obtain a writ of injunction to restrain her husband from selling or encumbering the community property. Art. 4643; *Wright v. Wright*, 3 T. 168.

58. **Fraudulent transfer of property.**—Injunction will lie to restrain the fraudulent transfer of property. *Washington County v. Schulz*, 63 T. 32.

59. **Interference with corporate management.**—Equity held to have jurisdiction of the suit of a corporation at the instance of its de facto officers to enjoin others claiming to hold the offices, where their acts interfere with the management of the corporation business. *De Zavala v. Daughters of the Republic of Texas* (Civ. App.) 124 S. W. 160.

60. **Use or control of live stock.**—An injunction will be granted to restrain a person from controlling live stock on the range, the property of the plaintiff in the suit. *Hickman v. Hickman*, 5 C. A. 99, 27 S. W. 31.

Where the administration of the estate of a decedent was pending in the probate court, one suing for the foreclosure of a mortgage covering certain live stock belonging to the estate could not in such suit secure an injunction restraining the use of the animals. *Dunovant's Estate v. R. E. Stafford & Co.*, 36 C. A. 33, 81 S. W. 101.

61. **Building party wall.**—Where plaintiff agreed that defendant might erect a party wall on the division line between their respective lots, injunction is the proper remedy to prevent defendant from building the wall in an improper manner, without a showing of irreparable injury. *Everly v. Driskill*, 24 C. A. 413, 58 S. W. 1046.

62. **Communicating with plaintiff's wife.**—Restraining defendant in a suit for the partial alienation of a wife's affection from conversing with, or writing to her in any way, or associating with her, held not inconsistent with freedom of speech or of the press or of locomotion; and defendant could be enjoined from speaking to her, though the conversation may not tend to a breach of marital relations between plaintiff and his wife. *Ex parte Warfield*, 40 Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

63. **Selling railroad tickets.**—A carrier held entitled to an injunction to restrain the dealing in return trip tickets not transferable. *Lytle v. Galveston, H. & S. A. Ry. Co.*, 100 T. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437.

A railroad company is not entitled to an injunction against dealing in nontransferable railway tickets which may thereafter be issued as occasion may arise. *Lytle v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 100 S. W. 199.

64. **Erection or maintenance of levee or dam.**—Equity will not interfere at the suit of an owner of land bordering on a stream with a right of the adjacent owner to erect levees on his own land, unless material injury results therefrom. *Knight v. Durham* (Civ. App.) 136 S. W. 591.

A married woman could not enjoin the maintenance of a dam by a corporation entitled to exercise the power of eminent domain, which would submerge a homestead, where the husband had waived prepayment of compensation before appropriation of the land, but was only entitled to recover compensation for her homestead. *Reitzer v. Medina Valley Irr. Co.* (Civ. App.) 153 S. W. 380.

65. **Interference with right to water.**—When the natural flow of water is diverted, so as to result in injury to the owner of land, an injunction should issue to prevent the continuance of the wrong. *G., H. & S. A. R. Co. v. Tait*, 63 T. 323. But see *I. & G. N. R. Co. v. Malone*, 1 App. C. C. § 234.

Injunction to restrain upper owner from maintaining dam held properly denied, where it appeared that interference with the flow was caused by obstruction in ditch for which defendant was not liable, and not by the dam. *Standart v. Vivion*, 22 C. A. 142, 54 S. W. 44.

One who has prepared his land and planted a crop, relying on a contract whereby another was required to furnish him water, is entitled to an injunction compelling specific performance of the contract. *Bay City Irr. Co. v. Sweeney* (Civ. App.) 81 S. W. 545.

One interested in waters of a stream held entitled to have its diversion enjoined. *Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Civ. App.) 92 S. W. 1014.

Grantee of lot and appurtenances held entitled to restrain vendee of former owner from selling rights to make connections with water main supplying plaintiff's lot with water, where such connections would interfere with plaintiff's rights to an adequate supply of water. *Hunstock v. Limburger* (Civ. App.) 115 S. W. 327.

Under this article, and Art. 5088 et seq., declaring that unappropriated waters of flowing rivers may be acquired for irrigation and other purposes, a lower riparian owner is not entitled to a temporary injunction against the diversion of water for the irrigation of nonriparian land in the absence of a showing that his land is now being used or is intended for immediate use or is prepared for agricultural or other purposes rendering the use of the water of the river necessary and beneficial. *Biggs v. Leffingwell* (Civ. App.) 132 S. W. 902.

Necessity for preventing defendant from obtaining prescriptive right to take water from above plaintiff's riparian land held not sufficient to authorize the grant of a temporary injunction. *Id.*

An upper riparian owner cannot be enjoined by a lower owner from diverting water until the former shall construct an intake, headgate, canals and ditches, and a return ditch for surplus water, so that the diversion may be made without unnecessary waste, where by agreement with such lower owner the surplus water of the upper owner was turned into the lower owner's canal, as the rule requiring the return is for the benefit of and may be waived by the lower owner. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

A second appropriator of water cannot be deprived by injunction of water which a prior appropriator did not need. *Id.*

If the water supply of plaintiff irrigation company was not sufficient because another irrigation company, other than defendant, was taking with plaintiff's consent more water than it was entitled to receive, defendant could not be held responsible for the shortage in plaintiff's water supply, and itself enjoined from taking water. *Matagorda Canal Co. v. Markham Irr. Co.* (Civ. App.) 154 S. W. 1176.

66. **Pollution of water.**—The wrongful pollution of a stream by one riparian owner to the injury of others may be enjoined. *Teel v. Rio Bravo Oil Co.*, 47 C. A. 153, 104 S. W. 420.

67. **Operation of mill.**—One acquiring after maturity a note given by a buyer of a half interest in a sawmill plant and timber held not entitled to restrain the operation of the mill and the creation of liens for wages of employes under Arts. 5644-5649. *Norwood v. Leeves* (Civ. App.) 115 S. W. 53.

68. **Hearing and determination of application for injunction.**—In a suit to enjoin defendants from locating a cemetery in a certain place on the ground that it would pollute the plaintiff's wells and springs held, that it was not necessary for the jury to find which wells or springs would be polluted. *Elliott v. Ferguson* (Civ. App.) 103 S. W. 453.

On an application for temporary injunction against interference by a city with the construction of a railroad track on a new location, where the city is confined on the hearing to a denial under oath of the allegations of the petition, and to such affidavits, rebutting the case as made by the petition and supporting affidavits, as could be procured by voluntary action of the witnesses, the cause will not be decided on the merits, though there is little dispute as to the main facts, the city being entitled to have its rights determined on a full trial, where it can have compulsory process for its witnesses, with the right of cross-examination. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 137 S. W. 724.

Right to the possession of archives, records, and other property belonging to a public office cannot be determined on an application for a temporary injunction in a suit to determine title to the office. *Perrett v. Wegner* (Civ. App.) 139 S. W. 984.

Upon hearing, after granting a temporary injunction provisionally, the judge could determine the meaning of a statute upon which plaintiff's probable right to an injunction depended. *Gibson v. Sterrett* (Civ. App.) 144 S. W. 1189.

Equity will not enjoin the completion nor require the removal of a fence where the determination of the issues necessarily requires the determination of the title to the land upon which the fence is located. *Walker v. Haley* (Civ. App.) 147 S. W. 360.

69. **Decree.**—If the plaintiff admit his indebtedness in his petition, upon the dissolution of the injunction the defendant is entitled to judgment for the amount due, on a prayer to this effect, and without specific allegations as to such indebtedness. *Bourke v. Vanderlip*, 22 T. 221; *Willis v. Gordon*, 22 T. 241.

While a judgment rendered by a justice of the peace cannot be revised in the district court, it would seem that in a suit brought in the district court by the defendant, to

prevent by injunction the collection of the judgment on the ground of fraud, and because the judgment was dormant, the district court would have power to inquire whether the sum for which the judgment was rendered was still due, and if so to render a judgment against the plaintiff in the injunction suit for the amount. In such a proceeding, when it is shown that the judgment has not been paid, the injunction should be dissolved. *Seymour v. Hill*, 67 T. 385, 3 S. W. 313.

In a suit by injunction to restrain the sale of property under a judgment erroneously rendered, the defendant, who was plaintiff in the judgment, can have the judgment set aside and the proper statutory judgment rendered therein. *Krall v. Printing Press Co.*, 79 T. 556, 15 S. W. 565.

After enjoining the issuance of an execution on a void judgment, the court having obtained jurisdiction will render judgment for the amount shown to be due. *Hickman v. White* (Civ. App.) 29 S. W. 692, citing *Edrington v. Aillsbrooks*, 21 T. 186; *Willis v. Gordon*, 22 T. 241; *Witt v. Kaufman*, 25 T. Sup. 384.

A judgment in a suit to enjoin the sale of land under an execution need not determine the amount of the debt, where the only issue raised by the pleadings and evidence is whether the property is a homestead, and therefore exempt. *Warren v. Kohr*, 26 C. A. 331, 64 S. W. 62.

Where a complaint by the commissioned branch pilots seeks to restrain a pilot from acting as a branch pilot, the decree cannot include his associates, agents, and employés. *Olsen v. Smith* (Civ. App.) 68 S. W. 320; *Pettersen v. Smith*, 30 C. A. 139, 69 S. W. 542.

A decree restraining a defendant who has not been created a branch pilot from piloting any foreign vessels in or out of the Galveston port held too broad. *Pettersen v. Smith*, 30 C. A. 139, 69 S. W. 542.

Where intervener, in an action to restrain the enforcement of a judgment, admitted payment before intervention, plaintiff was entitled to judgment. *Abee v. San Antonio Brewing Ass'n* (Civ. App.) 78 S. W. 973.

A decree enjoining the furnishing of water under existing contracts to certain persons not parties to the suit held invalid. *Watkins Land Co. v. Clements*, 98 T. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653.

A railroad held not entitled to object to a decree restraining certain acts as of a date when the railroad had voluntarily promised to desist from committing them. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 93 S. W. 177.

In a suit to restrain the collection of certain state privilege taxes, a judgment for the taxes should have been in favor of the state, and not in favor of the officers sued. *Producers' Oil Co. v. Stephens*, 44 C. A. 327, 99 S. W. 157; *Stephens v. Morning Star Oil Co.* (Civ. App.) 99 S. W. 159; *Southwestern Oil Co. v. State*, Id.

In a suit to enjoin a breach of a contract with a city to maintain a waterworks system, a decree held not objectionable as requiring the use of existing machinery beyond its life. *Bounds v. Hubbard City*, 47 C. A. 233, 105 S. W. 56.

A decree restraining the manufacturer and seller of salt from violation of the anti-trust laws, without specifying what acts would constitute such violation, held insufficient. *Lone Star Salt Co. v. Blount*, 49 C. A. 138, 107 S. W. 1163.

In an action for injunction, held that the decree was unauthorized by the pleadings. *Mundy v. Hart* (Civ. App.) 111 S. W. 236.

A decree in a suit for a mandatory injunction to compel obedience to a decree that defendant open a public highway across its property granting such relief held required to incorporate a certain provision in the latter decree. *Santa Fé Townsite Co. v. Norvell*, 55 C. A. 488, 118 S. W. 762.

A judgment held erroneous in perpetuating an injunction without provision for its dissolution on payment of the judgment. *Parriss v. Jewell*, 57 C. A. 199, 122 S. W. 399.

Where a petition seeks only to enjoin the construction of a railroad crossing over a street railroad, the court could not prescribe a particular character of crossing and require it, and no other, to be installed. *Galveston & W. Ry. Co. v. Galveston Electric Co.* (Civ. App.) 123 S. W. 1140.

In a suit to restrain a husband from exercising control over a wife's separate property, a decree held not warranted by the pleading. *Burns v. Burns* (Civ. App.) 126 S. W. 333.

An injunction will not be issued against unknown persons who are not made parties to the suit. *Hamner v. Garrett* (Civ. App.) 133 S. W. 1058.

An injunction operates in personam only. *Clement v. City of Paris* (Civ. App.) 154 S. W. 624.

70. — **Order for payment of deposit in court.**—Defendants in execution sought by injunction to restrain the collection of an execution, the money having been deposited in court. Under a judgment for plaintiff in execution who asserted his right to the fund with prayer for general relief, he was entitled to an order for the payment of the money. *Goodman v. Henley*, 80 T. 499, 16 S. W. 432.

71. — **Decree on sustaining demurrer to bill.**—See notes under Art. 4663.

72. — **Uncertainty.**—Decree in suit against city to abate its waterworks dam as a nuisance held not objectionable as indefinite. *City of Ennis v. Gilder*, 32 C. A. 351, 74 S. W. 585.

A decree enjoining defendants from using the water of a creek and spring to irrigate undefined parts of a number of surveys was void for indefiniteness. *Watkins Land Co. v. Clements*, 98 T. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653.

In a suit to enjoin a breach of contract with a city to maintain a waterworks system, a decree held not too indefinite and uncertain to be enforceable in equity by ordinary process. *Bounds v. Hubbard City*, 47 C. A. 233, 105 S. W. 56.

Judgment, directing defendants assuming to act for plaintiff corporation to dismiss all suits brought by them and cancel all powers of attorney which they hold, held not erroneous for uncertainty. *Nelson v. Lamm* (Civ. App.) 147 S. W. 664.

A decree, in a riparian owner's suit enjoining defendant from taking any water for nonriparian lands, except when the river was overflowing its banks at plaintiff's land, was too indefinite to be enforced. *Biggs v. Lee* (Civ. App.) 147 S. W. 709.

73. — **Modification.**—In an action to enjoin defendant from closing a road, a modification of the injunction on final hearing held not error. *Smith v. Ernest*, 46 C. A. 247, 102 S. W. 129.

Reformation of order granting an injunction allowed, where it grants a permanent injunction without notice, but the writ issued is in form a temporary injunction until the hearing. *Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 C. A. 611, 121 S. W. 716.

Plaintiffs, who were members of the minority faction of a religious society, held not entitled to complain of the modification of a temporary injunction which permitted the collection of dues and the admission of new members; it appearing that their right to the property and to protection from expulsion were preserved. *Mendelsohn v. Gordon* (Civ. App.) 156 S. W. 1149.

74. **Recovery of damages and continuation of injunction.**—Where plaintiff recovers, as damages for a nuisance, the amount of depreciation of his property, based on the permanency of the nuisance, he cannot also have the continuation of the nuisance enjoined. *Hockaday v. Wortham*, 22 C. A. 419, 54 S. W. 1094.

If a nuisance is permanent, so that the damage therefrom to adjacent property constantly and regularly occurs, the person injured may recover the resulting depreciation in the value of his property, both for the past and future at one time, and is not entitled, in addition, to have the nuisance enjoined. If a nuisance to adjacent property was abatable, the person injured thereby would be entitled, in an action to abate the nuisance, to recover such damages as would fairly compensate him for having been deprived of the enjoyment of his property up to trial, and, in addition, to have the maintenance of the nuisance restrained. *Kennedy v. Garrard* (Civ. App.) 156 S. W. 570.

75. **Defense in action for wrongful injunction.**—That the owner of a house cut off its top and moved it under telephone wires was no defense to his action for wrongful injunction against interference with the wires. *Southwestern Telegraph & Telephone Co. v. Thompson* (Civ. App.) 142 S. W. 1000.

76. **Evidence.**—See notes under Art. 4619.

77. **Judgments and orders appealable.**—See notes under Art. 4644.

78. **Assignments of error.**—See notes under Art. 4644.

79. **"Vacation" defined.**—See notes under Art. 4664.

Art. 4644. Appeals allowed to courts of civil appeals.—Any party or parties to any civil suit wherein a temporary injunction may be granted, refused or dissolved, under any of the provisions of this title, in term time or in vacation, may appeal from the order or judgment granting, refusing or dissolving such injunction, to the court of civil appeals having jurisdiction of the case; but such appeal shall not have the effect to suspend the enforcement of the order appealed from, unless it shall be so ordered by the court or judge who enters the order; provided, the transcript in such case shall be filed with the clerk of the court of civil appeals not later than fifteen days after the entry of record of such order or judgment granting, refusing or dissolving such injunction. [Acts 1909, p. 354, sec. 2.]

See *Naylor v. Naylor* (Civ. App.) 128 S. W. 475.

Nature of proceeding.—Where defendant in replevin showed that the property in controversy was levied on by a constable who refused to accept a sufficient replevy bond, and prayed that the constable be compelled to accept the bond and deliver the property to defendant, the proceeding resulting in granting the relief demanded could not be treated as one granting a temporary mandatory injunction, within this article and Art. 4646, but the proceeding must be treated as one for mandamus independent of the replevin action. *Keasler Lumber Co. v. Clark* (Civ. App.) 151 S. W. 345.

Notice of application for an injunction.—This article did not contemplate changing the rule that an ex parte order for an injunction may be granted. *Southwestern Surety Ins. Co. of Oklahoma v. Ferguson* (Civ. App.) 131 S. W. 662.

Judgments and orders appealable.—No appeal lies from the refusal of the district judge to grant an injunction in chambers. *Gibson v. Templeton*, 62 T. 555.

An appeal will not lie from an interlocutory order modifying and continuing in force a temporary injunction, where the record fails to show that the cause has been finally tried or disposed of. *Medlin v. Seidemann* (Civ. App.) 79 S. W. 590.

This article does not authorize an appeal from an order overruling a motion to dissolve a temporary injunction. *Walstein v. Nicholson*, 47 C. A. 358, 105 S. W. 208; *Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 C. A. 611, 121 S. W. 716; *Dodson v. Boger* (Civ. App.) 130 S. W. 1021; *Bledsoe v. United Brothers of Friendship and Sisters of Mysterious Ten*, 131 S. W. 256; *Jaynes v. Burch*, 151 S. W. 596; *Simpson v. City of Nacogdoches*, 152 S. W. 863; *Gregory v. Houston Oil Co. of Texas*, 154 S. W. 236.

Contra, see *Hoskins v. Velasco Nat. Bank*, 48 C. A. 246, 107 S. W. 606.

There is no appeal from an order refusing to grant an injunction. In this case the court holds that the writ granted was a temporary injunction, and of course, an appeal would lie upon it being dissolved. *Caswell v. Fundenberger*, 47 C. A. 456, 105 S. W. 1018.

The court of civil appeals has jurisdiction of an appeal from an order of a district court in vacation dissolving a temporary injunction restraining execution of judgment of county court. *Texas & P. Ry. Co. v. Butler*, 52 C. A. 323, 114 S. W. 672.

It is only when a temporary injunction is granted or having been granted is dissolved that right of an appeal from the judge's order is given. *City of Marshall v. Allen* (Civ. App.) 115 S. W. 851.

Parties against whom an injunction has been granted, by filing a motion to dissolve, which was overruled, did not lose their right to appeal from the order granting the injunction. *Jeff Chaison Town-Site Co. v. McFaddin, Wless & Kyle L. Co.*, 56 C. A. 611, 121 S. W. 716.

Acts 1907, c. 107, authorizes an appeal from an order granting a temporary restraining order. *American Const. Co. v. Seelg* (Civ. App.) 131 S. W. 655.

A suit to enjoin officers from prosecuting plaintiffs for crime held a civil suit, so that an appeal by the officers lies from the judgment granting relief. *McDonald v. Denton* (Civ. App.) 132 S. W. 823, affirmed *Denton v. McDonald*, 104 T. 206, 135 S. W. 1148, 34 L. R. A. (N. S.) 453.

An agreement for postponement of a hearing of application for an injunction held not to operate as a restraining order, so as to make subsequent proceedings nothing more than a motion to dissolve a restraining order, from which an appeal would not lie. *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Civ. App.) 132 S. W. 868.

This article affords a speedy remedy by immediate appeal from such an order not previously allowed by law, irrespective of the final determination on the merits, and an appeal from a final judgment dissolving a preliminary injunction and dismissing the suit is not affected thereby, but is regulated by the statute regulating appeals generally. *Hamner v. Garrett* (Civ. App.) 132 S. W. 951.

An order of a judge in vacation, requiring an irrigation company to furnish a sufficient amount of water to irrigate the crop of a person who had been adjudged entitled to such water, was not one granting a temporary injunction, but one granting a mandamus, and no appeal lay therefrom. *Old River Rice Irrigation Co. v. Stubbs* (Civ. App.) 133 S. W. 494.

This article does not authorize an appeal from an order modifying a temporary injunction, and denying a motion to dissolve the same as modified. *Powdrill v. Powdrill* (Civ. App.) 134 S. W. 272.

Since this article does not authorize an appeal from an order refusing to dissolve an injunction, nor limit the right to move to dissolve, defendant did not waive his right to appeal from a temporary injunction by filing a motion to dissolve, which was undisposed of when the appeal was taken. *Young v. Dudley* (Civ. App.) 140 S. W. 802.

Under this article the court of civil appeals may review on appeal a vacation order refusing a preliminary injunction. *State v. Wilkinson* (Civ. App.) 140 S. W. 826.

Under Art. 4643 and this article an order of a court, determining an appeal bond for an appeal from a justice's court sufficient and denying the dissolution of an injunction to restrain a sale under execution of the judgment of the justice, is not a final judgment, and no appeal therefrom may be taken. *LeBaume v. Northern Texas Traction Co.* (Civ. App.) 143 S. W. 301.

Under this article the court of civil appeals will hear an appeal in an action by a company seeking to condemn land to compel the owner to permit it to inspect and survey the land, coupled with an application for temporary injunction. *Byrd Irr. Co. v. Smythe* (Civ. App.) 146 S. W. 1064.

An interlocutory order granting a temporary injunction is appealable. *Ware v. Welch* (Civ. App.) 149 S. W. 263.

Jurisdiction to review an order denying a motion to dissolve or modify a temporary injunction is not given by this article. *Weiborn v. Collier* (Civ. App.) 151 S. W. 655.

This article does not make an order dissolving a temporary injunction a final order, but merely gives a right of appeal from such order, which is an interlocutory one and not reviewable prior to the statute until final determination of the suit. *McKenzie v. Withers* (Civ. App.) 152 S. W. 658.

An appeal from an order dissolving a temporary restraining order is properly dismissed where a prior appeal from an order refusing a temporary injunction involving the same issues is pending. *Simpson v. City of Nacogdoches* (Civ. App.) 152 S. W. 863.

An order dismissing a temporary order restraining execution, made merely on the pleadings, and without evidence as to the merits, is not appealable. *McKenzie v. Withers* (Civ. App.) 153 S. W. 413.

Under this article a party may appeal from an order modifying a temporary injunction. *Mendelsohn v. Gordon* (Civ. App.) 156 S. W. 1149.

Necessity of objections or exceptions in trial court.—Where, in an action to enjoin the carrying out of a local option election, the question that the election was not held at the designated place cannot be first raised on appeal. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 456.

In suit to enjoin opening highway, failure to allege variance between route as adopted and as ordered held to preclude urging objection on appeal. *McCown v. Hill* (Civ. App.) 73 S. W. 850.

This article as amended by the act of 1907 contemplates that some action must be taken in the court below calling in question the correctness of the proceedings before the appellate court can revise its action. The errors assigned are such as may be waived where no objection has been urged in the court below, and no fundamental error of the trial is shown, therefore the appellate court has no power to revise the action of the lower court. *Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co.*, 55 C. A. 116, 118 S. W. 790.

Since a temporary mandatory injunction order may be made in chambers out of term, without notice to the adverse party, or hearing, an exception to the order granting such an injunction is not necessary to authorize an appeal therefrom. *Young v. Dudley* (Civ. App.) 140 S. W. 802.

Objection that an injunction against a nuisance was too broad cannot be reviewed on appeal, where no steps were taken below to limit the scope of the decree, which conformed to the prayer for relief and the findings. *Nations v. Harris* (Civ. App.) 151 S. W. 334.

Assignments of error.—While under the direct provisions of Art. 4643, as amended by this article, formal assignments of error are not necessary on appeal from an order granting an injunction, the assignments of error in the record may be considered in determining the objections to the order, but it is immaterial whether such assignments

technically comply with the court rule. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

Notice of appeal.—Since a temporary mandatory injunction order may be made in chambers out of term, without notice to the adverse party, or hearing, a notice of appeal was not necessary to give a right to appeal from such an order. *Young v. Dudley* (Civ. App.) 140 S. W. 802.

Matters included in transcript.—On appeal from the granting of an injunction at an ex parte hearing, it was error to include in the transcript defendant's answer and application for fixing the amount of the appeal bond, where they were not filed until the injunction was granted. *Wynn v. R. E. Edmondson Land & Cattle Co.* (Civ. App.) 150 S. W. 310.

Filing transcript.—The petition with the fiat of the judge endorsed thereon, granting the temporary writ of injunction was filed July 11th. This constituted the "entry of record of such order" within the meaning of section 2 of the act of 1907, amending this article, and to give the court of civil appeals jurisdiction the transcript must have been filed within 15 days from 11th day of July. *Baumberger v. Allen*, 101 T. 352, 107 S. W. 526, 527.

Under this article it was sufficient that, within 15 days from the filing with the district court of the petition with the judge's order indorsed thereon, a second transcript was filed in the court of civil appeals showing that the transcript was filed within 15 days after entry of the order. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

Under this article it was held that, though ordinarily the time of filing transcripts was not jurisdictional as shown by Art. 1608, in view of the fact that no appeal was theretofore allowed from such orders and from the nature of the order itself the time of filing transcripts was jurisdictional, and the failure to file could not be waived by the parties so as to give the appellate court jurisdiction. *C. B. Livestock Co. v. Parrish* (Civ. App.) 127 S. W. 854.

Under this article the court can acquire no jurisdiction where the record is not filed in the appellate court within the time specified. *Powdrill v. Powdrill* (Civ. App.) 134 S. W. 272.

Under this article and Arts. 4645, 4646, it is intended that the entire record be filed within 15 days, that the case may be disposed of with dispatch, so that the general statute relating to making and filing statements of fact, giving 30 days after adjournment therefor, does not apply, but, if the statement is not filed in the 15 days, relief can be had only under article 1382, providing for consideration of statements of fact not filed within the time prescribed by law, provided good ground is shown for such delay. *Hicks v. Murphy* (Civ. App.) 150 S. W. 955.

An appeal from an order granting a temporary injunction cannot be considered, where the transcript was not filed in the court of civil appeals within 15 days from the entry of record. *Jaynes v. Burch* (Civ. App.) 151 S. W. 596.

Where within 15 days after the entry of an order granting a temporary injunction a party files the transcript on appeal in the court of civil appeals and duly complies with the other requisites of appeal, such as giving bond, etc., the right of appeal becomes a fixed right and cannot be defeated by any effort he may make to have the injunction dissolved in the court below. *Houston Electric Co. v. Glen Park Co.* (Civ. App.) 155 S. W. 965.

Where the record on appeal from an order granting a temporary injunction was filed in the court on appeal within 15 days after entry of the order, the appeal would not be dismissed though the record was not filed until more than 15 days after the entry of an order of injunction and to show cause why it should not be perpetuated. *City of Houston v. Richter* (Civ. App.) 157 S. W. 189.

Suspension.—When an injunction is dissolved by final judgment, and an appeal is prosecuted by giving a supersedeas bond, the injunction is continued in force, and the court will enforce obedience to its mandates until it reverses them. *Williams v. Pouns*, 48 T. 141; *G. C. & S. F. Ry. Co. v. F. W. & N. O. Ry. Co.*, 68 T. 98, 2 S. W. 199, 3 S. W. 564.

If the order granting an injunction limits its duration to the hearing of the cause in the district court, and on hearing the injunction is dissolved, the order of dissolution is not suspended by an appeal. *Ft. Worth Ry. Co. v. Rosedale Ry. Co.*, 68 T. 163, 7 S. W. 381.

Where an injunction has been granted and dissolved, in the absence of an appeal bond, the injunction is not kept alive. *Griffin v. State* (Cr. App.) 87 S. W. 156.

A temporary injunction restraining a defendant from selling intoxicating liquors on premises is not suspended by appeal under this article, with supersedeas bond required by Arts. 2101, 2103. *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n*, 56 C. A. 162, 121 S. W. 213.

This article leaves it to the discretion of the court or judge to determine the operation of an appeal, but contemplates that suspension shall be pending the appeal, and he cannot set aside a suspensory order after appellant complies therewith by giving a supersedeas bond, and after the record is filed, giving the appellate court full jurisdiction. *Mendelsohn v. Gordon* (Civ. App.) 155 S. W. 571.

Costs.—Where appellant included in the transcript pleadings which could not be considered, he was taxable with the costs of including same. *Wynn v. R. E. Edmondson Land & Cattle Co.* (Civ. App.) 150 S. W. 310.

Art. 4645. Proceedings on appeal.—It shall not be necessary to brief such case in the court of civil appeals or supreme court, and the case may be heard in the said courts on the bill and answer, and such affidavits and evidence as may have been admitted by the judge granting, refusing or dissolving such injunction; provided, the appellant may file a brief in the court of civil appeals or supreme court upon the furnishing the appellee with a copy thereof not later than two days before the

case is called for submission in such court, and the appellee shall have until the day the case is called for submission to answer such brief. [Id. sec. 3.]

Filing transcript.—See notes under Art. 4644.

Discretion of lower court.—The action of the court on a motion to dissolve a temporary injunction will not be disturbed, in the absence of abuse of discretion. Lone Star Lodge, No. 1935, Knights and Ladies of Honor, v. Cole (Civ. App.) 131 S. W. 1180.

Where the trial court modified a temporary injunction at the request of defendants, such order cannot be disturbed on appeal because, at the time of the modification, defendants were in contempt and might have been denied any relief on that ground; the trial court not being bound to deny relief for that reason. Mendelsohn v. Gordon (Civ. App.) 156 S. W. 1149.

Consideration of pleadings and evidence.—This act authorizes the court of civil appeals and the supreme court to consider the answer and affidavits and evidence only when same constituted a part of the case before the judge at the time he made the order appealed from. When the hearing by the judge is ex parte, and the order is made on the allegations in the petition alone, the appellate court, in reviewing the action of the judge, should consider the petition alone. City of Paris v. Sturgeon, 50 C. A. 519, 110 S. W. 460.

In view of an express provision of the statute giving the right of appeal from an order dissolving a temporary injunction, held, that a document containing evidence as to which a motion to strike out and disregard was sustained below cannot be considered on such appeal. Daniels v. Daniels (Civ. App.) 127 S. W. 569.

Where an application for a temporary injunction was denied solely on the ground that the bill showed no equities and no evidence was heard, the court on appeal must take the sworn bill as true and determine plaintiff's right therefrom. Middleton v. Presidio County (Civ. App.) 129 S. W. 637.

Proceedings on a motion to dissolve the injunction order appealed from, filed after the order was entered, held not to be considered on appeal. Young v. Dudley (Civ. App.) 140 S. W. 802.

On an appeal from an order granting a preliminary injunction, held, that the appellate court would consider the entire record. Commissioners' Court of Floyd County v. Nichols (Civ. App.) 142 S. W. 37.

Under this article a statement of facts or bill of exceptions need not be filed on appeal from an order denying an injunction, but the court of civil appeals must look to the answer and evidence as well as to the petition. Sutherland v. Cabiness (Civ. App.) 146 S. W. 331.

The court on appeal in an injunction proceeding has no power to look to certificates of the clerks of the county and district courts, made part of the transcript, but which were not before the court below when the order for injunction was made. Baker v. Crosbyton Southplains R. Co. (Civ. App.) 146 S. W. 569.

Recitals of a judgment below in action to enjoin a judgment held to show that a trial amendment to the petition, granted the day after dissolving the injunction, was considered on the issue, requiring similar consideration on appeal. Axtell v. Lopp (Civ. App.) 152 S. W. 192.

In the determination of an appeal from an order granting a temporary injunction made on plaintiff's verified bill alone, defendant's answer thereafter filed cannot be considered. Houston Electric Co. v. Glen Park Co. (Civ. App.) 155 S. W. 965.

Burden of proof.—Since this article authorizes appellate courts to dispose of appeals from injunction orders on the pleadings, and such affidavits and evidence as may have been admitted, if it is doubtful from the transcript whether the trial court acted upon evidence, other than the pleadings, the burden of showing what evidence was acted on is upon the party claiming that evidence was introduced, other than as shown by the transcript. Young v. Dudley (Civ. App.) 140 S. W. 802.

Questions reviewed.—Where the case is tried on its merits, exceptions to the sufficiency of the answer to authorize the court to dissolve a temporary injunction will not be considered. Jordan v. Chester (Civ. App.) 43 S. W. 904.

The propriety of granting a temporary injunction need not be considered on appeal where there was no motion to dissolve it before final hearing. Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160.

Dissolution of temporary injunction held not assignable as error after decree adverse to appellant and failure to file supersedeas bond. Brumby v. Boyd, 28 C. A. 164, 66 S. W. 874.

On defendant's appeal from a temporary injunction, facts stated in the application to the district court to have the amount of the appeal bond fixed, which related to plaintiff's right to the injunction, held to be considered. Holbein v. De La Garza (Civ. App.) 126 S. W. 42.

On appeal in an action by a property owner to enjoin county officers from condemning land and laying out a highway, the district court cannot review the amount of damages. Schlinke v. De Witt County (Civ. App.) 145 S. W. 660.

Harmless error.—Complainant in a suit to enjoin the opening of a road for want of notice to him held not entitled to complain of a conclusion that the former commissioners' courts recognized the road as a second-class road, if there was evidence sustaining a conclusion that the road was in fact a second-class road. Smith v. Palo Pinto County (Civ. App.) 128 S. W. 1193.

Dismissal of appeal.—An appeal by plaintiffs in an action wherein a temporary injunction was dissolved and the court refused to permit the order of dissolution to recite the dismissal dismissed. Clevenger v. Cariker (Civ. App.) 111 S. W. 177.

An appeal from the granting of a temporary injunction compelling appellant to furnish water to irrigate appellee's crop of rice will be dismissed; the subject-matter of the litigation having ceased to exist. Old River Rice Irr. Co. v. Stubbs (Civ. App.) 133 S. W. 494.

It was no ground for dismissal of an appeal from a final judgment dissolving an injunction that it was in form an appeal from an order dissolving an injunction. Smith v. Richardson (Civ. App.) 138 S. W. 426.

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In taxpayers' action to enjoin performance of contract with city, where it appeared that, pending the action, it had been performed and payment in full made, appeal from order denying temporary injunction would be dismissed. *Langham v. City of Beaumont* (Civ. App.) 152 S. W. 869.

Where a temporary injunction restraining the removal of personal property from plaintiff's land was dissolved, and the property was removed pending the appeal which did not stay the order dissolving the injunction, the appeal will be dismissed; the case being moot, and the only point left being the question of costs. *Electric Park Co. v. San Antonio Baseball Ass'n* (Civ. App.) 155 S. W. 1189.

Affirmance.—The court on appeal held authorized to affirm an order dissolving a temporary injunction, in view of the admissions on the argument that all acts sought to be restrained had been done. *Liebovitz v. American Const. Co.* (Civ. App.) 145 S. W. 1048.

— **Grounds.**—Affirmance of a judgment granting an injunction held proper on grounds stated, though the trial court gave other grounds for its action. *Hillsman v. Cline* (Civ. App.) 145 S. W. 726.

Art. 4646. Case to have precedence on appeal.—Such case shall be advanced in the court of civil appeals or supreme court on motion of either party, and shall have priority over other cases pending in such courts. [Id. sec. 4.]

✓ **Art. 4647. [2990] No injunction against a judgment, except, etc.**—No injunction shall be granted to stay any judgment or proceedings at law, except so much of the recovery or cause of action as the complainant shall in his petition show himself equitably entitled to be relieved against, and so much as will cover the costs. [Act May 13, 1846, p. 363. P. D. 3930.]

Injunction against judgment or execution.—An execution on an award of arbitrators, which had been made a judgment of court, will not be restrained, no fraud being alleged. *Jones v. Frosh*, 6 T. 202; *Payne v. Metz*, 14 T. 56.

An injunction will be refused, where the ground for the injunction existed before the judgment and was known to defendant, or might have been discovered by ordinary diligence on his part. *Prewitt v. Perry*, 6 T. 260; *York's Adm'r v. Gregg's Adm'r*, 9 T. 85; *Gibson v. Moore*, 22 T. 611; *Crawford v. Wingfield*, 25 T. 414; *Harrison v. Vines*, 46 T. 15; *Overton v. Blum*, 50 T. 417.

An injunction to restrain a judgment will be refused, when it appears that plaintiff therein is endeavoring to collect no more than was really due. *Watrous v. Rodgers*, 16 T. 410.

One who appeals from a judgment without giving supersedeas cannot enjoin its enforcement. *Dunson v. Spradley* (Civ. App.) 40 S. W. 327.

Injunction restraining execution held properly refused. *Anders v. Spalding* (Civ. App.) 44 S. W. 298.

In an action to enjoin the execution of a judgment, plaintiff, though not served with the summons, must show that he had a defense or other equity, or such relief will be denied. *Foust v. Warren* (Civ. App.) 72 S. W. 404.

Injunction by an administrator to prevent sale on execution of interest of certain heirs in land belonging to an estate in course of administration held not to lie. *Hahn v. P. J. Willis & Bro.*, 31 C. A. 643, 73 S. W. 1084.

Equitable title holders held not entitled to injunction restraining sale of land on execution directed against stranger to legal title. *Brown v. Ikard*, 33 C. A. 661, 77 S. W. 967.

The holder of the record title, having possession, held not entitled to restrain a sale thereof under an execution as the property of a third person. *Magoffin v. San Antonio Brewing Ass'n* (Civ. App.) 84 S. W. 843.

A defendant held entitled to restrain the enforcement of a judgment against him, though he had taken no proceedings under Rev. St. 1899, art. 1357, for the correction of the judgment. *Houston, E. & W. T. Ry. Co. v. Skeeter Bros.*, 44 C. A. 105, 98 S. W. 1064.

On an application to perpetually enjoin an execution for costs, held, that an injunction would not issue, whether the judgment was void or not. *Ward v. Powell* (Civ. App.) 140 S. W. 1188.

A defendant suing to vacate a default judgment in trespass to try title held to sufficiently show a defense justifying relief. *Crosby v. Di Palma* (Civ. App.) 141 S. W. 321.

— **Tender of amount due.**—One who seeks to enjoin the collection of a judgment for causes which would entitle him to relief from paying part of the amount adjudged against him must pay off or tender payment of so much of the judgment as under the averments of the petition equity cannot relieve against. *Smith v. Smith*, 75 T. 410, 12 S. W. 678.

The collection of a judgment on a contract, only part of which has been performed, will not be enjoined, unless the reasonable value of the services performed be tendered. *Jordan v. Chester* (Civ. App.) 43 S. W. 904.

In an application for an injunction to restrain the collection of a larger amount than was due on a judgment, it was not necessary to deposit the amount due in court in order to maintain the action. *Hamburger v. Kosminsky* (Civ. App.) 61 S. W. 958.

Under this article one of several makers of a note who seeks to restrain a judgment on the note must tender the part of the debt which he admits to be due from him. *Twitchell v. Askew* (Civ. App.) 141 S. W. 1072.

Equity will not intervene at the instance of a judgment debtor to stay execution, unless he tenders payment of the amount admitted to be due. *Shannon v. Hay* (Civ. App.) 153 S. W. 360.

✓ — **Grounds for injunction in general.**—Injunctions have been granted to restrain the sale of real estate under execution when it will cast a cloud upon the title. *Huston v. Curl*, 8 T. 239, 58 Am. Dec. 110; *Clegg v. Varnell*, 18 T. 294; *Dunham v. Chatham*, 21

T. 228, 73 Am. Dec. 228; *Mitchell v. Marr*, 26 T. 329; *Smith v. Boquet*, 27 T. 512; *Kirk v. Navigation Co.*, 49 T. 213; *Roe v. Dailey*, 1 U. C. 347; *Ryburn v. Getzendaner*, 1 U. C. 349; *Huggins v. White*, 7 C. A. 563, 27 S. W. 1066; *Rodriguez v. Buckley* (Civ. App.) 30 S. W. 1123; *Texas Brewing Co. v. Bisso*, 50 C. A. 119, 109 S. W. 270.

An injunction to restrain the sale of real estate under a decree of court, at the suit of a person not a party to the proceeding, on the ground that he is the rightful owner of the land and said sale would result in unnecessary litigation and expense to petitioner, will be refused. *Henderson v. Morrill*, 12 T. 1; *Cameron v. White*, 3 T. 152; *Carlin v. Hudson*, 12 T. 202, 62 Am. Dec. 521.

An execution for costs in a suit, where it is admitted that a part of the judgment is just, will not be restrained. *Criswell v. Bledsoe*, 22 T. 656.

An injunction to restrain a sale under execution, on the ground that the sheriff had levied on valuable, improved city lots for a comparatively insignificant debt, when he well knew that petitioner had ample personal property and unimproved land in the county to satisfy the execution, will be refused, it appearing that the petitioner had not pointed out property to the sheriff and had failed to designate in his petition what or where his other property, subject to execution, was situated. *Smith v. Frederick*, 32 T. 256.

An injunction will lie to restrain execution when waived as to the principal. *Parker v. Nations*, 33 T. 210; *Jenkins v. McNeese*, 34 T. 189.

An injunction will lie to restrain execution when plaintiff is dead. *Dailey v. Wynn*, 33 T. 614.

When a defendant, through accident or mistake, and without default in the proper degree of watchfulness and care required by careful men in their own cases of equal importance, failed to present his defense fully, the court will, in its discretion, grant relief by injunction to stay proceedings under the judgment and re-examine the case. *Taylor v. Fore*, 42 T. 256; *Overton v. Blum*, 50 T. 417.

A party cannot restrain by injunction the execution of judgment on the ground that it is unjust, unless he shows that he had a meritorious defense, and had used diligence to present it, and was prevented by the fraud, accident, or acts of the opposite party, wholly unaffected by any fault or negligence of his own. *Jordan v. Corley*, 42 T. 284; *Crawford v. Wingfield*, 25 T. 414; *Nevins v. McKee*, 61 T. 412; *Conteras v. Haynes*, 61 T. 104; *Morris v. Edwards*, 62 T. 205; *Ratto v. Levy*, 63 T. 278; *Clegg v. Darragh*, 63 T. 357; *Harn v. Phelps*, 65 T. 592; *Ferguson v. Herring*, 49 T. 126; *Harrison v. Crumb*, 1 App. C. C. § 991; *Bullard v. White*, 2 App. C. C. § 286; *Byars v. Justin*, 2 App. C. C. § 686.

A purchaser of a landlord's title under execution may stay proceedings by an insolvent landlord under a judgment in forcible entry and detainer proceedings brought against the tenant, until the question of title can be determined. *Texas Land Co. v. Turman*, 53 T. 619.

Injunctions have been granted to restrain an execution against one not a party to the suit. *Jeffus v. Allen*, 56 T. 196.

An injunction will be granted to restrain the sale, under execution against the husband, of land the separate property of the wife, conveyed to her by deed apparently vesting title in the marital community. *Roe v. Dailey*, 1 U. C. 247, citing *Huston v. Curl*, 8 T. 239, 58 Am. Dec. 110; *Mitchell v. Marr*, 26 T. 320; *Smith v. Boquet*, 27 T. 512; *Dunham v. Chatham*, 21 T. 244, 73 Am. Dec. 228; *Kirk v. Navigation Co.*, 49 T. 213; *Ryburn v. Getzendaner*, 1 U. C. 349.

An injunction will not be granted on the ground that the law prohibits an appeal by reason of the amount in controversy. It must also be shown that the judgment is unjust. *Railway Co. v. Henderson*, 83 T. 70, 18 S. W. 432.

Injunction is the proper proceeding to restrain an execution sale at the suit of a prior mortgagee, whose mortgage was wrongfully marked "satisfied" by a person without authority from him, and who took a subsequent mortgage on the faith of a contract with the mortgagors that the prior mortgage should remain in force until the entire debt was satisfied. *Ivory v. Kempner*, 21 S. W. 1006, 2 C. A. 474.

An injunction will not be granted to correct errors in a judgment which might have been corrected by legal remedies. *Reast v. Hughes* (Civ. App.) 33 S. W. 1003.

Defects in execution held mere irregularities not authorizing injunction of levy. *Dunson v. Spradley* (Civ. App.) 40 S. W. 327.

One whose goods were wrongfully taken under execution held entitled to an injunction against the sale. *Sumner v. Crawford* (Civ. App.) 41 S. W. 825.

Where notes given in consideration of services to be performed were put in judgment before performance, and afterwards the payee neglected to perform, the enforcement of the judgment should be enjoined. *Jordan v. Chester* (Civ. App.) 43 S. W. 904.

Where execution on a judgment for witness fees has not been issued to the county in which judgment was rendered, levy of execution to another county will be enjoined. *Norwood v. Orient Ins. Co.* (Civ. App.) 44 S. W. 188.

Equity held to have jurisdiction on the ground of a mistake of fact to relieve against a judgment entered on a forged agreement, though the adverse parties were innocent. *Lindsley v. Sparks*, 20 C. A. 56, 48 S. W. 204.

A person against whom two judgments had been rendered for the same obligation held not entitled to enjoin the collection of either judgment, in the absence of fraud. *Mason v. House*, 20 C. A. 500, 49 S. W. 911.

One is not entitled to have sale under execution enjoined because a portion of the property levied on belonged to deceased defendant. *Corder v. Steiner* (Civ. App.) 54 S. W. 277.

Plaintiff held entitled to an injunction restraining defendant from collecting more than the excess of her judgment against it over its judgment against her. *Kelly Furniture, Carpet & Hardware Co. v. Shelton* (Civ. App.) 62 S. W. 794.

Fraud on the part of a judgment plaintiff in obtaining his judgment need not be shown to authorize the judgment debtor to enjoin its collection. *Dashner v. Wallace*, 29 C. A. 151, 68 S. W. 307.

Agreement relieving defendants from liability on judgment to be rendered held not to lay a basis for injunction until actual levy of execution. *Crook v. Lipscomb*, 30 C. A. 567, 70 S. W. 993.

Even in cases of direct attack, a plaintiff seeking the interposition of the court's equitable powers by injunction to stay proceedings under an alleged void judgment must allege and show either that the judgment on its face or the record in the cause otherwise affirmatively shows a want of jurisdiction, or else that some equity against the judgment or defense to the cause of action upon which it is predicated exists. *Foust v. Warren* (Civ. App.) 72 S. W. 406.

A judgment creditor's insolvency will entitle the judgment debtor to enjoin the collection of the judgment, so that a counterclaim which he has may be established as a credit against it. *Norton v. Wochler*, 31 C. A. 522, 72 S. W. 1025.

One held not entitled to have a judgment against him enjoined, because he and his attorney could not be present at the trial, and the other party refused to postpone. *Aultman, Miller & Co. v. Higbee*, 32 C. A. 502, 74 S. W. 955.

Judgment for license tax held not void, so that relief by injunction against execution could not be had. *Francis Bros. v. Robinson*, 40 C. A. 328, 89 S. W. 803.

A wife owning a homestead interest in land held entitled to have it protected by injunction from a writ of possession or execution in a suit against her husband. *Taylor v. Ward* (Civ. App.) 102 S. W. 465.

Purchaser of land held not entitled to enjoin execution of judgment for sale of land, obtained by vendor in suit on purchase money notes, by merely showing that suit had been brought against himself and the vendor by a person claiming title to the land. *Broocks v. Lee*, 46 C. A. 372, 102 S. W. 777.

In a suit by a wife in which her husband joined to enjoin a sale under an execution against the husband of real estate claimed by her, the court held authorized to grant the injunction. *Texas Brewing Co. v. Bisso*, 50 C. A. 119, 109 S. W. 270.

An injunction held to lie to prevent a cloud on title by a sale of a married woman's land under an execution against the husband. *Barr v. Simpson*, 54 C. A. 105, 117 S. W. 1041.

Defendant in execution held entitled to enjoin plaintiff in execution from further enforcing execution, where the latter had wrongfully recovered from a defaulting bidder the difference between his bid and the amount received on a resale, which, under the statute, belonged to defendant in execution. *Shanley v. York*, 54 C. A. 214, 118 S. W. 146.

Where the amount of an execution as stated in the advertisement of sale exceeds the judgment by only 20 cents, the difference, on an application for injunction against the sale, should be disregarded as too trivial to be considered. *Lee v. Broocks*, 54 C. A. 220, 118 S. W. 164.

The failure of the advertisement of sale to state that the execution provided for collection of interest affords no ground for injunction. *Id.*

Where a judgment in a justice court is for more than \$20, and is appealed and tried de novo in the county court, the district court will not enjoin the judgment for errors committed by the justice. *New York Chemical Co. v. Spell Bros.*, 56 C. A. 315, 120 S. W. 579.

An injunction sued out by a wife to prevent the sale of property on an execution against her husband may be perpetuated on a showing that she owns the property. *Broussard v. Lawson* (Civ. App.) 124 S. W. 712.

To justify the issuance of an injunction by the district judge to enjoin a judgment, the judgment must be void, and the invalidity must be shown on its face or must appear affirmatively from the record. *Moore v. Vogt* (Civ. App.) 127 S. W. 234.

Injunction to restrain collection of an erroneous judgment held not a proper proceeding to set it aside. *Cariker v. Dill* (Civ. App.) 140 S. W. 843.

The enforcement of a judgment obtained against the owner of a lot in garnishment would be enjoined where a mechanic's lien was enforced for the same debt. *Waples-Painter Co. v. Ross* (Civ. App.) 141 S. W. 1027.

A person held not entitled to equitable relief against a default judgment on the ground that he was misinformed by his attorney. *Slayden-Kirksey Woolen Mill v. Robinson* (Civ. App.) 143 S. W. 294.

The district court has no power to enjoin the enforcement of a justice's judgment in a nonappealable case, unless it was obtained by fraud, accident, or mistake. *Flow v. Galveston, H. & S. A. Ry.* (Civ. App.) 149 S. W. 1081.

A default judgment based on the allegation that defendant was a corporation when in fact it was a copartnership, none of its members being parties, and service having been had on a certain person as agent of the alleged corporation, did not bind the partnership and enforcement of the judgment was properly enjoined on the theory that it was a nullity. *Spaulding Mfg. Co. v. Kuykendall* (Civ. App.) 151 S. W. 1122.

A surety on the replevin bond of defendant in sequestration proceedings, where the repleved chattels had been returned to the plaintiff, may enjoin a judgment, not only for the chattels, but for the withholding, though the return was not urged as a defense by the defendant. *Axtell v. Lopp* (Civ. App.) 152 S. W. 192.

The issuance of an order of sale on execution prior to the valid entry of the judgment being unauthorized, an injunction will issue against a sale of the property. *Hubbart v. Willis State Bank* (Civ. App.) 152 S. W. 458.

That persons have sold property and conveyed it by warranty deed authorizes them to apply for injunction to prevent its unlawful sale on execution as their property. *S. K. McCall Co. v. Page* (Civ. App.) 155 S. W. 655.

Justice's Judgment.—An injunction to restrain the collection of a judgment rendered in a justice's court, on the ground that the debt upon which the judgment was rendered was a portion of a debt due by petitioner for a sum exceeding the jurisdiction of the court, and which had been divided for the sole purpose of bringing two suits on the claim in the justice court, will be denied, it not appearing that petitioner was deprived of a right or remedy. *Pryor v. Emerson*, 22 T. 162.

An injunction to restrain execution of a judgment of a justice of the peace, on the ground that it was rendered on a note which was not due when the suit was commenced

and before the expiration of five days after service of citation, will be refused. *McNeill v. Hallmark*, 28 T. 157.

An injunction will be granted to stay execution of a judgment rendered by a justice of the peace against a garnishee on his indebtedness on a note not due. *Kapp v. Teel*, 33 T. 811.

An injunction to restrain a justice of the peace from adjudicating a case arising under an unconstitutional statute will be refused. *Jones v. Stallworth*, 55 T. 138.

Where the right of appeal is denied by statute, as where the amount in controversy is less than \$20 in the justice's court, an injunction will not be granted to restrain the execution of the judgment. *Odum v. McMahan*, 67 T. 292, 3 S. W. 286.

A county court may by injunction restrain a proceeding in a justice's court to determine priority of attachments issued from each court. *Moody v. McRimmon*, 27 S. W. 780, 7 C. A. 582.

The district court may enjoin the enforcement of a judgment of a justice of the peace whatever the amount may be. *Railway Co. v. Blankenbeckler*, 13 C. A. 249, 35 S. W. 331.

Defendant to a default in justice court held not entitled to relief by injunction against the judgment because of an alleged defective service of the summons. *Sherman Steam Laundry Co. v. Carter*, 24 C. A. 533, 60 S. W. 328.

Defendant was entitled to an injunction restraining enforcement of a judgment rendered by a justice after granting a new trial without notice. *Smith v. Carroll*, 28 C. A. 330, 66 S. W. 863.

A nonresident held entitled to restrain enforcement of a justice's judgment without showing a valid defense. *August Kern Barber Supply Co. v. Freeze*, 96 T. 513, 74 S. W. 303.

Where a justice of the peace set aside a judgment by default the day after it was rendered and granted a new trial held, that the judgment rendered therein was not void, and injunction to restrain enforcement would not lie. *Cohen v. Moore* (Civ. App.) 103 S. W. 422.

A judgment of a justice of the peace setting aside a judgment of dismissal rendered after the term of court in which the judgment of dismissal was rendered held of no validity and properly enjoined. *Rivers v. Campbell*, 51 C. A. 103, 111 S. W. 190.

Where there was evidence both ways on the plea of privilege interposed by defendant in justice's court, and the justice in overruling the plea merely committed an error of law, the judgment rendered by him could not be enjoined. *Coca Cola Co. v. Allison*, 52 C. A. 54, 113 S. W. 308.

Where a plea of privilege to be sued in another county is ignored by the justice of the peace or improperly overruled, the district court may enjoin the execution of the judgment. *Id.*

The district judge has power to enjoin prosecution of cases in justice court wherein it is alleged in the petition that the suits were instituted with the purpose of vexing, harassing and needlessly embarrassing plaintiff and in the injunction suit to determine the matters involved in suits in justice court. *Steger & Sons Piano Mfg. Co. v. MacMaster*, 51 C. A. 527, 113 S. W. 339.

Facts which must be shown by one to entitle him to an injunction restraining proceedings under a judgment of a justice, stated. *Jones v. Curtis*, 56 C. A. 181, 120 S. W. 530.

The enforcement of a judgment of a justice of the peace held not to be enjoined; the justice having jurisdiction of the subject-matter and parties, and the judgment being merely erroneous. *Hudson v. Smith* (Civ. App.) 133 S. W. 486.

Where a judgment was valid on its face, error in disregarding defendant's plea of privilege in an action in a justice's court cannot be remedied by injunction. *Lyons Bros. Co. v. Corley* (Civ. App.) 135 S. W. 603.

Where appellant perfects an appeal from a judgment of a justice's court, and thereby vacates the judgment, a dismissal of the appeal by the county court does not reinstate the judgment, and an injunction lies to restrain execution thereon. *Western Union Telegraph Co. v. McKee Bros.* (Civ. App.) 135 S. W. 658.

A judgment of a justice of the peace fixing a different rate than that fixed by the railroad commission held not void so as to authorize an injunction to restrain collection thereof. *Houston & T. C. R. Co. v. Young* (Civ. App.) 137 S. W. 380.

The district court has no power to enjoin enforcement of a justice's judgment in a nonappealable case, unless it was obtained by fraud, accident, or mistake. *Flow v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 149 S. W. 1081.

The privilege to be sued before a justice in a given district is a matter of defense and does not affect the validity of a judgment rendered, and hence enforcement of such judgment will not be restrained. *Pye v. Wyatt* (Civ. App.) 151 S. W. 1086.

— **Satisfied judgment.**—An injunction will be granted to restrain an execution upon a judgment which has been paid. *Dickenson v. McDermontt*, 13 T. 248; *Clow v. Merritt*, 15 T. 134; *Love v. Powell*, 67 T. 15, 2 S. W. 456.

The district court of one county has jurisdiction to restrain enforcement of a judgment of a justice court of another county, where it is shown that the judgment has been satisfied. *Osborne & Co. v. Gatewood* (Civ. App.) 74 S. W. 73.

— **Dormant judgment.**—An injunction will be granted to stay execution upon a dormant judgment. *North v. Swing*, 24 T. 193; *Jordan v. Corley*, 42 T. 284. But in such a case the judgment may be revived on plea in reconvention. *Oldham v. Erhart*, 18 T. 147; *Trevino v. Stedman*, 48 T. 561.

When an injunction is issued to restrain the collection of a judgment rendered by a justice of the peace on the ground of fraud, and because the judgment was dormant, the court has power to inquire whether the sum for which the judgment was rendered is still due, and if so to render a judgment against the plaintiff in the injunction suit for the amount. In such a proceeding, when it is shown that the judgment has not been paid, the injunction should be dissolved. The only ground for not issuing execution on a dormant judgment being the legal presumption of its payment, when this presumption ceases, to perpetuate the injunction would be in fact to violate the rule which denies the right, unless irreparable injury would result from its being refused. *Seymour v. Hill*, 67 T. 385, 3

S. W. 313, citing *Watson v. Newsham*, 17 T. 437, and *North v. Swing*, 24 T. 193, which are distinguished.

While execution on a dormant judgment is improper, it should not be permanently enjoined, where it appears that the judgment has not been discharged, and may be revived. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

✓ **Void judgments.**—An injunction will be granted to enjoin a judgment rendered by one not in fact a judge (*Walker v. McMaster*, 48 T. 213), or rendered without service of process (*Hamblin v. Knight*, 81 T. 351, 16 S. W. 1082, 26 Am. St. Rep. 818; *Edrington v. Alsbrooks*, 21 T. 186. See S. W. Tel. & Tel. Co. v. Howard, 22 S. W. 524, 3 C. A. 335; *Cook v. Railway Co.*, 22 S. W. 59, 3 C. A. 145; *Stapleton v. Wilcox*, 21 S. W. 977, 2 C. A. 542; *Railway Co. v. Rawlins*, 80 T. 579, 16 S. W. 430).

✓ An injunction will be granted to restrain the execution of a judgment void for want of jurisdiction over a defendant in the suit. *Wofford v. Booker*, 10 C. A. 171, 30 S. W. 67; *Dunlap v. Sutherland*, 63 T. 38; *Freeman v. Hawley*, 77 T. 498, 14 S. W. 364, 19 Am. St. Rep. 769; *Williams v. Warren*, 82 T. 322, 18 S. W. 560; *Chambers v. Hodges*, 23 T. 110; *Cooke v. Burnham*, 32 T. 129; *Smith v. Deweese*, 41 T. 595; *Glass v. Smith*, 66 T. 548, 2 S. W. 195.

An injunction will not be granted to restrain the sale of personal property under an execution on a void judgment. *Geers v. Scott* (Civ. App.) 33 S. W. 587.

Enforcement of judgment will not be enjoined for disqualification of judge. *Dunson v. Spradley* (Civ. App.) 40 S. W. 327.

✓ Where a plea of privilege to be sued in the county of one's residence, when properly entered and established, is ignored or improperly overruled by a justice, the execution of the judgment rendered by the justice may be enjoined as void for want of jurisdiction. *Jennings v. Shiner* (Civ. App.) 43 S. W. 276.

Enforcement of void judgment will be enjoined. *Harrison v. Lokey*, 26 C. A. 404, 63 S. W. 1030.

A judgment, void for want of jurisdiction, may be enjoined. *Dashner v. Wallace*, 29 C. A. 151, 68 S. W. 307.

An injunction lies to restrain the execution of a void judgment where the invalidity appears affirmatively from the record. *Ketelsen & Degetau v. Pratt Bros. & Seay* (Civ. App.) 100 S. W. 1172.

A statutory judgment rendered against a married woman on her replevy bond held a nullity, and may be directly attacked in a suit to vacate the same and enjoin the execution thereof. *Lane v. Moon* (Civ. App.) 103 S. W. 211.

Where neither the justice's court nor the county court to which the case was appealed acquired jurisdiction of complainants in a suit against them, the judgment of the county court against them will be enjoined. *St. Louis & S. F. Ry. Co. v. English* (Civ. App.) 109 S. W. 424.

To justify the issuance of an injunction by the district judge to enjoin a judgment, the judgment must be void, and the invalidity must be shown on its face or must appear affirmatively from the record. *Moore v. Vogt* (Civ. App.) 127 S. W. 234.

✓ The district court may enjoin the collection of a void judgment rendered by a justice of the peace, but cannot do so for mere error. *Houston & T. C. R. Co. v. Young* (Civ. App.) 137 S. W. 380.

A default judgment against a partnership on allegation that it was a corporation and service having been had on a certain person as agent of the alleged corporation held void and its enforcement subject to injunction. *Spaulding Mfg. Co. v. Kuykendall* (Civ. App.) 151 S. W. 1122.

Where plaintiff's homestead was sought to be subjected to the payment of a void justice's judgment against her, she was entitled to an injunction to restrain the sale of the homestead, but not to have the judgment declared void. *Rainwater v. Gwaltney* (Civ. App.) 157 S. W. 1191.

— **Exempt property.**—Injunctions have been granted to restrain executions in favor of several plaintiffs levied upon exempt property. *Clegg v. Varnell*, 18 T. 294.

Injunction granted to restrain sale of exempt property. *Rodriguez v. Buckley* (Civ. App.) 30 S. W. 1123; *Dearborn v. Phillips*, 21 T. 449; *Nichols v. Claiborne*, 39 T. 363; *Samuelson v. Bridges*, 25 S. W. 636, 6 C. A. 425; *Alexander v. Holt*, 59 T. 205; *Stein v. Frieberg*, 64 T. 271.

Where a sheriff seized exempt property under an execution, sale by him may be enjoined, even though the property has been taken from the sheriff on a delivery bond; the giving of the bond being an additional ground for the injunction. *Peevehouse v. Smith* (Civ. App.) 152 S. W. 1196.

Where a sheriff seized exempt property under an execution, an injunction will issue to prevent its sale by him, even though the property has been taken from the sheriff on a delivery bond; the giving of the bond being only an additional ground for enjoining the sale. *Id.*

— **Judgment record lost.**—An injunction will be granted to restrain an execution when the record of the judgment has been lost. *Cyrus v. Hicks*, 20 T. 483.

— **Direct or collateral attack.**—An attack on a judgment by means of injunction is direct, and not collateral. *Dashner v. Wallace*, 29 C. A. 151, 68 S. W. 307.

A cross-bill in a suit to enjoin defendant from entering on land claimed by plaintiff by virtue of a decree held a direct attack on the decree. *Clevenger v. Mayfield* (Civ. App.) 86 S. W. 1062.

A suit by a judgment debtor to vacate the judgment and to enjoin the execution of the same on the ground of its invalidity is a direct attack. *Lane v. Moon* (Civ. App.) 103 S. W. 211.

A suit to enjoin the further enforcement of an execution, on the ground that the execution plaintiff had recovered sufficient from a defaulting bidder to satisfy his judgment which the execution defendant should have recovered, held not a collateral attack on the judgment, in the action against the bidder. *Shanley v. York*, 54 C. A. 214, 118 S. W. 146.

A suit to enjoin the enforcement of certain judgments foreclosing a city's alleged tax lien on certain property held a direct attack thereon. *McMickle v. Rochelle* (Civ. App.) 125 S. W. 74.

— **Inadequacy of remedy at law.**—See notes under Art. 4643.

Art. 4648. [2991] Injunction to stay execution within twelve months, unless, etc.—No injunction to stay an execution upon any valid and subsisting judgment shall be granted after the expiration of one year from the rendition of such judgment, unless it be made to appear that an application for such injunction has been delayed in consequence of the fraud or false promises of the plaintiff in the judgment, practiced or made at the time of, or after rendition of, such judgment, or unless for some equitable matter or defense arising after the rendition of such judgment. If it be made to appear that the applicant was absent from the state at the time such judgment was rendered, and was unable to apply for such writ within the time aforesaid, such injunction may be granted at any time within two years from the date of the rendition of the judgment. [Id. P. D. 3931.]

Application in general.—When a judgment is void, its enforcement may be enjoined at any time. *Cooke v. Burnham*, 32 T. 129; *Fox v. Woods*, 34 T. 220; *McGar v. Nixon*, 36 T. 289; *Thompson v. Bohannon*, 38 T. 241. See *Cook v. Baldrige*, 39 T. 250; *Nichols v. Snow*, 42 T. 72; *Miller v. Clements*, 54 T. 351; *Hayes v. Bass*, 1 App. C. C. § 16. The limitation does not apply when the injunction is asked for on account of matter arising subsequent to the judgment. *Easley v. Bledsoe*, 59 T. 488; *Clegg v. Varnell*, 18 T. 294; *Harrison v. Crumb*, 1 App. C. C. § 993.

An injunction may be granted within twelve months after the affirmation of a judgment on appeal, although applied for more than that time after the rendition of the judgment in the district court. *Wills Point Bank v. Bates*, 76 T. 329, 13 S. W. 309; *Williams v. Haynes*, 77 T. 283, 13 S. W. 1029, 19 Am. St. Rep. 752.

This article does not apply to an injunction to protect the homestead against invasion under a judgment for the recovery of the land in which the wife was not a party. *Freeman v. Hamblin*, 1 C. A. 157, 21 S. W. 1019. Nor to a suit to reform a judgment. *Kempner v. Jordan*, 26 S. W. 870, 7 C. A. 275. Nor to a suit brought by one not a party to the judgment. *Kempner v. Ivory* (Civ. App.) 29 S. W. 538. See *Lumpkin v. Williams*, 1 C. A. 214, 21 S. W. 967; *Williams v. Lumpkin*, 26 S. W. 493, 86 T. 641.

See, for facts held to be insufficient to bring the plaintiff in an application for injunction within the exception of the above article of the statute, *McCray v. Freeman*, 17 C. A. 268, 43 S. W. 37.

Where defendant in an erroneous judgment learned of the judgment during the term at which it was rendered, but did not apply to the court for relief during such term, he could not afterwards enjoin its execution. *Rowlett v. Williamson*, 18 C. A. 28, 44 S. W. 624.

This article has no application to an action brought upon equitable grounds to vacate a judgment and enjoin its execution, but the period of time in which such action may be brought is determined by Art. 5690. *Lane v. Moon* (Civ. App.) 103 S. W. 214.

The claim that the execution could not be enjoined because it was issued more than one year after rendition of judgment is untenable, where the injunction is sought "for some equitable matter or defense arising after the rendition of such judgment." *Griffith v. M., K. & T. Ry. Co.* (Civ. App.) 108 S. W. 757.

This article only applies to matters affecting rendition of the judgment and does not apply to matters that subsequently arise, and would not bar an injunction staying an execution on the ground that the judgment creditor, who caused the issuance of the execution, had ceased to be the owner of the judgment. *Kruegel v. Rawlins* (Civ. App.) 121 S. W. 216.

Under this article a judgment debtor's right to enjoin the execution of the judgment to enable him to set off claims acquired since the rendition of the judgment was not barred. *Trammell v. Chamberlain* (Civ. App.) 128 S. W. 429.

Agreement to stay execution.—An agreement to stay execution in a case does not take it out of the statute. *Pillow v. Thompson*, 20 T. 206.

That a surety on a replevin bond in reliance on false statements of the defendant principal, who, after the disposal of the action, conspired with the plaintiff to defraud the surety, that he would settle the judgment against which the surety had a defense, and that it would be all right, delayed injunction proceedings for more than a year, will not, despite this article, preclude him from maintaining an injunction. *Axtell v. Lopp* (Civ. App.) 152 S. W. 192.

Art. 4649. [2992] Injunctions granted on sworn petition.—No writ of injunction shall be granted, unless the applicant therefor shall present his petition to the judge, verified by his affidavit taken before some officer authorized to administer oaths, and containing a plain and intelligible statement of the grounds for such relief. [P. D. 3929.]

See *Scales v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 35 S. W. 205; *Alamo Club v. State*, 147 S. W. 639.

Petition in general.—A petition to restrain collection of a tax held not to state that the board of equalization did not approve the assessment. *Clawson Lumber Co. v. Jones*, 20 C. A. 208, 49 S. W. 909.

Cross-bill to action to restrain contractor from interfering with certain premises, alleging lien for improvements which he had assigned, states no cause of action. *Tian v. Lloyd*, 21 C. A. 433, 52 S. W. 932.

Where the statute of limitations is pleaded by plaintiff, in an action against a city to enjoin it from interfering with a lot, described as bounded by certain streets, and the

city disclaims any intention to interfere with any portion of the lot other than the designated streets, it is error to hold that the plea applies to a cross action by the city to enjoin plaintiff from interfering with the opening of the streets. *City of San Antonio v. Campbell* (Civ. App.) 56 S. W. 97.

Petition to enjoin execution sale alleging judgment to be void on certain grounds held to admit its validity in other respects. *Loan & Deposit Co. of America v. Campbell*, 27 C. A. 52, 65 S. W. 65.

Certain pleadings construed in an action by a surviving wife and children to restrain a sale of community property under an execution against her after her remarriage, and held to raise the questions as to whether such sale could then be made, and whether, after her death pending the action, her estate, or that of her deceased husband, or the community estate, were represented. *Wingfield v. Hackney*, 95 T. 490, 68 S. W. 262.

Petition to enjoin judgment held to show good defense to original cause of action. *Dashner v. Wallace*, 29 C. A. 151, 68 S. W. 307.

In a suit to restrain the erection of a building of combustible materials, allegations in the answer held properly stricken out. *Chimine v. Baker*, 32 C. A. 520, 75 S. W. 330.

In proceedings to enjoin operation of a ferry, the question of plaintiff's want of consent held properly in issue by the pleadings. *Parsons v. Hunt* (Civ. App.) 81 S. W. 120.

Where complainant prayed for an injunction, to which he was not entitled, his petition was properly dismissed, on the dissolution of the temporary injunction. *Magoffin v. San Antonio Brewing Ass'n* (Civ. App.) 84 S. W. 843.

In a suit to enjoin the collection of taxes on timber standing on county school lands, on the ground that it was exempt from taxation, allegations of the petition held to show that the title to the timber was vested in plaintiff. *Montgomery v. Peach River Lumber Co.*, 54 C. A. 143, 117 S. W. 1061.

In an action to restrain the enforcement of a default judgment, on the ground of fraud in procuring the same, it is proper to plead all the facts in order to show fully the equities sought. *Dalhart Real Estate Agency v. Le Master* (Civ. App.) 132 S. W. 860.

Refusal of a judge in chambers to sustain special exceptions to the petition for an injunction held not error. *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Civ. App.) 132 S. W. 868.

In a suit to enjoin the Railroad Commission from enforcing rates, certain evidence held admissible under the allegations of the petition. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

In an action to enjoin a railway company from constructing a fence between its right of way and plaintiff's lot, an exception to an allegation in the petition that the fence was apt to injure plaintiff's existing and contemplated lines of business was properly overruled. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

Averments that a judgment of a justice of the peace was void, and that the justice had no jurisdiction over the subject-matter or the person of plaintiff suing to restrain enforcement of the judgment, are mere legal conclusions. *Pye v. Wyatt* (Civ. App.) 151 S. W. 1086.

In an action to enjoin a justice's judgment on the ground of a previous judgment of nonsuit, an allegation that in the first action the justice stated that he would be compelled to render judgment for defendant is not equivalent to an allegation that judgment had been announced so that no nonsuit could be taken. *Id.*

Requisites of petition.—A petition to enjoin the collection of a tax because of the unlawful and excessive assessment should show that the petitioner had used every mode provided by the law for his relief, and should allege readiness to pay the tax admitted to be due. *Rio Grande R. Co. v. Scanlan*, 44 T. 649.

The petition must state all the material and essential elements entitling the party to relief, and negating every reasonable inference arising upon the facts so stated, that the party might not, under other pertinent supposable facts, be entitled to relief. *Gillis v. Rosenheimer*, 64 T. 246; *Moody v. Cox*, 54 T. 492; *Martin v. Sykes*, 25 T. Sup. 197; *Carter v. Griffin*, 32 T. 212; *Smith v. Frederick*, 32 T. 256; *Harrison v. Crumb*, 1 App. C. C. § 992; *Cameron v. White*, 3 T. 152; *Henderson v. Morrill*, 12 T. 1; *Carlin v. Hudson*, 12 T. 203, 62 Am. Dec. 521; *Ferguson v. Herring*, 49 T. 130; *Whitman v. Willis*, 51 T. 421; *Spencer v. Rosenthal*, 58 T. 41; *Purinton v. Davis*, 66 T. 456, 1 S. W. 343; *Braden v. Gose*, 57 T. 37; *Wheeler v. Gray*, 23 S. W. 821, 5 C. A. 12.

A party seeking to enjoin a public officer as to his official acts must show his interest in the subject-matter and that he will be injured by the acts which he seeks to restrain. *Caruthers v. Harnett*, 67 T. 127, 2 S. W. 523; *Jung v. Neraz*, 71 T. 396, 9 S. W. 344.

A petition must state the facts showing the threatened injury. *Land & Cattle Co. v. Board*, 80 T. 489, 16 S. W. 312.

In a petition for an injunction against an execution on the ground that the judgment under which it issued had been rendered in violation of an agreement between counsel for the parties, it should be alleged that the attorneys had authority to make the agreement. *Anderson v. Oldham*, 82 T. 223, 18 S. W. 557.

The rule that he who seeks relief in equity from effects of a judgment rendered against him on personal service must show that he was not guilty of culpable neglect in not making his defense to the suit is simple and easily understood, but its application is often attended with difficulty. The facts in this case reviewed, and held to show a case entitling appellant to equitable relief. *Lumpkin v. Williams*, 1 C. A. 214, 21 S. W. 967.

As to allegations necessary to enable one to enjoin a sale of land under an execution to which he was not a party, see *Cook v. Tex. & P. Ry. Co.*, 22 S. W. 59, 3 C. A. 145.

Petition to restrain sheriff from levying on bank stock in which plaintiff has an equity must state nature of his interest. *Davis v. Beall*, 21 C. A. 133, 50 S. W. 1086.

The rule of pleading that statements of a party are to be taken most strongly against him held reinforced in injunction suits by the requirement that the essential elements entitling plaintiff to relief shall be certain. *City of Paris v. Sturgeon*, 50 C. A. 519, 110 S. W. 459.

A petition in a suit to enjoin an execution on a justice's judgment held required to set out the evidence in support of the plea of privilege interposed in justice's court and overruled by the justice. *Coca Cola Co. v. Allison*, 52 C. A. 54, 113 S. W. 308.

Requisites of petition by resident citizen for an injunction restraining the commissioners' court from opening the ballot boxes and counting the votes cast at a local option election defined. *Clarey v. Hurst* (Civ. App.) 136 S. W. 840.

In a suit for an injunction, the material facts calling for relief must be alleged with sufficient certainty to negative every other reasonable inference therefrom. *Schlinke v. De Witt County* (Civ. App.) 145 S. W. 660.

An application for an injunction must allege the facts with directness, certainty, and particularity. *Shannon v. Hay* (Civ. App.) 153 S. W. 360.

The allegations of a petition for injunction should both aver and negative all facts upon which the right to the injunction depends. *Weaver v. Emison* (Civ. App.) 153 S. W. 923.

The petition, in an action to restrain city officers from putting into effect ordinances for the paving of certain streets and from collecting assessments therefor, should have alleged the sums sought to be collected, in order that the amount of the bond might be fixed under Art. 4650, providing that, when an injunction is applied for to restrain the execution of a money judgment or the collection of a debt, the bond shall be fixed in double the amount of the judgment or debt. *Cole v. Forto* (Civ. App.) 155 S. W. 350.

— **Verification.**—The pleadings relating to restraining process or orders must be verified. *Wright v. Wright*, 3 T. 168.

A petition for temporary injunction sought during the pendency of a suit and prior to final trial must be sworn to. *Johnson v. Daniel*, 25 C. A. 587, 63 S. W. 1033.

A petition for an injunction, signed by plaintiff, to which the jurat of a proper officer certifying that it was subscribed and sworn to before him was attached, held sufficiently verified. *Chancey v. Allison*, 48 C. A. 441, 107 S. W. 605.

An affidavit to a petition for an injunction held sufficient. *Paine v. Carpenter*, 51 C. A. 191, 111 S. W. 430.

To entitle complainant to an injunction restraining enforcement of a judgment pending appeal from an order dissolving an injunction restraining execution of the judgment, complainant was bound to file a sworn petition alleging that the appeal was based on a supersedeas bond. *Lee v. Broocks*, 51 C. A. 344, 111 S. W. 778.

Where the only grounds relied on for temporary injunction were stated in an unsworn petition, a copy of which was made an exhibit to the petition for injunction and the affidavit did not pretend to state that the facts contained in the petition were true, it was improper to grant the injunction in the face of this statute requiring application for injunction to be sworn to. *Lee v. Broocks*, 54 C. A. 220, 118 S. W. 165, 166.

Verification to an affidavit to a petition for a preliminary injunction held insufficient. *Moss v. Whitson* (Civ. App.) 130 S. W. 1034.

Under this article a petition for an injunction, verified by one of the attorneys of the petitioner, who states that the facts alleged are within his knowledge and true, on information received from another, and that he believes the same to be true, is not sufficiently verified. *Clarey v. Hurst* (Civ. App.) 136 S. W. 840.

Under this article a temporary injunction should not be granted where the affidavit of verification is made on knowledge, information, or belief with nothing to show what statements are made on knowledge, and which on information or belief, since affidavits should be so direct and unequivocal that an indictment for perjury will lie if the oath is falsely made. *Smith v. Banks* (Civ. App.) 152 S. W. 449.

Where none of the allegations of a petition for a temporary injunction were on information and belief, supporting affidavit that the allegations as to facts were true, that the allegations based upon knowledge and belief were true to the best of affiant's knowledge and belief was sufficient. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 154 S. W. 337.

Sufficiency of petition.—A petition for an injunction to prevent the collection of a state tax, which discloses no individual damage about to be suffered from the sale sought to be enjoined, except that the sale would cast a cloud on the title of the plaintiff, is not sufficient to authorize the injunction. *Red v. Johnson*, 53 T. 284. But see *Galveston Gas Co. v. County of Galveston*, 54 T. 287.

A petition for injunction to restrain the sale of land for taxes assessed under the act of August 21, 1876, and which taxes were alleged to be excessive, is not sufficient to authorize the writ, if the petition shows no excuse for the failure of the plaintiff to take proper steps to refer, at the proper time, the valuation complained of to the board of equalization. *H. & T. C. R. Co. v. County of Presidio*, 53 T. 518.

Allegations of a telegraph company held sufficient to authorize an injunction to restrain the execution of a judgment against its property, the judgment having been obtained against another company. *Southwestern Telegraph & Telephone Co. v. Howard*, 22 S. W. 524, 3 C. A. 335.

Bill to enjoin execution sale of land as the property of plaintiff's grantor held good as against a general demurrer. *Paddock v. Jackson*, 16 C. A. 655, 41 S. W. 700.

Allegation of petition that county officers had diverted one fund to another held too vague for issuance of injunction. *Clarke & Courts v. San Jacinto County*, 18 C. A. 204, 45 S. W. 315.

Complaint in action by resident to enjoin performance by city of illegal contract to furnish water to a company outside the city held to show no sufficient reason for granting relief. *Wood v. City of Victoria*, 18 C. A. 573, 46 S. W. 284.

Petition to enjoin county from opening roads through plaintiff's land held insufficient, as not stating an entry by the county, except on proceedings in accordance with law. *Hall v. La Salle County* (Civ. App.) 46 S. W. 862.

Petition that alleges sheriff is levying execution on property of others does not state ground for injunction. *Davis v. Beall*, 21 C. A. 183, 50 S. W. 1086.

A petition for an injunction to restrain the erection of a fence held demurrable, and to justify the dissolution of a temporary injunction restraining its erection. *Slaughter v. Collup*, 22 C. A. 578, 55 S. W. 182.

Petition in a suit to enjoin the sale of land levied on, because of homestead interests of two of the plaintiffs, who were tenants in common with the other plaintiffs, which did not designate what part of the land was claimed as a homestead, was insufficient. *Ellis v. Harrison*, 24 C. A. 13, 57 S. W. 984.

A petition to restrain the collection of a larger sum than was due on a judgment held not demurrable as an attack on the validity of the judgment. *Hamburger v. Kosminsky* (Civ. App.) 61 S. W. 958.

Where plaintiff's petition affirmatively shows that certain property is their homestead, and negatives the fact that defendants' judgment is a lien thereon, and alleges that defendants are about to sell such homestead under execution, and prays an injunction, the petition is good as against a general demurrer. *Wylyde v. Capps*, 27 C. A. 112, 65 S. W. 648.

Petition for injunction restraining commissioners' court from declaring a local option election valid held not to show that petitioner was entitled to sue because failing to allege that he was "legally" engaged in the retail liquor business. *Harding v. Commissioners' Court of McLennan County*, 96 T. 174, 66 S. W. 44.

A bill to enjoin a judgment creditor of a grantor from selling under execution realty conveyed to plaintiff held not to present a case for equitable relief. *Chamberlain v. Baker*, 28 C. A. 499, 67 S. W. 532.

A bill to enjoin a judgment creditor of a grantor from selling under execution realty conveyed to plaintiff, together with defendant's answer and the reply thereto, held to warrant the trial court in finding that the deed was void as against creditors. *Id.*

In a suit to enjoin a judgment, the petition held sufficient to justify a decree enjoining the issuance of execution thereon. *Deleshaw v. Edelen*, 31 C. A. 416, 72 S. W. 413.

Allegation, in petition to enjoin opening highway, that plaintiff's damages have not been paid, held sufficient to let in proof. *McCown v. Hill* (Civ. App.) 73 S. W. 850.

Petition of liquor dealers held not to show them entitled to enjoin publication of result of a local option election. *L. Eppstein & Son v. Webb* (Civ. App.) 75 S. W. 337.

Allegations of a petition in a suit by a tenant held to entitle him to an injunction restraining the landlord from depriving him of a portion of the premises and of the crops, and for damages sustained. *Foster v. Roseberry* (Civ. App.) 78 S. W. 701.

Bill held not to show special injury to plaintiffs, entitling them to enjoin illegal call for state convention of political party. *McDonald v. Lyon*, 43 C. A. 484, 95 S. W. 67.

In a suit to restrain a levy on certain property, plaintiffs' petition alleging that they were entitled to point out property to be levied on by the sheriff held subject to exception. *Stone v. Tilley* (Civ. App.) 95 S. W. 718.

A petition in a suit for an injunction to restrain defendants from locating a cemetery where it would pollute plaintiff's wells and springs held sufficient. *Elliott v. Ferguson* (Civ. App.) 103 S. W. 453.

A petition to enjoin execution for costs held to show that injunction was sought "for some equitable matter or defense arising after the rendition of such judgment," under Art. 4648. *Griffith v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 108 S. W. 756.

A petition to enjoin execution for costs held to sufficiently allege that all were paid or a willingness and readiness to pay any balance unpaid. *Id.*

In a suit to enjoin the collection of taxes on timber standing on county school lands, petition held to show that plaintiff's theory was that the timber could not be taxed separately so long as it was not severed, irrespective of whether the county owned it, and hence was bad on general demurrer. *Montgomery v. Peach River Lumber Co.*, 54 C. A. 143, 117 S. W. 1061.

Under a petition, held, that petitioner was entitled to a preliminary injunction to restrain a water company from shutting off his supply of water. *Ball v. Texarkana Water Corporation* (Civ. App.) 127 S. W. 1068.

A petition held to state a cause of action justifying a temporary injunction. *Middleton v. Presidio County* (Civ. App.) 129 S. W. 637.

A petition to restrain the inclosure of a part of a street for building operations to the damage of occupants of adjoining property held not objectionable for failure to sufficiently allege that the obstructions were unlawfully erected, etc. *American Const. Co. v. Seelig* (Civ. App.) 131 S. W. 655.

In an action for an injunction, the bill held sufficient as against a general demurrer. *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Civ. App.) 132 S. W. 868.

A petition for an injunction restraining sale of land on execution as plaintiff's homestead held sufficient in the absence of special exceptions to entitle plaintiff to prove his homestead claim. *Parsons v. McKinney* (Civ. App.) 133 S. W. 1084.

A petition in a suit by a city to enjoin a telephone company from increasing its rates held to sufficiently make the franchise of the company a part of the petition. *Panhandle Telephone & Telegraph Co. v. City of Amarillo* (Civ. App.) 142 S. W. 638.

A complaint to restrain levy on certain land, held insufficient, where it failed to allege that other lands pointed out to the officer, and of sufficient value, were clear of incumbrances, not homestead, etc. *Pierson v. Connellee* (Civ. App.) 145 S. W. 1039.

In a suit to restrain alleged violation of an original railroad company's contract by a reorganized corporation, certain allegations held insufficient to show that certain prior liens covered the property of the original company and remained after a sale to defendant. *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094.

A petition by a railroad company to enjoin execution of a judgment against it in condemnation proceedings on land which was subject to a vendor's lien, showing that on the owner's failure to discharge the lien attorney's fees had accrued, and that the execution would cause the company to pay an amount greater than the judgment, in order to free the land from the lien, stated ground for injunction. *Baker v. Crosbyton Southplains R. Co.* (Civ. App.) 146 S. W. 569.

An allegation, in a petition for injunction against execution, that the petitioner now tenders into court the balance of amount due on a judgment, and asks that on satisfaction thereof it be paid to defendant, or whoever is entitled to it, sustains an order for injunction, without actually showing that the money had been paid into the court. *Id.*

A petition for an injunction to restrain third persons from intruding as members of the executive committee of a national party, and to restrain members thereof from inducing the intrusion, alleging that plaintiffs were the duly qualified and elected members, and that defendants were without color of title and were mere intruders, held to sufficiently negative the inference that the proceeding was one to try title for the office. *Ware v. Welch* (Civ. App.) 149 S. W. 263.

A petition held not to sufficiently allege fraud or other ground of equitable relief so as to authorize the enjoining of the enforcement of a justice's judgment, though it was not appealable because of the amount involved. *Flow v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 149 S. W. 1087.

A petition by a public weigher to enjoin an unauthorized weigher held not open to general demurrer for failure to allege that the office of public weigher had been created by the commissioner's court of the county, and that necessary steps had been taken by the voters to the creation of such office. *Perry v. Carlisle* (Civ. App.) 151 S. W. 1155; *Carlisle v. Perry*, *Id.* 1158.

A petition to enjoin a sale of land which complainant claimed was her homestead, on a judgment recovered against her husband, since deceased, held not subject to a general demurrer. *Bailey v. Arnold* (Civ. App.) 156 S. W. 531.

— **Allegations as to facts.**—Injunction was sought against an irrigation ditch company to restrain it from taking lands of the plaintiffs for a site for dam and for ditches. It appeared that condemnation proceedings were pending under the statute. There was no allegation that the land was not within the arid portion of the state. Held error to grant a perpetual injunction. *McGhee Irrigation Co. v. Hudson*, 85 T. 587, 22 S. W. 398.

Sufficiency of bill for injunction against execution held determinable from the facts alleged in it and those supplied by the answer. *Paddock v. Jackson*, 16 C. A. 655, 41 S. W. 700.

A petition for an injunction restraining the collection of a tax that states that the tax was levied upon an unreasonably excessive assessment, made in fraud of plaintiff's rights, states a cause of action. *Johnson v. Holland*, 17 C. A. 210, 43 S. W. 71.

The owner of abutting property can not enjoin a company from building a railroad on a street of a city between certain breweries and the nearest railroad on the allegation that the sole purpose of the construction of the railroad was for the private use of certain persons. The petition for injunction should have specifically averred the facts that negative the public use. *Mangan v. Texas Transportation Co.*, 18 C. A. 478, 44 S. W. 998.

Where a petition for an injunction filed in the county court failed to allege the value of the subject-matter of the suit, a plea in reconvention claiming damages could not aid the petition, so as to give the court jurisdiction to grant the writ. *De Witt County v. Wischkemper*, 95 T. 435, 67 S. W. 882.

Allegations as to possession by agent, which, if adverse to him, would have given them title, when contradicted by other allegations of petition, held not to entitle plaintiffs to injunction restraining sale of land on execution against agent. *Brown v. Ikard*, 33 C. A. 661, 77 S. W. 967.

The petition in a suit by a wife in which her husband joined to enjoin the sale of her land under execution against the husband held sufficient without alleging facts which make the property the wife's separate property. *Texas Brewing Co. v. Bisso*, 50 C. A. 119, 109 S. W. 270.

A bill to enjoin a judgment alleging that the judgment was void, but setting out no facts to show that it was void, held insufficient to authorize relief. *New York Chemical Co. v. Spell Bros.*, 56 C. A. 315, 120 S. W. 579.

Facts alleged in the petition in trespass to try title held not to authorize the dispossession of defendants from the land by a mandatory injunction. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

It is not sufficient, in a suit for injunction, to merely allege that the commission of threatened acts will work irreparable harm; but the facts must be alleged. *Id.*

The facts alleged in a petition, which was in the usual form in trespass to try title and for rent and damages, did not authorize the dispossession of defendants by mandatory injunction, either with or without notice; such an injunction being proper only where the necessity therefor is pressing. *Id.*

It is not sufficient, in a suit for injunction, to merely allege that the commission of threatened acts will work irreparable harm, but facts must be alleged showing that fact. *Id.*

A petition alleging abandonment by a husband, taking the children, and intention to remove them from the state, and the wife's desire and ability to retain them, authorized a temporary injunction against their removal from the jurisdiction. *Green v. Green* (Civ. App.) 146 S. W. 567.

A bill to enjoin execution of a judgment of a justice of the peace not alleging facts showing invalidity of service, or facts saving his right to set the judgment aside from being barred by limitations, held insufficient. *Board v. Adams*, 146 S. W. 685.

In an action to enjoin a railway company from constructing a fence between its right of way and plaintiff's lot, an allegation that the right of way constituted a public highway to and from which plaintiff had a right of ingress and egress, etc., was subject to exception for failing to plead facts showing such a right. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

A petition in a suit by a county and a city and the citizens thereof to restrain a railroad company from removing from the city its machine shops, roundhouses, and general offices held, in the absence of special exceptions, to state facts binding railroad companies to maintain their shops and roundhouses and general offices in the city. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

A petition to restrain an execution sale under a justice's judgment, which alleged that the justice was without jurisdiction because the suit was based on 20 notes of \$10 each and 10 per cent. attorney's fees, as against which a credit of \$45 had been allowed, did not show that the amount involved was in excess of \$200; there being no averment as to the date of the credit. *Chance v. Pace* (Civ. App.) 151 S. W. 843.

A petition to enjoin a substituted trustee from selling land which states that such trustee did not have authority under the trust deed, which was a conclusion, but pleads

no facts showing whether the deed of trust gave him authority, was insufficient; a power to sell being strictly construed. *Hicks v. Murphy* (Civ. App.) 151 S. W. 845.

The petition of a public weigher who sought to enjoin an unauthorized weigher from weighing produce which alleged that the plaintiff was the public weigher for the town of S. is not deficient for failing to allege that S. was a city; the word "town" being a generic word which includes cities, boroughs, and villages. *Perry v. Carlisle* (Civ. App.) 151 S. W. 1155; *Carlisle v. Perry*, *Id.* 1158.

In an action to enjoin the cutting and removal of timber the mere allegation that plaintiffs would otherwise suffer irreparable damage was but a legal conclusion. *Alf Bennett Lumber Co. of Texas v. Fall* (Civ. App.) 157 S. W. 209.

— **Inadequacy of remedy at law.**—A petition in a suit for an injunction restraining execution on a void judgment, showing on its face that the petitioner has a legal remedy, is demurrable. *Givens v. Delprat*, 28 C. A. 363, 67 S. W. 424.

Where branch pilots sue to restrain one not a branch pilot from acting as such, an allegation that the defendant is insolvent, so that the statute authorizing a judgment against him is of no avail, shows plaintiffs without adequate remedy at law. *Petterson v. Smith*, 30 C. A. 139, 69 S. W. 542.

A bill to restrain issuance of an execution held without equity in that it appeared that the matters relied on could have been set up as a defense in the action. *Wilson v. Cook* (Civ. App.) 91 S. W. 236.

A petition to restrain the prosecution of a suit in a sister state held to state no cause of action because of failure to show any inadequacy of the defense at law in the courts of the sister state. *Lightfoot v. Murphy*, 47 C. A. 112, 104 S. W. 511.

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

Dissolution on demurrer to bill.—See notes under Art. 4663.

Evidence.—The plaintiffs, in seeking a perpetual injunction, had the burden of showing facts authorizing its issuance. Failure to allege that the land was not arid was a fundamental defect. *McGhee Irrigation Co. v. Hudson*, 85 T. 587, 22 S. W. 398.

Evidence held insufficient to entitle a judgment debtor to restrain execution. *McCray v. Freeman*, 17 C. A. 268, 43 S. W. 37.

Where it is uncertain whether a verdict for plaintiff in an action to recover damages resulting from the wrongful removal of plaintiff's fence by the overseer of the road district is based on evidence that the damage was done by negligence in removal or on evidence of unauthorized removal, a decree perpetuating an injunction enjoining interference with the fence is not justified. *Luckie v. Schneider* (Civ. App.) 57 S. W. 690.

Evidence in a suit to enjoin the collection of the judgment held not sufficient to show that plaintiff had not received credit for a payment alleged to have been made by him. *Missouri, K. & T. Ry. Co. of Texas v. Wade* (Civ. App.) 62 S. W. 807.

Where the plaintiff in an action to enjoin a trespass is in actual and exclusive possession of the land, it is not necessary to prove title from the government. *Creswell v. Beakley*, 28 C. A. 245, 67 S. W. 907.

Where, in a suit to restrain the maintenance of a cotton gin near a dwelling, it appears the dust and lint complained of issue from pipes extending through the roof, a finding of the jury that a fence about the gin would not obviate the difficulty is warranted. *Faulkenbury v. Wells*, 28 C. A. 621, 68 S. W. 327.

In an action to enjoin a sewerage company from interference with a private sewer in a public street, held, that plaintiff made a prima facie case on showing that he had acquired the title of the original owner of the sewer. *Oak Cliff Sewerage Co. v. Marsalls*, 30 C. A. 42, 69 S. W. 176.

In a suit by adjoining property owners to restrain a railroad's use of a street for a switchyard, evidence held sufficient to show that complainants had sustained special injury. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 93 S. W. 177.

In injunction proceedings to restrain defendant from engaging in the photograph business, evidence held to support a jury finding in favor of plaintiff. *Parrish v. Adwell* (Civ. App.) 124 S. W. 441.

Certain proofs held not to authorize an injunction restraining the construction of a cotton gin, on the ground that its operation would create a nuisance. *Robinson v. Dale* (Civ. App.) 131 S. W. 308.

That one was in actual possession would be only prima facie evidence of his title or right of possession necessary to support his suit to enjoin another from trespassing thereon. *Paul v. City of El Paso* (Civ. App.) 131 S. W. 438.

Under Art. 4643, providing for the grant of a writ of injunction where it shall appear that the party applying for the writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant, and Rev. St. 1895, art. 3115 et seq., declaring that unappropriated waters of flowing rivers may be acquired for irrigation and other purposes, a lower riparian owner is not entitled to a temporary injunction against the diversion of water for the irrigation of nonriparian land in the absence of a showing that his land is now being used or is intended for immediate use or is prepared for agricultural or other purposes rendering the use of the water of the river necessary and beneficial. *Biggs v. Leffingwell* (Civ. App.) 132 S. W. 902.

Evidence held insufficient to authorize a temporary injunction restraining defendant from boring for oil on land held under a lease. *Simms v. Reisner* (Civ. App.) 134 S. W. 278.

Where, in a suit to enjoin enforcement of a judgment, the truth of plaintiff's allegations was denied, it was error to perpetuate the injunction on no other proof than the affidavit on which the preliminary injunction was granted. *Withers v. Linden* (Civ. App.) 138 S. W. 1117.

Evidence in a suit to restrain an obstruction to a public road held not to show any special injury to plaintiff different from that suffered by the public generally. *Owens v. Varnell* (Civ. App.) 145 S. W. 256.

In a proceeding to enjoin the commissioners' court from building a new courthouse, evidence on motion to continue a temporary injunction held not sufficient to warrant a

reasonable belief that the actions of the court were founded in fraud. *McWilliams v. Commissioners' Court of Pecos County* (Civ. App.) 153 S. W. 368.

As a rule, injunction will be granted to prevent a cloud being cast upon a title to realty, when the evidence upon which plaintiff's right depends is not of record, or shown by the instruments upon which it depends. *Weaver v. Emison* (Civ. App.) 153 S. W. 923.

Art. 4650. [2993] Judge's fiat to be indorsed on petition.—If, upon the inspection of such petition, it shall appear to the judge from the facts stated therein that the applicant is entitled to the writ, he shall indorse on such petition or annex thereto his written order directing the clerk of the proper court to issue the writ of injunction prayed for, upon such terms and under such modifications, limitations and restrictions as may be specified in said order; and the judge shall also specify in such order the amount of the bond to be given by the applicant as a prerequisite to the issuance of the writ. If the injunction be applied for to restrain the execution of a money judgment or the collection of a debt, the bond shall be fixed in double the amount of such judgment or debt. [P. D. 3933.]

Giving new bond.—Should it appear that the amount of the bond is insufficient, the judge may permit the plaintiff to give a new bond in a sufficient amount. *Downes v. Monroe*, 42 T. 307.

Time for filing bond.—It is error to permit a bond to be filed after judgment. *Downes v. Monroe*, 42 T. 307.

Validity of bond.—See notes under Art. 4654.

Duration of temporary restraining order.—It is obvious that under this article and Art. 4651 the judge is authorized to place upon a preliminary injunction such limitation as to the time of its operation as he may see proper; and an order indorsed by the judge on a petition for injunction, directing the clerk to cite defendants to appear at a certain time and place to show cause why a permanent injunction should not be granted and at the same time to issue "a restraining order to defendants * * * pending such hearing" shows that the intention was to limit the operation of the order until such time as the parties could be heard upon the issue, whether under the allegations of the petition and answer, should one be filed, an injunction to remain in force until the final disposition of the case should be granted. *Riggins v. Thompson*, 96 T. 154, 71 S. W. 14.

Requisites of petition.—See notes under Art. 4649.

Art. 4651. [2994] Notice to opposite party, when.—Upon application for any writ of injunction, if it appear to the judge that delay will not prove injurious to either party, and that justice may be subserved thereby, he may cause notice of such application to be served upon the opposite party, his agent or attorney, in such manner as he may direct, and fix a time and place for the hearing of such application.

Power to issue ex parte injunction.—While the facts alleged in the petition did not show any reason for issuing even a prohibitory injunction without the notice provided for by this article, where delay will not injure either party, the issuance of the prohibitory injunction without notice was not such an abuse of the trial court's discretion as would justify its vacation. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

It is discretionary with the trial court, on application for a temporary injunction, to act upon plaintiff's petition without notice to defendants, or to permit them to present pleadings and evidence and dispose of the matter as then presented. *Commissioners' Court of Floyd County v. Nichols* (Civ. App.) 142 S. W. 37.

The power of equity to grant a preliminary injunction without notice should not be exercised, unless there is a pressing necessity for such action. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

Rule as to mandatory injunction.—A mandatory injunction may be granted in a proper case without notice, even for the purpose of restoring to the owner possession of the premises of which he has been deprived by trespass. *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

Where a railroad company obligated by contract to maintain in a city its machine shops, roundhouses, and general offices had removed the same before suit was filed to restrain the company from violating its obligation, the court should not without notice grant a mandatory injunction compelling the company to remove its general offices from their present location to the city. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

The power of equity to grant a preliminary injunction without notice should not be exercised unless there is a pressing necessity for such action, and, as a general rule, a mandatory injunction should not be ordered before a final hearing of the case, and for the purpose of executing the judgment. *Id.*

Duration of temporary restraining order.—See notes under Art. 4650.

Transfer of subject-matter after rule to show cause.—A party cannot avoid the effect of an injunction by transferring the subject-matter of the order to another before the issuance of the writ, when he knows that a rule has been granted to show cause. *City of San Antonio v. Rische* (Civ. App.) 38 S. W. 388.

Dissolution of ex parte injunction.—Ordinarily a temporary injunction granted ex

parte will be dissolved on motion on answer under oath denying specific allegations of the petition material to granting it. *Daniels v. Daniels* (Civ. App.) 127 S. W. 569.

An order dissolving, on answer under oath clearly denying the material facts, and supported by ample testimony, a temporary injunction, granted without notice, on the petition, will be affirmed. *Wainwright v. Cotter* (Civ. App.) 137 S. W. 419.

Art. 4652. [2995] Petition to be filed and cause docketed.—Upon the grant of any writ of injunction, the party to whom the same is granted shall file his petition therefor, together with the order of the judge granting the same, with the clerk of the proper court; and, if such writ of injunction does not pertain to a pending suit in said court, the cause shall be entered on the civil docket of the court in its regular order in the name of the party to whom the writ is granted as plaintiff and of the opposite party as defendant.

See *Wier v. Hill* (Civ. App.) 125 S. W. 366.

Venue.—A suit to enjoin a sale of land under a judgment to which the plaintiff is not a party may be brought in the county in which the land is situated. *Huggins v. White*, 27 S. W. 1066, 7 C. A. 563.

In an action to restrain the enforcement of a judgment against the land of a stranger to the judgment, the action was properly brought in the county where the land was situated. *Horvets v. Dunman*, 46 C. A. 177, 102 S. W. 462.

This article and the following article fix the venue of suits for injunction for causes other than to stay proceedings in a suit or execution on a judgment in the county of the domicile of defendant. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

Under Art. 1830, subd. 27, providing that, when in any law authorizing any particular character of action the venue is expressly prescribed, the suit shall be commenced in the county to which the jurisdiction may be given, this article, and Art. 4653, providing that writs for injunction shall be returnable to and tried in the county in which defendant has his domicile, a suit against a railroad company for injunctive relief only can be brought in the county in which the corporation has its domicile. *Id.*

Art. 4653. [2996] Writs, where returnable.—Writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered: writs of injunction for other causes, if the party against whom it is granted be an inhabitant of the state, shall be returnable to, and tried in, the district or county court of the county in which such party has his domicile, according as the amount or matter in controversy comes within the jurisdiction of either of said courts. If there be more than one party against whom any writ is granted, it may be returned and tried in the proper court of the county where either may have his domicile. [*Id.* P. D. 3932.]

See *Reagan v. Evans*, 2 C. A. 35, 21 S. W. 427; *Wier v. Hill* (Civ. App.) 125 S. W. 366; *Ferguson v. Fain*, 142 S. W. 1184.

Application.—This article does not apply in case of an injunction to restrain collection of judgment of justice court, as the justice court has no power to issue writs of injunction or to determine issues dependent thereon. *Foust v. Warren* (Sup.) 72 S. W. 405.

In reference to proper county in which writs of injunction are returnable, this article should be looked to where an injunction has been issued against a county, rather than to Art. 1830 on the general subject of venue of suits. *Little v. Griffin*, 33 C. A. 515, 77 S. W. 635.

Where the suit is not to stay any proceedings in the case or to stay the execution on a judgment, but injunction is sought against the sale of a particular piece of property, and the injunction does not prevent the levy of the process upon any other property subject to it, an injunction can be sued out of another court than the one in which judgment was rendered and out of which execution was issued. In such case this article does not apply. *Cooper Grocery Co. v. Peter*, 35 C. A. 49, 80 S. W. 108.

This article does not apply where the injunction is to restrain an execution on a void judgment, where the invalidity affirmatively appears from the face of the record, and the injunction may be sued out in the county where the execution is sought to be levied. *Ketelsen & Degetan v. Pratt Bros. & Seay* (Civ. App.) 100 S. W. 1174.

This article applies to suits attacking the validity of the judgment, or presenting defenses properly connected with the suit in which it was rendered and which should have been adjudicated therein, and does not apply to a suit to enjoin the issuance of an execution in favor of one not entitled to have it enforced. *Kruegel v. Rawlins* (Civ. App.) 121 S. W. 216.

Art. 1830, subd. 17, providing that no inhabitant of the state shall be sued out of the county of his domicile, except when suit is brought to enjoin execution of a judgment, in which case the suit may be brought in the county where the judgment was rendered, and this article, apply only when suit is to restrain execution of a judgment because of some infirmity in the judgment or the writ, or where some equity has arisen since the judgment which should prevent enforcement, and does not apply where the injunction is only to prevent sale of exempt property, in which case suit may be brought in any court having jurisdiction of the subject-matter in the county in which any defendant resides or in which the property, if realty, is situated. *Parsons v. McKinney* (Civ. App.) 133 S. W. 1084.

Jurisdiction and venue.—See, also, notes under Arts. 4643, 4652.

The first clause of this article is imperative. *Hendrick v. Cannon*, 2 T. 259; *Winnie v. Grayson*, 3 T. 429; *Cook v. Baldrige*, 39 T. 250; *Hugo v. Dignowitty*, 1 App. C. C. § 158; *George v. Dyer*, 1 App. C. C. § 780.

An injunction to restrain the sale of land in A. county under an execution issued on a judgment rendered in B. county must be returned to the court from which the execution issued. *Seligson v. Collins*, 64 T. 314, citing *Hendrick v. Cannon*, 2 T. 259; *Winnie v. Grayson*, 3 T. 429; *Cook v. Baldrige*, 39 T. 250.

When the plaintiff in injunction is not a party to or in any wise connected with a judgment rendered in another county, or the execution issued thereon, an injunction to restrain the sale of goods under such execution levied on in the county of plaintiff's residence is returnable to the proper court of the latter county. *Brown v. Young*, 1 App. C. C. § 1241, citing *Winnie v. Grayson*, 3 T. 429. And see Art. 1830, § 17.

Our courts have uniformly held that the court in which the judgment is rendered alone has jurisdiction of a suit to enjoin the execution of such judgment, unless such judgment is void. *Adoue v. Wettermark*, 22 C. A. 545, 55 S. W. 511.

Writ of injunction to restrain officer from selling property under execution must be sued out in the court issuing the execution. *Id.*

The district court has no jurisdiction in a case which is in substance a suit to stay execution upon a judgment of the county court. The latter court only has jurisdiction. *Smith v. Morgan*, 28 C. A. 245, 67 S. W. 919.

Judgment of affirmance on a supersedeas bond, given on appeal by a third party solely from a judgment of foreclosure in a suit on a debt and to foreclose a mortgage lien, held not a judgment against appellant for the amount of the money judgment below against the mortgagor, but only an affirmance of the judgment then recovered, and hence appellant was entitled to resist execution thereunder by injunction from a court other than that rendering judgment of affirmance. *Adoue v. Wettermark*, 28 C. A. 503, 68 S. W. 553.

An injunction suit to restrain execution of an order of sale issued on a judgment must be brought in the court in which the judgment was obtained. *Broocks v. Lee* (Civ. App.) 110 S. W. 757.

A writ of injunction to restrain execution of a judgment rendered by the county court is returnable to the county court. *Texas & P. Ry. Co. v. Butler*, 52 C. A. 323, 114 S. W. 671, 672.

The judgment of a county court prima facie valid is not subject to attack in any other court. (In this case injunction was sued out in the district court.) *Wheeler v. Powell* (Civ. App.) 114 S. W. 689.

Under this article a district court has not jurisdiction to dissolve a temporary writ of injunction previously granted by the district judge, restraining the enforcement of a judgment rendered by the county court. *Godfrey v. Lackey* (Civ. App.) 129 S. W. 1145.

This article fixes the venue of trials on the merits of applications for injunctions to arrest the execution of judgments, and does not change the laws conferring jurisdiction on the county or district courts over the subject-matter. *Smith Drug Co. v. Rochelle* (Civ. App.) 135 S. W. 258.

This article does not give the district court jurisdiction to hear and determine an application for an injunction to restrain execution upon a judgment rendered in the county court. *Texas & P. Ry. Co. v. Butler*, 52 C. A. 327, 135 S. W. 1064.

Under this article a county court has jurisdiction to enjoin proceedings on an execution for costs out of that court. *Ward v. Powell* (Civ. App.) 140 S. W. 1188.

Under this article the writ in a suit in the county court to enjoin the enforcement of a judgment of the Lee county court should be returnable to that court, unless the judgment sought to be enjoined was absolutely void. *Hillsman v. Cline* (Civ. App.) 145 S. W. 726.

Under Const. art. 5, §§ 8, 16, relating to the jurisdiction of the county and district courts in the issuance of executions, and Art. 4643 and this article, a district judge might, where the equities warranted, enjoin execution of a judgment of the county court, though he could not finally dispose of the injunction proceeding, which should be finally disposed of in the county court. *Baker v. Crosbyton Southplains R. Co.* (Civ. App.) 146 S. W. 569.

Where the injunction applied for is merely ancillary to the main purpose of the suit, the suit is not a suit for injunction within this article, providing that writs for injunction shall be returnable to and tried in the county in which defendant has his domicile. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

Art. 4654. [2997] The bond for injunction.—Upon the filing of the petition and order of the judge hereinbefore provided for, in the proper court, and before the issuance of the writ of injunction, the complainant shall execute and file with the clerk a bond to the adverse party, with two or more good and sufficient sureties, to be approved by such clerk, in such sum as may be affixed in the order of the judge granting the writ, conditioned that the complainant will abide the decision which may be made therein, and that he will pay all sums of money and costs that may be adjudged against him, if the injunction be dissolved in whole or in part. If the state be complainant in any petition for injunction, no bond shall be required. [P. D. 3933.]

Provision mandatory.—The provisions of this article are mandatory and no exception is made in favor of a receiver. *Paine v. Carpenter*, 51 C. A. 191, 111 S. W. 431.

The issuance of a preliminary injunction without bond held erroneous, in the absence of facts justifying such discretion. *Pierson v. Connellee* (Civ. App.) 145 S. W. 1039.

Signature by attorney.—On motion to quash temporary injunction on ground that plaintiff's name was not signed to the bond, held that his name might be signed thereto by his attorney, and thereupon the motion be overruled. *Haynes v. Texas & N. O. R. Co.*, 51 C. A. 49, 111 S. W. 427.

Validity.—Where a bond is less onerous than required by the statute, as when it is executed for a less amount than the judgment enjoined, it is valid for the amount named in the bond. *Miller v. Clements*, 54 T. 351.

An injunction bond payable to one of the parties defendant "et al." will not be quashed. *Parker v. Boyd* (Civ. App.) 42 S. W. 1031.

Order for bond by appellate court.—On appeal from a judgment granting an injunction, where it appears that plaintiff did not execute and file with the clerk of the court a bond for injunction, and that the district judge who granted the writ did not fix the amount of the bond to be executed as a condition precedent to the issuance of the writ as expressly required by this article, the court of civil appeals, where the petition states grounds for injunctive relief, may enter such orders and judgment as should have been entered by the lower court, requiring the execution of the bond by plaintiff to be approved by the clerk of the district court. *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Civ. App.) 132 S. W. 868.

Filing bond.—See notes under Art. 4650.

Damages in general.—See notes under Art. 4667.

Liability.—If the bond is more onerous than required by statute, judgment cannot be rendered against the sureties. *James v. Reynolds*, 2 T. 250; *Hanks v. Horton*, 5 T. 103; *Pillow v. Thompson*, 20 T. 206.

When an injunction is sued out against the sale of personal property seized in execution, some of which is subject to execution, the measure of damages upon dissolving the injunction is the value of the property subject to execution. The defendant, upon an injunction suit upon proper pleadings in reconvention and proof, may recover his damages for the wrongful suing out of the injunction, without service of citation upon the sureties upon the injunction bond. *Sharp v. Schmidt*, 62 T. 263; *Coates v. Caldwell*, 71 T. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

Injunction bond does not cover attorney fees. *Jones v. Rosedale Street Ry. Co.*, 75 T. 382, 12 S. W. 998; *Davis v. Rosedale Street Ry. Co.*, 75 T. 381, 12 S. W. 999.

Where defendants are enjoined from conducting their business in such manner as to injure and annoy plaintiff by fire and smoke, in an action on the injunction bond they cannot recover for loss sustained by voluntarily closing their business. *Bancroft v. Russell*, 3 C. A. 95, 22 S. W. 240.

Where plaintiff applied for an injunction to restrain the collection of a larger amount than was due on a judgment against him, defendant held not entitled to a judgment against the sureties on the injunction bond for the amount due. *Hamburger v. Kosminsky* (Civ. App.) 61 S. W. 958.

In a suit to restrain the enforcement of a judgment and to set the same aside, held error to give judgment for defendant against plaintiff and the sureties on his injunction bond for the amount of the debt, costs, and interest. *Warren v. Foust*, 36 C. A. 59, 81 S. W. 323.

Where enforcement of a foreclosure decree is wrongfully restrained, the purchaser is entitled to recover on the injunction bond the rental value of the premises up to the time he was placed in possession. *Stevens v. Smith*, 49 C. A. 126, 107 S. W. 141.

Where an injunction restraining an execution sale is dissolved, judgment against the sureties on the injunction bond may not be rendered for the amount to be collected by the execution, without pleading and proof that the temporary injunction had caused such damage. *Dillard v. Stringfellow & Hume*, 50 C. A. 410, 111 S. W. 769.

The conditions of an injunction bond to abide the decision held not to prevent a second suit for the same relief, and plaintiff is not liable on the bond for defendant's expenses in defending another injunction suit, brought by plaintiff after the dissolution of the first. *Carpenter v. First Nat. Bank of Sour Lake*, 53 C. A. 23, 114 S. W. 904.

— **Profits.**—Profits which would have been made if an established business had not been interfered with by injunction may be recovered. *Galveston City R. Co. v. Miller et al.* (Civ. App.) 38 S. W. 1132.

Judgment against sureties in injunction suit.—Upon the dissolution of an injunction judgment cannot be rendered on the bond for the amount of the debt enjoined against the principal and sureties unless a cross-action is filed. If such an action is not filed, suit may be brought against the principal and sureties on the bond. *Appleton v. Draughan*, 11 C. A. 89, 32 S. W. 46.

It is unnecessary to cite sureties on an injunction bond to answer a plea of reconvention in order to render judgment against them for damages caused by the injunction. *Smith v. Wilson*, 18 C. A. 24, 44 S. W. 556.

In a suit to enjoin the sale of property levied on under an execution, the direction of a verdict against plaintiff and the sureties on the injunction bond held erroneous. *Webb v. Caldwell* (Civ. App.) 112 S. W. 97.

Action on bond.—Where defendant in injunction answered to the merits and reconvened for damages, but the action was tried and judgment rendered without reference to such plea, an action on the injunction bond for damages was not barred. *Crebbins v. Bryce*, 24 C. A. 532, 60 S. W. 587.

In an action on an injunction bond, evidence examined, and held to warrant the amount of the verdict rendered. *Hill v. Peeler* (Civ. App.) 105 S. W. 1005.

In a suit to enjoin the sale of property under an execution, held, that the court properly allowed defendant to dismiss a cross-bill as to plaintiff, and prosecute his action against the sureties on the injunction bond. *Broussard v. Lawson* (Civ. App.) 124 S. W. 712.

Art. 4655. [2998] Clerk to issue the writ.—When the petition, order of the judge and bond aforesaid are filed, it shall be the duty of the clerk to issue the writ of injunction directed in such order, in conformity with the terms thereof, and to deliver the same to the sheriff or any constable of the proper county for service and return.

Issuance of writ by clerk of another county court.—A temporary injunction held not subject to dissolution because the judge directed the clerk of the court of a county

other than the one in which the suit was pending to issue the writ. *Buchanan v. Barnsley* (Civ. App.) 105 S. W. 843.

Art. 4656. [2999] The writ and its requisites.—The writ of injunction shall be sufficient if it contains substantially the following requisites:

1. Its style shall be, "The State of Texas."
2. It shall be directed to the person or persons enjoined.
3. It must state the names of the parties to the proceeding, plaintiff and defendant, and the nature of the plaintiff's application, with the action of the judge thereon.
4. It must command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute such order as the judge has seen proper to make.
5. It shall state the term of the court to which such writ is returnable. ✓
6. It shall be dated and signed by the clerk officially, and attested with the seal of his office; and the date of its issuance must be indorsed thereon.

Art. 4657. [3000] Writs may issue in different counties.—If there be several persons enjoined, residing in different counties, a writ shall issue to each of such counties.

Art. 4658. [3001] To whom delivered.—The clerk issuing any such writ of injunction shall deliver the same to the sheriff or any constable of his county, if the person enjoined be a resident of such county; if the person enjoined be a resident of some other county, the clerk shall forward such writ by mail to the sheriff or any constable of such county.

Art. 4659. [3002] Service and return of the writ.—The officer receiving any writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy of such writ; and the original shall be returned to the court from which it issued, on or before the return day named therein, with the action of the officer indorsed thereon or annexed thereto, showing how and when he executed the same. ✓

Art. 4660. [3003] Duty of defendant upon service of writ.—The party upon whom any writ of injunction is served shall obey the command thereof and refrain from the commission of the act enjoined so long as such injunction continues in force; or, if the continuance of an act or acts be enjoined, the person enjoined shall immediately cease such act or acts and thereafter refrain from their continuance so long as such injunction remains in force. Any person violating the provisions of this article shall be dealt with as hereinafter directed.

Art. 4661. [3004] Injunctions restrain attorneys, etc., as well as the party.—Any injunction restrains the counselors, solicitors, attorneys, agents, servants and employés of the party, as well as the party himself.

Parties affected.—An injunction does not affect a person not a party to the suit in the exercise of rights acquired before its institution. *Shelby v. Burtis*, 18 T. 644. Nor can a stranger to the suit complain that a contract was made in violation of an injunction not affecting him at the time the contract was made. *Hewitt v. Patrick*, 26 T. 326.

Art. 4662. [3005] Citation to issue to defendants.—When any writ of injunction is issued, and such writ does not pertain to a suit pending in the court, the clerk of such court shall issue a citation to the defendant as in other civil cases, which shall be served and returned in like manner as ordinary citations issued from said court. But if any injunction is issued after notice to the defendant, as hereinbefore provided, no citation to such defendant shall be necessary. ✓

Necessary parties defendant.—Under this article, Arts. 1869–1873, providing for citation to nonresident defendants and the manner of its service and return, Art. 1874, providing for citation by publication, and Art. 1885, declaring that no judgment shall be rendered against any defendant, unless upon service, acceptance, waiver of process or appearance held that, where nonresident execution creditors placed execution in the hands

of the sheriff, who levied upon property claimed as a homestead, and the debtor then applied for an injunction against the sheriff as the only party defendant, the execution creditors were necessary parties defendant, and that without notice to them in one of the statutory methods the injunction was a nullity. *McCanless v. Gray* (Civ. App.) 153 S. W. 174.

Art. 4663. [3006] The answer.—The defendant to an injunction proceeding may answer as in other civil actions; but no injunction shall be dissolved before final hearing because of a denial of the material allegations of the plaintiff's petition, unless the answer denying the same is verified by the oath or affirmation of the defendant. [P. D. 3929.]

Answer.—An injunction may be made perpetual on the pleadings when the material allegations in the petition are not denied in the answer. *Eason v. Killough*, 1 App. C. C. § 604.

A general denial to a petition for an injunction, is not subject to general demurrer, but it makes it necessary for plaintiff to prove his case. *Murphy v. Smith, Walker & Co.*, 38 C. A. 50, 84 S. W. 679.

In a suit to enjoin execution for costs, matters in the answer referring to matters occurring on the trial of the original cause held properly stricken out as immaterial. *Griffith v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 108 S. W. 756.

An order dissolving a temporary injunction rendered without notice on petition, will be affirmed, having been on an answer under oath, clearly denying material facts and supported by ample testimony. *Wainwright v. Cotter* (Civ. App.) 137 S. W. 419.

— **Answer by all parties.**—Where fraud is charged against several parties, all of the defendants must answer to authorize a dissolution of an injunction. *Orr v. Moore*, 1 App. C. C. § 587.

Decree on sustaining demurrer to bill.—An injunction may be wholly dissolved on sustaining a general demurrer to the bill. *O'Neal v. Wills Point Bank*, 64 T. 644.

A demurrer to a petition was sustained on two of the grounds assigned, and overruled as to the third. The plaintiff declined to amend and to proceed further with the case, and judgment was given for the defendant on his injunction bond for damages and costs. Held, that the action of the plaintiff was equivalent to a voluntary nonsuit, and the action of the court would not be revised on appeal. *Id.*

Where, in a proceeding to enjoin the enforcement of an order of the railroad commission, a general demurrer to the petition was overruled, and defendant declined to further answer, judgment was properly rendered for plaintiff. *Railroad Commission of Texas v. Galveston, H. & S. A. Ry. Co.*, 51 C. A. 447, 112 S. W. 345.

This article contemplates a dissolution upon a denial alone, and does not apply to a dissolution on a demurrer on full hearing. *Smith v. Palo Pinto County* (Civ. App.) 128 S. W. 1193.

Art. 4664. [3007] Dissolution in term time or vacation.—In all cases of injunction, motions to dissolve the same without determining the merits may be heard after answer filed, in vacation as well as in term time, at least ten days' notice of such motion being first given to the opposite party or his attorney. In such cases, the proceedings upon such hearing including the action of the judge upon the motion, shall be entered upon the minutes of the proper court by the clerk thereof, on or before the first day of the succeeding term of such court, and thereafter shall constitute a part of the record of the same. [P. D. 3934.]

See *Duncan v. Herder*, 57 C. A. 542, 122 S. W. 904.

Time for making motion.—A motion to dissolve a temporary injunction, made after both sides had announced ready and the jurymen were taking their seats, was properly refused. *Briggs v. New South Lumber Co.* (Civ. App.) 117 S. W. 885.

"Vacation" defined.—"Vacation," as used in Arts. 4643, 4664, means the vacation of the district court of the county wherein the case was pending, in which an injunction was awarded, and hence, there being no statute fixing the place for hearing motions to dissolve, a judge granting an injunction in vacation may hear a motion to dissolve it in a county other than that in which the suit is pending. *Wier v. Hill* (Civ. App.) 125 S. W. 366.

Consideration of merits.—On a motion to dissolve an injunction granted by the appellate court, the court will not consider questions involving the merits. *Crary v. Port Arthur Channel & Dock Co.* (Civ. App.) 45 S. W. 842.

Dissolution of ex parte injunction.—See notes under Art. 4651.

Discretion of court.—Whether a temporary injunction should be continued in force on the principle that more harm would result to plaintiff if wrongfully dissolved than would result to defendant if wrongfully allowed to stand is within the court's sound discretion. *Daniels v. Daniels* (Civ. App.) 127 S. W. 569.

Rulings of the court on dissolution of a temporary injunction and denying a mandatory injunction held not an abuse of the court's judicial discretion. *Lone Star Lodge No. 1935, Knights and Ladies of Honor, v. Cole* (Civ. App.) 131 S. W. 1180.

A temporary injunction granted ex parte will be dismissed at the instance of defendant on the coming in of his answer, unqualifiedly denying all the allegations of the bill material to the granting of the injunction, unless irreparable injury may result or some peculiar circumstances exist, when the court may, in its sound discretion, refuse a dissolution. *Id.*

The dissolution of a temporary restraining order rests largely in the discretion of the court, and its action will not be disturbed, in the absence of an abuse of discretion. *Id.*

Even if the sworn answer denies all of the equities of the bill, the dissolution of a temporary injunction is largely a matter of judicial discretion, to be decided upon the particular facts. *Porter v. Johnson* (Civ. App.) 140 S. W. 469.

Where the answer is a complete denial, the dissolution of a temporary injunction against the sale of land under a trust deed rests largely in the discretion of the trial court. *Corbett v. Sweeney* (Civ. App.) 151 S. W. 858.

In an action to enjoin the cutting and removal of timber, held, in view of the failure to establish defendants' insolvency, of the allegation of plaintiffs' insolvency, and of the nature of the injury, that a dissolution of the temporary injunction leaving the parties to their actions at law was a proper exercise of the court's discretion. *Alf Bennett Lumber Co. of Texas v. Fall* (Civ. App.) 157 S. W. 209.

Dissolution on pleadings.—On a motion to dissolve on an exception to the petition, the allegations of the petition are taken to be true. *Jackson v. Browning*, 1 App. C. C. § 605.

Defendant's answer having denied all the material allegations of a petition, an interlocutory judgment was properly dissolved. *Frazier v. Coleman* (Civ. App.) 111 S. W. 662.

On motion to dissolve a temporary injunction, the bill must be taken as true, in the absence of a sworn answer traversing the equity of the bill. *Dawson v. Baldrige*, 55 C. A. 124, 118 S. W. 593.

On motion to dissolve an injunction on bill and answer, the answer, when sworn to in so far as responsive to the bill, is taken as true. *Id.*

A temporary injunction will be dissolved, when the answer is sworn to and unequivocally denies all the material allegations of the bill, unless irreparable mischief is likely to ensue from its dissolution, or unless some peculiar circumstances exist. *Id.*

A temporary restraining order against a judgment is properly dissolved, when heard on bill and answer denying all the material allegations of the verified bill. *New York Chemical Co. v. Spell Bros.*, 56 C. A. 315, 120 S. W. 579.

A bill to enjoin a judgment held properly dismissed, where no request was made to retain the case for trial after a hearing on bill and answer. *Id.*

A temporary injunction could be dissolved, though not prayed for by formal motion, where the answer contained such prayer. *Smith v. Palo Pinto County* (Civ. App.) 128 S. W. 1193.

The principle that a temporary injunction will not be dissolved, in the absence of a specific denial under oath of the allegations of the bill, merely by reason of matters pleaded in confession and avoidance thereof, held inapplicable in a certain case. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

On motion to dismiss an injunction on bill and answer, the verified answer must be taken as true in so far as it is responsive to the bill. *Lone Star Lodge No. 1935, Knights and Ladies of Honor, v. Cole* (Civ. App.) 131 S. W. 1180.

A temporary injunction granted ex parte held dissolved at the instance of defendant, on the coming in of his answer explicitly denying the material allegations of the bill. *Id.*

In a suit to restrain the enforcement of a justice's judgment, failure of the petition to show that plaintiff had a meritorious defense held no ground for dissolving a preliminary injunction. *Withers v. Linden* (Civ. App.) 138 S. W. 1117.

A verified answer only argumentatively denying the equities of plaintiff's bill, held insufficient to require the dissolution of a temporary injunction. *Id.*

Sworn answer held not to deny all of the allegations of a bill, so as to make it erroneous to continue a temporary injunction. *Porter v. Johnson* (Civ. App.) 140 S. W. 469.

An affidavit accompanying the answer in an injunction suit held to sufficiently negative the allegations of the petition to warrant dissolution of the temporary injunction. *Gibson v. Sterrett* (Civ. App.) 144 S. W. 1189.

Where an injunction against enforcing a judgment was sought on the ground that the property in litigation had been returned before judgment, allegations in the verified answer that none of the property had been returned for credit on the judgment will not warrant dissolution of a temporary injunction. *Axtell v. Lopp* (Civ. App.) 152 S. W. 192.

Where a judgment debtor sued to restrain the judgment creditor from enforcing the judgment, joining the constable to prevent a sale, and the judgment creditor and the constable filed sworn answers denying the material averments of the petition, the court could dissolve the temporary restraining order upon motion. *McKenzie v. Withers* (Civ. App.) 153 S. W. 413.

Evidence.—Affidavits are admissible in evidence on hearing on answer and motion to dissolve injunction restraining sale of land under decree. *Brightman v. Fry*, 17 C. A. 531, 43 S. W. 60.

The dissolution of a temporary injunction to restrain the commissioners' court from declaring the result of a local option election held proper under the evidence. *Hill v. Roach*, 26 C. A. 75, 62 S. W. 959.

An order dissolving an injunction restraining the sheriff from executing a writ of possession is proper, where there is evidence that the land claimed in the injunction suit is not the same as that in the writ. *Jett v. Hunter* (Civ. App.) 115 S. W. 309.

Dismissal of suit.—When the temporary injunction has been dissolved on the filing of an answer swearing away the equities of the bill, the plaintiff is entitled to a trial upon the merits, unless the right is expressly waived; and it is error to dismiss, though the plaintiff make no request for a trial on the merits. *Pullen v. Baker*, 41 T. 419; *Fulgham v. Chevallier*, 10 T. 518; *Burnley v. Cook*, 13 T. 586, 65 Am. Dec. 79; *Dearborn v. Phillips*, 21 T. 449; *Texas Land Co. v. Turman*, 53 T. 623; *Roe v. Dailey*, 1 U. C. 247 (*Gaskins v. Peebles*, 44 T. 390; *Sims v. Reddin*, 20 T. 386; *Lively v. Bristow*, 12 T. 60; *Clegg v. Darragh*, 63 T. 357; *Baldrige v. Cook*, 27 T. 565, overruled, and the distinction laid down in *Texas Land Co. v. Turman* not recognized); *Love v. Powell*, 67 T. 15, 2 S. W. 456.

When an injunction is dissolved in chambers, the judge has no authority also to dismiss the suit, and consequently no appeal can be taken from such order. *Price v. Bland*, 44 T. 145; *Grant v. Chambers*, 34 T. 573; *Aiken v. Carroll*, 37 T. 73; *Coleman v. Goyno*, 37 T. 552; *Wagner v. Edmiston*, 1 App. C. C. § 673.

When the injunction is dissolved by reason of a sworn denial of the facts stated in the petition, the suit should be continued for a hearing on the merits if plaintiff demand or indicate his wish that this should be done. *Washington County v. Schulz*, 63 T. 32; *Floyd v. Turney*, 23 T. 292; *Horton v. Jones, Dallam*, 466; *L. & H. Blum v. Schram & Co.*, 58 T. 524.

When, on the dissolution of an injunction, the plaintiff asks that the cause stand over for trial, it is error for the court to dismiss the suit if the averments of the petition entitled plaintiff to the relief sought, or could have been amended so as to state a good cause of action. *Washington County v. Schulz*, 63 T. 32; *Hale v. McComas*, 59 T. 484; *Corsicana v. White*, 57 T. 382; *Pryor v. Emerson*, 22 T. 162; *Cook v. De La Garza*, 13 T. 431; *Gibson v. Moore*, 22 T. 611; *Pullen v. Baker*, 41 T. 420; *Gaskins v. Peebles*, 44 T. 390; *Sims v. Redding*, 20 T. 387; *Floyd v. Turner*, 23 T. 292; *Lively v. Bristow*, 12 T. 60; *Fulgham v. Chevallier*, 10 T. 518; *Baldrige v. Cook*, 27 T. 565; *Elington v. Allsbrooks*, 21 T. 138; *Eccles v. Daniels*, 16 T. 137.

In a suit to set aside a judgment as obtained on perjured testimony, it was error, on dissolving the temporary injunction against a sale under the judgment, to dismiss the bill without a hearing on the merits. *Avocato v. Dell' Ara* (Civ. App.) 84 S. W. 443.

Upon a petition to enjoin defendant from selling plaintiff's property on execution, in which a temporary injunction has been granted, the court, on dissolving the injunction, should not dismiss the suit, although plaintiff does not affirmatively demand a trial upon the merits. *McKenzie v. Withers* (Civ. App.) 153 S. W. 413.

Partial dissolution.—A plaintiff held not entitled to complain of an order dissolving in part a temporary restraining order. *Purdie v. Stephenville, N. & S. T. Ry. Co.* (Civ. App.) 144 S. W. 364.

Dissolution on judgment in favor of defendant.—Absolute dissolution of a temporary injunction against a trespass by a condemnor on judgment in its favor held not improper. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

Harmless error.—The denial of a motion for a postponement of the dissolution of an injunction, made on the sole ground that this article gave a technical right to 10 days' notice of a motion to dissolve, where there was no contention that the moving party was not ready for trial or prejudiced in any matter, was not reversible error, since it did not cause the rendition of an improper judgment under rule 62a (149 S. W. x), providing that reversal shall be for no other cause. *McWilliams v. Commissioners' Court of Pecos County* (Civ. App.) 163 S. W. 368.

Art. 4665. [3008] Refunding bond on dissolution.—Upon the dissolution of any injunction restraining the collection of money, by an interlocutory order of the court or judge, made in term time or vacation, if the petition be continued over for trial, it shall be the duty of the court or judge to require of the defendant in such injunction proceedings a bond, with two or more good and sufficient sureties, to be approved by the clerk of the court; which bond shall be payable to the complainant in double the amount of the sum enjoined, and conditioned to refund to the complainant the amount of money, interest and costs, which may be collected of him in the suit or proceeding enjoined, in the event such injunction is made perpetual on final hearing. [P. D. 3937.]

Application of statute.—An injunction restraining a substituted trustee under a deed of trust from selling the land, but saying nothing about the collection of the notes for which the deed of trust was security, was not one restraining the "collection of money" within this article. *Hicks v. Murphy* (Civ. App.) 151 S. W. 845.

Rights of intervener.—An intervener in a suit for debt and foreclosure of an attachment lien has no right to have the money withheld from the judgment debtor, unless he gives a bond conditioned that he will pay plaintiff all the damages he might sustain if the intervener failed to show that he was not entitled thereto. *Eichoff v. Tidball*, 61 T. 421.

Art. 4666. [3009] Judgment on such bond.—In the event such injunction is perpetuated on final hearing, the court may, on motion of the complainant, enter judgment against the principal and sureties in any bond taken in accordance with the provisions of the preceding article for such amount as may be shown to have been collected from such complainant. [P. D. 3938.]

Art. 4667. [3010] Damages for delay.—Upon the dissolution of an injunction, either in whole or in part, on final hearing, where the collection of money has been enjoined, if the court be satisfied that the injunction was obtained only for delay, damages thereon may be assessed by the court, at ten per cent on the amount released by the dissolution of the injunction, exclusive of costs. [P. D. 3935.]

Right to damages in general.—Where goods are illegally seized under execution, plaintiff cannot recover damages for the erroneous issuance of an injunction to prevent a sale. *Sumner v. Crawford* (Civ. App.) 41 S. W. 825.

The court, upon dissolving an injunction restraining a void judgment, held not authorized to enter judgment against plaintiff and his sureties, nor to award damages under this article. *Givens v. Delprat*, 28 C. A. 363, 67 S. W. 424.

On plaintiff's dismissal of his suit for an injunction, defendant may recover damages for the wrongful suing out of the injunction. *Clevenger v. Cariker*, 50 C. A. 562, 110 S. W. 795.

Where a temporary injunction staying the issuance of execution on a judgment which was not final was improperly dissolved, it was error to award the statutory penalty for suing out the injunction. *Texas Co. v. Beddingfield*, 53 C. A. 10, 114 S. W. 894.

In an action for wrongful injunction restraining plaintiff from removing a building, plaintiff held entitled to recover damages from the date of defendant's refusal to surrender, and not from the date of the writ. *Hermann v. Allen* (Civ. App.) 118 S. W. 794.

An injunction restraining one from removing or interfering with a building held not to require him to leave appliances for moving houses which he had put under the building before the issuance of the injunction, and therefore on dissolution of the injunction he could not recover the value of the proper use of the appliances. *Hermann v. Allen*, 103 T. 382, 128 S. W. 115.

Where defendant was wrongfully prevented from removing his property from plaintiff's premises by an injunction sued out by plaintiff, defendant was entitled to recover the damages proximately resulting on a plea in reconvention. *Lancaster v. Roth* (Civ. App.) 155 S. W. 597.

Discretion of court.—The assessment of damages is within the discretion of the judge, and will not be revised unless there has been manifest error. *Pierrepont v. Sasse*, 1 App. C. C. § 1298; *Ross v. Lister*, 14 T. 469; *Fall v. Ratliff*, 10 T. 291; *Clegg v. Darragh*, 63 T. 357; *Perrin v. Stevens* (Civ. App.) 29 S. W. 927.

The trial court only can determine the question whether the injunction was sued out for delay, and whether the penalty should be allowed. *Carpenter v. First Nat. Bank*, 53 C. A. 23, 114 S. W. 906.

Measure and amount of damages.—On the dissolution of an injunction, the judgment against the sureties on the bond is limited to the 10 per cent. damages assessed by the court. Judgment cannot be rendered for the principal sum enjoined. *T. & N. O. Ry. Co. v. White*, 57 T. 129; *Avery v. Stewart*, 60 T. 154; *Stone Cattle Co. v. Davis*, 3 App. C. C. § 149; *Bayless v. Alston*, 1 App. C. C. § 1031; *Johnson v. Moore*, 2 App. C. C. § 210.

The proper measure of damages against one who improperly enjoined the collection of taxes is interest on the amount enjoined. *Rosenberg v. Weeks*, 67 T. 578, 4 S. W. 899.

Where property is levied on to satisfy a judgment, and one who is not a party thereto claims an injunction restraining the sale of the property, the plaintiffs in the judgment are not entitled, upon a dissolution of the injunction, to recover against the principal and sureties in the bond the amount of their judgment then remaining unpaid, without alleging damage or injury resulting from the grant of the injunction. *Robertson v. Schneider*, 1 C. A. 408, 20 S. W. 1129.

In estimating damages to be allowed a mill owner on dissolution of an injunction restraining him from cutting and using certain timber, it is proper to consider the cost to him of moving his tramway to other timber and of moving it back again. *French v. McCready* (Civ. App.) 57 S. W. 894.

The allowance of \$100 damages on dissolution of an injunction restraining the sale of certain personal property held a proper exercise of the trial court's discretion. *Wm. Cameron & Co. v. Jones*, 41 C. A. 4, 90 S. W. 1129.

Attorney's fees or other expenses not taxable as costs held not recoverable as damages in a cross-action in the injunction suit. *Carpenter v. First Nat. Bank of Sour Lake*, 53 C. A. 23, 114 S. W. 904.

In an action for withholding possession of a building by wrongful injunction, the measure of damages was the reasonable rental value, and not interest on the value of the building. *Hermann v. Allen* (Civ. App.) 118 S. W. 794.

That the submission of an appeal from a judgment perpetuating an injunction was postponed by stipulation held not to restrict defendant therein in an action for wrongful injunction to damages for the detention of his property which accrued subsequent to the final judgment of reversal on the appeal. *Id.*

Under this article, held that where defendant, in a suit to enjoin an execution, brought a cross-action for damages, but on the hearing showed no proof of damages caused by the temporary injunction, a judgment against the plaintiff and the sureties on his injunction bond for the full amount of the judgment upon which execution had issued was unauthorized. *Patterson v. English* (Civ. App.) 142 S. W. 18.

Exemplary damages.—Exemplary damages are not recoverable for the malicious suing out of an injunction. *Railway Co. v. Ware*, 74 T. 47, 11 S. W. 918; *Shackelford County v. Hounsfield* (Civ. App.) 24 S. W. 358.

Liability on injunction bond.—See notes under Art. 4654.

Art. 4668. [3011] Disobedience a contempt.—Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. [P. D. 3934.]

Power to punish.—Where a writ of injunction has been irregularly or improvidently issued, it must be obeyed until it is dissolved, and one may be punished for disobeying it. *Ex parte Breeding* (Cr. App.) 90 S. W. 635, 636.

Under the express provisions of this article the court may in vacation punish one for a violation of an injunction. *Ex parte Looper*, 61 Cr. R. 129, 134 S. W. 345, Ann. Cas. 1913B, 32.

Art. 4669. [3012] Procedure in case of disobedience.—In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending, or with the district or county judge, as the case may be, in vacation, his affidavit, stating the person guilty of such disobedience, and describing the act or acts constituting

the same; and thereupon the court or judge shall issue, or cause to be issued, an attachment for such person, directed to the sheriff or any constable of the proper county, and requiring such officer to arrest the person therein named and have him before the court or judge at a time and place to be named in such writ.

Affidavit or complaint.—Under this article the issuance of attachment on the affidavit of another is a mere irregularity in process, so that one arrested under such circumstances, and after hearing committed on an order in the contempt proceeding, cannot, for such irregularity, obtain his release by habeas corpus, which is a proper remedy only where the court was without jurisdiction in the matter, or so exceeded its jurisdiction that its judgment was void. *Ex parte Morgan*, 57 Cr. R. 551, 124 S. W. 99, 136 Am. St. Rep. 996.

The complaint calling to the court's attention the fact that relator had violated an injunction restraining him from maintaining a disorderly house, when signed by the county attorney officially, is sufficient, though not verified by him. *Ex parte Yoshida* (Civ. App.) 156 S. W. 1166.

Consideration of merits.—The court, in proceeding to enforce by contempt a temporary injunction, need not consider the merits of the controversy or whether the injunction was improperly granted, but it is sufficient that the injunction was granted and was violated. *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n*, 56 C. A. 162, 121 S. W. 213.

Writ of commitment.—Where relator was adjudged guilty of contempt in violating an injunction restraining him from continuing to run a disorderly house, a writ of commitment for contempt, showing that the order was made in the court which had issued the injunction, is not invalid because, through a clerical error, it recited that it was given in another court. *Ex parte Yoshida* (Civ. App.) 156 S. W. 1166.

Art. 4670. [3013] Persons guilty to be imprisoned.—On return of such attachment, the court or judge shall proceed to hear proof; and, if satisfied that such person has disobeyed the injunction either directly or indirectly, he shall be committed to jail without bail until he purges himself of such contempt, in such manner and form as may be directed by the court or judge.

Violation of decree and punishment.—Where a court has authority to enjoin, its writ must be obeyed until dissolved, though irregular and erroneously granted. *Ex parte Warfield*, 40 Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

It is error to punish the violation of a preliminary injunction by instructing that defendant's testimony in his own behalf is not to be construed, as it is also error to regard obedience to a preliminary injunction by instructing that defendant is entitled to a verdict. *Lake v. Copeland*, 31 C. A. 358, 72 S. W. 99.

The fact that defendant in injunction suit had answered by an attorney held not to show that he had knowledge of the issuance of injunction. *Ex parte Stone* (Cr. App.) 72 S. W. 1000.

A party violating an injunction subsequently dissolved for an irregularity or want of equity held liable to punishment. *Gulf, C. & S. F. Ry. Co. v. Cleburne Ice & Cold Storage Co.*, 37 C. A. 334, 83 S. W. 1100.

A decree against officers and agents of an insurance society, restraining them from canceling a certificate, is enforceable only by attachment of bodies and punishing the contumacious individuals. *Royal Fraternal Union v. Lundy*, 51 C. A. 637, 113 S. W. 185.

Where persons against whom an injunction issued knew of it, its issuance, service, and conformity to statute held unimportant. *Ex parte Young*, 103 T. 470, 129 S. W. 599.

— **Contempt.**—In order to render one guilty of a contempt, consisting of the violation of an injunction, it is not necessary that the writ should have been served on him, if he had actual knowledge of its issuance. *Ex parte Stone* (Cr. App.) 72 S. W. 1000.

Under this article it appears that the sole authority vested in the court in such cases is to commit to jail until the recalcitrant party purges himself of such contempt in such manner and form as may be directed by the court; that is, on disobedience of an injunction, the court can imprison without bail and hold such party in custody until he purges himself after the manner and form directed by the court. *Ex parte Morgan* (Cr. App.) 86 S. W. 756.

Court of civil appeals held to have jurisdiction to punish as for contempt of court an agent violating, pending an appeal therefrom, an injunction of the district court enjoining the selling by defendants, their agents, etc., of certain railroad tickets. *Lytle v. Galveston, H. & S. A. Ry. Co.*, 41 C. A. 112, 90 S. W. 316.

An appellate court will not interfere with a judgment punishing for contempt in violating an injunction, unless the lower court was without jurisdiction or had no authority to render the particular judgment. *Ex parte Garza*, 50 Cr. R. 106, 95 S. W. 1059.

Complainant in an injunction suit held not to have so invited defendant to violate the injunction as to relieve defendant from contempt. *Ex parte Cash*, 50 Cr. R. 623, 99 S. W. 1118, 9 L. R. A. (N. S.) 1304, 123 Am. St. Rep. 865.

The selling of tickets by a ticket broker, in violation of an injunction, held to have constituted a contempt. *Id.*

An order for contempt for the violation of an injunction held sufficient. *Id.*

That an affidavit for contempt for violating an injunction was sworn to on information and belief only did not deprive the court of jurisdiction to punish the party charged. *Ex parte Dupree*, 101 T. 150, 105 S. W. 493; *Ex parte Byrd*, 101 T. 157, 105 S. W. 496.

A writ of injunction served on an enjoined person held sufficient to render him guilty of contempt in disregarding it, even though through a clerical error it was made returnable at a date prior to its issuance. *Ex parte Testard*, 101 T. 250, 106 S. W. 319; *Ex parte Howard*, 101 T. 254, 106 S. W. 321.

The court having the power to restrain the grading of a sidewalk by a city in a proper case, that the injunction was erroneously issued under the circumstances would not prevent the city's agents from being guilty of contempt for violating the order. *City of Marshall v. Allen* (Civ. App.) 115 S. W. 849.

One who, with knowledge of an injunction against another, aids and abets the latter in violating the injunction, is guilty of contempt. *Ex parte Testard*, 102 T. 287, 115 S. W. 1156, 20 Ann. Cas. 117.

The court, in proceeding to enforce by contempt a temporary injunction, need not consider the merits of the controversy or whether the injunction was properly granted. *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n*, 56 C. A. 162, 121 S. W. 213.

Parties having knowledge of injunction held guilty of contempt in disobeying it, whether parties to the suit and served with notice or not. *Ex parte Young*, 103 T. 470, 129 S. W. 599.

Under this article a provision, in an order committing persons for contempt in violating an injunction, that they be held until they purge themselves of the contempt in such manner as the court may direct, does not invalidate the judgment prescribing a fine and imprisonment; but, in case no direction is given by the judge who grants the writ, the parties will be entitled to be discharged on compliance with the expressed terms of the order. *Id.*

One restrained by a preliminary injunction held not entitled to urge in contempt proceedings for a violation of the injunction that he had not been given a speedy trial. *Ex parte Roper*, 61 Cr. R. 68, 134 S. W. 334.

— **Collateral attack on decree.**—Where the court has jurisdiction of the parties and the matter adjudicated in the sense that it has jurisdiction of the class of cases to which the particular case belongs, an injunction is not absolutely void, however erroneous the decision may be, and hence cannot be questioned in proceedings for violation thereof. *Lytle v. Galveston, H. & S. A. Ry. Co.*, 41 C. A. 112, 90 S. W. 316.

Art. 4671. [3014] General principles of equity applicable, when.—The principles, practice and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with the provisions of this title or other law.

See *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

Judgment.—See notes under Art. 4643.

Art. 4672. [3015] Injunction by the state.—The full right, power and remedy of injunction may be resorted to and invoked by the state at the instance of the county or district attorney or attorney general, to prevent, prohibit or restrain the violation of any revenue law of the state. [Acts 1888, p. 10, sec. 1.]

See *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

Art. 4673. [3016] Shall be cumulative.—The right and remedy provided by the preceding article shall be cumulative of other laws in force in this state. [*Id.* sec. 2.]

INJUNCTIONS IN PARTICULAR CASES

Article 4674. Unlawful sale, etc., of liquors may be enjoined.—Any person, firm or corporation in this state who may engage in, pursue, carry on, or maintain, any of the following described occupations or callings under the circumstances and conditions herein described, are hereby declared to be the creators and promoters of a public nuisance, and may be enjoined at the suit either of the county or district attorney in behalf of the state, or of any private citizen thereof.

1. Any person, firm or corporation who may engage in or pursue the business of selling intoxicating liquor without having first procured the necessary license and paid the taxes required by law.

2. Any person, firm or corporation who may, as owner, proprietor or agent, establish, manage or conduct any public place or business where intoxicating liquors are stored, kept, drunk, sold or dispensed within any county or precinct within this state, wherein the sale of intoxicating liquor has been prohibited by law.

3. Any person, firm or corporation who may, under the pretense of selling or dispensing intoxicating liquor on prescription, in any county or precinct in this state wherein the sale of intoxicating liquor has been prohibited by law, and who in thus selling or dispensing such intoxicating liquor violates the law; provided, if, on final hearing, such injunction is sustained, the license of such person shall be revoked, and he shall

not thereafter be permitted to again pursue such business for a period of one year.

4. Any person who, as a physician, follows the business of writing and issuing prescriptions to persons contrary to law, prescribing the use of intoxicating liquors to such persons, in any county or precinct in this state wherein the sale of intoxicating liquor has been prohibited by law.

5. Any person who shall engage in the business of peddling or "bootlegging" intoxicating liquor in any county or precinct in this state wherein the sale of intoxicating liquor has been prohibited by law.

6. Any person who canvasses or solicits orders for the sale of intoxicating liquor from persons other than those engaged in the lawful sale of the same in any county or precinct in this state wherein the sale of intoxicating liquor has been prohibited by law. [Acts 1907, p. 166, sec. 1.]

See *Stockard v. Reid*, 57 C. A. 126, 121 S. W. 1144; *State v. De Silva*, 105 T. 95, 145 S. W. 330.

Construction of statute.—A statute authorizing an injunction against the keeping of a house for the sale of liquors without a license held at least a penal statute, and must be strictly construed. *State v. Duke*, 104 T. 355, 137 S. W. 654.

Who may bring suit.—A lessee held not entitled to restrain the sublessee from selling intoxicants on the premises; but injunction will lie at the suit of a lessee, to prevent the sale on the premises by the sublessee of intoxicating liquors in violation of the original lease. *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n (Sup.)* 122 S. W. 254.

Liability of club.—A bona fide club, which, as a mere incident and without profit, furnishes liquor to its members, and not to the public generally, is not a person, "engaged in the occupation or business of selling intoxicating liquors," though each individual act of such club in territory where the sale of liquor is prohibited by law is a sale. *State v. Duke*, 104 T. 355, 137 S. W. 654.

Injunction against disorderly house.—An injunction against a disorderly house for the sale of liquors without a license, held not sustainable, under Pen. Code, art. 359, unless the persons doing the acts complained of may be prosecuted and convicted under the statute. *State v. Duke*, 104 T. 355, 137 S. W. 654.

Saloon without license limits.—The charter of Dallas (act of 1907) empowers the city to define limits within which saloons may be confined. Although one has obtained a saloon license under the act of 1907 regulating the sale of intoxicating liquors, yet he can be enjoined from keeping a saloon without the prescribed limits in said city. *Paul v. State*, 48 C. A. 25, 106 S. W. 451.

Art. 4675. Procedure as in other cases.—The procedure in all cases brought under the preceding article shall be the same as in other suits for injunction, as nearly as may be; provided, that, when the suit is brought in the name of the state by any of the officers aforesaid, the petition for injunction need not be verified. [Id. sec. 2.]

Application.—By this act the legislature intended not to enlarge the powers of the district court to grant injunctions in local option cases, but rather to curtail them by requiring the judge in whose district the territory to be affected is situated to issue the writ with the exceptions enumerated. *Merrill v. Savage*, 49 C. A. 292, 109 S. W. 410.

Petition.—A private person, to be entitled to a temporary injunction under this article, must allege that a person named pursued the business of selling intoxicating liquors without a license; and a mere allegation in the petition that liquors are kept for sale on premises described, without defendant obtaining a license, is insufficient. *Spence v. Fenchler (Civ. App.)* 151 S. W. 1094.

— **Verification.**—A petition to enjoin a corporate club from illegally selling intoxicating liquor, when not required to be verified, is no evidence, even though verified. *Alamo Club v. State (Civ. App.)* 147 S. W. 639.

In a suit to enjoin an incorporated club from selling intoxicating liquors and keeping a place for the purpose of gaming, and for a forfeiture of its franchise, the petition, alleging the unlawful sale of intoxicating liquors and the keeping of a place for gambling, need not be verified by affidavit; the provisions relating to quo warranto not requiring verification, and this article and Art. 4688 expressly waiving the requirement of verification in petitions for injunctions to restrain such acts. Id.

Validity of injunction.—An injunction restraining a druggist licensed to sell liquor held not void because going beyond the limits authorized by law. *Ex parte Roper*, 61 Cr. R. 68, 134 S. W. 334.

Violation of injunction.—An injunction restraining a subtenant from selling intoxicating liquors on the leased premises held violated by sales made by a third person. *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n*, 56 C. A. 162, 121 S. W. 213.

A person held not, on the showing made, subject to punishment for the violation of an injunction restraining the selling or keeping for sale of intoxicants. *Ex parte Griffin*, 60 Cr. R. 502, 132 S. W. 770.

One convicted of selling whisky in violation of the local option law and of an injunction held not entitled to plead his conviction in bar of contempt proceedings for a violation of the injunction. *Ex parte Looper*, 61 Cr. R. 129, 134 S. W. 345, Ann. Cas. 1913B, 32.

Art. 4676. Persons compelled to testify.—Any person may be compelled to testify and give evidence in any proceeding under the two pre-

ceding articles, but such evidence shall not be used against such person in any criminal prosecution in this state. [Id. sec. 4.]

Constitutionality.—This act is constitutional. *Burckell v. State*, 47 C. A. 393, 106 S. W. 190.

Art. 4677. Cumulative remedy.—The foregoing remedy by injunction shall not be held to supersede or repeal any law now in force correcting the evils defined, but shall be cumulative of all such laws. [Id. sec. 3.]

Art. 4678. Sale of intoxicating liquors in local option territory enjoined.—The actual, threatened or contemplated use of any place, room, premises, building or part thereof, in any county, justice precinct, town, city or subdivision of a county, as may be designated by the commissioners' court of said county, in which the sale of intoxicating liquors has been prohibited under the laws of this state, for the purpose of selling intoxicating liquor in violation of law, or in which to keep, store or deposit any intoxicating liquor for the purpose of being sold in violation of law, or the possession of, or having under control or management at any such place, or any intoxicating liquor for the purpose and with the intent to sell the same in violation of law, shall be enjoined at the suit of the state, or of any citizen thereof. [Acts 1910, 3 S. S. p. 35, sec. 11.]

Constitutionality.—This is not a special law under the terms of our constitution, nor is it invalid, and where an injunction has been granted under the provisions of this law, its violation can be punished as for contempt. *Ex parte Dupree*, 101 T. 150, 105 S. W. 493, et seq.

Jurisdiction upon unsworn petition.—The fact that the petition is not sworn to is a mere irregularity, which does not deprive the district court of jurisdiction. *Ex parte Dupree*, 101 T. 150, 105 S. W. 493, et seq.

Application.—An injunction to restrain a club from selling intoxicating liquors to its members cannot be granted under Pen. Code, art. 359, defining a disorderly house, unless the persons doing the acts complained of may be prosecuted under the statute. *State v. Duke*, 104 T. 355, 137 S. W. 654.

This act is at least quasi penal and must be strictly construed. *Id.*

Art. 4679. Who made party defendant.—Any person, company, corporation or association of persons who may so use, or be about to use, or who may aid or assist in any such actual or threatened use, of such place, room, premises, building or part thereof, or any person who may have, possess or manage for any such purpose any intoxicating liquor, or who may aid or assist another in thus possessing, having or maintaining or managing intoxicating liquor for such purpose, may be made a party defendant to such suit. [Id. sec. 12.]

Art. 4680. By whom prosecuted.—The attorney general and the several district and county attorneys shall institute and prosecute all such injunction suits that the said attorney general or district or county attorney may deem necessary; provided, that such suit may be brought and prosecuted by any one of said officers; and provided, further, that nothing contained herein shall prevent said injunction from issuing at the suit of any citizen of this state who may sue in his own name, and any such citizen shall not be required to show that he is personally injured by reason of the matters and things of which he complains. [Id. sec. 13.]

Art. 4681. Same proceedings as in other cases, except.—The procedure in all cases brought hereunder shall be the same as in other suits for injunction, or where injunction is sought, as near as may be; provided, that where the suit is brought in the name of the state by any of the officers aforesaid, the petition therefor need not be verified, nor shall the state be required to pay or give security for costs or on appeal; and appeal by the state shall be perfected by giving notice thereof in open court, and all such cases shall have precedence on the docket of all courts where pending. [Id. sec. 14.]

Application.—The application of this law is not restricted to local option laws proper (Arts. 5715-5730), but the law is a cumulative remedy, and applies in any prescribed territory, without regard to the method by which laws inhibiting the sale of intoxicating liquors are enacted or put in operation. *Paul v. State*, 48 C. A. 25, 106 S. W. 451.

Art. 4682. General reputation evidence.—In any proceeding under the provisions of the three preceding articles evidence of the general reputation of the house, place, building, premises or part thereof, or of the business, occupation or pursuit of the defendant involved, may be admitted in evidence as tending to prove the allegations of the complaint; provided, that in any investigation no person shall be exempt from giving testimony therein, but the testimony given by a witness shall not be used against him in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him. [Id. sec. 15.]

Art. 4683. Injunction against soliciting orders in local option districts.—The actual, threatened or contemplated pursuit of any such business mentioned in articles 7479 and 7480 of the title, "Taxation," in any local option territory, by any person or firm or association of persons or corporations, without there having first been procured a license therefor as provided in said articles, shall be enjoined at the suit of the state at the instigation of either the county or district attorney, or at the suit of any individual citizen of the county where the business is, or is about to be, pursued; and it shall not be necessary for any citizen to show that he has any pecuniary interest involved; and the state shall not be required to give security for cost, and all the rules of evidence, practice and procedure that pertain to courts of equity generally, or that exist by virtue of any law of this state, may be invoked and applied in any injunction proceeding instituted hereunder. [Acts 1909, p. 53, sec. 6.]

Art. 4684. Injunction against sale of non-intoxicating liquors without license.—The actual, threatened or contemplated pursuit of any such business mentioned in article 7476 of the title, "Taxation," by any such person or firm or association of persons or corporations, without there having first been procured a license therefor as provided in said article, shall be enjoined at the suit of the state at the instigation of either the county or district attorney, or at the suit of any individual citizen of the county where the business is, or is about to be, pursued; and it shall not be necessary for any citizen to show that he has any pecuniary interest involved, and the state shall not be required to give security for cost, and all the rules of evidence, practice and procedure that pertain to courts of equity generally, or that exist by virtue of any law of this state, may be invoked and applied in any injunction proceeding instituted hereunder. [Acts 1909, p. 51. Amended Acts 1909, 2 S. S. p. 397.]

Art. 4685. Use of premises for gaming enjoined.—The habitual use, actual, threatened or contemplated, use of any premises, place, building or part thereof, for the purpose of gaming or of keeping or exhibiting games prohibited by the laws of this state, shall be enjoined at the suit either of the state or of any citizen thereof. [Acts 1905, p. 372.]

Constitutionality.—This act is constitutional, and therefore valid. *Ex parte Allison*, 99 T. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653.

Application.—This law only applies to those who own or have some control over the premises where the gambling is carried on. *Ex parte Garza*, 50 Cr. R. 106, 95 S. W. 1060, 1061.

Who may bring suit.—A gambling house is, under the statute, a nuisance, and may be enjoined at the instance of any one injured thereby. *Ex parte Allison*, 48 Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684.

Petition.—See for petition to enjoin the use of premises for gaming held to be sufficient, *Cain v. State ex rel.*, 106 S. W. 770.

Verification of petition.—In a suit to enjoin an incorporated club from selling intoxicating liquors and keeping a place for the purpose of gaming, and for a forfeiture of its franchise, the petition, alleging the unlawful sale of intoxicating liquors and the keeping of a place for gambling, need not be verified by affidavit; the provisions relating to quo warranto not requiring verification, and Art. 4675 and this article expressly waiving the requirement of verification in petitions for injunctions to restrain such acts. *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

Art. 4686. Parties and proceedings.—Any person who may so use, or who may be about to use, or who may aid or abet any other person in

the use of any premises, place or building or part thereof, may be made a party defendant in such suit. [Id. sec. 1.]

Constitutionality.—See notes under Art. 4685.

Application.—See notes under Art. 4685.

Petition.—See notes under Art. 4685.

Art. 4687. Suits, by whom instituted.—The attorney general and the several district and county attorneys shall institute and prosecute all suits under the two preceding articles that said attorney general or such district or county attorney may deem necessary to enjoin such use; provided, that such suit may be brought and prosecuted by any one of said officers; and provided, further, that nothing in the above proviso contained shall prevent such injunction from issuing at the suit of any citizen of this state who may sue in his own name, and such citizen shall not be required to show that he is personally injured by the acts complained of. [Id. sec. 2.]

Art. 4688. Procedure in other injunction cases.—The procedure in all cases brought hereunder shall be the same as in other suits for injunction, as near as may be; provided, that when the suit is brought in the name of the state by any of the officers aforesaid, the petition for injunction need not be verified. [Id. sec. 3.]

Art. 4689. Use of premises for bawdy houses enjoined.—The habitual, actual, threatened or contemplated use of any premises, place, building or part thereof, for the purpose of keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, shall be enjoined at the suit of either the state or any citizen thereof. Any person who may use, or who may be about to use, or who may aid or abet any other person in the use of any premises, place or building or part thereof, may be made a party defendant in such suit; provided, that the provisions of this and the succeeding article shall not apply to nor be so construed as to interfere with the control and regulation of bawds and bawdy houses by ordinances of incorporated towns and cities acting under special charters and where the same are actually confined by ordinance of such city within a designated district of such city. [Acts 1907, p. 246.]

Bawdy houses.—This article makes bawdyhouses, except those regulated by ordinances of incorporated towns and cities acting under special charters, nuisances, subject to be abated by injunction at the suit of the state or any citizen; and such right may be limited as is done in the proviso. *Spence v. Fenchler* (Civ. App.) 151 S. W. 1094.

Adequacy of legal remedy.—The fact that the remedy by criminal prosecution for keeping a bawdy or disorderly house is adequate held not ground for refusing an injunction as provided for by Acts 30th Leg. p. 246, c. 132. *Clopton v. State* (Civ. App.) 105 S. W. 994.

Art. 4690. By whom brought; proceedings as in other injunction cases.—The attorney general and the several district and county attorneys shall institute and prosecute all suits that said attorney general or such district or county attorney may deem necessary to enjoin such use; provided, that such suit may be brought and prosecuted by any one of such officers; and provided, further, that nothing in the above proviso contained shall prevent such injunction from issuing at the suit of any citizen of this state who may sue in his own name; and such citizen shall not be required to show that he is personally injured by the acts complained of; and the procedure in all cases brought hereunder shall be the same as in other suits for injunction, as near as may be; provided, that, when the suit is brought in the name of the state by any of the officers aforesaid, the petition for injunction need not be verified. [Id.]

See *Spence v. Fenchler* (Civ. App.) 151 S. W. 1094; and see notes under Art. 4643.

Petition.—A petition to restrain the use of a disorderly house sufficiently describes the premises by stating that the house is situated on the north side of a designated street in the town, and giving the name by which the locality is generally known. *Lane v. Bell*, 53 C. A. 213, 115 S. W. 918.

Appeal.—In case of an appeal from an order granting an injunction to restrain one from keeping a disorderly house, the court of appeals will not consider an answer filed to the merits after issuance of the writ, since it was not before the trial judge. *Jelinc v. State*, 52 C. A. 402, 115 S. W. 909.

Art. 4691. Bucket shops may be enjoined.—The habitual use, actual, threatened or contemplated, of any premises, place or building, for carrying on bucket shops, as defined in the penal laws of this state, or the habitual use by or permitting to remain in any bucket shop as defined, any telegraph or telephone wires or instruments, actual or threatened, under circumstances prohibited by the penal laws of this state, shall be enjoined at the suit of either the state or any citizen thereof. [Acts 1907, p. 172, sec. 11.]

Art. 4692. Who may enjoin.—The attorney general or the several district and county attorneys shall prosecute all suits deemed by them necessary to enjoin such use; provided, that nothing herein shall prevent such injunction from issuing at the suit of any citizen of this state who may sue in his own name, and such citizen shall not be required to show that he is personally injured by the acts complained of. [Id. sec. 12.]

Art. 4693. Procedure as in other cases.—The procedure in all cases brought under the two preceding articles of this chapter shall be the same as in other suits for injunction, as near as may be; provided, that when such suit is brought by any district or county attorney or by the attorney general, the petition for injunction need not be verified. [Id. sec. 13.]

TITLE 70

INJURIES RESULTING IN DEATH—ACTIONS FOR

[See Limitations. See Arts. 1838, 1895, 5686-6648.]

Art. 4694. Action for injuries resulting in death, brought when.	Art. 4700. Executor, etc., may bring the action, when.
4695. Character of wrongful act.	4701. Suit does not abate by death of either party.
4696. Exemplary damages.	4702. Abates, when.
4697. Action commenced without regard to criminal proceedings.	4703. Executor, etc., of defendant made party, when.
4698. For whose benefit action to be brought.	4704. Damages to be apportioned by jury.
4699. Who may bring the action.	4704a. Actions for death caused in foreign state or country.

Article 4694. [3017] Actions for injuries resulting in death, brought when.—An action for actual damages on account of injuries, causing the death of any person may be brought in the following cases:

1st. When the death of any person is caused by the neglect or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage coach or other vehicle for the conveyance of goods, passengers, or by the unfitness, neglect or carelessness of their servants or agents; when the death of any person is caused by the neglect or carelessness of the receiver or receivers, or other person or persons in charge or control of any railroad, or their servants or agents; the liability of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for damages on account of injuries, the same as if said railroad was being operated by the railroad company.

2nd. When the death of any person is caused by the wrongful act, neglect, unskillfulness or default of another person or corporation, their agents or servants. [Acts 1860, p. 32. Acts 1887, p. 44. Acts 1892, S. S., p. 5. Acts 1913, p. 288, sec. 1, amending Art. 4694, Rev. St. 1911.]

See *Texas & P. Ry. Co. v. Phillips* (Civ. App.) 37 S. W. 620; *Sullivan-Sanford Lumber Co. v. Cooper*, 126 S. W. 35; *Gray v. State*, 61 Cr. R. 454, 135 S. W. 1179 (dissenting opinion); *Farmers' & Mechanics' Nat. Bank v. Hanks*, 104 T. 320, 137 S. W. 1120; *Hampton v. Woolsey* (Civ. App.) 139 S. W. 888.

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| 1. Right of action in general. | 25. Nominal damages. |
| 2. Conflict of laws. | 26. Exemplary damages. |
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| 13. Negligence of owner or landlord of building. | 37. Persons liable. |
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| 15. Liability for act of agent or employé. | 39. Defenses. |
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| 18. — Imputed negligence. | 42. Pleadings of plaintiff. |
| 19. — Necessity of pleading. | 43. Presumptions, burden of proof and admissibility of evidence. |
| 20. Injury avoidable notwithstanding contributory negligence. | 44. Weight and sufficiency of evidence. |
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| 22. — Who are. | 46. — Negligence. |
| 23. Assumption of risk. | 47. — Contributory negligence. |
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Art. 4694
Vernon Sayles
1914
Amended
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1. **Right of action in general.**—The action accrues when the death is instantaneous. *I. & G. N. R. Co. v. Kindred*, 57 T. 491.

If one whose mental faculties are suspended by intoxicating drink is induced by another, by wager or otherwise, to continue to swallow spirituous liquor to such excess as manifestly to endanger his life, and he dies therefrom, he who thus takes advantage of his helpless and drunken condition is liable in damages to the surviving husband, wife, children and parents of the deceased. *McCue v. Klein*, 60 T. 168, 48 Am. Rep. 260.

At common law a parent cannot recover for loss of services of a minor child instantly killed. *Gulf, C. & S. F. Ry. Co. v. Beall*, 91 T. 310, 42 S. W. 1054, 41 L. R. A. 807, 66 Am. St. Rep. 992

Where a brakeman on defendant's train killed plaintiff's son, a trespasser on the train, and threw his body under the wheels, the mutilation of the body did not constitute a cause of action apart from the killing. *Houston & T. Cent. R. Co. v. Bowen*, 36 C. A. 165, 81 S. W. 80.

Where death is the result of two concurrent causes, it is not essential that both should be negligence in him, who put them in operation, and his negligence in either is sufficient to render him liable. *Texas Mexican Ry. Co. v. Higgins*, 44 C. A. 523, 99 S. W. 200.

At common law there is no right of action for negligent death. *Gutierrez v. El Paso & N. E. R. Co.*, 102 T. 373, 117 S. W. 426.

To sustain an action by a widow for herself and as next friend for her minor children for the unlawful killing of her husband, held only necessary to show an unlawful killing of decedent by defendant. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

Since no action lay at common law for wrongful death, the statute creating the liability is the only warrant therefor. *Kirby Lumber Co.'s Receivers v. Owens*, 56 C. A. 370, 120 S. W. 936.

An action for the negligent death of a servant does not lie at common law, but the right to recover is wholly statutory. *Farmers' & Mechanics' Nat. Bank v. Hanks*, 104 T. 320, 137 S. W. 1120.

Though General Provisions, § 3, provides that the rule that statutes in derogation of the common law shall be construed strictly shall not apply, but the statutes shall be liberally construed to effect their objects, a right of action for negligent death of a servant must be founded on a statute fairly construed. *Id.*

Under this article an action against a telephone company for the death of the wife of a subscriber does not lie where the death was the result of natural causes, but the company failed to provide a communication between the subscriber and a physician, which indirectly prevented the wife from receiving medical attention which might have saved her life, since the contingency is too remote on which to base an action based on breach of contract. *Deweese v. Southwestern Telegraph & Telephone Co. (Civ. App.)* 144 S. W. 732.

Right of action against a private corporation for wrongful death exists only under this article. *Williams v. Coca-Cola Co. (Civ. App.)* 150 S. W. 759.

Under this article and Art. 4695, an action cannot be maintained, unless decedent could have maintained an action for damages for his injury, had he not died therefrom, so that a guardian of infants could not maintain an action for damages to the infants for the wrongful murder of their mother by her husband, since the mother could not have maintained an action against defendant, her husband, had she survived. *Wilson v. Brown (Civ. App.)* 154 S. W. 322.

At common law one cannot maintain an action for damages for wrongfully causing the death of a third person, though murder was committed in causing the death so as to subject defendant to a prosecution. *Id.*

2. **Conflict of laws.**—The rule that the right to recover damages resulting from personal injuries is governed by the law of the place where the injury was received held to apply to actions to recover for injuries causing death. *Texas & N. O. R. Co. v. Miller (Civ. App.)* 128 S. W. 1165.

3. **Jurisdiction—Actions under laws of other state or foreign country.**—See notes under Art. 1712.

4. **Construction of statute as to carriers and railroads included.**—This article includes street railroads. *Bammell v. Kirby*, 19 C. A. 198, 47 S. W. 392.

This article is intended to apply to common carriers, and does not apply to tram railroads owned and operated by private individuals on their own premises for private purposes. *Ott v. Johnson (Civ. App.)* 101 S. W. 534.

Denial by the supreme court of a writ of error to review a decision of the court of civil appeals, adjudging that a logging road of a lumber company is a "railroad" within this article, is a decision of the supreme court that such road is a railroad, and the decision is conclusive on the court of civil appeals on a subsequent appeal, and the court will not certify the question to the supreme court. *Rice & Lyon v. Lewis (Civ. App.)* 125 S. W. 961.

Subdivision 1 of this article applies to carriers transporting persons or freight from some point of origin to some more or less distant point of destination, and does not apply to an elevator in an office building used to transport persons visiting the building; the words "other vehicle" meaning a vehicle performing, substantially at least, the same office and serving the same necessities as a railroad, steamboat, or stagecoach. *Farmers' & Mechanics' Nat. Bank v. Hanks*, 104 T. 320, 137 S. W. 1120, reversing (Civ. App.) 128 S. W. 147.

A logging railroad, owned and operated by a lumber company solely in its own business, is a railroad within this article. *Sullivan-Sanford Lumber Co. v. Watson (Sup.)* 155 S. W. 179.

5. **"Another" defined.**—The word "another," used in the second clause, refers to another person as a class of persons similar to that whose death is occasioned. *Ritz v. City of Austin*, 1 C. A. 455, 20 S. W. 1029.

The word "another," as used in this article means another person, and includes private corporations. *Williams v. Coca-Cola Co. (Civ. App.)* 150 S. W. 759.

6. **"Any railroad" defined.**—The words "a railroad" in Art. 6640 are used in the same sense as the words "any railroad" in this article, and the latter repel the idea that a par-

particular class of railroads was not intended to be included, and persons not common carriers are liable for damages caused by operating railroads. *Lodwick Timber Co. v. Taylor*, 39 C. A. 302, 87 S. W. 359.

7. "Passenger" defined.—The shipper of cattle in charge of the same, riding on the freight train without charge, is a passenger. *Railway Co. v. Aiken*, 71 T. 373, 9 S. W. 437.

8. "Person" defined. The word "person" means a natural person, and not an artificial person, such as a corporation. *Ritz v. City of Austin*, 1 C. A. 455, 20 S. W. 1029.

A private corporation is a "person," within this article. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

9. Negligence of municipal corporation.—An action for damages does not lie in favor of a parent the death of whose child was caused by the negligence or wrongful act of a municipal corporation. *Searight v. City of Austin* (Civ. App.) 42 S. W. 857.

10. — Officers.—If city authorities cause the removal of a person afflicted with a contagious disease, and in doing so fail to exercise the care and precaution the circumstances demand, and death results, they are responsible, though acting under a city ordinance. *Aaron v. Broiles*, 64 T. 316, 53 Am. Rep. 764.

11. Negligence of railroad company.—As to due care, see *Railway Co. v. Crosnoe*, 73 T. 79, 10 S. W. 342; *Railway Co. v. Higby* (Civ. App.) 26 S. W. 737; *Railway Co. v. Smith*, 87 T. 357, 28 S. W. 524; *Same v. Watkins*, 88 T. 20, 29 S. W. 232; *T. & P. Ry. Co. v. Roberts*, 14 C. A. 532, 37 S. W. 870.

Gross negligence is that entire want of care which would raise a presumption of a conscious indifference to consequences. *Railway Co. v. Beeman*, 74 T. 291, 11 S. W. 1102.

It is gross negligence to run an engine across a public street at a speed of fifteen miles an hour, contrary to ordinance, and without giving signals. *Texas & N. O. Ry. Co. v. Brown*, 21 S. W. 424, 2 C. A. 281.

Where deceased was killed in a collision, and the defense was that the air brakes on defendant's train failed to work, held not error to charge that if, by reasonable care, defendant could have stopped the train by other means, failure to do so was negligence. *Missouri, K. & T. Ry. Co. of Texas v. Ransom*, 15 C. A. 689, 41 S. W. 826.

The fact that the hospital department is operated in connection with the claim and legal department for the benefit and profit of the railway company, and as an essential department of its service as a common carrier, brings a case where a patient in the hospital contracts the smallpox and dies within the terms of this statute. *Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Civ. App.) 73 S. W. 543.

A railroad company established a hospital and contracted with its employes, in consideration of a monthly sum contributed out of their wages, to furnish them when sick or injured surgical and medical attention. One of its servants was injured and went to this hospital for treatment. There he was brought in contact with persons having smallpox, but left before the disease was developed on him, and returned to his work for the railroad company. The smallpox soon developed upon him, and he was placed in a pesthouse under the control of a local surgeon in the employment of the company. The surgeon employed an incompetent and irresponsible person and put him in charge of the smallpox patient. This person left the camp without having changed or disinfected his clothing, went upon the streets of a town, and met and communicated the disease to another person, who died. The railroad company was not liable for the death thus caused, as the negligence of the surgeon could not be regarded as the negligence of the road itself under subdivision 2 of this article, and the first subdivision does not apply because the maintenance of the hospital where the disease was contracted is not peculiar to the carrier's business, but merely collateral thereto. *M., K. & T. Ry. Co. v. Freeman*, 97 T. 394, 79 S. W. 9, 1 Ann. Cas. 481.

Failure of a railroad company to exercise ordinary care in moving its train into a depot, by reason of which deceased was struck and killed, held actionable negligence. *International & G. N. R. Co. v. Jackson*, 41 C. A. 51, 90 S. W. 918.

Railroad company held not liable for death of person sitting on railroad track where, when the trainmen discovered the object on the track, they did not recognize it as a human being. *San Antonio & A. P. Ry. Co. v. McMillan*, 100 T. 562, 102 S. W. 103.

Railroad company held not liable for causing death of person seen standing on the track, in the absence of something indicating to the trainmen that he was unable to leave or that he would not do so. *Id.*

In an action for the death of a person killed by a locomotive, duty of the engineer upon discovering the person's peril held to be to use every means at hand consistent with the safety of the train to avoid the injury. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442.

In an action against a railroad for the death of an employe of another railroad in a collision at a crossing, defendant's employes held guilty of negligence. *El Paso & S. W. R. Co. v. Murtle*, 49 C. A. 273, 108 S. W. 998.

The maintenance of a cut and dump by a railroad 600 feet from a crossing was not negligence rendering it liable for death at the crossing. *Missouri, K. & T. Ry. Co. of Texas v. Bratcher*, 54 C. A. 10, 118 S. W. 1091.

Maintenance by railroad company of tower house of interlocking plant held not negligence constituting independent ground of recovery for death at crossing. *Id.*

Under this article the owner of a railroad is not liable unless the negligence occurred in or was directly connected with operating the road. *Wm. Cameron & Co. v. McSween* (Civ. App.) 137 S. W. 139.

12. Negligence of electric and telephone companies.—Persons dealing with electricity, and failing to exercise proper care to see that their plant is properly constructed, are liable for death resulting therefrom, though the plant itself is operated by their employes. *Cole v. Parker*, 27 C. A. 563, 66 S. W. 135.

An electric company and a telephone company held jointly liable for a death occasioned by a charged guy wire attached to the electric company's pole by the telephone company, and allowed to remain in a dangerous position by both companies. *San Marcos Electric Light & Power Co. v. Compton*, 48 C. A. 586, 107 S. W. 1151.

An electric light company held not liable for the death of a trespasser through coming in contact with a live wire, charged through the failure of the company to

comply with city ordinances. *Burnett v. Ft. Worth Light & Power Co.*, 102 T. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504.

Under this article an electric company furnishing light to an employer is liable for the death of an employé of such employer occasioned by the electric company's negligence in permitting its light wires to become heavily charged with electricity and thereby causing a metallic tank in the employer's plant to be charged with electricity, by coming in contact with which the employé is killed. *G., H. & S. A. Ry. Co. v. Figott*, 54 C. A. 367, 116 S. W. 842.

An electric company permitting an uncovered guy wire stretched over the roof of a building to become charged with electricity, in violation of ordinance, held liable for death of a person resulting therefrom. *Burnett v. Ft. Worth Light & Power Co.* (Civ. App.) 117 S. W. 175.

Decedent's husband and children held not entitled to recover from a telephone company for her death, through the company breaking a general contract for telephone service, resulting in a delay in procuring a physician. *Southwestern Telegraph & Telephone Co. v. Solomon*, 54 C. A. 306, 117 S. W. 214.

This article does not authorize an action for death caused by the failure of a telephone company to provide a way of communication between a subscriber and a physician to attend the wife of the subscriber suffering from a disease resulting in her death for want of medical attention. *Deweese v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 144 S. W. 732.

13. Negligence of owner or landlord of building.—The owner of a defective hotel building held liable for the death of one killed, where he was lawfully on such premises. *Texas Loan Agency v. Fleming*, 18 C. A. 668, 46 S. W. 63.

A landlord held not liable for the death of a third person by falling through an unguarded door on an upper story of the premises. *Texas Loan Agency v. Fleming*, 92 T. 458, 49 S. W. 1039, 44 L. R. A. 279.

14. Negligence of master.—Employer held not to have furnished deceased employé with safe place to work. *Merchants' & Planters' Oil Co. v. Burns* (Civ. App.) 72 S. W. 626.

A master held not liable for the death of his servant by reason of his failure to provide a watchman to look out for engines entering the factory yard. *Merchants' & Planters' Oil Co. v. Burns*, 96 T. 573, 74 S. W. 758.

A master held not liable for the death of his servant by his failure to enact rules for the safety of his employés. *Id.*

Under this article a right of action exists in favor of a wife and children against a lumber company for the death of the husband and father, alleged to have been caused by the negligence of the defendant, if the negligence upon which the suit is predicated is the personal negligence of defendant. The basis of the action in this case is the negligence of the company, the employer of the deceased, in failing to keep a railroad track in its yards and the engine in repair, both being appliances of which the deceased was required to make use in the performance of his duties. *Kirby Lumber Co. v. Chambers*, 41 C. A. 632, 95 S. W. 612.

Where defendant required deceased to go on top of certain tanks belonging to another, it was defendant's duty either to see that the tanks were properly constructed, or to warn deceased of their improper construction. *Yellow Pine Oil Co. v. Noble* (Civ. App.) 97 S. W. 332.

Death of employé struck by hoisting bucket held caused by the negligence of a vice principal who directed another employé to signal the engineer to permit the bucket to drop without warning the employé or ascertaining whether he was in a position of danger. *William Miller & Sons Co. v. Wayman* (Civ. App.) 157 S. W. 197.

15. Liability for act of agent or employé.—Where the agent of an express company and also of the railroad company places men in the depot building for the purpose, and they kill a person under the impression that he is attempting to commit a burglary, the company is not liable for damages for the death, since it is not alleged that the company is the proprietor, etc., of a railroad, and the death was not the result of its own wrongful acts or omission. *H. & T. C. Ry. Co. v. Lipscomb* (Civ. App.) 62 S. W. 954.

A party is not liable for the act or omission of his agents, causing death, but death must result from his own immediate act or omission, etc. If one is negligent in seeing that an electric plant is properly constructed before it is operated, then if an injury occurs, it is his immediate act, or rather his omission, though the plant was operated by his employés. *Cole v. Parker*, 27 C. A. 563, 66 S. W. 136.

The proprietor of an eating house is not responsible for the shooting by its agent of a patron, where the agent was not acting in any matter relating to his duties. *Lytle v. Crescent News & Hotel Co.*, 27 C. A. 530, 66 S. W. 240.

Under this article one's liability for damages arises from his own wrongful act, negligence, unskillfulness or default, and not from any negligence on the part of an employé. Where the negligence of an employé concurs in causing the injury, but it could not have occurred without the negligence of the employer, then the latter is just as liable as if there had been no concurrence. *Shippers' Compress & Warehouse Co. v. Davidson*, 35 C. A. 558, 80 S. W. 1034.

Where a railway brakeman, after having killed a trespasser on the train, threw the body on the track to conceal the crime, the railway company was not liable for the mutilation of the body. *Houston & T. Cent. R. Co. v. Bowen*, 36 C. A. 165, 81 S. W. 80.

Where a brakeman on a freight train had authority to eject a trespasser, and in so doing shot and killed him, the railroad company was liable therefor. *Id.*

Act of servant in turning current of compressed air on a bystander, causing his death, held within scope of servant's employment. *Galveston, H. & S. A. Ry. Co. v. Currie* (Civ. App.) 91 S. W. 1100.

That a killing by a servant may be intentional and yet the result of his negligence, is within the statute. When the death is produced through the negligence in any recognized form, as a proximate cause, the statute applies. Any act which is merely rash, reckless, or wanton, as distinguished from intentional, or made without regard to consequences, is negligent. *Id.*

A railroad held liable under the statute for death caused by the negligence of its servants, though the servant intentionally does the act which is the proximate cause of death. *Galveston, H. & S. A. Ry. Co. v. Currie*, 100 T. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367.

Under this article an electric company is responsible for the negligence of its employes in leaving high voltage wires uninsulated, which results in the death of an employe. *San Antonio Gas & Electric Co. v. Bidders*, 46 C. A. 559, 103 S. W. 230, 231.

Under this article a party is not liable for the act or omission of his agents causing death, but death must result from his own immediate act or omission. *Williams v. Northern Texas Traction Co.* (Civ. App.) 107 S. W. 125.

The proprietor, owner, charterer or hirer of any railroad, or the receiver or other person in charge of any railroad, is liable for the death of person caused by the negligence of a servant or agent when such railroad is not used as a common carrier, but merely as an incident to the principal business. *Kirby Lumber Co.'s Receivers v. Owens*, 56 C. A. 370, 120 S. W. 936.

A railroad company held not liable for the act of a servant in killing a person done outside the scope of his employment. *Hidalgo v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 128 S. W. 683.

If a servant's death resulted from the negligence of the employer's agent placed in charge of its plant to control and direct the employes, the act of such servant would be the employer's act so as to make it liable. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 129 S. W. 852.

The negligent failure of an employe of a corporation operating an electric light plant and using wires for the distribution of dangerous currents of electricity to inspect the appliances, resulting in the death of a person by electric shock received from a broken wire, is the negligence of the corporation, and it is liable within subdivision 2 of this article. *Jacksonville Ice & Electric Co. v. Moses* (Civ. App.) 134 S. W. 379.

Any negligence of a physician employed to treat a lumber company's employes' families held not within this article. *Wm. Cameron & Co. v. McSween* (Civ. App.) 137 S. W. 139.

Under this article one maintaining a swimming pool for the use of the public, in which plaintiff's minor son was drowned, was only liable for his own negligence in failing to provide sufficient competent attendants to guard against such occurrences, but was not liable for any negligence on the part of the attendants provided in failing to promptly rescue decedent on his falling into danger. *Levinski v. Cooper* (Civ. App.) 142 S. W. 959.

Under this article plaintiff cannot recover in the absence of proof that decedent was employed by the general manager, the only person for whose negligence the corporation would be liable, and in the absence of proof that the general manager negligently set decedent at work without warning. *Commerce Cotton Oil Co. v. Camp*, 105 T. 130, 145 S. W. 902.

16. Contributory negligence.—Intoxication, when contributing to personal injury, is chargeable as negligence. *Railway Co. v. Evans*, 71 T. 361, 9 S. W. 325, 1 L. R. A. 476.

Where the injury does not result from a wrongful act, but from an intervening cause, such as the negligence of the party injured, a railway company is not liable therefor. *Railway Co. v. Chambers*, 73 T. 296, 11 S. W. 279.

Where there are concurrent causes of an injury, each of which contributed thereto, the fact that one of the causes might have been avoided by the plaintiff, or that with reference to it he might have been guilty of contributory negligence, will not exempt the company as to the other cause. *Railway Co. v. Shearer*, 1 C. A. 343, 21 S. W. 133.

A person is guilty of contributory negligence who attempts to cross a railroad at a street crossing without looking for trains, and is killed by a train that he might have seen if he had looked. *Railway Co. v. Brown*, 21 S. W. 424, 2 C. A. 281.

The fact that the engine was running at a rapid rate would not excuse want of care on the part of deceased. *Id.*

Contributory negligence defined. *Railway Co. v. Fuller*, 24 S. W. 1090, 5 C. A. 660; *Railway Co. v. Giddings* (Civ. App.) 24 S. W. 1125; *Railway Co. v. Herrin*, 26 S. W. 425, 6 C. A. 718; *Railway Co. v. Watkins* (Civ. App.) 26 S. W. 760; *Fordyce v. Allen* (Civ. App.) 26 S. W. 437; *Wilson v. Railway Co.* (Civ. App.) 26 S. W. 753.

Carrier not liable for the death of one riding on its train in violation of a regulation of which reasonable publicity has been given, although the rule has at various times been violated. *Railway Co. v. Lynch*, 28 S. W. 252, 8 C. A. 513.

As to contributory negligence, see *Railway Co. v. Lively*, 14 C. A. 554, 38 S. W. 370; *Railway Co. v. Curlin*, 13 C. A. 505, 36 S. W. 1003.

Woman driving gentle horse over crossing obstructed by defendant, and killed by being thrown from the wagon after her horse had become frightened at the obstruction, held not guilty of contributory negligence. *Sherman, S. & S. Ry. Co. v. Bridges*, 16 C. A. 64, 40 S. W. 536.

In an action for the death of a traveler at a highway crossing, held, that the deceased was guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Polk* (Civ. App.) 63 S. W. 343.

The contributory negligence of a person killed on railroad track held to preclude a recovery therefor from the company. *Missouri, K. & T. Ry. Co. of Texas v. Cowles*, 29 C. A. 156, 67 S. W. 1078.

Where deceased was run over by a train in a place used by the public as a street, he was not a trespasser or guilty of contributory negligence by reason of being there. *St. Louis Southwestern Ry. Co. of Texas v. Matthews*, 34 C. A. 302, 79 S. W. 71.

In an action against a railroad for the death of an employe of another railroad in a collision at a crossing, decedent held not guilty of contributory negligence. *El Paso & S. W. R. Co. v. Murtie*, 49 C. A. 273, 108 S. W. 998.

That a pedestrian was guilty of contributory negligence on a railway track held not to preclude recovery for his death. *Texas & P. Ry. Co. v. Gullett* (Civ. App.) 134 S. W. 262.

17. — Children.—A child 17 months old cannot be guilty of contributory negligence. *G., H. & S. A. Ry. Co. v. Clark*, 21 C. A. 167, 51 S. W. 276.

A boy 10 years old, killed by a railroad train, held not chargeable with contributory negligence. *St. Louis S. W. Ry. Co. v. Abernathy*, 28 C. A. 613, 68 S. W. 539.

A boy, 16 years of age and familiar with railroading, killed while riding on one of defendant's freight trains in violation of a rule of the company, held guilty of contributory negligence. *Chicago, R. I. & T. Ry. Co. v. Martin*, 35 C. A. 186, 79 S. W. 1101.

18. — **Imputed negligence.**—The contributory negligence of the husband cannot be imputed to the wife, who was injured by a collision of the train with the wagon driven by him. *Railway Co. v. Kutac*, 76 T. 473, 13 S. W. 327.

The negligence of the parent cannot be imputed to his child. *Allen v. T. & P. Ry. Co. (Civ. App.)* 27 S. W. 943. Citing *Railway Co. v. Moore*, 59 T. 64, 46 Am. Rep. 265; *Williams v. Railway Co.*, 60 T. 205; *Telegraph Co. v. Hoffman*, 80 T. 422, 15 S. W. 1048, 26 Am. St. Rep. 759; *Railway Co. v. Fletcher*, 26 S. W. 446, 6 C. A. 736.

In a mother's action for death of a son at a railroad crossing, she is not bound by the negligence of one to whom she did not intrust the child. *Taylor, B. & H. R. Co. v. Warner (Civ. App.)* 60 S. W. 442.

19. — **Necessity of pleading.**—See notes at end of Chapter 8, Title 37.

20. **Injury avoidable notwithstanding contributory negligence.**—Negligence of the injured party does not prevent recovery if the accident could have been avoided by use of reasonable care by the defendant. *Railway Co. v. Farrell (Civ. App.)* 27 S. W. 942.

A railroad company held liable for the death of a trespasser on its train where it could have prevented or lessened the accident. *De Palacios v. Rio Grande & E. P. Ry. Co. (Civ. App.)* 45 S. W. 612.

Where a boy killed by defendant's train was discovered in his perilous position by defendant's servants in time to have possibly prevented his death, a judgment for negligently causing his death should be sustained, though he was also negligent. *Missouri, K. & T. Ry. Co. of Texas v. Haltom (Civ. App.)* 62 S. W. 800.

Where a person killed while walking on a railroad track was guilty of contributory negligence it was necessary in order to recover for the death to prove that after the operatives of the train discovered that deceased was in danger they failed to use all the means at hand to stop the train. *International & G. N. R. Co. v. Ploeger (Civ. App.)* 96 S. W. 56.

A railway company is liable for the death of a pedestrian at a street crossing, though he be negligent in exposing himself to injury, if the employés in charge of the train know of his peril in time to avoid his injury by the use of means and agencies at hand. *Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.)* 99 S. W. 144.

21. **Fellow servants—Negligence of.**—An action against an employer, for the death of an employé, caused by the negligence of a fellow employé, not occupying the position of vice principal, is not maintainable under subdivision 2 of this article. *Bledsoe v. Thompson Bros. Lumber Co. (Civ. App.)* 151 S. W. 910.

22. — **Who are.**—See notes under Art. 6642.

23. **Assumption of risk.**—An employé assumes capacity to perform labor where the danger is patent. *Eddy v. Rogers (Civ. App.)* 27 S. W. 295, citing *Railway Co. v. French*, 23 S. W. 644, 86 T. 96; *Railway Co. v. Lemp*, 59 T. 22; *Railway Co. v. Tarver*, 72 T. 308, 11 S. W. 1043; *Railway Co. v. Hester*, 64 T. 403.

One voluntarily exposing himself to an apparent danger of injury assumes the risk. *Bonnet v. Railway Co. (Civ. App.)* 31 S. W. 525.

One, having the time and opportunity to learn of the condition of a lodging house as to fire escapes, by voluntarily remaining in the building assumed the danger of any failure to provide adequate escapes. *Radley v. Knepfly (Civ. App.)* 124 S. W. 447.

In an action for death from electric shock, held that the doctrine of assumed risk was not presented. *Temple Electric Light Co. v. Halliburton (Civ. App.)* 136 S. W. 584.

24. **Proximate cause of injury.**—The presence of a mudhole in a street caused by a railroad's negligence held not the proximate cause of the death of plaintiff's decedent by being thrown from his buggy when his horse, frightened by defendant's train, ran away. *Neely v. Ft. Worth & R. G. Ry. Co.*, 96 T. 274, 72 S. W. 159.

To attribute death to two or more concurrent causes, each must be a prominent efficient cause; for, if one of the alleged causes operates slightly with another, which is the prominent efficient cause, then proximate cause of death should be traced to the latter. *Ellyson v. International & G. N. R. Co.*, 33 C. A. 1, 75 S. W. 868.

Where intestate's horse was frightened by the blowing off of steam from defendant's engine after deceased had gotten control of him, deceased's previous negligence in getting into the buggy held not the proximate cause of his death. *Hord v. Gulf, C. & S. F. Ry. Co.*, 33 C. A. 163, 76 S. W. 227.

Negligence of defendant in obstructing a street by a gangway held proximate cause of death of plaintiff's husband, notwithstanding intervening act of defendant's servant in running a truck down the gangway. *Shippers' Compress & Warehouse Co. v. Davidson*, 35 C. A. 558, 80 S. W. 1032.

In an action against a railroad company for the death of one struck by a train, the negligence of an employé held the proximate cause of decedent's death. *Texas & N. O. R. Co. v. Scarborough (Civ. App.)* 104 S. W. 408.

If injuries received by decedent, through defendant's negligence, developed tuberculosis in decedent, her husband and minor children could recover, although she was predisposed to tuberculosis and died therefrom. *Chicago, R. I. & G. Ry. Co. v. Groner*, 51 C. A. 65, 111 S. W. 667.

The death of a servant, caused by the falling of a pile of cotton seed, held not the result alone of the action of gravity on the pile, but of the nonperformance of the duty of the master to protect him. *Alamo Oil & Refining Co. v. Curvier (Civ. App.)* 136 S. W. 1132.

In an action for death of a pedestrian, defendant's negligence in failing to discover and guard against decedent's peril and not his contributory negligence in walking on the track held the proximate cause of his death. *Ft. Worth & D. C. Ry. Co. v. Broomhead (Civ. App.)* 140 S. W. 820.

25. **Nominal damages.**—The right of action for death being of purely statutory origin, the doctrine of nominal damages has no applicability. *McGown v. I. & G. N. Ry. Co.*, 85 T. 289, 20 S. W. 80; *Rader v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 137 S. W. 718.

26. **Exemplary damages.**—See notes under Art. 4696.

27. **Measure and amount of damages.**—Measure of damages resulting to the husband or child from death of his wife. *Railway Co. v. Southwick* (Civ. App.) 30 S. W. 592.

Measure of damages for personal injuries not resulting in death, see *Railway Co. v. Bowlin* (Civ. App.) 32 S. W. 918; *Farrar v. Beeman*, 63 T. 180; *Railway Co. v. Curry*, 64 T. 86; *Railway Co. v. Ray* (Civ. App.) 28 S. W. 257; *Railway Co. v. Smith* (Civ. App.) 28 S. W. 111; *Railway Co. v. Muth*, 7 C. A. 443, 27 S. W. 752; *Mo., K. & T. Ry. Co. v. Johnson* (Civ. App.) 37 S. W. 771.

In an action by the widow and children of the deceased for his death, the measure of damages was defined. *Louisiana Western Extension Ry. Co. v. Carstens*, 19 C. A. 190, 47 S. W. 36.

In action for death, the measure of damages is the value of decedent's life "to the plaintiffs." *Houston & T. C. R. Co. v. Johnson*, 27 C. A. 420, 66 S. W. 72.

The measure of damages, in an action by parents for the wrongful death of their son, defined. *Cole v. Parker*, 27 C. A. 563, 66 S. W. 135.

The statute relating to wrongful death does not limit the damages which may be awarded to children of the deceased to such as accrue during their minority. *Galveston, H. & S. A. Ry. Co. v. Puente*, 30 C. A. 246, 70 S. W. 362.

Measure of damages for the death of a child determined. *Galveston, H. & N. Ry. Co. v. Olds* (Civ. App.) 112 S. W. 787.

The measure of recovery by a widow and minor children for the unlawful killing of decedent stated. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

The measure of damages to adult children in an action for the death of their mother, defined. *Rader v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 137 S. W. 718.

Damages for a wife and mother's wrongful death cannot be estimated with exactness, so that the amount is largely for the jury's discretion. *Texas & N. O. R. Co. v. Mills* (Civ. App.) 143 S. W. 690.

28. — **Inadequate damages.**—A verdict of \$500 for negligently killing plaintiff's husband, who was 28 years old, in perfect health, constantly employed, and contributed \$300 per year for her support, held inadequate. *Burns v. Merchants' & Planters' Oil Co.*, 26 C. A. 223, 63 S. W. 1061.

29. — **Excessive damages.**—Verdicts for the following amounts have been sustained: \$2,000 awarded a mother for the death of her son. *Gulf, C. & S. F. Ry. Co. v. Royall*, 18 C. A. 86, 43 S. W. 815. \$2,000 for the death of a son 7 years of age. *Missouri, K. & T. Ry. Co. v. Gilmore* (Civ. App.) 53 S. W. 61. \$2,250 for the death of an adult son. *St. Louis Southwestern Ry. Co. of Texas v. Huey* (Civ. App.) 130 S. W. 1017. \$2,572 in favor of a mother for the death of her two sons, 18 and 19 years old, respectively. *Texas & P. Ry. Co. v. Shoemaker* (Civ. App.) 81 S. W. 1019. \$3,500 by parents for the death of their infant son. *St. Louis, S. F. & T. Ry. Co. v. Bolen* (Civ. App.) 129 S. W. 860. \$3,750 for death of child of 7. *Taylor, B. H. R. Co. v. Warner* (Civ. App.) 60 S. W. 442. \$5,000 for the death of a boy 12 years of age. *Gulf, C. & S. F. Ry. Co. v. Brown*, 33 C. A. 269, 76 S. W. 794. \$5,000 for the death of a son who had contributed to plaintiffs' support. *Texas & N. O. Ry. Co. v. Kenny*, 46 C. A. 297, 102 S. W. 909. \$5,000 damages for killing a deaf mute, 32 years old, and a successful farmer. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442. \$6,000 in a death action held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Wall* (Civ. App.) 110 S. W. 453. \$3,500 to each of the parents of a child. *San Antonio Traction Co. v. Young* (Civ. App.) 141 S. W. 572. \$3,000 for the death of a son. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 129 S. W. 852. \$10,000 for causing death of another. *Missouri, K. & T. Ry. Co. of Texas v. Ferris*, 23 C. A. 215, 55 S. W. 1119; *Houston & T. C. R. Co. v. Rutland*, 45 C. A. 621, 101 S. W. 529. \$11,750 for wrongful death. *Ft. Worth & R. G. Ry. Co. v. Wilkinson*, 50 C. A. 48, 110 S. W. 470. \$7,500 in favor of decedent's widow and \$5,000 in favor of his child. *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561. \$12,960 for wrongful death, divided among widow and two children. *Galveston, H. & S. A. Ry. Co. v. Currie* (Civ. App.) 91 S. W. 1130. \$14,000 for wrongful death. *Temple Electric Light Co. v. Halliburton* (Civ. App.) 136 S. W. 584. \$15,000 for death. *Texas Mexican Ry. Co. v. Higgins*, 44 C. A. 523, 99 S. W. 200. \$16,000 for wrongful death. *Missouri, K. & T. Ry. Co. of Texas v. Nelson*, 39 C. A. 269, 87 S. W. 706. \$17,000, given a widow and four children, held not excessive. *Galveston, H. & S. A. Ry. Co. v. Davis*, 27 C. A. 279, 65 S. W. 217. \$20,000 for death from negligence. *Texas Loan Agency v. Fleming*, 18 C. A. 668, 46 S. W. 63. \$20,000 for death of the engineer of a fire department. *Houston Belt & Terminal Ry. Co. v. O'Leary* (Civ. App.) 136 S. W. 601. \$25,000 for wrongful death. *International & G. N. R. Co. v. White* (Civ. App.) 120 S. W. 958. \$10,000 for the widow and \$7,500 for each of the two minor children. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 C. A. 381, 107 S. W. 374. \$28,500 for death of one leaving a mother, widow, and six children. *Galveston, H. & S. A. Ry. Co. v. Pingenot* (Civ. App.) 142 S. W. 93.

Verdicts for the following amounts held to be excessive: \$500 for death of a son. *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561. More than \$1,000 for the death of a married son, the mother being 73 years old, living with her married daughter, and the son, earning \$100 a month, had contributed \$50 per year for her support. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477. \$1,500 for causing the death of plaintiff's husband. *International & G. N. R. Co. v. Jones* (Civ. App.) 60 S. W. 978. \$3,600 for the death of a man 41 years of age, earning \$37.50 per month. *Trinity Val. R. Co. v. Stewart* (Civ. App.) 62 S. W. 1085. \$20,000 in favor of a widow and children for death of husband and father. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 57 S. W. 702.

Verdicts were held not to be excessive in actions by a widowed mother for the death of her married son. *Texas & N. O. R. Co. v. Scarborough* (Civ. App.) 104 S. W. 408. By decedent's wife and children. *Galveston, H. & S. A. Ry. Co. v. Murray* (Civ. App.) 99 S. W. 144. By a wife. *Freeman v. Griewe* (Civ. App.) 143 S. W. 730. By

a son for death of his father. *Gulf, C. & S. F. Ry. Co. v. Delaney*, 22 C. A. 427, 55 S. W. 538. For causing the death of plaintiff's minor son. *Citizens' Ry. Co. v. Washington*, 24 C. A. 422, 58 S. W. 1042. By parents for the death of a child. *Galveston, H. & N. Ry. Co. v. Olds* (Civ. App.) 112 S. W. 787.

Verdicts in the following actions for death were held not to be excessive: *Texas & P. Ry. Co. v. Johnson*, 48 C. A. 135, 106 S. W. 773; *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395; *International & G. N. R. Co. v. Hays*, 44 C. A. 462, 98 S. W. 911; *El Paso & S. W. R. Co. v. Murtle*, 49 C. A. 273, 108 S. W. 998; *Houston & T. C. R. Co. v. Davenport* (Civ. App.) 110 S. W. 150; *Chicago, R. I. & G. Ry. Co. v. Trippett*, 50 C. A. 279, 111 S. W. 761.

Verdicts were held to be excessive: In an action by parents for the negligent death of their son. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841. And in an action by a child for the death of his father. *Freeman v. Griewe* (Civ. App.) 143 S. W. 730.

30. Mitigation or reduction of damages.—Insurance money payable on an accident policy will not be set off against the damage caused by the negligent act of another, resulting in death. *Tyler & S. E. Ry. Co. v. Raspberry*, 13 C. A. 185, 34 S. W. 794.

Where the wife is killed through the negligence of the defendant, the subsequent marriage of the husband does not in any manner operate to mitigate the damages for which the wrongdoer was responsible. *Railway Co. v. Younger*, 90 T. 387, 38 S. W. 1121.

Insurance on life of deceased is not to be considered in estimating the damages. *Houston & T. C. R. Co. v. Weaver* (Civ. App.) 41 S. W. 846.

In an action by the wife for damages for the death of her husband, evidence that she obtained insurance money after his death is inadmissible in mitigation of damages. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

That decedent's life was insured, and that plaintiffs would be entitled to collect the policy was no ground or reducing the damages allowable on account of his death. *Houston & T. C. R. Co. v. Lemair*, 55 C. A. 237, 119 S. W. 1162.

In an action by a wife for damages for the unlawful shooting and killing of her husband, evidence of the husband's abandonment of the wife is admissible on the issue of plaintiff's pecuniary damages. *Holland v. Closs*, 146 S. W. 671.

In the action by a wife for damages for the unlawful shooting and killing of her husband, the circumstances of the improper relations of deceased with the daughter of defendant were admissible in mitigation of exemplary damages only. *Id.*

31. Elements of compensation—In general.—In an action by a wife for the wrongful death of her husband, the jury may give such damages as they think proportioned to the injury resulting from his death. *Houston & T. C. R. Co. v. Loeffler* (Civ. App.) 51 S. W. 536.

In an action for the negligent killing of plaintiffs' husband and father, plaintiffs are not entitled to recover a sum equal to all the benefits that would have been received from the decedent in the future, had he not been killed. *Ft. Worth & R. G. Ry. Co. v. Sivells*, 28 C. A. 497, 67 S. W. 517.

The persons given a right of action for wrongful death by the statute held only entitled to recover damages upon showing actual damage sustained. *Texas & N. O. R. Co. v. Mills* (Civ. App.) 143 S. W. 690.

32. — Loss of pecuniary benefits.—In an action for death of plaintiff's husband, she could recover the pecuniary damages sustained, and the measure was the probable amount that he would have contributed to her support. *Missouri, K. & T. Ry. Co. of Texas v. Hines* (Civ. App.) 40 S. W. 152.

Adult children held not restricted to a recovery only for the loss of such pecuniary benefits from the death of their mother as would have resulted from her mental and bodily labor. *San Antonio & A. P. Ry. Co. v. Long*, 19 C. A. 649, 48 S. W. 599.

Measure of damages is a sum equal to the pecuniary benefit plaintiffs would have had a reasonable expectation of receiving from deceased. *Galveston, H. & S. A. Ry. Co. v. Hughes*, 22 C. A. 134, 54 S. W. 264.

In action for death of son, the parents are entitled to recover only the "present value" of the pecuniary aid they might have received from their son, and not the sum total thereof. *Ft. Worth & D. C. Ry. Co. v. Morrison* (Civ. App.) 56 S. W. 931.

In an action for wrongful death, the measure of damages is such a sum of money as, if paid now, would fairly compensate plaintiffs for the pecuniary loss sustained. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

Parents, suing for death of infant son, held entitled to recover pecuniary value of his services to them after majority. *Freeman v. Carter*, 28 C. A. 571, 67 S. W. 527.

Where, in an action for death, there was no evidence of pecuniary loss to decedent's father, a finding in his favor was erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Civ. App.) 73 S. W. 542.

The measure of damages for death by wrongful act is the pecuniary loss sustained by plaintiffs. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

In an action for death of plaintiff's 13-year old son, plaintiffs held entitled to allege and prove that they had a reasonable expectation of receiving pecuniary aid from decedent after he arrived at majority, which was of the value of \$5,000. *Missouri, K. & T. Ry. Co. of Texas v. Snowden*, 44 C. A. 509, 99 S. W. 865.

In an action for death, an instruction confining plaintiff's recovery to loss of pecuniary benefits and defining such term held proper. *Houston & T. C. R. Co. v. Rutland*, 45 C. A. 621, 101 S. W. 529.

Parents suing for the negligent death of their minor son can only recover the pecuniary benefits they would have received from the son had he lived. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

In an action for wrongful death, recovery is limited to the present value of the pecuniary aid plaintiffs have a reasonable expectation that decedent would have contributed to them had he lived, and excluding any allowance for grief and loss of society and affection. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 117 S. W. 1043.

Damages for the death of plaintiff's mother are to be measured by the children's pecuniary loss, and they are not entitled to damages for defendant's negligence inde-

pendent of financial injury. *Rader v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 137 S. W. 719.

Widow and minor children held entitled to recover an amount which would compensate them for the pecuniary loss resulting from the death of the husband and father. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

33. — **Suffering of deceased.**—Mental or physical pain suffered by decedent is not an element of damage in an action for wrongful death. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

34. — **Grief and loss of society, care, counsel and training.**—Loss of decedent's society or grief on account of his death is not an element of damage in an action for wrongful death. *McGown v. I. & G. N. Ry. Co.*, 85 T. 289, 20 S. W. 80; *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

In an action for wrongful death of plaintiff's son, plaintiff is not entitled to recover for mental anguish. *Houston & T. Cent. R. Co. v. Bowen*, 36 C. A. 165, 81 S. W. 80.

In an action for death by wrongful act, the earning capacity of deceased is not the only matter to be considered, but his services in working about his home and premises and the caring for and counsel to his children were proper matters for consideration. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

By pecuniary benefits is meant not only money, but everything that can be valued in money and includes in case of a minor child who is suing for death of parent, the reasonable value of such nurture, care and education as the child would have received from the deceased parent had he lived. But neither sorrow for the loss of a deceased relative, nor the loss of his or her society is the subject of recovery. *I. & G. N. Ry. Co. v. McVey*, 99 T. 28, 87 S. W. 329.

In an action by children for negligence causing the death of their father, the recovery is not limited to such sum as the father would probably have contributed to the support of plaintiffs, but the loss of care and moral and mental training which might have been given by the father may be considered in estimating damages. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

Neither sorrow nor loss of society held an element of damages for death of a parent. *Texas & N. O. R. Co. v. Green*, 42 C. A. 216, 95 S. W. 694.

In an action for death brought by decedent's widow and minor children, plaintiffs held entitled, under proper allegations and proof, to recover for the loss of advice and counsel of decedent, though the same is not a pecuniary loss within the statute. *Houston & T. C. R. Co. v. Davenport* (Civ. App.) 110 S. W. 150.

Compensation should be allowed only for such pecuniary loss as may have resulted to the plaintiff by the death of deceased and excludes all recovery for loss of society, or companionship of deceased or mental distress on account of such death. *Gulf, C. & S. F. Ry. Co. v. Farmer*, 102 T. 235, 115 S. W. 261.

A wife, suing for the negligent death of her husband, may recover for the loss of care and counsel of the husband. *Paris & G. N. Ry. Co. v. Robinson* (Civ. App.) 127 S. W. 294.

The damages recoverable by minor children for the death of their father is not limited to the sum which he would probably have contributed to them, but may include damages for loss of his care and moral and mental training. *Pecos & N. T. Ry. Co. v. Sultor* (Civ. App.) 153 S. W. 185.

35. — **Medical expenses.**—A husband held entitled to recover for medical expenses necessarily incurred, in an action for the death of his wife resulting from a carrier's negligence. *International & G. N. R. Co. v. Boykin*, 32 C. A. 72, 74 S. W. 93.

36. **Conditions precedent to action.**—A widow instituting a suit for the negligent death of her husband must show a compliance with the statutory conditions. *Gutierrez v. El Paso & N. E. R. Co.*, 102 T. 378, 117 S. W. 426.

37. **Persons liable.**—This statute confers a right of action against a private corporation other than a common carrier. *Fleming v. Loan Agency*, 87 T. 238, 27 S. W. 126, 26 L. R. A. 250; *Lynch v. S. W. T. & T. Co.* (Civ. App.) 32 S. W. 776; *Burns v. Merchants' & Planters' Oil Co.*, 26 C. A. 223, 63 S. W. 1063.

A private corporation is liable for injuries resulting in death from its own wrongful acts or omissions as distinguished from the acts or omissions of its agents. *Fleming v. Texas Loan Agency* (Civ. App.) 28 S. W. 338; *Id.*, 87 T. 238, 27 S. W. 126, 26 L. R. A. 250. See *Ritz v. City of Austin*, 1 C. A. 455, 20 S. W. 1029.

A telephone corporation is liable in damages for injuries resulting in death, when the negligence causing the injuries is the negligence of the corporation itself, as distinguished from that of its agents or servants. *Citizens' Telephone Co. v. Thomas*, 45 C. A. 20, 99 S. W. 880.

An action can be properly brought against an engineer of a train that runs over and kills a person, if he negligently causes the death. *Texas & P. Ry. Co. v. Tucker*, 48 C. A. 115, 106 S. W. 766.

Under this article only persons and corporations engaged in the business of a common carrier and the receiver of such corporations are liable for injuries resulting in death which are caused by the negligence of servants or agents. Other character of corporations are only liable for such injuries when they are the result of the negligent act or omission of the corporation, as distinguished from the act or omission of a servant or agent of such corporation. *Halbert v. Tex. Tie & Lumber P. Co.* (Civ. App.) 107 S. W. 594.

Under a contract between a railroad company and an express company, the express company held not liable over to the railroad company for the death of a person killed by striking an express truck on a station platform and being dragged from a train and run over. *Houston & T. C. R. Co. v. Wells, Fargo & Co.* (Civ. App.) 125 S. W. 971.

A private corporation including one engaged in supplying electricity is within subdivision 2 of this article, and it is liable for injuries resulting in death. *Jacksonville Ice & Electric Co. v. Moses* (Civ. App.) 134 S. W. 379.

This article makes a private corporation liable to the same extent as a natural person would be under the same facts; and whatever acts of its general manager, done for the corporation, would render him liable, if done for himself, will bind the corporation as it would bind him, but no further. *Commerce Cotton Oil Co. v. Camp*, 105 T. 130, 145 S. W. 902.

Where a lighting company was directing plumbing being done by an employé of a hardware company, it could not absolve itself from liability for death of the employé from coming in contact with an electric wire upon the ground that the hardware company was an independent contractor for injury to whose employés it was not liable. *Texas Traction Co. v. George* (Civ. App.) 149 S. W. 438.

38. — **Receiver.**—A receiver of a railroad operating it under a United States circuit court is not within the statute. *Turner v. Cross*, 83 T. 218, 18 S. W. 578, 15 L. R. A. 262; *Dillingham v. Blake* (Civ. App.) 32 S. W. 77.

An action for damages cannot be maintained against a receiver after his discharge. *Railway Co. v. Wylie* (Civ. App.) 33 S. W. 771.

An action cannot be maintained against a receiver of a private corporation for death caused by his negligence. *Parker v. Dupree*, 28 C. A. 341, 67 S. W. 186.

39. **Defenses.**—The apprehension which moved defendant to shoot deceased in self-defense must be judged from the standpoint in which defendant was at the time. *Croft v. Smith* (Civ. App.) 51 S. W. 1089.

Where the evidence shows that the killing was intentional, to escape liability the defendant must show that it was done under a reasonable apprehension of fear of death or serious bodily harm. *Id.*

That a railroad bridge is not a public bridge does not relieve the company from liability for the killing of a child thereon, resulting from an engineer's negligence in failing to see the child. *Texas & P. Ry. Co. v. Harby*, 28 C. A. 24, 67 S. W. 541.

That employés operating a work train had no knowledge of the dangerous position of a child on the train held not to relieve the company from liability for his death. *St. Louis S. W. Ry. Co. v. Abernathy*, 28 C. A. 613, 68 S. W. 539.

In an action by a posthumous child for the recovery of damages sustained by reason of his father's death caused by defendant's negligence, the fact that the mother and other children have recovered damages for such death is immaterial. *Galveston, H. & S. A. Ry. Co. v. Contreras*, 31 C. A. 489, 72 S. W. 1051.

That death caused by turning a current of compressed air on a person could not be foreseen held not to affect liability therefor. *Galveston, H. & S. A. Ry. Co. v. Currie* (Civ. App.) 91 S. W. 1100.

A defendant held not entitled to the perfect right of self-defense, and was liable to the widow and children of decedent for killing him. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 870.

40. — **Release.**—In a suit brought under this article, if the injured party make a settlement with the wrongdoer, and for a valuable consideration releases the latter from liability for all injuries received through his negligence, and subsequently dies from the effects of such injury, an action by the wife and children of the deceased for damages on account of the death is barred by the release. *Thompson v. Ft. Worth & R. G. Ry. Co.*, 97 T. 590, 80 S. W. 991, 1 Ann. Cas. 231; *Blount v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 82 S. W. 305.

A release held not a bar to an action by a widow for the negligent death of her husband. *Kirby Lumber Co. v. Chambers* (Civ. App.) 95 S. W. 607.

A release of all claim for damages which the releasor shall or may have sustained by reason of personal injuries on a certain date while in defendant's employment, executed voluntarily and with the same knowledge and means of knowledge of the extent of his injuries which defendant had, cannot be avoided because the parties were mistaken as to the extent of the injuries, which were graver than believed. *San Antonio & A. P. Ry. Co. v. Polka*, 57 C. A. 626, 124 S. W. 226.

41., **Limitations.**—See Title 87, Chapter 3.

42. **Pleadings of plaintiff.**—See notes under Art. 1827.

43. **Presumptions, burden of proof and admissibility of evidence.**—See notes under Art. 3687.

44. **Weight and sufficiency of evidence.**—The jury can estimate the damages to the parent from the negligent killing of a child upon evidence of his health, strength, aptitude or willingness to perform service, the reasonable benefit resulting therefrom, etc., without a statement of a definite sum by a witness. *Railway Co. v. Nixon*, 52 T. 24; *Railway Co. v. Cowser*, 57 T. 304; *Railway Co. v. Kindred*, 57 T. 508; *Winnt v. Railway Co.*, 74 T. 32, 11 S. W. 907; *March v. Walker*, 48 T. 375; *Brunswick v. White*, 70 T. 504, 8 S. W. 85; *Railway Co. v. Measles*, 81 T. 474, 17 S. W. 124.

In an action by adult children against a railroad company for the death of their mother, held, that the evidence showed a loss of service of pecuniary value. *San Antonio & A. P. Ry. Co. v. Long*, 19 C. A. 649, 48 S. W. 599.

Evidence considered, and held sufficient to justify the damages awarded by verdict. *Texas & P. Ry. Co. v. Spence* (Civ. App.) 52 S. W. 562.

Evidence considered, and held sufficient to support a verdict for \$1,500 damages for death of plaintiff's son. *International & G. N. R. Co. v. Knight* (Civ. App.) 52 S. W. 640.

A jury may assess the amount a parent may reasonably expect from a son, negligently killed, after his majority, on evidence of good health, etc., without proof of any definite sum. *San Antonio Traction Co. v. White* (Civ. App.) 60 S. W. 323.

That a father contributed different sums at irregular intervals to the support of his married daughter held to support a finding that she was damaged by his wrongful death. *Texas & P. Ry. Co. v. Martin*, 25 C. A. 204, 60 S. W. 803.

The subsequent use by plaintiff of money paid decedent as a consideration for a release from liability for an accident which caused decedent's death held not conclusive evidence of a ratification of the release. *Missouri, K. & T. Ry. Co. of Texas v. Brantley*, 26 C. A. 11, 62 S. W. 94.

Evidence held to show that plaintiffs as subcontractors, and not defendants as owners, of dangerous premises where decedent was killed, were under obligation to have warned decedent of the danger. *Proctor v. San Antonio St. Ry. Co.*, 26 C. A. 148, 62 S. W. 939.

Facts held to show want of pecuniary interest in decedent's life, so as to preclude plaintiffs' recovery for his negligent death. *Id.*

In an action for death of plaintiff's mother, evidence held insufficient to show damage. *Galveston, H. & S. A. Ry. Co. v. Polk* (Civ. App.) 63 S. W. 343.

In an action for killing plaintiffs' decedent by a train while a trespasser on the roadbed, a verdict for plaintiffs held not sustained by the evidence. *Houston & T. C. R. Co. v. Harris* (Civ. App.) 64 S. W. 227.

Mere relationship of decedent's parents to him, in the absence of proof of any pecuniary benefit to be derived from his continued existence, held insufficient to justify a recovery in their favor for his death. *Standard Light & Power Co. v. Munsey*, 33 C. A. 416, 76 S. W. 931.

In an action against a railroad company for negligence, causing death of a child attempting to cross the track, evidence held insufficient to support verdict for plaintiff. *International & G. N. R. Co. v. Wear*, 33 C. A. 492, 77 S. W. 272.

Evidence held not to show that person killed by current of compressed air had participated in an improper use of the air. *Galveston, H. & S. A. Ry. Co. v. Currie* (Civ. App.) 91 S. W. 1100.

In an action for the death of a night watchman run over by a train in a railroad cut, evidence held to justify directing verdict for defendant. *Hancock v. Gulf, C. & S. F. Ry. Co.*, 99 T. 613, 92 S. W. 456.

A railway company held not liable, under the facts, for the death of a pedestrian on its track. *Texas & P. Ry. Co. v. Huber* (Civ. App.) 95 S. W. 568.

In an action against a railroad company for decedent's death by being struck by a train while lying on the track either asleep or drunk, evidence held to present the issue of discovered peril, and to sustain a verdict for plaintiff. *Texas & P. Ry. Co. v. Brannon*, 43 C. A. 531, 96 S. W. 1095.

In an action for negligent death, the proof held sufficient to authorize plaintiffs to maintain the suit and to authorize the jury to fix the damages. *Texas & P. Ry. Co. v. Johnson*, 48 C. A. 135, 106 S. W. 773.

Evidence, in an action for death, held insufficient to show that one of the plaintiffs was interested as a minor child of deceased, so as to authorize a recovery in his favor. *St. Louis & S. F. R. Co. v. Sizemore*, 53 C. A. 491, 116 S. W. 403.

In an action by parents for the negligent death of a minor son, evidence held to justify a finding that they suffered damages by reason of his death. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

In an action against a lodging house keeper for death alleged to have been caused by defendant's failure to provide adequate fire escapes, evidence held to show that decedent was familiar with the condition of the building as to fire escapes when he was injured. *Radley v. Knepfly* (Civ. App.) 124 S. W. 447.

In an action for death, facts held to justify the jury in considering the pecuniary benefits which, in reasonable probability, the wife and children would have derived from deceased, had he lived, in considering the amount of their damages, caused by his death. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

Evidence in an action for death of a workman killed while repairing the plastering in an elevator shaft in an office building, held to show that an employé running the elevator was guilty of alleged negligence, proximately causing the death of deceased, and that the latter did not assume the risk. *Farmers' & Mechanics' Nat. Bank v. Hanks* (Civ. App.) 128 S. W. 147.

In an action by parents for the death of their son, the evidence held to warrant a finding with approximately reasonable certainty that deceased would have furnished plaintiffs financial aid, and that they were therefore damaged by his death. *St. Louis Southwestern Ry. Co. of Texas v. Huey* (Civ. App.) 130 S. W. 1017.

Evidence, in an action by a father and married minor children to recover for the wrongful death of their wife and mother, held to show that the married children had no reasonable expectation of financial assistance from their mother. *Texas & N. O. R. Co. v. Mills* (Civ. App.) 143 S. W. 690.

45. — **Proximate cause.**—In an action against a railroad for the deaths of persons killed by a train, evidence held insufficient to show that the railroad's negligence was the proximate cause of the deaths. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 451, 84 S. W. 1049.

Where the evidence in an action for negligent death did not show the proximate cause of the accident, but left the same open to conjecture, there could be no recovery. *Mt. Marion Coal Mining Co. v. Holt*, 54 C. A. 411, 118 S. W. 825.

In an action against a lodging house keeper for death claimed to have been caused by failure to provide adequate fire escapes, evidence held to show such failure was not the proximate cause of decedent's injuries. *Radley v. Knepfly* (Civ. App.) 124 S. W. 447.

In an action for death by fire in a building, evidence considered and held that the violation of an ordinance requiring fire escapes was not the proximate cause of the injury. *Radley v. Knepfly*, 104 T. 130, 135 S. W. 111.

46. — **Negligence.**—Evidence in the following cases held insufficient to show that defendant negligently caused the death of decedent: *Galveston, H. & S. A. Ry. Co. v. Haas*, 19 C. A. 645, 48 S. W. 540; *Fleming v. Texas Loan Agency*, 24 C. A. 203, 58 S. W. 971; *Forge v. Houston & T. C. R. Co.*, 41 C. A. 81, 90 S. W. 1118; *Jones v. Ft. Worth & D. C. Ry. Co.*, 47 C. A. 596, 105 S. W. 1007; *A. Cohen & Co. v. Rittmann* (Civ. App.) 139 S. W. 59.

Evidence in the following cases held to show defendant's negligence: *Missouri, K. & T. Ry. Co. of Texas v. Brantley*, 26 C. A. 11, 62 S. W. 94; *Gulf, C. & S. F. Ry. Co. v. Brown*, 33 C. A. 269, 76 S. W. 794; *St. Louis Southwestern Ry. Co. of Texas v. Allen*, 35 C. A. 355, 80 S. W. 240; *Houston & T. C. R. Co. v. Ramsey*, 43 C. A. 603, 97 S. W. 1067; *Houston & T. C. R. Co. v. Kauffmann*, 46 C. A. 72, 101 S. W. 817; *International & G. N. R. Co. v. Tison* (Civ. App.) 117 S. W. 936.

Railroad held, on the facts, not liable for death of one killed at crossing. *Missouri, K. & T. Ry. Co. of Texas v. Eyer*, 96 T. 72, 70 S. W. 529.

Evidence held to authorize a finding of no negligence in the killing of a person on a railroad by a train. *Gonzales v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 107 S. W. 896.

Evidence held to sustain a verdict that defendant railroad company was not negligent, proximately resulting in the death of plaintiff's decedents, who were trespassing on the track when killed. *Parham v. Ft. Worth & D. C. Ry. Co.*, 51 C. A. 511, 113 S. W. 154.

47. — **Contributory negligence.**—Evidence in the following cases held not to show contributory negligence: *International & G. N. Ry. Co. v. Knight* (Civ. App.) 45 S. W. 167; *Chicago, R. I. & G. Ry. Co. v. Clay*, 55 C. A. 526, 119 S. W. 730; *Farmers' & Mechanics' Nat. Bank v. Hanks* (Civ. App.) 128 S. W. 147; *Jacksonville Ice & Electric Co. v. Moses* (Civ. App.) 134 S. W. 379; *Temple Electric Light Co. v. Halliburton* (Civ. App.) 136 S. W. 584.

Evidence in the following cases held sufficient to show contributory negligence: *Galveston, H. & S. A. Ry. Co. v. Haas*, 19 C. A. 645, 48 S. W. 540; *Proctor v. San Antonio St. Ry. Co.*, 26 C. A. 148, 62 S. W. 939; *Tucker v. International & G. N. R. Co.* (Civ. App.) 67 S. W. 914; *International & G. N. R. Co. v. De Ollos* (Civ. App.) 76 S. W. 222; *St. Louis Southwestern Ry. Co. of Texas v. Hunt*, 45 C. A. 401, 100 S. W. 968; *Houston & T. C. R. Co. v. Kauffmann*, 46 C. A. 72, 101 S. W. 817; *Caldwell v. Houston & T. C. Ry. Co.*, 54 C. A. 399, 117 S. W. 488.

Evidence in the following cases held sufficient to sustain a finding of no contributory negligence: *International & G. N. R. Co. v. Knight* (Civ. App.) 52 S. W. 640; *Texas & P. Ry. Co. v. Martin*, 25 C. A. 204, 60 S. W. 803; *Missouri, K. & T. Ry. Co. of Texas v. Brantley*, 26 C. A. 11, 62 S. W. 94; *St. Louis Southwestern Ry. Co. of Texas v. Matthews*, 34 C. A. 302, 79 S. W. 71; *St. Louis Southwestern Ry. Co. of Texas v. Allen*, 35 C. A. 355, 80 S. W. 240; *Alamo Oil & Refining Co. v. Curvier* (Civ. App.) 136 S. W. 1132.

48. **Instructions.**—For instructions in general, see notes under Arts. 1970-1973.

A charge that is practically in the language of this article and Art. 4704, when no request is made for an additional charge on the subject of the measure of damages, is sufficient and is no ground for reversal. *I. & G. N. Ry. Co. v. McVey* (Civ. App.) 83 S. W. 34.

49. **Questions for jury.**—See notes under Art. 1971.

50. **Harmless error.**—See notes under Arts. 1553, 1623.

Art. 4695. [3018] Character of wrongful act.—The wrongful act, negligence, carelessness, unskillfulness, or default, mentioned in the preceding article, must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury. [Acts 1860, p. 32. Acts 1887, p. 44. Acts 1892, S. S., p. 5.]

See *Galveston, H. & S. A. Ry. Co. v. Michalke*, 14 C. A. 495, 37 S. W. 480; *St. Louis & S. F. Ry. Co. v. Williams* (Civ. App.) 37 S. W. 992.

Assumption of risk.—See notes under Art. 4694 and Title 115, Chapter 14.

Contributory negligence.—See notes under Art. 4694 and Title 115, Chapter 14.

Damages—Measure of.—See notes under Art. 4694.

Right of action of person injured.—Under this article and Art. 4694, an action cannot be maintained, unless decedent could have maintained an action for damages for his injury, had he not died therefrom, so that a guardian of infants could not maintain an action for damages to the infants for the wrongful murder of their mother by her husband, since the mother could not have maintained an action against defendant, her husband, had she survived. *Wilson v. Brown* (Civ. App.) 154 S. W. 322.

Under this article no action for the wrongful killing of one who lost his life on a railroad can be maintained if the deceased would not have been entitled to maintain an action himself. *Sullivan-Sanford Lumber Co. v. Watson* (Sup.) 155 S. W. 179.

Pleading.—See notes under Art. 1827 and at end of Chapter 8, Title 37.

Burden of proof.—See notes under Art. 3687, Rule 12.

Questions for jury.—See notes under Art. 1971.

Art. 4696. [3019] Exemplary damages.—When the death is caused by the wilful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered. [Const., art. 16, sec. 26.]

Cited, *Gray v. State*, 61 Cr. R. 454, 135 S. W. 1179 (dissenting opinion of Davidson, P. J.).

In general.—This statute does not in any respect change the well-recognized rules for the determination of the liability of a railway company either to a passenger or an employé. *Railway Co. v. Carlton*, 60 T. 397.

The right to recover exemplary damages is limited to the surviving husband, widow, children or parents. *Winnt v. Railway Co.*, 74 T. 32, 11 S. W. 907, 5 L. R. A. 172.

Construction of prior act.—The retaining of a servant in its service by the corporation after it has been cited to answer a petition, the allegations of which, charging gross negligence, are denied by the servant, will not of itself constitute ratification sufficient to authorize recovery of exemplary damages under this article. *McGown v. International & G. N. R. Co.*, 85 T. 289, 20 S. W. 80.

Right to recover exemplary damages without actual damages.—Under article 16, § 26, of the constitution, exemplary damages for the wilful or negligent commission of a homicide cannot be recovered in cases in which no recovery can be had for actual damages. *Ritz v. City of Austin*, 1 C. A. 455, 20 S. W. 1029.

The doctrine that there can be no exemplary damages without actual damages has not been overthrown, notwithstanding article 16, § 26, of the constitution and this article and Art. 4698 of the statutes. Not even in a case of gross negligence, if the jury find no actual damages, can a finding of exemplary damages be sustained. *Adams v. S. A. & A. P. Ry. Co.*, 34 C. A. 413, 79 S. W. 80.

This article did not change the common-law rule that exemplary damages cannot be recovered if actual damages were not recovered. *Wilson v. Brown* (Civ. App.) 154 S. W. 322.

Negligence.—See notes under Art. 4694.

Art. 4697. [3020] Action commenced without regard to criminal proceedings.—The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceedings that may, or may not, be had in relation to the homicide. [Id.]

Evidence—Admissibility of.—See notes under Art. 3687, Rules 5 and 6.

Persons entitled to sue.—See notes under Art. 4694.

Art. 4698. [3021] For whose benefit action to be brought.—The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been caused, and the amount recovered therein shall not be liable for the debts of the deceased. [Id. sec. 2. P. D. 16.]

In general.—As to the construction of this article, see *Johnson v. Farmer*, 35 S. W. 1062.

Persons entitled to sue.—See Art. 1838.

It is not required that the deceased should have been under any legal obligation to contribute anything of pecuniary value to those to whom the right of action is given, to entitle them to recover. *Atchison, T. & S. F. Ry. Co. v. Van Belle et ux.*, 26 C. A. 511, 64 S. W. 397.

Any one having right of action may sue for negligent death; but it must appear that the action is brought for the benefit of all. *El Paso & N. E. R. Co. of Texas v. Whatley* (Civ. App.) 76 S. W. 589.

While the statute gives a right of action for death by wrongful act to the persons bearing to decedent the relationships named therein, such persons may only recover upon showing actual injury by reason of the death. *Texas & N. O. R. Co. v. Mills* (Civ. App.) 143 S. W. 690.

— **Parents.**—Evidence held to show that deceased contributed to the support of his father, so as to authorize recovery by the father for his death. *Galveston, H. & S. A. Ry. Co. v. Ford*, 22 C. A. 131, 54 S. W. 37.

The fact that parents applied to the support of an unmarried daughter, who lived with them, a part of the sums received from their son, held not to deprive them of the right to recover to the full extent of contributions expected from him. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Civ. App.) 78 S. W. 374.

Parents held not entitled to recover for the wrongful death of their son after his marriage. *Texas Portland Cement & Lime Co. v. Lee*, 36 C. A. 482, 82 S. W. 306.

— **Wife and children in general.**—The subsequent marriage of the surviving wife does not affect her right of action. *Railway Co. v. Kuehn*, 70 T. 582, 8 S. W. 484.

A wife living apart from her husband, in a house of prostitution, cannot recover for his death. *Ft. Worth & D. C. Ry. Co. v. Floyd* (Civ. App.) 21 S. W. 544.

Where a divorced wife assumes custody of a daughter, and the father is killed after remarriage, the daughter is entitled to recover, since she had a legal right to support from her father. *International & G. N. R. Co. v. Culpepper*, 19 C. A. 182, 46 S. W. 922.

A wife by common-law marriage and the issue of such marriage may recover damages for the death of the husband and father. *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 C. A. 520, 50 S. W. 135.

A wife held entitled to recover damages for her husband's death, notwithstanding his failure to support her for a long time prior to his death. *De Garcia v. San Antonio & A. P. Ry. Co.* (Civ. App.) 77 S. W. 275.

That a father had been divorced from the mother of the children, who were placed in the mother's custody by the court, and that the father from that time had not contributed to the support of the children, did not deprive them of the right to damages for his death. *Taylor v. San Antonio Gas & Electric Co.* (Civ. App.) 93 S. W. 674.

The fact that several months before the death of decedent he and his wife had separated did not preclude her from recovering for his negligent death. *Galveston, H. & S. A. Ry. Co. v. Murray* (Civ. App.) 99 S. W. 144.

A wife held entitled to recover damages accruing to her child through the death of the father, though the father did not support the child. *Gulf, C. & S. F. Ry. Co. v. Anderson* (Civ. App.) 126 S. W. 928.

Where plaintiff's father rendered pecuniary assistance to plaintiff's family, and it is reasonably probable that he would have continued to do so, plaintiff may recover for his father's wrongful death. *Freeman v. Morales* (Civ. App.) 151 S. W. 644.

— **Adult children.**—Adult children are not entitled to damages resulting from the death of their father, in the absence of proof of actual damage. *Railway Co. v. De Baglithy*, 28 S. W. 829, 9 C. A. 108.

Adult children not dependent on the father for support cannot recover for his death through the negligence of another. *Railway Co. v. Bishop*, 14 C. A. 504, 37 S. W. 764.

Under the statute giving children a right of action for negligence causing the death of their father, the right of action is not limited to minors or to such children as cannot support themselves, nor is it necessary to prove that the father actually contributed anything to the support of his children. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

Adult children not dependent on their father for support, and not receiving anything from him for their support, cannot recover for his negligent death. *Missouri, K. & T. Ry. Co. of Texas v. James*, 55 C. A. 588, 120 S. W. 269.

This article does not limit damages recoverable by children for the negligent death of their father to the period of minority. *Paris & G. N. Ry. Co. v. Robinson* (Civ. App.) 127 S. W. 294.

An adult married son has a pecuniary interest in the life of his mother, where she has since his marriage resided with him and has continuously performed the household

duties so as to enable his wife to devote her attention to her millinery business, and he may sue for her negligent death. *Missouri, K. & T. Ry. Co. v. Butts* (Civ. App.) 132 S. W. 88.

— **Married minor children.**—A married daughter can recover damages for death of her father, though he was not bound to contribute to her support. *T. & P. Ry. Co. v. Martin*, 25 C. A. 204, 60 S. W. 804.

Married minor daughter held not prevented from recovering damages for the death of her mother, because of her marriage. *International & G. N. Ry. Co. v. Boykin* (Civ. App.) 85 S. W. 1163.

That a minor daughter married after the death of her mother, resulting from wrongful act, would not prevent the daughter from recovering such damages as she sustained before her marriage, but minor children married at the time of her death are not entitled to recover. *Texas & N. O. R. Co. v. Mills* (Civ. App.) 143 S. W. 690.

— **Posthumous child.**—The word "children" includes a posthumous child. *Nelson v. Railway Co.*, 73 T. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. Rep. 81.

— **Illegitimate children.**—The statute giving a right of action for the death of a mother to her children embraces her illegitimate children. *Galveston, H. & S. A. Ry. Co. v. Walker*, 48 C. A. 52, 106 S. W. 705.

— **Grandchildren.**—A judgment awarding recovery to the grandchildren of the person killed is erroneous. *Houston & Texas Cent. Ry. Co. v. Harris et al.* (Civ. App.) 64 S. W. 229.

The word "children" does not include grandchildren. *Railway Co. v. Elliott*, 26 S. W. 455, 7 C. A. 216.

Necessity for valid marriage.—In a suit by a wife, a valid marriage must be shown. *Railway Co. v. Cook* (Civ. App.) 25 S. W. 455.

Exemplary damages.—See notes under Art. 4696.

Parties.—See notes under Art. 4699.

Pleading—Allegation in petition of existence of beneficiary.—See notes under Art. 1827.

Art. 4699. [3022] Who may bring the action.—The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all. [Id.]

Damages—Apportionment of.—See notes under Art. 4704.

Persons entitled to sue.—See notes under Art. 4698.

Plaintiffs.—See *March v. Walker*, 48 T. 372; *Railway Co. v. Le Gierse*, 51 T. 189; *Cotton Press Co. v. Bradley*, 52 T. 587; *H. & T. C. Ry. Co. v. Cowser*, 57 T. 293; *I. & G. N. R. Co. v. Kindred*, 57 T. 491; *D. & W. R. R. Co. v. Spiker*, 59 T. 435.

The father and mother may join in an action for the death of a child. *Railway Co. v. Hall*, 83 T. 675, 19 S. W. 121.

In an action for wrongful death, it is no answer to an objection made for want of proper parties plaintiff to reply that the claim of the unjoined beneficiaries is barred by the statute of limitations. *Ft. W. & D. C. Ry. Co. v. Wilson*, 85 T. 516, 22 S. W. 578.

Recovery by husband and wife jointly for burial expenses of their minor son held not prejudicial to defendant, though such expenses were due to the husband alone. *Missouri, K. & T. Ry. Co. of Texas v. Evans*, 16 C. A. 63, 41 S. W. 80.

In an action to recover for wrongful death, the mother of deceased held properly joined with his wife and children in the action. *Gulf, B. & K. C. Ry. Co. v. Hernandez* (Civ. App.) 45 S. W. 197.

Where the widow of the deceased sues for damages on account of death of her husband and the mother of deceased is the only other person who can also claim, and she is made defendant, and the jury give damages to the widow and none to the mother, the judgment is not erroneous because the mother was not made party plaintiff. She was before the court as defendant and the petition alleged that she was deceased's mother and asked that damages be apportioned to those entitled thereto. *Merchants' & Planters' Oil Co. v. Burns* (Civ. App.) 72 S. W. 628.

Minor heirs of the deceased may join the widow as plaintiff in suits provided for by this statute, but if this is not done in good faith, but in collusion with defendant to cut off her rights, the plea of *res adjudicata* will not avail in a subsequent action to set aside a judgment so obtained. *De Garcia v. S. A. & A. P. Ry. Co.* (Civ. App.) 77 S. W. 277.

In an action to recover damages for injuries resulting in death, all or any of the parties to whom the right of action belongs may bring suit. *De Garcia v. San Antonio & A. P. Ry. Co.* (Civ. App.) 90 S. W. 670.

In an action for death, persons who had no pecuniary interest in decedent's life were not proper parties plaintiff. *San Antonio & A. P. Ry. Co. v. Mertink* (Civ. App.) 102 S. W. 153.

Under the statute giving a right of action to the relatives of a person wrongfully killed, an action for the death of a mother, leaving surviving her a husband and four daughters, cannot be maintained by the husband and one daughter alone. *San Antonio & A. P. R. Co. v. Mertink*, 101 T. 165, 105 S. W. 485.

In an action for negligent death, defendant held entitled to have all parties interested included as parties plaintiff. *International & G. N. R. Co. v. Howell* (Civ. App.) 105 S. W. 560.

An action for negligent death must be prosecuted in the name of all the beneficiaries or in the name of one or more for the benefit of all. *Vernon Cotton Oil Co. v. Catron* (Civ. App.) 137 S. W. 404.

An adult married daughter, abandoned by her husband and living, with her young children, with her father, must be made a party plaintiff in an action for the negligent death of the father, and a decision adjudging that she has no pecuniary benefit, rendered in an action in which she is not a party, is not binding on her. *Id.*

Necessary parties.—All the surviving kindred related in the degrees designated in the statute are necessary parties. If one thus related is not made a party, and the existence of such necessary party is made known to the court during the trial, it would seem to be the duty of the court to suspend the trial and require such relative to be made

a party. *Railway Co. v. Culberson*, 68 T. 664, 5 S. W. 820; *Ft. W. & D. C. Ry. Co. v. Wilson*, 85 T. 516, 22 S. W. 578.

One suit should be brought for the benefit of all parties. Should the defendant fail to require proper parties to be made, the objection is waived. *Railway Co. v. Wilson*, 24 S. W. 686, 3 C. A. 583; *Nelson v. Railway Co.*, 78 T. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. Rep. 81; *Railway Co. v. Kutac*, 72 T. 643, 11 S. W. 127.

Parents who have released their claim for damages are not necessary parties to the suit. *Id.*

The father of the decedent, living in another state and not dependent upon the decedent, is not a necessary party to the suit. *Railway Co. v. Taylor*, 24 S. W. 975, 5 C. A. 668; *Railway Co. v. Henry*, 75 T. 220, 12 S. W. 828; *Railway Co. v. Younger*, 10 C. A. 141, 29 S. W. 948; *Railway Co. v. Frazier* (Civ. App.) 34 S. W. 664.

In a death action by decedent's widow and son for the use of decedent's mother, where the mother claimed no damages and testified that decedent was not contributing to her support at the time of his death, her then husband was not a necessary party to the action. *Houston & T. C. R. Co. v. Lemair*, 55 C. A. 237, 119 S. W. 1162.

An adult married daughter living with her father held required to be made a party in an action for his negligent death. *Vernon Cotton Oil Co. v. Catron* (Civ. App.) 137 S. W. 404.

Who may intervene.—Where an attorney performs services for a widow in the prosecution of an action against a railroad company for negligence resulting in the killing of her husband, the claim of such attorney for compensation is not an interest in the cause of action which entitles him to intervene in such suit. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477.

Action in name of beneficiaries.—The fact that an action under the state statute for the death of a railroad employé was brought in the name of the real beneficiaries, and not in the name of some administrator or executor of the decedent's estate, did not prevent a recovery. *St. Louis, S. F. & T. Ry. Co. v. Seale* (Civ. App.) 148 S. W. 1099.

Authority to sue for others.—A stepfather may represent his wife's minor children as next friend in a suit for damages for causing the death of their father. *Railway Co. v. Kuehn*, 70 T. 582, 8 S. W. 484.

A widow may bring suit for herself and for the benefit of all parties entitled to recover. *Railway Co. v. Renkin*, 15 C. A. 229, 38 S. W. 329.

Where a wife sues for damages accruing from the death of her husband, she has the authority to sue for herself and for the benefit of the minor children without notice to them, and the failure to appoint a guardian ad litem does not render the judgment open to attack. *Taylor v. San Antonio Gas & E. Co.* (Civ. App.) 93 S. W. 674, 675.

Waiver of right of recovery by one plaintiff.—One of several plaintiffs may waive the right of recovery. *Railway Co. v. Elliott*, 26 S. W. 455, 7 C. A. 216.

Pendency of other action.—In a suit by the widow and children of one alleged to have been killed by the negligence of a railway company, the fact that the deceased had instituted suit for damages resulting from the negligence before his death is no bar to the action. *Railway Co. v. Kuehn*, 70 T. 582, 8 S. W. 484.

Pleading.—See notes under Art. 1827.

Admissibility of evidence, presumptions and burden of proof.—See notes under Art. 8687.

Art. 4700. [3023] Executors, etc., may bring the action, when.—If the parties entitled to the benefit of the action shall fail to commence the same within three calendar months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same. [Id.]

Attacking authority to sue.—Where the authority of plaintiff to sue as administratrix was not attacked in the trial court, it cannot be attacked in the appellate court. *El Paso & N. E. Ry. Co. v. Gutierrez* (Civ. App.) 111 S. W. 160.

Art. 4701. [3024] Suit does not abate by death of either party.—The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled. [Id. sec. 4. P. D. 18.]

Death of party to suit.—Under this article and Arts. 4698, 4702, the right of action for death by wrongful act is restricted to the surviving husband, wife, children, and parents of decedent, and does not survive them. *Texas Loan Agency v. Fleming*, 18 C. A. 668, 46 S. W. 63.

A cause of action growing out of an injury resulting in death is for the sole benefit of those to whom the right to sue is given, and the suit abates upon the death of those entitled to sue. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 480.

Art. 4702. [3025] Abates, when.—If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

Art. 4703. [3026] Executor, etc., of defendant made party, when.—If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be, to be paid in due course of administration. [Id.]

Art. 4704. [3027] Damages to be apportioned by the jury.—The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict. [Id. sec. 2. P. D. 16.]

Apportionment of damages.—Each of the parties plaintiff can recover only the damage he has sustained individually by reason of the death. *Railway Co. v. Henry*, 75 T. 220, 12 S. W. 828; *Railway Co. v. Johnston*, 78 T. 536, 15 S. W. 104; *Nelson v. Railway Co.*, 78 T. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. Rep. 81; *Railway Co. v. Wilson*, 24 S. W. 686, 3 C. A. 533.

The damages for the death of an infant child should be apportioned by the jury, whether the parents sue jointly or the husband sues alone. *Railway Co. v. Sciacca*, 80 T. 350, 16 S. W. 31.

Damages are given both to the father and mother for their son's death. *Railway Co. v. Hall*, 83 T. 675, 19 S. W. 121.

The failure of the jury to apportion the damages is not reversible error. *Railway Co. v. Burselson* (Civ. App.) 26 S. W. 1107; *March v. Walker*, 48 T. 372; *Railway Co. v. Hudman*, 8 C. A. 309, 28 S. W. 388.

Apportionment of damages, how made. *Railway Co. v. Hudman*, 28 S. W. 388, 8 C. A. 309.

Failure of the jury to apportion damages in action by parents for death of son held not prejudicial to defendant. *Missouri, K. & T. Ry. Co. of Texas v. Evans*, 16 C. A. 68, 41 S. W. 80.

Recovery by parents for death of child, there being no other interested parties, being community property, finding of separate amount held unnecessary. *Galveston, H. & S. A. Ry. Co. v. Hughes*, 22 C. A. 134, 54 S. W. 264.

Under the statute providing that in actions by two or more plaintiffs, the jury shall apportion a verdict among the plaintiffs, failure to do so is not error, where plaintiffs do not object. *International & G. N. R. Co. v. Lehman* (Civ. App.) 72 S. W. 619.

Where a verdict in favor of decedent's parents was erroneous, but was sustainable in favor of his wife, a judgment based thereon and apportioning the damages would be reversed as to the parents and affirmed as to the wife. *Texas Portland Cement & Lime Co. v. Lee*, 36 C. A. 482, 82 S. W. 306.

In an action for negligent death, verdict held not excessive in apportionment. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

A defendant cannot complain of the manner in which a verdict was apportioned among the plaintiffs where the facts justified the submission of the issue as to whether each of the plaintiffs had suffered a loss. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442.

In an action for negligent death, by the mother, wife, and child of decedent, the jury must apportion the damages, and defendant cannot complain thereof. *Texas & N. O. R. Co. v. Scarborough* (Civ. App.) 104 S. W. 408.

Part of a verdict apportioning damages between two defendants in a death action held to be treated as surplusage, and judgment rendered against both defendants for the full amount. *San Marcos Electric Light & Power Co. v. Compton*, 48 C. A. 586, 107 S. W. 1151.

In an action for death, evidence held to sustain a verdict giving the entire damages to the wife and child of decedent, to the exclusion of the parents. *Missouri, K. & T. Ry. Co. of Texas v. Wall* (Civ. App.) 110 S. W. 453.

A verdict and judgment in a death action held sufficiently to dispose of a party's action. *Houston & T. C. R. Co. v. Lemair*, 55 C. A. 237, 119 S. W. 1162.

Where the evidence made it an issue in a death action whether each plaintiff had suffered loss from decedent's death, and the verdict for plaintiffs as a whole was not complained of as excessive, defendant cannot complain that the amount apportioned to one of plaintiffs was excessive. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

Under this article a verdict in an action for death by the widow, minor children, and mother of decedent that the jury "find for the plaintiffs and fix the damages as follows," giving the names of and the amounts awarded to the respective plaintiffs, was proper, and not reversible error. *International & G. N. R. Co. v. White*, 103 T. 567, 131 S. W. 811.

The damages which the widow and minor children are entitled to recover for the wrongful death of their husband and father should be apportioned by the jury. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

Art. 4704a. Actions for death caused in foreign state or country.—That whenever the death or personal injury of a citizen of this state or of a country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by a wrongful act, neglect or

default in any state, for which a right to maintain an action and recover damages in respect thereof is given by a statute or by law of such state, territory or foreign country, such right of action may be enforced in the courts of the United States, or in the courts of this state, within the time prescribed for the commencement of such action by the statute of this state, and the law of the former shall control in the maintenance of such action in all matters pertaing [pertaining] to procedure. [Acts 1913, p. 338, sec. 1.]

See annotations under Art. 1712.

TITLE 71

INSURANCE

[For Live Stock Insurance, see Art. 1121, Subd. 46; Employers' Liability, see Title 77, Chapter 5.]

Chap.	Chap.
1. Incorporation of Insurance Companies.	10a. Farmers' Mutual Hall Insurance Companies.
2. Life, Health and Accident Insurance Companies.	11. Printers' Mutual Fire and Storm Insurance Companies.
3. Investment in Texas Securities and Taxation of Gross Receipts.	12. Mutual Companies Insuring Against Loss by Burglary, etc.
4. Assessment or Natural Premium Companies.	13. Fidelity, Guaranty and Surety Companies.
5. Mutual Assessment Accident Insurance Companies.	14. Employers' Liability Insurance Companies.
6. Co-operative Life Insurance Companies.	14a. Casualty and Other Insurance Companies, Except Fire, Marine and Life Insurance Companies.
7. Fraternal Benefit Societies.	15. General Provisions.
8. Fire and Marine Insurance Companies.	16. Indemnity Contracts.
9. State Insurance Commission.	
10. Mutual Fire, Lightning, Hail, and Storm Insurance Companies.	

[In addition to notes under particular articles, see notes relating to Insurance in general, at end of title.]

CHAPTER ONE

INCORPORATION OF INSURANCE COMPANIES

Art.	Art.
4705. Formation of company.	4714. Number and qualification of directors.
4706. What the articles of incorporation shall contain.	4715. Election of directors.
4707. Duty of commissioner of insurance on deposit of articles with him.	4716. Annual meeting for election.
4708. Company shall certify, under oath, that the capital is bona fide its property.	4717. Special meetings for election.
4709. Where examination is made by other than commissioner, etc.	4718. Quorum of stockholders.
4710. Stock shall be divided into shares.	4719. Directors shall choose president and other officers.
4711. Capital stock shall consist of what.	4720. Directors may ordain by-laws, etc.
4712. Surplus money may be invested, how.	4721. Shall keep a record of transactions.
4713. May be changed and re-invested.	4722. Shall fill vacancies, and what shall constitute quorum of the board.
	4723. General incorporation law shall apply to insurance companies, unless, etc.

Article 4705. [3028] Formation of company.—Any number of persons desiring to form a company for the purpose of transacting insurance business shall adopt and sign articles of incorporation, and submit the same to the attorney general; and, if said articles shall be found by him to be in accordance with the law of this state, and of the United States, he shall attach thereto his certificate to that effect, whereupon such articles shall be deposited with the commissioner of insurance and banking.

Commissioner of insurance.—See Title 65, Chapter 7.

Application.—This article in its origin was, as in its language it is, a general provision applicable to all insurance corporations, except such as may be excluded by Arts. 4793, 4830, 4855 and 4860. *State v. Burgess*, 101 T. 524, 109 S. W. 923.

A foreign assessment company writing insurance in Texas is subject to all the provisions of these articles, which contain most of the provisions of Acts 28th Leg. c. 69, relating to such subject. *National Life Ass'n v. Hagelstein* (Civ. App.) 156 S. W. 353.

Limitation by following article.—See notes under Art. 4706.

Art. 4706. [3029] What the articles of incorporation shall contain.—Such articles shall contain:

1. The name of the company; and the name selected shall not be so similar to that of any other insurance company as to be likely to mislead the public.
2. The locality of the principal business office of such company.
3. The kind of insurance business which the company proposes to engage in.

4. The amount of its capital stock, which shall in no case be less than one hundred thousand dollars.

No limitation on preceding article.—This article specifies the information the articles of incorporation shall contain among others the amount of capital stock, but does not limit the general provisions of Art. 4706, providing for the incorporation of companies for the transaction of insurance business to stock companies or to any other class of companies. *State v. Burgess*, 101 T. 524, 109 S. W. 923.

Art. 4707. [3030] Duty of commissioner of insurance when articles are deposited with him.—When the said articles of incorporation have been deposited with the commissioner of insurance and banking, and the law in all other respects has been complied with by the company, the commissioner shall make an examination, or cause one to be made by some competent and disinterested person appointed by him for that purpose; and if it shall be found that the capital stock of the company, to the amount required by law, has been paid in, and is possessed by it, in money, or in such stocks, notes, bonds or mortgages, as are required by law, and that the same is the bona fide property of such company, and that such company has in all respects complied with the law relating to insurance, then the commissioner of insurance and banking shall issue to such company a certificate of authority to commence business as proposed in their articles of incorporation. [Act Feb. 17, 1875, p. 33, sec. 7.]

Art. 4708. [3031] Company shall certify, under oath, that the capital is bona fide its property.—The corporators or officers of any such company shall be required to certify under oath to the commissioner of insurance and banking that the capital exhibited to the person making the examination is the bona fide property of the company so examined, which certificate shall be filed and recorded in the office of the commissioner of insurance and banking. [Act Feb. 17, 1875, sec. 7.]

Art. 4709. [3032] Where examination is made by other than commissioner.—If the examination be made by any other person than the commissioner of insurance and banking, the finding shall be certified under the oath of the person making such examination, and such finding and certificate shall be filed and recorded in the office of the commissioner of insurance and banking. [Id.]

Art. 4710. [3033] Stock shall be divided into shares.—The stock of any company organized under the laws of this state shall be divided into shares of one hundred dollars each. [Id. sec. 3.]

Art. 4711. [3034] Capital stock shall consist of what.—The capital stock of a company shall consist—

1. In lawful money of the United States; or
2. In the bonds of this state or any county or incorporated town or city thereof, or the stock of any national bank; or
3. In first mortgages upon unincumbered real estate in this state, the title to which is valid, and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company and the policy or policies transferred to the company taking such mortgage. [Acts 1889, p. 11.]

Art. 4712. [3035] Surplus money may be invested, how.—The surplus money of a company over and above its paid up capital stock may be invested in, or loaned upon the pledge of, public stocks or bonds of the United States, or any of the states, or stocks, bonds, or other evidence of indebtedness of any solvent dividend paying corporations, or in bills of exchange or other commercial notes or bills, except its own stock; provided, always, that the current market value of such stocks, bonds, notes, bills, or other evidences of indebtedness, shall be at all times during the continuance of such loans at least twenty per cent more than the sum loaned thereon. [Acts 1875, p. 33.]

Art. 4713. [3036] Company may change and re-invest its stock.—A company may change and re-invest its capital stock in like securities, as occasion may, from time to time, require. [Id.]

Art. 4714. [3037] Number and qualification of directors.—The affairs of any company organized under the laws of this state shall be managed by not more than thirteen nor fewer than seven directors, all of whom shall be stockholders in the company. [Id. sec. 5.]

Art. 4715. [3038] Election of directors.—Within thirty days after the subscription books of the company have been filed, a majority of the stockholders shall hold a meeting for the election of directors, each share entitling the holder thereof to one vote; and the directors then in office shall continue in office until their successors have been duly chosen and have accepted the trust. [Id.]

Art. 4716. [3039] Annual meetings for election of directors.—The annual meeting for the election of directors of a company shall be held during the month of January, as the by-laws of the company may direct. [Id. sec. 9.]

Art. 4717. [3040] Special meetings for election of directors.—If from any cause the stockholders should fail to elect directors at an annual meeting, they may hold a special meeting for that purpose, by giving thirty days' notice thereof in some newspaper in general circulation in the county in which the principal office of the company is located, and the directors chosen at such special meeting shall continue in office until their successors are duly elected and have accepted. [Id.]

Art. 4718. [3041] Quorum of stockholders.—No meeting of stockholders shall elect directors or transact such other business of the company, unless there shall be present at such meeting, in person or by proxy, a majority in value of the stockholders equal to two-thirds of the stock of such company.

Art. 4719. [3042] Directors shall choose president and other officers.—The directors shall choose by ballot from their own number a president and such other officers as the by-laws of the company may designate, who shall perform such duties, receive such compensation and give such security as the by-laws of such company may require. [Id. sec. 10.]

Art. 4720. [3043] Directors may ordain by-laws, etc.—The directors may ordain and establish such by-laws and regulations, not inconsistent with law, as shall appear to them necessary for regulating and conducting the business of the company. [Id. sec. 11.]

Art. 4721. [3044] Shall keep a record of their transactions.—It shall be the duty of the directors to keep a full and correct record of their transactions, which shall, at all times during business hours, be open to the inspection of the stockholders and other persons interested therein. [Id. sec. 11.]

Art. 4722. [3045] Shall fill vacancies, and what shall constitute a quorum.—The directors shall fill all vacancies which shall occur in the board or in any of the offices of the company, and a majority of the board shall constitute a quorum for the transaction of business.

Art. 4723. [3046] General incorporation law shall apply to insurance companies.—The laws relating to and governing corporations in general shall apply to and govern insurance companies incorporated in this state in so far as the same may not be inconsistent with the provisions of this title.

CHAPTER TWO

LIFE, HEALTH AND ACCIDENT INSURANCE COMPANIES

Art.	Art.
4724. Terms defined.	4749. Deposit of securities.
4725. Who may incorporate.	4750. Same.
4726. Charter to be approved by attorney general.	4751. Policies shall have indorsed on face, what.
4727. Amendment of charter.	4752. Fees for making deposits.
4728. Examination of commission before commencing business.	4753. Securities may include capital stock; securities to be increased.
4729. Shall file annual statement.	4754. Sub-standard, or extra hazardous policies.
4730. Renewal certificate.	4755. No commission to be paid to officers.
4731. Copy of certificate for agents.	4756. Co-operative companies.
4732. To sue and be sued—Commissioner only can enjoin.	4757. Funds to be deposited in name of company.
4733. Laws relating to corporations shall govern.	4758. Impairment of capital stock.
4734. May invest in what securities.	4759. Form of policy to be filed.
4735. May hold real estate for what purposes and how long.	4760. Policy to be approved by commissioners.
4736. Directors not to do certain things.	4761. Must have certificate of authority.
4737. May reinsure.	4762. Companies with \$25,000.00 capital stock.
4738. Dividends to be paid only from profits.	4763. Unlawful dividends.
4739. Salaries.	4764. Taxation of domestic insurance companies.
4740. Disbursements to be made only on voucher.	4765. Statement of foreign companies.
4741. Policies shall contain what.	4766. To file articles of incorporation.
4742. Policies shall not contain what.	4767. Paid up capital stock.
4743. Policies of foreign companies may contain.	4768. Deposits required.
4744. Venue of suits on policies.	4769. Alien companies to deposit.
4745. Service of process.	4770. Deposit liable for judgment.
4746. Losses shall be paid promptly.	4771. When alien company need not deposit.
4747. Certificate shall be null and void, when.	4772. Assets, how invested.
4748. Business of life insurance companies limited to certain kinds of business.	4773. Shall file power of attorney.
	4774. Duty of commissioner in accepting service.

Article 4724. Terms defined.—A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value, conditioned on the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities. An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value, conditioned upon the injury, disablement or death of persons resulting from traveling or general accidents by land or water. A health insurance company shall be deemed to be a corporation doing business under any charter involving the payment of any amount of money, or other thing of value, conditioned upon loss by reason of disability due to sickness or ill health. When consistent with the context and not obviously used in a different sense, the term, "company," or, "insurance company," as used herein, includes all corporations engaged as principals in the business of life, accident or health insurance. The term, "home," or domestic company, as used herein, designates those life, accident, or life and accident, health and accident, or life, health and accident insurance companies incorporated and formed in this state. The term, "foreign company," means any life, accident or health insurance company organized under the laws of any other state or territory of the United States or foreign country. The term, "home office," of a company means its principal office within the state or country in which it is incorporated and formed. The "insured" or "policy-holder" is the person on whose life a policy of insurance is effected. The "beneficiary" is the person to whom a policy of insurance effected is payable. By the term, "net assets," is meant the funds of the company available for the payment of its obligations in this state, including uncollected premiums

not more than three months past due and deferred premiums on policies actually in force, after deducting from such funds all unpaid losses and claims, and claims for losses, and all other debts, exclusive of capital stock. The "profits" of a company are that portion of its funds not required for the payment of losses and expenses, nor set apart for any other purpose required by law. [Acts 1909, p. 192, sec. 1.]

Venue of suit against foreign live stock insurance company.—See note under Art. 4744.

Art. 4725. Who may incorporate.—Any three or more citizens of this state, who shall be known as incorporators, may associate themselves for the purpose of forming a life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company; provided, that no such company shall transact more than one of the foregoing classes of business, except in separate and distinct departments. In order to form such a company, the incorporators shall sign and acknowledge its articles of incorporation before any officer authorized to take acknowledgments to deeds and file the same in the office of the commissioner of insurance and banking. Such articles of incorporation shall specify:

- (a) The name and place of residence of each of the incorporators.
- (b) The name of the proposed company, which shall contain the words, "Insurance Company," as a part thereof, and which must not so closely resemble the name of any existing company transacting insurance business in this state as to mislead the public.
- (c) The location of its home office.
- (d) The kind or kinds of insurance business it purposes to transact.
- (e) The amount of its capital stock, not less than \$100,000, all of which capital stock must be subscribed and fully paid up and in the hands of the corporators before said articles of incorporation are filed, such capital stock to be divided into shares of one hundred dollars each.
- (f) The period of time it is to exist, which shall not exceed five hundred years.
- (g) The number of shares of such capital stock.
- (h) Such other provisions not inconsistent with the law as the corporators may deem proper to insert therein. [Id. sec. 2.]

Art. 4726. Charter to be approved by attorney general, etc.—When such articles of incorporation are filed with the commissioner of insurance and banking, together with an affidavit made by two or more of its incorporators that all the stock has been subscribed in good faith and fully paid for, together with a charter fee of twenty dollars, it shall be the duty of the commissioner to submit such articles of incorporation to the attorney general for examination; and, if he approves the same as conforming with the law, he shall so certify and deliver such articles of incorporation, together with his certificate of approval attached thereto, to the commissioner of insurance and banking, who shall, upon receipt thereof, record the same in a book kept for that purpose; and upon receipt of a fee of one dollar, he shall furnish a certified copy of the same to the corporators, upon which, they shall be a body politic and corporate, and may proceed to complete the organization of the company, for which purpose they shall forthwith call a meeting of the stockholders, who shall adopt by-laws for the government of the company, and elect a board of directors not less than five, composed of stockholders; which board shall have full control and management of the affairs of the corporation, subject to the by-laws thereof as adopted or amended from time to time by the stockholders or directors, and to the laws of this state. The board of directors so elected shall serve until the second Tuesday in March thereafter, on which date annually thereafter there shall be held an annual meeting of the stockholders at the home office, and a board of directors elected for the ensuing year. At all meetings of the stockholders, each stockholder shall be entitled to one vote for each

share of stock fully paid up appearing in his name on the books of the company, which vote may be given in person or by written proxy. The majority of the paid up capital stock at any meeting of the stockholders shall constitute a quorum. [Id. sec. 3.]

Art. 4727. Amendment of charter.—At any regular meeting or called meeting of the stockholders, they may, by resolution, provide for any lawful amendment to the charter or articles of incorporation; and such amendment, accompanied by a copy of such resolution duly certified by the president and secretary of the company, shall be filed and recorded in the same manner as the original charter, and shall thereupon become effective. Stockholders representing a majority of the capital stock of any such company may in such manner also increase or reduce the amount of its capital stock; provided, that the capital stock shall in no case be reduced to less than one hundred thousand dollars fully paid up. A statement of any such increase or reduction shall be signed and acknowledged by two officers of the company and filed and recorded along with the certified copy of the resolution of the stockholders provided therefor in the same manner as the charter or amendment thereto. For any such increase or reduction, the company may require the return of the original certificates as other evidences of stock in exchange for new certificates issued in lieu thereof. The shares of stock of such company shall be transferable on its books, in accordance with law and the by-laws of the company, by the owner in person or his authorized agent; and every person becoming a stockholder by such transfer shall succeed to all rights of the former holder of the stock transferred, by reason of such ownership. [Id. sec. 3.]

Art. 4728. Examination by commissioner before commencing business.—When the first meeting of the stockholders shall be held and the officers of the company elected, it shall be the duty of the president or secretary to notify the commissioner of insurance and banking; and he shall thereupon immediately make, or cause to be made, at the expense of the company, a full and thorough examination thereof; and, if he shall find that all of the capital stock of the company, amounting to not less than one hundred thousand dollars, has been fully paid up and is in the custody of the officers, either in cash or securities of the class in which such companies are authorized by this chapter to invest or loan their funds, he shall issue to such company a certificate of authority to transact such kind or kinds of insurance business within this state as such officers may apply for and as may be authorized by its charter; which certificate shall expire on the last day of February next after the date of its issuance. Before such certificate is issued, not less than two officers of such company shall execute and file with the commissioner of insurance and banking a sworn schedule of all the assets of the company exhibited to him upon such examination, showing the value thereof, together with a sworn statement that the same are bona fide, the unconditional and unencumbered property of the company and are worth the amounts stated in such schedule. No original or first certificate of authority shall be granted, except in conformity herewith, regardless of the date of filing of the articles of incorporation with the commissioner of insurance and banking. [Id. sec. 4.]

Art. 4729. Shall file annual statement.—Each life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, organized under the laws of this state, shall, after the first day of January of each year and before the first day of March following, and before the renewal of its certificate of authority to transact business, prepare, under oath of two of its officers, and deposit in the office of the commissioner of insurance and banking, a statement, accompanied with the fee for filing annual statements of ten dollars, showing the condition of the company on

the thirty-first day of December the next preceding, which shall include a statement in detail showing the character of its assets and liabilities on that date, the amount and character of business transacted, moneys received and how expended during the year, and the number and amount of its policies in force on that date in Texas, and the total amount of all policies in force; and the commissioner of insurance and banking may, from time to time, make such changes in the forms and requirements of the annual statements of companies as shall seem to him best adapted to elicit from the companies a true exhibit of their condition and method of conducting business; and such statement shall also contain and set forth an exhibit of the investments of such company; provided, that such terms and requirements shall elicit only such information as shall pertain to the business of the company. [Id. sec. 5.]

Art. 4730. Renewal certificates.—Whenever any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, transacting insurance business in this state, shall have filed its annual statement in accordance with the preceding article, showing a condition which entitles it to transact business in this state in accordance with the provisions of this chapter, the commissioner of insurance and banking shall, upon receipt of a fee of one dollar, issue a renewal certificate of authority to such company, which shall expire on the last day of February of the subsequent year. [Id. sec. 6.]

Art. 4731. Copy of certificate for agents.—Any such company organized under the laws of this state, having received authority from the commissioner of insurance and banking to transact business in this state, shall receive from such commissioner, upon written request therefor, a certified copy of its certificate of authority for each of its agents in this state. [Id. sec. 7.]

Art. 4732. To sue and be sued; commissioner only can enjoin.—Actions may be maintained by a company organized under the laws of this state against any of its policy holders, stock holders, or other person, for any cause relating to the business of such company; and actions may also be prosecuted and maintained by any policy holder, or the heirs or legal representatives of any such policy holder, against the company for losses which accrue on any policy; but no action shall be brought or maintained by any person other than the commissioner of insurance and banking of this state for the enjoining, restraining or interfering with the prosecution of the business of the company. [Id. sec. 8.]

Art. 4733. Laws relating to corporations shall govern.—The laws relating to and governing corporations in general shall apply to and govern companies organized under this chapter, in so far as the same are pertinent and not in conflict with the provisions of this chapter. [Id. sec. 9.]

Requirement as to notice.—Under Art. 5714, providing that a stipulation in a contract requiring notice to be given of any claim of damages which fixes the time within which it shall be given at less than 90 days shall be void, a provision of a casualty policy requiring notice of the injury to be given within 10 days would be void; this article not conflicting with that act. *Royal Casualty Co. v. Nelson* (Civ. App.) 153 S. W. 674.

Art. 4734. May invest in what securities.—A life insurance company organized under the laws of this state may invest in or loan upon the following securities, viz.:

(a) It may invest any of its funds or accumulations in the bonds of the United States or of any state, county, or city of the United States, or the bonds of any independent or common school district, or first mortgage bonds of any dividend paying railroad or electric railway company duly incorporated under the laws of the United States, or any state thereof.

(b) It may loan any of its funds and accumulations, taking as security therefor such collateral as under the previous subdivision it may

invest in, and upon first liens upon real estate, the title to which is valid, and the value of which is double the amount loaned thereon; provided, that, if any part of such value is in buildings, such buildings shall be insured against loss by fire for at least fifty per cent of the value thereof, with loss clause payable to such company. It may also make loans upon the security of or purchase its own policies, but no loan on any policy shall exceed the reserve value thereof. No investment or loan, except policy loans, shall be made by any such insurance company, unless the same shall first have been authorized by the board of directors, or by a committee charged with the duty of supervising such investments or loans. No such company shall subscribe to, or participate in, any underwriting of the purchase or sale of securities or property, or enter into any such transaction for such purpose, or sell on account of such company jointly with any other person, firm or corporation; nor shall any such company enter into any agreement to withhold from sale any of its property; but the disposition of its property shall be at all times within the control of its board of directors. Every such company possessed of assets not authorized by this chapter shall dispose of the same within five years after July 10, 1909, unless such time is extended for good cause by the commissioner of insurance and banking. [Id. sec. 10.]

Art. 4735. May hold real estate for what purposes and for how long.—Every such insurance company may secure, hold and convey real property only for the following purposes and in the following manner:

1. One building site and office building for its accommodation in the transaction of its business and for lease and rental.
2. Such as shall have been acquired in good faith by way of security for loans previously contracted or for moneys due.
3. Such as shall have been conveyed to it in the satisfaction of debts previously contracted in the course of its dealings.
4. Such as shall have been purchased at sales under judgment or decrees of court, or mortgage or other liens held by such companies.

All such real property specified in subdivisions 2, 3 and 4 of this article, which shall not be necessary for its accommodation in the convenient transaction of its business, shall be sold and disposed of within five years after the company shall have acquired title to the same, or within five years after the same shall have ceased to be necessary for the accommodation of its business; and it shall not hold such property for a longer period, unless it shall procure a certificate from the commissioner of insurance that its interests will suffer materially by the forced sale thereof; in which event, the time for the sale may be extended to such time as the commissioner shall direct in such certificate. [Id. sec. 11.]

Art. 4736. Director not to do certain things.—No director or officer of any insurance company transacting business in this state, or organized under the laws of this state, shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase or sale by such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan; provided, that nothing contained in this article shall prevent a life insurance corporation from making a loan upon a policy held therein, by the borrower, not in excess of the reserve value thereof. [Id. sec. 12.]

Art. 4737. May reinsure.—Any life insurance company, organized under the laws of this state, may reinsure in any insurance company authorized to transact business in this state, any risk or part of a risk which it may assume; provided, that no such company shall have the power to so reinsure its entire outstanding business until the contract therefor shall be submitted to the commissioner of insurance and banking, and be by him approved, as protecting fully the interests of all the policy holders. [Id. sec. 13.]

Art. 4738. Dividends to be paid only from profits.—No life insurance company, organized under the laws of this state, shall declare or pay any dividends to its policy holders, except from the profits made by such company; provided, that this shall not prohibit the issuance of policies guaranteeing a definite payment or reduction in premiums, not exceeding the expense loading on said premiums; but, where said reduction exceeds said expense loading, the proper reserve therefor must be held by the company to provide for the deficiency so arising in the net premium; and provided, further, that this shall not apply to payments to holders of special or board contracts heretofore issued. No such life insurance company shall declare or pay any dividends to its stockholders, except from the profits made by said company, not including surplus arising from the sale of stock. [Id. sec. 14.]

Art. 4739. Salaries.—No domestic life insurance company shall pay any salary, compensation or emolument to any officer, trustee or director thereof, nor any salary, compensation or emolument amounting in any year to more than five thousand dollars to any person, firm or corporation, unless such payment be first authorized by a vote of the board of directors of such life insurance company; provided, that the limitation as to time contained herein shall not be construed as preventing a life insurance company from entering into contracts with its agents for the payment of renewal commissions. No such company shall grant any pension to any officer, director or trustee thereof, or to any member of his family after his death. [Id. sec. 20.]

Art. 4740. Disbursements to be made by vouchers only.—No domestic life insurance company shall make any disbursement of one hundred dollars or more, unless the same be evidenced by a voucher signed by, or on behalf of, the person, firm or corporation receiving the money and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements, the voucher shall set forth the service rendered and statement of the disbursement made. If the expenditure be in connection with any matter pending before any legislature or public body, or before any department or officer of any state or government, the voucher shall correctly describe, in addition, the nature of the matter and of the interest of such company therein. When such voucher can not be obtained, the expenditure shall be evidenced by a paid check or an affidavit describing the character and object of the expenditure and stating the reason for not obtaining such voucher. [Id. sec. 21.]

Art. 4741. Policies shall contain what.—No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, unless the same shall contain provisions substantially as follows:

1. A provision that all premiums shall be payable in advance either at the home office of the company or to an agent of the company upon delivery of a receipt signed by one or more of the officers who are designated in the policy.

2. A provision for a grace of at least one month for the payment of every premium after the first, which may be subject to an interest charge, during which month the insurance shall continue in force, which provision may contain a stipulation that, if the insured shall die during the period of grace, the overdue premium will be deducted in any settlement under the policy.

3. A provision that the policy, or policy and application, shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premiums; and which provision may or may not, at the option of the company, contain an exception for violations of the conditions of the policy relating to naval and military services in time of war.

4. A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties.

5. A provision that, if the age of the insured has been understated, the amount payable under the policy shall be such as the premium paid would have purchased at the correct age.

6. A provision that, after three full years premiums have been paid, the company, at any time while the policy is in force, will advance upon proper assignment of the policy and upon the sole security thereof at a specified rate of interest a sum equal to, or at the option of the owner of the policy less than, the legal reserve at the end of the current policy year on the policy and on any dividend addition thereto, less than a sum not more than two and one-half per centum of the amount insured by the policy, and of any dividend additions thereto; and that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year, which provision may further provide that such loans may be deferred for not exceeding six months after application therefor is made. It shall further be stipulated in the policy that failure to repay any such advance, or to pay interest, shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value. No condition other than as herein provided shall be exacted as a prerequisite to any such advance. This provision shall not be required in term insurances, nor in pure endowments issued or granted as original policies, or in exchange for lapsed or surrendered policies; and no provision herein required shall compel any company to loan on any policy an amount greater than ninety-seven and one-half per centum of the face value thereof, including net dividend additions thereto.

7. A provision which, in event of default in premium payments, after premiums shall have been paid for three full years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy, and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum not more than two and one-half per cent of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid, and may stipulate that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurances.

8. A table showing in figures the loan values, and the options available under the policies each year, upon default in premium payments during the first twenty years of the policy or the period during which premiums are payable, beginning with the year in which such values and options become available.

9. A provision that if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurances; and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payments of arrears of premiums with interest.

10. A provision that, when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and the right of the claimant to the proceeds, or not later than two months after the receipt of such proof.

11. A table showing the amounts of installments in which the policy may provide its proceeds may be payable.

Any of the foregoing provisions, or portions thereof, not applicable to single premium policies shall, to that extent, not be incorporated therein. [Id. sec. 22.]

Art. 4742. Policies shall not contain what.—No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company incorporated under the laws of this state, if it contains any of the following provisions:

1. A provision limiting the time within which any action at law or in equity may be commenced to less than two years after the cause of action shall accrue.

2. A provision by which the policy shall purport to be issued or to take effect more than six months before the original application for the insurance was made, if thereby the insured would rate at any age younger than his age at date when the application was made, according to his age at nearest birthday.

3. A provision for any mode of settlement at maturity of less value than the amounts insured on the face of the policy, plus dividend additions, if any, less any indebtedness to the company on the policy, and less any premium that may, by the terms of the policy, be deducted; provided, that any company may issue a policy promising a benefit less than the full benefit in case of the death of the insured by his own hand while sane or insane, or by following stated hazardous occupations. This provision shall not apply to purely accident and health policies. None of the foregoing provisions relating to policy forms shall apply to policies issued in lieu of, or in exchange for, any other policy issued before July 10, 1909. [Id. sec. 23.]

Art. 4743. Policies of foreign companies may contain.—The policies of a life insurance company not organized under the laws of this state may contain any provision which the law of the state, territory, district or country, under which the company is organized, prescribes shall be in such policies when issued in this state; and the policies of a life insurance company organized under the laws of this state may, when issued or delivered in any other state, territory, district or country, contain any provision required by the laws of the state, territory, district or country in which the same are issued, anything in this chapter to the contrary notwithstanding. [Id. sec. 24.]

Venue of suit against foreign live stock insurance company.—Under this article, Art. 1830, subd. 28, Art. 4724, and Art. 1121, subd. 46, which latter article originally provided for the organization of fire and live stock, etc., insurance companies, but was amended in 1907 (Acts 30th Leg. c. 150) so as to provide that all insurance companies under such subdivision shall be in all respects subject to the provisions of Title 58, held, that a foreign live stock insurance company could not be sued on a policy in the county of plaintiff's residence, where the company did not have a representative or office therein, and the insured animal did not die there. *Indiana & Ohio Live Stock Ins. Co. v. Krenek* (Civ. App.) 144 S. W. 1181.

Art. 4744. Venue of suits on policies.—Suits on policies may be instituted and prosecuted against any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred or where the policy holder or beneficiary instituting such suit resides. [Id. sec. 33.]

Art. 4745. Service of process.—Process in any civil suit against any domestic life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, may be served only on the president, or any active vice president, or secretary, or general counsel residing at the city of the home office of the company, or by leaving a copy of same at the home office of such company during business hours. [Id. sec. 34.]

Art. 4746. Losses shall be paid promptly.—In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss. [Id. sec. 35.]

See Metropolitan Life Ins. Co. v. Lennox, 103 T. 133, 124 S. W. 623; American Nat. Ins. Co. v. Briggs (Civ. App.) 156 S. W. 909.

Constitutionality.—This article does not violate the fourteenth amendment to the Constitution of the United States. Merchants' Life Ass'n of United States v. Yoakum, 98 Fed. 251, 39 C. C. A. 56; New York Life Ins. Co. v. Orlopp, 25 C. A. 284, 61 S. W. 339, 340; Manhattan Life Ins. Co. v. Cohen (Civ. App.) 139 S. W. 51. Contra, see New York Life Ins. Co. v. Smith (Civ. App.) 41 S. W. 680, overruling Insurance Co. v. Chowning, 86 T. 654, 26 S. W. 982, 24 L. R. A. 504; Insurance Co. v. Walden (Civ. App.) 26 S. W. 1012; Casualty Co. v. Allibone, 15 C. A. 178, 39 S. W. 632; Id., 90 T. 660, 40 S. W. 399.

This statute is not unconstitutional. Manhattan Life Ins. Co. v. Fields (Civ. App.) 26 S. W. 280; Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 982, 86 T. 654, 24 L. R. A. 504; Mutual Life Ins. Co. v. Blodgett, 27 S. W. 286, 8 C. A. 45; Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123; Sun Life Ins. Co. of America v. Phillips (Civ. App.) 70 S. W. 605, 606.

Const. 1876, art. 3, § 43, which provided for a revision of the statutes at the first session of the legislature under the constitution, did not prevent the legislature in revising the statutes in 1879 and inserting in the revision Act May 2, 1874 (Acts 14th Leg. c. 145) § 9, which made foreign life insurance companies liable to a penalty and an attorney's fee on refusal to pay over proceeds within the time provided by the policy from making the provision applicable to all life insurance companies as is done in this article. American Nat. Ins. Co. v. Collins (Civ. App.) 149 S. W. 554.

What law governs.—The laws of the state in which an insurance company is incorporated apply to contracts made in that state or in any other state. Rue v. Railway Co., 74 T. 475, 8 S. W. 533, 15 Am. St. Rep. 852; Manhattan Life Ins. Co. v. Fields (Civ. App.) 26 S. W. 280; Union Cent. Life Ins. Co. v. Chowning, 86 T. 654, 26 S. W. 982, 24 L. R. A. 504.

A foreign life insurance company doing business in Texas cannot avoid the 12 per cent. statutory penalty for a failure to pay a policy by a stipulation in it that it shall be payable in the state of the incorporation, in which no such penalty is provided for. Franklin Ins. Co. v. Villeneuve, 25 C. A. 356, 60 S. W. 1014.

Application to accident insurance company.—This article does not apply to accident insurance. Aetna Life Ins. Co. v. J. B. Parker & Co., 96 T. 287, 72 S. W. 168; Id., 30 C. A. 521, 72 S. W. 621; Lane v. General Accident Ins. Co. (Civ. App.) 113 S. W. 324.

Application to assessment and fraternal associations.—The American Legion of Honor is a mutual benefit association and is not subject to the penalties imposed by this article. Legion of Honor v. Larmour, 81 T. 71, 16 S. W. 633.

It not being shown that defendant is a fraternal beneficiary association as defined by this act, it is, like an insurance company, liable for 12 per cent. damages and attorney's fees, having failed to pay in full its certificate at maturity, and after demand, according to its liability. Sup. Council Am. Legion of Honor v. Storey, 97 T. 264, 78 S. W. 1.

This article having been repealed by Acts 31st Leg. c. 108, § 69, and the penalty clause of the latter act not being applicable to assessment companies, plaintiff in an action on an assessment policy in which the cause of the action did not accrue until after such repeal could not recover a penalty and attorney's fees. National Life Ass'n v. Hagestein (Civ. App.) 156 S. W. 353.

Demand.—It is necessary to make demand after the policy becomes due, before the penalties provided for in the statute can be recovered. The demand can be made after suit is filed and cause of action therefor set up by amended petition. N. W. Life Assurance Co. v. Sturdevant, 24 C. A. 331, 59 S. W. 61.

A polite letter by attorneys requesting payment of amount due on policies is such a demand as will authorize recovery of 12 per cent. damages and attorney's fees if request is not complied with. Penn Mut. Life Ins. Co. v. Mauer, 101 T. 553, 109 S. W. 1088.

This article does not authorize the court to impose the penalty unless there is proof of a specific demand, and evidence of the furnishing of proofs of death, and of a statement by insured to the policy holder that it would not pay, and the bringing of suit on the policy, is insufficient; the word "demand" meaning a request made on another to do a particular act under a claim of right. Mutual Life Ins. Co. v. Ford (Civ. App.) 130 S. W. 769.

Where an insurance company refuses to pay a loss after proofs have been furnished, and thereupon plaintiff at once began suit, such suit did not constitute a statutory "demand," and she was therefore not entitled to recover statutory damages and attorney's fees on recovering the amount of the policy. Mutual Life Ins. Co. v. Ford, 103 T. 522, 131 S. W. 406.

In the absence of proof of demand of payment of a life policy prior to bringing suit thereon, plaintiff was not entitled to recover any penalty or attorney's fees. Bankers' Reserve Life Co. v. Ellison (Civ. App.) 135 S. W. 226.

The penalty prescribed by this article is not recoverable in the absence of demand before suit, though it appears that demand would be ineffectual. American Nat. Ins. Co. v. Collins (Civ. App.) 149 S. W. 554.

Allegation of demand and refusal.—See notes under Art. 1827.

Amount on which penalty may be charged.—The 12 per cent. penalty provided by statute for the failure of an insurance company to pay a life policy will only be charged on the portion of the amount due thereon which the company withholds. *Franklin Ins. Co. v. Villeneuve*, 25 C. A. 356, 60 S. W. 1014.

Where a policy is payable in installments, the penalty and attorney's fees are payable only on the amount due when suit is brought. *New York Life Ins. Co. v. English*, 95 T. 391, 67 S. W. 884.

Effect of filing interpleader.—Where an insurance company promptly filed its bill of interpleader to determine conflicting claims as to a policy, it was not liable for the statutory penalties. *Stevens v. Germania Life Ins. Co.*, 26 C. A. 156, 62 S. W. 824.

Proofs of loss.—Proofs of loss, by whom made. *Warren v. Insurance Co.*, 13 C. A. 466, 35 S. W. 810.

Burden of proof.—See, also, notes under Art. 3687, Rule 12.

Under this article and Sayles Ann. Civ. St. 1895, Art. 3096, providing that that title shall not apply to mutual relief associations, if the principal officer thereof makes an annual statement as therein required, but that, if it refuses or neglects to make the annual report, it shall be deemed an insurance company conducted for profit and amenable to the laws governing such companies, the burden was on the party suing on a benefit certificate, and claiming to be entitled to the penalty and attorney's fees, provided by this article, to show failure to make the annual report required by article 3096. *Grand Lodge F. & A. Masons of Texas v. Moore* (Civ. App.) 164 S. W. 362.

Interest on judgment.—See notes under Art. 4981.

Art. 4747. Certificate null and void, when.—Should any life insurance company, accident insurance company, life and accident, health and accident, or life, health and accident insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after the officer holding such execution has demanded payment thereof from any officer or attorney of record of such company, in this state, or out of it, such officer shall immediately certify such demand and failure to the commissioner of insurance and banking; and thereupon the commissioner shall forthwith declare null and void the certificate of authority of such company; and such company shall be prohibited from transacting any business in this state until such execution shall be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company. [Id. sec. 36.]

Art. 4748. Business of life insurance companies limited to certain kinds of business.—It shall be unlawful for any life insurance company, accident insurance company, life and accident, health and accident, and life, health and accident insurance company to take any kind of risks or issue any policies of insurance, except those of life, accident or health; nor shall the business of life, accident or health insurance in this state be in any wise conducted or transacted by any company which, in this or any other state or country, is engaged or concerned in the business of marine, fire or inland insurance. [Id. sec. 37.]

Art. 4749. Deposit of securities.—Any life insurance company, accident insurance company, life and accident, health and accident, or life, health and accident insurance company, organized under the laws of this state, may, at its option, deposit with the treasurer of this state securities equal to amount of its capital stock, and may, at its option, withdraw the same, or any part thereof, first having deposited in the treasury in lieu thereof other securities equal in value to those withdrawn. Any such securities, before being so originally deposited or substituted, shall be approved by the commissioner of insurance and banking; and, when any such deposit is made, the treasurer shall execute to the company making the deposit a receipt therefor, giving such description to such securities as will identify the same; and such company shall have the right to advertise such fact, or print a copy of the treasurer's receipt on the policies it may issue; and the proper officers or agents of each insurance company making such deposit shall be permitted, at all reasonable times, to examine such securities and to detach coupons therefrom and to collect interest thereon, under such reasonable rules and regulations as may be prescribed by the treasurer, and the commissioner of insurance and banking, of this state. The deposit herein provided for,

when made by any company, shall thereafter be maintained as long as said company shall have outstanding any liability to its policy holders. For the purpose of state, county and municipal taxation, the situs of all personal property belonging to such companies shall be at the home office of such company. [Id. sec. 38.]

Art. 4750. Same.—Any life insurance company now incorporated, or which may hereafter be incorporated, under the laws of this state, may deposit with the commissioner of insurance and banking of the state of Texas, for the common benefit of all the holders of its policies and annuity bonds, securities of the kinds in which, by the laws of this state, it is permitted to invest or loan its funds, equal to the legal reserve on all its outstanding policies in force, which securities shall be held by said commissioner in trust for the purpose and objects herein specified. Any such company may deposit lawful money of the United States in lieu of the securities above referred to, or any portion thereof, and may also, for the purposes of such deposit, convey to said commissioner in trust the real estate in which any portion of its said reserve may be lawfully invested; and, in such case, said commissioner shall hold the title thereto in trust until other securities in lieu thereof shall be deposited with him, whereupon he shall reconvey the same to such company. Said commissioner may cause any such securities or real estate to be appraised and valued prior to their being deposited with, or conveyed to, him in trust as aforesaid, the reasonable expense of such appraisal or valuation to be paid by the company. [Acts 1909, p. 448, 2 S. S. sec. 1.]

Art. 4751. Policies shall have indorsed on face, etc.—After making the deposit mentioned above, no company shall thereafter issue a policy of insurance or endowment or annuity bond, except policies of industrial insurance, unless it shall have upon its face a certificate substantially in the following words: "This policy is registered, and approved securities equal in value to the legal reserve hereon are held in trust by the commissioner of insurance and banking of the state of Texas," which certificate shall be signed by such commissioner and sealed with the seal of his office. All policies and bonds of each kind and class issued and the forms thereof filed in the office of said commissioner shall have printed thereon some appropriate designating letter or figure, combination of letters or figures or terms identifying the particular form of contract, together with the year of adoption of such form; and, whenever any change or modification is made in the form of contracts, policy or bond, the designating letters, figures or terms and year of adoption thereon shall be correspondingly changed. The commissioner of insurance and banking shall prepare and keep such registers thereof as will enable him to compute their value at any time. Upon written proof attested by the president or vice president and secretary of the company which shall have issued such policies or annuity bonds that any of them have been commuted or terminated, the commissioner shall commute or cancel them upon his register; and, until such proof is furnished all registered, contracts shall be considered in force for the purposes of this chapter. The net value of every policy or annuity bond, according to the standard prescribed by the laws of this state for the valuation of policies of life insurance companies, when the first premium shall have been paid thereon, less the amount of such liens as the company may have against it (not exceeding such value), shall be entered opposite the record of said policy or annuity bond in the register aforesaid at the time such record is made. On the first day of January of each year, or within sixty days thereafter, the commission shall cause the policies and annuity bonds of each company accepting the terms of this chapter to be carefully valued; and the actual value thereof at the time fixed for such valuation, less such liens as the company may have against it, not exceeding such value, shall be entered upon the register opposite the rec-

ord of such policy or bond, and the commissioner shall furnish a certificate of the aggregate of such value to the company. It shall be the duty of the commissioner to cancel mutilated or surrendered policies and annuity bonds issued by any such company, and register other like policies or bonds issued in lieu thereof. Each company, which shall have made the deposit herein provided for, shall make additional deposits from time to time, in amounts not less than five thousand dollars, and of such securities as are permitted by this chapter to be deposited, so that the market value of the securities deposited shall always be equal to the net value of the policies and annuity bonds issued by said company, less such liens as the company may have against them, not exceeding such net value. So long as any company shall maintain its deposits as herein prescribed at an amount equal to, or in excess of, the net value of its policies and annuity bonds as aforesaid, it shall be the duty of said commissioner to sign and affix his seal to the certificates before mentioned on every policy and annuity bond presented to him for that purpose by any company so depositing. The commissioner shall keep a careful record of the securities deposited by each company, showing by item the amount and market value thereof. If at any time it shall appear therefrom that the value of the securities held on deposit is less than the actual value of the policies and annuity bonds issued by such company and then in force, it shall be unlawful for the commissioner to execute the certificate on any additional policies or annuity bonds of such company until it shall have made good the deficit. Any company depositing under the provisions of this chapter may increase its deposits at any time by making additional deposits of not less than five thousand dollars of such securities as are authorized by this chapter. Any such company whose deposits exceed the net value of all policies and annuity bonds it has in force, less such liens (not exceeding such net value) as the company may hold against them, may withdraw such excess; and it may withdraw any of such securities at any time by depositing others of equal value and of the character authorized by this chapter in their stead; and it may collect the interest coupons, rents and other income on the securities deposited as the same accrue.

The securities deposited under this chapter by each company shall be placed and kept by the commissioner of insurance and banking of the state in some secure safe-deposit, fire-proof box or vault in the city or town in or near which the home office of the company is located; and the officers of the company shall have access to such securities for the purpose of detaching interest coupons and crediting payment and exchanging securities as above provided, under such reasonable rules and regulations as the commissioner may establish. [Id. sec. 2.]

Art. 4752. Fees for making deposits.—Every company making deposit under the provisions of this chapter shall pay to the commissioner of insurance and banking for each certificate placed on registered policies or annuity bonds issued by the company, after the original or first deposit is made hereunder, a fee of twenty-five cents; and the fee so received shall be disposed of by said commissioner as follows:

1. The payment of the annual rent or hire of the safety deposit fire-proof box above provided.
2. Payment for the services of a competent and reliable representative of said commissioner, to be appointed by him, who shall have direct charge of the securities and safety box containing the same, and through whom, and under whose supervision, the insurance company may have access to its securities for the purposes above provided. The sum paid such representative shall not exceed sixty dollars per annum for each company.
3. The balance of such fees shall be paid to, or deposited with, the state treasurer to the credit of the general fund. [Id. sec. 3.]

Art. 4753. Securities may include capital stock; securities to be increased.—Any life insurance company organized under the laws of this state and making the deposit provided for by this chapter, may include, as a part thereof, securities representing its capital stock, and any deposits of its securities heretofore or hereafter made in compliance with the laws of this state representing its capital stock, and shall only be required to deposit in addition thereto the remainder of its total reserve on outstanding policies and annuity bonds after deducting therefrom the amount of its capital stock securities so deposited. Deposits of securities made hereunder to the value of the reserve on all outstanding policies and annuity bonds shall be added to, and maintained from time to time as the reserve values increase, by the company issuing such contracts, or by any company which may reinsure or assume them; and such securities shall be held by the commissioner of insurance and banking and his successors in office in trust for the benefit of such policies and annuity bonds so long as the same shall remain in force. No company, making the deposit provided for herein, shall reinsure its outstanding business, or the whole of any one or more of its risks, except in or with a company or companies incorporated and organized under the laws of this state, or a company having permission to do business in this state. [Id. secs. 4, 5.]

Art. 4754. Sub-standard or extra hazardous policies.—If any life insurance company doing business under the laws of this state has written or assumed risks that are sub-standard or extra hazardous and has charged therefor more than its published rates of premium, the commissioner of insurance and banking shall in valuing such policies compute and charge such extra reserves thereon as is warranted by reason of the extra hazard assumed and the extra premium charged. [Id. sec. 6.]

Art. 4755. No commissions to be paid officers.—No life insurance company transacting business in this state shall pay, or contract to pay, directly or indirectly, to its president, vice president, secretary, treasurer, actuary, medical director or other physician charged with the duty of examining risks or applications for insurance or to any officer of the company other than an agent or solicitor, any commission or other compensation contingent upon the writing or procuring of any policy of insurance in such company, or procuring an application therefor by any person whomsoever, or contingent upon the payment of any renewal premium, or upon the assumption of any life insurance risk by such company; and, should any company violate the provisions of this article, it shall be the duty of the commissioner of insurance and banking to revoke its certificate of authority to transact business in this state. [Id. sec. 7.]

Art. 4756. Co-operative companies.—The provisions of articles 4750 to article 4755, inclusive, shall likewise apply to and govern co-operative life insurance companies organized under the laws of this state. [Id. sec. 8.]

Art. 4757. Funds to be deposited in name of company.—Any director, member of a committee, or officer, or any clerk of a home company, who is charged with the duty of handling or investing its funds, shall not deposit or invest such funds, except in the corporate name of such company; shall not borrow the funds of such company; shall not be interested in any way in any loan, pledge, security, or property of such company, except as stockholder; shall not take or receive to his own use any fee, brokerage, commission, gift or other consideration for, or on account of, a loan made by or on behalf of such company. [Acts 1909, p. 192, sec. 39.]

Art. 4758. Impairment of capital stock.—Any such insurance company transacting business within this state, whose capital stock shall be-

come impaired to the extent of thirty-three and one-third per cent thereof, computing its liabilities according to the terms of this chapter, shall make good such impairment within sixty days, by reduction of its capital stock (provided such capital stock shall in no case be less than one hundred thousand dollars), or otherwise; and failure to make good such impairment within said time shall forfeit its right to write new business in this state until said impairment shall have been made good. And provided, that the commissioner of insurance and banking may apply to any court of competent jurisdiction for the appointment of a receiver to wind up the affairs of such company when its capital stock shall become impaired to the extent of fifty per cent thereof, computing its policy liabilities according to the American experience table of mortality and four and one-half per cent interest. And provided, further, that no company shall write new business in Texas when its net surplus to policy holders is less than one hundred thousand dollars. [Id. sec. 43.]

Art. 4759. Form of policies to be filed.—Life insurance companies shall, within five days after the issuance of, and the placing upon the market, any form of policies of life insurance, file a copy of such form of policy with the department of insurance and banking. [Id. sec. 44.]

Art. 4760. Policy to be approved by commissioner.—No insurance company transacting business in this state shall hereafter be permitted to issue or sell any policy of industrial life insurance, or any policy of accident or health insurance, until the form thereof has been submitted to the commissioner of insurance and banking. If the commissioner of insurance and banking shall approve the form of such policy as complying with the requirements of the laws of this state, the same may thereafter be issued and sold. If he shall disapprove the same, any such company may institute a proceeding in any court of competent jurisdiction to review his action thereon. [Id. sec. 45.]

Art. 4761. Must have certificate of authority.—No foreign or domestic insurance company shall transact any insurance business in this state, other than the lending of money, unless it shall first procure from the commissioner of insurance and banking a certificate of authority, stating that the requirements of the laws of this state have been fully complied with by it, and authorizing it to do business in this state. Such certificate of authority shall expire on the last day of February in each year, and shall be renewed annually so long as the company shall continue to comply with the laws of the state, such renewals to be granted upon the same terms and considerations as the original certificate. [Id. sec. 46.]

Art. 4762. Companies with \$25,000 capital stock.—Companies may be incorporated in the manner prescribed by this chapter for the incorporation of life, accident and health insurance companies generally, which shall have power only to transact business within the state of Texas, and to write insurance only on the weekly or monthly premiums plan, and to issue no policy promising to pay more than one thousand dollars in the event of the death of the insured from natural causes, nor more than two thousand dollars in the event of death of any person from accidental causes, which may issue, combined or separately, life, accident or health insurance policies with not less than an actual paid up capital of twenty-five thousand dollars; provided, that all such companies shall be subject to all the laws regulating life insurance companies in this state not inconsistent with the provisions of this article; and provided, further, that such companies shall not be permitted to invest their assets in other than Texas securities as defined by the laws of this state regulating the investments of life insurance companies. [Id. sec. 56.]

Art. 4763. Unlawful dividends.—It shall not be lawful for any insurance company organized under the laws of this state to make any divi-

dend, except from surplus profits arising from its business; and, in estimating such profits, there shall be reserved therefrom the lawful reserve on all unexpired risks and also the amount of all unpaid losses, whether adjusted or unadjusted, and all other debts due and payable, or to become due and payable, by the company. Any dividends made contrary to the provisions of this article shall subject the company making them to a forfeiture of its charter; and the commissioner of insurance shall forthwith revoke its certificate of authority; provided, that he shall give such company at least ten days notice in writing of his intention to revoke such certificate, stating specifically the reasons why he intends to revoke same. [Id. sec. 61.]

Art. 4764. Taxation of domestic insurance companies.—Insurance companies incorporated under the laws of this state shall hereafter be required to render for state, county and municipal taxation all of their real estate as other real estate is rendered; and all of the personal property of such insurance companies shall be valued as other property is valued for assessment in this state in the following manner: From the total valuation of its assets shall be deducted the reserve, being the amount of the debts of insurance companies by reason of their outstanding policies in gross, and from the remainder shall be deducted the assessed value of all real estate owned by the company and the remainder shall be the assessed taxable value of its personal property. Home insurance companies shall not be required to pay any occupation or gross receipt tax. [Id. sec. 25.]

Art. 4765. Foreign companies, statement.—Any life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, incorporated under the laws of any other state, territory or country, desiring to transact the business of such insurance in this state, shall furnish said commissioner of insurance and banking with a written or printed statement under oath of the president or vice president, or treasurer and secretary of such company, which statement shall show:

- (a) The name and locality of the company.
- (b) The amount of its capital stock.
- (c) The amount of its capital stock paid up.
- (d) The assets of the company, including: first, the amount of cash on hand and in the hands of other persons, naming such persons and their residence; second, real estate unincumbered, where situated and its value; third, the bonds owned by the company and how they are secured, with the rate of interest thereon; fourth, debts due the company secured by mortgage, describing the property mortgaged and its market value; fifth, debts otherwise secured, stating how secured; sixth, debts for premiums; seventh, all other moneys and securities.
- (e) Amount of liabilities to the company, stating the name of the person or corporation to whom liable.
- (f) Losses adjusted and due.
- (g) Losses adjusted and not due.
- (h) Losses adjusted.
- (i) Losses in suspense and for what cause.
- (j) All other claims against the company, describing the same.

Provided that the commissioner of insurance and banking may require any additional fact to be shown by such annual statement. Each such company shall be required to file a similar statement not later than March 1 of each year. [Acts 1909, p. 192, sec. 26.]

Art. 4766. To file articles of incorporation.—Such foreign life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company shall accompany such statement with a certified copy of its acts or articles of incorporation, and all amendments thereto, and a copy of its

by-laws, together with the name and residence of each of its officers and directors, and all of which shall be certified under the hand of the president or secretary of such company. [Id. sec. 27.]

Art. 4767. Paid up capital stock.—No such foreign life insurance company, accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, shall transact any business of insurance in this state, unless such company is possessed of at least one hundred thousand dollars of actual paid up in cash money capital invested in such securities as provided under the laws of the state, territory or country of its creation; and no mutual life insurance company or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company operating on the old line or legal reserve basis, shall transact any business of insurance in this state, unless such company is possessed of at least one hundred thousand dollars of net surplus assets invested in securities provided for under the law of the state, territory or country of its creation. [Id. sec. 28.]

Art. 4768. Deposits required.—Whenever the existing or future laws of any other state or territory of the United States, or of any other country, shall require of life insurance companies, accident insurance companies, or life and accident, health and accident, or life, health and accident insurance companies, incorporated by this state, any deposit of securities in such other state, territory or country before transacting insurance business therein, then, and in every such case, all insurance companies of such state shall, before doing any insurance business in this state, be required to make the same deposit of securities with the treasurer of this state. [Id. sec. 29.]

Application.—This article does not apply to any other state of the United States, unless the laws of that state require such a deposit from companies incorporated in this state. Foreign companies must, however, deposit bonds or securities for the benefit of policy holders before doing business in this state, as provided for in Art. 4769. *Selders v. Merchants' Life Ass'n of America*, 93 T. 194, 54 S. W. 753.

Art. 4769. Alien companies to deposit.—No foreign life insurance company or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company, incorporated by or organized under the laws of any foreign government, shall transact business in this state, unless it shall first deposit and keep deposited with the treasurer of this state, for the benefit of the policy holders of such company, citizens or residents of the United States, bonds or securities of the United States or the state of Texas to the amount of one hundred thousand dollars. [Id. sec. 30.]

Art. 4770. Deposit liable for judgment.—The deposit required by the preceding article shall be held liable to pay the judgments of policy holders in such company, and may be so decreed by the court adjudicating the same. [Id. sec. 31.]

Art. 4771. When alien companies need not deposit.—If the deposit required by article 4769 has been made in any state of the United States, under the laws of such state, in such manner as to secure equally all the policy holders of such company who are citizens and residents of the United States, then no deposits shall be required in this state; but a certificate of such deposit under the hand and seal of the officer of such other state with whom the same has been made shall be filed with the commissioner of insurance and banking. [Id. sec. 32.]

Art. 4772. Assets, how invested.—The assets of any company not organized under the laws of this state shall be invested in securities or property of the same classes permitted by the laws of this state as to home companies or by other laws of this state in other securities approved by the commissioner of insurance and banking as being of substantially the same grade. [Id. sec. 57.]

Art. 4773. Shall file power of attorney.—Each life insurance company engaged in doing or desiring to do business in this state shall file with the commissioner of insurance and banking of this state an irrevocable power of attorney, duly executed, constituting and appointing the commissioner of insurance and banking of this state and his successors in office, or any officer or board which may hereafter be clothed with the powers and duties now devolving upon said commissioner, its duly authorized agent and attorney in fact for the purpose of accepting service for it or being served with citation in any suit brought against it in any court of this state, by any person, or by or to or for the use of the state of Texas, and consenting that the service of any civil process upon him as its attorney for such purpose in any such suit or proceeding shall be taken and held to be valid, waiving all claim and right to object to such service or to any error by reason of such service; and such appointment, agency and power of attorney shall, by its terms and recitals, provide that it shall continue and remain in force and effect so long as such company continues to do business in this state or to collect premiums of insurance from citizens of this state, and so long as it shall have outstanding policies in this state, and until all claims of every character held by the citizens of this state, or by the state of Texas, against such company, shall have been settled. And said power of attorney shall be signed by the president or a vice president and the secretary of such company, whose signature shall be attested by the seal of the company; and said officer signing the same shall acknowledge its execution before an officer authorized by the laws of this state to take acknowledgments; and the said power of attorney shall be embodied in, and approved by, a resolution of the board of directors of such company; and a copy of such resolution, duly certified to by the proper officers of said company, shall be filed with the said power of attorney in the office of the commissioner of insurance and banking of this state, and shall be recorded by him in a book kept for that purpose, there to remain a permanent record of said department. [Acts 1909, p. 240, sec. 12.]

Art. 4774. Duty of commissioner in accepting service.—Whenever the commissioner of insurance and banking of this state shall accept service or be served with citation in any suit pending against any life insurance company in this state, as provided by the preceding article, he shall immediately enclose the copy of the citation served upon him, or a substantial copy thereof, in a letter properly addressed to the general manager or general agent of the company against whom such service is had, if it shall have a general manager or general agent within this state, and if not, then to the home office of the company, and shall forward the same by registered mail, postage prepaid; and no judgment by default shall be taken in any such cause until after the expiration of at least ten days after the general agent or general manager of such company, or the company at its home office, as the case may be, shall have received such copy of such citation; and the presumption shall obtain, until rebutted, that such notice was received by such agent or company in due course of mail after being deposited in the mail at Austin. [Id. sec. 13.]

CHAPTER THREE

INVESTMENT IN TEXAS SECURITIES AND TAXATION OF GROSS RECEIPTS

<p>Art. 4775. Investment in Texas securities. 4776. Definition of "Texas securities." 4777. Investment, how made. 4778. Report showing amount of reserve. 4779. Report showing gross amount of receipts.</p>	<p>Art. 4780. Taxes to be paid before certificate is issued. 4781. Taxes imposed herein to be sole taxes imposed. 4782. Companies deemed to have accepted provisions of this chapter, when.</p>
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<p>Art. 4783. Companies desiring to do business after having ceased to do so.</p> <p>4784. Failure to renew certificate may do what.</p> <p>4785. Commissioner to revoke certificate, when and how.</p> <p>4786. Penalty for failure to report, or investment.</p>	<p>Art. 4787. Deposit by domestic company.</p> <p>4788. Not to apply to certain companies.</p> <p>4789. Not to apply to fraternal beneficiary associations.</p> <p>4790. Companies desiring to loan money only.</p>
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Article 4775. Investment in Texas securities.—Each and every life insurance company now engaged, or that may hereafter engage, in transacting the business of life insurance in this state, shall, as a condition of its right to transact such business in this state, invest and keep invested in Texas securities, as hereinafter defined, and in Texas real estate as hereinafter provided, a sum of money equal to at least seventy-five per cent of the aggregate amount of the legal reserve required by the laws of the state of its domicile, to be maintained on account of its policies of insurance in force written upon the lives of citizens of this state, which reserve is hereinafter denominated as its "Texas Reserves." And each such company, securing a certificate of authority to do business in this state, shall be deemed to have accepted such certificate subject to all of the conditions and requirements of this chapter. [Acts 1909, p. 240, sec. 1.]

Art. 4776. Definition of "Texas securities."—The phrase, "Texas Securities," as used in this chapter, shall be held to include bonds of the state of Texas, or of any county, city, town, school district or other municipality or subdivision, which is now or may hereafter be constituted or organized and authorized to issue bonds under the constitution and laws of this state, promissory notes and other obligations, the payment of which is secured by a mortgage, deed of trust or other valid lien upon unincumbered real estate situated in this state, the title to which real estate is valid and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured and kept insured in some company authorized to transact business in this state, and the policy or policies transferred to the company taking such mortgage or lien; the first mortgage bonds of any solvent corporation, incorporated under the laws of this state and doing business in this state, which has not in five years next preceding the date of the investment by such company in such mortgage bonds, defaulted for more than three months in the payment of interest upon its bonds or indebtedness, the market value of which bonds is equal to the amount invested therein; and loans made to policy holders on the sole security of the reserve values of their policies. And the investments required by this chapter, or any part thereof, may be made by the purchase of not more than one building site, and in the erection thereon of not more than one office building, or in the purchase at its reasonable market value of such office building already constructed and the ground upon which the same is located, in any city of the state having a population of more than four thousand inhabitants. And all real estate owned by life insurance companies in this state, on December 31, 1909, and all thereafter acquired under the provisions of this chapter, or by foreclosure of a lien thereon, shall be treated, to the extent of its reasonable market value, as a part of the investments required by this chapter. And "Texas Securities," as used in the following articles of this chapter shall be held to include every character of investment authorized by the terms of this article [Id. sec. 2.]

Art. 4777. Investments, how made.—The investments required by this chapter shall be made as follows:

(a) Each life insurance company which had a certificate of authority to transact business in this state April 2, 1909, the total amount of whose investments in Texas securities as of December 31, 1908, was equal to or

exceeded seventy-five per cent of the amount of its Texas reserves as of that date, shall have so invested not later than January 31, in each year, a sum of money equal to seventy-five per cent of the amount of its Texas reserves as of the preceding December 31.

(b) Each life insurance company which had a certificate of authority to transact business in this state on April 2, 1909, the amount of whose investments in Texas securities as of December 31, 1908, was less than seventy-five per cent of the amount of its Texas reserves as of said date shall have so invested, not later than January 31 in each year, a sum at least equal to seventy-five per cent of the amount by which its Texas reserves as of December 31 preceding exceeded the amount of its Texas reserves as of December 31, 1908, added to the amount of its total investments in Texas securities as of said date; and each such company shall, in addition, have so invested not later than January 31, 1910, a sum at least equal to ten per cent of the amount by which seventy-five per cent of its Texas reserves as of December 31, 1908, exceeded the amount of its investments in Texas securities as of said date, and annually thereafter it shall have invested, not later than January 31, an additional ten per cent of the amount of such excess, until the total amount of its investments in Texas securities shall at least equal seventy-five per cent of its Texas reserves.

(c) Each life insurance company not having a certificate of authority to transact business in this state on April 2, 1909, or that may thereafter discontinue writing new business under such certificate, shall, if it again obtain a certificate of authority to transact business in this state, be required to have invested in Texas securities annually as above provided, a sum equal to seventy-five per cent of its Texas reserves; provided, that if on December 31 preceding the issuance of such certificate of authority, the amount of its investments in Texas securities was less than seventy-five per cent of the amount of its Texas reserves it shall be required to have so invested annually as above provided, a sum equal to seventy-five per cent of the increase in its Texas reserves since December 31 last preceding the issuance of its certificate of authority, added to the amount of its total investment in Texas securities as of said date; and, in addition, it shall, not later than January 31 in each year after the issuance of its certificate of authority, have so invested ten per cent of the amount by which seventy-five per cent of its Texas reserves as of December 31 preceding the date of said certificate exceeded the amount of its total investments in Texas securities as of that date, and shall have invested annually thereafter, not later than January 31, an additional ten per cent of such excess, until the total amount of its investments in Texas securities shall at least equal seventy-five per cent of the amount of its Texas reserves. The proportionate amount of the Texas reserves required by this section to be invested in Texas securities as of any date shall thereafter be maintained; provided, that such investment shall not be required to be made by any life insurance company after it has ceased to do the business of life insurance or to write policies of life insurance in this state. [Id. sec. 3.]

Art. 4778. Report showing amount of reserve.—That each life insurance company doing business in this state shall, not later than ten days after January 31 of each year, file with the commissioner of insurance and banking of this state, on a blank prepared and furnished by him for that purpose, a report showing the entire amount of the reserve on its entire business in force in this state on December 31, preceding, and an itemized schedule of its investments in Texas securities, which report shall be sworn to by either the president or a vice president and the secretary of such company. Such report shall contain such other information as may be required by the commissioner to determine whether or not such company has continuously and in good faith complied with

this law; and for that purpose the commissioner may, whenever he shall deem it proper, require such special or supplemental reports as he may deem necessary. [Id. sec. 4.]

Art. 4779. Report showing gross amount of receipts.—Each life insurance company not organized under the laws of this state, transacting business in this state, shall annually, on or before the first day of March, make a report to the commissioner of insurance and banking of this state, which report shall be sworn to by either the president or vice president and secretary or treasurer of such company, and which shall show the gross amount of premiums collected during the year ending on December 31, preceding, from citizens of this state, upon policies of insurance; and each such company shall pay annually an occupation tax equal to three per cent of such gross premium receipts; provided, that when the report of the investment in Texas securities, as defined by law, of any such companies as of December 31, of any year, shall show that it has invested on said date as much as thirty per cent of its total Texas reserves, as defined by law, in promissory notes or other obligations secured by mortgage, deed of trust, or other lien on Texas real estate, the rate of occupation tax shall be reduced to two and six-tenths per cent; and, when such report shall show that such company has so invested on said date as much as sixty per cent of its total Texas reserve, the rate of such occupation tax shall be reduced to two and three-tenths per cent; and when such a report shall show that such company has so invested, on said date, as much as seventy-five per cent of its total Texas reserve, the rate of such occupation tax shall be reduced to two per cent; provided, that all such companies shall in any event make the investments in Texas securities in proportion to the amount of Texas reserves as required by law. Such occupation taxes shall be for and on account of the business transacted within this state during the calendar year in which such premiums were collected, or for that portion thereof during which the company shall have transacted business in this state. [Acts 1909, 1 S. S., p. 264, sec. 1.]

Art. 4780. Taxes to be paid before certificate is issued.—Upon the receipt of sworn statements showing the gross premium receipts of such company, the commissioner of insurance and banking of this state shall certify to the treasurer of this state the amount of taxes due by such company for the preceding year; which taxes shall be paid to the state treasurer for the use of the state, by such company. Upon his receipt of such certificate, and the payment of such tax, the treasurer shall execute a receipt therefor, which receipt shall be evidence of the payment of such taxes; and no such life insurance company shall receive a certificate of authority to do business in this state until such taxes are paid. If, upon the examination of any company, or in any other manner, the commissioner of insurance and banking shall be informed that the gross premium receipts of any year exceed in amount those shown by the report thereof, theretofore made as above provided, it shall be the duty of such commissioner to file with the state treasurer a supplemental certificate showing the additional amount of taxes due by such company, which shall be paid by such company upon notice thereof. It shall be the duty of the state treasurer of this state if, within fifteen days after the receipt by him of any certificate or supplemental certificate provided for by this article, the taxes due as shown thereby have not been paid, to report the facts to the attorney general, who shall immediately institute suit in the proper court in Travis county to recover such taxes. [Id. sec. 1.]

Art. 4781. Taxes imposed in this chapter to be sole taxes imposed.—No occupation tax other than herein imposed shall be levied by the state or any county, city or town, upon any life insurance company herein subject to the occupation tax in proportion to its gross premium receipts,

or its agents. The occupation tax imposed by this act upon life insurance companies shall be the sole occupation tax which any company doing business in this state under the provisions of this chapter shall be required to pay. [Acts 1909, p. 240, sec. 6.]

Art. 4782. Companies deemed to have accepted provisions of this chapter, when.—Each life insurance company not organized under the laws of this state, hereafter granted a certificate of authority to transact business in this state, shall be deemed to have accepted such certificate and to transact such business hereunder subject to the conditions and requirements that, after it shall cease to transact new business in this state under a certificate of authority, and so long as it shall continue to collect renewal premiums from citizens of this state, it shall be subject to the payment of the same occupation tax in proportion to its gross premiums during any year, from citizens of this state, as is or may be imposed by law on such companies transacting new business within this state, under certificates of authority during such year; provided, that the rate of such tax to be so paid by any such company shall never exceed the rate imposed by this chapter upon insurance companies transacting business in this state; and each such company shall make the same reports of its gross premium receipts for each such year and within the same period as is or may be required of such companies holding certificates of authority; and shall at all times be subject to examination by the commissioner of insurance and banking, or some one selected by him for that purpose, in the same way and to the same extent as is or may be required of companies transacting new business under certificates of authority in this state, the expenses of such examination to be paid by the company examined; and the respective duties of the commissioner of insurance and banking in certifying the amount of such taxes, and of the state treasurer and attorney general in their collection, shall be the same as are or may be prescribed respecting taxes due from companies authorized to transact new business within this state. [Id. sec. 7.]

Art. 4783. Companies desiring to do business after having ceased to do so.—Any life insurance company which has heretofore been, may now be, or may hereafter be, engaged in writing policies of insurance upon the lives of citizens of this state, which has heretofore ceased, or may hereafter cease, writing such policies, and which does not now or may not hereafter have a certificate of authority to transact the business of life insurance in this state, but which has continued or may continue to collect renewal or other premiums upon such policies, shall, before it may again obtain a certificate of authority to transact the business of life insurance in this state, report under oath to the commissioner of insurance and banking of this state the gross amount of premiums so collected from citizens of this state upon policies of insurance during each calendar year since the end of the period covered by the last preceding report by such company of gross premium receipts upon which it paid an occupation tax, and shall pay to the state a sum equal to the percentage of its gross premium receipts for each such year that was required by law to be paid as occupation taxes by companies doing business in this state, during such year or years; and, upon the payment of such sum and securing a certificate of authority to do business in this state, the penalties provided for the failure to pay such taxes and make such reports in the past shall be remitted. [Id. sec. 8.]

Art. 4784. Failure to renew certificate, may do what.—Any company which shall fail to renew its certificate of authority or continue to write new business in this state shall, nevertheless, have the right to maintain an agent or agents in Texas for the purpose of collecting renewal premiums on outstanding business written by it under certificate of author-

ity, and also for the purpose of making investments as provided by this chapter. [Id. sec. 9.]

Art. 4785. Commissioner may revoke certificate, when and how.—If any life insurance company, while holding a certificate of authority to transact business in this state, shall fail or refuse to comply with any of the provisions or requirements of this chapter, it shall be the duty of the commissioner of insurance and banking, upon ascertaining such fact, to notify such company by registered letter, properly addressed and mailed, or by any other form of actual notice in writing delivered to an executive officer of such company, of his intention to revoke its certificate of authority to transact business in this state at the expiration of thirty days after the mailing of such registered letter, or the date upon which such actual notice is served; and, if such provisions or requirements are not fully complied with upon the expiration of said thirty days, it shall be the duty of the commissioner of insurance and banking to revoke the certificate of authority of such company; and, in case of such revocation, such company shall not be entitled to receive another certificate of authority for a period of one year, and until it shall have fully and in good faith complied with all such provisions and requirements of this chapter. Any company feeling itself aggrieved by the action of the commissioner in revoking its certificate of authority to do business in this state may bring suit against him in the court of Travis county having jurisdiction thereof, to annul and vacate the order revoking such certificate. [Id. sec. 10.]

Art. 4786. Penalty for failure to report or investment.—If any company shall intentionally fail or refuse to make the investments required by this chapter, or make any report required by this chapter, or to make any special report requested by the commissioner of insurance and banking under the authority of this chapter, or generally to comply with any provision or requirements of this chapter, while holding a certificate of authority to transact business in this state, or after it shall cease to write new business or cease to hold such certificate, such failure or refusal shall subject such company, in addition to the penalty provided in the preceding article, in cases to which said article may be applicable, to the payment of a penalty of twenty-five dollars per day for each day that such company shall remain in default after the commissioner of insurance and banking shall notify such company of such default, in the manner provided in the preceding article, to be recovered in a suit to be brought by the attorney general in behalf of the state in the district court of Travis county. And in any suit that may be brought to recover such penalty or penalties, there shall be a prima facie presumption, subject to rebuttal, that any default that may have occurred was intentional, and that the notice required by this chapter was given, and the burden of proof shall be on the defendant company to prove that the investments required by this chapter were made as herein required whenever the question of whether or not such investments were thus made is in issue. [Id. sec. 11.]

Art. 4787. Deposit by domestic company.—Any life insurance company, organized under the laws of this state, may, at its option, deposit with the treasurer of this state, securities in which its capital stock is invested, or securities equal in amount to its capital stock, of the class in which the law of this state permits insurance companies to invest their capital stock, and may, at its option, withdraw the same or any part thereof, first having deposited with the treasurer, in lieu thereof, other securities of like class and equal amount and value to those withdrawn. Any such securities, before being so originally deposited or substituted, shall be approved by the commissioner of insurance and banking; and, when any such deposit is made, the treasurer shall execute to the company making such deposit a receipt therefor, giving such description of

said stock or securities as will identify the same, and stating that the same are held on deposit as the capital stock investments of such company; and such company shall have the right to advertise such fact or print a copy of the treasurer's receipt on the policies it may issue; and the proper officers or agent of each insurance company making such deposit shall be permitted at all reasonable times to examine such securities and to detach coupons therefrom and to collect interest thereon, under such reasonable rules and regulations as may be prescribed by the treasurer and the commissioner of insurance and banking of this state. The deposit herein provided for, when made by any company, shall thereafter be maintained so long as said company shall have outstanding any liability to its policy holders in this state. [Id. sec. 14.]

Art. 4788. Not to apply to certain companies.—The provisions of this chapter requiring investments in Texas securities shall not apply to any life insurance company, the total amount of whose Texas reserves does not exceed five thousand dollars, or to any such company doing only a reinsurance business in this state, but all of the other provisions of this chapter shall apply to such companies. [Id. sec. 16.]

Art. 4789. Not to apply to fraternal beneficiary associations.—The provisions of this chapter shall not be held to apply to fraternal beneficiary associations as defined by the laws of this state. [Id. sec. 17.]

Art. 4790. Companies desiring to loan money only.—Any life insurance company not desiring to engage in the business of writing life insurance in this state, but desiring to loan its funds in this state, may obtain a permit to do so by complying with the laws of this state relating to foreign corporations engaged in loaning money in this state, without being required to secure a certificate of authority to write life insurance in this state. [Id. sec. 18.]

CHAPTER FOUR

ASSESSMENT OR NATURAL PREMIUM COMPANIES

Art.
4791. Foreign assessment companies.
4792. Fees.

Art.
4793. Shall not apply to mutual benefit associations.

Article 4791. Foreign assessment companies.—Companies or associations organized under the laws of any other state of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this state regulating other insurance companies, shall be licensed by the commissioner of insurance and banking to do business in this state, and be subject only to the provisions of this chapter; provided, however, that such company or association shall first file with the commissioner of insurance and banking a certified copy of its charter, a written agreement, appointing the commissioner of insurance and banking, and his successor in office, to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it may be served; a certificate under oath of its president and secretary that it is paying, and for the twelve months next preceding has paid, the maximum amount named in its policies or certificates in full; a statement under oath of its president and secretary of its business for the year ending on the thirty-first day of December preceding; a certified copy of its constitution and by-laws, and a copy of its policy and application; a certificate from the proper authority in its home state that said company or association is legally entitled to do business in such home state, and has at least one hundred

thousand dollars surplus assets subject to its indebtedness. It shall be the duty of the commissioner of insurance and banking to issue a license to any company or association complying with the provisions of this chapter; and every such company or association shall annually thereafter, before such license is renewed, file with the commissioner of insurance and banking on or before the first day of March, a statement under oath of its president and secretary, or like officers, of its business for the year ending December 31 preceding. [Acts 1889, p. 98, sec. 1.]

Application.—This article applies only to proceedings required to obtain a license to do business in Texas, and does not prevent any regulation of such companies which would result from applying other regulatory statutory provisions to them. *National Life Ass'n v. Hagestein* (Civ. App.) 156 S. W. 353.

Art. 4792. Fees.—Every such company or association shall pay to the commissioner of insurance and banking, for the use of the state, the following fees: For filing copy of its charter, twenty-five dollars; for filing statement preliminary to admission, twenty dollars; for filing each annual statement after admission, twenty dollars; for license to company or association, one dollar. [Id. sec. 2.]

See *National Life Ass'n v. Hagestein* (Civ. App.) 156 S. W. 353.

Art. 4793. Shall not apply to mutual benefit associations.—The provisions of this chapter shall in no wise apply to mutual benefit organizations doing business in this state through lodges or councils, such as the Order of Chosen Friends, Knights of Honor, or kindred organizations. [Id. sec. 3.]

See *National Life Ass'n v. Hagestein* (Civ. App.) 156 S. W. 353.

CHAPTER FIVE

MUTUAL ASSESSMENT ACCIDENT INSURANCE HOME COMPANIES

Art.	Art.
4794. Incorporation of.	4802. Commissioner to examine financial condition annually.
4795. Charter, requirements of.	4803. Statement to be filed, filing fees, etc.
4796. Application to accompany charter, and what it shall show.	4804. Certificate of membership; reserve fund.
4797. Complete and ready for business, when.	4805. Notices of assessment must show, what.
4798. What constitutes business of mutual assessment companies.	4806. May change name of beneficiary.
4799. What such companies may or may not do.	4807. Policy shall specify what; liability on.
4800. Notice of by-laws, how given.	4808. Charter forfeited for not complying with provisions of this chapter.
4801. Books and papers subject to inspection of members.	

Article 4794. Incorporation of.—Any number of persons, not less than five, may organize a corporation for the purpose of transacting the business of accident insurance, upon the co-operate or mutual assessment plan, without capital stock, by complying with the provisions of this chapter; provided, that all such persons shall be bona fide citizens and residents of the state of Texas. [Acts 1903, p. 174, sec. 1.]

Art. 4795. Charter, requirements of.—Such persons must sign and acknowledge, before an officer duly authorized to take acknowledgments of deeds, a written charter setting forth:

First. The name of such corporation, which name must not so resemble the name of any other company engaged in the insurance business in this state as to cause a probability of confusion.

Second. The number of its directors, and the names and residences of those who are to act as such for the first year.

Third. The location of its principal office, which must be within the state of Texas.

Fourth. It shall state that said corporation shall have no capital stock, and shall give the purpose for which same is organized, and the plan upon which it proposes to do business, by stating that its said business shall be conducted upon the assessment plan, without lodges.

Fifth. The term for which it is to exist, which shall not be for more than fifty years. [Id. sec. 2.]

Art. 4796. Application to accompany charter, what it shall show.—Said charter shall be presented to the attorney general of this state, accompanied by affidavits of all said incorporators, showing that they are bona fide citizens of this state, by bona fide applications for insurance in said company, from not less than two hundred applicants, for not less than one hundred thousand dollars insurance, by an affidavit by one of its incorporators, showing that each of said applicants has deposited with applicant at least eighty cents on each one thousand dollars insurance so applied for by him, and by a certificate of some solvent bank, showing that all such advance funds are deposited therein to be turned over to the treasurer of such corporation when organized. Said attorney general shall carefully examine all said instruments; and, if he finds the same are in conformity with the requirements of this chapter, he shall give his approval, and file the same with the commissioner of insurance and banking. [Id. sec. 3.]

Art. 4797. Complete and ready for business, when.—When said charter has been filed with the commissioner, with the approval of the attorney general, accompanied by a filing fee of twenty dollars, the commissioner shall record the said charter and certificate of the attorney general in a book kept for that purpose, and shall, upon the receipt of fee for certified copy of charter of one dollar, furnish a certified copy of such charter and certificate of the attorney general to the corporators, and shall return to said corporators all such applications for membership, also a certificate that such charter has been filed and recorded in his office, and that said company is duly incorporated under the laws of the state of Texas, and authorized to transact the business set forth in its charter, stating same; upon the filing and recording of which charter, said association shall become a body politic and corporate, with the right to transact its said business in this state and elsewhere, according to the provisions of this chapter, to hold property and to alienate same, to contract, sue and be sued under its corporate name, and by that name shall have succession, and may by its board of directors make by-laws not inconsistent with law, and shall carry on its business subject to the provisions of this chapter. [Id. sec. 3a.]

Art. 4798. What constitutes business of mutual assessment companies.—Any corporation which issues any certificate, policy or other evidence of interest to its members, whereby, upon his death or total disability, any money is to be paid by such corporation to such member, or beneficiary designated by him, which money is derived from voluntary contributions or from admission fees, dues and assessments, or any of them, collected, or to be collected, from the members thereof, and interest and accretions upon, and wherein the paying of such money is conditioned upon the same being realized in the manner aforesaid, and wherein the money so realized is applied to the uses and purposes of said corporation and the expense of the management and prosecution of its business, and which has no subordinate lodges or similar bodies, shall be deemed to be engaged in the business of mutual assessment accident insurance as contemplated by this chapter, and shall be subject only to the provisions of this chapter. [Id. sec. 4.]

Art. 4799. What such companies may or may not do.—Such corporations shall issue no certificate of stock, shall declare no dividends, shall pay no profits; and the salaries of all officers shall be designated in its

by-laws, and such by-laws shall provide for annual members' meetings, in which each member shall be entitled to vote, only in person, to the amount of insurance held. [Id. sec. 5.]

Art. 4800. Notice of by-laws, how given.—Every such corporation must, before the adoption of any by-laws or amendments thereto, cause the same to be mailed to all the members and directors of such association, together with the notice of the time and place when the same will be considered, and same shall be so mailed at least ten days before the time for such meeting; provided, that the provisions of this article shall not apply to by-laws adopted within sixty days after the incorporation of such company. [Id. sec. 6.]

Art. 4801. Books and papers subject to inspection of members.—All books and papers of such corporation shall, at all reasonable times, be open for examination by members and their representatives. [Id. sec. 7.]

Art. 4802. Commissioner to examine financial condition annually.—The commissioner of insurance and banking shall annually or as often as he deems it necessary, in person or by one or more examiners, commissioned in writing, visit each and every such corporation and examine its financial condition and its ability to meet its liabilities. He shall have free access to all books and papers of the corporation, or agents thereof, and shall have power to examine under oath the officers, agents and employés of such corporation. He may revoke or modify any certificate of authority issued by him, when any conditions prescribed by law for granting it no longer exist. The expense of every such examination shall be paid by the corporation so examined. [Id. sec. 7a.]

Art. 4803. Statement to be filed; filing fees, etc.—Every such corporation shall, on the first day of January of each year, or within sixty days thereafter, make and file with the commissioner of insurance and banking of this state a report of its affairs and operations during the year ending on the thirty-first day of December immediately preceding. Such report shall be upon blank forms to be provided by such commissioner, and shall be verified by the oath of the secretary of such corporation, and shall contain answers to the following questions:

1. Number of certificates or policies issued or members admitted during the year.
2. Amount of indemnity affected thereby.
3. Number of death losses.
4. Number of death losses paid.
5. Number of other losses.
6. Number of other losses paid.
7. The amount received from each assessment in each class.
8. Total amount paid for losses.
9. Number of death claims for which assessments have been made.
10. Number of death claims compromised or resisted, and brief statement of reasons.
11. Number of other claims for which assessment has been made.
12. Number of other claims compromised or resisted, and brief statement of the reasons.
13. Does company charge annual dues, and, if so, how much?
14. Total amount received and the disposition thereof.
15. Does the company use moneys received for payment of claims to pay expense of the company in whole or in part, and, if so, state the amount so used.
16. Give total amount of salaries paid officers, and name of each salaried officer and the amount paid him.
17. Does the company guarantee fixed amount to be paid, regardless of amounts realized from assessments, dues, admissions, fees, etc.
18. If so, state the amount guaranteed and the security therefor.

19. Has the company a reserve fund?
20. If so, how is it created and for what purpose, the amount thereof and in what form and how invested?
21. Has the company more than one class of members?
22. If so, how many and what, and give amount of indemnity in each.
23. Give number of members in each class.
24. State when the company was organized.
25. Number of policies or memberships lapsed during the year.
26. Number of policies of each class at beginning and at the end of the year.
27. All assets applicable to payment of insurance, other than reserve fund, and how invested.
28. Amount received from all sources for payment of losses, and the disposition thereof; and, in case such corporation fails or refuses to make such report in full within said time, its charter and franchise shall be forfeited, as provided in article 4808. The following fees shall be paid annually: Filing annual statement, ten dollars; certificate of authority to corporation, one dollar; each certified copy thereof, one dollar. [Id. sec. 8.]

Art. 4804. Certificate of membership; reserve funds.—Each certificate of membership, policy or other contract of insurance issued by such company shall bear on its face in red letters the following words: "The payment of the benefit herein provided for is conditioned upon its being collected by this company from assessments and other sources, as provided in its by-laws;" provided, that nothing in this chapter shall be construed to prevent the creation of a reserve fund by any such organization, which fund, or its accretions, or both, are to be used only for the payment of assessments or death losses, or benefits in case of physical disability, as provided in the by-laws of such corporation; provided, further, that at least sixty per cent of all amounts realized from assessments shall be used only for the payment of losses as they occur, or the balance thereof remaining after paying such losses transferred to such reserve fund; provided, further, that no part of such reserve fund shall be invested, except by order of the board of directors, in property or securities approved by such board. [Acts 1905, p. 311, sec. 9.]

Art. 4805. Notices of assessment must show what.—Each notice of assessments made by such corporation upon its members, or any of them, shall truly state the cause and purpose of such assessment, amount paid on the last claim paid, the cause of disability or death, the name of the member for whose death or disability such payment was made, the maximum face value of the certificate or policy, and, in case of disability, the maximum amount provided for in such policy or certificate for such disability, and, if not paid in full, the reason therefor. [Acts 1903, p. 174, sec. 10.]

Art. 4806. May change name of beneficiary.—Any member of such corporation shall have the right at any time, with the consent of such corporation, to change the beneficiary in his policy or certificate, without requiring the consent of such beneficiary; and such corporation shall give consent under such regulations as may be prescribed in its by-laws. [Id. sec. 11.]

Art. 4807. Policy shall specify what; liability on.—Every policy or certificate issued by any such corporation shall specify the sum of money which it promises to pay upon the contingency insured against, and the number of days after the receipt of satisfactory proof of the happening of such contingency at which such payment shall be made; and, upon the happening of such contingency, such corporation shall be liable for the payment of such amount in full at the time so specified, subject to such legal defenses as it may have against same; provided, that, if the

sum realized by it from assessments made in accordance with its by-laws to meet such payment, together with such other sums as its by-laws may provide shall be used for that purpose, shall be insufficient to pay such sum in full, for which it is so liable, then the payment of the full amount so realized shall discharge such corporation from all liability, by the reason of the happening of such contingency, and in that event such corporation shall be liable only for the amount so actually realized. [Id. sec. 12.]

Art. 4808. Charter forfeited for not complying with provisions of this chapter.—If any corporation not incorporated under this chapter shall engage in any branch of mutual assessment accident insurance, as herein defined, or if any corporation organized under the provisions of this chapter shall transact business in any manner except as herein authorized, such corporation shall, in either event, be subject to the forfeiture of its charter and franchises; and the attorney general of this state shall immediately institute suit to forfeit its charter and dissolve it. [Id. sec. 13.]

CHAPTER SIX

CO-OPERATIVE LIFE INSURANCE COMPANIES

Art.	Art.
4809. Articles of incorporation, commissioner shall examine.	4818. Medical examination.
4810. Officers, directors and policy holders; their powers and duties.	4819. Premiums, where to be paid and notice of.
4811. Investment and disposition of funds; not to hold real estate, except.	4820. Loan value; non-forfeitable after three years.
4812. Shall not borrow money or create debts, except.	4821. Annual certificates and statements.
4813. Policies to be valued by commissioner.	4822. Agents shall have certificates.
4814. Net premium to be computed.	4823. Annual examination and statement.
4815. May set aside reserve.	4824. Additional examination; may suspend certificates, receiver.
4816. Shall make apportionment of surplus.	4825. Taxes, how calculated; authorized to deposit securities.
4817. Transact business only in Texas and form of policy.	4826. General laws regulating deposits applicable to.

Article 4809. Articles of incorporation; commissioner shall examine.—Nine or more persons, residents of the state of Texas, may form a co-operative life insurance company for the purpose of insuring the lives of individuals on the mutual, level premium, legal reserve plan, subject to the conditions and limitations prescribed in this chapter, by executing and acknowledging before some officer authorized to take acknowledgments to conveyances of real estate, articles of incorporation for that purpose. Such articles shall set forth:

1. The name and residence of each of the incorporators.
2. The name of the proposed company, which shall contain the words, "Co-operative Life Insurance Company," as a part thereof, and which shall not be so similar to that of any other life insurance company or association transacting business in this state as to mislead the public.
3. The location of the principal office from which the business of the company is to be transacted.
4. The number of directors and the name and place of residence of each of those who are to serve until the first regular election of directors, as provided by this chapter.

Such articles of incorporation shall be filed with the commissioner of insurance and banking, who shall immediately submit them to the attorney general for his examination and approval as complying in all respects with the law. If the attorney general approve them, he shall so certify thereon in writing, and return them to the commissioner of insurance and banking, who shall file the same in his office and issue to

the company a certificate of authority, to which shall be attached a certified copy of the articles of incorporation, authorizing it to receive applications for insurance as provided in this chapter, and to collect premiums thereon, and to issue receipts therefor; which certificate shall expressly state that such company is not authorized to issue policies of insurance or transact any business other than that specifically authorized therein until it has received bona fide applications for insurance on the lives of at least two hundred individuals for not less than one thousand dollars each, which applications have been approved by a competent physician and on which the first annual premiums at adequate rates have been paid to the company, nor until these facts shall have been fully shown to the commissioner of insurance and banking, and he shall have issued to the company a certificate of authority to transact business as a co-operative life insurance company. If this showing is not made within six months after the date upon which such articles of incorporation are filed with the commissioner of insurance and banking, it shall be his duty to cancel the certificate of authority of such company to receive applications for insurance, and to notify each incorporator of such action. When the commissioner of insurance and banking shall be notified that any such company has complied with all the foregoing provisions of this article, he shall make, or cause to be made, at the expense of such company, an examination thereof; and, if he shall find that the law has been in all respects fully complied with, it shall be his duty to issue to it a certificate of authority to transact the business of a co-operative life insurance company, in accordance with the terms of this chapter. [Acts 1909, p. 285, sec. 1.]

Art. 4810. Officers, directors and policy holders, their powers and duties.—The business of a co-operative life insurance company shall be controlled and directed by a board of directors consisting of not less than five nor more than nine members, who shall be elected annually as provided in this chapter, those to serve until the first annual election to be named in the charter, and who shall hold office until their successors shall be elected and qualified, or until they shall be removed for improper practices. Such board of directors shall elect the officers of the company, which shall be a president, and such number of vice presidents as the by-laws may provide, a secretary, a treasurer, a medical director, and such other officers as the by-laws of the company may provide for, and shall fix the compensation of all such officers. The duties of all officers shall be prescribed by the by-laws. The by-laws governing the society until the date of its first annual meeting, as provided by this chapter, shall be adopted by the board of directors at their first meeting after the certificate of authority shall be issued authorizing the company to transact the business of a co-operative life insurance company. There shall be an annual meeting of all the policy holders of each co-operative life insurance company at the home office of such company on the second Tuesday in January after it shall have received a certificate of authority to transact the business of life insurance, and annually thereafter, at which the directors shall be elected for the succeeding year, and at which by-laws for the government of the company not inconsistent with the provisions of this chapter or with the laws of this state may be adopted, and at which the existing by-laws may be repealed or amended. At such annual meeting, every policy holder shall be entitled to one vote for each five hundred dollars of insurance held by him; and any policy holder may execute his proxy authorizing and entitling the holder to exercise his voting powers, unless such proxy shall be revoked previous to such annual meeting. The president, secretary and treasurer shall each give a bond for the protection of the company and its policy holders in amount and with securities to be approved by the commissioner of insurance and banking, condi-

tioned for the faithful performance of their respective duties. [Id. sec. 2.]

Art. 4811. Investment and disposition of funds; not to hold real estate, except.—Co-operative life insurance companies shall invest their funds only in bonds of the state of Texas, or of some county, city, town, school district, or other subdivision, organized, or which may hereafter be organized, and authorized, or which may hereafter be authorized, to issue bonds under the constitution and laws of this state, or in mortgages upon improved, unincumbered real estate, the title to which is valid, situate within the state of Texas, worth double the amount of the loan thereon exclusive of buildings, unless such buildings are insured in some fire insurance company authorized to transact business under the laws of this state, and the policy or policies transferred to the company, or in not more than one office building located in some city or town of this state in which the home office of such company is located, the actual value of which is not less than the amount invested therein. All moneys of any such company coming into the hands of any officer thereof or subject to his control, when not invested as prescribed in this article, shall be deposited in the name of such company in some bank or banks in this state which are subject to either state or national regulation and supervision, and which have been approved by the commissioner of insurance and banking as depositories therefor. No co-operative life insurance company shall purchase or hold real estate except the building in which it has its home office and the land upon which it stands, or such as it shall acquire in good faith through foreclosure sale or otherwise in satisfaction of debts contracted or loans made in the course of its dealings. [Id. sec. 3.]

Art. 4812. Shall not borrow money or create debts, except.—No co-operative life insurance company shall have the power to borrow money for any purpose other than the payment of death losses. No such company shall have the power to incur any debt on any account, except under policies issued by it or for money borrowed to pay death losses, for which any portion of its assets over and above that which may represent or be derived from the expense loading of the premiums collected by it, shall in any event be subject to execution upon a judgment therefor. [Id. sec. 4.]

Art. 4813. Policies to be valued by commissioner.—The commissioner of insurance and banking shall annually make valuations of all outstanding policies of co-operative life insurance companies as of December 31 of each year, in accordance with the one year preliminary term method based upon the American Experience Table of Mortality, and three and one-half per cent interest per annum. [Id. sec. 5.]

Art. 4814. Net premiums to be computed.—The net premiums upon all policies issued by any such company shall be computed in accordance with the provisions of this article, and no portion of such net premium collected upon any policy, and no portion of the gross premium collected upon any policy, except the expense loading, shall ever be used or applied for the payment of any expenses of the company of any kind or character, or for any other purpose than the payment of death losses, surrender values, or lawful dividends to policy holders, loans to policy holders, or for the purposes of such investments of the company as are prescribed in this chapter. [Id.]

Art. 4815. May set aside reserve.—Every co-operative life insurance company may maintain and set aside, before declaring any dividends to policy holders, in addition to an amount equal to the net value of its policies, computed as required by this chapter, a contingency reserve not exceeding the following respective percentage of said net values, to-wit: When said net values are less than one hundred thou-

sand dollars, twenty per centum thereof, or the sum of ten thousand dollars, whichever is the greater; when said net values are greater than one hundred thousand dollars, the percentage thereof measuring the contingency reserve shall decrease one-half of one per cent for each one hundred thousand dollars of said net values up to one million dollars; and, thereafter, one-half of one per centum for each additional one million dollars; provided, that as the net values of said policies increase and the maximum percentage measuring the contingency reserve decreases, such company may maintain the contingency reserve already accumulated hereunder, although for the time being it may exceed the maximum percentage herein prescribed, but may not add to the contingency reserve when the addition will bring it beyond the maximum percentage. [Id. sec. 6.]

Art. 4816. Shall make apportionment of surplus.—Every co-operative life insurance company organized under this chapter shall make an annual apportionment and accounting of divisible surplus to each policy holder after the end of the second policy year on all policies issued; and each such policy holder shall be entitled to and credited with or paid, in a manner hereafter provided, such a portion of the entire divisible surplus as has been contributed thereto by his policy. Upon the thirty-first day of December of each year, or as soon thereafter as may be practicable, every such company shall well and truly ascertain the surplus earned by it during such year; and, after setting aside from such surplus the contingency reserve provided in this chapter, it shall apportion to its policies upon which all premiums due and payable for the first two years thereof have been paid, the proportion of the remainder of such surplus which has been contributed by each such policy, and shall immediately submit a detailed report of such apportionment under the oath of its president or secretary to the commissioner of insurance and banking. If such commissioner shall find such apportionment to be equitable and just to the policy holders and to be in accordance with the provisions of this chapter, he shall approve the same, and it shall become effective; and, if he shall not approve such apportionment, he shall make such changes therein as he shall deem equitable and just and necessary to make the same comply with the provisions of this chapter, and shall certify such changes to such company, whereupon such apportionment as changed by the commissioner shall become effective. The dividends declared as aforesaid shall be applied toward the payment of any premium or premiums upon such policy which shall come due more than thirty days after such apportionment shall become effective. [Id. sec. 7.]

Art. 4817. Transact business only in Texas; form of policy.—Co-operative life insurance companies are authorized to transact business only within the state of Texas, and shall issue no policies other than whole life or twenty-payment life policies on the annual dividend plan; and the forms of all policies issued by any such company shall be prescribed by the commissioner of insurance and banking; and all such policies shall have plainly printed both on the face and the reverse side thereof the words, "The form of this policy is prescribed by the commissioner of insurance and banking of the state of Texas;" and it shall be the duty of the commissioner to revoke the certificate of authority of any company which shall issue any policy except upon such form so prescribed. All such policies may provide for not more than one year preliminary term insurance. No such company shall issue any policy or policies by which it shall be bound for more than five thousand dollars upon any one life at any time when the amount of its total insurance in force is less than ten million dollars. [Id. sec. 8.]

Art. 4818. Medical examination.—No co-operative life insurance company shall enter into any contract of insurance upon the life of any

person without having previously made, or caused to be made, a detailed medical examination, prescribed by its medical director and approved by its board of directors, of the insured by a duly qualified and licensed medical practitioner, and without his certificate that the insured was in sound health at the date of examination. [Id. sec. 9.]

Art. 4819. Premiums, when to be paid, and notice of.—The policies issued by a co-operative life insurance company may provide that the premiums thereon may be paid annually, semi-annually, quarterly or monthly; and, in the event that such premiums are payable other than annually, no deduction shall be made from the amounts due on any policy in the event that the death of the policy holder shall occur prior to the completion of a full policy year. It shall be the duty of the company to mail from its home office to each policy holder a notice of the date upon which each premium is to become due at least thirty days prior to such date if the premium is payable annually, semi-annually, or quarterly, and at least ten days prior to such date if the same is payable monthly; provided, that local agents may be authorized and empowered by the board of directors to collect premiums and to give the notice required by this article. [Id. sec. 10.]

Art. 4820. Loan value; non-forfeitable after three years.—After three full years premiums have been paid upon any policy in a co-operative life insurance company, the owner thereof shall be entitled, on proper assignment of such policy and on the sole security thereof, to borrow from the company a sum not greater than the reserve value thereof, and apply the same in payment of any premiums due or to become due upon such policy. In the event of default in the payment of any premium after three full years premiums have been paid upon any policy, the owner, within one month after any default, may elect to accept the value of such policy in cash, or to have the insurance continued in force from the date of default, without future participation and without the right to loans, for its face amount less any indebtedness to the company thereon, or to purchase non-participating paid-up insurance, payable at the same time and on the same conditions as such policy. The cash value will be the reserve at the date of default computed in accordance with the provisions of this chapter, less such surrender charge as may be provided in the policy, not exceeding two and one-half per centum of the amount insured thereby and less any existing indebtedness to the company on such policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The terms for which the insurance will be continued, or the amount of the paid-up policy, will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the American Experience Mortality Table and interest at the rate of three and one-half per cent per annum. If the owner shall not, within one month from such default, surrender the policy to the company at its home office for a cash surrender value or paid-up insurance, the company shall continue the insurance as above provided. [Id. sec. 11.]

Art. 4821. Annual certificates and statements.—The original certificate of authority to transact the business of a co-operative life insurance company, issued to any such company by the commissioner of insurance and banking, shall expire on March 1 next succeeding the date of its issuance. Each such company is required to render annually, under oath by its president or a vice-president and its secretary or treasurer, and file not later than February 15 of each year, in the office of the commissioner of insurance and banking, a statement, in such form and upon such blanks as may be prescribed by the commissioner of insurance and banking, accompanied by a filing fee of ten dollars, showing the condition of the company on the thirty-first day of December

next preceding, which shall include a statement in detail showing the class and character of its assets and liabilities on said date, the amount and character of business transacted, moneys received and disbursed during the preceding calendar year and the number and amount of its policies in force on said date, and such other facts as may be required by the commissioner of insurance and banking. When such annual statement is filed with the commissioner of insurance and banking, upon receipt of a fee of one dollar, if he is satisfied that the company has in all respects complied with the laws of the state, he shall issue a certificate of authority to such company for the year beginning March 1 after the filing of such statement. [Id. sec. 12.]

Art. 4822. Agents shall have certificates.—No agent or other person shall solicit or receive applications for insurance in a co-operative life insurance company without a certificate of authority from the commissioner of insurance and banking, which shall expire on March 1 next after the date of its issuance. Such certificates of authority shall not be issued by such commissioner, except upon application therefor, signed by the president or secretary of the company, which application shall state that the contract between the company and such agent has been made in writing, and that a true copy of such contract is attached to and made a part of such application, and that such contract fully shows the entire compensation that such agent is to receive, directly or indirectly, on account of any services to be rendered by him for such company; and no such certificate of authority shall be issued by such commissioner, unless it shall be shown that the compensation to be paid such agent, together with all other expenses of any sort likely to be incurred in connection with or attributable to the obtaining of new insurance through such agent, shall not exceed eighty per centum of the expense loading in the premiums to be collected therefor. [Id. sec. 13.]

Art. 4823. Annual examination and statement.—It shall be the duty of the commissioner of insurance and banking to have made, at least once in each calendar year, a thorough and full examination of the affairs of each co-operative life insurance company, the report of which examination shall be made to such commissioner under oath, which shall be accompanied by a list of all policy holders as shown by the books of the company, together with the postoffice address of each; and it shall be the duty of the commissioner of insurance and banking, if he shall approve the report of such examination, after having given the officers of the company an opportunity to be heard, to mail a printed copy of such report to each such policy holder. The expense of each such examination and of mailing the copies of such reports to the policy holders shall be borne by the company examined. [Id. sec. 14.]

Art. 4824. Additional examination; may suspend certificates; receiver.—If at any time the commissioner of insurance and banking deems it necessary to make an additional examination of any such company, he may do so; and, if as a result of any such examination or from other information, he shall have the opinion that the operations of the company are unsafe or hazardous to the policy holders' interests, or in violation of any law of this state, he shall suspend its certificate of authority, and direct its officers to call a special meeting of its policy holders and direct them to cease the further issuance of policies until such meeting is held. At such meeting of the policy holders, the commissioner of insurance and banking shall present the facts for such action as the policy holders may deem advisable. If, in the opinion of the commissioner of insurance and banking, such action of the policy holders when taken will not fully protect the interests of all policy holders, he shall apply to the district court of the county in which the home office of the company is situated, or to the judge thereof, in vacation, for the appointment of a receiver to take temporary charge of the business and

affairs of such company, who shall receive the compensation allowed by law to state bank examiners, and who shall have all power and authority of the board of directors to manage and control the business and affairs of such company, subject to the orders of the district court or judge in vacation, until the reasons for his appointment shall, in the opinion of the judge appointing him, have been removed. At any time when the liabilities of any such company, computing its reserve liability upon the American Experience Table of Mortality and three and one-half per cent interest per annum, shall be in excess of its assets, the company shall cease the issuance of new policies until the impairment in its reserves shall be made good. Whenever the liabilities of any such company, computing its reserve liability upon the American Experience Table of Mortality and four and one-half per cent per annum, exceed its assets, the commissioner of insurance and banking may request the attorney general to file suit in the name of the state in the district court of the county in which such company is located for the appointment of a receiver to wind up its affairs, and such action may be maintained. In any such action, such district court, or judge thereof, in vacation, shall have the power, if in his opinion the interests of the policy holders of such company require it, to enter an order providing for the re-insurance of all outstanding risks of such company in some other life insurance company authorized to do business in this state upon such terms and conditions as may be approved by the commissioner of insurance and banking, and by such court, or the judge thereof, in vacation; and such court or judge may for that purpose direct the conveyance of the entire assets of any such company, or of any portion thereof, to such re-insuring company in consideration of such re-insurance. [Id. sec. 15.]

Art. 4825. Taxes, how calculated; authorized to deposit securities.—For the purposes of state, county and city taxation, the amount of the reserve and contingency reserve of all co-operative life insurance companies shall be treated as debts due by them to their policy holders; and the total value of their property for such purposes shall be ascertained by deducting from the total amount of their gross assets the amount of such reserves and contingency reserves. [Id. sec. 16.]

Art. 4826. General law as to deposits applicable to.—The provisions of article 4749 to article 4750, inclusive, in chapter 2 of this title, relating to the deposit of securities by insurance companies, shall likewise apply to and govern co-operative life insurance companies organized under the provisions of this chapter. [Acts 1909, 2 S. S. p. 448, sec. 8.]

CHAPTER SEVEN

FRATERNAL BENEFIT SOCIETIES

Art.	Art.
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<p>Art. 4853. Examination of foreign societies. 4853a. No adverse publications. 4854. Revocation of license. 4855. Examination of certain societies. 4856. Taxation. 4857, 4858. [Repealed.]</p>	<p>Art. 4859. Provisions not to apply to local mutual aid associations; annual statement by such associations; etc. 4859a. Penalties. 4860, 4861. [Repealed.]</p>
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[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 4827. Fraternal benefit societies defined.—Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 [Art. 4832] hereof, is hereby declared to be a fraternal benefit society. [Acts 1913, p. 220, sec. 1.]

Note.—Acts 1913, p. 220, sec. 33, repeals chapter 36 of the Acts of the First Called Session and chapter 22, Acts of Second Called Session, of the 31st Legislature, and chapter 92, Acts of the Regular Session of the 32d Legislature, and all other laws in conflict; and thus supersedes Arts. 4827-4861, Rev. St. 1911.

Art. 4828. Lodge system defined.—Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with its constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system. [Id. sec. 2.]

Art. 4829. Representative form of government defined.—Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives, elected either by the members or by delegates elected, directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; provided, further, that the meetings of the supreme or governing body, and the election of officers, representatives or delegates, shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. [Id. sec. 3.]

Art. 4830. Exemptions.—Except as herein provided, such societies shall be governed by this Act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. [Id. sec. 4.]

Time for bringing action.—Agreement shortening time for bringing suit, see notes under Art. 5713.

Effect of incorporation under this chapter.—A corporation created as provided for in this article is expressly relieved from the provisions of Title 71 regulating other insurance companies. *State v. Burgess* (Civ. App.) 107 S. W. 367.

Art. 4831. Benefits.—Every society transacting business under this Act shall provide for the payment of death benefits and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age; provided the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently dis-

abled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this Act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificates may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contribution, and to contracts affected by such readjustment.

Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and five per cent. interest may grant to its members extended and paid-up protection, or such withdrawal equities as its Constitution and laws may provide; provided, that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. [Id. sec. 5.]

Art. 4832. Beneficiaries.—The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes. [Id. sec. 6.]

Beneficiaries in general.—A person having no insurable interest in the life of one insured cannot have a beneficiary interest in a policy of insurance on such life. *Price v. Lodge K. of H.*, 68 T. 361, 4 S. W. 633; *K. & L. of Honor v. Burke*, 4 App. C. C. § 165, 15 S. W. 45.

A beneficiary of applicant for life insurance held entitled to recover after his death. *Pledger v. Sovereign Camp Woodmen of the World*, 17 C. A. 13, 42 S. W. 653.

Laws of a society construed, and held that, where a member never designated a beneficiary, his mortuary fund reverted to the society, though he left a widow. *Grand Lodge A. O. U. W. v. Cleghorn* (Civ. App.) 42 S. W. 1043.

One voluntarily paying dues of a member of a mutual benefit society held to have no claim on the mortuary fund. *Id.*

Evidence held sufficient to support a finding that beneficiaries named in a benefit certificate were dependent on deceased. *Grand Lodge A. O. U. W. v. Bollman*, 22 C. A. 106, 53 S. W. 829.

Where the constitution of a mutual benefit insurance society provided that, on death of beneficiary, the sum specified should go to the next living relative in the order of wife, children, parents and brothers, the wife of a deceased member held entitled to the sum specified in the policy in preference to his brothers. *Mattison v. Sovereign Camp, Woodmen of the World*, 25 C. A. 214, 60 S. W. 897.

A child of insured held not entitled to recover on a life certificate payable to the wife of insured, without showing that the insured died before the wife. *Screwmen's Benev. Ass'n v. Whitridge*, 95 T. 539, 68 S. W. 501.

Under the provisions of a benefit certificate, held, that the relatives of the insured were entitled to the benefit, in the absence of proof that the named beneficiary survived the insured. *Males v. Sovereign Camp Woodmen of the World*, 30 C. A. 184, 70 S. W. 108.

Benefit fund payable to a beneficiary who died before the member held to lapse to the society, and not recoverable by the member's administrator. *Home Circle Soc. of Gollad and Refugio Counties v. Hanley*, 33 C. A. 547, 86 S. W. 641.

Under the laws of a mutual benefit insurance society, member held only entitled to appoint a beneficiary among his family and dependents. *Coleman v. Anderson*, 98 T. 570, 86 S. W. 730.

Second wife of insured held entitled to proceeds of certificate in mutual benefit association on death of first wife and failure of insured to designate new beneficiary. *Harris v. Harris*, 44 C. A. 152, 97 S. W. 504.

Under the constitution of a mutual benefit society a member held entitled to designate an illegitimate daughter as his beneficiary. *Stahl v. Grand Lodge A. O. U. W.*, 44 C. A. 203, 98 S. W. 643.

Where a benefit certificate provided for the payment of a sum for a monument at insured's grave, but there was no express recital as to whom it should be paid, held, that it should be paid to insured's wife. *Woodmen of the World v. Torrence* (Civ. App.) 103 S. W. 652.

The classes named in this law, in the order named are entitled to the benefits of the certificate, when there is no designation of a beneficiary by the insured. If there is no one of the classes named capable of taking the benefits, the same shall pass as provided by the laws and regulations of the association. But one who has no insurable interest cannot take the benefits of the certificate. *Grand Lodge, Colored K. of P. v. Mackey* (Civ. App.) 104 S. W. 907.

By the terms of this law blood relatives can become lawful beneficiaries in certificates issued by the W. O. W., but where the applicant stated in the application that the beneficiary was his cousin, when in fact she was not, the certificate was void, by reason of fraud in procuring same. *Gray v. Sovereign Camp, W. O. W.*, 47 C. A. 609, 106 S. W. 177.

Where an insurance certificate was payable to insured in case of total disability or to plaintiff in case of death, if it matured in insured's lifetime, plaintiff could not recover thereon after insured's death. *Brotherhood of Ry. Trainmen v. Dee*, 101 T. 597, 111 S. W. 396.

Vested right of beneficiary.—The beneficiary named in the certificate of a member of a mutual benefit insurance society held to have no vested property interest in the benefit during the life of the member. *Coleman v. Anderson*, 98 T. 570, 86 S. W. 730.

Change of beneficiary.—Provisions as to change of beneficiaries and prohibiting change by will held reasonable. *Bollman v. Supreme Lodge Knights of Honor* (Civ. App.) 53 S. W. 722.

Change of beneficiary by insured in benefit certificate held binding. *Schmitt v. New Braunfelser Unterstuetzungs Verein*, 32 C. A. 11, 73 S. W. 568.

Under the constitution of a mutual benefit society a member desiring to change the beneficiary held required to actually furnish the sovereign clerk with the request therefor and certain proof. *Flowers v. Sovereign Camp, Woodmen of the World*, 40 C. A. 593, 90 S. W. 526.

The method provided in the constitution of a mutual benefit society for a change of beneficiary held exclusive. *Id.*

A holder of certificate in a mutual benefit society held to fail to comply with the constitution relating to change of beneficiary. *Id.*

A defective application for a change of beneficiary in a benefit certificate could not be regarded as an assignment of the certificate to the proposed beneficiary. *Id.*

Attempted change of beneficiary of benefit certificate, not made in compliance with the constitution and by-laws of the association, held ineffectual. *Gray v. Sovereign Camp Woodmen of the World*, 47 C. A. 609, 106 S. W. 176.

A holder of a mutual benefit certificate held entitled to change the beneficiary, notwithstanding his agreement with his wife and payments of assessments by her and by the lodge. *Eatman v. Eatman* (Civ. App.) 135 S. W. 165.

Art. 4833. Qualifications for membership.—Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society; provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefore. Nothing herein contained shall prevent such society from accepting general or social members. [*Id.* sec. 7.]

Estoppel to deny membership.—See notes at end of this chapter.

Sufficiency of medical examination.—Medical examination of an applicant for membership in a fraternal order held sufficient, though not by the official examiner. *Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 32 C. A. 603, 75 S. W. 844.

Reinstatement of suspended member.—Suspended member held not entitled to reinstatement on paying one assessment, where another remained unpaid, though he had no notice of the latter. *Sovereign Camp, Woodmen of the World, v. Rothschild*, 15 C. A. 463, 40 S. W. 553.

Expulsion of insane member.—Where a member of a fraternal insurance company was expelled because of excessive drinking, in accordance with the policy, it is immaterial that he was insane at the time of his expulsion. *Kempe v. Woodmen of the World* (Civ. App.) 44 S. W. 688.

Art. 4834. Certificate.—Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation (or, if a voluntary association, the articles of association), the Constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the

member, and copies of the same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, a constitution or laws duly made or enacted subsequent to the issuance of the benefit certificates shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. [Id. sec. 8.]

See note under Art. 4827.

Adoption of Art. 4947.—Rev. St. 1895, art. 3096aa, as amended by Acts 1903, p. 94, c. 69, declaring that any provision in an insurance policy contracted for in Texas that the answers or statements in the application, if false, shall render the policy void or voidable, shall not constitute a defense unless shown to have been material to the risk and that whether it was material should be a question of fact to be determined by the court or jury trying the case, was not adopted by this article, and so left the question of materiality one of law for the court upon the jury's findings or upon the uncontroverted facts. Supreme Ruling of Fraternal Mystic Circle v. Hansen (Civ. App.) 153 S. W. 351.

Construction in general.—A clause in a certificate issued by a benefit association held to apply to a case of disability only. Roth v. Travelers' Protective Ass'n of America, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

A clause in the constitution of a benefit association which is susceptible of two constructions must be interpreted in favor of the beneficiary. Id.

The language of an insurance policy must be construed according to the intent of the parties, derived from the words used, the subject-matter to which they relate, and the matters naturally incident thereto. Daniel v. Modern Woodmen of America, 53 C. A. 570, 118 S. W. 211.

An insurance policy will be strictly construed against insurer and liberally in favor of insured, and, where the words thereof admit of two constructions, the one most favorable to insured will be adopted. Id.

Nature of certificate.—Benefit certificates are insurance contracts. Am. Leg. of Honor v. Larmour, 81 T. 71, 16 S. W. 633; Insurance Co. v. Hanna, 81 T. 487, 17 S. W. 35.

A benefit certificate issued by a fraternal benefit order, which is in effect a policy of life insurance, is, even before the death of the insured, a chose in action. Coleman v. Anderson (Civ. App.) 82 S. W. 1057.

To whom payable.—An endowment certificate payable to the assured during his lifetime, and also payable upon his death, being subject to assignment and disposition by will, is payable to his administrator and becomes assets in his hands. White v. Smith, 2 App. C. C. §§ 399, 401. An application to a benevolent association directed that the policy should be payable to the four children of the applicant. The certificate recited that the sum due at his death should be paid to his children. Held, that the right to the benefit must be determined by the language of the certificate, and that an after-born child was entitled to share in the benefit equally with the four children named in the application. Thomas v. Leake, 67 T. 469, 3 S. W. 703.

A benefit certificate payable to the wife of the assured was renewed in the name of L., "creditor," who paid the past and future assessments and charged them to the assured. Held, that on the death of the assured L. was entitled to the proceeds to the extent of such payments by him, and that the surplus belonged to the widow of the assured, although he was indebted to L. on account of other claims, acquired after the renewal. Levy v. Taylor, 66 T. 652, 1 S. W. 900.

A beneficiary certificate to one who has no insurable interest in the life of the insured is not void except as to the beneficiary and is payable to the heirs of the assured. Schonfield v. Turner, 75 T. 324, 12 S. W. 626, 7 L. R. A. 189; K. & L. of Honor v. Burke, 4 App. C. C. § 165, 15 S. W. 45.

If a member of a mutual benefit insurance society does not designate a beneficiary his mortuary fund reverts to the society, even though he left a widow. Grand Lodge A. O. U. W. v. Cleghorn, 20 C. A. 134, 48 S. W. 750.

Omission of beneficiaries' names.—That beneficiaries' names were not inserted in a policy until after the death of assured, held no defense to the policy, they having been omitted by the insurer's fault. International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Civ. App.) 48 S. W. 1108.

Delivery and acceptance of certificate.—Evidence held sufficient to establish the liability of a benefit association on a certificate issued, but not delivered, before insured's death. Home Forum Ben. Order v. Jones, 20 C. A. 68, 48 S. W. 219.

Facts held sufficient to establish the liability of a benefit association on a certificate delivered while the insured was very ill of a disease of which she died the next day. Home Forum Ben. Order v. Varnado (Civ. App.) 55 S. W. 364.

Where an applicant is accepted by a mutual benefit society, but his certificate, through the mistake of the society, is not delivered, and the applicant has complied with all the requirements of the society, the society is liable, although the applicant dies before delivery of the certificate. Sovereign Camp, Woodmen of the World, v. Dees, 45 C. A. 318, 100 S. W. 366.

Receipt of benefit certificate by clerk of local camp of beneficiary association held not a delivery to the insured. Modern Woodmen of America v. Owens (Civ. App.) 130 S. W. 858.

Clerk of local camp of benefit association held not only justified in not delivering certificate, but to have no authority to deliver it when applicant was sick. Id.

Where delivery of a mutual benefit certificate is essential to completion of the contract, no delay caused by acts of the insurer can take the place of delivery. *Id.*

The delivery of a benefit certificate to the beneficiary after the death of the applicant did not amount to a delivery to him so as to bind the association. *Id.*

A provision of the by-laws of a fraternal insurance order as to the delivery of the certificate to the member while in good health held to refer only to the original certificate. *Eatman v. Eatman* (Civ. App.) 135 S. W. 165.

Acceptance by a member of an insurance order of a new certificate changing the beneficiary held not necessary to the taking effect of the new certificate. *Id.*

Delivery of a benefit certificate by the head officers of the order to the clerk of the local camp held not a delivery to the member. *McWilliams v. Modern Woodmen of America* (Civ. App.) 142 S. W. 641.

Where a certificate of membership in a mutual benefit society was never delivered to decedent, and he was never adopted as a member in accordance with the by-laws, he was not a member, and there could be no recovery of benefits in case of his death. *Id.*

Assignment of certificate.—An endowment certificate payable to the assured during his lifetime, and also payable upon his death, is assignable and becomes assets in the hands of the administrator. *White v. Smith*, 2 App. C. C. §§ 399, 401.

A party having no insurable interest in the life of another cannot receive an assignment of a policy of insurance issued upon the life of the latter upon an agreement merely to pay the premiums or assessments necessary to keep the policy in force. Such an assignment is in contravention of public policy, and the fact that the rules of the company may permit the transfer cannot validate it. *Price v. Knights of Honor*, 68 T. 361, 4 S. W. 633.

Where the constitution of an insurance association provided that the benefit should be paid to members of the insured's family, his heirs, or those dependent on him for support, an assignment of a certificate to one who was not related to the insured by blood or otherwise held void. *Williams v. Fletcher*, 26 C. A. 85, 62 S. W. 1082.

Transaction between beneficiary in life policy and other persons held to have amounted to a binding contract, whereby the others were entitled to the proceeds of the policy, irrespective of whether the assignment had complied with the laws of the insurer. *Kendall v. Morrison*, 33 C. A. 345, 77 S. W. 31.

Rules of a mutual benefit society, prohibiting assignment of members' certificates, held unavailable as between a beneficiary and a third person paying assessments under an agreement for reimbursement. *Coleman v. Anderson*, 98 T. 570, 86 S. W. 730.

In an action for conversion of a portion of the proceeds of a benefit certificate, a judgment setting aside an assignment thereof by insured's widow on the theory that she had been overreached in the transaction as a matter of law held error. *Roberts v. Roberts* (Civ. App.) 99 S. W. 886.

Pledge of certificate.—See, also, notes under Art. 583.

Mere contingent interest of beneficiary of fraternal benefit certificate held sufficient to support a pledge thereof as collateral security for sums advanced by third persons, so that possession of the certificate could not be recovered without a repayment of the amount advanced. *Coleman v. Anderson* (Civ. App.) 82 S. W. 1057.

Forfeiture of certificate or membership.—Policy providing for forfeiture on breach of any of the conditions construed. *Smith v. Covenant Mut. Ben. Ass'n*, 16 C. A. 593, 43 S. W. 819.

Provision of constitution of association of locomotive engineers held not to authorize expulsion of member for going on the witness stand and testifying against a railroad. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 C. A. 176, 91 S. W. 834.

Publication by fraternal association of notice of expulsion of member held legal or illegal in accordance with the legality or illegality of the expulsion. *Id.*

The association in expelling member must act in good faith and in pursuance of by-laws not violative of the laws of the land. *Id.*

Held, that a beneficial association had no right to expel a member for testifying in a cause. *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 108 S. W. 453.

That a member of a railroad brotherhood testified against a railroad company and his brother members held not ground for his expulsion. *St. Louis & S. W. Ry. Co. of Texas v. Thompson*, 102 T. 89, 113 S. W. 144, 19' Ann. Cas. 1250.

Language of an insurance policy fairly susceptible of an interpretation which will prevent a forfeiture will be so construed. *Daniel v. Modern Woodmen of America*, 53 C. A. 570, 118 S. W. 211.

Where a member of a benefit association died pending rehearing on appeal after the affirmance of a conviction for manslaughter, his certificate was not forfeited under a provision forfeiture if the member should be convicted of a felony. *Woodmen of the World v. Dodd* (Civ. App.) 134 S. W. 254.

A member in a fraternal beneficiary association held not to have forfeited his rights against the insurer until notice of his delinquency had been given in the manner provided by the constitution of the insurer; and no other will suffice, in the absence of a custom or contract binding upon the member to receive notice in a different manner. *Haywood v. Grand Lodge of Texas, K. P.* (Civ. App.) 138 S. W. 1194.

A mutual benefit certificate held rendered void by insured engaging in the sale of malt liquors. *Modern Woodmen of America v. Lynch* (Civ. App.) 141 S. W. 1055.

Where a member of a fraternal organization was not in good standing at the time of his death in the only subordinate temple to which he belonged, or could belong, there could be no recovery on the certificate. *International Order of Twelve Knights and Daughters of Tabor v. Wilson* (Civ. App.) 151 S. W. 320.

False representations, in a petition for reinstatement in a mutual benefit association, will avoid the insurance when material to the risk, though ignorantly made, especially where their truth is expressly warranted. *Supreme Ruling of Fraternal Mystic Circle v. Hansen* (Civ. App.) 153 S. W. 351.

— **Nonpayment of dues or assessments.**—Payment of dues or assessments in general, see Art. 4835.

A member of a mutual benefit society not having complied with its constitution and by-laws on the suspension of his local camp, and being in arrears for assessments at the time of his death, no recovery could be had on his certificate. *Sovereign Camp Woodmen of the World v. Hicks*, 37 C. A. 424, 84 S. W. 425.

A member of a mutual benefit society held not subject to forfeiture of his certificate by a failure to pay an assessment levied for a particular month, which he was unable to pay by reason of the absence of the clerk of his local camp, to whom the assessment was payable. *Id.*

By-laws of a mutual benefit insurance society, made a part of a benefit certificate, held to authorize forfeiture, without further act on the part of the society, on the member's failure to pay dues as required by the society's constitution and by-laws. *Id.*

Nonpayment of monthly dues held not to operate as a forfeiture of a certificate issued by a fraternal benefit society. *Brotherhood of Railway Trainmen v. Dee* (Civ. App.) 108 S. W. 492.

Provision of an accident insurance association held to deny recovery by a beneficiary of a member who was in default when he sustained the injury resulting in his death, though at his death he had been reinstated. *Travelers' Protective Ass'n of America v. Roth* (Civ. App.) 108 S. W. 1039.

Under a rule of a mutual benefit association, failure of a local lodge to pay insured's dues while ill, in the absence of notice of such illness required by the lodge's rule, held not to relieve insured from a forfeiture for nonpayment of dues. *Brotherhood of Ry. Trainmen v. Dee*, 101 T. 597, 111 S. W. 396.

A mutual benefit certificate held forfeited for failure to pay assessments. *United Benev. Ass'n v. Cass*, 54 C. A. 628, 119 S. W. 123.

A mutual benefit certificate held forfeited for nonpayment of an assessment. *Fletcher v. Supreme Lodge Knights and Ladies of Honor* (Civ. App.) 135 S. W. 201.

A provision in a policy for forfeiture for nonpayment of assessments, being for the benefit of the insurer, is to be strictly construed. *Haywood v. Grand Lodge of Texas*, K. P. (Civ. App.) 138 S. W. 1194.

Holder of policy in a mutual benefit association, by failure to pay assessments within 15 days after notice, as required by by-laws on face of policy, declaring forfeit for non-compliance, forfeited his rights. *Hawkins v. Lone Star Ins. Union* (Civ. App.) 146 S. W. 1041.

Policy in mutual benefit association, held notice to the insured of conditions as to payment necessary to keep the policy in force. *Id.*

A member of a fraternal beneficiary association who paid benefits in advance to his local camp, and the camp was suspended, was entitled to receive benefits on account of disability, and, where they more than equaled assessments levied, his certificate could not be forfeited for nonpayment of assessments. *Knights of the Modern Maccabees v. Mayfield* (Civ. App.) 147 S. W. 675.

The constitution and by-laws of an association providing that a member cannot be suspended for nonpayment of dues while sick, it is immaterial that during her sickness she had stated that she knew she was in arrears, that she did not intend to pay any dues, and did not wish to keep up the insurance. *Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve v. Counts* (Civ. App.) 157 S. W. 1180.

— **False statements in application or examination.**—Where an applicant for a life certificate states that he has never used narcotics, the association cannot defeat liability thereon by showing a use of narcotics which did not amount to a custom or habit. *National Fraternity v. Karnes*, 24 C. A. 607, 60 S. W. 576.

Statements by insured in his application for a life certificate held to be warranties which, if false, would avoid the policy, though they were made through mistake and in good faith. *Id.*

Assured's false statement that he had not been successfully vaccinated held not to be a representation on the faith of which the policy was issued, so as to render the same void. *Sovereign Camp Woodmen of the World v. Gray*, 26 C. A. 457, 64 S. W. 801.

Evidence held to sustain a finding that deceased's answers in his application for insurance as to the state of his health were true. *Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 32 C. A. 603, 75 S. W. 844.

The applicant's answer, that he had never had any serious illness held a mere expression of opinion, which will not avoid the policy. *Id.*

Answers of insured to questions in a medical examination, accompanying his application for a policy, held warranties. *Brock v. United Moderns*, 36 C. A. 12, 81 S. W. 340.

Where insured warranted that he had not been under the care of a physician within five years prior to applying for a policy, which statement was untrue, the policy was void. *Id.*

Questions asked of insured in the application for a benefit certificate held to call for the extent of his use of intoxicants. *Endowment Rank Supreme Lodge K. P. v. Townsend*, 36 C. A. 651, 83 S. W. 220.

In an action on a certificate issued on the life of a daughter, by application of the father, held, that his false statement that she was in good health would not necessarily defeat recovery on the certificate. *Home Circle Soc. No. 2 v. Shelton* (Civ. App.) 85 S. W. 320.

A misstatement concerning medical attendance in an application for life insurance held not material to the risk as a matter of law; its materiality depending on the surrounding circumstances. *Modern Order of Pratorians v. Hollmig* (Civ. App.) 103 S. W. 474.

Breach of warranty consisting of a misstatement that insured was not pregnant in an application for insurance held fatal to a recovery, though unintentional, and though she died from other causes. *Supreme Lodge Knights & Ladies of Honor v. Payne*, 101 T. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277.

Statements of the applicant in an application for insurance held statements of opinion merely, and, where the applicant in good faith believed them to be true, their falsity did not vitiate the policy notwithstanding its stipulations. *Daniel v. Modern Woodmen of America*, 53 C. A. 570, 118 S. W. 211.

Statements of applicant for benefit certificate as to his health held true in the sense intended by the parties. *Modern Woodmen of America v. Owens* (Civ. App.) 130 S. W. 858.

Statement of applicant for benefit certificate that applicant did not have typhoid fever is a continuing warranty up to the consummation of the contract; and where within time in which contract could have been consummated the applicant became sick with typhoid fever, contract held never to have taken effect. *Id.*

Regarding date at which corrections were made in application for benefit certificate, when the applicant was sick, as the date of the certificate, statement in application that applicant was not sick and approval of examining physician, held a fraud on the association not within the actual or apparent authority of the physician. *Id.*

Question of good faith in making answers in application for benefit certificate which were made warranties held immaterial. *Id.*

Under this article the term "risk assumed" must be taken to mean the hazard of the contract determined by the perils menacing the life of the insured, and hence a false representation that defendant had never had a certain practicably incurable disease was material to the risk and would avoid the policy which provided that a false answer to such question avoided the policy, even though the applicant died of a wholly different disease. *United Benev. Ass'n v. Baker* (Civ. App.) 141 S. W. 541.

An answer made to a question in an application for life insurance held not to avoid the policy. *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Civ. App.) 143 S. W. 247.

An applicant's failure to disclose facts tending to show a rejection by another order held not to invalidate his benefit certificate. *Id.*

A finding that insured had an ulcer of the rectum held not necessarily inconsistent with his representations in his application as to having had the piles. *Knights of Maccabees of the World v. Hunter*, 57 C. A. 115, 143 S. W. 359.

Where insured in her medical examination stated that she had had two miscarriages, proof that she had had two abortions did not show a breach of warranty. *Royal Neighbors of America v. Bratcher* (Civ. App.) 151 S. W. 885.

Where insured denied that she had had any illness within seven years prior to her application, proof that her physicians treated her for headache three years prior to the date of the policy did not necessarily defeat plaintiff's right to recover, the jury being authorized to find that such illness, if any, was not material to the risk assumed within this article. *Id.*

Statements, in an application for reinstatement in a mutual benefit association, that the applicant was of sound constitution, in good health, and that he had had no severe illness, local disease, or injury since his original petition, when in fact he had had malarial fever, had two operations for hydrocele, had suffered from dysentery and diarrhea or inflammation of the bowels, caused by catarrh of the stomach, and had disease of the genital organs, were misrepresentations "material to the risk" within this article; any fact concerning the health, condition, or physical history of the applicant, which would naturally influence the association in determining whether it would grant the reinstatement, being material to the risk (citing 5 Words and Phrases, p. 4406). *Supreme Ruling of Fraternal Mystic Circle v. Hansen* (Civ. App.) 153 S. W. 351.

— **Materiality question of law on jury's findings.**—See notes under Art. 1971.

— **Waiver.**—Forfeiture of a life insurance policy held not waived by ignorance of the insured of the facts of the payment made for him by his mother, under which the forfeiture is claimed. *United Moderns v. Pike* (Civ. App.) 76 S. W. 774.

— **Evidence.**—Evidence, in an action on a life policy containing a provision that the insurer shall not be liable if insured was not in good health when he received the policy, considered, and held sufficient to show that insured was in good health when he received the policy, so as to sustain a judgment for plaintiff. *Woodmen of the World v. Locklin*, 28 C. A. 486, 67 S. W. 331.

Waiver of the defense to an action on a benefit certificate that insured made false statements in his application must be based on actual and not constructive knowledge of the falsity held erroneous. *Brotherhood of Railroad Trainmen v. Roberts*, 48 C. A. 325, 107 S. W. 626.

Evidence in an action on an insurance policy held to show that the insured acted in good faith in answering a question. *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Civ. App.) 143 S. W. 247.

Evidence, in an action on a mutual benefit certificate, held to sustain a finding that insured was not affected with lung disease or tuberculosis, and had not changed his residence for his health. *Knights of Maccabees of the World v. Hunter*, 57 C. A. 115, 143 S. W. 359.

Evidence held insufficient to show that member of benefit insurance society was not suspended for nonpayment of assessments at the time of his death. *Knights of the Modern Maccabees v. Gillis* (Civ. App.) 144 S. W. 713.

Revocation or cancellation.—A mutual benefit association cannot revoke a binding contract of insurance, after death of the insured, by tendering to the beneficiary the amounts paid therefor. *Home Forum Ben. Order v. Varnado* (Civ. App.) 55 S. W. 364.

Board of directors of beneficial association held to have had authority to cancel a contract of membership. *Travelers' Protective Ass'n of America v. Dewey*, 34 C. A. 419, 78 S. W. 1087.

Reduction of assessments required to be paid by the holder of a benefit certificate and reduction of the liability of the association held a sufficient consideration for an agreement canceling the member's original certificate and issuing another for a less amount. *Supreme Council A. L. H. v. Garrett* (Civ. App.) 85 S. W. 27.

An original beneficiary certificate held revoked, though the designation of beneficiary in the second certificate was illegal. *Grand Lodge Colored Knights of Pythias v. Mackey* (Civ. App.) 104 S. W. 907.

No act of insurer, without insured's consent, will terminate a contract of life insurance, or relieve the insurer from liability thereon. *Royal Fraternal Union v. Lundy*, 51 C. A. 637, 113 S. W. 185.

Insured, on the alleged wrongful termination of his policy, may tender premiums, and on maturity sue for benefits. He may sue for damages for the wrongful cancellation of the policy, or sue in equity to determine whether the policy is still in force. *Id.*

Reinstatement.—Where an application for reinstatement by a member of a benevolent association, as required by the association, was without authority, statements in such application are nudum pactum. *Supreme Lodge Nat. Reserve Ass'n v. Turner*, 19 C. A. 346, 47 S. W. 44.

A provision of the constitution of a beneficial association held not to entitle a member whose certificate had been forfeited for nonpayment of dues to reinstatement as a matter of right on payment of all arrearages within 60 days. *Brotherhood of Ry. Trainmen v. Dee*, 101 T. 597, 111 S. W. 396.

A policy in a mutual benefit association, forfeited by a failure of the insured to pay assessments, was not revived by an unaccepted tender of the arrearages, made in behalf of insured at a time when it was known that he could not live. *Hawkins v. Lone Star Ins. Union (Civ. App.)* 146 S. W. 1041.

Art. 4835. Funds.—Any society may create, maintain, invest, disburse and apply an emergency surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in section 5 of this Act [Art. 4831]. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent. per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum.

Deferred payments or installments of claims shall be considered as fixed liabilities on the happenings of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. [Id. sec. 9.]

Validity of mortuary call.—Validity of mortuary call of mutual insurance company determined. *Smith v. Covenant Mut. Ben. Ass'n*, 16 C. A. 593, 43 S. W. 819.

Advance premiums.—Contract for mutual benefit insurance construed, and held, that advance premiums were in the nature of a membership fee, and not to meet bimonthly calls. *Smith v. Covenant Mut. Ben. Ass'n*, 16 C. A. 593, 43 S. W. 819.

Payment of assessments, premiums, and dues.—Forfeiture of certificate or membership for nonpayment, see notes under Art. 4834.

Right of one giving order on a mutual benefit insurance company for payment of advance premium of soliciting agent to withdraw the same without canceling the application determined. *Smith v. Covenant Mut. Ben. Ass'n*, 16 C. A. 593, 43 S. W. 819.

The holder of a life benefit certificate who had paid benefit assessments held not released from duty to pay other assessments. *Supreme Council American Legion of Honor v. Landers*, 31 C. A. 338, 72 S. W. 880.

The mere fact that a member of a fraternal insurance order had been permitted to pay two delinquent assessments held not to create a binding custom to receive delinquent assessments. *Fraternal Union of America v. Hurlock*, 33 C. A. 78, 75 S. W. 539.

Finding that subsequent payments by member after notice of virtual reduction of value of certificate by beneficial association were not an election to treat the contract as still in force held justified. *Supreme Council A. L. H. v. Batte*, 34 C. A. 456, 79 S. W. 629.

An officer of a subordinate lodge of a mutual benefit association, who is authorized to receive and receipt for payments of monthly dues, may receipt therefor at the time of payment or at any time thereafter. *United Moderns v. Pistole*, 38 C. A. 422, 86 S. W. 377.

Mailing a draft to a former collector for a fraternal order held not payment to the order, and hence the member was properly suspended. *Supreme Lodge of Pathfinder v. Johnson*, 47 C. A. 109, 104 S. W. 508.

Where it does not appear that an accident insurance association had authorized remittances of dues by mail, payment is not made when the letter containing the remit-

tance is deposited in the post office. *Travelers' Protective Ass'n of America v. Roth* (Civ. App.) 108 S. W. 1039.

It was no excuse for insured's failure to pay assessments on his certificate that he was unconscious and unable to attend to business when the assessment became due. *Brotherhood of Ry. Trainmen v. Dee*, 101 T. 597, 111 S. W. 396.

Mailing of a check for dues to a benefit association is not payment until it is received. *Roth v. Travelers' Protective Ass'n of America*, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

An insurance company held bound to take from benefits due the amount of dues unpaid. *Royal Fraternal Union v. Stahl* (Civ. App.) 126 S. W. 920.

Act of the secretary of a local lodge of a mutual benefit society in going to delinquent members to collect assessments held a mere courtesy, on which no rights could be based. *Fletcher v. Supreme Lodge Knights & Ladies of Honor* (Civ. App.) 135 S. W. 201.

— **Evidence of payment.**—An entry made on the receipt book of a subordinate lodge of a mutual benefit association by the proper officer of such lodge, who was authorized to receive payment of dues, showing payment to him of monthly dues on a certain date, may be taken as true by the jury, although such officer testifies that the entry was false. *United Moderns v. Pistole*, 38 C. A. 422, 86 S. W. 377.

Evidence held to justify a finding that a member of a fraternal insurance order had not defaulted in the payment of dues for specified months. *Grand Fraternity v. Mulkey* (Civ. App.) 130 S. W. 242.

Application of payment.—Where member of mutual company, with knowledge that his first payment was applied on membership fee, retains a certificate until forfeiture for nonpayment of bimonthly call, he cannot complain that such application was wrongful. *Smith v. Covenant Mut. Ben. Ass'n*, 16 C. A. 593, 43 S. W. 819.

Recovery of premiums paid.—Member of beneficial association held not entitled to recover premiums on ground of wrongful expulsion, he not having pursued his remedies within the order. *Supreme Council Catholic Knights of America v. Gambati*, 29 C. A. 80, 69 S. W. 114.

• Member of beneficial association held not to have been expelled, and hence not entitled to sue for premiums paid. *Id.*

The mere fact that the expulsion of a member of a beneficial association was void for want of notice and trial as provided by the association's laws held no defense to an action by him to recover premiums paid. *Id.*

When a beneficial association wrongfully expels a member, and is sued by him for the recovery of premiums paid, the association is not entitled to a credit for the value of the insurance during the time it was in force. *Id.*

That defendant's assignor failed to make further payments on certain benefit certificates under a contract, after objection by the beneficiary, held no defense to his right to reimbursement for the amounts previously paid. *Coleman v. Anderson*, 98 T. 570, 86 S. W. 730.

The holder of a mutual benefit certificate who exchanged it for a new certificate held not entitled to recover the premiums paid on the first certificate. *Supreme Council A. L. H. v. Lyon* (Civ. App.) 88 S. W. 435.

Person paying dues and assessments of member of fraternal society pursuant to contract with such member and beneficiaries held entitled to reimbursement for money so expended, though beneficiaries died before the decease of member. *Kelly v. Searcy*, 100 T. 566, 102 S. W. 100, reversing (Civ. App.) 98 S. W. 1080.

Where a life policy was void ab initio, the premiums paid, with interest thereon, were the measure of damages for a cancellation. *Supreme Lodge Knights of Pythias v. Neeley* (Civ. App.) 135 S. W. 1046.

Rescinding, without authority, by a fraternal benefit society of a member held a repudiation of the contract, so as to give the member a right to recover assessments paid. *Ericson v. Supreme Ruling of Fraternal Mystic Circle*, 105 T. 170, 146 S. W. 160.

Art. 4836. Investments.—Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies; provided, that any foreign society permitted or seeking to do business in this state which invests funds in accordance with the laws of the state in which it is incorporated shall be held to meet the requirements of this Act for the investment of funds; provided, that in case the constitution and by-laws of the grand lodge or governing body of any such association provides that all or any part of the beneficiary or mortuary or insurance fund of such association that is paid in by or collected from the members of such subordinate or local lodge may be retained in the custody of and controlled and managed by such subordinate or local lodge, and designate what officers of such subordinate or local lodge shall have the custody and control of such fund and authorize such local officers to loan or invest the same, and such local officer shall have executed and filed, and shall from time to time when required by the commissioner of insurance and banking, file with the commissioner of insurance and banking such bond or other written instrument to be prescribed and approved in terms and amount by the commissioner of insurance and banking as will indemnify such fund against waste, depletion or loss through loans, investment or otherwise,

then such fund so secured shall be exempt from the provisions of this Act. [Id. sec. 10.]

See note under Art. 4827.

Art. 4837. Repealed. See Note under Art. 4827.

Art. 4838. Distribution of funds.—Every provision of the laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses. [Id. sec. 11.]

Art. 4839. Organization.—Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this Act, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

First. The proposed corporate name of the society, which shall so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or to lead to confusion.

Second. The purpose for which it is formed, which shall not include more liberal powers than are granted by this Act; provided, that any lawful, social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society, and the mode in which its corporate powers are to be exercised.

Third. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the Society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Fourth. Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the commissioner of insurance and banking, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner of insurance and banking, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this Act, and all provisions of law have been complied with, the commissioner of insurance and banking shall so certify and retain and record (or file) the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Upon receipt of said certificate from the commissioner of insurance and banking, said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applications for death benefits shall have been regularly exam-

ined by legally qualified practicing physicians, and certificates of such examination have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner of insurance and banking, under oath of the president and secretary or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date, approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation, contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum; nor until it shall be shown to the commissioner of insurance and banking by the sworn statement of the treasurer or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars; all of which shall be credited to the mortuary or disability fund on account of such applicants and no part of which may be used for expenses.

Said advanced payments shall, during the period of organization, be held in trust, and if the organization is not completed within one year as hereinafter provided, returned to said applicants.

The commissioner of insurance and banking may make such examination and require such further information as he deems advisable; and upon presentation of satisfactory evidence that the society has compiled [complied] with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The commissioner of insurance and banking shall cause a record of such certificate to be made and a certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commissioner of banking and insurance upon cause shown; unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the object and purposes of the society. [Id. sec. 12.]

See *Modern Woodmen of America v. Metcalfe* (Civ. App.) 154 S. W. 662.

Right to do business.—When a fraternal beneficiary association has filed with the secretary of state its charter, as required by this section, it has the right to begin business

and to continue until enjoined by the suit of the attorney general. *Trinity Life & Annuity Society v. Love*, 102 T. 277, 116 S. W. 1139.

Second charter as amendment of first.—A second charter of benefit insurance company held to operate as an amendment to a former one, and that deceased, agreeing to comply with future regulations, was bound by it. *Bollman v. Supreme Lodge Knights of Honor* (Civ. App.) 53 S. W. 722.

Constitution, by-laws and rules.—It will be supposed that the rules and regulations of mutual insurance companies are known to the members, and there must be substantial compliance therewith. *Supreme Lodge of Protection, Knights & Ladies of Honor, v. Grace*, 60 T. 569.

Where by-laws of a mutual benefit insurance company are inconsistent, the one most favorable to the member controls. *Supreme Lodge, National Reserve Ass'n v. Mondrowski*, 20 C. A. 322, 49 S. W. 919.

A member in a mutual benefit association, as well as his beneficiary, held bound by changes in the by-laws, where the insured agreed in his application to abide by the by-laws which might be passed. *Duer v. Supreme Council, Order of Chosen Friends*, 21 C. A. 493, 52 S. W. 109.

Where charter of benefit insurance company was abandoned, and one obtained in another state was recognized, by deceased, held, the rules enacted under the new charter determined his rights. *Bollman v. Supreme Lodge Knights of Honor* (Civ. App.) 53 S. W. 722.

Where notice of a condition of a benefit certificate, which was part of the constitution, was intended to be given by inserting it in the certificate, but was not, the insured is not chargeable with knowledge on the ground that it was enacted as a by-law. *Sovereign Camp, Woodmen of the World, No. 955, v. Fraley*, 94 T. 200, 59 S. W. 879, 51 L. R. A. 898.

Where the insured committed suicide while insane, his certificate was not void for that reason, though the constitution of the insurer provides that it shall be. *Id.*

The minor son and heir of a member of a fraternal insurance association, who failed to name a new beneficiary after the death of his wife, held entitled under its by-laws to recover on a certificate without joining the administrator of the insured as a party. *Order of Columbus of Baltimore City, Md., v. Fuqua* (Civ. App.) 60 S. W. 1020.

The meaning of the words "face value," in a by-law of a beneficial association relative to payment of certificates, defined. *Supreme Council, American Legion of Honor v. Storey* (Civ. App.) 75 S. W. 901.

Holder of mutual benefit insurance certificate held bound by subsequent amendment of by-laws amplifying defense of suicide. *Eversberg v. Supreme Tent Knights of Macca-bees of the World*, 33 C. A. 549, 77 S. W. 246.

By-laws of mutual benefit insurance association held not to require publication in official organ of adopted amendment to by-laws. *Id.*

A member of a mutual benefit association held bound by a provision of its by-laws rendering his certificate void in case of self-destruction. *Id.*

By-laws of beneficial association, limiting amount which would be paid on death claims to a sum less than face of member's certificate, could be treated as void, and full amount recovered by beneficiary, or member could regard it as repudiation of contract, and recover premiums paid. *Supreme Council A. L. H. v. Batte*, 34 C. A. 456, 79 S. W. 629.

Provisions in the by-laws of a fraternal benefit society, inhibiting a member from assigning the certificate to secure a debt, or as collateral security, can only be taken advantage of by the society. *Coleman v. Anderson* (Civ. App.) 82 S. W. 1057.

Under the by-laws of a mutual benefit society, written acceptance of a benefit certificate held not necessary to its validity. *Sovereign Camp Woodmen of the World v. Brown* (Civ. App.) 88 S. W. 372.

In a suit involving the right of the original beneficiary in a mutual benefit certificate or the new one to recover the fund due thereon, the original beneficiary held not entitled to raise the question of noncompliance with the by-laws of the society governing the change of beneficiaries. *Coleman v. Grand Lodge Colored Knights of Pythias* (Civ. App.) 104 S. W. 909.

The word "killed" as used in the constitution of a benefit association, held to refer to death of a member, and not to the accident or cause of death. *Roth v. Travelers' Protective Ass'n of America*, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

"Business methods," as to which a mutual benefit society was authorized to adopt new by-laws binding on existing members, includes the fixing of proper assessment rates. *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Civ. App.) 131 S. W. 92.

The constitution and laws of a fraternal insurance order held a part of the contract entered into by each member when he becomes a member. *Lone Star Lodge No. 1935, Knights and Ladies of Honor, v. Cole* (Civ. App.) 131 S. W. 1180.

Policy holders in an insurance association, agreeing to be bound by future by-laws passed, held to intend only such by-laws as the association has power to pass. *Eaton v. International Travelers' Ass'n* (Civ. App.) 136 S. W. 817.

— **Change of rates.**—Authority to rerate members received from another organization, see notes under Art. 4841.

A by-law raising the assessment rates payable by an existing member of a mutual benefit society held not an impairment of a vested right. *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Civ. App.) 131 S. W. 92.

Evidence held insufficient to show that an increase in the rates of a mutual benefit society was unreasonable. *Id.*

A mutual benefit society, both under its certificates and independent thereof, held entitled to pass new laws providing for rerating of members and increasing the amount of monthly premiums. *Id.*

Affairs of a mutual benefit society held not such as to render a further increase in rates unnecessary and unreasonable. *Id.*

A constitutional provision of a mutual benefit society, authorizing the rerating of members held applicable to existing members. *Id.*

A change of assessment rates of a mutual benefit society was not arbitrary where it fell equally on all of plaintiff's class. *Id.*

A by-law providing for the rerating of the members of a mutual benefit society passed by the executive committee held not objectionable because not passed by the supreme legislative body. *Id.*

Under constitution of a subordinate lodge held that an unrecorded proceeding fixing the monthly dues could not be regarded as a by-law. *Haywood v. Grand Lodge of Texas, K. P. (Civ. App.) 138 S. W. 1194.*

The constitution of a fraternal insurance corporation, providing that members taken over from other associations may be rerated, held prospective. *Ericson v. Supreme Ruling of Fraternal Mystic Circle, 105 T. 170, 146 S. W. 160.*

A provision in a fraternal benefit certificate that the member will comply with the orders and by-laws adopted in the future held to refer only to such regulations as have reference to the duties and conduct of the members, as such, and not to a radical charge greatly increasing the assessments. *Id.*

Art. 4840. Powers retained—Reincorporation—Amendments.—Any society now engaged in transacting business in this state may exercise, after the passage of this Act, all of the rights conferred thereby, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this Act, if incorporated; or if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein or in its constitution and laws, and all such amendments shall be filed with the commissioner of insurance and banking and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution or laws. [*Id.* sec. 13.]

Art. 4841. Mergers and transfers.—No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and filed with the commissioner of insurance and banking of this state, together with a sworn statement of the financial condition of each of said societies by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of said contract financial statements and certificates, the commissioner of insurance and banking shall examine the same, and if he shall find such financial statements to be correct and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve said merger or transfer, issue his certificate to that effect, and thereupon the said contract or merger or transfer shall be of full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the commissioner of insurance and banking. [*Id.* sec. 14.]

Authority to re-rate.—A fraternal insurance corporation organized to receive the membership and assets of another fraternal insurance corporation and to assume its liabilities held not authorized to re-rate a member of the latter organization, pursuant to a constitution adopted by the former. *Ericson v. Supreme Ruling of Fraternal Mystic Circle, 105 T. 170, 146 S. W. 160.*

Art. 4842. Annual license.—Societies which are now authorized to transact business in this state may continue such business until the first day of April next succeeding the passage of this Act, and the authority of such societies may thereafter be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the commissioner of insurance and banking ten dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this Act. [*Id.* sec. 15.]

Art. 4843. Admission of foreign society.—No foreign society now transacting business, organized prior to the passage of this Act, which is not now authorized to transact business in this state, shall transact any business herein without a license from the commissioner of insurance and banking. Any such society shall be entitled to a license to transact business within this state upon filing with the commissioner of insurance and banking a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the commissioner of insurance and banking as hereinafter provided; a statement of its business under oath of its president and secretary or corresponding officers in the form required by the commissioner of insurance and banking, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the commissioner of insurance and banking of this state; a certificate from the proper official in its home state, province or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts; and upon furnishing the commissioner of insurance and banking such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding April, and such license shall, upon compliance with the provisions of this Act, be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this Act and have its assets invested as required by the laws of the state, territory, district, country or province where it is organized. For each such license or renewal the society shall pay the commissioner of insurance and banking ten dollars. When the commissioner of insurance and banking refuses to license any society or revokes its authority to do business in this state, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the action of the commissioner of insurance and banking shall be reviewable by proper proceedings in any court of competent jurisdiction within the state; provided, however, that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this State during the time such society was legally authorized to transact business herein. [Id. sec. 16.]

Diversion of benefits.—In the absence of proof of the law under which a fraternal beneficiary association is organized, it must be presumed that it comes within this article, admitting associations of another state to do business in this state when they have complied with certain requirements, and that there are the same limitations upon its corporate powers that are imposed upon corporations organized in this state. Any attempt to divert the benefit fund derived from the members from the purpose for which it was provided, and to appropriate it to payment of benefit certificate or policy issued by another corporation with which it had no power to consolidate is *ultra vires* and void. *Whaley v. Bank's Union of the World*, 39 C. A. 385, 88 S. W. 262.

Art. 4844. Power of attorney and service of process.—Every society, whether domestic or foreign, now transacting business in this state shall, within thirty days after the passage of this Act, any [and] every such society hereafter applying for admission, shall before being licensed, appoint in writing the commissioner of insurance and banking, and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is

served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment certified by said commissioner of insurance and banking shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance and banking, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading [pleading] or defense in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said commissioner of insurance and banking he shall forthwith forward by registered mail, one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein. [Id. sec. 17.]

Service under general law.—The act prescribes that citation may be served on the insurance commissioner. It does not repeal the general law authorizing service of citation on "local agents" of foreign corporations. This statute (of 1899) is merely cumulative of the general law on the subject, and therefore service in accordance with either statute is legal and sufficient. *Bankers' Union of the World v. Nabors*, 36 C. A. 88, 81 S. W. 93.

This article does not take away the right to serve them in the usual mode prescribed by general law, which mode must be adopted where the association has not complied with the act. *Modern Woodmen of America v. Metcalfe* (Civ. App.) 154 S. W. 662.

Art. 4845. Place of meeting—Location of office.—Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state; but its principal office shall be located in this state. [Id. sec. 18.]

Meetings outside of state.—A mutual benefit society may hold meetings of its supreme legislative department, which has authority to make its laws, outside of the state of its incorporation. *Sovereign Camp, Woodmen of the World, No. 955, v. Fraley*, 94 T. 200, 59 S. W. 879, 51 L. R. A. 898.

A beneficial society cannot legally hold a meeting outside the state in which it was incorporated for the exercise of a corporate act. *Sovereign Camp, Woodmen of the World, v. Fraley* (Civ. App.) 59 S. W. 905.

Art. 4846. No personal liability.—Officers and members of the supreme, grand or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. [Id. sec. 19.]

Liability of directors.—Directors in a voluntary insurance association held personally liable for the amount which a beneficiary should have received, where they wrongfully withheld payment on the member's death and paid it on account of a member subsequently deceased. *Home Benefit Ass'n No. 3 of Coleman County v. Wester* (Civ. App.) 146 S. W. 1022.

Art. 4847. Waiver of the provisions of the laws—Separate jurisdiction.—The constitution and laws of the society may provide that no subordinate body nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members.

All grand lodges, by whatever name known, whether incorporated or not, holding charters from any supreme governing body, which were conducting business in this state upon the passage of this Act as a fraternal beneficiary association, upon what is known as the separate jurisdiction plan, shall be treated as single state organizations, and all reports required by the provisions of this Act shall be made and fur-

nished by the officers of such supreme state governing body and shall embrace and contain the transactions, liabilities and assets of such state organization. [Id. sec. 20.]

Estoppel or waiver affecting right of forfeiture.—An act or promise of an officer superintending the business of a mutual benefit association, although beyond his power as defined in the by-laws of the association, if acted upon by a member, will bind the company. See facts held to estop the T. B. A. from denying the privileges of membership to one who was claimed to have forfeited his membership. *McCorkle v. Insurance Ass'n*, 71 T. 149, 8 S. W. 516.

Sovereign camp of benefit order held not estopped to deny reinstatement of suspended member by unauthorized act of subordinate agent. *Sovereign Camp, Woodmen of the World, v. Rothschild*, 15 C. A. 463, 40 S. W. 553.

The knowledge by a benefit company of a member's excessive drinking, long prior to the time he was expelled therefor, does not estop the company to set up the fact of expulsion, where the certificate provided that it should become void if the holder drank to excess. *Kempe v. Woodmen of the World (Civ. App.)* 44 S. W. 688.

The acceptance of subsequent assessments by the supreme lodge of a benevolent association from a subordinate lodge held to estop the supreme lodge from setting up suspension to defeat a recovery by a member of said lodge. *Supreme Lodge Nat. Reserve Ass'n v. Turner*, 19 C. A. 346, 47 S. W. 44.

Finding that there was no evidence that a benefit order knew that a statement in a member's application was false held supported by the evidence. *Brown v. Sovereign Camp, Woodmen of the World*, 20 C. A. 373, 49 S. W. 393.

Where a beneficial society's charter provides that no agent shall waive any law of the order, an agent's issuance of a certificate containing conditions different from those prescribed by amended certificates, which amendment was void, does not violate his official duty. *Sovereign Camp, Woodmen of the World, v. Fraley (Civ. App.)* 59 S. W. 905.

A life association which sends an organizer properly equipped with literature and blanks to organize a local lodge is estopped from resisting liability on the certificate by his accepting an application for insurance with a knowledge of false warranties contained therein. *National Fraternity v. Karnes*, 24 C. A. 607, 60 S. W. 576.

Facts known by a physician who signs a medical examination certificate to enable another physician to get insurance held not to estop the association from relying on a breach of warranty. *Id.*

A local council of a fraternal insurance association held to have borne the relation of agent to the supreme council, and to have waived in its behalf a breach of warranty by an assured and his subsequent failure to abide by the rules of the order. *Order of Columbus of Baltimore City, Md., v. Fuqua (Civ. App.)* 60 S. W. 1020.

A fraternal order, after receipt of assessments from a person and delivery to him of a benefit certificate, cannot question his membership, though he were not initiated. *Supreme Ruling of the Fraternal Mystic Circle v. Crawford*, 32 C. A. 603, 75 S. W. 844.

Forfeitures of policies in a benevolent insurance association held not waived by the acceptance by the supreme lodge, without protest, of reports of the local financier later than the by-laws directed. *United Moderns v. Pike (Civ. App.)* 76 S. W. 774.

A waiver by a beneficiary society of the requirement that the applicant must be in good health may be established by showing that it had customarily and knowingly accepted persons not in good health. *Home Circle Soc. No. 1 v. Shelton (Civ. App.)* 81 S. W. 84.

A letter inclosing a blank application for reinstatement, sent to a member of a mutual benefit society not then in good standing, held not to constitute a waiver of his previous lapses. *Sovereign Camp Woodmen of the World v. Hicks*, 37 C. A. 424, 84 S. W. 425.

In an action on a fraternal life insurance certificate, plaintiff held entitled to show that the application was prepared by defendant's agent, and that defendant did not know it contained the statement of good health, or that condition of health was material. *Home Circle Soc. No. 2 v. Shelton (Civ. App.)* 85 S. W. 320.

A mutual benefit society, alleged to have absorbed another society by which plaintiff's wife was insured for plaintiff's benefit, held not liable on such certificate on the ground of equitable estoppel. *Whaley v. Bankers' Union of the World*, 39 C. A. 385, 88 S. W. 259.

Clerk of local camp of mutual benefit association held to have authority to waive provision in benefit certificate that no liability should begin thereon until delivered to insured in person, while in good health. *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 C. A. 29, 90 S. W. 921.

Certain fact held not to operate in favor of a claim by a beneficiary of a member of an accident insurance association for his death as a waiver of such member's failure to pay dues. *Travelers' Protective Ass'n of America v. Roth (Civ. App.)* 108 S. W. 1039.

Insurer held not estopped to enforce a forfeiture of a benefit certificate by the fact that its local officer by mistake informed insured that a medical certificate was required in order to secure reinstatement. *Brotherhood of Ry. Trainmen v. Dee*, 101 T. 597, 111 S. W. 396.

Custom of local lodges of a mutual benefit society to pay dues of sick members held not to create an estoppel against the association's right to enforce a forfeiture for non-payment of dues. *Id.*

A fraternal insurance order held to waive a failure of a member to comply with the rules of the order in the payment of dues for specified months. *Grand Fraternity v. Mulkey (Civ. App.)* 130 S. W. 242.

A member of a mutual benefit society held to have consented to its change from the assessment to the monthly payment plan. *Supreme Ruling of Fraternal Mystic Circle v. Ericson (Civ. App.)* 131 S. W. 92.

The failure of a fraternal insurance order to surrender a certificate to the beneficiary therein on the death of the member held not a waiver of objections to liability, under the certificate. *Knights of Maccabees of the World v. Hunter*, 103 T. 612, 132 S. W. 116.

Acts constituting a waiver of a condition in a life policy requiring payment of the

first premium before the policy takes effect stated. *Supreme Lodge United Benevolent Ass'n v. Lawson* (Civ. App.) 133 S. W. 907.

Prepayment of the first premium on a life insurance policy as a condition precedent to its taking effect may be waived by parol by the insurer or its agent. *Id.*

A mutual benefit society formed by the consolidation of two societies created by laws of different states held not estopped from denying the legality of the consolidation and denying a liability to a member of one of the societies. *Gordon v. American Patriots of Springfield, Ill.* (Civ. App.) 141 S. W. 331.

A deputy head consul of a mutual benefit society held without power to waive a by-law requiring adoption as a condition to membership. *McWilliams v. Modern Woodmen of America* (Civ. App.) 142 S. W. 641.

Collection of certain fees and dues by an organizer of a mutual benefit society held not to estop the society to deny that decedent was a member. *Id.*

A fraternal insurance company held estopped to assert that an answer of an applicant incorrectly transcribed by its medical examiner was false. *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Civ. App.) 143 S. W. 247.

Forfeiture of policy for nonpayment of assessments held not waived by subsequent notices, nor by invitation to pay arrearages and be reinstated, if in good health, where insured took no steps towards reinstatement. *Hawkins v. Lone Star Ins. Union* (Civ. App.) 146 S. W. 1041.

A fraternal beneficiary association which denied liability on a certificate of membership on account of nonmembership of decedent at the time of his death waived any further proceedings by the beneficiary under its by-laws providing for an appeal from the executive committee. *Knights of the Modern Maccabees v. Mayfield* (Civ. App.) 147 S. W. 675.

Art. 4848. Repealed. See note under Art. 4827. The provisions of this article are included in section 20 of the new act (Art. 4847).

Art. 4848a. Benefit not attachable.—No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment, or other process, or be seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. [*Id.* sec. 21.]

Art. 4849. Constitution and laws—Amendments.—Every society transacting business under this Act shall file with the commissioner of insurance and banking a duly certified copy of all amendments of, or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws, as amended, changed, or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. [*Id.* sec. 22.]

Amendments.—Amendment to defendant's constitution held not to affect benefit certificates previously issued. *Grand Lodge, A. O. U. W. v. Stumpf*, 24 C. A. 309, 58 S. W. 840.

Under the articles of incorporation of a mutual benefit society, delegates, when assembled as the "Sovereign Camp," had power to adopt an amendment to the constitution changing the conditions of the benefit certificate. *Sovereign Camp, Woodmen of the World, No. 955, v. Fraley*, 94 T. 200, 59 S. W. 879, 51 L. R. A. 898.

A member of a beneficial association, accepting a certificate subject to laws that might be adopted before an amendment changing the conditions of certificates, which was void, held not precluded from questioning its validity. *Sovereign Camp, Woodmen of the World, v. Fraley* (Civ. App.) 59 S. W. 905.

Art. 4850. Annual reports.—Every society transacting business in this state shall annually, on or before the day of March, file with the commissioner of insurance and banking in such form as he may require, a statement under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner of insurance and banking may deem necessary to a proper exhibit of its business and plan of working. The commissioner of insurance and banking may at other times require any further statement he may deem necessary to be made relating to such society.

In addition to the annual report herein required, each society shall annually report to the commissioner of insurance and banking a valuation of its certificates in force on December 31st last preceding, excluding those issued within the year for which the report is filed, in cases where the contribution for the first year in whole or in part are used

for current mortality and expenses; provided, the first report of valuation shall be made as of December 31st, 1913, such report of valuation shall show, as contingent, liabilities the present mid-year value of the promised benefits provided in the constitution and laws of such society, under certificates the subject to valuation; and, as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner of insurance and banking within ninety days after the submission of the last preceding annual [annual] report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Congress, August 23rd, 1899; or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years, and covering not less than one hundred thousand lives with interest assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society; provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experiences, and in such cases a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent [solvent] so long as the funds [funds] in its possession are equal to or in excess of its matured liabilities.

Beginning with the year, 1914, a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed, shall be printed and mailed to each beneficiary member of the society not later than June 1st, of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum. [Id. sec. 23.]

Art. 4850a. Provisions to insure future security.—If the valuation of the certificates, as hereinbefore provided, on December 31st, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect

of the degree of deficiency as shown in the valuation as of December 31, 1917. If at any succeeding triennial valuation such society does not show at least the same condition, the commissioner of insurance and banking shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the commissioner of insurance and banking may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of section 24 [Art. 4851] of this Act, or in the case of a foreign society, its license may be cancelled in the manner provided in this Act.

Any such society, shown by any triennial valuation, subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, be subject, so far as stated rates of contributions are concerned, to the provisions of section 12 [Art. 4839] of this Act, applicable in the organization of new societies; provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. [Id. sec. 23a.]

Art. 4850b. Valuation of certificates on accumulation basis; member may transfer to any plan; valuation on tabular basis; deficiency.— In lieu of the requirements of section 23 [Art. 4850] and 23a [Art. 4850a], any society accepting in its laws the provisions of this section, may value its certificates on a basis herein designated, "accumulation basis," by crediting each member with the net amount contributed for each year and with interest at approximately the next rate earned and by charging him with his share of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member, except as specifically provided in its articles of laws or contracts no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contribution especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated or readjusted on a basis provided for adequate rates with adequate reserves to mature such certificates upon assumption for mortality and interest recognized by the law of this state shall be valued on such basis, herein designated the "tabular basis"; provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve or from increased contributions or by an increase in the number of assessments applied to the society, as a whole or to classes of members as may be specified in its laws, savings from a lower amount of death losses may be returned in like manner as may be specified in its laws. If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class, so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this state and adopted by the society, shall be filed by the society with each annual report and also be furnished to each member before July 1st of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis. For this purpose individual bookkeeping accounts for each member shall not be required and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis, and the reserves on the tabular basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. [Id. sec. 23b.]

Art. 4851. Examination of domestic societies.—The commissioner of insurance and banking, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have, free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employes or other person in relation to the affairs, transactions and conditions of the society.

The expense of such examination shall be paid by the society examined, upon statement furnished by the commissioner of insurance and banking and the examination shall be made at least once in three years.

Whenever after examination the commissioner of insurance and banking is satisfied that any domestic society has failed to comply with any provisions of this Act, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred, (or shall determine to discontinue business) the commissioner of insurance and banking may present the facts relating thereto to the attorney general, who shall, if he deem the circumstance warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it

shall then appear that such society should be closed, said society shall be enjoined from carrying [carrying] on any further business and some person shall be appointed receiver of such society and shall proceed at once to take possession of the books, papers, moneys and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society, and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney general against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceeding should not be commenced. [Id. sec. 24.]

Art. 4852. Application for receiver, etc.—No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in the state unless the same is made by the attorney general. [Id. sec. 25.]

Art. 4853. Examination of foreign societies.—The commissioner of insurance and banking, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this state. The said commissioner of insurance and banking may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employes and other persons in relation to the affairs, transactions and conditions of the society. He may, in his discretion, accept in lieu of such examination of the insurance department of the state, territory, district, province or country where such society is organized. The actual expense of examiners making any such examination shall be paid by the society, upon statements furnished by the commissioner of insurance and banking. If any such society or its officers refuse to submit such examination or to comply with the provisions of the section relative thereto, the authority of such society to write new business in this state shall be suspended, or license refused until satisfactory evidence is furnished the commissioner of insurance and banking relating to the condition and affairs of the society, and during such suspension the society shall not write any new business in this state. [Id. sec. 26.]

Art. 4853a. No adverse publications.—Pending during or after an examination or investigation of any such society either domestic or foreign, the commissioner of insurance and banking shall make public no financial statement, report or finding, nor shall he permit to become public any financial statement, report or finding affecting the status, standing or rights of any such society, until a copy thereof shall have been served upon such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report of finding, and to make such showing in connection therewith as it may desire. [Id. sec. 27.]

Art. 4854. Revocation of license.—When the commissioner of insurance and banking on investigation is satisfied that any foreign society transacting business under this Act has exceeded its powers, or has failed to comply with any provisions of this Act, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If, on the date named in said notice, such objections have not been removed to the satisfaction of said commissioner of insurance and banking, or the society does not present good and sufficient reasons why its authority to

transact business in this state should not at that time be revoked, he may revoke the authority of the society to continue business in this state. All decisions and findings of the commissioner of insurance and banking made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in section 16 [Art. 4843] of this Act. [Id. sec. 28.]

Art. 4855. Examination of certain societies.—Nothing contained in this Act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department of the supreme lodge Knights of Pythias) and the Junior Order of the United American Mechanics (exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United States American Mechanics) or societies which limit their membership to any one hazardous occupation nor to similar societies which do not issue insurance certificates nor to an association of local lodges of a society now doing business in this state which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to pay one person or both, nor to any contracts of reinsurance business on such plan in this state nor to domestic societies which limit their membership to the employés of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description which do not provide for a death benefit of more than one hundred dollars or for disability benefits of more than one hundred and fifty dollars to any person in one year.

The commissioner of insurance and banking may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this Act.

Any fraternal benefit society heretofore organized and incorporated and operating within the definition set forth in sections 1, 2 and 3 [Arts. 4827–4829] of this Act, providing for the benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this Act and shall have all the privileges and shall be subject to all the provisions and regulations of this Act, except that the provisions of this Act requiring medical examinations, valuations of benefit certificates and that the certificates shall specify the amount of benefits, shall not apply to such society. [Id. sec. 29.]

Legislative power.—The legislature had the power to divide the different associations and orders into classes and to exempt those orders named in this section (16) from the general operation of the law. *Supreme Lodge United Benev. Ass'n v. Johnson*, 98 T. 1, 81 S. W. 19.

Art. 4856. Taxation.—Every fraternal benefit society organized or licensed under this Act is hereby declared to be a charitable and benevolent institution, and all of its funds and property shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment, when same is used for other than lodge purposes. [Id. sec. 30.]

Arts. 4857, 4858.—Repealed. See note under Art. 4827.

Art. 4859. Provisions not to apply to local mutual aid associations; annual statement by such associations, etc.—The provisions of this Act shall not apply to incorporated or unincorporated mutual relief or benefit or burial associations operating upon the assessment plan, whose business is confined to not more than one county in the state, or to a territory in two or more adjacent counties included within a radius of not more than twenty-five miles surrounding the city or town in which its principal office is to be located, which is designated in its charter, which are hereby denominated local mutual aid associations; providing that such associations are in no manner directly or indirectly connected,

federated or associated with any such association, and do not directly or indirectly contribute to the expense or support of any other such association or to the officers, promoters or managers thereof. And, provided, that no person or officer shall receive from said association any payment on account of organization or other expenses or salaries not a bona fide resident of such county, in which such association is domiciled. The association above mentioned shall annually on or before March 1st, file a statement with the commissioner of insurance and banking, which shall be signed and sworn to by the president, secretary and treasurer or the officers holding positions corresponding thereto. Such statement shall show whether the association has during the preceding year done any business outside of the county in which it is domiciled, and shall state whether or not said association is associated, federated or directly or indirectly connected with any other, and shall show what, if anything, has been contributed during the preceding year by said association, or the members to any person or officer or director thereof for salaries, commissions or promotion expenses and the name and residence of the party or parties receiving the same. Should any person in such affidavit herein provided for make any false statement he shall be deemed guilty of false swearing, and punished as provided by law. The commissioner of insurance and banking may, at his option, and it shall be his duty, if not satisfied with said statement, to demand other and additional statements, and examine the books, papers and records of said association, either himself or by some other suitable person, authorized by him. Should it appear to the commissioner of insurance and banking that any such local mutual aid association is not carrying on business as set forth in this section, and is not entitled to the exemption therein set forth, such association shall be subject to and comply with all provisions of this Act as a fraternal beneficiary association. Every such local association claiming to be entitled to the benefit of the exemption created by this section shall plainly state upon its certificates, applications and all advertising matter, in a conspicuous manner, that said association is a local mutual aid association, or same shall be deemed subject to all provisions of this Act. [Id. sec. 31.]

Art. 4859a. Penalties.—Any person, officer, member or examining physician of any society authorized to do business under this Act who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year, or both in the discretion of the court; any person who shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such society for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement in any verified report or delaration [declaration] under oath required or authorized by this Act, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in such society not authorized as herein provided to do business as herein defined in this state, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any person who solicits for or organizes lodges of such association as are described in the first section of this Act without first obtaining from the commissioner of insurance and banking a certificate of authority showing that the association has complied with the provisions of this Act, and is entitled to do business in this state, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than two hundred and fifty dollars, or by imprisonment in the county jail for not less than three nor more than six months, or by both such fine and imprisonment; provided, the provisions of this section shall not be so construed as to prohibit any member or members of a local or subordinate lodge from soliciting any person or persons to become a member of any local or subordinate lodge already in existence; and providing, further, the provisions of this section shall not apply to any member or members of any local or subordinate lodge who participate in, supervise or directs or conducts the organization or establishment of any local or subordinate lodge within the limits of the county of his or their residence or lodge district. All certificates of authority for agents or solicitors shall be issued by the commissioner upon application made therefor by any of the general officers of the association, or by any agent whom the properly authorized governing body of the association has, by resolution, filed with the commissioner of insurance and banking, duly empowered to make such application, and all such certificates shall be revoked by the commissioner upon the request of the association and may be revoked for cause upon like ground and in like manner as the certificates of authority of agents for life insurance companies under the laws of this state. All such certificates shall be renewed annually and shall expire on the first day of April of each year, and a fee of \$1.00 shall be paid for the use of the state for the issuance of said such certificate.

Any society or any officer, agent or employé thereof neglecting or refusing to comply with or violating any of the provisions of this Act, the penalty for which neglect, refusal or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. [Id. sec. 32.]

Arts. 4860, 4861.—Repealed. See note under Art. 4827.

Determination of insolvency.—Under Art. 4861 the power to levy additional assessments is an important factor in determining the corporation's insolvency. *State v. Trinity Life & Annuity Society* (Civ. App.) 127 S. W. 1174.

DECISIONS RELATING TO SUBJECT

What constitutes the contract.—The constitution and by-laws and the policy of a fraternal benefit association constitute the contract between a member and the association, so far as the insurance is concerned. *Haywood v. Grand Lodge of Texas, K. P.* (Civ. App.) 138 S. W. 1194.

Insured's application to a fraternal benefit insurance company, the certificate, and the by-laws, with amendments, held to constitute the contract of insurance. *Modern Woodmen of America v. Lynch* (Civ. App.) 141 S. W. 1055.

Agents of association.—The medical examiner and worthy recorder of an insurance society held agents of the society while performing the duties of his office in the absence of a restriction on such authority contained in the contract of insurance. *Modern Order of Prætorians v. Hollmig* (Civ. App.) 103 S. W. 474.

A secretary of a subordinate lodge of a mutual benefit society acts as the agent of the subordinate lodge and its members, and not of the grand lodge, in sending up assessments. *Grand Lodge United Brothers of Friendship of Texas v. Williams* (Civ. App.) 108 S. W. 195.

Under the by-laws of an insurance society, the local secretary in collecting dues and assessments represents the society, and not the member. *Supreme Lodge United Benevolent Ass'n v. Lawson* (Civ. App.) 133 S. W. 907.

Contingency upon which benefits become payable.—The constitution and by-laws of a beneficial association held not to authorize the recovery of a sick benefit by one who had been a member of the association less than six months when the illness commenced, though it lasted more than that time. *Dabura v. Sociedad de la Union* (Civ. App.) 59 S. W. 835.

In an action to recover on a certificate from a fraternal benefit society on the ground of insanity held, that under the terms of the certificate it must be insanity such as would authorize an adjudication of insured's mental status by the courts. *Knipp v. United Benev. Ass'n*, 45 C. A. 357, 101 S. W. 273.

A member in a mutual benefit society held permanently and totally disabled within the meaning of the certificate. *Brotherhood of Railway Trainmen v. Dee* (Civ. App.) 108 S. W. 492.

That the evidence that a member of an accident insurance association died because of a certain injury is circumstantial held not to require that it be of such nature as not to reasonably permit any other conclusion than that his death was so caused. *Travelers' Protective Ass'n of America v. Roth* (Civ. App.) 108 S. W. 1039.

A beneficial certificate entitling the member to one-fourth of his benefit if he should "lose a foot" held not to mean that there must be a severance of the foot from the body, but to mean a permanent loss of use of the foot. *Modern Order of Pretorians v. Taylor* (Civ. App.) 127 S. W. 260.

Where insured while insane and resisting arrest was killed by a sheriff, his policy was not forfeited because of death while violating the criminal laws of the state. *Woodmen of the World v. Dodd* (Civ. App.) 134 S. W. 254.

Where the evidence, in an action on a benefit certificate, shows that the insured was shot and killed in consequence of his violation of law, it is immaterial whether the person shooting him committed an offense. *Woodmen of the World v. Hipp* (Civ. App.) 147 S. W. 316.

Where the by-laws of an accident insurance association provided for payment only where an insured should receive accidental injury immediately and wholly disabling him from transacting any kind of business, the fact that the insured, a traveling salesman, continued a journey after his accident will not bar recovery. *International Travelers' Ass'n v. Bosworth* (Civ. App.) 156 S. W. 346.

— **Evidence.**—In an action on a mutual benefit certificate, evidence held to sustain a finding that insured's death was not suicidal. *Grand Fraternity v. Melton* (Civ. App.) 111 S. W. 967; *Same v. Green*, 131 S. W. 442.

Evidence held not only to raise an issue for the jury as to the intention of insured in shooting himself, but to establish to a moral certainty that he shot himself with intent to commit suicide. *Grand Fraternity v. Melton*, 102 T. 399, 117 S. W. 788.

Evidence in an action on a fraternal benefit certificate held: To show that insured was engaged in performing duties incident to the sale of intoxicating liquors when he died. *Modern Woodmen of America v. Lynch* (Civ. App.) 141 S. W. 1055. To authorize a finding that K. was the aggressor in the fight in which insured was killed. *Woodmen of the World v. McCoslin* (Civ. App.) 126 S. W. 894. To sustain a finding that the insured did not die of a concealed disease. *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Civ. App.) 143 S. W. 247. To sustain a finding that insured did not commit suicide. *Knights of Maccabees of the World v. Johnson* (Civ. App.) 143 S. W. 718.

Where the defense was that insured died by reason of a violation of law, and there was evidence that he went to another's house, and that the other was angered by language of insured, and approached him without any weapon, and that insured then struck him a violent blow, following which insured was shot, held not to show self-defense, so as to exempt him from a breach of the certificate. *Woodmen of the World v. Hipp* (Civ. App.) 147 S. W. 316.

Proof of death.—Where the by-laws of a beneficial association require a report of the cause of death by the subordinate council to the supreme secretary, the beneficiary need not make proof of death. *Supreme Council American Legion of Honor v. Landers*, 23 C. A. 625, 57 S. W. 307.

A fraternal insurance order held to deny liability, so that proof of death of member was unnecessary. *Grand Fraternity v. Mulkey* (Civ. App.) 130 S. W. 242.

Release on part payment.—A receipt or release in whole, given on payment by a beneficial association of part of a certificate, held to be without consideration. *Supreme Council, American Legion of Honor, v. Storey* (Civ. App.) 75 S. W. 901.

Insolvency of association.—The holder of a certificate against a mutual benefit association held entitled to enforce his rights against its assets which had been turned over to another association under an invalid consolidation agreement only through a receiver. *Whaley v. Bankers' Union of the World*, 39 C. A. 385, 88 S. W. 259.

A fraternal beneficiary association held not insolvent so as to authorize a termination of its business, though its unmaturing obligations greatly exceeded its assets. *State v. Trinity Life & Annuity Society* (Civ. App.) 127 S. W. 1174.

Defenses in action on certificate.—A fine entered against a member of a beneficial association by the secretary held no defense to an action on the certificate. *Screwmen's Benev. Ass'n v. O'Donohoe*, 25 C. A. 254, 60 S. W. 683.

Amount recoverable.—Where insurer agreed to pay so much for each member in the order, not exceeding a specified sum, the fact that the members were not sufficient to pay the sum, and that the fund was not sufficient therefor, are matters of defense. *International Order of Twelve of the Knights and Daughters of Tabor v. Boswell* (Civ. App.) 48 S. W. 1108.

A beneficiary of a \$3,000 certificate, disabled to perform any or all kinds of labor, could recover only the sum of the annual installments due at the time of the trial, and not the entire amount of the certificate. *Supreme Tent of Knights of Maccabees of the World v. Cox*, 25 C. A. 366, 60 S. W. 971.

Where deceased surrendered a benefit certificate and accepted one for a lesser amount under a mistake of law, his beneficiary was not entitled to recover on the surrendered certificate, in the absence of evidence of misrepresentations. *Supreme Council A. L. H. v. Garrett* (Civ. App.) 85 S. W. 27.

Actions for breach of contract.—Improper motives of officers of fraternal benefit order in disorganizing and reorganizing local lodge held insufficient to constitute a cause of action against the order for conspiracy to deprive plaintiff of membership. *Grand Lodge Order of Hermann's Sons of Texas v. Schuetze*, 36 C. A. 539, 83 S. W. 241.

To make conduct of a fraternal association in maliciously expelling a member actionable, it is not necessary that hatred or ill will by the association toward the member be shown. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 C. A. 176, 91 S. W. 834.

Member of fraternal association who is wrongfully expelled held entitled to sue for damages. *Id.*

A member of a fraternal association wrongfully expelled therefrom need not exhaust his remedies within the order to correct its wrongful action before suing for damages. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 C. A. 176, 91 S. W. 834; *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 108 S. W. 453.

Held, further, that plaintiff was not limited to recovery of nominal damages. *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 108 S. W. 453.

In an action for the publication of an order of expulsion of plaintiff from an association in the association's journal, defendant cannot claim protection on the ground that the publication was privileged. *Id.*

A member of a beneficial association, having been wrongfully expelled, is not required to prosecute all his remedies by appeal within the association before instituting a suit for damages against those responsible for his expulsion. *St. Louis & S. W. Ry. Co. of Texas v. Thompson*, 102 T. 89, 113 S. W. 144, 19 Ann. Cas. 1250.

If a member of a beneficial association was entitled to recover damages for his wrongful expulsion, he was entitled to recover as actual damages, his pecuniary loss, also for mental suffering and humiliation, and the value of his insurance and traveling card forfeited. *Id.*

An expelled member of a beneficial association held entitled to recover for such expulsion if the members did not exercise an honest judgment in finding that a certain act constituted a violation of the member's obligation to the society, and used it as a pretext to expel him on another unwarranted charge, but not otherwise. *Id.*

A finding of the members of a beneficial association acting fairly and in good faith that a letter written by a member was a violation of the constitution and laws of the order is conclusive on the court on the question. *Id.*

The measure of damages for the wrongful cancellation of a life policy is the value of the policy at the time of its cancellation. *Supreme Lodge Knights of Pythias v. Neeley* (Civ. App.) 135 S. W. 1046.

Where a life policy was canceled by agreement between the parties and insured obtained a new certificate, which insurer wrongfully canceled, the measure of damages did not include the premiums paid on the first policy. *Id.*

Remedies of insured for wrongful cancellation of a policy on his life stated. *Id.*
The act of a fraternal insurance order held to give a member thereof a right of action against it. *Id.*

Rights as to lodge property.—Under the constitution of a fraternal insurance order, the right of members of a subordinate order to property thereof held merely the right to use it during the meetings of the lodge. *Lone Star Lodge No. 1935, Knights and Ladies of Honor, v. Cole* (Civ. App.) 131 S. W. 1180.

Suspension of lodge.—Officers of supreme lodge of benevolent association held to have right to waive by-laws suspending a subordinate lodge for failure to promptly remit assessments. *Supreme Lodge Nat. Reserve Ass'n v. Turner*, 19 C. A. 346, 47 S. W. 44.

The suspension of a subordinate lodge of a benevolent association held not to suspend its members. *Id.*

A forfeiture of the rights of a subordinate lodge of a mutual benefit society held unauthorized because not in accordance with the laws of the order. *Grand Lodge United Brothers of Friendship of Texas v. Williams* (Civ. App.) 108 S. W. 195.

The suspension of a subordinate lodge of a fraternal insurance order, composed of a supreme lodge and subordinate lodges, held justified. *Lone Star Lodge No. 1935, Knights and Ladies of Honor, v. Cole* (Civ. App.) 131 S. W. 1180.

The suspension of a subordinate lodge of a fraternal insurance order held not to affect property rights of members within bill of rights, so that the suspension was not invalid because made without notice. *Id.*

The moral and social privileges of which members of a subordinate lodge have been deprived by reason of a suspension thereof held not properly within a bill of rights, so that the courts will not interfere therewith. *Id.*

Authority of court in lodge matters.—The court, at the suit of the members of a subordinate lodge of a fraternal insurance order, held not authorized to interfere with the action of the supreme lodge suspending the subordinate lodge. *Lone Star Lodge No. 1935, Knights and Ladies of Honor, v. Cole* (Civ. App.) 131 S. W. 1180.

The courts will not interfere with the internal policy of a fraternal benefit association, whether incorporated or not, unless some valuable or property right is involved. *Id.*

Members of a fraternal insurance order held required to comply with the constitution relating to appeals from actions of officers, and they cannot first resort to the courts. *Id.*

CHAPTER EIGHT

FIRE AND MARINE INSURANCE COMPANIES

Art.	Art.
4862. Marine, fire and other than life and health insurance companies, may do what.	4866. Company may create and dispose of new stock, when.
4863. Commissioner may permit capital stock of company to be reduced, when.	4867. Unlawful dividends.
4864. When company is called upon to make good its capital stock, shall do what.	4868. Penalty for making unlawful dividends.
4865. Stockholders failing to pay when called upon, what course shall be taken.	4869. Insurance companies shall not purchase or hold real estate, except.
	4870. Shall file bond.
	4871. May deposit securities in lieu of bond.

Art.
4872. Annual statement of company.
4873. What the annual statement shall exhibit.
4874. Policy shall be considered a liquidated demand.

Art.
4874a. Breach or violation by insured of policy, etc., on personal property, not a defense, when.
4874b. Provisions not affected.
4875. Reinsurance.

Article 4862. [3074] Marine, fire and all other than life or health insurance companies, may do what.—It shall be lawful for any insurance company doing business in this state under the proper certificate of authority, except a life or health insurance company to insure houses, buildings and all other kinds of property against loss or damage by fire, and to take all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water, or any vessel afloat, wherever the same may be; to lend money on bottomry or respondentia; and to cause itself to be insured against any loss or risk it may have incurred in the course of its business and upon the interest which it may have in any property by means of any loan or loans which it may have made on bottomry or respondentia; and generally to do and perform all other matters and things proper to promote these objects; to insure automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any of the risks of fire, lightning, wind storms, hail storms, tornadoes, cyclones, explosions, transportation by land or water, theft and collisions upon filing with the commissioner of insurance and banking of this state, notification of their purpose to do so. [Act Feb. 17, 1875, p. 34, sec. 8. Acts 1913, p. 209, sec. 1, amending Art. 4862, Rev. St. 1911.]

Art. 4863. [3077] Commissioner may permit capital stock of company to be reduced, when.—Whenever the joint stock of any fire, fire and marine, or marine insurance company of this state becomes impaired, the commissioner of insurance and banking may, in his discretion, permit the said company to reduce its capital stock and par value of its shares in proportion to the extent of impairment; but in fixing such reduced capital no sum exceeding twenty-five thousand dollars shall be deducted from the assets and property on hand, which shall be retained as surplus assets; and no part of such assets and property shall be distributed to the stockholders, nor shall the capital stock of a company in any case be reduced to an amount less than one hundred thousand dollars. [Act Aug. 21, 1876, p. 222, sec. 8, subd. 11.]

Art. 4864. [3078] When company is called upon to make good its capital stock, shall do what.—Any fire, marine, or inland, insurance company having received notice from the commissioner of insurance and banking to make good its whole capital stock within sixty days, shall forthwith call upon its stockholders for such amounts as shall make its capital equal to the amount fixed by the charter of such company. [Id. sec. 221.]

Art. 4865. [3079] Stockholder failing to pay when called upon, what course shall be taken.—In case any stockholder of such fire, marine, or inland insurance company shall neglect or refuse to pay the amount so called for, after notice personally given, or by advertisement for such time and in such manner as said commissioner shall approve, it shall be lawful for said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificate for such number of shares as such defaulting stockholders may be entitled to, in the proportion that the ascertained value of the funds of said company may be found to bear to the original capital of said company; the value of such shares, for which new certificates are issued, to be ascertained under the direction of said commissioner, and the company shall pay for the fractional parts of shares. [Id. sec. 8.]

Art. 4866. [3080] Company may create and dispose of new stock, when.—It shall be lawful for such fire, marine, or inland insurance company to create new stock and dispose of the same, and to issue new certificates therefor, to any amount sufficient to make up the original capital of the company. [Id.]

Art. 4867. [3087] Unlawful dividends.—It shall not be lawful for any life, health, fire, marine, or inland insurance company organized under the laws of this state to make any dividend, except from the surplus profits arising from its business; and in estimating such profits there shall be reserved therefrom a sum equal to forty per cent of the amount received as premiums on unexpired fire risks and policies, and one hundred per cent of the premiums received on unexpired life, health, marine, or inland transportation risks and policies, which amount so reserved is hereby declared to be unearned premiums; and there shall also be reserved the amount of all unpaid losses, whether adjusted or unadjusted; all sums due the company on bonds, mortgages, stocks and book accounts, of which no part of the principal or the interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and upon which interest shall not have been paid; and, in case of any such judgment, the interest due or accrued thereon and remaining unpaid shall also be reserved. [Id. sec. 15.]

Art. 4868. [3088] Penalty for making unlawful dividends.—Any dividends made contrary to the provisions of the preceding article shall subject the company making it to a forfeiture of its charter, and the commissioner of insurance and banking shall forthwith revoke its certificate of authority. [Id.]

Art. 4869. [3076] Insurance companies shall not purchase or hold real estate, except, etc.—No fire, marine, or inland insurance company organized under the laws of this state shall purchase or hold any real estate, except—

1. Such as shall be requisite for its convenient accommodation in the transaction of its business.

2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted or for money due.

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the company or for money due.

4. Such as shall have been purchased at sales under judgments, decrees or mortgages obtained or made for such debts.

All lands purchased or held in violation of this article shall be forfeited to the state. [Id. sec. 16.]

Art. 4870. Shall file bond.—Every fire insurance company, not organized under the laws of this state, applying for a certificate of authority to transact any kind of insurance in this state, shall, before obtaining such certificate, file with the commissioner of insurance and banking a bond, with good and sufficient surety or sureties, to be approved by the commissioner of insurance and banking, payable to the commissioner of insurance and banking, and his successors in office, in a sum equal to twenty-five per cent of its premiums collected from citizens or upon property in this state during the preceding calendar year, as shown by its annual report for such year; provided, however, the bond in no case shall exceed fifty thousand dollars, nor be less than ten thousand dollars, conditioned that said company will pay all its lawful obligations to citizens of this state. Such bonds shall be subject to successive suits by citizens of this state so long as any part of the same shall not be exhausted, and the same shall be kept in force unimpaired until all claims of

citizens of this state arising out of obligations of said company have been fully satisfied. Such bonds shall provide that, in the event the company shall become insolvent or cease to transact business in this state, at any time when it has outstanding policies of insurance in favor of citizens of this state, or upon property in this state, the commissioner of insurance and banking shall have the power, after having given ten days notice to the officers of such company, or any receiver in charge of its property and affairs, to contract with any other insurance company transacting business in this state for the assumption and reinsurance by it of all the insurance risks outstanding in this state of such company which is insolvent, or which has ceased to transact business in this state, which contract shall also provide for the assumption by such reinsuring company of all outstanding and unsatisfied lawful claims then outstanding against such company which has become insolvent, or ceased to transact business in this state; and in the event of the commissioner making any such contract, and if the same shall be approved as reasonable by the attorney general and the governor of this state, the reinsuring company shall be entitled to recover from the makers of such bond the amount of the premium or compensation so agreed upon for such reinsurance. Any company desiring to do so may, at its option, in lieu of giving the bond required by this article, deposit securities of any kind, in which it may lawfully invest its funds with the state treasurer of this state upon such terms and conditions as will in all respects afford the same protection and indemnity as is herein provided for to be afforded by said bond. [Acts 1909, p. 182, sec. 1.]

See *Southwestern Surety Ins. Co. v. Anderson* (Civ. App.) 152 S. W. 816; *Id.*, 155 S. W. 1176.

When bond required.—Under this article and Art. 4871, requiring that before any company shall issue any policy it shall first have filed during the calendar year in which such policy may issue a bond in a sum not less than \$10,000, conditioned for the payment of all lawful obligations to citizens of this state arising out of any policies or contracts issued by such company, and makes it a penal offense for any company to issue policies without having given bond, held that, when construed with the senate journal, which showed that this article as it originally stood made no provision for a minimum or maximum penalty, which provision was entered by amendment without any other change in the bill, the two articles were but complements of each other, and hence required the giving of only one bond. *Aetna Ins. Co. v. Hawkins*, 103 T. 195, 125 S. W. 313.

Under this article and Art. 4871, which requires that before any company shall issue any policy it shall first have filed, "during the calendar year in which such policy may issue, a bond," etc., and the practice and statutory provision, under which the state department did not issue the certificates to insurance companies until March, the words "calendar year," as used in Art. 4871, would be read in connection with this article, and construed to mean the year in which the certificate is to run, since it was obvious that the legislature considered that the certificate was to run a calendar year, and since any other construction would leave an interval between January and March, during which time a policy issued by the company would not be preceded by a bond "filed during the calendar year." *Id.*

Under the statutory provision that certificate of authority for an insurance company to do business in the state must be obtained annually, and this article, the filing of a bond is required whenever a certificate to do business was applied for. *Id.*

Obligation of bond.—Under this article and Art. 4871, which requires that, before any company shall issue any policy, it shall first have filed a bond conditioned for the payment of all lawful obligations to citizens of the state arising out of any policies or contracts issued by such company, a bond filed must contain all the conditions imposed by either section, except that the bond mentioned in this article would be limited by the language of Art. 4871 to include only lawful obligations arising out of insurance policies or contracts. *Aetna Ins. Co. v. Hawkins*, 103 T. 195, 125 S. W. 313.

Bond for benefit of policy holders.—A bond executed by defendant to indemnify a surety on the bond of a foreign insurance company to enable it to obtain a license to do business in Texas held to inure to the benefit of policy holders of the insurance company. *Southwestern Surety Ins. Co. v. Anderson* (Civ. App.) 155 S. W. 1176.

Art. 4871. May deposit securities in lieu of bond.—Every fire insurance company, not organized under the laws of this state, hereafter issuing, or causing or authorizing to be issued, any policy of insurance other than life insurance, shall first have filed with the commissioner of insurance and banking during the calendar year in which such policy may issue, or authorize or cause to be issued, a bond of good and sufficient sureties to be approved by such commissioner in a sum of not less than ten thousand dollars, conditioned for the payment of all lawful obligations to citizens of this state arising out of any policies or contracts

issued by such fire insurance company; which such bond shall be subject to successive suits by citizens of this state so long as any part of the same shall not be adjusted, and so long as there remains outstanding any such obligations or contracts of such fire insurance company. This article shall not apply to any person, firm or corporation, or association, doing an inter-insurance, co-operative or reciprocal business. [Id. sec. 3.]

When bond required.—See notes under Art. 4870.

Obligation of bond.—See notes under Art. 4870.

Art. 4872. [3083] Annual statement of company.—It shall be the duty of the president or of the vice-president and secretary of each fire, marine or inland insurance company doing business in this state, annually, on the first day of January of each year, or within sixty days thereafter, to prepare under oath and deposit with the commissioner of insurance and banking of this state a full, true and complete statement of the condition of such company on the last day of the month of December preceding. [Act Feb. 17, 1875, p. 37, sec. 17.]

Art. 4873. [3084] What the annual statement shall exhibit.—The annual statement required by the preceding article shall exhibit the following items and facts:

1. The name of the company and where located.
2. The names and residences of the officers.
3. The amount of capital stock of the company.
4. The amount of capital stock paid up.
5. The property or assets held by the company, viz.: The real estate owned by such company, its location, description and value as near as may be, and if said company be one organized under the laws of this state, shall accompany such statement with an abstract of the title to the same; the amount of cash on hand and deposited in banks to the credit of the company, and in what bank or banks the same is deposited; the amount of cash in the hands of agents, naming such agents; the amount of cash in course of transmission; the amount of loans secured by first mortgages on real estate, with the rate of interest thereon, specifying the location of such real estate, its value and the name of the mortgagor; the amount of all bonds and other loans, with the rate of interest thereon and how secured; the amount due the company in which judgments have been obtained, describing such judgments; the amount of stock of this state, of the United States, of any incorporated city of this state, and of any other stock owned by the company, describing the same and specifying the amount and number of shares, and the par and market value of each kind of stock; the amount of stock held by such company as collateral security for loans, with amount loaned on each kind of stock, its par and market value; the amount of interest actually due to the company and unpaid; all other securities, their description and value.

6. The liabilities of such company, specifying the losses adjusted and due; losses adjusted and not due; losses unadjusted; losses in suspense and the causes thereof; losses resisted and in litigation; dividends, either in scrip or cash, specifying the amount of each declared but not due; dividends declared and due; the amount required to reinsure all outstanding risks on the basis of forty per cent of the premium on all unexpired fire risks and one hundred per cent of the premium on all unexpired marine and inland transportation risks; the amount due banks or other creditors, naming such banks or other creditors and the amount due to each; the amount of money borrowed by the company, of whom borrowed, the rate of interest thereon and how secured; all other claims against the company, describing the same.

7. The income of the company during the preceding year, stating the amount received for premiums, specifying separately fire, marine and inland transportation premiums, deducting reinsurance; the amount received for interest, and from all other sources.

8. The expenditures during the preceding year, specifying the amount of losses paid during said term, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement; the amount paid for dividends; the amount paid for return premiums, commissions, salaries, expenses and other charges of officers, agents, clerks and other employés; the amount paid for local, state, national, internal revenue and other taxes and duties; the amount paid for all other expenses such as fees, printing, stationery, rents, furniture, etc.

9. The largest amount insured in any one risk, naming the risk.

10. The amount of risks written during the year then ending.

11. The amount of risks in force having less than one year to run.

12. The amount of risks in force having more than one and not over three years to run.

13. The amount of risks having more than three years to run.

14. It shall be stated whether or not dividends are declared on premiums received for risks not terminated. [Id.]

Change of law.—So far as subdivision 7 is in conflict with section 8 of the act of 1907 (Supp. to Sayles' Ann. Stat. 1908 [Acts 1907, p. 482, ch. 180]), the latter must prevail. The act of 1907 prescribes with certainty what the report of the fire insurance company shall be upon the subject of the gross receipts, and its terms are not modified by the former laws. *Fire Association v. Love*, 101 T. 376, 108 S. W. 810.

Art. 4874. [3089] Policy shall be considered a liquidated demand.—A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided, that the provisions of this article shall not apply to personal property. [Acts 1879, ch. 73, p. 83.]

See Arts. 4874a, 4874b.

See, also, *Merchants' Ins. Co. of New York v. Story et al.*, 13 C. A. 124, 35 S. W. 68.

Real or personal property.—When the petition describes and the evidence shows the fact that a dwelling house, which was attached to the soil and so described in the policy, was totally destroyed, at least a prima facie case is made justifying the court to treat the property as not personal and bringing the case within the terms of this article. *Co-operative Ins. Ass'n v. Hubbs*, 53 C. A. 68, 115 S. W. 671.

Where property covered by a fire policy is clearly real estate, a provision in the policy that the property shall be considered personalty for the purposes of the contract is void, because in contravention of this article, though, where the true status of the property is doubtful, it may be permissible for the parties by agreement to impress it with the character of personalty, provided the agreement is made in good faith, and not to contravene the statute. *Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.)* 147 S. W. 629.

Validity of stipulation.—In case of loss of a house the policy, issued under this article, is a liquidated demand, and the insurer is liable for the full amount expressed in the policy, the total insurance not exceeding the value of the property, notwithstanding there was subsequent insurance with the consent of the insurer, upon a stipulation that in the event of a loss it should only be liable for its proportion of three-fourths of the cash market value of the property at the time of the fire. So far as the policy covered personal property, its provisions as to the share of loss to be suffered by the insured should be allowed full force and effect. *Queen Ins. Co. v. Jefferson Ice Co.*, 64 T. 578; *East Texas Fire Ins. Co. v. Coffee*, 61 T. 287.

Any stipulation in contravention of this article is void. *Phoenix Ins. Co. v. Levy (Civ. App.)* 33 S. W. 992; *Western Assurance Co. of Toronto, Canada, v. Brown (Civ. App.)* 33 S. W. 994; *Royal Ins. Co. of Liverpool v. Levy (Civ. App.)* 33 S. W. 994; *Royal Ins. Co. of Liverpool v. Levy (Civ. App.)* 33 S. W. 995; *Phoenix Ins. Co. of Brooklyn v. Levy (Civ. App.)* 33 S. W. 995; *Orient Ins. Co. v. Levy*, 33 S. W. 995; *Merchants' Ins. Co. v. Levy (Civ. App.)* 33 S. W. 996; *Fire Association of Philadelphia v. Brown*, 12 C. A. 64, 33 S. W. 997; *Sun Mutual Ins. Co. v. Holland*, 2 App. C. C. § 448.

Total loss.—When the loss is total it is a liquidated demand, and notice or proof of loss is not necessary. Suit can be maintained on the policy as on any other liquidated demand, with the single addition that the property on which it was issued was real property and that it had been totally destroyed. *Queen Ins. Co. v. Jefferson Ice Co.*, 64 T. 582; *Continental Ins. Co. v. Chase (Civ. App.)* 33 S. W. 602.

When a city ordinance prohibited the repair of a wooden building within its limits, when injured by fire to the extent of one-third its value, and an application to repair such a building is refused, the loss is total. *H. & B. Ins. Co. v. Garlington*, 66 T. 103, 18 S. W. 337, 59 Am. Rep. 613.

If an insured building is injured by fire so as to have lost its identity and specific character as a building, the loss is total. Id.

A total loss exists when the specific character and identity as a house is lost; it does not mean the entire destruction of its material. *Royal Ins. Co. v. McIntyre (Civ. App.)* 34 S. W. 669.

There is no total loss of a building so long as the remnant of the structure standing is reasonably adapted to use as a basis upon which to restore the building to the condition in which it was before the injury. *Royal Ins. Co. v. McIntyre*, 90 T. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 747.

The statute embraces a house without reference to the question of the fee-simple title to the land. *Orient Ins. Co. v. Parlin*, 14 C. A. 512, 38 S. W. 60.

An insurance company cannot avoid its liability for total loss of a house on the ground that an excessive value was stated by the owner. *German Ins. Company v. Jansen*, 18 C. A. 190, 45 S. W. 220.

A building is a total loss, within this article, where the remnant is inconsiderable compared with the part entirely destroyed, and does not constitute a sufficient basis to restore the burnt building. *Murphy v. American Cent. Ins. Co.*, 25 C. A. 241, 54 S. W. 407.

The question of injury to the foundation should not be considered by the jury in reaching a conclusion as to total loss. *Id.*

The loss is total where only part of one wall was left standing so as to be used in another building and this even was condemned by the architect as unfit for use. *Am. Cent. Ins. Co. v. Murphy* (Civ. App.) 61 S. W. 956.

Liquidated demand.—Though by express provision of this article a demand on a fire policy, in case of total loss of the property insured, is a liquidated demand, a claim for breach of a contract to renew or procure insurance is an unliquidated demand within Art. 1329, providing that unliquidated damages cannot be set off in an action on a certain demand. *Wise v. Ferguson* (Civ. App.) 138 S. W. 816.

Where a policy insured a building for a certain amount, and the furniture for another amount, the amount upon the building became a liquidated demand upon the total destruction of that structure, regardless of its value, under this article. *Co-operative Ins. Ass'n of San Angelo v. Ray* (Civ. App.) 138 S. W. 1122.

Measure of recovery.—Neither the jobbing, nor the ordinary price of the goods destroyed, nor the cost of manufacturing them, was held to furnish the measure of damages. *Virginia Fire & Marine Ins. Co. v. Cannon*, 18 C. A. 588, 45 S. W. 945.

The measure of damages under an insurance contract where loss is not total is the difference between the value of the property whole and damaged within the amount of the policy. *German Ins. Co. v. Everett*, 18 C. A. 514, 46 S. W. 95.

Where goods insured are held by manufacturer thereof, their market price at time and place of destruction is the basis for determining loss. *Hartford Fire Ins. Co. v. Cannon*, 19 C. A. 305, 46 S. W. 851.

Where goods destroyed by fire were replaced by assured within 30 days, such was a reasonable time, and the cost of the goods fixed the measure of his recovery under the policy. *Texas Moline Plow Co. v. Niagara Fire Ins. Co.*, 39 C. A. 168, 87 S. W. 192.

"Actual value" defined. *Milwaukee Mechanics' Ins. Co. v. Frosch* (Civ. App.) 130 S. W. 600.

Insured held entitled to recover, not merely what secondhand goods would sell for, but what it would cost her to replace them. *Southern Nat. Ins. Co. v. Wood* (Civ. App.) 133 S. W. 286.

A fire policy issued to a lessee construed, and held not to give to the lessee a right to recover the rental value of the property covered by the policy. *Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.* (Civ. App.) 133 S. W. 1097.

Liability of co-insurers.—An insurer held liable, under a three-fourths clause of a divisible policy, only for three-fourths of the value of each item covered, taken separately. *Sun Mut. Ins. Co. v. Tufts*, 20 C. A. 147, 50 S. W. 180.

The "co-insurance clause," limiting the risk to such proportion of the loss as the sum insured bears to the value of the whole property covered, is valid. *Pennsylvania Fire Ins. Co. v. Moore*, 21 C. A. 523, 51 S. W. 878.

Where a loss so far exceeds the whole insurance that each insurer will be liable to its full amount, an insurer cannot complain of the method of computation adopted. *American Cent. Ins. Co. v. Heath*, 29 C. A. 445, 69 S. W. 235.

Where a fire policy permits concurrent insurance, additional insurance on a part only is within the provision, and in prorating such concurrent insurance should not be treated as on the whole property. *Id.*

An insurer sued on its fire policy, held under its answer and the evidence liable for only a part of the loss, according to the policy, without making another insurer a party. *Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n*, 56 C. A. 588, 121 S. W. 599.

Fire policies held to constitute double insurance, limiting the liability of one insurer according to the terms of its policy. *Id.*

A stipulation in a fire policy held not to nullify a provision therein limiting insurer's liability to no greater proportion of the loss sustained than the amount insured by it bore to the whole insurance. *Id.*

Whether void or voidable by the issuance of a second policy, held that a prior policy should be considered as insurance in determining the second insurance company's liability under a clause providing that it was liable for no greater amount than its policy bore to the whole amount of the insurance. *Southern Nat. Ins. Co. of Austin v. Barr* (Civ. App.) 148 S. W. 845.

Effect of foreclosure of mortgage.—Foreclosure of a mortgage on property insured by mortgagee held not to prevent her from recovering for loss under the policy. *Sun Ins. Office v. Beneke* (Civ. App.) 53 S. W. 98.

Notice or proof of loss.—Proof of loss, when stipulated for in the policy, is a condition precedent to a suit. *Fire Ins. Co. v. Miller*, 2 App. C. C. § 334; *Insurance Co. v. Clancy*, 83 T. 113, 18 S. W. 439.

A notice of loss given on the day succeeding is a compliance with a condition requiring immediate notice, the plaintiff being absent at the time of the fire. *Oakland Home Ins. Co. v. Davis* (Civ. App.) 33 S. W. 587.

A failure to furnish proof of total loss does not defeat an action on the policy. *Continental Ins. Co. v. Chase* (Civ. App.) 33 S. W. 602.

Under this article proof of loss may be made at any time before suit is brought. *Id.* The property insured being realty and the amount of policy being liquidated demand the clause relating to magistrate's certificate does not apply; even if it could be held to apply, the certificate is not provided for, unless it be required by the insurance company, and there must be proof that it was required. *Ætna Ins. Co. v. Shacklett* (Civ. App.) 57 S. W. 583.

— **Waiver.**—Proofs of loss are waived by an absolute refusal by the insurer to pay. *E. T. F. Ins. Co. v. Coffee*, 61 T. 287; *G. H. Ins. Co. v. Jacobs*, 56 T. 366; *Insurance Co. v. Josey*, 25 S. W. 685, 6 C. A. 290; *Insurance Co. v. Tobey*, 10 C. A. 425, 30 S. W. 1111. The failure to furnish proofs of loss is waived, when it was caused by the promise of the insurer to adjust and pay without further delay. *E. T. Fire Ins. Co. v. Dyches*, 56 T. 565.

Art. 4874a. Breach or violation by insured of policy, etc., on personal property, not a defense, when.—That no breach or violation by the insured of any of the warranties, conditions or provisions of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. [Acts 1913, p. 194, sec. 1.]

Art. 4874b. Provisions not affected.—That the provisions hereof shall in no way affect or repeal the provisions of article 4874 of the Revised Civil Statutes of 1911 in so far as the same relates to fire insurance policies upon real or mixed property. [*Id.* sec. 2.]

Art. 4875. [3075] Reinsurance.—No fire, fire and marine, marine or inland insurance company doing business in this state shall expose itself to any one risk, except when insuring cotton in bales and grain, to an amount exceeding ten per cent of its paid up capital stock, unless the excess shall be insured by such company in some other solvent insurance company legally authorized to do business in this state.

2. Every fire, fire and marine, marine or inland insurance company doing business in this state may reinsure the whole or any part of any policy obligation in any other insurance company legally authorized to do business in this state. The commissioner of insurance and banking shall require every year from every insurance company doing business in this state a certificate sworn to before an officer legally qualified to administer oaths in the state of Texas, to the effect that no part of the business written by such company in this state has been reinsured in whole or in part by any company, corporation, association or society not authorized to do business in this state. Every insurance company doing business shall also furnish the commissioner of insurance and banking with a list of all reinsurances during the year in authorized companies, showing the name, amount and premium effected in each company.

3. Any insurance company authorized to transact the business of fire, fire and marine, marine and inland insurance in this state, failing to comply with the provisions of this article, shall forfeit its authority to do such business for a period of one year; and it is hereby made the duty of the commissioner of insurance and banking to investigate any complaint as to violation of said article; and, upon satisfactory proof that any company authorized to transact the business of fire, fire and marine, marine or inland insurance in this state has violated the provisions of this article, the said commissioner shall revoke the certificate of authority of the offending company.

4. The commissioner of insurance and banking, upon the payment of license fee of twenty-five dollars, issue to an agent who is regularly commissioned to represent one or more fire, fire and marine insurance companies authorized to do business in this state, a certificate of authority to place excess lines of insurance in companies not authorized to do business in this state; provided, that the party desiring such excess insurance shall first file with the commissioner of insurance and banking an affidavit that he has exhausted all the insurance obtainable from companies duly authorized to do business in the state.

5. Before receiving license provided for in section 4 of this article, party applying for same shall file with the commissioner of insurance and banking a bond in the sum of one thousand dollars, payable to the governor of the state, for the faithful observance of the provisions of this article. Said bond to be approved by the commissioner, and to be for the benefit of the state of Texas.

6. Every agent so licensed shall report, under oath, to the commissioner of insurance and banking, within thirty days from the first day of January and July of each year, the amount of gross premiums received by him for such excess insurance, and shall pay the said commissioner a tax of five per cent thereon. The agent procuring a license as provided in this article shall keep a separate record of all transactions herein provided open at all times to the inspection of the commissioner, or his legally appointed representative. In default of the payment of any sums which may be due the state under this article, the said commissioner may sue for the same in any court of record in this state. [Act Feb. 17, 1875, p. 34, sec. 8. Amended Acts 1905, p. 112.]

Application.—This article does not forbid the taking of risks in excess of 10 per cent. of the capital stock, but requires that the excess shall be reinsured; and an insurance company, issuing a policy in a sister state on a building in excess of 10 per cent. of its capital stock without reinsuring the excess, violates the statute, though it is authorized under the laws of the sister state to take the risk. *Glen Falls Ins. Co. v. Hawkins*, 103 T. 327, 126 S. W. 1114.

CHAPTER NINE

STATE INSURANCE COMMISSION

Art.	Art.
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4876a. Maximum rate of premiums for fire insurance.	4891. Commission to establish uniform policies, etc.
4877. State insurance commission; appointment, etc.	4892. Certain provisions in policies void.
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4881. Duties of fire marshal.	4896. Insurance companies not to do certain things.
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4888. Company to furnish policy holders, with analysis of rate; schedules open to public.	4903. Gross premiums tax.
4889. [Repealed.]	4904. Unconstitutionality of part not to affect whole law.

Article 4876. Companies deemed to have accepted provisions of law.—Every fire insurance company, every marine insurance company, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this state, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this state or to some foreign country, whether such company is organized under the laws of this state or under the

laws of any other state, territory or possession of the United States, or foreign country, or by authority of the federal government, now holding a certificate of authority to transact business in this state, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this Act and that it agrees to transact business in this state, subject thereto; it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this Act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire. [Acts 1913, p. 195, sec. 3.]

Note.—Acts 1913, p. 195, sec. 1, repeals chapter 8 of Acts Fourth Called Session of the 31st Legislature, and thus supersedes Arts. 4876-4904, Rev. St. 1911.

Art. 4876a. Maximum rate of premiums for fire insurance.—After this Act shall take effect, a maximum rate of premiums to be charged or collected by all companies transacting in this state the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the state fire insurance commission created by this Act, and no such fire insurance company shall, after this Act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community. [Id. sec. 2.]

Art. 4877. State insurance commission; appointment, etc.—That there may be reasonable and just insurance rates in Texas, there is hereby created a commission to be known as the "State Insurance Commission," which shall be composed of the commissioner of insurance and banking, who shall be chairman thereof, and two commissioners who shall be appointed by the governor by and with the consent of the senate, subject to removal as provided for removal of state officers by article 3528 of the Revised Statutes of Texas [Art. 6027, Rev. St. 1911, and this compilation]; the members of said commission other than the commissioner of insurance and banking shall be appointed as herein provided within ten days after this Act takes effect; one of said members to be so appointed shall be appointed for a term ending February 1, 1914, and biennially thereafter; the other of said members of said commission shall be appointed for a term ending February 1st, 1915, and biennially thereafter, and the governor in making his first appointments to fill these respective offices shall designate which of said officers shall fill the term expiring February 1st, 1914, and which of said officers shall fill the term expiring February 1st, 1915. The commissioner of insurance and banking, for the purpose of this Act, may be referred to as the commissioner of insurance. [Id. sec. 4.]

Art. 4878. Compensation, etc.; appropriation.—The members of said commission other than the commissioner of insurance and banking shall each receive as compensation for their services the sum of twenty-five hundred dollars (\$2500.00) per annum; and the commissioner of insurance and banking shall receive as compensation or salary for his services under this Act, the sum of five hundred dollars (\$500.00) per annum in addition to his compensation as now fixed by law. Such salaries of the said two appointed members of said commission, and the said five hundred dollars (\$500.00) salary of the commissioner of insurance and banking, together with the necessary compensation of experts, the clerical force, and other persons employed by said commission, and

all necessary traveling expenses, and such other expenses as may be necessary, incurred in carrying out the provisions of this Act, shall be paid by warrants drawn by the comptroller upon the state treasurer upon the order of said commission; provided, that the total amount of all salaries and said other expenses shall not exceed the sum of one hundred thousand dollars (\$100,000.00) annually, and for the purpose of carrying out the provisions of this Act, there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of one hundred and twenty-five thousand dollars (\$125,000.00), or so much thereof as may be necessary for the period beginning April 1st, 1913, and ending August 31st, 1914. [Id. sec. 5.]

Art. 4879. Insurance commission to fix rates, etc.—The state fire insurance commission shall have the sole and exclusive power and authority, and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this state. As soon as practicable after this Act shall take effect, the state fire insurance commission shall begin the work of fixing and determining and promulgating the rates of premiums to be charged and collected by fire insurance companies throughout the state, and the making and adoption of its schedules of such rates, and then until such time as this work shall have been completed, said commission shall have full power and authority to adopt and continue in force the rates of premiums which may be lawfully charged and collected when this Act shall take effect, or any portion thereof, for such time as it may prescribe or until the work of making such schedules for the entire state shall be completed. Said commission shall also have authority to alter and amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided. Said commission shall also have authority to employ clerical help, inspectors, expert and other assistants, and to incur such other expenses as may be necessary in carrying out the provisions of this Act; provided that such expenses, including the salaries of the members of the commission shall not exceed in the aggregate the sum of one hundred thousand dollars (\$100,000.00) per annum.

It shall be the duty of said commission to ascertain as soon as practicable, the annual fire loss in this state; to obtain, to make and maintain a record thereof and collect such data and information with respect thereto as will enable said commission to classify the fire losses of this state, the causes thereof, and the amount of premiums collected therefor for each class of risks and the amount paid thereon, in such manner as will be of assistance in determining equitable insurance rates, methods of reducing such fire losses, and reducing the insurance rates of the state, or subdivisions of the state. [Id. sec. 6.]

Art. 4880. Secretary and fire marshal.—For the purpose of facilitating the work of said commission, one of the appointed members thereof shall be selected by the commission as its secretary, who shall perform the duties which shall appertain to that position, and whose official title shall be "Secretary of the State Insurance Commission"; the other of said appointed members thereof shall be selected by said commission as fire marshal of the state insurance commission, and his official title shall be "Fire Marshal of the State Insurance Commission;" but the said members so selected as secretary and fire marshal as aforesaid, shall receive no compensation for filling their respective positions, other than their salaries as members of the state insurance commission, and shall perform the duties of those respective positions at the will of the commission, but their expenses incurred in performing the duties of these positions shall be paid as provided in this Act. [Id. sec. 7.]

Art. 4881. Duties of fire marshal.—It shall be the duty of the fire marshal of the state insurance commission, who, for the purpose of this Act, may be referred to as the state fire marshal, at the discretion of the board, and upon the request of the mayor of any city or village, or the chief of a fire department of any city or village or any fire marshal where a fire occurs within such city or village, or of a county or district judge, or of the sheriff or county attorney of any county, where a fire occurs within the district or county of the officer making such request, or of any fire insurance company, or its general, state or special agent, interested in a loss, or of a policyholder sustaining a loss, or upon the direction of the state insurance commission to forthwith investigate at the place of such fire before loss can be paid, the origin, cause and circumstances of any fire occurring within this state, whereby property has been destroyed or damaged, and shall ascertain if possible whether the same was the result of any accident, carelessness or design, and shall make a written report thereof to the state insurance commission, and shall also furnish in writing, to the county or district attorney of the county in which such fire occurred, all the information and evidence obtained by him including a copy of all the pertinent testimony taken in the case. [Id. sec. 8.]

Art. 4882. Powers of fire marshal.—The state fire marshal shall have the power to administer oaths, take testimony, compel the attendance of witnesses and the production of documents and to enter at any reasonable time, any buildings or premises where a fire has occurred or is in progress, or any place contiguous thereto for the purpose of investigating the cause, origin and circumstances of such fire. And he may enter and examine at any reasonable time any building, structure or place for the purpose of ascertaining the fire hazard and may remove or require the owner or occupant to remove or safely store combustible material, dangerously exposed or improperly placed therein, and to remove any unnecessary exposure to fire hazard found therein; the said state fire marshal is hereby authorized when necessary to apply to a court of competent jurisdiction for the necessary writs or orders to enforce the provisions of this section, and in such case he shall not be required to give bond. [Id. sec. 9.]

Art. 4883. When state fire marshal is unable to act.—If for any reason the state fire marshal is unable to make any required investigation in person, he may designate the fire marshal of such city or town or some other suitable person to act for him; and such person so designated shall have the same authority as is herein given the state fire marshal with reference to the particular matter to be investigated by him, and shall receive such compensation for his services as may be allowed by the state insurance commission. If the investigation of a fire is made at the request of an insurance company, or at the request of a policyholder sustaining loss, or at the request of the mayor, town clerk or chief of the fire department of any city, village or town in which the fire occurred, then the expenses of the fire marshal, clerical expenses, witnesses and officers fees incident and necessary to such investigation shall be paid by such insurance company, or such policyholder of such city or town as the case may be, otherwise the expenses of such investigation are to be paid as part of the expenses of the state insurance commission. Provided, the party or parties, company or companies, requesting such investigation, shall before such investigation is commenced deposit with the state insurance commission, an amount of money in the judgment of said commission sufficient to defray the expenses of said fire marshal in conducting such investigation. [Id. sec. 10.]

Art. 4884. Action of fire marshal not to affect policies, etc.—No action taken by the state fire marshal shall effect the rights of any policyholder or any company in respect to a loss by reason of any fire so investigated; nor shall the result of any such investigation be given in

evidence upon the trial of any civil action upon such policy, nor shall any statement made by any insurance company, its officers, agents or adjusters, nor by any policyholder, or any one representing him, made with reference to the origin, cause or supposed origin or cause of a fire to the fire marshal or to any one acting for him, or under his direction, be admitted in evidence or made the basis for any civil action for damages. [Id. sec. 11.]

Art. 4885. Statements to be made to insurance commission; powers of commission.—That said commission is authorized and empowered to require sworn statements from any insurance company affected by this Act, and from any of its directors, officers, representatives, general agents, state agents, special agents and local agents of the rates and premiums collected for fire insurance on each class of risks, on all property in this state during any or all years for the five years next preceding the first day of January, 1913, and of the causes of fire, if such be known, if they are in possession of such data, and information, or can obtain it at a reasonable expense; and said commission is empowered to require such statements for any period of time after the first day of January, 1913, and said commission is empowered to require such statements showing all necessary facts and information to enable said commission to make, amend and maintain the general basis schedules provided for in this Act, and the rules and regulations for applying same and to determine reasonable and proper maximum specific rates and to determine and assist in the enforcement of the provisions of this Act. The said commission shall also have the right, at its discretion, either personally, or by some one duly authorized by it to visit the office whether general, local or otherwise, of any insurance company doing business in this state, and the home office of said company outside of this state, if there be such, and the office of any officers, directors, general agents, state agents, local agents or representatives of such company, and there require such company, its officers, agents or representatives to produce for inspection by said commission or any of its duly authorized representatives all books, records and papers of such company or such agents and representatives; and the said commission or its duly authorized agents or representatives shall have the right to examine such books and papers and make or cause to be made copies thereof; and shall have the right to take testimony under oath with reference thereto, and to compel the attendance of witnesses for such purpose; and any company, its officers, agents or representatives failing to make such statements and reports herein referred to and failing or refusing to permit the examination of books, papers and records as herein required, when so called upon or declining or failing to comply with any provisions of this section shall be subject to the penalties provided for in section 26 [Art. 4900] of this Act. Said commission shall be further authorized and empowered to require the fire insurance companies transacting business in this state or any of them, to furnish said commission with any and all data which may be in their possession, either jointly or severally, including maps, tariffs, inspection reports and any and all data affecting fire insurance risks in this state, or in any portion thereof and said commission shall be authorized and empowered to require any two or more of said companies, or any joint agent or representative of them, to turn over any and all such data in their possession, or any part thereof, to said commission for its use in carrying out the provisions of this Act. [Id. sec. 12.]

Art. 4886. Rates to be reasonable; schedules of rates; powers and duties of commission; when rates take effect, etc.—The rates of premium fixed by said commission under and in pursuance of the provision of this Act shall be at all times reasonable and the schedules thereof made and promulgated by said commission as herein provided, shall be

in such form as will in the judgment of the commission, most clearly and definitely and in detail disclose the rate so fixed and determined by said commission to be charged and collected for policies of fire insurance. Said commission may employ and use any facts and information now in the possession of the present state insurance board, as well as all facts obtainable from and concerning fire insurance companies transacting business in this state, showing their expense and charges for fire insurance premiums, for any period or periods, said commission may deem advisable, which in their opinion will enable them to devise and fix and determine reasonable rates of premium for fire insurance. The said commission in making and publishing schedules of the rates fixed and determined by it shall show all charges, credits, terms privileges and conditions which in any wise affect such rates, and copies of all such schedules shall be furnished by said commission to any and all companies affected by this Act applying therefor, and the same shall be furnished to any citizens of this state applying therefor, upon the payment of the actual cost thereof. No rate or rates fixed or determined by the commission shall take effect until it shall have entered an order or orders fixing and determining same, and shall give notice thereof to all fire insurance companies affected by this Act, authorized to transact business in the state. It shall be the duty of the state fire insurance commission, and of any inspector or other agent or employé thereof, who shall inspect any risk for the purpose of enabling the commission to fix and determine the reasonable rate to be charged thereon, to furnish to the owner of such risk at the date of such inspection, a copy of the inspection report, showing all defects that may operate as charges to increase the insurance rate.

Said commission shall have full power and authority to alter, amend, modify or change any rate fixed and determined by it on thirty days' notice, or to prescribe that any such rate or rates shall be in effect for a limited time, and said commission shall also have full power and authority to prescribe reasonable rules whereby in cases where no rate of premium shall have been fixed and determined by the commission, for certain risks or classes of risks, policies may be written thereon at rates to be determined by the company, provided, however, that such company or companies shall immediately report to said commission such risk so written, and the rates collected therefor, and such rates shall always be subject to review by the commission. [Id. sec. 13.]

Art. 4887. Companies may petition for change of rates, etc.; credits for reduced hazards, etc.—Any fire insurance company or companies affected by this Act shall have the right at any time to petition the commission for an order changing or modifying any rate or rates fixed and determined by the commission, and the commission shall consider such petition in the manner provided in this Act and enter such order thereon as it may deem just and equitable. The commission shall have full authority and power to give each city, town, village or locality credit for each and every hazard they may reduce or entirely remove, and also for all added fire fighting equipment, increased police protection, or any other equipment or improvement that has a tendency to reduce the fire hazard of any such city, town, village or locality, and also to give credit for a good fire record made by any city, town, village or locality. Said commission shall also have the power and authority to compel any company to give any or all policyholders credit for any and all hazards that said policyholder or holders may reduce or remove. Said credit shall be in proportion to such reduction or removal of such hazard and said company or companies shall return to such policy holder or holders such proportional part of the unearned premium charged for such hazard that may be reduced or removed. [Id. sec. 14.]

Art. 4888. Company to furnish policy holder with analysis of rate; schedules open to public.—When a policy of fire insurance shall be issued by any company transacting the business of fire insurance in this state, such company shall furnish the policyholder with a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate, unless such policyholder has theretofore been furnished with such analysis of such rate. All schedules of rates promulgated by said commission shall be open to the public at all times, and every local agent of a fire insurance company transacting business in this state shall have and exhibit to the public copies of such schedules covering all risks upon which he is authorized to write insurance. [Id. sec. 15.]

Art. 4889. Repealed. See note under Art. 4876.

Art. 4890. Authority to revise schedules of rates.—The commission shall have full power and authority after having given reasonable notice, not exceeding thirty days, of its intention to do so, to alter, amend or revise any rates of premium fixed and determined by it in any schedules of such rates promulgated by it as herein provided, and to give reasonable notice of such alteration, amendment or revision to the public, or to any company or companies affected thereby. Such altered, amended or revised rates shall be the rates thereafter to be charged and collected by all fire insurance companies affected by this Act; provided, that no policy in force prior to the taking effect of such changes or amendments shall be affected thereby, unless there shall be a change in the hazard of the risk, necessitating a change in the rate applicable to such risk, in which event such policy shall be subject to the new rates. [Id. sec. 16.]

Art. 4891. Commission to establish uniform policies, etc.—It shall be the duty of the state insurance commission to make, promulgate and establish uniform policies of insurance applicable to the various risks of this state, copies of which uniform policies shall be furnished each company doing business in this state, or which may hereafter do business in this state. That after such uniform policies shall have been established and promulgated and furnished the respective compies [companies] doing business in this state, such companies shall, within sixty days after the receipt of such forms of policies, adopt and use said form or forms and no other; also all companies which may commence business in this state after the adoption and promulgation of such forms of policies, shall adopt and use the same and no other forms of policies.

The said state fire insurance commission shall also prescribe all standard forms, clauses and endorsements used on or in connection with insurance policies. All other forms, clauses and endorsements placed upon insurance policies shall be placed thereon subject to the approval of the commission. The commission shall also have authority in its discretion to change, alter or amend such form or forms of policy or policies, and such clauses and endorsements used in connection therewith, upon giving notice and proceedings in accordance with section 21 [Art. 4895] of this Act. [Id. sec. 17.]

Art. 4892. Certain provisions in policies void.—Any provision in any policy of insurance issued by any company subject to the provisions of this Act to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character, that such encumbrance shall render such policy void, shall be of no force and effect, and any such provision within or placed upon any such policy shall be absolutely null and void. [Id. sec. 18.]

Art. 4893. Co-insurance clauses.—No company subject to the provisions of this Act may issue any policy or contract of insurance covering property in this state, which shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the assured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause or provision shall be null and void, and of no effect; provided that the co-insurance clauses and provisions may be inserted in policies written upon cotton, grain or other products in process of marketing, shipping, storing or manufacture. [Id. sec. 19.]

Art. 4894. Right of persons to petition insurance commission.—Any citizen or number of citizens of this state or any policyholder or policyholders, or any insurance company affected by this Act, or any board of trade, chamber of commerce, or other civic organization, or the civil authorities of any town, city, or village, shall have the right to file a petition with the state fire insurance commission, setting forth any cause of complaint that they may have as to any order made by this commission, or any rate fixed and determined by the commission, and they shall have the right to offer evidence in support of the allegations of such petition by witnesses, or by depositions, or by affidavits; upon the filing of such petition, the party complained of, if other than the commission shall be notified by the commission of the filing of such petition and a copy thereof furnished the party or parties, company or companies, of whom complaint is made, and the said petition shall be set down for a hearing at a time not exceeding thirty days after the filing of such petition and the commission shall hear and determine said petition; but it shall not be necessary for the petitioners or any one of them to be present to present the cause to the commission, but they shall consider the testimony of all witnesses, whether such witnesses testify in person or by depositions, or by affidavits, and if it be found that the complaint made in such petition is a just one, then the matter complained of shall be corrected or required to be corrected by said commission. [Id. sec. 20.]

Art. 4895. Regulations for hearings by insurance commission; actions to vacate or modify; injunctions or restraining orders; appeals, etc.—The state fire insurance commission shall give the public and all insurance companies to be affected by its orders or decisions, reasonable notice thereof, not exceeding thirty days, and an opportunity to appear and be heard with respect to the same; which notice to the public shall be published in one or more daily papers of the state, and such notice to the insurance company or companies to be affected thereby shall be by letter deposited in the postoffice, addressed to the state or general agent of such company or companies if the address of such state or general agent be known to the commission, or if not known, then such letter shall be addressed to some local agent of such company or companies, or if the address of a local agent be unknown to the commission, then by publication in one or more of the daily papers of the state, and the commission shall hear all protests or complaints from any insurance company or any citizen or any city, or town, or village or any commercial or civic organization as to the inadequacy or unreasonableness of any rates fixed by it or approved by it, or as to the inadequacy or unreasonableness of any general basis schedules promulgated by it or the injustice of any order or decision by it, and if any insurance company, or other person, or commercial or civic organization, or any city, town or village, which shall be interested in any such order or decision, shall be dissatisfied with any regulation, schedule or rate adopted by such commission, such company or person, commercial or civic organization,

city, town or village shall have the right, within thirty days after the making of such regulation or order, or rate, or schedule or within thirty days after the hearing above provided for, to bring an action against said commission in the district court of Travis county to have such regulation or order or schedule or rate vacated or modified; and shall set forth in a petition therefor the principal ground or grounds of objection to any or all of such regulations, schedules, rates or orders; in any such suit, the issue shall be formed and the controversy tried and determined as in other civil cases, and the court may set aside and vacate or annul any one or more or any part of any of the regulations, schedules, orders or rates promulgated or adopted by said commission, which shall be found by the court to be unreasonable, unjust, excessive or inadequate, without disturbing others. No injunction, interlocutory order or decree suspending or restraining [restraining] directly or indirectly the enforcement of any schedule, rate, order or regulation of said commission shall be granted; provided, that in such suit, the court, by interlocutory order, may authorize the writing and acceptance of fire insurance policies at any rate which in the judgment of the court is fair and reasonable, during the pending of such suit, upon condition that the party to such suit in whose favor the said interlocutory order of said court may be, shall execute and file with the commissioner of insurance and banking a good and sufficient bond to be first approved by said court, conditioned that the party giving said bond will abide the final judgment of said court and will pay to the commissioner of insurance and banking whatever difference in the rate of insurance, it may be finally determined to exist between the rates as fixed by said state fire insurance commission complained of in such suit, and the rate finally determined to be fair and reasonable by the court in said suit, and the said commissioner of insurance and banking, when he receives such difference in money, shall transmit the same to the parties entitled thereto.

Whenever any action shall be brought by any company under the provisions of this section within said period of thirty days, no penalties nor forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the orders, schedules, rates or regulations sought to be vacated in such action until the final determination of the same.

Either party to any such action, if dissatisfied with the judgment or decree of said court, may appeal therefrom as in other civil cases. No action shall be brought in any court of the United States to set aside any orders, rates, schedules or regulations made by said commission under the provisions of this Act until all of the remedies provided herein, shall have been exhausted by the party complaining.

If any insurance company affected by the provisions of this Act shall violate any of the provisions of this Act, the commissioner of insurance shall, by and with the consent of the attorney general, cancel its certificate of authority to transact business in this state. [Id. sec. 21.]

Art. 4896. Insurance companies not to do certain things.—No company shall engage or participate in the insuring or re-insuring of any property in this state against loss or damage by fire except in compliance with the terms and provisions of this Act; nor shall any such company knowingly write insurance at any lesser rate than the rates herein provided for, and it shall be unlawful for any company so to do, unless it shall thereafter file an analysis of same with the commission, and it shall be unlawful for any company, or its officers, directors, general agents, state agents, special agents, local agents, or its representatives, to grant or contract for any special favor or advantages in the dividends or other profits to come thereon, or in commissions in the dividends or

other profits to accrue thereon, or in commissions or division of commission, or any position or any valuable consideration or any inducement not specified in the policy contract of insurance; nor shall such company give, sell or purchase, offer to give, sell or purchase, directly or indirectly as an inducement to insure or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, partnership or individual, or any dividends or profits accrued or to accrue thereon, or anything of value whatsoever, not specified in the policy; but nothing in this section or in this Act shall be construed to prohibit a company from sharing its profits with its policyholders, provided that such agreement as to profit-sharing shall be placed on or in the face of the policy, and such profit-sharing shall be uniform and shall not discriminate between individuals or between classes; provided, however, that no part of the profit shall be paid until the expiration of the policy. Any company, or any of its officers, directors, general agents, state agents, special agents, local agents or its representatives, doing any of the acts in this section prohibited, shall be deemed guilty of unjust discrimination; provided, however, that if any agent of [or] company shall issue a policy without authority, and any policyholder holding such policy shall sustain a loss or damage thereunder, said company or companies shall be liable to the policyholder thereunder, in the same manner and to the same extent as if said company had been authorized to issue said policies, although the company issued said policy in violation of the provisions of this Act. But this shall not be construed to give any company the right to issue any contract or policy of insurance other than as provided in this Act. [Id. sec. 22.]

Art. 4897. Unlawful to accept rebate.—No person shall knowingly receive or accept from any insurance company or from any of its agents, sub-agents, brokers, solicitors, employés, intermediaries or representatives, or any other person, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other financial profits accrued or to accrue thereon, or any valuable consideration, position or inducement not specified in the policy of insurance, and any person so doing shall be guilty of a violation of the provisions of this section, and shall be punished by a fine of not exceeding one hundred dollars (\$100.00) or by imprisonment in the county jail for not exceeding ninety days, or by both such fine and imprisonment. [Id. sec. 23.]

Art. 4898. Law not applicable to collection of premiums; certain policies to be in force.—The provisions of this law shall not deal with the collection of premiums, but each company shall be permitted to make such rules and regulations as it may deem just between the company, its agents, and its policyholders; and no bona fide extension of credit shall be construed as a discrimination, or in violation of the provisions of this Act.

All policies heretofore issued or which shall hereafter be issued by any insurance company prior to the taking effect of this Act which provide that said policies shall be void for non-payment of premiums at a certain specified time, shall be and the same are in full force and effect, provided, that the company or any of its agents have accepted the premium on said policies after the expiration of the dates named in said provisions fixing the date of payment. [Id. sec. 24.]

Art. 4899. Commissioner of insurance may revoke authority of company, when.—The commissioner of insurance, upon ascertaining that any insurance company or officer, agent or representative thereof, has violated any of the provisions of this Act, may, at his discretion, and with the consent and approval of the attorney general, revoke the certificate of authority of such company, officer, agent or representative; but such revocation of any certificate shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any

other penalty provided by this Act, and provided, that any action, decision or determination of the commissioner of insurance and banking and the attorney general in such cases shall be subject to the review of the courts of this state as herein provided. [Id. sec. 25.]

Art. 4900. Unlawful for company or agents to evade law.—Any insurance company affected by this Act, or any officer or director thereof, or any agent or person acting for or employed by any insurance company, who, alone, or in conjunction with any corporation, company or person, who shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done any act, matter or thing prohibited or declared to be unlawful by this Act, or who shall wilfully omit or fail to do any act, matter or thing required to be done by this Act or shall cause or wilfully suffer or permit any act, matter or thing directed not to be done, or who shall be guilty of any wilful infraction of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00), nor more than one thousand dollars (\$1000) for each offense. [Id. sec. 26.]

Art. 4901. Persons testifying in trials for violation of law not to be prosecuted.—No person shall be excused from giving testimony or producing evidence when legally called upon to do so at the trial of any other person or company charged with violating any of the provisions of this Act on the ground that it may incriminate him under the laws of this state; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence under this Act, except for perjury in so testifying. [Id. sec. 27.]

Art. 4902. Law not to apply to certain companies.—This Act shall not apply to purely mutual or to purely profit-sharing fire insurance companies incorporated or unincorporated under the laws of this state, and carried on by the members thereof solely for the protection of their property and not for profit; nor to purely co-operative inter-insurance and reciprocal exchange carried on by the members thereof solely for the protection of their property and not for profit. [Id. sec. 28.]

Art. 4903. Gross premiums tax.—There shall be assessed and collected by the state of Texas, an additional one and one-quarter (1¼) per cent. of the gross premiums on all fire insurance companies doing business in this state, according to the reports made to the commissioner of insurance and banking as required by law; and said taxes when collected shall be placed in a separate fund with the state treasurer to be expended during the current year, in carrying out the provisions of this Act; and should said amount collected be more than necessary to pay all expenses, the state fire insurance commission may reduce the rate for the next succeeding year, so that no more money will be collected than is necessary to pay all necessary expenses of maintaining the commission, which funds shall be paid out on requisitions made out and filed by the commissioner when the comptroller shall issue warrants therefor. [Id. sec. 29.]

See Art. 7376 for provision as to gross premium taxes.

Exemption.—Under this article, an insurance company which had paid such an occupation tax in 1909 at the rate of 2 per cent. under an existing law is not exempted; the provisions for such exemption referring to future legislation, and not to existing statutes. *Fireman's Fund Ins. Co. v. Von Rosenberg*, 103 T. 571, 132 S. W. 467.

Mandamus.—Mandamus to require commissioner to impose tax assessments, see notes under Title 89.

Art. 4904. Unconstitutionality of part not to affect whole law.—If any part of this Act be for any reason held unconstitutional, it shall not affect any other portion or part of this Act. [Id. sec. 30.]

CHAPTER TEN

MUTUAL FIRE, LIGHTNING, HAIL, AND STORM INSURANCE COMPANIES

<p>Art. 4905. Incorporation; for what purposes. 4906. Application for permit; contents of application; fee; duty of commissioner of insurance and banking. 4907. Conditions, etc., for obtaining charter; charter or articles of association, how executed; shall contain what; duty of commissioner. 4907a. Supervision of commissioner of insurance and banking; duties of commissioner, examination and certificate; suspension of permit; forfeiture. 4907b. Annual statement of company. 4907c. Who are members; right to vote and share in benefits. 4907d. Liability of members. 4907e. By-laws; premiums or assessments, surplus fund, etc.</p>	<p>Art. 4907f. Funds, how invested. 4907g. Limitation of expenses. 4907h. Solvency and profit, how determined; reserve. 4907i. When assets insufficient; notice to commissioner and examination. 4907j. Suspension or revocation of license for insufficient assets; forfeiture. 4907k. Laws applicable. 4907l. Penalties, etc. 4907m. Foreign companies may be admitted, when. 4907n. Fees; taxes. 4907o. Withdrawal of securities deposited under former law. 4907p. Laws repealed. 4908-4918. [Repealed.]</p>
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Article 4905. Incorporation; for what purposes.—Any number of persons, not less than seven, who shall be resident citizens of the state of Texas, may form and incorporate a company for the purpose of mutual insurance against loss or damage by fire, lightning, hail and storms, and for all or either of such purposes; provided, that every company incorporated, under the provisions of this Act shall embody the word “mutual” in its title, which shall appear upon the first page of every policy, and renewal receipt. [Acts 1913, p. 54, sec. 1.]

See Art. 4907p.

Art. 4906. Application for permit; contents of application; fee; duty of commissioner of insurance and banking.—When any number of persons, not less than seven, desire to organize a mutual insurance company, as herein provided, they shall make application to the commissioner of insurance and banking of the state of Texas for permission to solicit insurance on the mutual plan.

Such application shall contain:

- (1) The name of the company, and the name selected shall not be so similar to that of any other insurance company as to be likely to mislead the public.
- (2) The locality of the principal business office of such company.
- (3) The kind of insurance business the company proposes to engage in.
- (4) The names and places of residence of not less than seven persons making such application for such permit.
- (5) An affidavit of at least one of said applicants, stating the places of residence and names of such applicants correctly.

Upon receipt of such application, together with a fee of one dollar, in payment for filing such application, the commissioner of insurance and banking shall at once file said application, and issue to said applicant a permit authorizing said applicant to solicit insurance on the mutual plan, in accordance with the terms of the application, but not to issue policies of insurance. [Id. sec. 2.]

Art. 4907. Conditions, etc., for obtaining charter; charter or articles of association, how executed; shall contain what; duty of commissioner.—No such company shall be granted a charter, or be authorized to issue policies of insurance, until insurance, upon not less than one hundred separate risks, the total amount of which insurance shall not be less than one hundred thousand dollars has been applied for and entered on the books of said company, and until an amount equal to not

less than fifty per cent of the first premiums for such insurance has been paid in cash to such company, a premium note being taken for the balance, if any, and such mutual [annual] premiums must aggregate not less than twice the maximum liability to be incurred on any one risk, and no policy of insurance shall be written, or liability, as an insurer, be incurred by said company, until a statement subscribed and sworn to by the president and secretary of said company, stating that the above provisions have been complied with, has been filed with the commissioner of insurance and banking of the state of Texas, together with certified copies of the company's proposed charter, and by-laws.

The charter or articles of association of said company shall be signed and acknowledged by at least four of the original applicants for said permit, and shall contain:

- (1) The name of the company.
- (2) The purpose for which it is formed.
- (3) The place or places where its business is to be transacted, and the location of its principal business office.
- (4) The term for which it is to exist.
- (5) The number of its directors, or trustees, and the names and residences of those who are elected for the first year.

When said applicants have complied with all of the above requirements, and have filed the necessary copies of their charter and by-laws with the commissioner of insurance and banking of the state of Texas, and have paid the fees and taxes required by the laws of the state of Texas to be paid, the commissioner of insurance and banking shall record said charter, and furnish said company with a certified copy thereof, and shall issue to said company a certificate of authority showing it has complied with the laws of the state of Texas, and authorizing it to do business until the last day of the following February. [Id. sec. 3.]

Art. 4907a. Supervision of commissioner of insurance and banking; duties of commissioner, examination and certificate; suspension of permit; forfeiture.—Every mutual fire, lightning, and storm insurance company incorporated in this state shall be under the supervision of the commissioner of insurance and banking, who shall make or cause to be made, an examination of the affairs of each mutual insurance company, at the company's expense, at least once in every two years and at such other times as he deems proper, and he shall thoroughly and carefully inspect books, accounts and records of the company, and if upon such inspection the affairs of such company are found to be in a sound condition and the company thus solvent and able to fulfill its obligations, he shall issue to the company a certificate showing the result of such examination. If upon examination he is of opinion that the mutual insurance company is insolvent or has exceeded its powers, or has failed to comply with any provisions of law governing it, he may suspend the company's permit and shall give such company written notice of that objected to, and failing such being remedied [remedied] within thirty days, he shall report the same to the attorney general, who shall at once bring suit to forfeit the charter of such company. [Id. sec. 4.]

Art. 4907b. Annual statement of company.—Every mutual insurance company transacting business in the state shall, before the month of March in each year, file in the office of the commissioner of insurance a statement showing the exact condition of affairs of the company upon the 31st day of December preceding, such statement being in conformity with such forms as the insurance commissioner may furnish. [Id. sec. 5.]

Art. 4907c. Who are members; right to vote and share in benefits.—Every person to whom a policy of insurance has been issued by a mutual company incorporated in this state shall be a member of such company so long as his policy remains in force and shall be entitled to

one vote at the meetings of the members of such companies, and shall further be entitled to his equitable share of all benefits derived from being a member of such company. [Id. sec. 6.]

Art. 4907d. Liability of members.—The by-laws of every company organized under this Act shall provide that every member, in addition to his annual premium paid in cash, or in cash and premium notes, shall be liable for a sum equal to another annual premium, or it may provide, a sum equal to three or five annual premiums, such additional liability being assessable at the discretion of the insurance commissioner or the company's board of directors, for the members proportionate share of losses and expenses should the company's funds become impaired. [Id. sec. 7.]

Art. 4907e. By-laws; premiums or assessments; surplus fund, etc.—The by-laws of such companies shall specifically provide for the rules and regulations of the government, providing for the collection of adequate premiums or assessments, either all in cash or part cash and part by note, such premiums being based upon the greater or less risk attached to the property insured, and they shall state clearly and plainly the extent of each member's liability to other members, shall provide for the accumulation of a surplus fund to which shall be added not less than 10 per cent of the annual saving, being made by the company, shall require [provide] for the bonding of the company's officers and shall name such other provisions and safeguards as may be deemed proper and not contrary to the laws of the state, and a notice in heavy type shall be printed on all policies calling to the attention of the insured that the by-laws are a part of his contract with the company. [Id. sec. 8.]

Art. 4907f. Funds, how invested.—Funds of mutual companies may be invested in United States bonds, Texas state bonds, county or city bonds of the state of Texas, provided that such bonds are issued by authority of law and that interest upon them has never been defaulted, or in first mortgages on improved real estate within the state where the first mortgage does not exceed 50 per cent of the value of the land and improvements thereon. [Id. sec. 9.]

Garnishment of funds.—See notes under Art. 271.

Art. 4907g. Limitation of expenses.—The expenses of all companies incorporated under this Act must not exceed an amount equal to 35 per cent of the annual premiums, and a statement must be made annually to the commissioner of insurance and banking by the president or secretary of the company that they are being so limited. [Id. sec. 10.]

Art. 4907h. Solvency and profit, how determined; reserve.—In determining the solvency of any mutual company organized for any purpose mentioned in this Act, and in determining the profit or saving to be distributed among members, 40 per cent of the actual cash premiums paid on policies in force for one year and a pro rata of all premiums received on risks that have more than one year to run shall be deemed to be a sufficient reserve under the said policies and no dividends to members shall be paid out of this reserve. [Id. sec. 11.]

Art. 4907i. When assets insufficient; notice to commissioner and examination.—If any time the admitted assets of any mutual company, operating under this Act shall come to be less than the largest single risk for which the company is liable, then the president and the secretary of the company shall at once notify the commissioner of insurance and banking, and he may make an examination into the company's affairs if he deems it best. [Id. sec. 12.]

Art. 4907j. Suspension or revocation of license for insufficient assets; forfeiture.—If, upon the examination of the company's affairs, as

required in section 12 [Art. 4907i], it appear that the largest single risk for which the company is liable exceeds the admitted assets of the company, the commissioner of insurance and banking shall immediately suspend or revoke the license of the company until the assets of the company are increased by assessment or otherwise, sufficiently to meet the requirement.

The company shall have thirty days within which to meet this requirement, and if within that time it fails to do so the commissioner of insurance and banking shall refer the matter to the attorney general of the state of Texas, with instructions to institute proper legal proceeding to forfeit the charter of said company. [Id. sec. 13.]

Art. 4907k. Laws applicable.—Every mutual company organized for any purpose mentioned in this Act, shall be amenable to, and subject to, the provisions of all laws of this state governing stock fire insurance companies, in so far as they are applicable to mutual companies, and not in conflict with the provisions of this Act. [Id. sec. 15.]

Art. 4907l. Penalties, etc.—Any mutual company that shall wilfully violate, or fail to comply with the provisions of this Act shall be subject to, and liable to pay, a penalty of not less than five dollars, nor more than one hundred dollars for each violation thereof, and such penalty may be collected and recovered in an action brought in the name of the state of Texas, in any court having jurisdiction thereof; and for any violation or failure to comply with any of the provisions of this Act, the commissioner of insurance and banking may suspend a company's permit, or license, and while suspended, such company shall be prohibited from writing or renewing any insurance policies. [Id. sec. 16.]

Art. 4907m. Foreign companies may be admitted, when.—Mutual companies incorporated under the laws of any other state, or foreign government, for any, or all of the purposes, specified in the first section [Art. 4905] of this Act, and duly licensed to transact business in such other states or government, and that have not less than one hundred thousand dollars assets in excess of liabilities, shall, when they have complied with the requirements and restrictions of this Act, as far as applicable to them, be admitted to do business in this state, and the commissioner of insurance and banking shall issue to any such company, so complying, a permit authorizing such company to do business in this state until the last day of the following February. [Id. sec. 17.]

Art. 4907n. Fees; taxes.—Every mutual company operating under this Act shall pay to the commissioner of insurance and banking of the state of Texas, for obtaining a charter, a fee of twenty dollars, and for each license granted, or renewal thereof, a fee of one dollar, and for filing each annual statement a fee of ten dollars annually on the 31st day of each December, and when the insurance commissioner has certified to the treasurer of the state of Texas, the correct amount to be paid, every mutual company operating under this Act shall pay to the treasurer of the state of Texas one-half of one per cent of all of the net premiums, or assessments, received by it during the year, and no other tax shall be required of such mutual company, or companies, their officers and agents, except such fees as shall be paid to the commissioner of insurance as required by law. [Id. sec. 18.]

Art. 4907o. Withdrawal of securities deposited under former law.—Any mutual fire, lightning and storm insurance company which has deposited securities with the state treasurer of the state of Texas, in accordance with chapter 10, title 71, of the Revised Statutes of Texas of 1911, repealed in section 20 [Art. 4907p] of this Act, may withdraw from such depository any securities so deposited, upon filing with the commissioner of insurance and banking of the state of Texas, a declaration of its

intentions to comply with the provisions of this Act, and upon the execution and delivery to the state treasurer of the state of Texas of a proper receipt for such securities, which receipt shall release the state treasurer from all further liabilities on account of such deposit, or the withdrawal thereof. [Id. sec. 19.]

Art. 4907p. Laws repealed.—Chapter 10, title 71, of the Revised Statutes of the state of Texas of 1911, and all other Acts, or laws, or parts of laws, in conflict with this Act, or in conflict with any portion of this Act are hereby repealed, but nothing in this Act shall be deemed to apply in any way to the present law governing county mutual insurance, or farmer's mutuals, now operating under lodge systems, or printers' mutuals and such companies and associations shall not be subject to the provisions of this Act, except that they will make annual reports to the commissioner of insurance and banking of the state of Texas. [Id. sec. 20.]

Arts. 4908–4918.—Repealed. See Art. 4907p.

CONSTRUCTION OF PRIOR ACT

Application of old Art. 4910.—This act authorizes the garnishment of securities held in trust by the state treasurer, belonging not only to companies incorporated under the act, but those belonging to all other companies acting thereunder. *Robbins v. Midkiff*, 46 C. A. 272, 102 S. W. 431, 432.

Jurisdiction to forfeit charter.—The district court of Travis county had jurisdiction to forfeit for cause the charter of a mutual fire insurance company whose domicile was at Houston and appoint a receiver for the company. *Graham v. Sparks*, 56 C. A. 483, 121 S. W. 597.

Garnishment.—See notes under Art. 271.

CHAPTER TEN A

FARMERS' MUTUAL HAIL INSURANCE COMPANIES

Art.	Art.
4918a. Who may incorporate.	4918d. Application shall state what.
4918b. Application for permit; contents; duty of commissioner of insurance and banking; applicants to execute promissory notes, etc.	4918e. Board of directors; officers; bond of treasurer.
4918c. Commissioner of insurance and banking, on approval of applications and notes, etc., to certify to secretary of state; permit; charter; license and fees; notes of applicants.	4918f. Policies on growing crops; applications and contracts; insufficient premiums, etc.
	4918g. Premiums, how used; funds, how invested; reserve fund.
	4918h. Rates, how fixed.
	4918i. Annual report of corporation.
	4918j. Fees.

Article 4918a. Who may incorporate.—Private corporations may be created without a capital stock within this state by the voluntary association of seven or more persons, resident citizens of this state who collectively own not less than 1,000 acres of growing crops of all kinds for the purpose of mutual insurance against loss or damage by hail; provided, that every company incorporated under the provisions of this Act shall embody the word "mutual" in its title. [Acts 1913, p. 40, sec. 1.]

See Art. 4907p.

Art. 4918b. Application for permit; contents; duty of commissioner of insurance and banking; applicants to execute promissory notes, etc.—When any number of persons not less than seven desire to organize a mutual hail insurance company as herein provided, they shall make application to the commissioner of insurance and banking for permission to solicit business under the mutual plan, stating the principal place of business and name of the company; that said company is to be organized for the insurance of growing crops against loss or damage by hail. Upon receipt of said application the commissioner of insurance and banking shall issue said applicants a permit to solicit insurance against loss or

damage by hail on the mutual plan in accordance with the terms of the application, but not to issue policies of insurance. Said mutual company shall take from each applicant an obligation specifying the property to be insured and the amount to be paid as the first assessment evidenced by a promissory note for such sum and payable on or before the 31st day of the succeeding December, and upon the state of Texas granting to said mutual insurance company a charter authorizing it to do business in this state. [Id. sec. 2.]

Art. 4918c. Commissioner of insurance and banking, on approval of applications and notes, etc., to certify to secretary of state; permit; charter; license and fees; notes of applicants.—When applications have been secured for insurance with such company from at least two hundred applicants residing in not less than twenty-five different counties of this state, the first assessment or premium on which applications shall amount to at least ten thousand dollars, for which notes of solvent parties founded on actual bona fide applications for insurance payable upon the granting the charter by the state to said mutual hail insurance company, which premium notes shall be a lien on the crop insured, or otherwise secured, and which notes and applications shall be submitted to the commissioner of insurance and banking, and when he finds the applications and notes to be genuine and secured by liens on growing crops or otherwise secured, he shall upon the payment of a fee of twenty-five dollars, certify the fact that he has examined and approved said applications and notes to the secretary of state, who shall upon an application of said persons to which application shall be attached the said certificate of the commissioner of insurance and banking, permit said company to incorporate and issue to it a charter. A certified copy of the charter shall thereupon be filed with the commissioner of insurance and banking, who, upon the payment of the fees required by law, shall issue to said mutual hail insurance company a license to solicit and transact business and issue policies against loss or damage by hail. Every person making application for insurance in such company prior to the granting of a charter to such company and signing a non-negotiable promissory note shall be liable upon the note upon the granting of a charter by the state, and if payment is refused, suit may be brought on same in any court in this state having jurisdiction of the amount at the principal office of said insurance company. [Id. sec. 3.]

Art. 4918d. Application shall state what.—The application for charter shall state the name of the corporation, the purpose for which it is formed, the place of its principal office, the term for which it is to exist, the number, name, and residence of its directors for the first year and shall be subscribed and acknowledged by seven or more of the applicants. [Id. sec. 4.]

Art. 4918e. Board of directors; officers; bond of treasurer.—Upon the issuance of a charter by the secretary of state to such mutual hail insurance company the persons making application for such charter shall constitute a board of directors for the first year, which board of directors shall, consist of not less than seven persons all of whom shall be residents of this state.

The officers of such company shall be such as may be provided by the by-laws, and the treasurer or the secretary and treasurer, if such offices should be combined in one, shall execute a bond in the sum of ten thousand dollars payable to the commissioner of insurance and banking and his successors in office conditioned for the faithful performance of his duties and that he will account for all moneys, notes or other assets that may come into his hands said bond shall be signed by two or more good and solvent sureties, or be executed by a guaranty company authorized to do business in this state, and shall be approved by the commissioner of insurance and banking. [Id. sec. 5.]

Art. 4918f. Policies on growing crops; applications and contracts; insufficient premiums, etc.—Mutual hail insurance companies organized under the provisions of this Act may issue policies on growing crops of all kinds against loss or damage by hail only. Any person desiring insurance in such company shall make application on blanks furnished by the company and shall pay the full amount of the premium in cash or secured notes. Provided, that no contract shall be made providing for payment of any obligation by the insured or for suit on any such obligation of the insured, except those given by the charter members referred to in section 3 [Art. 4918c] of this Act, in any county other than the county in which the insured has his domicile. In case the whole amount of the premium collected by such company for any one year shall be insufficient to pay all losses occurring during said year, after paying the necessary expenses for said year, the persons insured by such company shall receive their proportionate share of the sums realized from said premiums after deducting the expenses therefrom in full satisfaction of their losses, and no member shall be liable to the company or to any other person for more than the premium, which shall be paid by him or secured to be paid by him in making his application for insurance. [Id. sec. 6.]

Art. 4918g. Premiums, how used; funds, how invested; reserve fund.—All companies incorporated under this Act shall set aside 60 per cent of all premiums collected as a policy holder's fund for the payment of losses which fund shall be used for no other purpose, and the remainder of the gross premiums collected shall be used, if needed, for paying the expenses of said company, and if not needed for such purpose such remainder not so used shall be added to the policy holders' fund at the end of the current year, and if, at the end of such current year the total of said policy holders' fund has not been appropriated or necessary in the payment of losses to policy holders, then such amount of said fund so remaining may be invested in first mortgage notes on lands in this state, said investment not exceeding 50 per cent of the value of said lands, or in bonds of this state, or in county, city, town or school district bonds of this state, provided said bonds have been approved by the attorney general, which funds or securities shall be deposited in trust for said policy holders with any bank approved by the commissioner of insurance and banking as a reserve fund, which fund may be used for the payment of policy holders, if necessary, in case of excessive and unprecedented losses, and such company may collect and receive the interest and dividends thereon to be used in defraying the expenses and paying the losses of said company. [Id. sec. 7.]

Art. 4918h. Rates, how fixed.—The board of directors of such company shall have the authority to fix the rates to be charged for such insurance, and may fix at their discretion different rates for different sections of the states based upon the frequency of hail storms in such sections. [Id. sec. 8.]

Art. 4918i. Annual report of corporation.—Every such corporation shall on or before January 1st, or within thirty days thereafter, each year make and file with the commissioner of insurance and banking, a report upon blank forms to be furnished by such commissioner which report shall be verified by the oath of the secretary of such corporation and shall show the number of policies issued for the preceding year, the number and amount of losses paid, the gross amount received from premiums, the amount of expenses paid, and the amount set aside or invested during the year as a reserve fund, if any, and the books, records, and documents of such corporation shall be subject to the inspection and examination of the attorney general or the commissioner of insurance and banking. [Id. sec. 9.]

Art. 4918j. Fees.—The following fees shall be paid by companies organized under this law:

In addition to the application fee, charter fee, to the secretary of state when charter is issued, \$25.00 annual franchise tax of \$50.00; and to the commissioner of insurance and banking for filing annual statement, \$5.00, certificate of authority to corporation \$1.00 and no other fees shall be paid by said companies. [Id. sec. 10.]

CHAPTER ELEVEN

PRINTERS' MUTUAL FIRE AND STORM INSURANCE COMPANIES

Art.
4919. How incorporated.

4920. Certificate to do business, how obtained.

Art.

4921. Shall report annually and pay fee.

Article 4919. How incorporated.—Private corporations may be created within this state by the voluntary association of three or more persons for the organization of printers' mutual fire and storm insurance associations without an authorized or subscribed capital stock, and for the purpose of insuring against loss by fire or storm only such property as may be owned and operated for the purpose of publishing daily, weekly or other periodical newspapers, or such as may be incident thereto or conducting job printing offices. [Acts 1905, p. 225.]

Art. 4920. Certificate to do business, how obtained.—Before beginning operations, the company provided for in this chapter must obtain from the commissioner of insurance and banking a certificate of authority such as is issued to mutual fire and tornado insurance companies doing business in this state, first making a showing to said commissioner that the company has fully complied with all the requirements of law applicable to such mutual fire and tornado insurance companies; provided, that no officers of printers' mutual fire and storm insurance associations shall be required to give a bond, except the treasurers thereof, who shall annually file a bond with good securities and in amount to be approved by said commissioner. [Id. Amended Acts 1909, p. 219, sec. 2.]

Art. 4921. Shall report annually and pay fee.—All printers' mutual fire and storm insurance associations, which transact business in only one county, shall report annually, on or before the last day of February, to said commissioner on blanks prepared by him, and pay to said commissioner as a fee for filing the same the sum of five dollars; and such associations shall not be required to pay the annual franchise tax collected of other corporations under the laws of this state. [Id. sec. 1a.]

CHAPTER TWELVE

MUTUAL COMPANIES INSURING AGAINST LOSS BY BURGLARY, ETC.

Art.

4922. What companies entitled to license.

4923. Certain conditions; premium contracts to constitute part of assets.

4924. Must file copy of charter and statement; impaired reserve, etc.; line of business; must set aside reserve.

Art.

4925. Policy holders.

4926. Commissioner agent for service of process.

4927. Statement submitted and license issued annually.

Article 4922. What companies entitled to license.—Any insurance company organized and incorporated on the mutual plan, under the laws of this state or any other state, for the purpose of insuring against loss or damage resulting from burglary and robbery, or any attempt thereat, and securing against the loss of money and securities in course of transportation, when shipped by registered mail, shall be authorized, admitted and licensed to do business in this state, as provided in this chapter. [Acts 1899, p. 107, sec. 1.]

Art. 4923. Certain conditions; premium contracts to constitute part of assets.—Before any such company shall be authorized to transact business in this state, except to solicit and receive applications for insurance and portions of premiums thereon, as provided in this chapter, it shall have in force five hundred or more policies on which the premiums shall have been paid in cash, or shall be evidenced by the written contracts of the policy holders, on which not less than one-fifth of the amount shall have been paid in cash, and the cash and contracts for premiums shall amount in the aggregate to a sum of not less than one hundred thousand dollars. The premium contracts so held shall constitute a part of the assets of the company. [Id. sec. 2.]

Art. 4924. Must file copy of charter and statement; impaired reserve, etc.; line of business; must set aside reserve.—And every such company, association or partnership shall also file a certified copy of its charter, articles of incorporation or deed of settlement, together with a statement under the oath of the president or vice-president and secretary of the company, for which he or they may act, stating the name of the company and place where located, a detailed statement of its assets, showing the number of policy holders, aggregate amount of premium contracts, the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how the same is encumbered by mortgage, the number of shares of stock of every kind owned by the company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other securities, stating the kind and amount loaned on each, and the estimated value of the whole amount of such securities, and other assets or property of the company, also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; and for a company organized under the laws of any other state, a copy of the last annual report, if any, made under any law of the state by which such company was incorporated; and no agent shall be allowed to transact business for any such company whose reinsurance reserve, as required in this chapter is impaired to the extent of twenty per cent thereof, while such deficiency shall continue. Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this chapter directly or indirectly, in taking risks or transacting the business of burglary and robbery insurance, or the insuring of the safe shipping of money and securities by registered mail in this state, without procuring from the insurance commissioner a certificate of authority stating that such company has complied with all the requirements of this chapter which apply to such companies, and as to companies organized under the laws of any other state, there shall be added the name of the attorney appointed to act for the company.

Any company organized, admitted and licensed to transact business in this state under this chapter shall confine its line of business to that stated in the first article of this chapter, and shall confine its business in this state to banks, bankers, loan companies and county treasurers, and shall not issue any policy or policies to any person, firm or corporation in this state other than banks, bankers, loan companies and coun-

ty treasurers. Every such company shall set aside a reinsurance reserve of fifty per cent of its premiums, whether collected in cash or represented by the obligations of the policy holders, as written in its policies. [Id. secs. 3 and 4.]

Art. 4925. Policy holders.—Policy holders of any company organized and admitted to transact business in this state under this chapter shall be held liable to pay the membership fee and premium on their insurance as paid, or contracted to be paid, at the time the policy is taken out, and shall not be held liable for any further or other assessments or claims on the part of the company or its policy holders. The membership fees and premiums agreed upon may be collected in cash at the time the policy is issued or evidenced by a written obligation of the policy holder as may be agreed upon by the company and the policy holder. Such payment or obligation shall be the limit of the liability of the policy holder to the company for premium on their insurance. [Id. sec. 5.]

Art. 4926. Commissioner agent for service of process.—It shall not be lawful for any insurance company, association or partnership incorporated by, or organized under, the laws of any other state of the United States for any of the purposes specified in this chapter, directly or indirectly, to take risks or transact any business of insurance in this state by any agent or agents in this state until it shall first appoint an attorney in this state, who shall be the commissioner of insurance and banking, on whom process of law can be served, and file in the office of the commissioner of insurance and banking a written instrument duly signed and sealed, certifying such appointment; and any process issued by any court of record in this state, and served upon such attorney by the proper officer of the county in which such attorney may reside or be found, shall be deemed a sufficient service of the process upon said company; but service of process upon such company may also be made in any other manner provided by law. [Id. sec. 6.]

Art. 4927. Statement submitted and license issued, annually.—The statement and evidences of new membership, assets, and investments required by article 4924 of this chapter shall be renewed from year to year in such manner and form as may be required by said insurance commissioner, with an additional statement of the amount of premiums received in this state during the preceding year, so long as such agency continues; and the said insurance commissioner, on being satisfied that the membership, assets, securities and investments remain secure, as hereinbefore mentioned, shall furnish a renewal of the certificate as aforesaid. [Id. sec. 7.]

CHAPTER THIRTEEN

FIDELITY, GUARANTY AND SURETY COMPANIES

<p>Art. 4928. To act as trustee, etc., and do general fiduciary and depository business; to act as surety, etc.</p> <p>4929. Surety company's bond is a legal bond, when.</p> <p>4930. Requirements to be complied with; minimum capital; securities to be deposited.</p> <p>4931. Certificate to issue, when.</p> <p>4932. Certificate may be surrendered, how.</p> <p>4933. May withdraw from bond.</p>	<p>Art. 4934. May be sued on bond, where.</p> <p>4935. Defaulting company, claims paid, how.</p> <p>4936. Who are agents.</p> <p>4937. Penalty for accepting corporation which has not complied with the law.</p> <p>4938. Cancellation of bond; statement of cause.</p> <p>4939. Authority revoked, when.</p> <p>4940. Charged with public use.</p>
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Article 4928. To act as trustee, etc., and do general fiduciary and depository business; to act as surety, etc.—Private corporations may be created to act as trustee, assignee, executor, administrator, guardian,

and receiver, when designated by any person, corporation or court to do so, and to do a general fiduciary and depository business; to act as surety and grantor of the fidelity of employees, trustees, executors, administrators, guardians or others appointed to, or assuming the performance of any trust, public or private, under appointment of any court or tribunal, or under contract between private individuals or corporations; also upon any bond or bonds that may be required to be filed in any judiciary proceedings; also to guarantee any contract or undertaking between individuals, or between private corporations, or between individuals or private corporations and the state and municipal corporations or counties, or between corporations and individuals; to act as executor and testamentary guardian when designated by such decedents; or to act as administrator or guardian when appointed by any court having jurisdiction; also, on any bond or bonds that may be required of any state official, district official, county official or official of any school district or of any municipality; provided that the commissioners courts of each county shall have the right to reject any or all official bonds made by surety companies and in their discretion may require any or all officials to make their official bonds by personal sureties; provided, also, that any such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other securities than such corporation, and provided further, that when any such bond shall exceed fifty thousand dollars in penal sum, the officer or officers charged by law with the duty of approving and accepting such bond, may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties, in the discretion of the principal or official of whom the bond is required, and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this article; provided also that each corporation, making or offering to make any bond under this article, shall publish in some newspaper of general circulation in the county where such company is organized or has its principal office on the first day of February of each year, a statement of its condition on the previous thirty-first day of December, showing under oath its assets and liabilities that a copy of said statement be filed with the commissioner of insurance and banking before the 1st of March, of the year following, and a fee of \$25.00 be paid to that officer for filing the same, and that an examination of its affairs may be made at any time by the commissioner of insurance and banking; such examination to be at the expense of the company; provided that said corporation organized under the provisions of this article shall have a paid up capital stock of not less than \$100,000.00, and shall keep on deposit with the state treasurer money, bonds or other securities in an amount not less than \$50,000.00; and said securities be approved by the commissioner of insurance and banking, and that this amount be kept intact at all times. And further providing that all foreign corporations transacting the business of a guaranty and fidelity company in this state file with the commissioner of insurance and banking an affidavit showing that such foreign company has on deposit with the state treasurer of its home state \$100,000.00 or more, in money, bonds or other securities for the protection of its policyholders. [Acts 1897, p. 128, sec. 37. Amended Acts 1903, p. 197, sec. 1. Acts 1913, p. 123, sec. 1, amending Art. 4928, Rev. St. 1911.]

Art. 4929. Surety company's bond is a legal bond, when.—Whenever any bond, undertaking, recognizance or other obligation, is by law or the charter, ordinances, rules and regulations of a municipality, board, body, organization, court, judge or public officer, required or

permitted to be made, given, tendered or filed, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company, qualified as hereinbefore provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every law, charter, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such sureties shall be residents, or householders, or freeholders, or either, or both, or possess any other qualification and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers or every character shall accept and treat such bond, undertaking, obligation, recognizance or guaranty, when so executed by such company, as conforming to, and fully and completely complying with, every requirement of every such law, charter, ordinance, rule or regulation; and provided any suit on any bond issued under articles 4928 and 4929, shall be brought at the place provided by article 4934, Revised Statutes, 1911, and if the corporation issuing the bond sued on has no agent in the county where said bond was issued then the commissioner of banking and insurance of this state is made, by consent of the said company, its agent on whom service of process may be held. [Acts 1897, p. 244, sec. 1. Acts 1913, p. 123, sec. 1, amending Art. 4929, Rev. St. 1911.]

Requisites of bond.—It is not necessary to state in the bond that the company is authorized to do business in Texas. Such lack of authority may be proved. *Clopton v. Goodbar* (Civ. App.) 55 S. W. 972.

Sequestration bond signed by a surety company as one surety is sufficient. *Id.*
Under this article a bail bond executed by a solvent bonding company should be accepted, either in the form of a bond approved by the sheriff, or in open court as a recognizance. *Ex parte Cook*, 61 Cr. R. 449, 136 S. W. 67.

Art. 4930. Requirements to be complied with.—Such company, to be so qualified to so act as surety or guarantor, must comply with the requirements of every law of this state applicable to such company doing business therein; must be authorized under the laws of the state where incorporated, and under its charter, to become surety upon such bond, undertaking, obligation, recognizance or guaranty; must have a fully paid up and safely invested and unimpaired capital of at least one hundred thousand dollars; must have good available assets exceeding its liabilities, which liabilities for the purpose of this chapter shall be taken to be its capital stock, its outstanding debts and a premium reserve at the rate of fifty per centum of the current annual premiums on each outstanding bond, undertaking, recognizance and obligation of like character in force; must file with the commissioner of insurance, statistics, history and agriculture [commissioner of insurance and banking] a certified copy of its certificate of incorporation, a written application to be authorized to do business under this chapter, and also, with such application, and in each year thereafter, a statement verified under oath made up to December 31, preceding, stating the amount of its paid up cash capital, particularizing each item of investment, the amount of premiums upon existing bonds, undertakings, [recognizances and obligations of like character in force upon which it is surety; the amount of liability for unearned portion thereof estimated at the rate of fifty per centum of the current annual premiums on each such bond, undertaking, recognizance and obligation in force, stating also the amount of its outstanding debts of all kinds, and such further facts as may be by the laws of this state required of such company in transacting business therein; and, if such company be organized under the laws of any other state than this state, it must also have on deposit with a state officer of one of the states of the United States, not less than one hundred thousand dollars in good securities, deposited with,

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and held by, such officer for the benefit of the holders of its obligations; must also appoint an attorney in this state upon whom process of law can be served, which appointment shall continue until revoked or another attorney substituted, and must file with the commissioner of insurance, statistics and history and agriculture [commissioner of insurance and banking] written evidence of such appointment, which shall state the residence and office of such attorney; and such service of process may also be made upon the commissioner of insurance of this state, by virtue of his office, and shall be as effective as if made upon said attorney; and must also have on deposit with the treasurer of this state at least fifty thousand dollars in good securities, worth at par and market value at least that sum, of the value of which securities the commissioner of insurance shall judge, held for the benefit of the holders of the obligations of such company, ~~and~~ said securities so deposited with said treasurer to remain with him in trust to answer any default of said company as surety upon any such bond, undertaking, recognizance or other obligation, established by final judgment upon which execution may lawfully be issued against said company; said treasurer and his successors in office being hereby directed to so receive and hereafter retain such deposit under this act, in trust, for the purposes hereof; such company, however, at all times to have the right to collect the interest, dividends and profits upon such securities, and, from time to time, to withdraw such securities, or portions thereof, substituting therefor others of equally good character and value, to the satisfaction of said treasurer; and such securities and substitutes therefor shall be at all times exempt from, and not subject to, levy under writ or process of attachment; and, further, shall not be sold under any process against such company until after thirty days notice to said company, specifying the time, place and manner of such sale, and the process under which, and purposes for which, it is to be made, accompanied by a copy of such process; provided, however, that whenever any such company, domestic or foreign, has been engaged in this state in the business contemplated by this act, has made deposit in this state, in trust or otherwise, of securities, to answer any default of such company upon any such bond, undertaking, recognizance, guaranty or stipulation, such securities so deposited shall be by the trustee or custodian thereof transferred and delivered to said treasurer of this state in trust for the same purposes under and subject to all the rights and equities of all parties interested, and to the terms and provisions of this act; and thereupon such deposit shall remain in trust under and subject to the terms and provisions of this act; and, whenever such deposit has been made with a trustee by order of any court or other authority, it shall be the duty of the court or other authority, by order or otherwise, to direct such transfer to said treasurer; and, in case such deposit is less than the sum of fifty thousand dollars, then] said company must deposit with said treasurer securities sufficient to increase said deposit to said sum of fifty thousand dollars, as required by this chapter; provided, domestic corporations chartered for the purpose of doing business under this chapter within this state alone shall be required to deposit securities as hereinbefore provided for to the amount of twenty-five thousand dollars. [Acts 1897, p. 244, sec. 2.] X

Art. 4931. Certificate to issue, when.—The commissioner of insurance and banking, upon due proof by any such company of its possessing the qualifications in this chapter specified, shall issue to such company a certificate setting forth that such company has qualified, and is authorized for the ensuing year to do business under this chapter, which said certificate shall be evidence of such qualification of such company, and of its authorization to become and to be accepted as sole surety on all bonds, undertakings, recognizances and obligations required or per-

mitted by law or the charter, ordinances, rules or regulations of any municipality, board, body, organization or public officer, and the solvency or credit of such company for all purposes, and its sufficiency as such surety. [Id. sec. 3.]

Proof of solvency.—Where objection is raised to the solvency of a bonding company that has signed an indemnifying bond as surety, the appellate court cannot know without a statement of facts that the trial court did not have before it enough to satisfy itself that the surety company had been duly authorized to do business in this state, in which event proof of its solvency was unnecessary. *Romine v. Howard* (Civ. App.) 93 S. W. 692.

Art. 4932. Certificate to be surrendered, how.—Any such company, domestic or foreign, may at any time surrender to the commissioner of insurance and banking its said certificate of qualification, and shall thereupon cease to engage in said business of suretyship; and such company shall thereupon be entitled to the release and return of its said deposit as aforesaid, in manner following: Said company shall file with said commissioner of insurance and banking a statement in writing, under oath, giving the date, name, and amount of all its then existing obligations of suretyship in this state, briefly stating the facts of each case to said commissioner, who, after examination of the facts, shall require said company to file with the treasurer of this state a bond, payable to the state, in a sum equal to the whole amount of its liability in this state, under its contracts, conditioned for the faithful performance and fulfillment of all its outstanding obligations, or it may, at its option, reinsure its risks in some surety company authorized to do business in this state, or cancel all bonds on which it is liable, and return a pro rata of the premium received thereon, whenever such cancellation and return can be done without impairing its obligation to third parties. [Id. sec. 4.]

Art. 4933. May withdraw from bond.—Any surety company may withdraw from the bond of any trustee, guardian, assignee, receiver, executor, administrator or other fiduciary, in like manner and by like proceeding as is now provided by law in the case of individual sureties. [Id. sec. 5.]

Art. 4934. May be sued on bond, where.—If any suit shall be instituted upon any bond or obligation of any surety company, the proper court of the county wherein said bond is filed shall have jurisdiction of said cause; and service therein shall be made, either upon the attorney for said company, by this chapter required to be appointed, or upon the commissioner of insurance and banking; and such service shall be to all intents valid and effectual as service upon said company. And such guaranty, fidelity and surety companies shall be deemed resident of the counties wherever they may do business, and the doing or performing any business in any county shall be deemed an acceptance of the provisions of this chapter. [Id. sec. 6.]

Art. 4935. Defaulting company; claims paid, how.—Should any company of the character named or enumerated in this chapter fail or refuse to pay any loss by it incurred in this state within sixty days after its liability thereupon shall have been by suit finally determined, upon satisfactory proof, to the treasurer of this state, of such liability and of its non-payment, said treasurer shall, out of the deposits so made with him, as by this chapter provided, pay said loss, and, when he shall have done so, he shall, at once, certify to the commissioner of insurance and banking the fact of such default on the part of said company; whereupon said commissioner shall forthwith cancel and annul the certificate of authority of such company to do business in this state; provided, that such payment shall not operate to release the company from payment of any balance which it still may owe after such payment by the treasurer of this state has been made. [Id. sec. 7.]

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Art. 4936. Who are agents.—Any person who solicits business for or on behalf of such corporation, or makes or transmits for any person other than himself, any application for guaranty or security, or who advertises or otherwise gives notice that he will receive or transmit same, or who shall receive or transmit same, or who shall receive or deliver a contract of guaranty or security, or who shall examine or investigate the character of any applicant for guaranty or security than himself, or who shall refer any applicant for guaranty or security to such corporation, whether any of said acts shall be done at the instance and request, or by the employment of such corporation, or other corporation or person, or any person who shall issue indemnifying bonds or contracts, whose solvency and compliance with his said bonds or obligations is guaranteed, directly or indirectly, by any corporation, shall be held to be the agent of such corporation so far as relates to all the liabilities and penalties prescribed by this chapter. [Id. sec. 8.]

Powers of agent.—Under this article, where a guaranty company intrusted a bond to the seller of oil to deliver it to the buyer, it not only made the seller its agent for the delivery of the bond, but the seller became the agent under the statute, where it was not only empowered to deliver the bond, but to attach to it the contract referred to in it; provision being made for its attachment, and the contract being made a part "as fully as if recited in detail herein." *San Antonio Brewing Ass'n v. J. M. Abbott Oil Co.* (Civ. App.) 129 S. W. 373.

Art. 4937. Penalty for accepting corporation which has not complied with law.—Any person, association of persons, or corporations, who shall accept any corporation created for the purposes, or either of them, mentioned in article 4928, without such corporation having previously complied with the provisions and requirements of this chapter and having received from the commissioner of insurance and banking the certificate of authority provided for in this chapter shall forfeit as a penalty the sum of five hundred dollars, to be recovered by suit in the name of the state in any court of competent jurisdiction. [Id. sec. 9.]

Art. 4938. Cancellation of bond; statement of cause.—When any corporation shall cancel a bond of guaranty or indemnity, or shall notify the employer of the person whose fidelity is guaranteed that said corporation will no longer guarantee or be security for the fidelity of said person, or when said corporation has once guaranteed the fidelity of any person, or acted as security therefor, and on application refuses to do so again, it shall furnish to such person a full statement in writing of the facts on which the action of the corporation is based, and, if such action be based in whole or in part on information, all such information; and any such corporation failing or refusing to furnish any such written statement within thirty days after a request therefor, shall be liable to such person injured in the sum of five hundred dollars, in addition to all other damages caused thereby, which may be sued for and recovered in any court of competent jurisdiction. [Id. sec. 10.]

Art. 4939. Authority revoked, when.—If any such corporation shall fail or refuse to comply with the provisions of this chapter, the commissioner of insurance and banking shall revoke the certificate of authority issued said corporation. [Id. sec. 11.]

Art. 4940. Charged with public use.—Corporations created for the purposes mentioned in article 4928 are hereby declared to be charged with a public use. [Id. sec. 12.]

CHAPTER FOURTEEN

EMPLOYER'S LIABILITY INSURANCE COMPANIES

Art. 4941.	Reserve, how reported and calculated.	Art. 4942.	Commissioner may accept certificate when.
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Article 4941. Reserve, how reported and calculated.—Every insurance company which has for ten years or more undertaken to insure persons, firms or corporations against loss or damage on account of the bodily injury or death by accident of any person, for which loss or damage said persons, firms or corporations are respectively responsible, shall, on or before the first day of October in each year, render to the insurance commissioner a statement in writing of its business transacted in the United States, which shall show separately for each of the five calendar years constituting the first half of the period of ten years next preceding the thirty-first day of December of the year in which the statement is made:

1. The number of persons reported injured under all its forms of liability policies, whether such injuries were reported to the home office of the company or to any of its representatives, and whether such injury resulted in loss to the company or not.

2. The amount that, on or before the thirty-first day of August of the year in which the statement is made, had been paid on account or in consequence of all injuries so reported, including therein all payments on suits arising from such injuries.

3. The number of suits or actions under such policies on account of injuries reported which have been settled, either by payments or compromise.

4. The amount paid in settlement of such suits or actions on or before the thirty-first day of August of the year when the statement is made, including therein all payments made on account or in consequence of injuries from which the suits arose, whether prior to or later than the date when the suits were brought. Every such company shall, in its financial statements hereafter made in this state, use the experience so ascertained for computing its outstanding losses under all its forms of liability policies, irrespective of the date when the policies were issued. The average cost per suit of settling such cases, as computed by the data required in this article, shall be multiplied by the number of suits or actions pending on account of injuries reported prior to eighteen months previous to the date on which the condition of the company is to be ascertained and shown, which suits or actions are being defended for or on account of a holder of any such policy, also the average cost on account of each injured person, determined as aforesaid from the company's experience, shall be multiplied by the number [of injuries reported within the eighteen months prior to] making the statement of the company's condition, whether such injuries were reported to the home office of the company or to any of its representatives. From the sum of these two products so ascertained there shall be deducted the amount of all payments made on account or in consequence of said injuries reported within eighteen months, this amount so deducted to be taken as of the date at which the said statement is made. The sum remaining after making this deduction shall be charged as the liability of the company on account of outstanding losses. Any admitted company issuing liability contracts, which, by reason of its limited experience in liability underwriting, cannot furnish the information required by this article shall, nevertheless, until it is able to comply with said requirements, be charged with a liability for outstanding losses upon all kinds of its lia-

bility policies an amount not less than the amount resulting from the following process:

The number of suits or actions pending on account of injuries reported prior to eighteen months previous to the date of making up the statement, whether such injuries were reported to the home office of the company or to any of its representatives, which are being defended on account of the holder of any policy, shall be multiplied by the average cost per suit as shown by the average experience of all other admitted liability companies ascertained from the data required by this article, also the number of injuries reported under said policies at any time within eighteen months of making up the statement, whether reported to the home office of the company or to any of its representatives, and whether such injuries resulted in loss to the company or not, shall be multiplied by the average cost for each injured person as shown by the average of said experience of all other admitted liability companies, ascertained from the data required by this article. From the sum of these two products there shall be deducted the amount of all payments made on account or in consequence of said injuries reported within eighteen months, this amount to be taken as of the date at which the statement is made. A sum not less than the amount remaining after this deduction shall be charged as a liability for outstanding losses to liability companies covered by the provisions of this paragraph. The average cost for suits and for injured persons required by this paragraph shall, on or before the first day of December of each year, be furnished by the insurance commissioner to every such company which has not had an experience of ten years in liability underwriting. Besides the reserve provided for in this article, each such company shall be charged as a liability with all unpaid losses of which the company received notice on or before December 31, and all other debts and liabilities. If the capital stock of any such company, computing its liabilities in accordance with the provisions of this article, shall be at any time impaired to the extent of twenty per cent thereof, it shall be the duty of the commissioner of insurance and banking to give notice to the company to make good its whole capital stock within sixty days; and, if this is not done, he shall require the company to cease to do business within this state, and shall thereupon, in case the company is organized under the authority of the state, immediately institute legal proceedings to wind up the affairs of such company. [Acts 1909, p. 193, sec. 54.]

Note.—Employers' insurance association, see Title 77, Chapter 5.

Art. 4942. Commissioner may accept certificate, when.—The commissioner of insurance and banking, in calculating the reserve liability of any such company, may accept the certificate of the officer of any other state charged with the duty of supervising such company as to any such company organized under the laws of such state; provided, such certificate shows that such liability has been computed in accordance with the provisions of the preceding article.

CHAPTER FOURTEEN A

CASUALTY AND OTHER INSURANCE COMPANIES, EXCEPT FIRE, MARINE AND LIFE INSURANCE COMPANIES

Art.		Art.	
4942a.	May be incorporated for what purposes.		meeting of stockholders, by-laws; directors.
4942b.	Articles of incorporation to specify what.	4942d.	Officers; subscription books.
4942c.	Commissioner of insurance and banking to submit articles to attorney general, when; certificate of attorney general; record and fees;	4942e.	Capital stock, amount of; how paid or invested; deposit of securities; certificate authorizing to do business, etc.

Art.
4942f. Corporate powers.
4942g. Annual statement of company to commissioner.
4942h. Commissioner may amend statement, etc.
4942i. Failure to file statement; duty of commissioner, etc.
4942j. Commissioner may examine books, etc.
4942k. Commissioner may revoke authority to do business, when; receiver, etc.
4942l. Company may change securities on deposits.
4942m. May increase capital stock, how.
4942n. Dividends.
4942o. Collection of interest on securities on deposit.

Art.
4942p. Penalty for doing business without certificate.
4942q. Suits for penalties.
4942r. Funds, how invested.
4942s. Real estate may be held for what purposes.
4942t. Real estate, when disposed of, etc.
4942u. Commissioner to issue certificate of authority to transact business, when.
4942v. What companies subject to provisions.
4942w. Fees.
4942x. Process against company, how served.
4942y. May decrease capital stock, how.
4942z. Provisions cumulative.

Article 4942a. May be incorporated for what purposes.—Any three (3) or more persons, a majority of whom shall be residents of the state of Texas, may associate in accordance with the provisions of this Act, and form an incorporated company for any one or more of the following purposes:

(a) To insure any person against bodily injury, disablement or death resulting from accident and against disablement resulting from disease.

(b) To insure against loss or damage resulting from accident to or injury sustained by an employé or other person for which accident or injury the assured is liable.

(c) To insure against loss or damage by burglary, theft or house breaking.

(d) To insure glass against breakage.

(e) To insure against loss from injury to person or property which results accidentally from steam boilers, elevators, electrical devices, engines and all machinery and appliances used in connection therewith or operated thereby; and to boilers, elevators, electrical devices, engines, machinery, and appliances.

(f) To insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers and water pipes.

(g) To insure against loss resulting from accidental damage to automobiles or caused accidentally by automobiles.

(h) To insure against loss or damage resulting from accident to or injury suffered by any person for which loss and damage the insured is liable; excepting employers liability insurance as authorized under subdivision "b" of this section.

(i) To insure persons, associations or corporations against loss [loss] or damage by reason of giving or extending of credit.

(j) To insure against loss or damage on account of circumstances upon or defects in the title to real estate and against loss by reason of the non-payment of the principal or interest of bonds, mortgages or other evidences of indebtedness.

(k) To insure against any other casualty or insurance risk specified in the articles of incorporation which may be lawfully made the subject of insurance, and the formation of a corporation for issuing against which is not otherwise provided for by this Act, excepting fire, marine and life insurance. [Acts 1911, p. 237, sec. 1.]

Art. 4942b. Articles of incorporation to specify what.—Such persons shall associate themselves together by articles of incorporation in writing for the purpose of forming an accident or casualty insurance company, which articles shall specify the name by which the company shall be known, the place in which its principal office will be established or located, the amount of its capital stock, the general object of the company, and the proposed duration of the same. Any name not previously in use

by any existing company may be adopted. The commissioner of insurance and banking shall reject any name or title, when in his judgement [judgment] it too closely resembles that of any existing company or is likely to mislead the public. [Id. sec. 2.]

Art. 4942c. Commissioner of insurance and banking to submit articles to attorney general, when; certificate of attorney general; record and fees; meeting of stockholders; by-laws; directors.—When such articles of incorporation are filed with the commissioner of insurance and banking, together with an affidavit [affidavit] made by two or more of its incorporators that all the stock has been subscribed in good faith and fully paid for, together with a charter fee for \$20.00, it shall be the duty of the commissioner to submit such articles of incorporation to the attorney general for examination, and if he approves the same as conforming with the law, he shall certify and deliver such articles of incorporation, together with his certificate of approval attached thereto, to the commissioner of insurance and banking, who shall, upon receipt thereof, record the same in a book kept for that purpose, and upon receipt of a fee of \$1.00 he shall furnish a certified copy of the same to the incorporators, upon which they shall be a body politic and corporate, and may proceed to complete the organization of the company, for which purpose they shall forthwith call a meeting of the stockholders, who shall adopt by-laws for the government of the company and elect a board of directors not less than three, composed of stockholders, which board shall have full control and management of the affairs of the corporation, subject to the by-laws thereof as adopted or amended from time to time by the stockholders or directors and to the laws of this state. [Id. sec. 3.]

Art. 4942d. Officers; subscription books.—The subscribers to said articles of incorporation shall choose from their number a president, a secretary, a treasurer and such number of directors not less than three (3), who shall continue in office for the period of one year from the date of filing articles of incorporation, and until their successors shall be duly chosen and qualified, as hereinafter provided. They shall open books for the subscription of stock in the company at such times and places as they shall deem convenient and proper, and shall keep them open until the full amount specified in the certificate is subscribed. [Id. sec. 4.]

Art. 4942e. Capital stock, amount of; how paid or invested; deposit of securities; certificate authorizing to do business; etc.—Any company organized under the provisions of this Act shall have not less than one hundred thousand dollars (\$100,000) of capital stock subscribed, paid in, in cash, with an additional fifty thousand dollars (\$50,000) of capital stock subscribed and fully paid in, in cash, for every kind of insurance, more than one of which it is authorized to transact as specified in any of the subdivision; provided, that such companies with two hundred thousand dollars (\$200,000) of capital stock subscribed and fully paid in, in cash shall be authorized to transact all and every kind of insurance specified in any and all of the subdivisions of section 1 [Art. 4942a] of this Act; all of which said capital stock shall be paid up or invested in bonds of the United States or of this state or of any county or of any municipality of this state or in bonds or first liens upon unencumbered real estate in this state or in any other state in which such company may previously have been duly licensed to conduct an insurance business; and provided in either instance such real estate shall be worth at least twice the amount loaned thereon. The value of such real estate shall be determined by a valuation made under oath by two freeholders of the county where the real estate is located, and if buildings are considered as part of the value of such real estate they must be insured for the benefit of the mortgage, upon such company furnishing evidence satisfactory to the commissioner of insurance and banking

that the capital stock as herein prescribed has been all subscribed and paid up in cash in good faith, and that such capital stock has been invested as herein prescribed, and upon the deposit of the sum of fifty thousand dollars (\$50,000) of such securities or in cash with the state treasurer, then the commissioner of insurance and banking shall issue to said company a certificate authorizing it to do business. No part of the capital paid in shall be loaned to any officer of said company. In the event any such company shall be required by the law of any other state, county or province as a requirement prior to doing an insurance business therein, to deposit with the duly appointed officer of such other state, county or province, or with the state treasurer of this state, any securities or cash in excess of the said deposit of fifty thousand dollars (\$50,000) hereinbefore mentioned, such company, at its discretion, may deposit with the state treasurer securities of the character authorized by this Act, or cash, sufficient to enable it to meet such requirements. The state treasurer is hereby authorized and directed [directed] to receive such deposit and to hold it exclusively for the protection of all policy holders of the company. Any deposits so made to meet the requirements of any such other state, county or province shall not be withdrawn by the company except upon filing with the commissioner of insurance and banking evidence satisfactory to him that the company has withdrawn from business, and has no unsecured liabilities outstanding in any such other state, county or province by which such additional deposit was required, and upon the filing of such evidence the company may withdraw such additional deposit at any time. [Id. sec. 5.]

Art. 4942f. Corporate powers.—A corporation organized or doing business under the provisions of this Act, shall, by the name adopted by such corporation, in law, be capable of suing or being sued, and may have the power to make or enforce contracts in relation to the business of such corporation; may have and use a common seal, and may change and alter the same at pleasure, and in the name of the corporation or by a trustee chosen by the board of directors, shall in law, be capable of taking, purchasing, holding and disposing of real and personal property for carrying into effect the purposes of their organization; and may by their board of directors, trustees, or managers, make by-laws and amendments thereto, not inconsistent with the laws or the constitution of the state, or of the United States, which by-laws shall define the manner of electing directors, trustees or managers and officers of such corporations, together with the qualifications and duties of the same, and fixing the term of office. [Id. sec. 6.]

Art. 4942g. Annual statement of company to commissioner.—The president, vice president and secretary, or a majority of directors or trustees of such company organized under the provisions of this Act shall annually, on the first day of January or within sixty days thereafter, prepare and deposit in the office of the commissioner of insurance and banking a verified statement of the condition of such company on the 31st day of December of the preceding year, showing:

First. Name and where located, (a) names of officers, (b) the amount of capital stock, (c) the amount of capital stock paid in.

Second. Assets, (a) the value of real estate owned by said company, (b) the amount of cash on hand, (c) the amount of cash deposited in bank or trust company, (d) the amount of bonds of the United States, and all other bonds, giving names and amounts with par and market values of each kind, (e) the amount of loans secured by first mortgage on real estate, (f) the amount of all other bonds, loans and how secured, with rate of interest, (g) the amount notes given for unpaid stock and how secured, (h) the amount of interest due and unpaid, (i) all other credits or assets.

Third. Liabilities, (a) the amount of losses due and unpaid, (b) the amount of claims for losses unadjusted, (c) the amount of claims for losses resisted.

Fourth. Income during the year, (a) the amount of fees received during the year, (b) the amount of interest received from all sources, (c) the amount of receipts from all other sources.

Fifth. Expenditures during the year, (a) the amount paid for losses, (b) the amount of dividends paid to stockholders, (c) the amount of commissions and salaries paid to agents, (d) the amount paid to officers for salaries, (e) the amount paid for taxes, (f) the amount of all other payments or expenditures.

Sixth. Miscellaneous, (a) the amount paid in fees during the year, (b) the amount paid for losses during the year, (c) the whole amount of insurance issued and in force on the 31st day of December of the previous year. [Id. sec. 7.]

Art. 4942h. Commissioner may amend statement, etc.—The commissioner of insurance and banking is authorized to amend the form of statement and to exact such additional information as he may think necessary in order that a full exhibit of the standing of companies organized and doing business under this Act may be shown. [Id. sec. 8.]

Art. 4942i. Failure to file statement; duty of commissioner, etc.—Upon the failure of any company organized or doing business under this Act to make the deposit or to file the statement in time as stated in the preceding section, the commissioner of insurance and banking shall notify such company to issue no new insurance until there should have been a compliance with said requirements, and it shall be unlawful for any such company to thereafter issue any policy of insurance until such requirements shall be complied with. [Id. sec. 9.]

Art. 4942j. Commissioner may examine books, etc.—The commissioner of insurance and banking may at any time make personal examination of the books, papers and securities of any company organized and doing business under the provisions of this Act, or may authorize or empower any other suitable person to make such examinations, and for the purpose of securing a full and true exhibit of its affairs, he or the person selected by him shall have power to examine under oath any officer of said company relative to its business management. [Id. sec. 10.]

Art. 4942k. Commissioner may revoke authority to do business, when; receiver, etc.—If the commissioner of insurance and banking shall at any time from the report of examination that the company has not complied with the provisions of this Act, he shall revoke its certificate of authority to do business in this state, and shall refer the facts to the attorney general, who shall proceed to ask the proper court to appoint a receiver for said company, who shall, under the direction of the court, wind up the affairs of said company. But in no other way can the commissioner of insurance and banking or any other person restrain or interfere with the prosecution of business of any company doing business under provisions of this Act, except in actions by judgment creditor or in proceedings supplementary to execution. [Id. sec. 11.]

Art. 4942l. Company may change securities on deposit.—Companies organized under the provisions of this Act shall have the right at any time to change their securities on deposit with the state treasurer by substituting for those withdrawn, a like amount in other securities of the character provided for in this Act. [Id. sec. 12.]

Art. 4942m. May increase capital stock, how.—Any company organized under the provisions of this Act may increase the capital stock of the same at any time after the intention to so increase the capital stock shall have been ratified by a two-thirds vote of the stockholders, and after notice of the purpose to so increase the capital stock has been given

by publication in some newspaper of general circulation for the period of four consecutive weeks; but no increase if capital stock in less amount than fifty thousand dollars (\$50,000) is hereby authorized. [Id. sec. 13.]

Art. 4942n. Dividends.—The directors of any company organized under this Act shall not make any dividends except from the surplus profit arising from their business, no dividends shall be declared except at the close of the year and at the time when, by law, the company is required to file its annual statement with the commissioner of insurance and banking. [Id. sec. 14.]

Art. 4942o. Collection of interest on securities on deposit.—The state treasurer shall permit companies having securities on deposit with him under the provisions of this Act, to collect the interest as the same may become due, and shall deliver to such companies respectively the coupons or other evidences of interest pertaining to such deposits; provided, however, that upon failure of any company to deposit additional security as called for by the commissioner of insurance and banking, or pending any proceedings to close up or enjoin it, the state treasurer shall collect the interest as it becomes due and hold the same as additional security in his hands belonging to such company. [Id. sec. 15.]

Art. 4942p. Penalty for doing business without certificate.—Any company organized or doing business under this Act without a certificate as provided for in this Act shall forfeit one hundred dollars (\$100.00) for every day it continues to write new business in this state without such certificate. [Id. sec. 16.]

Art. 4942q. Suits for penalties.—Suits brought to recover any of the penalties provided for in this Act shall be instituted in the name of the state of Texas, by the attorney general or by a district or county attorney under his direction, either in the county where the principal office is situated or in the county of Travis. Such penalties, when recovered, shall be paid into the state treasury for the use of the school fund. [Id. sec. 17.]

Art. 4942r. Funds, how invested.—No company organized under the provisions of this Act shall invest its funds over and above its paid up capital stock in any other manner than as follows:

(a) In bonds of the United States or of any of the states of the United States which are at or above par. (b) In bonds or first liens on unencumbered real estate in this state or in any other state, county or province in which such company may be duly licensed to conduct an insurance business, and provided in each instance such real estate shall be worth at least twice the amount loaned thereon. The value of such real estate shall be determined by a valuation made under oath by two freeholders of the county where real estate is located, and if buildings are considered as a part of the value of such real estate they must be insured for the benefit of the mortgages. (c) In bonds or other interest-bearing evidence of indebtedness [ness] of any county, incorporated city, town or school or sanitary district within this state, or in any other state, county or province in which said company may be duly licensed to conduct an insurance business, and provided that such bonds or other evidences of indebtedness are issued by authority of law, and that interest upon them has never been defaulted. (d) In the stocks or bonds or other evidences of indebtedness of any solvent dividend-paying corporation incorporated under the laws of this state, or of the United States or of any state, county or province in which such company may be duly licensed to conduct an insurance business. (e) In loans upon the pledge of any mortgage, stock or bonds, or other evidence of indebtedness, acceptable as investments under the terms of this Act if the current value of such mortgage stock, bond or other evidence of indebtedness is at least twenty-five (25) per cent more than the amount loaned thereon. [Id. sec. 18.]

Art. 4942s. Real estate may be held for what purposes.—No company organized under this Act shall be permitted to purchase, hold or convey real estate, except for the purpose and in the manner herein set forth:

First. For the erection and maintenance of buildings at least ample and adequate for the transaction of its own business.

Second. Such as shall have been mortgaged to it in good faith for money due.

Third. Such as shall have been conveyed to it in the satisfaction of debts previously contracted in the course of its dealings and which must be taken in by the company on account of the debt secured by such mortgage.

Fourth. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts, and no company incorporated as aforesaid shall purchase, hold or convey real estate in any other cases or for any other purpose. [Id. sec. 19.]

Art. 4942t. Real estate, when disposed of, etc.—All real estate acquired as aforesaid, except such as is occupied by buildings used in whole or in part for the accommodation of such companies in the transaction of its business, shall, except as hereinafter provided, be sold and disposed of within ten years after such company shall have acquired title to the same. No such company shall have such real estate for a longer period than that above mentioned, unless the said company shall procure a certificate from the commissioner of insurance and banking that the interests of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the commissioner of insurance and banking shall direct in said certificate. [Id. sec. 20.]

Art. 4942u. Commissioner to issue certificate of authority to transact business, when.—The commissioner of insurance and banking, upon due proof by a company organized under the provisions of this Act, of its possessing the qualifications required, shall issue a certificate setting forth that it has qualified and is authorized for the ensuing year to do business under these statutes, which certificate or a copy thereof shall be evidence of such qualifications and of the company's authority to transact business authorized by this Act, mentioned in the preceding sections [Arts. 4942a–4942t], and of its solvency and credits. [Id. sec. 21.]

Art. 4942v. What companies subject to provisions.—Only companies organized and doing business under the provisions of this Act shall be subject to its provisions. [Id. sec. 22.]

Art. 4942w. Fees.—The commissioner of insurance and banking shall charge for filing the preliminary statement or for filing the annual statement required by the provisions of this Act, a fee of ten dollars; and for each certificate and seal he shall charge a fee of one dollar. [Id. sec. 23.]

Art. 4942x. Process against company, how served.—Proceed [process] in any civil suit against any casualty company organized under the laws of this state may be served only on the president, or any active vice president or secretary, or general council residing at the city of the home office of the company, or by leaving a copy of same at the home office of such company during business hours. [Id. sec. 24.]

Art. 4942y. May decrease capital stock, how.—Any company organized under the provisions of this Act may decrease the capital stock of same at any time after the intention to so decrease the capital stock shall have been ratified by a majority vote of the stockholders, and after notice of the purpose to so decrease the capital stock has been given by

publication in some newspaper of general circulation for a period of four consecutive weeks. [Id. sec. 25.]

Art. 4942z. Provisions cumulative.—This Act is cumulative as to insurance legislation in this state, and as to the mode and manner of organizing and doing insurance business in this state, and shall not be construed to repeal any law now in force in this state. [Id. sec. 26.]

CHAPTER FIFTEEN

GENERAL PROVISIONS

Art.	Art.
4943. Must publish certificate of commissioner.	4958. Shall not misrepresent terms of policies.
4944. Companies organized in this state; unlawful dividend.	4959. Policy shall not be defeated.
4945. Association of companies not permitted to do business until.	4960. Insurance shall be unlawful unless authorized by commissioner of insurance.
4946. Notice to be published, etc.	4961. Who are agents.
4947. Misrepresentation must be material to avoid contract.	4962. Taxes to be assessed against, when; penalty, etc.
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4949. Shall not constitute defense unless shown.	4964. Affidavit to be filed before certificate will issue.
4950. Policies governed by laws of Texas, notwithstanding stipulation to the contrary.	4965. Agents prohibited from paying commissions to non-residents.
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4956. Corporations may be incorporated to transact one or more kinds of insurance business.	4971. Revocation of agent's authority, grounds for.
4957. Chapter not to apply to fraternal beneficiary associations.	4972. Foreign corporations held to accept provisions of this title.

Article 4943. [3086] Must publish certificate of commissioner.—It shall be the duty of every insurance company doing business in this state, whether life, health, fire, marine or inland, to publish annually, within thirty days after the issuance thereof, a certificate from the commissioner of insurance and banking that such company has in all respects complied with the laws in relation to insurance.

Art. 4944. [3087] Companies organized in this state; unlawful dividend.—It shall not be lawful for any life, health, fire, marine or inland insurance company, organized under the laws of this state, to make any dividend except from the surplus profits arising from its business; and, in estimating such profits, there shall be reserved therefrom a sum equal to forty per cent of the amount received as premiums on unexpired fire risks and policies, and one hundred per cent of the premiums received on unexpired life, health, marine or inland transportation risks and policies; which amount so reserved is hereby declared to be unearned premiums; and there shall also be reserved the amount of all unpaid losses, whether adjusted or unadjusted; all sums due the company on bonds, mortgages, stocks and book accounts, of which no part of the principal or the interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosures or collections has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and upon which interest shall not have been paid; and, in case of any such judgment, the interest due or accrued thereon and remaining unpaid shall also be reserved.

Art. 4945. [3081] Association of companies not permitted to do business, until.—In the event that any number of insurance companies, whether life, health, fire, marine or inland, should associate themselves together for the purpose of issuing or vending policies or joint policies of insurance, such association shall not be permitted to do business in this state until the taxes and fees due from each of said companies shall have been paid and all the conditions of the law fully complied with by each company; and any company failing or refusing to pay such taxes and fees, and to fully comply with the requirements of law, shall be refused permission by the commissioner of insurance and banking to do business in this state.

Art. 4946. [3082] Notice to be published, etc.—Whenever, by any provision of this title, any notice or other matter is required to be published, it shall, unless otherwise provided, be published for three successive weeks in two newspapers printed in the state, and which have a general circulation in the state.

Art. 4947. Misrepresentation must be material to avoid contract.—Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. [Acts 1903, p. 94, art. 3096aa.]

See *Hartford Fire Ins. Co. v. Wright* (Civ. App.) 125 S. W. 363; *Scottish Union & National Ins. Co. v. Wade* (Civ. App.) 127 S. W. 1186.

Former law.—This article was not adopted by Art. 4834, providing that benefit certificates should be noncontestable for misrepresentations unless material to the risk, and so left the question of materiality one of law for the court upon the jury's findings or upon the uncontroverted facts. *Supreme Ruling of Fraternal Mystic Circle v. Hansen* (Civ. App.) 153 S. W. 351.

Constitutionality of prior act.—Rev. St. 1895, tit. 58, as amended by Gen. Laws 1903, c. 69, providing that any provision in an insurance contract that any answers or statements made therein, or in the application, if untrue or false, shall render the policy void, shall be of no effect, unless the matter misrepresented is material to the risk, and that the provisions of the act shall not apply to policies of life insurance containing a clause making the policy indisputable after two years or less, provided premiums are duly paid, and that no defense based upon misrepresentation made in the application for life insurance shall be valid in any suit upon the contract two years or more after its issuance, where the premiums are paid and received without notice to the assured of the intention to rescind the contract because of misrepresentation, unless it is shown at the trial to have been material to the risk and intentionally made, is not unconstitutional as taking insurance companies' property without due process of law under Const. U. S. Amend. 14, § 1. *Scottish Union & National Ins. Co. v. Wade* (Civ. App.) 127 S. W. 1186.

Nor is the act unconstitutional, as denying insurance companies the equal protection of the law, guaranteed by Const. U. S. Amend. 14, § 1, since the statute does not classify the companies, but classifies the contracts, and furnishes on its face sound reason for such classification. *Id.*

Construction in general.—The language of this article indicates that it was the intent of the legislature that it should cover every kind and class of insurance, and was not limited to life insurance. *Scottish Union & National Ins. Co. v. Wade* (Civ. App.) 127 S. W. 1186.

This article does not apply to fraternal beneficiary societies. *Modern Woodmen of America v. Owens* (Civ. App.) 130 S. W. 858.

The statute is remedial within the rule that in construing remedial statutes the courts will look to the evil to be remedied and construe it liberally to accomplish the legislative purpose. *Mecca Fire Ins. Co. v. Strickler* (Civ. App.) 136 S. W. 599.

This article, relating to insurance, did not except assessment companies, and made a foreign assessment company writing insurance in Texas subject to all the provisions of Arts. 4947-4950, inclusive, which contained most of the provisions of Acts 28th Leg. c. 69, relating to such subject. *National Life Ass'n v. Hagelstein* (Civ. App.) 156 S. W. 353.

Repeal of article.—Acts 31st Leg. c. 108, regulating insurance, did not repeal any of the provisions of Acts 28th Leg. c. 69, containing this article, so as to render such provision inapplicable to a foreign assessment company doing business in Texas. *National Life Ass'n v. Hagelstein* (Civ. App.) 156 S. W. 353.

Warranties.—A stipulation in a policy as to the occupancy of the building insured is a warranty. *Sun Ins. Co. v. Texas Foundry & Machine Co.*, 4 App. C. C. § 31, 15 S. W. 34.

In order to constitute a statement or promise of the insured a warranty, it must be made a part of the policy, either by appearing in the body of the instrument, or by a proper reference in the policy to some other paper in which it is found. When a doubt as to whether such other paper was regarded by the insurer and insured as a part of the policy, the doubt will be resolved by the courts in favor of the insured. When a policy of insurance is in its terms inconsistent, or ambiguous in its provisions, it must be construed most favorably for the assured. *Goddard v. Insurance Co.*, 67 T. 69, 1 S. W. 906, 60 Am. Rep. 1.

An express stipulation in a policy is a warranty. *Insurance Co. v. Brown*, 82 T. 631, 18 S. W. 713. See *Insurance Co. v. Mattingly*, 77 T. 162, 13 S. W. 1016.

A false statement as to a disease is a warranty, unless the same was temporary and due to exceptional causes. *Life Ins. Co. v. Simpson*, 88 T. 333, 31 S. W. 501, 28 L. R. A. 765, 53 Am. St. Rep. 757.

Answer in application as to the character of a building held not a warranty where a special agent, after examination, canceled the policy, and issued a new one for an additional premium. *Phoenix Ins. Co. v. Padgett* (Civ. App.) 42 S. W. 800.

Answers in an application and certain requirements of the policy held not warranties, though stated to be such. *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.*, 92 T. 297, 49 S. W. 222.

Statement in application for life insurance held not a warranty. *Provident Savings Life Assur. Soc. of New York v. Oliver*, 22 C. A. 8, 53 S. W. 594.

A clause in a fire policy held to cause other statements in the application to operate as representations only, though they were sufficient in themselves to constitute warranties. *Delaware Ins. Co. v. Harris*, 26 C. A. 537, 64 S. W. 867.

In an action on a life insurance policy, which provided that the representations and answers in the application were warranties, and provided that the contract was completely set forth in the policy and application, alleged answers to questions not copied in the policy held immaterial. *Metropolitan Life Ins. Co. v. Gibbs*, 34 C. A. 131, 78 S. W. 398.

A stipulation in an application for a life policy held not to modify the warranty and make the answers of the insured mere representations. *National Life Ins. Co. v. Reppond* (Civ. App.) 96 S. W. 778.

The use of the word "warranty" in an application for life insurance held not necessarily to create a warranty in law, whether one was intended being a question to be determined from a construction of the policy, the application, and the medical examiner's report. *Reppond v. National Life Ins. Co.*, 100 T. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.

A representation or statement in an application for insurance held not to constitute a promissory warranty. *Scottish Union & National Ins. Co. v. Wade* (Civ. App.) 127 S. W. 1186.

Avoidance of policy for misrepresentation or breach of warranty or condition.—Forfeiture of policy for breach of promissory warranty or condition subsequent, see notes at the end of this title.

As to the effect of material misrepresentations by the insured at the time policy is obtained, see *Hanover Fire Ins. Co. v. National Exchange Bank* (Civ. App.) 34 S. W. 333; *Sullivan v. Hartford Fire Ins. Co.* (Civ. App.) 34 S. W. 999.

The fact that insured made a false statement unintentionally, which he could have avoided by due diligence, held not to avoid the policy. *Phoenix Ins. Co. v. Swann* (Civ. App.) 41 S. W. 519.

The contract is complete when the policy is issued, and an application signed thereafter does not relate back and become a part of the original contract, so as to render insured bound by representations therein, unless there is a consideration for such subsequent act. *Fire Ass'n of Philadelphia v. Bynum* (Civ. App.) 44 S. W. 579.

When the machinery in a mill has been in use much longer than represented in an application for insurance thereon, but has been rebuilt, and is practically new and of the represented value, the representation is substantially correct. *Delaware Ins. Co. v. Harris*, 26 C. A. 537, 64 S. W. 867.

Insured in fire policy held not guilty of making fraudulent statement to insurer. *Underwriters' Fire Ass'n v. Palmer & Co.*, 32 C. A. 447, 74 S. W. 603.

Failure of insured in a life policy to give certain information held a material misstatement, avoiding the policy. *National Life Ins. Co. v. Reppond* (Civ. App.) 81 S. W. 1012.

A breach of warranty defeats a life policy without reference to its materiality. *Pacific Mut. Life Ins. Co. v. Terry*, 37 C. A. 486, 84 S. W. 656.

Where the statements in an application for a life policy are made warranties, it is essential to the validity of the policy that the statements are true. *National Life Ins. Co. v. Reppond* (Civ. App.) 96 S. W. 778.

An insurer making every statement of the application a warranty held to a strict rule when endeavoring to avoid payment of a policy because of answers to inquiries which it has framed. *Mutual Life Ins. Co. v. Ford* (Civ. App.) 130 S. W. 769.

Answers in an application for life insurance when operating as affirmative warranties need only be substantially true; but, where they are not substantially true, the insurer may treat the policy as forfeited without reference to the materiality of the answers. *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

— **Covenant to keep books or inventory.**—Breach of covenant as to keeping books or inventory in general, see notes at end of title.

This article does not apply to a provision in a policy as to keeping books. *Home Ins. Co. v. Rogers* (Civ. App.) 128 S. W. 625.

This article has no application to a covenant in a policy to keep an inventory in an iron safe and produce it after fire. *National Fire Ins. Co. v. J. W. Caraway & Co.* (Civ. App.) 130 S. W. 458.

— **Title or interest.**—It seems that a warranty that the insured building stands on land owned in fee simple is not broken when the equitable title only is in the vendee, and

he is in a condition to enforce specific performance of the contract to convey. *E. T. Fire Ins. Co. v. Dyches*, 56 T. 565.

A surviving partner of a mercantile firm has not the "entire, unconditional and sole ownership of the property" so as to insure the stock of goods in his own name, without disclosing the interest of the estate of the deceased partner, when such disclosure is required by the terms of the policy. *Crescent Ins. Co. v. Camp*, 64 T. 521.

A stipulation that a policy should be void if the insured buildings are not on ground owned by the insured is valid. *Home Ins. Co. v. Smith* (Civ. App.) 29 S. W. 264.

A material misrepresentation as to the state of the insured's title to the property will avoid the policy. *Queen Ins. Co. of America v. May* (Civ. App.) 35 S. W. 829.

Evidence held to show that plaintiff was the sole, absolute, and unconditional owner of the property insured, within the requirements of the policy. *Phoenix Assur. Co. v. Deavenport*, 16 C. A. 283, 41 S. W. 399.

The fact that part of furniture insured was owned by the wife of the insured before their marriage held not a breach of warranty of sole and unconditional ownership. *Georgia Home Ins. Co. v. Brady* (Civ. App.) 41 S. W. 513.

Where a person doing business under a firm name insures his goods in such name, representing that they belonged to such firm, held not a violation of a provision that the policy should be void for misrepresentation. *Bonnet v. Merchants' Ins. Co.* (Civ. App.) 42 S. W. 316.

A person who succeeded a firm, and took out insurance in its name, under which he traded, did not thereby violate a provision avoiding the policy if his interest was not fully stated. *Delaware Ins. Co. v. Bonnet* (Civ. App.) 48 S. W. 1104; *Merchants' Ins. Co. v. Bonnet* (Civ. App.) 48 S. W. 1110.

A married woman held absolute owner of property within a policy requiring sole interest, though her husband was entitled to homestead therein. *Sun Ins. Office v. Beneke* (Civ. App.) 53 S. W. 98.

Policy of insurance on property, warranted to be the insured's, described as household and kitchen furniture contained in a certain building, held not rendered void by the fact that furniture of another was contained in the same building. *Liverpool & L. & G. Ins. Co. v. Nations*, 24 C. A. 562, 59 S. W. 817.

Condition in fire policy as to sole ownership of property held breached. *Fire Ass'n of Philadelphia v. Calhoun*, 28 C. A. 409, 67 S. W. 153.

That goods owned by a single individual are insured in a firm name does not avoid the policy. *American Cent. Ins. Co. v. Heath*, 29 C. A. 445, 69 S. W. 235.

In an action on a fire policy, evidence held to show that the property covered belonged, not to plaintiff, but to the woman with whom he was living in adultery. *McCarty v. Hartford Fire Ins. Co.*, 33 C. A. 122, 75 S. W. 934.

In an action on a fire policy by a mortgagee, an instruction that under the circumstances stated assured was the sole and unconditional owner of the property, as required by the policy, held proper. *Hamburg-Bremen Fire Ins. Co. v. Ruddell*, 37 C. A. 30, 82 S. W. 826.

— **Incumbrances.**—A condition in a policy on a building that it should be void if the building was on ground not owned by the insured in fee simple is not broken by a lien on the land. *Alamo Fire Ins. Co. v. Lancaster*, 28 S. W. 126, 7 C. A. 677.

The insurer is charged with notice of recorded liens on insurance property in the absence of any statement relating thereto. *Insurance Co. v. Holcomb* (Civ. App.) 31 S. W. 1086.

A policy of insurance covering many articles of furniture is not avoided as to unincumbered property by a stipulation that a policy should be avoided by a mortgage of the insured property. *German Ins. Co. v. Lockett*, 12 C. A. 139, 34 S. W. 173.

Incumbrances do not avoid a policy where the insured represented himself as the sole, absolute and unconditional owner. *Burlington Ins. Co. v. Coffman*, 13 C. A. 439, 35 S. W. 406.

A note secured by a mortgage on property insured, which was never delivered, held not a breach of a mortgage condition in the policy. *Insurance Co. of North America v. Wicker*, 93 T. 390, 55 S. W. 740.

A mortgage existing against property insured held a breach of a mortgage condition in the policy, though the mortgage was discharged the day after the execution of the policy. *Id.*

Under a stipulation that the policy should become void if the subject of the insurance be personal and be incumbered, forfeiture cannot be claimed for false statement as to incumbrances; the subject of insurance being partly real and partly personal. *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 60 S. W. 820.

Insurance on certain specified articles held not rendered void as to all, because one article was incumbered by a chattel mortgage. *Delaware Ins. Co. v. Harris*, 26 C. A. 537, 64 S. W. 867.

Condition in fire policy held to have been breached by insured. *Curlee v. Texas Home Fire Ins. Co.*, 31 C. A. 471, 73 S. W. 831.

Facts held insufficient to show that property insured was not subject to a lien for a part of the price, as represented, within a provision of the policy that it should be void if insured's interest was not truly stated. *Fire Ass'n of Philadelphia v. American Cement Plaster Co.*, 37 C. A. 629, 84 S. W. 1115.

A purchaser of real estate receiving a deed retaining a vendor's lien for the unpaid part of the price held to acquire the entire, unconditional, and sole ownership within a fire policy. *Wright v. Hartford Fire Ins. Co.*, 54 C. A. 6, 118 S. W. 191.

A fire policy stipulating that it shall be void on the interest of insured becoming other than unincumbered held void because of a vendor's lien on the property. *Id.*

While this article relates to fire as well as life policies, it applies only where there are misrepresentations by insured, either in the application or in the policy itself, and does not apply to a provision in the policy making it void if the property be or become incumbered by a chattel mortgage; there being no representation made by insured. *Hartford Fire Ins. Co. v. Wright* (Civ. App.) 125 S. W. 363.

A warranty in a fire policy against incumbrances existing at the time on the property insured is valid, and its violation renders the policy void. *Id.*

This article applies to covenants of warranty as well as to statements in the application not made warranties by the contract, and a stipulation in the policy relating to liens on the property which was equivalent to a representation that no liens existed, as well as a stipulation guaranteeing that the building had brick chimneys and flues throughout, were representations in the contract of insurance within the statute, so that a misrepresentation with reference thereto could not be set up as a defense without showing that it was material. *Mecca Fire Ins. Co. of Waco v. Stricker (Civ. App.) 136 S. W. 599.*

— **Value of property.**—Overvaluation of property insured will avoid the policy when it is so gross and clear that it is obvious at a glance, although it may not have been intentional or fraudulent. It is immaterial that it was the result of mistake. Overvaluation by an agent is imputable to his principal. *Home Ins. Co. v. Eakin, 2 App. C. C. §§ 665, 666.* But see *Eakin v. Home Ins. Co., 1 App. C. C. § 368.*

Overvaluation by insured held not material to the risk under a nonvalued policy and material only to the question of fraud and false swearing. *Delaware Ins. Co. of Philadelphia v. Hill (Civ. App.) 127 S. W. 283.*

To establish fraudulent overvaluation of property insured by a valued policy, it must be shown that insured knew that the property was worth less, or the actual value must be so much less than that stated as to warrant a presumption of fraud. *Id.*

A misrepresentation of the value of property insured by a valued policy, not a mere error in judgment, is material, and, if intentional, avoids the policy. *Id.*

Under this article misrepresentation by an insured as to the value of a building and personal property therein will not avoid the policy. *Co-Operative Ins. Ass'n of San Angelo v. Ray (Civ. App.) 138 S. W. 1122.*

— **Concealment.**—Mere failure of insured to mention that a gambling concern was connected with his insured saloon held not such a concealment of a material fact as to avoid the policy. *American Cent. Ins. Co. v. Nunn (Civ. App.) 79 S. W. 88.*

✓ **Health and physical condition.**—The trivial illness of insured on the day on which he received his life policy, though he never recovered therefrom, held not a defense to an action on the policy, which required him to be in good health on such day. *Woodmen of the World v. Locklin, 28 C. A. 486, 67 S. W. 331.*

The words "injuries or wounds," and the words, "otherwise injured," in an application for accident insurance, held only to refer to such serious wounds or injuries not specified as might affect the risk taken by insurer in insuring against accidents. *Trenton v. North American Acc. Ins. Co. (Civ. App.) 89 S. W. 276.*

✓ Under the terms of a life policy, insurer held to have incurred no liability where insured was at the time of delivery affected with a mortal disease. *Metropolitan Life Ins. Co. v. Betz, 44 C. A. 557, 99 S. W. 1140.*

A declaration in a life policy held not to qualify another provision, so as to require only good faith on insured's part in answering the medical examiner's questions. *Supreme Lodge Knights and Ladies of Honor v. Payne (Civ. App.) 110 S. W. 523.*

The answer "No" to the question to an applicant for life insurance whether she had suffered "abortions" held not false, where she had suffered only one. *Mutual Life Ins. Co. of New York v. Crenshaw (Civ. App.) 116 S. W. 375.*

✓ **Medical attendance.**—Untrue statements as to medical attendance, in an application for life insurance warranting their truth, held material, and to preclude recovery on the policy. *Fidelity Mut. Life Ass'n v. Harris, 94 T. 25, 57 S. W. 635, 86 Am. St. Rep. 813.*

✓ False statements of insured that she had not been treated by a physician, except in childbirth, for 10 years, and had no disease of the liver, held warranties, and to void the policy, whether material or not. *Flippen v. State Life Ins. Co., 30 C. A. 362, 70 S. W. 787.*

Where a physician testified that he had treated insured, and she permitted him to prescribe for her, it was immaterial that she did not summon him, as regards the falsity of her statement that she had not been treated by a physician. *Id.*

✓ The answer of an applicant for life insurance to questions in an application held not to give notice to the insurer that any other physician than those mentioned in the application had treated the applicant, and the policy was nonenforceable in view of the application making the applicant's statements warranties. *National Life Ins. Co. v. Reppond (Civ. App.) 96 S. W. 778.*

Where a life policy made the statements in the application warranties, and insured did not give the name of the physician who had treated him within five years when answering the question calling on him to give the name and address of each physician consulted during the past five years, there was a misstatement avoiding the policy. *Id.*

✓ The failure of an applicant for life insurance to state the name of one of the physicians who attended him within five years preceding the application held not a breach of warranty defeating the policy. *Reppond v. National Life Ins. Co., 100 T. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.*

— **Occupation and family history.**—Provision of a policy of life insurance held to constitute a warranty of the truth of the statements made in the application, so that a discrepancy between the ages of the sisters of the insured as stated and their actual ages caused the forfeiture of the contract. *Kansas Mut. Life Ins. Co. v. Pinson, 94 T. 553, 63 S. W. 531.*

Insurance held unenforceable by reason of breach of warranty as to the ages of the applicant's sisters. *Kansas Mut. Life Ins. Co. v. Pinson (Civ. App.) 64 S. W. 818.*

A statement by an applicant for life insurance as to his place of birth and residence, held substantially false so as to justify forfeiting the policy. *Kansas City Life Ins. Co. v. Blackstone (Civ. App.) 143 S. W. 702.*

— **Habits and age.**—Proof that insured occasionally drank to excess held not a breach of a warranty that he took a drink once a month. *Equitable Life Assur. Soc. v. Liddell, 32 C. A. 252, 74 S. W. 87.*

The word "use," in a question put to an applicant for life insurance in relation to intoxicating liquors, held to mean habit or custom, and a negative answer was not false

because the applicant had drunk liquor. *Pacific Mut. Life Ins. Co. v. Terry*, 37 C. A. 486, 84 S. W. 666.

Insured held bound by statements in his application, as to his age, made by his father, to whom he referred the company's agents. *Mutual Reserve Life Ins. Co. v. Jay* (Civ. App.) 101 S. W. 545.

In an action to recover the balance due on a life insurance policy, evidence held not to conclusively show that the insured in his application misstated his age. *Metropolitan Life Ins. Co. v. Lennox*, 103 T. 133, 124 S. W. 623.

A statement by an applicant for life insurance as to occupation held substantially false so as to justify forfeiting the policy. *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

— **Other insurance.**—A warranty that an applicant for life insurance had a policy in another company called the "Mutual Reserve" was not proven to be broken by evidence showing that he had another policy, which was void, in the "Mutual Reserve Fund Life Association." *Kansas Mut. Life Ins. Co. v. Coalson*, 22 C. A. 64, 54 S. W. 388.

A warranty that an applicant for insurance had never made application for insurance under which no policy was issued is not broken by the fact that a company wrote out, signed, and sent to its agent a policy for applicant which was never delivered. *Id.*

A fire insurance policy provided that it should be void if assured then had, or thereafter procured other insurance. Held, construing this article under the assumption that it was enacted with knowledge of the judicial doctrine of promissory warranties and representations, and requiring strict compliance with the former, that it did not abolish such doctrine, and the policy was avoided by carrying policies in other companies, \$750 in excess of the \$37,000 concurrent insurance permitted, and the small amount of the excess, compared with the total insurance permitted, did not excuse the violation of the provision. *Gross v. Colonial Assur. Co.*, 56 C. A. 627, 121 S. W. 517.

The liability of an insurance company under a provision as to the effect of other insurance held fixed at the time that a loss occurs. *Allemania Fire Ins. Co. v. Fordtran* (Civ. App.) 128 S. W. 692.

Insured in a life policy held authorized to conclude that a question as to other insurance related only to policies in regular insurance companies, and not insurance in fraternal orders and accident policies. *Mutual Life Ins. Co. v. Ford* (Civ. App.) 130 S. W. 769.

An application for insurance in an old life insurance company calling for other insurance held not to require disclosure of accident policies and certificates in fraternal assessment orders and local societies. *Mutual Life Ins. Co. v. Ford*, 103 T. 522, 131 S. W. 406.

Art. 4948. No defense based upon misrepresentation valid, unless, etc.—In all suits brought upon insurance contracts or policies hereafter issued or contracted for in this state, no defense based upon misrepresentations made in the applications for, or in obtaining or securing the said contract, shall be valid, unless the defendant shall show on the trial that, within a reasonable time after discovering the falsity of the misrepresentations so made, it gave notice to the assured, if living, or, if dead, to the owners or beneficiaries of said contract, that it refused to be bound by the contract or policy; provided, that ninety days shall be a reasonable time; provided, also, that this article shall not be construed as to render available as a defense any immaterial misrepresentation, nor to in any wise modify or affect article 3096aa [4947].

See *Hartford Fire Ins. Co. v. Wright* (Civ. App.) 125 S. W. 363.

Constitutionality of prior act.—See notes under Art. 4947.

Application.—See notes under Art. 4947.

This article applies to mutual relief associations as well as to other insurance companies and the defendant must show that the alleged false statements contained in the application were material, if it would avoid the risk on this account. *Modern Order of Pretorians v. Hollmig* (Civ. App.) 103 S. W. 475.

The provisions of this article do not apply to fraternal and beneficiary associations. *Modern Order of Pretorians v. Hollmig* (Civ. App.) 105 S. W. 846.

The peculiar wording of this statute makes it apply only to the truth or falsity of answers or statements in the application or contract and not what was agreed in the contract to be performed. *Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 55 C. A. 263, 118 S. W. 1087.

This article applies to covenants of warranty as well as to statements in the application not made warranties by the contract, and a stipulation in the policy relating to liens on the property which was equivalent to a representation that no liens existed, as well as a stipulation guaranteeing that the building had brick chimneys and flues throughout, were representations in the contract of insurance within the statute, so that a misrepresentation with reference thereto could not be set up as a defense without showing that it was material. *Mecca Fire Ins. Co. of Waco v. Stricker* (Civ. App.) 136 S. W. 599.

Notice.—Under this article a company not having given the prescribed notice was absolutely barred from defending an action on the policy because of alleged misrepresentations in the application. *National Life Ass'n v. Hagelstein* (Civ. App.) 156 S. W. 353.

Art. 4949. Shall not constitute defense, unless shown, etc.—Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the same shall be void or voidable, if any misrepresentations or false statements be made in proofs of loss or

of death, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract or policy, unless it be shown upon the trial of such suit that the false statement made in such proofs of loss or death was fraudulently made, and misrepresented a fact material to the question of the liability of the insurance company upon the contract of insurance sued on, and that the insurance company was thereby misled, and caused to waive or lose some valid defense to the policy. [Id. art. 3096cc.]

Constitutionality of prior act.—See notes under Art. 4947.

Construction in general.—See notes under Art. 4947.

Art. 4950. Policies governed by laws of Texas, notwithstanding stipulation to the contrary.—Any contract of insurance payable to any citizen or inhabitant of this state by any insurance company or corporation doing business within this state shall be held to be a contract made and entered into under and by virtue of the laws of this state relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed, and the premiums and policy (in case it becomes a demand) should be payable without this state, or at the home office of the company or corporation issuing the same. [Id. art. 3096dd.]

Construction in general.—See notes under Art. 4947.

Art. 4951. Policies of insurance to be accompanied by copy of questions, etc.—Every contract or policy of insurance issued or contracted for in this state shall be accompanied by a written, photographic or printed copy of the application for such insurance policy or contract, as well as a copy of all questions asked and answers given thereto. The provisions of the foregoing articles shall not apply to policies of life insurance in which there is a clause making such policy indisputable after two years or less, provided premiums are duly paid; provided, further, that no defense based upon misrepresentation made in the application for, or in obtaining or securing, any contract of insurance upon the life of any person being or residing in this state shall be valid or enforceable in any suit brought upon such contract two years or more after the date of its issuance, when premiums due on such contract for the said term of two years have been paid to, and received by, the company issuing such contract, without notice to the assured by the company so issuing such contract of its intention to rescind the same on account of misrepresentation so made, unless it shall be shown on the trial that such misrepresentation was material to the risk and intentionally made. [Id. art. 3096eee.]

See *Metropolitan Life Ins. Co. v. Lennox*, 103 T. 133, 124 S. W. 625; *National Life Ass'n v. Hagelstein* (Civ. App.) 156 S. W. 353.

Art. 4952. No level premium policies shall be issued.—No level premium policy of life insurance shall be issued or sold by any company in this state after December 31, 1909, which provides for more than one year preliminary term insurance. [Acts 1909, p. 192, sec. 16.]

Art. 4953. Policies shall contain entire contract.—Every policy of insurance issued or delivered within this state on or after the first day of January, 1910, by any life insurance company doing business within this state, shall contain the entire contract between the parties, and the application therefor may be made a part thereof. [Id. sec. 17.]

Parts of policy.—The written portions of the policy will control the printed when they conflict. *G. H. Ins. Co. v. Jacobs*, 56 T. 366.

Where there are no words of reference to the application in the policy, it forms no part thereof. *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

Where a paper attached to the policy, and describing the goods insured, makes the policy subject to a clause attached thereto, such clause is a part of the contract, and constitutes a warranty. *City Drug Store v. Scottish Union & National Ins. Co.* (Civ. App.) 44 S. W. 21.

Application for life policy held to constitute a part of the contract. *Parish v. Mutual Benefit Life Ins. Co.*, 19 C. A. 457, 49 S. W. 153.

A slip of paper containing a stipulation is not a part of an insurance policy merely because pinned thereon. *Co-Operative Ins. Ass'n of San Angelo v. Ray* (Civ. App.) 138 S. W. 1122.

An application for life insurance is made part of the policy by a clause therein that it is issued in consideration of the application. *Grell v. Sam Houston Life Ins. Co.* (Civ. App.) 157 S. W. 757.

Art. 4954. Companies shall not discriminate.—No insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insureds (the insured) of the same class and of equal expectation of life in the amount of, or payment of, premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as expressed in the policy issued thereon; nor shall any such company, or any officer, agent, solicitor or representative thereof, pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for service of any kind, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; or give, sell or purchase, or offer to give, sell or purchase, as an inducement to insurance, or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or anything of value whatsoever not specified in the policy, or issue any policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or a charge against any portion of the premium on any other policy. Any company or agent violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the Penal Code; and the said company shall, as an additional penalty, forfeit its certificate of authority to do business in this state, and the said agent shall, as an additional penalty, forfeit his license to do business in this state for one year; provided, the company shall not be held liable under this article for any act of its agent, unless such act was authorized by its president, one of its vice presidents, its secretary or an assistant secretary, or by its board of directors. [Id. sec. 19.]

Art. 4955. Shall apply to all companies.—All the provisions of the laws of this state applicable to the life, fire, marine, inland, lightning, or tornado insurance companies, shall, so far as the same are applicable, govern and apply to all companies transacting any other kind of insurance business in this state, so far as they are not in conflict with provisions of law made specially applicable thereto. [Id. sec. 55.]

Art. 4956. Corporations may be incorporated to transact one or more kinds of insurance business.—Corporations may be incorporated, under the laws of this state, to transact any one or more kinds of insurance business other than life, fire, marine, inland, lightning or tornado insurance business in the same manner, and by complying with the same requirements, as prescribed by law for the incorporation of life insurance companies; provided, that no such company shall be incorporated having the power to do a fidelity and surety business or a liability insurance business with a paid up capital stock of less than two hundred thousand dollars. [Id. sec. 62.]

Art. 4957. Chapter does not apply to fraternal beneficiary companies.—None of the terms or provisions of this chapter shall apply to, nor in any wise affect, fraternal beneficiary associations as defined by the laws of this state, nor apply to companies carrying on the business

of life or casualty insurance on the assessment or annual premium plan, under the provision of this title. [Id. sec. 65.]

Application.—A fraternal beneficiary association of another state, the relief funds of which are created by assessments on its members, which has subordinate lodges to which application is made for membership and which issues benefit certificates, the amount payable on which is under a by-law dependent on the sum collected by assessments, comes within the provisions of this article and is not liable under Art. 4746, except in case of failure of its principal officer to make the required statement. *Supreme Council A. L. H. v. Story*, 97 T. 264, 78 S. W. 3.

A live stock insurance company, organized under Art. 1121, subd. 46, to "conduct a live stock insurance company or business upon a mutual or co-operative plan without authorized capital stock and to issue policies of indemnity," to its members, is not such a mutual relief association as is mentioned in this article. *State v. Burgess*, 101 T. 524, 109 S. W. 923.

Art. 4958. Shall not misrepresent terms of policies, etc.—No life insurance company doing business in this state, and no officer, director or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it, or benefits or advantages to be promised thereby, or the dividends or share of surplus to be received thereon. [Id. sec. 67.]

Art. 4959. Policy shall not be defeated.—No recovery upon any life, accident or health insurance policy shall ever be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed. [Id. sec. 68.]

In general.—See notes under Art. 4947.

Art. 4960. [3061] [2943] Insurance unlawful unless authorized by commissioner of insurance.—It shall not be lawful for any person to act within this state, as agent or otherwise, in soliciting or receiving applications for insurance of any kind whatever, or in any manner to aid in the transaction of the business of any insurance company incorporated in this state or out of it, without first procuring a certificate of authority from the commissioner of agriculture, insurance, statistics and history [commissioner of insurance and banking].

Art. 4961. [3093] Who are agents.—Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter; provided, that the provisions of this chapter shall not apply to citizens of this state who arbitrate in the adjustment of losses between the insurers and insured, nor to the adjustment of particular or general average losses of vessels or cargoes by marine adjusters who have paid an occupation tax of two hundred dollars for the year in which the adjustment is made; provided, further, that the provisions of this chapter shall not apply to practicing attorneys at law in the state of Texas, acting in the regular transaction of their business as such attorneys at law,

and who are not local agents, nor acting as adjusters for any insurance company. [Acts 1879, S. S., p. 32.]

"Insurance broker" defined.—"Insurance agent," "insurance broker," defined. The broker is the agent of the insurer as to the premium, but for nothing else. In all other respects he is the agent of the insured. *Insurance Co. v. Brown*, 82 T. 631, 18 S. W. 713.

Bond of agent.—Under the terms of a bond, an insurance agent held bound to turn over all property received by virtue of the agency to the receiver of the company. *Urquhart v. Saner* (Civ. App.) 94 S. W. 902.

A bond of an insurance agent held treated as a satisfactory bond and enforceable. *Haupt v. James Cravens & Co.*, 56 C. A. 253, 120 S. W. 541.

Authority of agent.—Authority of agent as to premiums, see notes at the end of this title.

When the policy clearly defines the authority of an agent, his act not within his authority does not bind the principal. *First Nat. Bank v. L. Ins. Co.*, 62 T. 461; *S. F. & M. Ins. Co. v. McKinnon*, 59 T. 507.

An agent's representation as to the amount of surplus which would accrue on a tontine policy held a mere statement of opinion; and hence assured was not entitled, as a matter of law, to recover the difference between the amount paid and the amount stated. *Donoho v. Equitable Life Assur. Soc.*, 22 C. A. 192, 54 S. W. 645.

Acts of insurance agent held to be binding on the company, as within the apparent scope of his authority. *Insurance Co. of North America v. Bell*, 25 C. A. 129, 60 S. W. 262.

The law declares the person performing the acts specified to be the agent of the company for which he acted, so as to render it liable for taxes for doing business within the limits of the state, but does not confer any power or authority upon him, with reference to making contracts, or to make the insurance company liable for any act that he did, except as specified in that law. *Insurance Co. v. Walker*, 94 T. 473, 61 S. W. 711.

The answers inserted by an agent in an application for a fire policy held binding on the insured. *Delaware Ins. Co. v. Harris*, 26 C. A. 537, 64 S. W. 867.

Instructions from an insurance company to its agent not to write policies on property of insolvent or financially crippled debtors does not avoid a policy written on such a risk, unless it appear that insured had knowledge of such inhibition. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

In an action on a fire insurance policy, evidence held sufficient to warrant a finding that the insurer was bound by an agreement its agent made with an insurance broker acting for plaintiff. *Hanover Fire Ins. Co. v. Turner* (Civ. App.) 147 S. W. 625.

Restriction.—Where one solicits insurance, writes out, takes and forwards the application to a company, collects the premium and delivers the policy, he is the agent of the company, with all the usual powers, rights, duties and obligations the relation confers or demands, and no restriction of his power or authority contained in the application or contract of insurance is valid. *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 60 S. W. 824.

This article, being originally a part of the revenue act of 1879 does not prevent an insurance company from limiting the power of soliciting agents to bind it by information received in procuring the contract of insurance. *Delaware Ins. Co. of Philadelphia v. Harris*, 26 C. A. 537, 64 S. W. 871.

Tender of premium to agent.—A bank in this state having acted as an agent of an insurance company in another state, a tender of premiums could be made to it until the agency is revoked and notice given to the insured. *Manhattan Life Ins. Co. v. Fields* (Civ. App.) 26 S. W. 280.

Agent for insured or insurer.—A local insurance agent in issuing a fire policy held to have acted not as agent of insured or of the payee, but for the insurer. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

Where an insurance broker agreed with the owner to keep the property insured for a certain time, the broker's act in securing a policy to replace a worthless one insured to the owner, though he did not know of the act. *Hanover Fire Ins. Co. v. Turner* (Civ. App.) 147 S. W. 625.

Liability of agent.—Where an insurance company is authorized to do business in this state, it, and not its agents, is bound upon the contract. *Hudson v. Compere*, 94 T. 449, 61 S. W. 390.

Where agents of a foreign insolvent fire insurance company unauthorized to do business in Texas, and known by the agents to be so unauthorized, entered into a conspiracy with such company to defraud one, and procured for him a fire insurance policy on property that was destroyed during the life of the policy, they come within the two preceding articles and are personally liable. *Price v. Garvin* (Civ. App.) 69 S. W. 986.

Acts of agent held not to render him liable for the amount of loss under the policy. *Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 40 C. A. 184, 89 S. W. 419.

Certain facts held not to show that a soliciting agent of an insurance company had collected money for the company and had failed to remit it. *Armstrong v. National Life Ins. Co.* (Civ. App.) 112 S. W. 327.

In a suit to recover on a policy of fire insurance, where the insurer impleaded its agent and asked judgment over against him in the event of a recovery by the insured, evidence held to warrant a verdict in favor of the agent. *Shawnee Fire Ins. Co. v. Chapman* (Civ. App.) 132 S. W. 354.

An insurance broker held liable to his principal, with whom he had agreed to procure reinsurance, for failure to notify the principal that the present insurance on the property was worthless; the insurer having become insolvent. *Diamond v. Duncan* (Civ. App.) 138 S. W. 429.

Liability of insurer.—A company held to have waived a provision in its contract that its agent should forward premium notes at the end of a month by accepting them sooner without objection. *Lea v. Union Cent. Life Ins. Co.*, 17 C. A. 451, 43 S. W. 927.

An agent held entitled to commissions on a policy withdrawn by the company before delivery. *Id.*

Where an insurance company claims exemption from liability to its agent by reason of the terms of its contract, it must allege and prove that such terms were complied with. *Id.*

The fact that an insurance agent gave private information sent to him by his principal to the public is not binding on the principal, so as to make him responsible as for libel. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580.

A contract of employment as soliciting agent for an insurance company construed, and held that the agent, on the cancellation of the contract by the company, was deprived of his commissions on renewal premiums. *Armstrong v. National Life Ins. Co.* (Civ. App.) 112 S. W. 327.

Where a promise by an agent of a life insurance company to return a premium note to an applicant in case the applicant should not accept the policy was unauthorized, the applicant was entitled to recover the amount of the note where he declined the policy and the agent fraudulently negotiated the note to an innocent purchaser. *Mutual Reserve Life Ins. Co. v. Seidel*, 52 C. A. 278, 113 S. W. 945.

Where an agent may exercise discretion as to the issuance of policies, and the risk is a legal one, insurer is bound by the agent's acts within his real or apparent authority. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 383.

Where an insurance agent obtained negotiable notes of applicants for policies, knowing that one of the policies would not be issued, and transferred the notes to an innocent holder, he perpetrated a fraud for which the insurance company was responsible. *Security Life Ins. Co. of America v. Stephenson* (Civ. App.) 136 S. W. 1137.

A provision in contracts of general agency for a life insurance company, as to deductions from the agent's commissions on renewal premiums, where the agent did not collect the premiums, held to apply to commissions on all policies written by the agent, and not merely those policy holders who removed from the state. *Washington Life Ins. Co. v. Reinhardt* (Civ. App.) 142 S. W. 596.

Provision in a contract of general agency for a life insurance company as to commissions on renewal premiums after discontinuance of agreement held not to entitle the agent to commissions free of the provision for deduction where the premiums were not collected by him. *Id.*

If a contract of general agency for a life insurance company is doubtful as to whether a provision as to deduction from commissions on renewal premiums when not collected by the agent applies to policies written under prior contracts, held the practical construction put on it by the parties on termination of the agency should control. *Id.*

Where the general office of insurer sent a policy to a local office, where, according to rule, it was held pending an investigation of the applicant, and not being satisfied with the risk, it was declined, and the policy recalled, and no premium was ever paid, the agent was not entitled to commissions. *Mutual Life Ins. Co. of New York v. Hodnette* (Civ. App.) 147 S. W. 615.

In an action by a life insurance broker for commissions for securing liability business for defendant, evidence held insufficient to establish any agreement for the payment of commissions. *Ætna Life Ins. Co. v. Farrell* (Civ. App.) 154 S. W. 1164.

Liability of insured.—Insured, procuring broker to obtain policy, held liable to the broker for the premium paid by him. *Holmes v. Thomason*, 25 C. A. 389, 61 S. W. 504.

Where a broker, without being applied to, procured a policy on property of insured and paid premiums thereon, he cannot recover the same of the insured. *Id.*

Estoppel of agent.—A soliciting agent of an insurance company held estopped from asserting as against the company that he was not responsible for applications sent by an associate to the company. *Armstrong v. National Life Ins. Co.* (Civ. App.) 112 S. W. 327.

Forfeiture of agent's rights.—A contract of employment as soliciting agent for an insurance company construed, and held that the agent did not in consequence of a certain fact forfeit his rights under the contract. *Armstrong v. National Life Ins. Co.* (Civ. App.) 112 S. W. 327.

The failure of a soliciting agent of an insurance company to make reports called for by his contract of employment held to forfeit his rights under the contract. *Id.*

Discharge of agent.—A contract of employment as soliciting agent for an insurance company construed, and held to authorize the company to discharge the agent for specified grounds. *Armstrong v. National Life Ins. Co.* (Civ. App.) 112 S. W. 327.

Art. 4962. [3094] Taxes to be assessed against, when.—Whenever any person shall do or perform within this state any of the acts mentioned in article 4961 for or on behalf of any insurance company therein referred to such company shall be held to be doing business in this state, and shall be subject to the same taxes, state, county and municipal, as insurance companies that have been legally qualified and admitted to do business in this state by agents or otherwise are subject, the same to be assessed and collected as taxes are assessed and collected against such companies; and such persons so doing or performing any of such acts or things shall be personally liable for such taxes. [*Id.* sec. 3.]

Penalty, etc.—Any person who shall do any of the acts mentioned in article 4961 for or on behalf of any insurance company without such company has first complied with the requirements of the laws of this state, shall be personally liable to the holder of any policy of insurance

in respect of which such act was done for any loss covered by the same. [Id. sec. 4.]

Art. 4963. Policies to be issued only through resident agents, except.—Any fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety, or fidelity insurance company, legally authorized to do business in this state, is hereby prohibited from authorizing or allowing any person, agent, firm or corporation that is a non-resident of the state of Texas to issue, or cause to be issued, to sign or countersign, or to deliver, or cause to be delivered, any policy or policies of insurance on property, person or persons located in the state of Texas, except through regularly commissioned and licensed agents of such companies in Texas; provided, however, that this law shall not apply to property owned by the railroad companies or other common carriers, and provided, further, that upon oath made in writing by any person that he can not procure insurance on property through such agents in Texas it shall be lawful for any insurance company not having an agent in Texas to insure property of any person upon application of said person, upon his filing said oath with the county clerk of the county in which such person resides. [Acts 1903, p. 232, sec. 1.]

Art. 4964. Affidavit to be filed before certificate will issue.—Before a certificate or license to any fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance companies is issued authorizing it to transact business in this state, the insurance commissioner shall require in every case, in addition to the other requirements already made and provided by the law, that each and all such insurance companies herein mentioned shall file with him an affidavit that it has not violated any provision of this law. [Id. sec. 2.]

Art. 4965. Agents, etc., prohibited from paying commissions to non-residents.—Any person, agent, firm or corporation licensed by the commissioner of insurance to act as a fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent in the state of Texas, is hereby prohibited from paying, directly or indirectly, any commission, brokerage or other valuable consideration on account of any policy or policies covering property, person or persons, in the state of Texas, to any person, persons, agent, firm or corporation that is a non-resident of the state of Texas, or to any person or persons, agent, firm or corporation not duly licensed by the commissioner of insurance and banking of the state of Texas as a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent. [Id. sec. 3.]

Art. 4966. Penalty for violation.—Whenever the commissioner of insurance and banking shall have or receive notice or information of any violation of any of the provisions of this law, he shall immediately investigate, or cause to be investigated, such violation, and if a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company has violated any of such provisions aforesaid, he shall immediately revoke its license for not less than three months, nor more than six months for the first offense, and, for each offense thereafter, for not less than one year; and, if any person, agent, firm or corporation licensed by the commissioner of insurance and banking as a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent shall violate or cause to be violated any of the provisions of this law, he shall, for the first offense, have his license revoked for

all companies for which he has been licensed, for not less than three months, and for the second offense he shall have his license revoked for all companies for which he is licensed and shall not thereafter be licensed for any company for one year from date of such revocation. [Id. sec. 4.]

Art. 4967. Commissioner authorized to examine books, witnesses, to discover violations.—For the purpose of enforcing the provisions of this law, the commissioner of insurance and banking is hereby authorized and it is made his duty, at the expense of the company investigated, to examine at the head office, located within the United States of America, all books, records and papers of such company and also any officers or employes thereof under oath, as to violations of this law, and he is further hereby empowered to examine person or persons, administer oaths, and send for papers and records, and failure or refusal upon the part of any life [fire], fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company, person or persons, agent, firm or corporation, licensed to do business in the state of Texas, to appear before the commissioner of insurance and banking when requested to do so, or to produce records and papers, or answer under oath, shall subject such fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company, person, persons, agent, firm or corporation to the penalties of this law. [Id. sec. 5.]

Books, etc., transferred from department of insurance and banking.—See notes under Title 85.

Art. 4968. Solicitor deemed agent of company.—Any person who shall solicit an application for insurance upon the life of another shall in any controversy between the assured and his beneficiary and the company issuing any policy upon such application be regarded as the agent of the company, and not the agent of the insured, but such agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy. [Acts 1909, p. 192, sec. 18.]

✓ **Art. 4969. What persons debarred from acting as agent.**—No corporation or stock company shall be licensed or granted a certificate of authority as the agent or representative of any life insurance company in soliciting, selling or in any manner placing life insurance policies or contracts in this state. No life insurance company shall, after June 30, 1903, be granted a certificate of authority to transact business in this state, which has or is bound by any valid subsisting contract with any other corporation, by virtue of which such other corporation is entitled to receive, directly or indirectly, in [any] percentage or portion of the premium or other income of such life insurance company for any period. No person shall hereafter be granted a certificate of authority as the agent of any life insurance company, who, after June 30, 1903, enters into any contract with any corporation other than such life insurance company, by virtue of which such other corporation is entitled to receive, directly or indirectly, any compensation earned by him as agent for such life insurance company, or any percentage or portion thereof for any period. [Id. sec. 42.]

Art. 4970. Company to notify commissioner of appointment of general agent.—Every such foreign company shall, by resolution of its board of directors, designate some officer or agent who is empowered to appoint or employ its agents or solicitors in this state, and such officer or agent shall promptly notify the commissioner in writing of the name, title and address of each person so appointed or employed. Upon receipt of this notice, if such person is of good reputation and character, the commissioner shall issue to him a certificate which shall include a copy of the certificate of authority authorizing the company requesting it to do business in this state, and the name and title of the person to whom

the certificate is issued. Such certificate, unless sooner revoked by the commissioner for cause or canceled at the request of the company employing the holder thereof, shall continue in force until the first day of March next after its issuance, and must be renewed annually. [Id. sec. 47.]

Art. 4971. Revocation of agent's authority, grounds for.—Cause for the revocation of the certificate of authority of an agent or solicitor for an insurance company may exist for violation of any of the insurance laws, or if it shall appear to the commissioner upon due proof, after notice that such agent or solicitor has knowingly deceived or defrauded a policy holder or a person having been solicited for insurance, or that such agent or solicitor has unreasonably failed and neglected to pay over to the company, or its agent entitled thereto, any premium or part thereof, collected by him on any policy of insurance or application therefor. The commissioner shall publish such revocation in such manner as he deems proper for the protection of the public; and no person whose certificate of authority as agent or solicitor has been revoked shall be entitled to again receive a certificate of authority as such agent or solicitor for any insurance company in this state for a period of one year. [Id. sec. 48.]

Art. 4972. [3096ee] Foreign corporations held to accept provisions of this title.—The provisions of this title are conditions upon which foreign insurance corporations shall be permitted to do business within this state, and any such foreign corporations engaged in issuing insurance contracts or policies within this state shall be held to have assented thereto as a condition precedent to its right to engage in such business within this state. [Acts 1903, p. 94.]

CHAPTER SIXTEEN

INDEMNITY CONTRACTS

Art.

4972a. Certain indemnity contracts not subject to insurance laws.

4972b. Representative to file declaration with commissioner of insurance and banking, etc.; citations served on commissioner.

4972c. Annual report to commissioner.

Art.

4972d. Commissioner to issue certificate of authority, when; fee.

4972e. Corporations may exchange indemnity contracts.

4972f. Representative violating act, when guilty of misdemeanor; commissioner may reject application, or revoke certificate.

Article 4972a. Certain indemnity contracts not subject to insurance laws.—The making of contracts between individuals, firms or corporations, providing indemnity among each other, from casualty or other contingency or from fire loss or other damage to their own property, shall not be subject to the laws of this state, relating to insurance. [Acts 1913, p. 210, sec. 1.]

Art. 4972b. Representative to file declaration with commissioner of insurance and banking, etc.; citations served on commissioner.—The attorney, agent or other representative, acting for such individuals, firms or corporations, shall file with the commissioner of insurance and banking, of this state, a declaration in writing, verified by the oath of such attorney, agent or other representative, setting forth: (a) The name or title of the office through which such individuals, firms or corporations exchange such contracts. (b) A copy of the form of contract under or by which such indemnity is to be effected. (c) The location of the office or offices through which such contracts are to be issued. (d) That service of process may be had upon the commissioner of insurance and

banking in this state, in all suits arising out of such contracts. Citation served upon the commissioner shall be accompanied by a certified copy of the petition, which shall be immediately sent by registered mail to the attorney of the concern, who shall have at least ten days thereafter within which to answer. [Id. sec. 2.]

Art. 4972c. Annual report to commissioner.—Such attorney shall make a sworn report to the commissioner of insurance and banking, on or before the first day of March every year, showing the financial condition of the association at the office where such contracts are issued, on December 31st, immediately preceding. Such report shall show the income and disbursements of the association for the calendar year; the assets and liabilities on the 31st day of December; a statement of the total number and amount of indemnity contracts issued during the year, and the total number (but not the names) and amount outstanding on said date; together with such other information as the commissioner may require in order for him to ascertain and know that the requirements of this Act have been complied with. [Id. sec. 3.]

Art. 4972d. Commissioner to issue certificate of authority, when; fee.—Every attorney, agent or other representative through whom are issued or negotiated any contracts, for indemnity of the character referred to in this Act, shall procure from the commissioner of insurance and banking annually a certificate of authority, stating that all the requirements of this Act which are applicable, have been complied with; and upon such compliance and the payment of the fee of \$20.00 the commissioner of insurance and banking shall issue such certificate. [Id. sec. 4.]

Art. 4972e. Corporations may exchange indemnity contracts.—Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange indemnity contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporation is organized, and as such granted as the rights and powers expressly conferred. [Id. sec. 5.]

Art. 4972f. Representative violating act, when guilty of misdemeanor; commissioner may reject application, or revoke certificate.—Any attorney, agent or other representative who shall take any application for or execute any of the contracts provided for herein, without complying with the provisions of this Act entitling him to a certificate of authority hereunder, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offense. The commissioner, for reasonable cause, shall have authority to reject any application made under this Act, or to revoke any certificate of authority granted hereunder. [Id. sec. 6.]

DECISIONS RELATING TO TITLE OF INSURANCE IN GENERAL

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| 2. Notice to mortgagor of provisions of policy. | 18. — Property covered. |
| 3. Insurable interest in property. | 19. — Valued policy. |
| 4. Insurable interest in human life. | 20. — Estoppel of insured as to objections. |
| 5. Existence of contracts. | 21. — Modification. |
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| 44. Effect of transfer. | 90. — Indemnity insurance. |
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| 68. — Effect of breach of condition subsequent. | 114. Time for payment. |
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| 75. — Delivering policy with knowledge of facts. | 121. Defenses in general. |
| | 122. Defense available against mortgagee. |
| | 123. Judgment on policy payable in installments. |
| | 124. Reinsurance. |
| | 125. Recovery of payment. |

1. **Duty to insure.**—A builder is not required to protect himself against loss by fire by insuring the property of another which he is constructing or repairing; and if a fire occurs and destroys the structure during the progress of the work, his failure to do so will not be regarded as negligence. *Weis v. Devlin*, 67 T. 507, 3 S. W. 726, 60 Am. Rep. 38.

2. **Notice to mortgagor of provisions of policy.**—Where a mortgagee agreed to attend to the insurance on the mortgaged premises and procured policies of insurance thereon and retained them in its possession, the mortgagor was chargeable with notice of their provisions. *Commonwealth Fire Ins. Co. v. Obenchain* (Civ. App.) 151 S. W. 611.

3. **Insurable interest in property.**—The surviving husband having possession of the community property of himself and deceased wife, with the right of disposition of it in the settlement of his business, has an insurable interest therein. *Jones v. Jones*, 15 T. 148; *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

One to whom a policy is payable as his interest may appear, and having a lien on the property, held to have an insurable interest entitling him to sue for a loss. *Sun Mut. Ins. Co. v. Tufts*, 20 C. A. 147, 50 S. W. 180.

A bailee having possession of property under an agreement to keep it insured may take out a policy in his own name for the benefit of the owner. *Wagner v. Westchester Fire Ins. Co.*, 92 T. 549, 50 S. W. 569.

Grantor, who has deposited deed in escrow, has insurable interest, and may recover upon policy, if title remains in him at time of loss. *Merchants' Ins. Co. v. Nowlin* (Civ. App.) 56 S. W. 193.

A husband has an insurable interest in property owned by his wife and minor children by a former husband, and occupied as the homestead of husband and wife. *Continental Fire Ass'n v. Wingfield*, 32 C. A. 194, 73 S. W. 847.

Evidence held to show that alleged mistake of insurance company in supposing that property insured belonged to person other than plaintiff was not due to negligence on its part. *McCarty v. Hartford Fire Ins. Co.*, 33 C. A. 122, 75 S. W. 934.

4. **Insurable interest in human life.**—A creditor purchasing a policy of insurance upon the life of the debtor, upon the death of the debtor takes only his debt and the aggregate of premiums he has paid, with interest upon his debt and outlay. *Cawthon v. Perry*, 76 T. 383, 3 S. W. 268; *Goldbaum v. Blum*, 79 T. 638, 15 S. W. 564.

The insured can make any person a beneficiary in a life policy. *Mutual Life Ins. Co. v. Blodgett*, 27 S. W. 286, 8 C. A. 45.

It is against the public policy of this state to allow any one who has no insurable interest to be the owner of a policy of insurance upon the life of a human being. *Cheeves v. Anders*, 87 T. 287, 28 S. W. 274, 47 Am. St. Rep. 107.

A community creditor has no insurable interest in the life of the wife. *Cameron v. Barcus*, 31 C. A. 46, 71 S. W. 423.

Assignee of life policy, having no insurable interest in life insured, held not entitled to recover on the policy. *Wilton v. New York Life Ins. Co.*, 34 C. A. 156, 78 S. W. 403.

Niece, having no expectation of pecuniary benefit from uncle, except occasional gift, held to have no insurable interest in his life. *Id.*

The rule that a wife's interest as assignee of a policy on her husband's life ceases on the divorce of the parties is applicable to an endowment policy issued to the husband. *Hatch v. Hatch*, 35 C. A. 373, 80 S. W. 411.

A wife's interest as assignee of a policy on her husband's life ceases on the divorce of the parties, except so far as she has paid premiums. *Id.*

One to whom insured assigns his life policy, not being a relative of his and not alleging any insurable interest in his life or in the policy, held not entitled to recover on it. *Dugger v. Mutual Life Ins. Co. of New York (Civ. App.)* 81 S. W. 335.

An assignment of a life policy to one without insurable interest is valid in Texas only to the extent of reimbursing the assignee for the amount paid out by him. *Manhattan Life Ins. Co. v. Cohen (Civ. App.)* 139 S. W. 51.

5. **Existence of contract.**—Evidence held to show that no binding contract of insurance was created between the parties. *Atkins v. New York Life Ins. Co. (Civ. App.)* 62 S. W. 563.

6. **Executory agreement to insure.**—In the absence of any requirement in the by-laws or charter of a mutual insurance company, or of any statutory provision, its executory agreement to insure which leaves nothing to be done but to deliver the policy is valid. *State Mut. Fire Ins. Co. v. Taylor (Civ. App.)* 157 S. W. 950.

7. **Oral contracts.**—A contract for life insurance may be effected by parol. *Pacific Mut. Ins. Co. v. Shaffer*, 30 C. A. 313, 70 S. W. 566.

A verbal contract of insurance held not consummated during the lifetime of the insured. *Dickey v. Continental Casualty Co.*, 40 C. A. 199, 89 S. W. 436.

A contract of insurance can be effected by parol, and in the absence of any requirement in the by-laws or charter of a mutual insurance company, or of any statutory provision its oral contract of insurance which leaves nothing to be done but to issue and deliver the policy, is valid. *State Mut. Fire Ins. Co. v. Taylor (Civ. App.)* 157 S. W. 950.

8. **Ratification of contract.**—A contract of insurance by an agent who acts for both parties is voidable, and if the insurer fails to refund the premium within a reasonable time after he is apprised of the fact he ratifies the contract. *Georgia Home Ins. Co. v. City of Smithville (Civ. App.)* 49 S. W. 412.

Where an insurance contract is voidable, the insured, by bringing suit on the contract before his premiums are returned, ratifies it, and may enforce it. *Id.*

Repudiation by an insurer on the ground that its agent had acted for insured held under the facts not sufficiently prompt. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

9. **Acceptance of application.**—A contract of life insurance is not completed until acceptance of the application. As to effect of retaining the premium, *quære*. *Life Ins. Co. v. Rudolph*, 45 T. 454.

10. **Effect of altering application.**—An insurance company, by altering an application for insurance, may be concluded from defenses reserved therein, without affecting the beneficiary's right to recover on the policy. *Kansas Mut. Life Ins. Co. v. Coalson*, 22 C. A. 64, 54 S. W. 388.

11. **Policy.**—A policy of insurance is a mere chose in action, and is not subject to attachment or garnishment. *Grace v. Koch*, 1 App. C. C. § 1065; *Hamilton v. E. T. Fire Ins. Co.*, 1 App. C. C. §§ 448, 449.

In the absence of any provision in an insurance company's charter, or in the statute under which it was organized, an absolute unconditional policy, issued thereby, will not be abrogated by the court as ultra vires. *Continental Fire Ass'n v. Masonic Temple Co.*, 26 C. A. 139, 62 S. W. 930.

Evidence in an action on a fire insurance policy on lumber held insufficient to show fraud or mistake on the part of the insurance agent, in inserting in the policy a clause requiring a certain clear space surrounding the lumber. *Keller v. Liverpool & L. & G. Ins. Co.*, 27 C. A. 102, 65 S. W. 695.

A policy of accident insurance issued to a man over 65 years of age held void under a condition therein. *Perry v. Standard Life & Accident Ins. Co. of Detroit, Mich. (Civ. App.)* 125 S. W. 374.

12. — **Execution.**—A life policy held not binding on the insured because not countersigned by the policy writer in the lifetime of the insured. *Dickey v. Continental Casualty Co.*, 40 C. A. 199, 89 S. W. 436.

13. — **What law governs.**—Contracts made in another state by an insurance company, chartered by the laws of and doing business in such state, are governed by its laws. *Manhattan Life Ins. Co. v. Fields (Civ. App.)* 26 S. W. 280.

Contract of insurance intended to be performed in the state held governed by the laws of the state. *Sleders v. Merchants' Life Ass'n of United States* (Civ. App.) 51 S. W. 547.

The legal effect of an insurance contract, making the principal and premiums payable in a state other than that of the insured's residence, is to be determined by the laws of that state. *Seiders v. Merchants' Life Ass'n of the United States*, 93 T. 194, 54 S. W. 753.

The fact that the law requires foreign insurance companies, as a condition precedent to their doing business in Texas, to establish an office and appoint an agent upon whom service of process can be made, does not, where the principal and premiums are made payable in another state, operate to make the contract performable in, and its legal effect to be determined by the laws of, Texas. *Id.*

A contract of insurance held subject to the laws of the place of its issue, notwithstanding a limitation of liability until its delivery. *Fidelity Mut. Life Ass'n v. Harris*, 94 T. 25, 57 S. W. 635, 86 Am. St. Rep. 813.

Where a life policy issued in Texas provides that it shall be governed by the laws of another state, the statutes applicable are considered as part of the written contract. *New York Life Ins. Co. v. Orlopp*, 25 C. A. 254, 61 S. W. 336.

Where a life policy provides that it shall be governed by the laws of a foreign state, the provisions of a statute applying thereto cannot be waived by the parties. *Id.*

Where a policy is to be construed by the laws of another state, in the absence of evidence as to such laws, it is not error to charge that it should be construed as under the law of the state where the court is sitting. *Ash v. Fidelity Mut. Life Ass'n*, 26 C. A. 501, 63 S. W. 944.

Provision of New York law regulating forfeitures of life policies held not to govern a policy application for which was made in Texas and which was delivered in Texas. *Cowen v. Equitable Life Assur. Soc.*, 37 C. A. 430, 84 S. W. 404.

Provision of an insurance contract relating to the law governing its construction held to have no application whatever to an action brought in this state predicated upon a breach of the contract by insured. *Washington Life Ins. Co. v. Lovejoy* (Civ. App.) 149 S. W. 398.

14. — **Construction in general.**—An ordinary life insurance policy, payable to the heirs of the assured, vests title to the amount of the insurance in the heirs of the assured. *Splawn v. Chew*, 60 T. 532; *Mullins v. Thompson*, 51 T. 7; *White v. Smith*, 2 App. C. C. § 400.

The same rules of law apply in the construction of insurance contracts as in contracts in general. *City Drug Store v. Scottish Union & National Ins. Co.* (Civ. App.) 44 S. W. 21.

An ambiguity in a policy of insurance must be construed in favor of indemnity and against a forfeiture. *Home Mut. Ins. Co. v. Tomkies*, 30 C. A. 404, 71 S. W. 812.

Plain language of insurance policy cannot be disregarded, so as to make a new contract for parties. *Maryland Casualty Co. v. Hudgins*, 97 T. 124, 76 S. W. 745, 64 L. R. A. 249, 104 Am. St. Rep. 857, 1 Ann. Cas. 252.

The language of an insurance policy should be construed most favorably to the insured. *London & L. Fire Ins. Co. v. Davis*, 37 C. A. 348, 84 S. W. 260.

An application for insurance, the policy issued thereon and the notes given for the premiums held part of one transaction, and must be considered together in ascertaining the terms of the policy. *North American Acc. Ins. Co. v. Bowen* (Civ. App.) 102 S. W. 163.

The rule that a policy must be construed most liberally in favor of the beneficiary has no application where there is no ambiguity nor uncertainty in the language sought to be construed. *Continental Casualty Co. v. Wade*, 101 T. 102, 105 S. W. 35.

Where the language of an indemnity contract is susceptible of more than one construction, that construction most favorable to the party indemnified should be adopted; the company having prepared the obligation and chosen the language used. *Griffin v. Zuber*, 52 C. A. 288, 113 S. W. 961.

Where the language of a fire policy is susceptible of another than the literal construction, that construction will be adopted which is most favorable to insured. *Royal Ins. Co. v. Texas & G. Ry. Co.*, 53 C. A. 154, 115 S. W. 117.

Where the language of a contract of insurance is plain and unambiguous, the contract must be enforced as written, but such construction as will preserve the intention of the parties must be adopted. *Id.*

The court, in construing a fire policy, held required to adopt the construction giving to insured the protection under the general terms thereof, and relieving insurer from any increased hazard against which it undertook to provide. *Id.*

Where a policy is capable of two interpretations equally reasonable, that construction most favorable to insured must be adopted. *Hartford Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 465.

Where a contract was prepared by an insurance company, it must be construed most favorably to the assured. *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 104 T. 199, 135 S. W. 1165.

An insurance policy must be liberally construed in favor of the insured and against a forfeiture. *Philadelphia Underwriters' Agency of the Fire Ass'n of Philadelphia v. Neurenberg* (Civ. App.) 144 S. W. 357.

A condition of forfeiture must be construed against the insurer, and so as to prevent a forfeiture if the language used will admit of such a construction. *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 153 S. W. 398.

15. — **Consideration.**—Though an application for a fire policy did not promise to pay the premium on the delivery of the policy, the obligation to pay the premium held a consideration for the policy on which insurer could sue. *Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House* (Civ. App.) 147 S. W. 629.

16. — **Delivery and acceptance.**—A contract may be consummated by letter deposited in the postoffice; and when an offer is made contemplating an acceptance in this manner, and a letter accepting is properly mailed, the agreement is complete; but to be properly mailed, the letter should be duly posted, and the date of the posting must

determine the date of the contract. *Blake v. Insurance Co.*, 67 T. 160, 2 S. W. 368, 60 Am. Rep. 15.

The holder of a policy of insurance, who has an opportunity to inspect it before he accepts it, is chargeable with knowledge of its contents, in the absence of fraud, misrepresentation or concealment. *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

A delivery of a policy to the broker or agent appointed by the insured to procure it is a delivery to the latter. *Holmes v. Thomason*, 25 C. A. 389, 61 S. W. 504.

The delivery of a policy by an insurance company in accordance with a written application constitutes a contract between the parties. *Travelers' Ins. Co. v. Jones*, 32 C. A. 146, 73 S. W. 978.

Facts held insufficient to show an acceptance of a policy intended for conditional delivery only. *Ætna Life Ins. Co. v. Hocker*, 39 C. A. 330, 89 S. W. 26.

Actual or constructive delivery of an insurance policy is essential to its validity. *American Home Life Ins. Co. v. Melton* (Civ. App.) 144 S. W. 362.

A mere intention by the officer executing a life policy that it should become effective as soon as executed held not to make it effective. *Id.*

17. — **Validity of policy issued while another was in force.**—Where insured erroneously believing that a prior fire policy had terminated, procured a new policy, the new policy held effective. *National Union Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 475.

18. — **Property covered.**—A marine policy on property in general terms, "laden or to be laden on board," will not cover property laden upon deck; but if the property is named, and is such as is usually carried on deck in the particular trade, the policy will cover property so carried. If a general usage to carry goods on deck exists, contracts of underwriters in the particular trade will be construed with reference to such usage. *O. M. Ins. Co. v. Reymershoffer*, 56 T. 234; *Meaheer v. Lufkin*, 21 T. 391.

An open policy covered property belonging to the insured, or held by it in trust, or on commission, or sold and not delivered. The insured advanced money to a third party to purchase cotton under an agreement to return the money when the cotton was sold, and if it was shipped that the bill should be taken in the name of the insured. Held, that the cotton was not covered by the policy. *First Nat. Bank v. Lancashire Ins. Co.*, 62 T. 461.

Policy construed, and held to cover cotton for which a railroad company issued bills of lading while in compress yard. *Germania Ins. Co. v. Anderson*, 15 C. A. 551, 40 S. W. 200.

A policy on furniture whose value exceeded the amount of the policy held not to attach to furniture subsequently purchased. *Phoenix Ins. Co. v. Dunn* (Civ. App.) 41 S. W. 109.

Insurance policy construed, and held not to cover personal property in a building other than that described in the policy. *British America Assur. Co. v. Miller*, 91 T. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901.

Policy construed, and held to cover the entire house, together with a specified personal property therein. *Phoenix Ins. Co. v. Moore* (Civ. App.) 46 S. W. 1131.

When policy covers specified contents of saloon, and afterwards a safe is placed in the saloon upon which a mortgage is given, the safe is not covered by the policy, and therefore the mortgage does not avoid it. *Moriarty v. U. S. Fire Ins. Co.*, 19 C. A. 669, 49 S. W. 132.

A policy of insurance construed and held to cover cars which were out of repair and standing on storage tracks. *Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co.*, 31 C. A. 104, 71 S. W. 419.

Goods stored with one are within the insurance policy taken out by him on goods "held in trust." *Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Civ. App.) 73 S. W. 545.

A fire policy held not to cover dental books. *American Fire Ins. Co. v. Bell*, 33 C. A. 11, 75 S. W. 319.

A fire policy held to cover cotton on open cars placed on a spur track adjacent to a depot preparatory to the transportation thereof on such cars. *Royal Ins. Co. v. Texas & G. Ry. Co.*, 53 C. A. 154, 115 S. W. 117.

Fire insurance covers gifts. *Milwaukee Mechanics' Ins. Co. v. Frosch* (Civ. App.) 130 S. W. 600.

A bank safe held furniture within a policy insuring the bank's furniture and fixtures. *Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin* (Civ. App.) 135 S. W. 1083.

A fire policy on stock of "grain" in a warehouse covers "bran." *German Fire Ins. Co. v. Peoria v. Walker* (Civ. App.) 146 S. W. 606.

A policy "on merchandise consisting of clothing made and in process of making, and materials for same," embraces all goods, wares, and merchandise on hand and the tools and implements of the business as conducted by insured. *Oklahoma Fire Ins. Co. v. McKey* (Civ. App.) 152 S. W. 440.

19. — **Valued policy.**—A policy which does not indicate an intention of the insurer to value the risk and loss held not a valued policy. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

20. — **Estoppel of insured as to objections.**—Insured was not estopped from asserting that a life policy was procured by misrepresentations, where he declined to accept the policy written so as to mature differently from the time represented, and received possession of it solely to deliver it to the company's adjuster. *Stengel v. Colorado Nat. Life Assur. Co.* (Civ. App.) 147 S. W. 1193.

21. — **Modification.**—It is not within the power of an insurer against the consent of the insured to substitute another insurer in the carrying out of its undertakings. *Washington Life Ins. Co. v. Lovejoy* (Civ. App.) 149 S. W. 398.

In action by insured for recovery of premiums and damages for the insurer's breach of its contract, held that a company which had taken over the contracts and assets of the original company and had assumed its obligations was liable. *Id.*

22. — Reformation.—Policy will not be reformed on a ground of mistake in inserting name of owner eight months after delivery and after property has been burned. *Wagner v. Westchester Fire Ins. Co.* (Civ. App.) 48 S. W. 49.

Fact that insurance agent negligently omitted to follow directions of insured in writing application held no ground for reformation of the application. *Cowen v. Equitable Life Assur. Soc.*, 37 C. A. 430, 84 S. W. 404.

One suing on a fire policy which misdescribes the building in which the property insured was located need not, in order to recover, first secure a reformation of the policy. *Ætna Ins. Co. v. Brannon*, 99 T. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020.

An insured held not precluded from having a mistake in the policy corrected. *Id.*

A policy, which by mutual mistake does not embody the intent of the parties, may be reformed. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

An insurance policy may be reformed after, as well as before, loss, if assured has not been guilty of laches. *Id.*

A fire policy, not accepted by insured, but returned to insurer and canceled by insurer, held not the subject of reformation. *Jefferson Fire Ins. Co. of Philadelphia v. Greenwood* (Civ. App.) 141 S. W. 319.

23. — Renewal.—The fact that a contract to renew a fire policy was entered into in August while the policy did not expire until the following March held not to affect the validity of the contract. *Orient Ins. Co. v. Wingfield*, 49 C. A. 202, 108 S. W. 788.

The jury held authorized to find the existence of a contract to renew an insurance policy. *Id.*

Payment of premium is not essential to the validity of a contract to renew a fire policy, and in ascertaining whether payment of the premium has waived the course of dealing between the parties may be looked to. *Id.*

An action held maintainable on a contract to renew a fire policy where no renewal policy was issued. *Id.*

A contract to renew a fire policy held presumptively to call for a policy exactly similar to the old one. *Id.*

24. — Loans on policies.—An insurance company held not compelled to make a loan to plaintiff according to the terms of a policy issued to him, unless he satisfies his divorced wife's lien on the policy to the amount of premiums paid by her. *Hatch v. Hatch*, 35 C. A. 373, 80 S. W. 411.

25. Premiums.—A policy is valid, though the premium be never paid, if a credit was intentionally given, unless it has actually been canceled before loss. *E. T. Fire Ins. Co. v. Mims*, 1 App. C. C. § 1323.

An insurance premium held payable at any time within the days of grace allowed, not being due at 5 o'clock p. m. of the last day of grace. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Civ. App.) 108 S. W. 778.

Where the last day for the payment of a premium on an insurance policy falls on Sunday, the party has until the succeeding Monday to pay the premium. *Id.*

Where the cash part of a quarterly premium due in June and payable in advance was unpaid, the insured had no right to require the company to apply thereon a distribution of less than the full cash part of the premium, paid some time in August under an independent "board contract," since he had no right to require the acceptance of less than the full cash part of the premium. *Security Life & Annuity Co. of America v. Underwood* (Civ. App.) 150 S. W. 293.

While the rate is an element of the contract which must be agreed upon, yet where the policy is for one year and the proximate amount of the premium is known, and the exact amount is a mere matter of calculation, and the applicant agreed to pay whatever amount the premium should be, the contract can be enforced. *State Mut. Fire Ins. Co. v. Taylor* (Civ. App.) 157 S. W. 950.

26. — Authority of agent.—Authority in an agent to collect premiums does not authorize him to accept property. *Equitable Life Assur. Soc. v. Cole*, 13 C. A. 486, 35 S. W. 720.

Under certain circumstances, agent of insurance company held empowered to extend payment of premiums. *Washington Life Ins. Co. v. Berwald* (Civ. App.) 72 S. W. 436.

In action on insurance policy, evidence held not to tend to show that an extension of time of payment of premiums was applied for, or given, or that the insurer's collecting agents had power to grant such extension. *Cowen v. Equitable Life Assur. Soc.*, 37 C. A. 430, 84 S. W. 404.

An agent of a life insurance company held to have authority to make a verbal agreement with an applicant for a policy that a premium note signed by the applicant shall be surrendered in case he declines to receive the policy. *Mutual Reserve Life Ins. Co. v. Seidel*, 52 C. A. 278, 113 S. W. 945.

A cashier of an insurance company held authorized to extend the time for the payment of an annual premium on a policy. *Equitable Life Assur. Society of United States v. Ellis* (Civ. App.) 137 S. W. 184.

Provision in a contract of general agency for a life insurance company as to collecting renewal premiums on policies written by others held not to require the company to allow such agent to collect them. *Washington Life Ins. Co. v. Reinhardt* (Civ. App.) 142 S. W. 596.

A general agent of an insurance company, even though in violation of the rules and regulations of his principal, may give credit for premiums. *State Mut. Fire Ins. Co. v. Taylor* (Civ. App.) 157 S. W. 950.

27. — Notice of maturity.—Life policy issued by a New York company held governed by the statutes of New York as to notice, though policy provides for a waiver thereof. *New York Life Ins. Co. v. Smith* (Civ. App.) 41 S. W. 680.

Under a New York statute and a policy of insurance, the insurance company held required to give notice of maturity of premiums to nonresidents of that state. *Washington Life Ins. Co. v. Berwald* (Civ. App.) 72 S. W. 436.

28. — Payment by check or note.—A negotiable note received by the agent of the insurance company is a sufficient payment of the premiums. *E. T. Fire Ins. Co. v. Mims*,

1 App. C. C. § 1324. Payment of the premium to an agent in a draft is a valid payment, although prohibited, if the draft was collected. *Life Ins. Co. v. Ray*, 50 T. 511.

A company held to have either accepted a check as payment of the premium of a life policy, or to have waived strict compliance with its terms in regard thereto. *Northwestern Life Assur. Co. v. Sturdevant*, 24 C. A. 331, 59 S. W. 61.

An insurance company held justified in returning a check to an agent of the insured without notifying the insured of its nonacceptance. *Mullins v. Hartford Life Ins. Co.*, 26 C. A. 383, 63 S. W. 909.

Notes accepted by life insurance agent held not subject to the provision in the policy for a forfeiture for the nonpayment of premium notes. *Reppond v. National Life Ins. Co.*, 100 T. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.

A life insurance agent held to have apparent authority to accept notes for less than the full amount of the first annual premiums on taking applications for insurance. *Security Life Ins. Co. of America v. Stephenson* (Civ. App.) 136 S. W. 1137.

29. — **Liability for premiums paid by creditor or insurance agent.**—Where an insurance agent paid the premium on a policy, and took the note of the insured for the amount so paid, there was full consideration for the note, though the company was insolvent, and soon thereafter failed. *Hudson v. Compere*, 94 T. 449, 61 S. W. 389.

A debtor held not liable for premiums paid by a creditor on insurance taken out by the creditor for his own benefit on the debtor's life, in the absence of an agreement imposing such liability. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

30. — **Grounds for nonpayment in general.**—Refusal of the company to change the beneficiary in a life insurance policy held no defense to an action on note for the premium. *Harris v. Scrivener* (Civ. App.) 78 S. W. 705.

Failure of insurer to notify plaintiff of the amount of a premium due on a specified date held not to relieve him of the duty of paying an amount on that date equal to the last preceding premium. *Kray v. Mutual Reserve Life Ins. Co.*, 50 C. A. 555, 111 S. W. 421.

31. — **Failure of consideration.**—Where defendant discovered that certain policies had been issued to him through plaintiff's fraud before any part of the insurance contract had been performed by the insurance company, there was an entire failure of consideration for notes given for the premium thereon. *Curry v. Stone* (Civ. App.) 92 S. W. 263.

In an action on a note given for a first premium of a life insurance policy, evidence held to establish a total failure of consideration. *Struve v. Moore* (Civ. App.) 136 S. W. 1175.

32. — **Evidence as to payment.**—Evidence held sufficient to sustain a finding that the premium of a fire insurance policy had been paid. *Hartford Fire Ins. Co. v. Cameron*, 18 C. A. 237, 45 S. W. 153.

In an action where the wife of insured contested the right of a beneficiary to the proceeds of a policy, the premium of which had been paid out of the community estate of the husband and wife, evidence held insufficient to show that such payments were a fraud on the wife. *Jones v. Jones* (Civ. App.) 146 S. W. 265.

33. — **Refunding or recovery of premiums paid.**—A policy holder who had paid the premium by giving notes to the agent held entitled to the return of the entire unearned premium on the cancellation of the policy. *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.*, 92 T. 297, 49 S. W. 222.

Under provision of policy providing for cancellation at request of either party on return of premium, where company's agent takes note for portion of premium and reports the premium as paid before cancellation the company must return so much of the unearned premium as exceeds the amount of the note. *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.* (Civ. App.) 49 S. W. 271.

Miscarriage of mail held insufficient to excuse failure to give required notice of action on application for insurance and repayment of premium. *Mutual Life Ins. Co. of New York v. Elliott*, 93 T. 144, 53 S. W. 1014.

An insurance company, having sold a note given by the insurer for the first premium, is liable to the insured for the amount thereof on its breach of the insurance contract. *American Union Life Ins. Co. v. Wood* (Civ. App.) 57 S. W. 685.

Insured in a fire policy canceled at his solicitation held to have waived the repayment of the unearned premium as a prerequisite to the cancellation. *Ragley Lumber Co. v. Insurance Co. of North America*, 42 C. A. 511, 94 S. W. 185.

The fact that an insurance agent who had received a premium note from an applicant for insurance which he promised to return in case the policy was not accepted negotiated the note and at once disappeared supported a finding that the promise to return the note was made with intent to defraud. *Mutual Reserve Life Ins. Co. v. Seidel*, 52 C. A. 278, 113 S. W. 945.

An action against a life insurance company to recover the amount of a premium note delivered to defendant's agent by plaintiff on his applying for a policy held to be an action for rescission, and not one for damages for deceit so as to permit plaintiff to relief on the ground of fraud of the agent. *Id.*

Where a contract for life insurance was not fully consummated, the applicant for a policy was entitled to recover from the insurance company the amount of a note delivered to the agent of the company which note the agent agreed to return to the applicant in case he did not accept the policy. *Id.*

Defendant S., having applied for a \$50,000 policy and executed a negotiable note for a part of the premium which the agent transferred, held entitled to reject a policy for \$20,000, and to protection by the insurance company against liability on the note. *Security Life Ins. Co. of America v. Stephenson* (Civ. App.) 136 S. W. 1137.

34. **Right to assign policy.**—The right of the insured to transfer policy cannot be affected by acts of the insurer subsequent to the issuance of the policy. *Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 40 C. A. 184, 89 S. W. 419.

A life insurance policy held assignable by assured to his creditor as security for the debt as against the rights of the beneficiary. *McNeill v. Chinn*, 45 C. A. 551, 101 S. W. 465.

The beneficiary in an ordinary life insurance policy takes a vested interest which cannot be affected by the acts of the insured, unless the policy contains a reservation that the insured may change the beneficiary or assign the policy, etc. *Id.*

35. — **What law governs.**—Assignment of certain policies in Texas to an assignee residing in Georgia held governed by the laws of Texas. *Manhattan Life Ins. Co. v. Cohen* (Civ. App.) 139 S. W. 51.

36. **Form of transfer of policy.**—A parol transfer or gift of a life insurance policy, accompanied by a delivery thereof, is effective to transfer the proceeds of the policy. *Nixon v. Malone* (Civ. App.) 95 S. W. 577; *New York Life Ins. Co. v. Same, Id.* 585; *Mutual Life Ins. Co. v. Same, Id.*; *Mutual Benefit Life Ins. Co. v. Same, Id.*

Provisions of a policy with reference to the forms by which the policy might be assigned or the beneficiary changed held for the benefit of insurer, which it was entitled to waive. *McNeill v. Chinn*, 45 C. A. 551, 101 S. W. 465.

37. **Consideration for transfer of policy.**—Policies payable to insured, his executors or assigns, held assets which he could transfer with or without consideration, in the absence of a fraudulent intent to hinder or delay creditors. *Nixon v. Malone* (Civ. App.) 95 S. W. 577; *New York Life Ins. Co. v. Same, Id.* 585; *Mutual Life Ins. Co. v. Same, Id.*; *Mutual Benefit Life Ins. Co. v. Same, Id.*

38. **Consent of insurer to assignment.**—The consent of the insurer to the transfer of a fire policy to a purchaser of the property inures to the benefit of the co-owner, though his name be not expressly mentioned. *Palatine Ins. Co. v. Boyd* (Civ. App.) 50 S. W. 643.

Certain insurance agents held to have apparent authority to consent to a transfer of insurance on transfer of the property. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

39. **Consent of beneficiary to assignment.**—Under a life policy held, that a new beneficiary might be substituted without the consent of the old. *Fuos v. Dietrich* (Civ. App.) 101 S. W. 291.

40. **Delivery of assignment.**—Mailing assignment in duplicate of policy to insurer, in compliance with policy, is sufficient delivery to assignee. *Burges v. New York Life Ins. Co.* (Civ. App.) 53 S. W. 602.

Actual delivery of assignment of policy to assignee, who was assignor's adopted child, was unnecessary to validate assignment. *Id.*

Delivery of an assignment of certain policies to assignee's agent held sufficient to pass title without payment of the consideration or delivery of the policies. *Manhattan Life Ins. Co. v. Cohen* (Civ. App.) 139 S. W. 51.

41. **Rights of assignee.**—Where insurance policies were indorsed payable to a mortgagee, such mortgagee had an interest in the policies of which it could not be deprived by the acts of the owner and insurers in canceling such indorsement and making new ones to the owner without its consent. *Security Co. v. Panhandle Nat. Bank*, 93 T. 575, 57 S. W. 22.

The assignee of an insurance policy held entitled to recover premiums paid on the strength of the assignment. *Stevens v. Germania Life Ins. Co.*, 26 C. A. 156, 62 S. W. 824.

Assignee of policy of fire insurance, knowing that the delivery of the policy was unauthorized, that it had never been accepted by the insured, and that on failure to pay premiums it was automatically canceled, held not entitled to recover. *Polk v. State Mut. Fire Ins. Co.* (Civ. App.) 151 S. W. 1126.

42. **Rights of beneficiary after transfer.**—Where policy on life of husband payable to wife is transferred to secure husband's debt, when the debt is barred it may be sued on by wife. *Washington Life Ins. Co. v. Gooding*, 19 C. A. 490, 49 S. W. 123.

43. **Validity of assignment in general.**—An instrument held, as against the old beneficiary in a life policy, to be a substitution of a new beneficiary; the provision in the policy for a particular manner of evidencing any change in beneficiary being for the benefit of the company, which alone could claim it. *Fuos v. Dietrich* (Civ. App.) 101 S. W. 291.

44. **Effect of transfer.**—The transfer of a life insurance policy held to operate as an assignment of the proceeds of the policy to plaintiff as security for a debt and as a change of beneficiary from insured's daughter to his wife. *McNeill v. Chinn*, 45 C. A. 551, 101 S. W. 465.

45. **Cancellation of policy.**—A policy which provides that the insurance may be terminated at any time at the option of the company is avoided from the time when the insured has notice that the proper local agent is instructed that the risk is terminated, the premium not having been paid. *S. F. & M. Ins. Co. v. McKinnon*, 59 T. 507.

A fire policy may be canceled when the right to do so is reserved, by notice to the insured that the policy is terminated and return of the unearned premium. *Continental Ins. Co. v. Busby*, 3 App. C. C. § 101; *Planters' Ins. Co. v. Walker Lodge*, 1 App. C. C. § 758.

Facts held sufficient to constitute a cancellation of a policy of insurance. *Lampasas Hotel & Park Co. v. Home Ins. Co.*, 17 C. A. 615, 43 S. W. 1081.

Notice of cancellation of a fire insurance policy, unaccompanied by a payment or tender of unearned premium, held insufficient to cancel the policy. *Hartford Fire Ins. Co. v. Cameron*, 18 C. A. 237, 45 S. W. 158.

46. **Abandonment of policy by insured.**—Evidence held not to show an abandonment of a life policy by the insured. *Washington Life Ins. Co. v. Berwald* (Civ. App.) 72 S. W. 436.

The act of insured in taking out a life policy in another company held not an abandonment of his first policy, in the absence of consent by the beneficiary. *Washington Life Ins. Co. v. Berwald*, 97 T. 111, 76 S. W. 442, 1 Ann. Cas. 682.

47. **Rescission of policy by insured.**—The unauthorized and unratified appointment of insured to a committee of reference for the insurance company held a breach of the policy and contract between insured and the insurance agent, entitling insured to rescind. *American Union Life Ins. Co. v. Wood* (Civ. App.) 57 S. W. 685.

Applicant held not estopped to deny knowledge of falsity of representations of insurance agent, though he could have informed himself from means at hand. *Equitable Life Assur. Soc. v. Maverick* (Civ. App.) 78 S. W. 560.

Where policies were issued on an application containing false statements written therein by insurer's agent, it was insured's duty, on discovering the fraud, to disclose the same to the insurance company, and tender the policy for cancellation. *Curry v. Stone* (Civ. App.) 92 S. W. 263.

One applying for a life policy held not estopped from complaining of the falsity of the representations made by the agent soliciting the insurance. *Mutual Life Ins. Co. v. Hargus* (Civ. App.) 99 S. W. 580.

In an action by an insured for the cancellation of a life policy based on the fraudulent representations of the soliciting agent, the action of the court in informing the jury that the insured was not estopped from showing the kind of policy agreed on held proper. *Id.*

48. Rescission of policy by agreement.—Action of insurance company in demanding payment of premium held a rejection of insured's offer of rescission of policy. *Travelers' Ins. Co. v. Jones*, 32 C. A. 146, 73 S. W. 978.

Death of insured revokes all offers of cancellation made by him prior to his death, and not accepted by insurer prior thereto. *Id.*

Rights of parties to contract of insurance having become fixed by death of insured, insurance company could not then accept insured's offer of cancellation by withdrawal of its order for payment of premium. *Id.*

Plaintiff held not estopped by her conduct from collecting amount of insurance policy by suit. *Id.*

49. Condition precedent to action to rescind policy.—In suit to avoid insurance contract, held not necessary for plaintiff to offer payment of premiums; nor could defendant be prejudiced by plaintiff's retention of binding receipt or policy. *Equitable Life Assur. Soc. v. Maverick* (Civ. App.) 78 S. W. 560.

50. Remedies for wrongful cancellation of policy.—Present value of a life policy, not paid up, stated. *Supreme Lodge Knights of Pythias v. Neeley* (Civ. App.) 135 S. W. 1046.

Evidence in an action to recover premiums and for damages for breach of its contract held sufficient to support a finding that the original insurer had transferred all of its assets to another company, and that the two companies had been consolidated; that the correspondence between plaintiff and the original insurer showed that plaintiff must look to a substituted company for all information touching his rights; that the insurer's president admitted to plaintiff that the insurer had gone out of business; and that the insurer had abandoned the performance of its contracts. *Washington Life Ins. Co. v. Lovejoy* (Civ. App.) 149 S. W. 398.

Where insurer assigned its policies, transferred its assets, shifted to another company its obligation to an insured, and placed it beyond its own power to perform such obligation, except so far as it could compel performance by such other company, there was a breach of its contract entitling the insured to a recovery, and that the assignee was solvent and able and willing to carry out the original contract did not prevent a breach. *Id.*

51. Damages recoverable from insurer on cancellation or breach of contract.—In an action by an insured for the cancellation of a life policy, based on the fraudulent representations of the soliciting agent of the insurer, the insurer held not liable for exemplary damages. *Mutual Life Ins. Co. v. Hargus* (Civ. App.) 99 S. W. 580.

On breach or repudiation of its contract by the insurer, the insured, during his lifetime, has a present right of action for the recovery of damages. *Washington Life Ins. Co. v. Lovejoy* (Civ. App.) 149 S. W. 398.

The measure of damages in an action by an insured to recover premiums and damages for the insurer's breach of contract stated. *Id.*

52. Forfeiture of policy for breach of promissory warranty, covenant or condition subsequent.—An open policy covered property of the insured situated in certain storehouses, to be specified in the book attached to the policy. The property having been removed from the place named was not thereafter covered by the policy. *First Nat. Bank v. Lancashire Ins. Co.*, 62 T. 46L.

Wearing apparel, jewelry, etc., described in an insurance policy as being insured "while located and contained as described herein and not elsewhere," and "all while contained in the above-described building," are not covered by the policy if the loss occurs in another house. *British-America Assurance Co. v. Miller*, 91 T. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901.

Temporary breach of policy, where there is no specific forfeiture attached, and which breach does not exist when loss occurs, and which does not contribute to loss, does not defeat recovery on the policy. *Phoenix Assur. Co. v. Munger Imp. Cotton Mach. Mfg. Co.* (Civ. App.) 49 S. W. 271.

Forfeiture clauses will be construed most strongly against the insurer. *Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 40 C. A. 184, 89 S. W. 419.

If the language in an insurance policy is fairly susceptible of a construction preventing a forfeiture, such construction will be adopted. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Civ. App.) 108 S. W. 778.

Forfeitures will not be given effect unless the facts on which they depend bring the case clearly within the provisions of the policy. *Norwich Union Fire Ins. Society v. Cheaney Bros.* (Civ. App.) 128 S. W. 1163.

Approval by an insurance company of an assignment of a policy held to constitute a new contract, whereby the assignee could not be charged with prior breaches of the policy. *National Fire Ins. Co. v. J. W. Caraway & Co.* (Civ. App.) 130 S. W. 458.

Where on the sale of insured property the insurance was assigned to the grantees, they were the "assured" within the terms of a rider protecting the grantor's reserved interest, and hence the latter could only recover in case of loss such an amount as was recoverable by the grantees. *Dumphy v. Commercial Union Assur. Co., Limited, of London* (Civ. App.) 142 S. W. 116.

53. — **Statutory provisions.**—Statutes cannot change rights of parties to policy executed under previous statutes. *Germania Life Ins. Co. v. Peetz* (Civ. App.) 47 S. W. 687.

Statute as to forfeiture of policy is part of policy. *Id.*

54. — **What law governs.**—A contract of insurance made in Texas held governed by the laws of New York, where the home office of the company was located. *Metropolitan Life Ins. Co. v. Bradley* (Civ. App.) 79 S. W. 367.

Life insurance policy taken out in Texas held, under term of policy, not governed by statute of New York relative to notice to pay premiums as condition of forfeiture. *Metropolitan Life Ins. Co. v. Bradley*, 98 T. 230, 82 S. W. 1031, 68 L. R. A. 509.

55. — **Proceedings to give effect to forfeiture.**—When an insurance policy provides that it shall be forfeited for nonpayment of premiums before a stipulated date, time is of the essence of the contract and the failure to so pay terminates it ipso facto. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 147 S. W. 1152.

A provision avoiding a fire policy held not to make it ipso facto void by the issuance of a second policy on the property by another company. *Southern Nat. Ins. Co. of Austin v. Barr* (Civ. App.) 148 S. W. 845.

Under the provisions of insurer's receipt and of a note given to extend a policy until default in payment of the note when all rights thereunder should cease and the policy be ipso facto null and void, failure to pay the note at maturity forfeited the policy, and no action on the part of the insurer was required to declare such forfeiture. *Security Life & Annuity Co. of America v. Underwood* (Civ. App.) 150 S. W. 293.

56. — **Change in occupancy of building.**—A recital in a policy that the house insured is occupied for a particular purpose is a warranty that it shall be occupied for no other purpose. *Banking Co. v. Stone*, 49 T. 4.

Where the insured agreed to obtain the insurer's consent to vacancy or change of occupancy, held not error to define "occupancy" as such occupancy as the parties might be presumed to have intended. *Georgia Home Ins. Co. v. Brady* (Civ. App.) 41 S. W. 513.

57. — **Building becoming vacant.**—Where there was a stipulation in a policy that it was to become void, "if the premises become vacant and so remain for thirty days," etc., it was immaterial whether or not the risk is increased thereby. *Insurance Co. v. Long*, 51 T. 89.

Where, for extra compensation paid, there was a stipulation that the building might remain vacant for sixty days, "all openings to be kept securely closed," the insurer cannot defeat a recovery in case of loss unless he shows that the insured negligently permitted the openings to remain unclosed, that the risk was thereby increased, and the property was probably destroyed by reason of such negligence. *Eakin v. Home Ins. Co.*, 1 App. C. C. § 370.

A temporary vacancy, for the time reasonably necessary for the outgoing tenant to remove his goods and the incoming tenant to place his in the building, is not within a clause in a policy avoiding it if the building became vacant. *East Texas Fire Ins. Co. v. Kempner* (Civ. App.) 25 S. W. 999; *Id.*, 12 C. A. 533, 34 S. W. 393.

A vacancy of three days avoids a policy containing such a stipulation. *Fire Ins. Co. v. Kempner*, 87 T. 229, 27 S. W. 122, 47 Am. St. Rep. 99.

Where defendant left a large part of his furniture in the house, and placed a room in possession of a servant, who slept there, the house did not become vacant within the meaning of a contract of insurance. *German-American Ins. Co. v. Evans*, 94 T. 490, 62 S. W. 417.

An insured house held to have been occupied when destroyed by fire, within a provision of the policy. *Agricultural Ins. Co. of Watertown, N. Y., v. Owens* (Civ. App.) 132 S. W. 828.

A policy upon several buildings which provided for lapse if any one of them remained vacant for more than 10 days is avoided where only one is vacant. *Mecca Fire Ins. Co. v. Coghlan* (Civ. App.) 134 S. W. 266.

58. — **Falling of building.**—Cupola of building, blown off in a storm, held to be a material part of the building, within provision of fire policy by which it was avoided if a material part of the building fell. *Home Mut. Ins. Co. v. Tomkies*, 96 T. 187, 71 S. W. 814; *Id.*, 30 C. A. 404, 71 S. W. 812.

59. — **Special causes increasing risk.**—"Increased hazard," referred to in a fire policy, did not include dangerous conditions on adjacent premises. *Hartford Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 465.

Increased hazard for which a fire policy can be forfeited held limited to hazards resulting from physical changes in the property. *Id.*

Insurer held not entitled to claim that an anonymous letter received by insured increased the risk, in the absence of proof by insurer that the conditions referred to in the letter actually existed to insured's knowledge. *Id.*

A fire policy providing for forfeiture for an increase of hazard by any means within the control or knowledge of insured held not to require insured to communicate an increase of hazard arising from knowledge of an attempt by others to burn adjoining property. *Id.*

The hazard insured against under a fire policy defined, and held to include losses from incendiary fires communicated from other premises. *Id.*

An increase in hazard within a fire policy must be determined by a comparison with the conditions existing when the policy was written. *Id.*

In an action on a fire insurance policy, evidence held to show that plaintiff increased the risk. *Simpson v. Mecca Fire Ins. Co. of Waco* (Civ. App.) 133 S. W. 491.

A single effort by an unknown person to set fire to property covered by a fire policy held not within a stipulation of the policy. *Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.* (Civ. App.) 133 S. W. 1097.

60. — **Precautions against loss.**—A provision of a policy, making it void if the hazard be increased by any means within the control or knowledge of the insured, held not to avoid the policy because, on attempt of a third person to burn the property, insured did not notify the insurer, or do anything to prevent its repetition. *Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.*, 103 T. 608, 132 S. W. 121, 31 L. R. A. (N. S.) 603.

A warranty in a policy of marine insurance that a competent watchman should always be on board was sufficiently complied with where a competent member of the crew was always detailed as a watchman; the fact that different members of the crew were required to stand different watches, and that they also performed other duties, not being in violation of the warranty. *Mannheim Ins. Co. v. Charles Clarke & Co.* (Civ. App.) 157 S. W. 291.

Such warranty is complied with by the providing of a competent watchman, and the fact that he was asleep at the time of the accident will not avoid the policy. *Id.*

61. — **Additional insurance.**—A provision that no additional insurance upon the same property shall be obtained without the consent of the company, expressed in writing on the policy, is reasonable and valid. *N. O. Ins. Ass'n v. Griffin*, 66 T. 232, 18 S. W. 505. See *Hartford Ins. Co. v. McLemore*, 7 C. A. 317, 26 S. W. 928.

Additional insurance defined. *Guinn v. Insurance Co.* (Civ. App.) 31 S. W. 566.

A condition in a policy not to take additional insurance without notice to the insurer held not a warranty imposing forfeiture for breach. *Fidelity & Casualty Co. v. Carter*, 23 C. A. 359, 57 S. W. 315.

A stipulation in a policy avoiding it if other insurance is taken out without insurer's consent is reasonable and proper. *Orient Ins. Co. v. Prather*, 25 C. A. 446, 62 S. W. 89.

In an action on a fire policy, defended on the ground that plaintiff violated the provision against additional insurance, evidence that plaintiff notified defendant's agent that he had procured additional insurance held insufficient to support a verdict for plaintiff. *Aetna Ins. Co. v. Eastman* (Civ. App.) 72 S. W. 431.

The rights of an insurer, under accident policies limiting the issuance of one policy to a person for a single period, held not affected by its failure to return to the insured before the injury to him the premium paid under one of the two policies issued to one person for a single period. *Wilkinson v. Travelers' Ins. Co.* (Civ. App.) 72 S. W. 1016.

Stipulations in accident policies issued to the same person at the same time for a single period held to render one of the policies void. *Id.*

A verdict for defendant held properly directed in an action on a fire policy; additional insurance having been taken out without a permit. *Works, Pritchett & May v. Springfield Fire & Marine Ins. Co.* (Civ. App.) 79 S. W. 42.

Under the provisions of a policy, held that an overvaluation in obtaining concurrent insurance did not avoid the policy. *Pennsylvania Fire Ins. Co. v. Waggener*, 44 C. A. 144, 97 S. W. 541.

Strict compliance with a clause in a fire insurance policy, forbidding other concurrent insurance unless permitted, is essential to a recovery. *Gross v. Colonial Assur. Co.*, 56 C. A. 627, 121 S. W. 517.

In an action on an insurance policy, evidence held to show that plaintiff had no insurance except that represented by the policy of defendant. *Allemania Fire Ins. Co. v. Fordtran* (Civ. App.) 128 S. W. 692.

Evidence held insufficient to show that insured goods from one stable were so intermingled with insured goods in another stable, so as to avoid a policy providing for its avoidance in case insured obtained other insurance. *Norwich Union Fire Ins. Society v. Cheaney Bros.* (Civ. App.) 128 S. W. 1163.

That other insurance shall constitute additional insurance within a policy, the property covered by both policies must be the same. *Id.*

That insured after ascertaining a contemplated arson on adjoining premises took out additional insurance held not to constitute such fraud as would void the policy sued on if the new policy did not exceed the amount of the current insurance authorized by the contract in question. *Hartford Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 465.

A fire policy held invalidated by the procurement by insured of additional insurance. *National Union Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 475.

A stipulation in a fire policy as to additional insurance held to include an invalid additional policy. *Id.*

The cancellation of a new fire policy after a fire held not to prevent a forfeiture of the original policy stipulating against additional insurance. *Id.*

Violation by insured of a provision in a fire policy prohibiting other insurance forfeits the policy. *Dumphy v. Commercial Union Assur. Co., Limited, of London* (Civ. App.) 142 S. W. 116.

A conveyance of property insured, reserving to the vendor a lien for the unpaid portion of the price and assignment of a fire policy thereon, held to create a new contract of insurance in which the vendees were the "insured." *Id.*

Where a lienholder procured additional insurance without authority of the owner, who had procured a policy stipulating that it should be void if insured procured other insurance, the owner's policy was not void. *Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House* (Civ. App.) 147 S. W. 629.

62. — **Taking inventory and keeping books and safe.**—Failure to keep books or inventory as violation of Art. 4947, see notes under that article.

The "iron safe" clause is a stipulation that the books of account, with the last inventory, shall be kept in a fireproof safe at night, etc., and constitutes a warranty on the part of the insured, and compliance with it is necessary to a recovery. *Banking Co. v. Stone*, 49 T. 11; *Goddard v. Insurance Co.*, 67 T. 69, 1 S. W. 906, 60 Am. Rep. 1; *Kelly-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 28 S. W. 1027, 8 C. A. 227; *American Fire Ins. Co. v. Center* (Civ. App.) 33 S. W. 554; *Palatine Ins. Co. v. Brown* (Civ. App.) 34 S. W. 462; *N. W. Ins. Co. v. Mize* (Civ. App.) 34 S. W. 670; *Brown v. Insurance Co.*, 89 T. 590, 35 S. W. 1060; *Pennsylvania Fire Ins. Co. v. Brown* (Civ. App.) 36 S. W. 590.

A refusal to produce books, etc., when required, does not avoid the policy, but is a subject of comment before the jury. *Insurance Co. v. Starr*, 71 T. 733, 12 S. W. 45.

Iron safe clause. *Georgia Home Ins. Co. v. O'Neal*, 14 C. A. 516, 38 S. W. 62; *Georgia Home Ins. Co. v. McKinley*, 14 C. A. 7, 37 S. W. 606; *Allred v. Hartford Fire Ins. Co.* (Civ. App.) 37 S. W. 95; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 C. A. 64, 35 S. W. 955; *Brown v. Palatine Ins. Co.*, 89 T. 590, 35 S. W. 1060.

Evidence held to establish a violation of a clause requiring the keeping of a set of books showing sales by insured. *Beville v. Merchants' Ins. Co.* (Civ. App.) 46 S. W. 914.

An "inventory" held to mean an itemized enumeration of articles of merchandise, with prices. *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 19 C. A. 338, 48 S. W. 559.

An "iron safe" clause held to be a promissory warranty. *Id.*

A policy held divisible, and hence breach of iron safe clause did not preclude recovery for fixtures. *Sun Mut. Ins. Co. v. Tufts*, 20 C. A. 147, 50 S. W. 180.

Failure to comply with a condition requiring an inventory to be kept in a fireproof safe held not ground for avoiding policy. *Kemendo v. Western Assur. Co. (Civ. App.)* 57 S. W. 293.

A substantial compliance with an iron-safe clause held necessary to entitle the assured to the benefits of his policy. *Western Assur. Co. v. Kemendo*, 94 T. 367, 60 S. W. 661.

The insured is responsible for the negligence of his employes in the performance of a condition in the policy requiring the preservation of an inventory of the insured property. *Id.*

The furnishing by insured of invoices of goods placed in the insured's store held not a substantial compliance with condition of policy requiring an inventory. *Fire Ass'n of Philadelphia v. Masterson*, 25 C. A. 518, 61 S. W. 962.

The fact that it was not customary nor practicable for manager of insured grocery store to receive invoices of farm produce generally held no excuse for failure of insured to comply with condition of policy requiring an inventory. *Id.*

Iron safe clause in fire policy, as to keeping complete record of purchases, sales, etc., of stock covered, held breached where the cash book was negligently left out and destroyed in the fire. *Fire Ass'n of Philadelphia v. Calhoun*, 23 C. A. 409, 67 S. W. 153.

An iron-safe clause, attached to an insurance policy, held to be a part thereof, and to constitute a warranty. *Couch & Gilliland v. Home Protection Fire Ins. Co.*, 32 C. A. 44, 73 S. W. 1077.

Where insured, in policy containing "iron safe clause," keeps the books, etc., in an iron safe believed to be fireproof, the policy is complied with, though the books, etc., while in the safe, are destroyed by fire. *Underwriters' Fire Ass'n v. Palmer & Co.*, 32 C. A. 447, 74 S. W. 603.

The character of an inventory of goods insured, required by the stipulation of a fire policy, determined. *Delaware Ins. Co. v. Monger & Henry (Civ. App.)* 74 S. W. 792.

A person held guilty of negligence who, by his failure to store them in a safe, permitted a set of books required by his fire insurance policy to be burned. *Rives v. Fire Ass'n of Philadelphia (Civ. App.)* 77 S. W. 424.

A provision requiring assured to keep a set of books held not complied with by books of others showing the same facts. *Id.*

Failure to keep account of goods taken from stock for domestic consumption held not violation of clause in policy requiring books of account to be kept. *Ætna Ins. Co. v. Fitz*, 34 C. A. 214, 78 S. W. 370.

While the iron safe clause in an insurance policy is a warranty, the breach of which will avoid the policy, yet, where it is open to two constructions, that one will be given it which favors the insured. *Id.*

Insured held to have substantially complied with iron safe clause. *Continental Fire Ins. Co. v. Cummings (Civ. App.)* 78 S. W. 378.

An iron safe clause in a policy held substantially complied with, where books and papers preserved disclose a correct record of the business, etc., though one of the inventories and some of the invoices were left out of the safe, and were destroyed. *Virginia Fire & Marine Ins. Co. v. Cummings (Civ. App.)* 78 S. W. 716.

The requirement of a fire policy that insured keep a set of books held not complied with. *Monger & Henry v. Delaware Ins. Co. of Philadelphia*, 97 T. 362, 79 S. W. 7.

A requirement in a fire insurance policy that the insured should "preserve and produce the last preceding inventory, if such has been taken," held to be construed most strongly against the company, as meaning the last inventory taken before the issuance of the policy. *Phoenix Assur. Co. v. Stenson*, 34 C. A. 471, 79 S. W. 866.

In an action on a fire policy, held, that there had been a substantial compliance with the "iron safe" clause. *Scottish Union & National Ins. Co. v. Moore*, 36 C. A. 312, 81 S. W. 573.

Iron-safe clause construed, and held to require the keeping and production of the inventory of stock taken prior to the date of the policy. *Continental Ins. Co. v. Cummings*, 98 T. 115, 81 S. W. 705.

Where insured, after loss, produced records showing a complete history of his business, there was no breach of an iron-safe clause contained in the policy. *First Nat. Bank v. Cleland*, 36 C. A. 478, 82 S. W. 337.

In an action on a fire policy, books of account introduced by insured held to show a substantial compliance with the policy. *Fire Ass'n of Philadelphia v. Masterson (Civ. App.)* 83 S. W. 49.

Facts reviewed, and held that insured complied with the condition in his policy to keep a set of books clearly presenting a complete record of business transacted. *Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 40 C. A. 184, 89 S. W. 419.

A requirement of a fire policy that insured keep a set of books clearly presenting a record of all sales and purchases is not complied with by the preservation of slips from a cash register. *Henry v. Green Ins. Co. of America (Civ. App.)* 103 S. W. 836.

The inventory of goods on hand taken two or three days before the fire cannot take the place of the accounts of cash sales kept by insured, as required by the policy. *Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 55 C. A. 263, 118 S. W. 1086.

The failure of insured to keep an account of his cash sales of goods, as required by his policy, is a forfeiture of the insurance as a matter of law. *Id.*

In an action on a fire policy, plaintiff held not entitled to recover because of breach of warranties requiring the taking of an inventory and the keeping of books showing a complete list of purchases and sales. *German Ins. Co. v. Beville (Civ. App.)* 126 S. W. 31.

Under a provision requiring an inventory of a stock of goods insured within three months after the policy was issued, held, that an intentional failure to inventory from

one-tenth to one-fifth of the value of the stock breached the provision so as to prevent recovery on the policy. *Orient Ins. Co. v. Dorroh-Kelly Mercantile Co.* (Civ. App.) 126 S. W. 616.

Failure to keep inventory of insured property in a safe, as required by policy, whereby it was lost, held to prevent recovery on policy. *National Fire Ins. Co. v. J. W. Caraway & Co.* (Civ. App.) 130 S. W. 458.

The court cannot vary the terms of a contract providing for a complete inventory of the stock. *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 104 T. 199, 135 S. W. 1165.

Where there was no inventory as required by a policy taken within a year prior to its issuance, and no inventory taken within 30 days thereafter, the policy was forfeited. *Id.*

Where there was omitted purposely from an invoice articles of the value of \$3,000 or \$4,000, held, a claim of a substantial compliance with a provision for a complete itemized statement could not be maintained. *Id.*

An invoice must contain a complete itemized statement of the stock on hand in order to meet the requirements of the covenant, in a policy or the assured can have no right of action thereon. *Id.*

Facts held insufficient to show a sufficient classification of cotton in storage covered by certain policies, precluding plaintiff's recovery thereon. *Royal Exchange Assur. of London, Eng., v. Rosborough* (Civ. App.) 142 S. W. 70.

Where insured was in the produce business handling large quantities of eggs, which in part were kept in cold storage, he must keep his books so as to show what eggs were removed from his store and placed in cold storage. *Teutonia Ins. Co. v. Tobias* (Civ. App.) 145 S. W. 251.

There could be no breach of a clause of an insurance policy requiring that the inventory be made within 30 days, until the expiration of such 30 days. *Royal Ins. Co. v. W. P. Wright & Co.* (Civ. App.) 148 S. W. 824.

Where the keeping of invoices and books of entry by insured was in substantial compliance with the iron-safe clause, he was entitled to recover. *American Cent. Ins. Co. v. Hardin* (Civ. App.) 151 S. W. 1152.

Provision of policy requiring insured to take a "complete, itemized inventory of stock on hand," held not to require that the cost or value of the articles listed both in detail and in total be shown. *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 153 S. W. 398.

Insured's failure to take inventory as required held to bar recovery, though he kept a set of books from which might be ascertained the stock on hand at any time. *National Union Fire Ins. Co. v. Walker* (Civ. App.) 156 S. W. 1095.

63. — Change of title, interest or possession.—The sale by one partner to his copartners of his interest in the partnership property is not within a proviso in the policy that it should be avoided by a transfer of the property, by sale or otherwise, without the consent of the insurer. *T. B. & I. Co. v. Cohen*, 47 T. 406, 26 Am. Rep. 298.

The sale of property insured will not invalidate the policy thereon, if the insured at the time of the loss still had an insurable interest therein as a lien for unpaid purchase money, or otherwise holds such relation to the property that its destruction by the peril insured against involves pecuniary loss to him. *Merchants' Ins. Co. v. Scott*, 1 U. C. 534.

A policy of insurance which, by its terms, is to become void if the property insured shall be sold, etc., is not avoided by a deed made for the sole purpose of enabling the owner to negotiate a loan which was never effected, and which was not intended by either party to convey title. *Insurance Co. v. Gordon*, 68 T. 144, 3 S. W. 718.

Where the policies were made payable to a mortgagee as his interest might appear, held, that a sale of the property by the owner without the mortgagee's consent did not forfeit the mortgagee's right to enforce the policy. *Pan Handle Nat. Bank v. Security Co.*, 18 C. A. 96, 44 S. W. 15.

Evidence held to show such change of possession or ownership as to forfeit the policy within the terms. *Northern Assur. Co. v. City Sav. Bank*, 18 C. A. 721, 45 S. W. 737.

Foreclosure of judgment lien by third party held not to affect mortgagee's interest in a policy providing against foreclosure, such mortgagee's interest being excepted therefrom. *Sun Ins. Office v. Beneke* (Civ. App.) 53 S. W. 98.

Legal transfers of insured property held to be a complete defense to an action on a policy which provided that it should be void on any change in the title to the property insured. *Hartford Fire Ins. Co. v. Ransom* (Civ. App.) 61 S. W. 144.

Change in title in insured property held not to have taken place, so as to avoid the policy. *Home Mut. Ins. Co. v. Tomkies*, 30 C. A. 404, 71 S. W. 812.

Disposal of undamaged property by insured within three days after loss by fire held not a breach of contract, requiring separation and appraisal of undamaged property. *Phoenix Assur. Co. v. Stenson*, 34 C. A. 471, 79 S. W. 866.

Facts considered, and held that there was no change in the status of the title to insured property in violation of a clause in the policy. *Pennsylvania Fire Ins. Co. v. Waggener*, 44 C. A. 144, 97 S. W. 541.

A mortgage taken by a retiring partner, who sells the property to the remaining copartner as security, is not within a policy condition rendering it void in case of a change of interest. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 233.

In an action to recover insurance, evidence as to the defense of fraud on the part of insured in shipping away part of the insured goods before the fire held sufficient to sustain a verdict for plaintiff. *Home Ins. Co. v. Rogers* (Civ. App.) 128 S. W. 625.

64. — Incumbrances.—The clause, "This entire policy shall be void if, with the knowledge of the insured, foreclosure proceedings are commenced by virtue of any mortgage," is valid and binding. *Hartford Fire Ins. Co. v. Clayton*, 17 C. A. 644, 43 S. W. 910.

Provisions in a policy of fire insurance requiring notice of any mortgage on the property insured are obligatory, and failure to comply therewith renders the policy void. *Insurance Co. of North America v. Wicker* (Civ. App.) 54 S. W. 300.

A policy of insurance, which is to be void if the "subject of insurance" be mortgaged, held not rendered void by a mortgage on a part of the property. *Mecca Fire Ins. Co. of Waco v. Wilderspin* (Civ. App.) 118 S. W. 1131.

A fire policy on merchandise and fixtures held not invalidated as to the furniture and fixtures by the execution of a chattel mortgage on the merchandise. *Spring Garden Ins. Co. of Philadelphia v. Brown* (Civ. App.) 143 S. W. 292.

Insurance company liable although no policy was issued, because it had agreed to attend to the matter, held not relieved of liability by a conveyance as security two years before the loss because the policy, if issued, would have been subsequent to such conveyance. *Commonwealth Fire Ins. Co. v. Obenchain* (Civ. App.) 151 S. W. 611.

65. — **Assignment of policy.**—A life policy payable to the heirs or assigns of the assured is assignable. *Mullins v. Thompson*, 51 T. 7.

A clause prohibiting the assignment of a policy does not prohibit its transfer as collateral security. *Scottish-Union & National Ins. Co. v. Andrews & Matthews*, 40 C. A. 184, 89 S. W. 419.

An assignment of a policy by mistake, there having been no delivery and no consideration therefor, besides being made subject to the consent of the insurer, did not avoid the policy under a clause prohibiting an assignment. *Pennsylvania Fire Ins. Co. v. Waggener*, 44 C. A. 144, 97 S. W. 541.

Insurer having waived the requirements of a life policy as to the form of an assignment of the policy by insured to secure a debt, no one else could attack the form. *Clark v. Southwestern Life Ins. Co.*, 52 C. A. 38, 113 S. W. 335.

66. — **Keeping or use of prohibited articles.**—Custom of insurer not to permit use of gasoline held subordinate to implied permission to insured to use the same. *American Cent. Ins. Co. v. Green*, 16 C. A. 531, 41 S. W. 74.

Insurance of household furniture and supplies, shown to ordinarily include gasoline and gasoline stoves, is repugnant to prohibition of the use of gasoline, and such prohibition accordingly fails. *Id.*

Where "French electric fluid," made from gasoline, was used on insured premises, and there was no evidence that it was the same as gasoline, held, that a finding that no illuminating gas was generated on the premises, and no gasoline was used on the premises, was warranted. *Phoenix Ins. Co. v. Shearman*, 17 C. A. 456, 43 S. W. 930.

A policy of fire insurance, prohibiting the keeping of explosives on the insured premises, held not avoided by a temporary use as an experiment. *Fireman's Fund Ins. Co. v. Shearman*, 20 C. A. 343, 50 S. W. 598.

A prohibitory clause in a fire insurance policy against keeping gasoline on the insured premises held not to prevent insured from keeping it in a shed on his lot, outside the insured building. *Id.*

Operating a laundry held not a trade or manufacture, within a clause of a fire policy prohibiting the use of gasoline, so as to preclude proof of a custom of using gasoline, to explain or avoid the prohibition. *Northern Assur. Co. of London, England, v. Crawford*, 24 C. A. 574, 59 S. W. 916.

Warranty in a fire insurance policy that no gasoline should be "kept, allowed, or used" on the premises, held not to include the temporary use of a small quantity. *Springfield Fire & Marine Ins. Co. v. Wade*, 95 T. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870.

Gasoline used on other premises held not kept, used, or allowed on the premises insured within the meaning of a fire policy. *American Cent. Ins. Co. v. Chancey* (Civ. App.) 127 S. W. 577.

67. — **Nonpayment of premiums or assessments.**—To prevent a forfeiture of a policy by nonpayment of premiums by a tender, such a tender should be repeated as often as under the terms of the policy the premium was due. *Life Ins. Co. v. Le Pert*, 52 T. 504.

A policy is terminated by failure to pay premiums when due. A tender of payment, to operate as a payment, must be made on the very day when due, and must be unconditional. When due on demand, tender need not be made before demand. When due on or before a stated day, tender may be made at any time on or before the day fixed. *Continental Ins. Co. v. Busby*, 3 App. C. C. § 103.

A tender of a premium to an agent one day before it falls due will prevent a forfeiture. *Manhattan L. Ins. Co. v. Fields* (Civ. App.) 26 S. W. 280.

A policy which was to become a paid-up term policy on nonpayment of a premium held not to become such if, at the time of the default, a past-due premium note was unpaid. *Union Cent. Life Ins. Co. v. Wilkes*, 92 T. 468, 49 S. W. 1038.

A condition in a life policy held not to prevent forfeiture for failure to pay an assessment within 30 days, as required by the policy, where the insured does not die within 6 months thereafter. *Mutual Reserve Fund Life Ass'n v. Lovenberg*, 24 C. A. 355, 59 S. W. 314.

The failure of insured to surrender his policy within six months after default in a premium, as provided by the policy, held to defeat his right to paid-up insurance. *Equitable Life Assur. Soc. v. Evans*, 25 C. A. 563, 64 S. W. 74.

The nonpayment of a premium note held, under the terms of a life insurance policy, to defeat recovery thereon. *Union Cent. Life Ins. Co. v. Hughes* (Civ. App.) 70 S. W. 1010.

Under a statute requiring notice that, unless a premium on a policy is paid at maturity, the policy will be forfeited, except the insured's right to the surrender value or paid-up policy, a mere notice that, if the premium is not paid, the policy lapses, held insufficient. *Security Trust & Life Ins. Co. v. Hallum*, 32 C. A. 134, 73 S. W. 554.

An insurance company's failure to have a premium note at the place where it was payable at maturity held not to prevent a forfeiture of the policy for nonpayment of the note. *Texas Fire Ins. Co. v. Knights of Tabor Lodge of Camp County*, 32 C. A. 328, 74 S. W. 809.

Under a fire policy, providing that failure to pay a premium note shall render the policy void, failure to pay a premium note, the receipt for which contained a similar provision, avoided the policy. *National Life Ins. Co. v. Repond* (Civ. App.) 81 S. W. 1012.

Under New York law, prohibiting forfeitures of life policies for nonpayment of premiums unless notice is mailed to insured, notice giving only initial of insured's middle name, instead of full name, held sufficient. *Cowen v. Equitable Life Assur. Soc.*, 37 C. A. 430, 84 S. W. 404.

Provision of life insurance policy, contemplating the sending of notice of accruing premiums to insured, held not to continue the policy in force indefinitely in case of failure to give such notice. *Id.*

Failure of insured to pay a premium note at maturity held to terminate the insurance, in the absence of waiver. *National Life Ins. Co. v. Manning*, 38 C. A. 498, 86 S. W. 618.

Where insured elected to pay an insurance premium annually by giving a note therefor, but made default in payment thereof, payments made could not be applied as quarterly payments to keep the policy in force for part of the year. *Id.*

A payment of interest on a premium in default after insured's death held insufficient to restore the policy. *Id.*

Insured, after default in payment of a premium note, held only entitled to a restoration of the insurance by payment of the amount due and furnishing evidence of good health, as required by the note. *Id.*

A life policy held void for the failure of the insured to pay certain notes given to the agent in settlement of the premium. *National Life Ins. Co. v. Reppond* (Civ. App.) 96 S. W. 778.

The failure to pay a premium note held to avoid a life policy. *Id.*

Where, in an action on a life insurance policy, the company claimed it had been forfeited for nonpayment of premium notes, evidence held to sustain a finding that the notes were taken by the agent individually for his part of the first premium. *Reppond v. National Life Ins. Co.*, 100 T. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.

An accident policy, premium notes, and application therefor construed, and held that a failure to pay any one of the premium notes at maturity operated to put an end to the policy without notice to the insured. *North American Acc. Ins. Co. v. Bowen* (Civ. App.) 102 S. W. 163.

An insurer in an accident policy held required to apply so much of the sum due the insured on account of an accident to the satisfaction of unpaid premium notes as was necessary for that purpose to prevent a forfeiture of the policy for nonpayment of the premium. *Id.*

Allowing the 30 days of grace, an insured held to have died within the protection of his policy. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Civ. App.) 108 S. W. 778.

In an action on an insurance policy, a holding in favor of the beneficiary extending the term of the policy and declaring unnecessary the payment by the beneficiary of an unpaid premium held justified. *Id.*

Failure of plaintiff to pay an extra assessment without complaint or demand for explanation from insurer held not to justify his failure to pay a subsequent, regular, ~~regularly~~ assessment for which the policy was forfeited. *Kray v. Mutual Reserve Life Ins. Co.*, 50 C. A. 555, 111 S. W. 421.

Plaintiff's failure to complain of irregularity of special assessments on a policy on B.'s life held a waiver of the irregularity, and to preclude a claim that the amounts paid thereon should be applied to the discharge of certain regular assessments. *Id.*

Where an insurance policy required the payment of premiums on October 1st, but allowed an extension of 30 days, that day falling on Sunday, the 30-day extension held to begin to run at midnight on October 1st, and the policy was forfeited before insured's death on November 1st. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly*, 102 T. 46, 112 S. W. 1038, 23 L. R. A. (N. S.) 759, 132 Am. St. Rep. 852.

A failure to pay a premium when due held to forfeit a policy. *Equitable Life Assur. Society of United States v. Ellis* (Civ. App.) 137 S. W. 184.

In an action on a life policy, evidence held not to show that insured obtaining an extension of the time of the payment of an annual premium, and dying before payment, would not have paid the premium had he lived. *Id.*

Where the insurer agreed to look solely to the broker procuring the insurance for the premiums, the nonpayment of a premium did not affect the right of the insured to recover on a fire policy; the insurer's remedy being an action against the broker. *Hanover Fire Ins. Co. v. Turner* (Civ. App.) 147 S. W. 625.

Under provisions of a policy and of an extension note, held, that policy was avoided by a default in the payment of an extension note. *Security Life & Annuity Co. of America v. Underwood* (Civ. App.) 150 S. W. 293.

A provision in an extension note, given for a premium due, and in the insurer's receipt, for forfeiture on account of a default in payment, is valid, especially in view of express provisions of the policy that the amount was payable, "all premiums and indebtedness hereon having been fully paid." *Id.*

Failure of insured to pay insurance premium when notified by local agent that it was due held not to relieve the company, the mortgagee, from liability where it had agreed to attend to the insurance, had done so for a time, and had not notified the insured that it would not continue to do so. *Commonwealth Fire Ins. Co. v. Obenchain* (Civ. App.) 151 S. W. 611.

Where the assignee of an insurance policy did not pay the last premium due because of the insurer's failure to present the receipt for payment in accordance with its custom, the assignee's failure to discover the nonpayment for some years, it appearing that the insured was still alive, and the policy had been merely filed away, does not bar him on the ground of laches. *Mutual Life Ins. Co. of New York v. Davis* (Civ. App.) 154 S. W. 1184.

Owing to the custom of the insurer to make demand for premiums, an insurance policy, which was assigned to the insured's creditor, cannot be forfeited for nonpayment of the tenth and last premium, where a demand was not made by the insurer. *Id.*

68. — Effect of breach of condition subsequent.—Temporary breach of condition in policy not existing at time of fire, and not contributing thereto, held not to prevent recovery. *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.* (Civ. App.) 49 S. W. 271.

There being no cotton insured by a policy on a cotton gin, a warranty relating to keeping a "correct account of the cotton put into and taken out of the gin house" becomes immaterial. *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 60 S. W. 820.

The policy providing that "the entire policy shall be void," a forfeiture cannot be claimed for a part of the policy. *Id.*

The breach of a condition in an application for a fire policy requiring insured to keep barrels of water in the insured mill will not prevent a recovery for a loss occurring at a time when no one was at or near the mill. *Delaware Ins. Co. v. Harris*, 26 C. A. 537, 64 S. W. 867.

69. — **Reinstatement of lapsed policy.**—A life policy, incontestable after five years except for nonpayment of premiums, when forfeited on that ground, is again contestable on reinstatement, and may be forfeited for fraud in securing its revival. *Ash v. Fidelity Mut. Life Ass'n*, 26 C. A. 501, 63 S. W. 944.

Declarations made in an application for reinstatement of a lapsed life policy "as a basis for the reinstatement" are warranties, and, if false, the contract is invalid. *Id.*

Where the option of an insurance company to reinstate a lapsed life policy is induced by fraud of the insured, the reinstatement may be avoided. *Id.*

70. **Estoppel or waiver of conditions or right of forfeiture.**—Where there is a proviso that, if the risk is increased, the policy is void, mere silence on the part of the company, failure to give notice, make objection or return any part of the premium will not constitute a waiver of the forfeiture occasioned by the increased risk. *Texas Banking & Ins. Co. v. Hutchins*, 53 T. 61, 37 Am. Rep. 750; *Banking Co. v. Stone*, 49 T. 13; *Insurance Co. v. Lacroix*, 45 T. 170; *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

A policy of insurance contained the following clause: "If the assured shall have or shall hereafter have any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * then and in every such case this policy shall be void." Another insurance was obtained on the same property without procuring the indorsement of consent on the first policy, but notice was given thereof to the agent of the company, who had full discretion in the premises, and made no objection to the additional insurance, said nothing about canceling the first policy, and did nothing to indicate a wish to do so. On the contrary, after knowing of the second insurance, the agent of the company in which the first insurance was effected took two risks on the same property in other companies represented by him. Held, that it was the duty of the first insurers to elect, within a reasonable time, whether they would enforce the policy or abandon it; and having by their silence induced the assured to believe the policy still in force, they were estopped from alleging the contrary when the attempt was made to enforce it. *Crescent Ins. Co. v. Griffin*, 59 T. 609.

Waiver of default in payment of premium note, how shown. *Insurance Co. v. Perky*, 5 C. A. 698, 24 S. W. 1080.

Where insurers refuse to pay on special grounds, it is a waiver of their right to object on the ground of the insufficiency of the preliminary proof. *Standard L. & A. Ins. Co. v. Koen*, 11 C. A. 273, 33 S. W. 133.

An insurance company held to waive forfeiture for misrepresentations as to incumbrances. *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.* (Civ. App.) 49 S. W. 271.

A condition that the policy should be void if the interest of insured was other than sole and absolute ownership held waived. *Wagner v. Westchester Fire Ins. Co.*, 92 T. 549, 50 S. W. 569.

Stipulation in policy that misrepresentation as to title would avoid it held waived. *Westchester Fire Ins. Co. v. Wagner*, 24 C. A. 140, 57 S. W. 876.

Course of dealings between an insurance company and the insured, under an open policy held to be a waiver of a stipulation requiring the insured to advise the company of risks as soon as known. *Insurance Co. of North America v. Bell*, 25 C. A. 129, 80 S. W. 262.

A company held not to have waived the breach of a provision in a policy that it should be void on any transfer of the title to the property insured. *Hartford Fire Ins. Co. v. Ransom* (Civ. App.) 61 S. W. 144.

Forfeiture of fire policy by reason of breach of condition held to have been waived. *German-American Ins. Co. v. Evants*, 25 C. A. 300, 61 S. W. 536.

Evidence in an action on a fire insurance policy on lumber held insufficient to show waiver of a clause requiring 200 feet of clear space surrounding the lumber. *Keller v. Liverpool & L. & G. Ins. Co.*, 27 C. A. 102, 65 S. W. 695.

Where insurer consented to a transfer of the property and an assignment of the policy, a breach of condition by the original holder held no defense to an action for a subsequent loss. *Home Mut. Ins. Co. v. Nichols* (Civ. App.) 72 S. W. 440.

Breach of condition in fire policy held not to have been waived by company. *Curlee v. Texas Home Fire Ins. Co.*, 31 C. A. 471, 73 S. W. 831.

Fire insurance company held estopped to assert forfeiture of policy for want of indorsement of consent to other insurance. *Ætna Ins. Co. v. Eastman* (Civ. App.) 80 S. W. 255.

A stipulation in a policy, insuring an employer against damage for injuries to its employes held not waived by the act of the insurer. *Texas Short Line Ry. Co. v. Waymire* (Civ. App.) 89 S. W. 452.

An insurer held not estopped from proving that the policy correctly stated the contract. *Ætna Ins. Co. v. Brannon*, 99 T. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020.

Accident insurance company held not in a position to claim a forfeiture for nonpayment of premiums induced by the negligence of its own agent. *Johnson v. Standard Life & Accident Ins. Co.* (Civ. App.) 97 S. W. 831.

A finding that an insurer in an accident policy elected to waive a forfeiture of a policy by reason of the nonpayment of the premium notes held authorized. *North American Acc. Ins. Co. v. Bowen* (Civ. App.) 102 S. W. 163.

An estoppel against an insurance company from the acts of its local agent to assert forfeiture held the same as in case of an individual insurer present and acting. *Continental Casualty Co. v. Bridges* (Civ. App.) 114 S. W. 170.

Facts held to establish a waiver of payment of premium on an accident policy on a specified date. *Id.*

Evidence held to show a waiver by insurer's agent of a clause in a fire policy forbidding transfer of the property without insurer's consent. *British America Assur. Co. v. Francisco* (Civ. App.) 123 S. W. 1144.

Though insurer's agent knew that insured occupied leased premises, and that his property was subject to the statutory lien, there was no waiver of a clause rendering the policy void if the property "be or become incumbered by a chattel mortgage," where the lease contained a clause of which the agent was ignorant, giving the landlord a lien for the full term, expressly waiving all exemption laws, and providing that the lien should be cumulative of all statutory liens and remedies. *Hartford Fire Ins. Co. v. Wright* (Civ. App.) 125 S. W. 363.

Insurer in a fire policy held not entitled to insist that an increased hazard had not been waived by it. *American Cent. Ins. Co. v. Chancey* (Civ. App.) 127 S. W. 577.

A waiver of the forfeiture of a life policy held not to result from silence of insurer. *Equitable Life Assur. Society of United States v. Ellis* (Civ. App.) 137 S. W. 184.

A waiver of the forfeiture of a life policy held to result from acts of insurer. *Id.* An insurer held authorized to elect not to forfeit a policy for nonpayment of a premium when due. *Id.*

A stipulation in an insurance policy for forfeiture on nonpayment of premiums before a stipulated date is for the benefit of the insurer and may be waived by him. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 147 S. W. 1152.

The forfeiture of an insurance policy for nonpayment of a premium is waived without any agreement to that effect by negotiations or transactions with the insured after knowledge of the forfeiture. *Id.*

Whether an insurance company waives forfeiture for nonpayment of a premium does not depend on anything the insured does or on whether he was misled; a waiver not being necessarily based on a new agreement or estoppel. *Id.*

On facts stated, held, that letters of an insurer amounted to a waiver of forfeiture of a policy for nonpayment of premiums, but that its letter written after a premium was due, but before the right to forfeiture accrued thereon, was not a waiver of a forfeiture of nonpayment of such premium. *Security Life & Annuity Co. of America v. Underwood* (Civ. App.) 150 S. W. 293.

An insurer, who denies liability under a fire policy, thereby waives the stipulation therein that any loss shall not be payable until 60 days after receipt of proofs of loss, and cannot claim that a suit brought on the policy within such time is premature. *Oklahoma Fire Ins. Co. v. McKey* (Civ. App.) 152 S. W. 440.

Waiver of a forfeiture of a life policy for nonpayment of premiums may result from any unequivocal acts by the insurer, after knowledge of the forfeiture, without action by insured. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 152 S. W. 625.

71. — **What conditions may be waived.**—An insurance company may waive any condition of a policy inserted therein for its benefit, and such waiver is provable as any other fact. *P. & A. Life Ins. Co. v. Fitzgerald*, 1 App. C. C. § 1347; *Ins. Co. v. Waters*, 10 C. A. 363, 30 S. W. 576; *Sun Ins. Co. v. Tex. Foundry & Machine Co.*, 4 App. C. C. § 33, 15 S. W. 34; *Phoenix Ins. Co. v. Witt* (Civ. App.) 25 S. W. 796. An insurance company may, through its authorized agent, contract by parol for the renewal of a policy of insurance, although it may be stipulated on the face of the policy itself that this shall not be done. *Cohen v. Insurance Co.*, 67 T. 325, 3 S. W. 296, 60 Am. Rep. 24. A condition in the policy that there should be no transfer or assignment of the same, except by writing on the policy, is waived by a verbal consent to a transfer or assignment by an agent of the insurer. *Fire Ins. Co. v. Miller*, 2 App. C. C. § 333.

A policy of insurance stipulated that "agents of this company have no authority to bind the company in violation of any of the printed terms or conditions of insurance as herein expressed; and no printed or written restriction hereof, which by its terms may be subject to waiver, shall be deemed to have been waived, except by distinct, specific agreement, clearly expressed in the body of the policy." Held, that any condition in the policy which under its terms might have been waived in the body thereof, and not otherwise, must be deemed, within the meaning of the stipulation, a condition or restriction "subject to waiver," and to such only does the stipulation apply. *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

A requirement in a policy that premiums should be paid at a designated place may be waived. *Manhattan Life Ins. Co. v. Fields* (Civ. App.) 26 S. W. 280.

A clause in a policy of life insurance, exempting the insurers from liability until actual payment of premium, may be waived. *Metropolitan Life Ins. Co. v. Gibbs*, 34 C. A. 131, 78 S. W. 398.

A forfeiture of a policy for nonpayment of premium or of a premium note may be waived by the insurer. *Security Life & Annuity Co. of America v. Underwood* (Civ. App.) 150 S. W. 293.

72. — **Authority of agent in general.**—A policy contained a stipulation that it should be void in case of other insurance thereon without the consent of the company written thereon. The agent of the company was notified by the assured that additional insurance had been obtained. The company having failed to indorse the same upon the policy, or to notify the insured of the risk, was estopped from setting up the additional insurance as a defense. *Insurance Co. v. Lyons*, 38 T. 253; *Crescent Ins. Co. v. Griffin*, 59 T. 509. See, also, *N. O. Ins. Ass'n v. Griffin*, 66 T. 232, 18 S. W. 505.

One of the conditions of the policy was that there should be no transfer unless the consent of the insurance company was indorsed in writing on the policy. There was no such indorsement, but it was shown that the agent of the company knew of the transfer and had consented thereto. Held, that the company was estopped by the act of its agent. *Fire Ins. Ass'n v. Miller*, 2 App. C. C. § 333.

Though a policy of insurance upon its face may provide that it shall not be valid unless countersigned by the company's general agent, yet if other insurance was obtained with the verbal consent of such agent, who promised to indorse his consent on the policy, and afterwards made written memoranda of a renewal, but not on the policy,

and no objection was made by the company, the company would be bound, and the consent of the company to the subsequent insurance can be shown otherwise than by indorsement on the policy. *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63. See *Phoenix Ins. Co. v. Witt* (Civ. App.) 25 S. W. 796.

A provision that no additional insurance shall be obtained without the consent of the insurer expressed in writing on the policy may be waived by verbal consent of the agent under such circumstances as would result in injustice to the insured if the act of the agent were repudiated. *N. O. Ins. Ass'n v. Griffin*, 66 T. 232, 18 S. W. 505.

A waiver of conditions in a policy by an agent without authority, within the knowledge of the insured, is void. *Westchester Fire Ins. Co. v. Wagner*, 10 C. A. 398, 30 S. W. 959; *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63; *Insurance Co. v. Lee*, 73 T. 641, 11 S. W. 1024; *Insurance Co. v. Josey*, 25 S. W. 685, 6 C. A. 290.

In an action on life policy, held, local agent was authorized to waive provision in policy that premium should be paid in cash before policy should go into effect. *Provident Savings Life Assur. Soc. of New York v. Oliver*, 22 C. A. 8, 53 S. W. 594.

Life insurance company held to have ratified act of agent in delivering policy during insured's ill health. *Northwestern Life Ass'n v. Findley*, 29 C. A. 494, 68 S. W. 695.

Where a local agent by direction wrote out, issued, and delivered a fire insurance policy, the company, after loss, held estopped from asserting that none but its general agent could issue or indorse such policy. *Continental Fire Ass'n v. Norris*, 30 C. A. 299, 70 S. W. 769.

Waiver of a requirement of a fire policy by an agent held binding on insurer. *Fire Ass'n of Philadelphia v. Masterson* (Civ. App.) 83 S. W. 49.

Where by mutual agreement between an insurance agent and insured the agent intended to insure property in a negro cabin, but described it as located elsewhere, the insurer was bound. *Ætna Ins. Co. v. Brannon* (Civ. App.) 91 S. W. 614.

The fraud of an insurance agent authorized to issue and deliver policies held chargeable to the insurer. *Id.*

An insurance company would not be bound by the fraud of its agent in inducing the execution of certain policies after such fraud had been discovered by insured, in case the latter concealed the same. *Curry v. Stone* (Civ. App.) 92 S. W. 263.

Where the insurer in a fire policy ascertained that its agent at the time of writing the policy was also the agent of the insured, if it desired to avoid the policy, it was its duty to manifest such intention promptly. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

Where an insurance agent either fraudulently or negligently inserts in an application false answers to questions correctly answered by the applicant, the insurer will be estopped to defend on the ground of the falsity of the answers. *North American Accident Ins. Co. v. Trenton* (Civ. App.) 99 S. W. 740.

An agent of an insurer held to possess authority to extend the time of the payment of premium notes and prevent a forfeiture of the policy for nonpayment at maturity. *North American Acc. Ins. Co. v. Bowen* (Civ. App.) 102 S. W. 163.

* The insurer's agent may waive a stipulation as to the indorsement of transfer on the policy. *British America Assur. Co. v. Francisco* (Civ. App.) 123 S. W. 1144.

Insurer is bound by the statement of its agent, having authority to issue policies, that a sale and mortgage of the insured property would be agreed to. *Delaware Ins. Co. of Philadelphia v. Hill* (Civ. App.) 127 S. W. 283.

Insurer's agent's waiver of an "iron-safe" clause in a fire policy held to bind insurer. *Old Colony Ins. Co. v. Starr-Mayfield Co.* (Civ. App.) 135 S. W. 252.

The right of an insurer to rely on certain warranties, held waived by his agent. *Co-operative Ins. Ass'n of San Angelo v. Ray* (Civ. App.) 138 S. W. 1122.

A soliciting agent held without authority to waive any of the conditions of an insurance policy. *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

A health policy having excepted liability for an illness contracted before the policy had been in force 30 days, and insured having contracted an illness within such time, that the agent authorized to issue receipts, but not to issue policies, continued the policy, and issued receipts for premiums, and assured insured that he would get his money, held not a waiver of the exception. *American Nat. Ins. Co. v. Roberts* (Civ. App.) 146 S. W. 326.

An agent of an insurance company in charge of its loan and extension department at its headquarters in New York held to have general authority to waive a forfeiture for nonpayment of premiums. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 152 S. W. 625.

73. — **Effect of provisions in application or policy.**—An insurance company that stipulates in a policy that it will only be bound by writing to any future contract in regard thereto does not preclude itself from making a parol contract to change that stipulation; and if through its general agent the stipulation is disregarded, and the company fails to repudiate his act, when good conscience requires that if it be disaffirmed it should be done promptly, the company will be bound. *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63; *Niagara Ins. Co. v. Lee*, 73 T. 641, 11 S. W. 1024; *Insurance Co. v. Ende*, 65 T. 118; *Insurance Co. v. Camp*, 71 T. 503, 9 S. W. 473.

An agent can verbally waive a condition in a policy, although the policy prescribes that it must be waived by writing in the body of the policy. *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63; *Pennsylvania Fire Ins. Co. v. Faires*, 13 C. A. 111, 35 S. W. 55.

The limitation in the policy of the agent's authority to waive conditions does not apply to waivers arising by operation of law from acts of the agent amounting to a repudiation of the policy. *Fire Ass'n of Philadelphia v. Jones* (Civ. App.) 40 S. W. 44.

Where the policy, and a separate agreement under which the appraisal was made, provided that the appraisal should not be a waiver of any forfeiture, the insurer by entering into such appraisal did not waive a forfeiture. *City Drug Store v. Scottish Union & National Ins. Co.* (Civ. App.) 44 S. W. 21.

Provision in application for life policy that no statements made shall be binding unless reduced to writing, and approved by the company's officers, held not to affect waiver.

er of forfeiture by receipt of premiums with knowledge of facts authorizing forfeiture. *Northwestern Mut. Life Ins. Co. v. Freeman* (Civ. App.) 47 S. W. 1025.

A general agent, having authority to make contracts of insurance and to issue policies, may make a valid parol contract waiving conditions, though the policy declare such a waiver unauthorized unless in writing. *Wagner v. Westchester Fire Ins. Co.*, 92 T. 549, 50 S. W. 569.

Validity of life insurance based on an application providing that no verbal statements should modify the contract held not affected by oral communications of the insured to the soliciting agent. *Fidelity Mut. Life Ass'n v. Harris*, 94 T. 25, 57 S. W. 635, 86 Am. St. Rep. 813.

A clause in a life policy held to render the policy incontestable for false warranties after the expiration of one year from its execution. *Franklin Ins. Co. v. Villeneuve*, 25 C. A. 356, 60 S. W. 1014.

Certain provisions of a policy relating to waiver of forfeiture held binding on insured. *American Cent. Ins. Co. v. Nunn*, 98 T. 191, 82 S. W. 497, 68 L. R. A. 83.

Clause of a life policy providing for incontestability after one year, though including fraud, held not contrary to public policy. *American Nat. Ins. Co. v. Briggs* (Civ. App.) 156 S. W. 909.

A clause making a policy incontestable after one year held to include a prior clause that it should not take effect until the first premium was paid during insurability, and so where premiums were properly paid and insured did not die during the year, and no steps were taken to avoid it, it was no defense that insured had never been insurable. *Id.*

74. — **Knowledge or notice of facts.**—Casual information communicated to an agent of the assured in a conversation occurring on the street does not constitute notice. *Texas Banking Co. v. Hutchins*, 53 T. 61, 37 Am. Rep. 750.

Where an insurance agent receives premiums with notice of concurrent insurance, payment of loss cannot be refused. *Insurance Co. v. Malevinsky*, 24 S. W. 804, 6 C. A. 81; *Insurance Co. v. Ende*, 65 T. 123; *Cohen v. Insurance Co.*, 67 T. 328, 3 S. W. 296, 60 Am. Rep. 24; *Insurance Co. v. Lee*, 73 T. 646, 11 S. W. 1024; *Morrison v. Insurance Co.*, 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63; *Insurance Co. v. Blum*, 76 T. 653, 13 S. W. 572.

Knowledge on the part of an agent of a life insurance company that an answer is false is notice to the company. *Insurance Co. v. Nichols* (Civ. App.) 26 S. W. 998.

A policy issued in the name of a partnership after its dissolution by the death of a member is valid, the agent who procured the policy and countersigned it knowing the circumstance. *Fire Ass'n v. Laning* (Civ. App.) 31 S. W. 681.

Mere notice to agent of existence of mortgage on the property insured, or parol waiver by the agent, held not to estop the company from asserting condition broken. *Phoenix Ins. Co. v. Dunn* (Civ. App.) 41 S. W. 109.

A written application for insurance, not made a part of the policy, will not avoid the verbal notice of the true condition of the title given by the insured to the insurer's agent, while soliciting the insurance. *Queen Ins. Co. of America v. May* (Civ. App.) 43 S. W. 73.

Knowledge by an insurance company that a mortgage on property will mature during the life of the policy thereon is not a waiver of a clause providing that the policy shall be void if foreclosure proceedings are begun by virtue of any mortgage. *Hartford Fire Ins. Co. v. Clayton*, 17 C. A. 644, 43 S. W. 910.

A misrepresentation of a fact existing at the date of a policy is waived by the company, if its agent, not being in collusion with the insured, knows the real fact. *Fire Ass'n of Philadelphia v. Bynum* (Civ. App.) 44 S. W. 579.

Notice to the agent who has authority to solicit insurance, report applications, deliver policies, etc., of incumbrances on the property insured is notice to the company. *German Ins. Co. v. Everett*, 18 C. A. 514, 46 S. W. 95.

Insured's failure to give notice of a mortgage held not waived by the insurer's knowledge of a mortgage subsequently given to secure money with which to pay the mortgage existing when the policy was issued. *Insurance Co. of North America v. Wicker* (Civ. App.) 54 S. W. 300.

An agent held to waive warranty against incumbrances; the applicant proposing to go to the creditor and get the exact amount of the incumbrance, which the agent waived. *Hartford Fire Ins. Co. v. Walker* (Civ. App.) 60 S. W. 820.

Issuance of policy with knowledge of intent of insured to take out other insurance held not a waiver of condition against it. *Orient Ins. Co. v. Prather*, 25 C. A. 446, 62 S. W. 89.

Knowledge of the insurer's agent that, before the issuance of the policy, the insured property was not located as required by a provision of the policy, held not to waive such provision. *Hartford Fire Ins. Co. v. Post*, 25 C. A. 428, 62 S. W. 140.

Where insured property is easily movable, the issuance of a policy with knowledge that the property is not located as required by a clause of the policy is a waiver of such clause only to the extent of allowing insured a reasonable time in which to move the property. *Id.*

Knowledge acquired by a banker to whom claims for premiums on a life policy are sent for collection and a renewal contract to obtain the signature of the insured, as to the falsity of statements in the contract, held not imputable to the company. *Ash v. Fidelity Mut. Life Ass'n*, 26 C. A. 501, 63 S. W. 944.

False statements, willfully made for the purpose of deceiving a life insurance company and obtaining insurance, did not vitiate the policy, where the agent knew the facts. *Sun Life Ins. Co. v. Phillips* (Civ. App.) 70 S. W. 603.

Proof of a certain custom held not alone sufficient to show that an insurer had knowledge of the issuance of two accident policies to one person for a single period. *Wilkinson v. Travelers' Ins. Co.* (Civ. App.) 72 S. W. 1016.

Insurance agent, applying to other agents for a policy which he could not issue, held the agent of the company subsequently issuing the same in the issuance of the policy, so that his knowledge of facts relating to the risk was the knowledge of the insurer. *Virginia Fire & Marine Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 716.

Knowledge of an insurance agent issuing policies as to ownership held a waiver of a clause of warranty of sole ownership in the policy. *Continental Ins. Co. v. Cummings*, 98 T. 115, 81 S. W. 705.

Information obtained by an insurance broker from the officers of insured held not imputable to insurers. *Fire Ass'n of Philadelphia v. American Cement Plaster Co.*, 37 C. A. 629, 84 S. W. 1115.

Knowledge of an insurance agent as to the ownership of property not shown to have been obtained in the course of the agency held not imputable to defendant. *Continental Ins. Co. v. Cummings* (Civ. App.) 95 S. W. 48.

Knowledge of incumbrances by a member of a firm of insurance agents held knowledge of the insurer. *St. Paul Fire & Marine Ins. Co. v. Stogner*, 44 C. A. 60, 98 S. W. 218.

Knowledge of an agent of a life insurance company that at the time of the delivery by him of the policy insured was not in good health held knowledge of the company. *Security Mut. Life Ins. Co. v. Calvert* (Civ. App.) 100 S. W. 1033.

An insurance company is chargeable with notice of the acts of its agents within the apparent scope of the agents' authority. *Id.*

Insurer in a fire policy issued by an agent held bound by the facts known by the agent at the time of the issuance of the policy. *Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co.*, 50 C. A. 172, 109 S. W. 1134.

An insurer held bound by the knowledge of its agent acquired while acting without the scope of his agency. *Id.*

Proof of actual knowledge on the part of defendant insurance company's agent of the existence when the policy was issued of mortgage liens on plaintiff's property was essential to show a waiver of a stipulation against incumbrances. *Hartford Fire Ins. Co. v. Wright* (Civ. App.) 125 S. W. 363.

Proof that a mortgage permit was once issued to insured by the wife of the predecessor of defendant insurance company's agent in behalf of another company held insufficient to establish knowledge on the part of the agent of the issuance of such permit. *Id.*

The agent of a fire insurance company issuing a policy with a stipulation against incumbrances held not required to exercise diligence in examining the registers of insurance in other companies kept by his predecessor in order to ascertain whether mortgage permits had been granted by any of the 12 companies represented by such agents. *Id.*

A fire policy held not void because insured kept, used, or allowed on the premises gasoline in violation of the stipulations of the policy, the agent securing the insurance having knowledge of the violation. *American Cent. Ins. Co. v. Chancey* (Civ. App.) 127 S. W. 577.

Provisions of a fire insurance policy as to sole and unconditional ownership held waived, where the insurer's agent knew that the policy was issued to an executor in that capacity, and not as sole owner. *Shawnee Fire Ins. Co. v. Chapman* (Civ. App.) 132 S. W. 854.

A fire policy held not invalidated by insured procuring other insurance in excess of the amount of concurrent insurance allowed, where the agent of original insurer consented thereto. *National Union Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 475.

An insurer, issuing a fire policy on property incumbered by a vendor's lien to the knowledge of the insurance agent, held estopped from setting up the incumbrance to defeat the policy. *Mecca Fire Ins. Co. v. Smith* (Civ. App.) 135 S. W. 688.

Where insurer, when issuing a fire policy stipulating that it should be void if insured should keep gasoline on the premises, knew that gasoline was kept on the premises and used in insured's business, the keeping of the gasoline did not invalidate the policy. *Oklahoma Fire Ins. Co. v. McKey* (Civ. App.) 152 S. W. 440.

75. — **Delivering policy with knowledge of facts.**—Where the state of ownership of insured property is made known to the agent of the insurance company at the time the policy was issued, the insurance company cannot set up the want of complete ownership to bar an action upon the policy. *Insurance Co. v. Ende*, 65 T. 118; *Insurance Co. v. Camp*, 71 T. 503, 9 S. W. 473; *Crescent Ins. Co. v. Camp*, 64 T. 521.

An untrue or fraudulent statement on the part of the assured, in his application, of a fact material to the risk, does not avoid the policy when the company or its agent knew the real facts at the time when the contract was made and the premium paid. *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

An insurance company is estopped from setting up a breach of the condition of a policy in regard to representations, when the policy was delivered with full knowledge of the facts. *Phoenix Ins. Co. v. Ward*, 26 S. W. 763, 7 C. A. 13.

Receiving the premium and issuing a policy with knowledge of other insurance estops insurer from relying on a misrepresentation by insured as to such additional insurance. *Standard Life & Accident Ins. Co. v. Davis* (Civ. App.) 45 S. W. 826.

A condition against incumbrances is waived by the company's delivering the policy with knowledge of the incumbrance. *German Ins. Co. v. Everett*, 18 C. A. 514, 46 S. W. 95.

Issuance of policy on application containing questions as to incumbrances held waiver of omission of specific answer as to the amount of incumbrances. *Phoenix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co.* (Civ. App.) 49 S. W. 271.

Life policy, delivered by agent during the ill health of the insured, held binding on company, if agent was vested with discretion in making the delivery. *Northwestern Life Ass'n v. Findley*, 29 C. A. 494, 68 S. W. 695.

An insurer held estopped from asserting the invalidity of a policy, delivered with full knowledge of the facts on which its validity may be disputed. *Mecca Fire Ins. Co. v. Smith* (Civ. App.) 135 S. W. 688.

76. — **Acceptance of premiums.**—The company, by receiving the premium for fire insurance, with knowledge of the true state of title of the property insured, is estopped from denying the right of the insured to recover on the ground that his interest in the property was other than the entire unconditional and sole ownership for his own use. *L. & L. & G. Ins. Co. v. Ende*, 65 T. 118.

An insurance company, by accepting part cash and assured note for premium after maturity, held to waive forfeiture of the policy for nonpayment thereof. *New York Life Ins. Co. v. Smith* (Civ. App.) 41 S. W. 680.

Act of agent in accepting payment of premium after due held ratified by the company. *Id.*

A forfeiture is waived by acceptance of a premium with knowledge of the facts. *Morris v. Travelers' Ins. Co.* (Civ. App.) 43 S. W. 898.

Acceptance after maturity of payment of premium notes, which provided that, if not paid at maturity, the policy was forfeited, is a waiver of the right to a forfeiture. *Union Cent. Life Ins. Co. v. Wilkes* (Civ. App.) 47 S. W. 546.

Recovery on life policy can be had though insured engaged in occupation rendering it void under its terms, where the general agents of the company received premiums with knowledge of change of occupation. *Northwestern Mut. Life Ins. Co. v. Freeman* (Civ. App.) 47 S. W. 1025.

Although an insurance company can avoid a policy where the agent acts for both parties, yet it must return the premium within a reasonable time after knowledge of the fact has come to it, else it will be held to have ratified the contract; and where the contract of insurance is voidable the insurer can, by bringing suit before the premium is returned, ratify it, and may enforce it. *Insurance Co. v. City of Smithville* (Civ. App.) 49 S. W. 412.

Acceptance, after maturity, of payment of a premium note, nonpayment of which was to avoid the policy, is not a waiver of the right to assert a forfeiture. *Union Cent. Life Ins. Co. v. Wilkes*, 92 T. 468, 49 S. W. 1038.

Acceptance of a payment on conditions which were complied with held a waiver of a requirement of "satisfactory evidence of good health," etc. *Mutual Reserve Fund Life Ass'n v. Bozeman*, 21 C. A. 490, 52 S. W. 94.

Circumstances of receipt of overdue premiums on a life policy held not a waiver of forfeiture for nonpayment thereof. *New York Life Ins. Co. v. Scott*, 23 C. A. 541, 57 S. W. 677.

Payment of assessments on a life policy after it has been forfeited for failure to make such payments, and the taking of a receipt which states that the payment was received on the condition that the insured was in good health, does not reinstate such policy, where the insured was not in good health when the payment was made. *Mutual Reserve Fund Life Ass'n v. Lovenberg*, 24 C. A. 355, 59 S. W. 314.

Where an insurer issues a policy, and accepts premiums thereon, with knowledge of facts that constitute a violation of a provision in the policy, and would make the same void when issued, such insurer has waived the provision violated. *Hartford Fire Ins. Co. v. Post*, 25 C. A. 428, 62 S. W. 140.

Receipt of premium held to estop insurance company from relying on misrepresentation as to title to property. *Continental Fire Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 378.

Acceptance by insured of an installment on a premium note after default held not a waiver of a forfeiture of the policy by failure to pay the note at maturity. *National Life Ins. Co. v. Manning*, 38 C. A. 498, 86 S. W. 618.

The fact that insured did not promptly return or retain a premium held not to reinstate a forfeited contract. *Moore v. Supreme Assembly of Royal Soc. of Good Fellows*, 42 C. A. 366, 93 S. W. 1077.

Forfeiture of an accident policy for nonpayment of premiums when due held waived, the company having afterwards received them. *Continental Casualty Co. v. Jennings*, 45 C. A. 14, 99 S. W. 423.

77. — **Demand for payment of premium.**—When a policy of insurance provides for a forfeiture upon failure to pay the premiums which are to fall due, but does not stipulate that upon such failure the overdue premiums shall be considered as earned, a demand for a payment of such premium constitutes a waiver of the forfeiture. It is otherwise when the policy stipulates that upon default in any installments the insurance shall cease and the installments shall be considered as earned. *Cohen v. Insurance Co.*, 67 T. 325, 3 S. W. 296, 60 Am. Rep. 24.

78. — **Extension of time for payment of premium.**—Extension of time for the payment of a premium note, after it had matured and the policy had been forfeited for failure to pay the note at maturity, and payment of the note after loss, held not to estop insurer from insisting on a forfeiture. *Texas Fire Ins. Co. v. Knights of Tabor Lodge of Camp County*, 32 C. A. 328, 74 S. W. 809.

Act of insurance company's collector in stating that he would call again for premium held not to show an extension, or waiver of forfeiture, where the premium was never collected. *Cowen v. Equitable Life Assur. Soc.*, 37 C. A. 430, 84 S. W. 404.

79. — **Suing to recover premium.**—A provision that a life policy shall be void on failure to pay a premium note is waived by suing on such a note. *National Life Ins. Co. v. Reppond* (Civ. App.) 81 S. W. 1012.

80. — **Offer of loan on policy.**—Offer of loan on policy after lapse, by the superintendent of the department of the company at its home office, held to be the act of the company and to constitute a waiver notwithstanding provision that policy could be varied only by specified officers. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 147 S. W. 1152.

Offer of loan on policy for purpose of paying premium, made after policy had lapsed, held not conditional on insured furnishing certificate of good health so as to negative recognition of the continued validity of the policy. *Id.*

In determining whether company waived forfeiture, offer of loan with which to pay premiums after a lapse, made by a superintendent of a department of the company and transmitted to the insured by the cashier of a local agency, held to be considered as if made direct to insured by the superintendent. *Id.*

A waiver by an insurance company of a forfeiture for nonpayment of premiums by an offer of a loan is operative for a reasonable time thereafter during which insured may adjust the premium. *Id.*

Where, after the expiration of the days of grace within which a premium on a life policy could be paid, the insurer offered to make a loan with which to pay premiums without reinstatement, the forfeiture was waived. *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 152 S. W. 625.

81. — **Examination by adjuster.**—An adjuster held not to have waived a breach of "an iron safe clause" by examining and estimating loss at insured's request, and by

requiring duplicate invoices at his expense. *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 19 C. A. 338, 48 S. W. 559.

The right to claim a forfeiture of a fire policy for noncompliance with the iron safe clause held waived by insured being subjected to an examination under oath by the adjuster, with knowledge of the facts. *American Cent. Ins. Co. v. Nunn* (Civ. App.) 79 S. W. 88.

Waiver of production of inventories by an insurance adjuster, without knowledge of the loss of one of them, held not a waiver of a condition of the iron safe clause, requiring the keeping and production of such lost inventory. *Continental Ins. Co. v. Cummings*, 98 T. 115, 81 S. W. 705.

The forfeiture of a policy for nonproduction of books held not waived by requiring insured to submit to a sworn examination. *American Cent. Ins. Co. v. Nunn*, 98 T. 191, 82 S. W. 497, 68 L. R. A. 83.

A forfeiture of the policy by failure of insured to keep an account of cash sales held not waived by requiring insured to submit to several examinations. *Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 55 C. A. 263, 118 S. W. 1086.

Employers' indemnity company held not estopped from denying liability under the policy, where its adjuster's act did not injure or mislead the injured employer. *Ætna Life Ins. Co. v. Tyler Box & Lumber Co.* (Civ. App.) 149 S. W. 283.

82. — Denial of liability as waiver of right to demand of payment.—Where an insurance company, upon an offer to furnish proofs of death of the insured, denied liability on the policy, it thereby waived its right to demand of payment, and could not contend that because of failure to demand payment as required a judgment against it was erroneous in including the statutory penalty and attorney's fees. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Civ. App.) 108 S. W. 778.

83. — Accepting proofs of loss.—Where defective proofs have been made, a refusal to pay on special grounds, or a denial of liability, unless predicated upon the defects in the preliminary proofs, is a waiver of all the defects therein, and estops the insurer from insisting upon them to defeat his liability. *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

A requirement by the company of proofs of loss after full information as to breaches of policy is a waiver of its right of forfeiture. *Georgia Home Ins. Co. v. Moriarty* (Civ. App.) 37 S. W. 628.

84. — Form and requisites of express waiver.—A waiver of the conditions of a policy must be supported by a consideration, or must be such as to estop a party from insisting on a performance of the contract. *Sun Ins. Co. v. Tex. Foundry & Machine Co.*, 4 App. C. C. § 32, 15 S. W. 34.

Where an insurance agent, having authority to consent to a transfer of the property, orally consented thereto, the insurer was bound thereby. *Home Mut. Ins. Co. v. Nichols* (Civ. App.) 72 S. W. 440.

Parol waiver as to forfeiture clauses in insurance contracts may be shown notwithstanding an express provision of the policy forbidding it. *British America Assur. Co. v. Francisco* (Civ. App.) 123 S. W. 1144.

An insurer whose agent consented in advance to additional insurance, and issued a slip showing such agreement, was estopped from asserting a forfeiture, though such slip was not attached to the policy until after the loss. *American Cent. Ins. Co. v. Hardin* (Civ. App.) 151 S. W. 1152.

85. — Effect of waiver.—A waiver by an insurance company of a ground of forfeiture is not a waiver of another ground of which it has no knowledge. *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

Where a forfeiture of an insurance policy is once waived because of the course of dealings between the parties, it cannot later be interposed to defeat recovery. *Mutual Life Ins. Co. of New York v. Davis* (Civ. App.) 154 S. W. 1184.

86. — Weight and sufficiency of evidence.—Evidence in action on policy held to support finding of waiver of production of books of account, *Continental Fire Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 378; insufficient to charge an insurance agent with knowledge that plaintiff's interest in the property was other than sole and unconditional ownership, *Virginia Fire & Marine Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 716; sufficient to sustain a plea that defendant waived its right to insist on a forfeiture of the policy, *Security Mut. Life Ins. Co. v. Calvert* (Civ. App.) 100 S. W. 1033; to sustain a finding that the insurer was advised by its agent of the full amount of concurrent insurance carried, which exceeded that permitted by the policy, *St. Paul Fire & Marine Ins. Co. v. Cronin* (Civ. App.) 131 S. W. 649; to justify a finding that the insurer in a life policy waived forfeiture for nonpayment of premiums at maturity, *Equitable Life Assur. Society of United States v. Ellis* (Civ. App.) 137 S. W. 184; sufficient to support a finding that the forfeiture of a policy for nonpayment of the premium had been waived, *Equitable Life Assur. Society of United States v. Ellis*, 105 T. 526, 147 S. W. 1152; insufficient to warrant a finding that the insurer issued the policy without notice that an insurance broker was acting as agent of the insured, *Hanover Fire Ins. Co. v. Turner* (Civ. App.) 147 S. W. 625.

87. Curing forfeiture.—Payment of a mortgage on insured property before loss does not cure a forfeiture for failure to give the insurer notice of the existence of the mortgage. *Insurance Co. of North America v. Wicker* (Civ. App.) 54 S. W. 300.

88. Risks and causes of loss—Marine insurance.—A policy of marine insurance upon a vessel while in the waters of the Mexican gulf held in force, where the vessel was in a river where the gulf tide ebbed and flowed. *Mannheim Ins. Co. v. Charles Clarke & Co.* (Civ. App.) 157 S. W. 291.

There can be no recovery, under a policy insuring a vessel against the adventures and perils of the sea, for the sinking of the vessel caused by the negligence of the watchman in failing to close the sea valve, which caused it to tip over, or to tip so far that water ran in from the top and foundered it. *Id.*

89. — Insurance of property.—Evidence in an action on a fire policy examined and held sufficient to justify the finding that the fire was negligently set by a third party, which had been impleaded by the insurance company as a defendant. *Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co.*, 31 C. A. 104, 71 S. W. 419.

Evidence held insufficient to show that insured fraudulently caused a fire. *Milwaukee Mechanics' Ins. Co. v. Frosch* (Civ. App.) 130 S. W. 600.

A live stock insurance policy held to prohibit recovery, where the animal died without the county named in the policy. *Indiana & Ohio Live Stock Ins. Co. v. Krenke* (Civ. App.) 144 S. W. 1181.

90. — **Indemnity insurance.**—There can be no recovery on a policy insuring assured against his liability on cotton consigned to him as warehouseman, the loss occurring without his negligence. *Allen v. Royal Ins. Co.* (Civ. App.) 49 S. W. 931.

Employé of insured under employer's liability insurance policy held to be engaged in occupation covered by policy at the time of his death. *Fidelity & Casualty Co. of New York v. Lone Oak Cotton Oil & Gin Co.*, 35 C. A. 260, 80 S. W. 541.

An insurance contract to indemnify the sureties of a postmaster for loss caused by his embezzlement of money order funds, etc., should be construed with reference to the federal laws in determining what constitutes an embezzlement within the contract, and not under the state statutes defining the offense. *Griffin v. Zuber*, 52 C. A. 288, 113 S. W. 961.

91. — **Life insurance.**—When the policy provides that if within two years from date of policy the insured shall commit suicide, and the evidence shows that within that time the insured did commit suicide, it is not error to instruct the jury to find for the company. *Parish et al. v. Mutual Benefit Life Ins. Co.*, 19 C. A. 457, 49 S. W. 153.

In an action on a policy, evidence held insufficient to show that deceased's death was caused by poison administered by his wife, who was the beneficiary. *Mutual Life Ins. Co. v. Mellott* (Civ. App.) 57 S. W. 887.

In action on life policy, evidence held sufficient to show that deceased came to his death from natural causes, and not from suicide. *Equitable Life Assur. Soc. v. Liddell*, 32 C. A. 252, 74 S. W. 87.

Evidence in an action for damages for refusal to pay a death benefit certificate held to show that insured committed suicide. *Loyal Americans of the Republic v. McClanahan*, 50 C. A. 256, 109 S. W. 973.

Evidence held to show that an insured committed suicide. *Metropolitan Life Ins. Co. v. Wagner*, 50 C. A. 233, 109 S. W. 1120.

The fact that a pistol could only be fired by pulling the trigger does not show beyond a reasonable doubt that the person killed by a shot from the pistol intentionally fired it. *Mutual Life Ins. Co. v. Ford* (Civ. App.) 130 S. W. 769.

A finding that insured in a life policy, void if he committed suicide within a specified period, did not commit suicide must stand, unless the evidence establishes that the shooting causing his death was intentional to that degree of conclusiveness which precludes a reasonable doubt to the contrary. *Id.*

In an action upon a life policy void on the suicide of insured, evidence held to justify a finding that insured's death was accidental, and not suicidal. *Id.*

Evidence, in an action on a benefit certificate, defended on the ground that insured died in consequence of his violation of law, held sufficient to show that insured was killed because of an assault made by him in violation of a penal statute. *Woodmen of the World v. Hipp* (Civ. App.) 147 S. W. 316.

92. — **Accident and health insurance.**—An accident policy which provides against death or injury resulting from fighting, intentional injury, or violation of law is forfeited by engaging in a fight voluntarily, and being shot while so engaged. *Morris v. Travelers' Ins. Co.* (Civ. App.) 43 S. W. 398.

Accident insurance policy construed, and held, that where insured died from effect of an overdose of morphine, given to cure delirium tremens, the insurer was not liable. *Flint v. Travelers' Ins. Co.* (Civ. App.) 43 S. W. 1079.

In an action on an accident policy, evidence held sufficient to support a finding that death occurred through external and violent means, and not because of insured's diseased condition. *Ætna Life Ins. Co. v. Hicks*, 23 C. A. 74, 56 S. W. 87.

Evidence in an action on an accident policy held to show that the death of insured did not result from an anæsthetic alone. *Maryland Casualty Co. v. Glass*, 29 C. A. 159, 67 S. W. 1062.

An injury inflicted by one protecting himself from an unprovoked assault is intentionally inflicted within the meaning of an accident policy. *Fidelity & Casualty Co. of New York v. Smith*, 31 C. A. 111, 71 S. W. 391.

An accident policy exempting insurer from liability for death by voluntarily or involuntarily taking poison held to include death resulting from an accidental taking of a poisonous medicine. *Kennedy v. Ætna Life Ins. Co.*, 31 C. A. 509, 72 S. W. 602.

A stipulation in an accident policy held not to relieve the insurer from liability for injuries sustained by the insured while on a hunting expedition. *Wilkinson v. Travelers' Ins. Co.* (Civ. App.) 72 S. W. 1016.

Accident insurance policy held not to insure against death caused by spoiled oysters. *Maryland Casualty Co. v. Hudgins*, 97 T. 124, 76 S. W. 745, 64 L. R. A. 349, 104 Am. St. Rep. 857, 1 Ann. Cas. 252, reversing (Civ. App.) 72 S. W. 1047.

An injury held an intentional one within the clause of an accident policy exempting insurer from liability. *Travelers' Protective Ass'n of America v. Weil*, 40 C. A. 629, 91 S. W. 886.

Facts held not to show, as matter of law, that death of insured resulted from exposure to unnecessary and obvious danger, so as to limit the company's liability. *Continental Casualty Co. v. Jennings*, 45 C. A. 14, 99 S. W. 423.

The word "injury" in a certain policy of accidental insurance held to include fatal injury. *Continental Casualty Co. v. Morris*, 46 C. A. 394, 102 S. W. 773.

Clauses of a health policy relating to the payment of benefits held not repugnant. *General Accident Ins. Co. v. Hayes*, 52 C. A. 272, 113 S. W. 990.

Evidence, in an action on an accident insurance policy, held sufficient to support a finding that plaintiff lost the sight of both his eyes as the result alone of the injury to his right eye, and not as the result of any kind of disease. *Ætna Life Ins. Co. of Hartford, Conn., v. Griffin* (Civ. App.) 123 S. W. 432.

"Voluntary exposure" to unnecessary danger or obvious risks, within the meaning of an accident policy, is a conscious or intentional exposure to a known risk, and not a

mere inadvertent or accidental one. *Continental Casualty Co. v. Deeg* (Civ. App.) 125 S. W. 353.

The death of a collector by sunstroke while pursuing his work on a hot day was not within an accident policy insuring against death by sunstroke due to external, violent, and accidental means. *Bryant v. Continental Casualty Co.* (Civ. App.) 145 S. W. 636.

A health policy, dated September 19th, having excepted illness contracted before the policy should have been in force thirty days, held there could be no recovery for an illness contracted October 1st. *American Nat. Ins. Co. v. Roberts* (Civ. App.) 146 S. W. 326.

Evidence in an action on a casualty insurance policy held to sustain a finding that decedent died solely as a result of injury received and not from other causes. *Royal Casualty Co. v. Nelson* (Civ. App.) 153 S. W. 674.

The "visible mark upon the body" required by a casualty insurance company need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of internal injury or any physical effect observable from an outward indication which reveals an injured condition of the internal organs. *Id.*

93. **Extent of loss and liability of insurer—Fire Insurance.**—Insured gifts held properly valued as of the time of their destruction. *Milwaukee Mechanics' Ins. Co. v. Frosch* (Civ. App.) 130 S. W. 600.

In an action on a fire policy, evidence held insufficient to show that the loss was only partial. *Hartford Fire Ins. Co. v. Dorroh* (Civ. App.) 133 S. W. 465.

94. — **Accident Insurance.**—On an accident policy against injuries which wholly disable assured from pursuing every duty pertaining to his occupation, he cannot recover for injuries which prevent him from performing his duties "as effectively" as he could otherwise have done. *Fidelity & Casualty Co. of New York v. Getzendanner*, 22 C. A. 76, 53 S. W. 838.

A condition in an accident policy preventing recovery for death from disease or voluntary overexertion held not to prevent recovery for death occurring while insured was in a diseased condition, but wholly from independent and accidental causes. *Ætna Life Ins. Co. v. Hicks*, 23 C. A. 74, 56 S. W. 87.

Recovery can be had on an accident policy for death, where the accidental injury causes rheumatism, and this produces death. *Travelers' Ins. Co. v. Hunter*, 30 C. A. 489, 70 S. W. 798.

In the absence of fraud, an insurance company held entitled to enforce a clause in an accident policy on the life of a policeman, for which an extra-risk premium had been paid, providing for a liability only for premiums in case injuries were intentionally inflicted by another. *Grimes v. Fidelity & Casualty Co.*, 33 C. A. 275, 76 S. W. 811.

Provisions of an accident policy considered and held, that the provision that the accident must at once render the insured unable to engage in any work does not relate to injuries resulting in death. *Continental Casualty Co. v. Wade* (Civ. App.) 99 S. W. 877.

Insured held not to have sustained an injury which continuously incapacitated him from labor from the time of the injury until he died so as to authorize a recovery on an accident policy. *Continental Casualty Co. v. Wade*, 101 T. 102, 105 S. W. 35.

Insurer in an accident policy held liable only to the indemnity provided for the occupation of a hunter, where insured was killed while hunting for recreation. *Lane v. General Accident Ins. Co.* (Civ. App.) 113 S. W. 324.

Evidence, in an action on an accident insurance policy, held sufficient to support a finding that plaintiff was irrevocably blind. *Ætna Life Ins. Co. of Hartford, Conn., v. Griffin* (Civ. App.) 123 S. W. 432.

Accident insurance policy for \$400 providing that for injury intentionally inflicted by any person other than insured the liability was limited to one-fifth the amount otherwise payable construed, and held that, upon the assassination of assured, the beneficiary was entitled to recover only \$80. *General Accident, Fire & Life Assur. Corporation v. Stegman* (Civ. App.) 153 S. W. 692.

95. — **Life Insurance.**—Under a life policy, notes given for a premium, with interest, held a proper charge against the amount of the policy. *Southwestern Ins. Co. v. Woods Nat. Bank* (Civ. App.) 107 S. W. 114.

Because of a provision for deducting the amount of the premium from the face of the policy, a beneficiary of a life insurance policy held to have the right to recover thereon, though the premium was not paid within the time required. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Civ. App.) 108 S. W. 778.

Present value of a paid-up life policy stated. *Supreme Lodge Knights of Pythias v. Neeley* (Civ. App.) 135 S. W. 1046.

96. **Notice and proof of loss.**—Validity of provision in policy requiring immediate notice, see notes under Art. 5714.

97. — **Necessity of proof.**—Where a life insurance policy makes it a condition precedent to recovery thereon that proofs of death be furnished in accordance with the provisions of the policy, and there is a failure to furnish such proof and no waiver of the provision is claimed nor excuse shown, there can be no recovery. *Metropolitan Life Ins. Co. v. Wagner*, 50 C. A. 233, 109 S. W. 1120.

98. — **Estoppel or waiver as to proofs.**—Where proofs are prepared under directions of the agent and with his approval imperfections therein are waived. *Merchants' Ins. Co. v. Reichman* (Civ. App.) 40 S. W. 831.

Insurance company's denial of liability on policy, though made to a third party, will operate as waiver of proofs of loss. *Merchants' Ins. Co. v. Nowlin* (Civ. App.) 56 S. W. 198.

Failure to furnish a magistrate's certificate of loss will not prevent recovery, where the same was not requested till suit was brought, 60 days after loss. *Ætna Ins. Co. v. Shacklett* (Civ. App.) 57 S. W. 583.

An insurer's denial of liability held a waiver of proofs of loss and of the insurer's right to 60 days within which to pay the same. *Connecticut Fire Ins. Co. v. Hilbrant* (Civ. App.) 73 S. W. 558.

Insurance company held to have waived proofs of loss. *Continental Fire Ins. Co. v. Cummings* (Civ. App.) 78 S. W. 378.

That plaintiff, at the time he demanded blanks for proofs of death from insurer, was not authorized to receive payment, did not prevent insurer's refusal of blanks from operating as a waiver of proofs of death. *Metropolitan Life Ins. Co. v. Gibbs*, 34 C. A. 131, 78 S. W. 398.

It is unnecessary for insured to prove furnishing of proofs of loss, where insurer refuses them, or would have ignored them. *Woodall v. Pacific Mut. Life Ins. Co.* (Civ. App.) 79 S. W. 1090.

Proofs of loss under a fire policy are waived, where the insurer denies its liability. *Scottish Union & National Ins. Co. v. Moore*, 36 C. A. 312, 81 S. W. 573.

A nonwaiver clause in a fire policy held not to apply after an adjustment of the loss has been made. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

Ignorance of insurer at the time of an adjustment under a fire policy of facts which might have defeated the claim of the policy held of no avail if the insurer might have known them and was not fraudulently prevented from learning them. *Id.*

An insurance company, on receipt of proof of death, held charged with notice of any discrepancies between the statements therein and those contained in the application. *Security Mut. Life Ins. Co. v. Calvert* (Civ. App.) 100 S. W. 1033.

Where insurer expressly denied liability, proof of loss was dispensed with. *Orient Ins. Co. v. Wingfield*, 49 C. A. 202, 108 S. W. 788.

Effect of insurer's refusal to pay certain sick benefits because the final proof indicated that insured had not been confined for the required period stated. *General Accident Ins. Co. v. Hayes*, 52 C. A. 272, 113 S. W. 990.

99. — **Fraud, false swearing or misstatement.**—False swearing to avoid a policy after loss must be willful. *Phoenix Ins. Co. v. Swann* (Civ. App.) 41 S. W. 519.

In order to make out a case of false swearing in making the proof of loss by fire, so as to affect the policy, the facts alleged to be false must have been known to have been such by the party swearing to them. *Phoenix Ins. Co. v. Shearman*, 17 C. A. 456, 43 S. W. 930.

Where the amount of fire policy is by statute made a liquidated demand in case of total loss, the liability of the insurer cannot be avoided by showing an excessive valuation in the proof of loss. *German Ins. Co. v. Jansen*, 18 C. A. 190, 45 S. W. 220.

Misstatement as to ownership of property in proof of loss held not fraudulent, so as to avoid policy. *Westchester Fire Ins. Co. v. Wagner*, 24 C. A. 140, 57 S. W. 876.

Misstatement in notice of accident and proof of death as to cause thereof held not to relieve the company from liability on an accident policy. *Continental Casualty Co. v. Jennings*, 45 C. A. 14, 99 S. W. 423.

100. — **Proofs of injury or loss.**—Where proofs of accident furnished showed injury and disability, it was only necessary for insured, in furnishing further proofs, to show continuance of disability. *Woodall v. Pacific Mut. Life Ins. Co.* (Civ. App.) 79 S. W. 1090.

Where a building insured was totally destroyed, it was immaterial that the proofs of loss were furnished by the mortgagee, to whom the policy was payable. *Hamburg-Bremen Fire Ins. Co. v. Ruddell*, 37 C. A. 30, 82 S. W. 826.

101. — **Notice of insufficiency.**—After proofs made under directions of insurer's agent, notice of insufficiency, without stating in what particular, is unavailing. *Merchants' Ins. Co. v. Reichman* (Civ. App.) 40 S. W. 831.

102. **Adjustment of loss.**—Neither party to a policy is concluded by an adjustment as to rights arising from facts not considered when an adjustment was made. The assignee of a policy is not bound by an adjustment of the loss with the assignor, the insurer having previous notice of the assignment. *Fire Ass'n of London v. Blum*, 63 T. 282.

An open policy is one in which the sum to be paid in case of loss is not fixed in the contract, but if left open to be proved by the claimant, or to be determined by the parties, and this determination is called an adjustment of the loss. *Fire Insurance Ass'n v. Miller*, 2 App. C. C. § 332.

A stipulation in a policy by which it is agreed that the amount of loss shall be determined by an appraisal, is valid, and if such appraisal be made a condition precedent to the bringing of a suit upon the policy it will be enforced. *Insurance Co. v. Clancy*, 83 T. 113, 18 S. W. 439; *Id.*, 71 T. 5, 8 S. W. 630; *American Cent. Ins. Co. v. Bass*, 90 T. 380, 38 S. W. 1119.

A disagreement merely as to the basis of determining the loss does not call an arbitration provision into force. *Virginia Fire & Marine Ins. Co. v. Cannon*, 18 C. A. 588, 45 S. W. 945.

The loss being total the question of appraisal cannot arise. *Ætna Ins. Co. v. Shacklett* (Civ. App.) 57 S. W. 583.

103. — **Demand of appraisal.**—A fire insurance policy construed, and held that, where the company did not demand an appraisal until more than 60 days after the loss and 3 weeks after receipt of proofs of loss, the demand was too late. *Lion Fire Ins. Co. v. Heath*, 29 C. A. 203, 68 S. W. 305.

Demand for appraisal of loss held too late, under terms of policy. *American Cent. Ins. Co. v. Heath*, 29 C. A. 445, 69 S. W. 235.

104. — **Waiver as to adjustment.**—Where the company accepts proofs of loss made by insurer, it waives the right to have the question of loss determined by arbitrators. *Virginia Fire & Marine Ins. Co. v. Cannon*, 18 C. A. 588, 45 S. W. 945.

Provision in policy requiring submission of amount of loss to appraisers held waived. *Springfield Fire & Marine Ins. Co. v. Cannon* (Civ. App.) 46 S. W. 375.

Where there is a tacit agreement between insurer and insured on all points except amount of loss, and proofs of loss are retained, it is a waiver of all points except manner of determining loss. *Hartford Fire Ins. Co. v. Cannon*, 19 C. A. 305, 46 S. W. 851.

Where an insurer fails to demand an appraisal within the time prescribed by the policy, it waives its right thereto. *American Cent. Ins. Co. v. Heath*, 29 C. A. 445, 69 S. W. 235.

Insurance company held to have waived its right to reappraisal of property injured in fire. *American Fire Ins. Co. v. Bell*, 33 C. A. 11, 75 S. W. 319.

105. — **Validity and effect of appraisal or award.**—Where policy provided for arbitration and award, and the award was invalid through no fault of the insured, an action on the policy could be maintained. *Phoenix Ins. Co. v. Moore* (Civ. App.) 46 S. W. 1131.

Where arbitrators gave no notice of the time and place of their meeting, and refused to permit a party to appear before them, the award was void. *Id.*

Appraisers held to have no authority to refuse to appraise property claimed by insured to have been destroyed. *American Fire Ins. Co. v. Bell*, 33 C. A. 11, 75 S. W. 319.

An arbitration award under fire policies held not inadmissible as not complying with the provisions under which arbitration was had. *Milwaukee Mechanics' Ins. Co. v. Froesch* (Civ. App.) 130 S. W. 600.

Under an agreement to arbitrate a fire loss, the award binds insurer; especially where the policy provides for arbitration on disagreement. *Id.*

106. — **Settlement between parties.**—A settlement of claim for insurance held without consideration; insurer's contention that the policy was void not being in good faith. *Northwestern Nat. Life Ins. Co. v. Blasingame*, 38 C. A. 402, 85 S. W. 819.

A settlement of a claim under a fire policy held not established, but insured could sue for the balance due. *Mecca Fire Ins. Co. v. Blohopolo* (Civ. App.) 141 S. W. 358.

107. — **Setting aside adjustment.**—An adjustment of a loss under a fire policy may be set aside on a showing that it was fraudulent or made through a mistake of fact. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1063.

108. **Right to proceeds.**—One having a beneficial interest in a policy may maintain an action on loss of property. *Allison v. Phoenix Assur. Co.*, 87 T. 593, 30 S. W. 547.

The fact that the custody of stepchildren has been taken from their stepmother after their father's death cannot defeat the recovery from her of their share in a life insurance policy. *Clausen v. Jones*, 18 C. A. 376, 45 S. W. 183.

The holder of a life insurance policy has the power to direct that his children shall share the proceeds thereof. *Id.*

In an action by the beneficiary of an insurance policy, the proceeds of which were claimed by the wife of the insured, under an agreement whereby the wife agreed to convey the homestead to enable the husband to purchase other incumbered property, the husband agreeing to take out sufficient insurance to pay the incumbrances, the carrying of insurance in favor of his estate and an only child, coher with the wife, constitutes a partial performance of the agreement, and where all of the husband's insurance amounts to more than the incumbrances, the wife cannot claim the proceeds of a policy of which another is a beneficiary. *Jones v. Jones* (Civ. App.) 146 S. W. 265.

109. — **Policy payable to creditor.**—Where a policy was payable to a creditor of insured as his interest might appear, otherwise to the executor, held that the company must show that insured was indebted to the creditor, if it justified on the ground of payment to him. *Andrews v. Union Cent. Life Ins. Co.*, 92 T. 584, 50 S. W. 572.

A creditor holding a policy payable to him as collateral, and who has paid the premiums thereon, in order to recover, need not show any assignment of it to him, as he is the absolute owner. *Andrews v. Union Cent. Life Ins. Co.*, 24 C. A. 425, 58 S. W. 1039.

Where a creditor insures his debtor's life as security, on the debtor's death the creditor can only recover the debt with interest at 6 per cent. and the premiums paid by him. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

110. — **Policy payable to mortgagee.**—Where policies are made payable to a mortgagee, the owner and the insurer cannot, without the mortgagee's consent, make any change in the policies that will affect its rights. *Pan Handle Nat. Bank v. Security Co.*, 18 C. A. 96, 44 S. W. 15.

A mortgagee held to have such an interest in the property as would entitle him to collect insurance money. *Id.*

Mortgagees of an intestate's property were not entitled to insurance money payable to them under the mortgage, where the intestate's administrator had restored the property to the condition it was in before the fire. *Huey v. Ewell*, 22 C. A. 638, 55 S. W. 606.

111. — **Trustee.**—A stepmother's conduct towards her stepchildren does not disqualify her to act as their trustee in the collection of their insurance money, as authorized by her deceased husband. *Clausen v. Jones*, 18 C. A. 376, 45 S. W. 183.

112. — **Remaindermen.**—Where a fire policy is payable to one having a life estate, in case of a loss the remaindermen are entitled to the excess over the value of the life estate. *Grant v. Buchanan*, 36 C. A. 334, 81 S. W. 820.

113. — **Assignment of claim.**—An assignment of a fire insurance policy after a loss has occurred will not vitiate the policy. *Merchants' Ins. Co. v. Scott*, 1 U. C. 534.

Where a fire policy by its terms was payable to a third person, insured could not, after the loss, assign his claim, so as to defeat the rights of the payees under the terms of the policy. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

A fire policy may be assigned orally after the loss. *Id.*

An assignment of a life policy held to give to the assignee an interest in the policy to the amount insured owed the assignee. *Smith v. Hesse* (Civ. App.) 134 S. W. 256.

An assignment of the proceeds of a fire insurance policy need not be accepted by the company's agent in order to become effective, if the company had notice of the assignment. *Prentice v. Security Ins. Co.* (Civ. App.) 153 S. W. 925.

An order by an insured requesting the local agents of a fire company to pay to defendant out of insured's policy the amount of a specified note for the sum named therein was drawn upon a specific fund so as to operate as an assignment thereof within the rule that an interest in a chose in action can only be assigned by an order drawn upon a specific fund. *Id.*

Since a fire policy, the proceeds of which were assigned by a written order, was nonnegotiable, no question of bona fide purchaser without notice could arise with respect to conflicting claimants; the rule that the first in time is the first in right obtaining. *Id.*

Where it was agreed when plaintiff sold land in consideration of an assignment of an interest in a fire policy that the deed should not be delivered to insured until

plaintiff received the proceeds of the policy, no question of innocent purchaser could arise as between plaintiff and another assignee of such proceeds. *Id.*

If the assignee of the proceeds of a fire policy had no knowledge of fraud by the insurance company in adjusting the loss with insured, another claimant to the proceeds could not rely upon fraud as against such assignee. *Id.*

An instruction which required a finding that all parties to a contract assigning an interest in an insurance policy must have agreed to its terms at the same time to make it effective was properly refused. *Id.*

114. Time for payment.—A stipulation that the insurer may have 60 days after proofs are made to pay the loss, etc., is waived by its unconditional refusal to pay. *E. T. Fire Ins. Co. v. Dyches*, 56 T. 565.

115. Election to repair or rebuild.—A stipulation in a policy for the right to rebuild in case of total loss is void. *Fire Association v. Brown* (Civ. App.) 33 S. W. 997; *Insurance Co. v. Levy*, 12 C. A. 45, 33 S. W. 992, 996.

An offer to repair a building incapable of being put in the same condition it was before the loss will not relieve the insurer from liability. *Northwestern Nat. Ins. Co. v. Woodward*, 18 C. A. 496, 45 S. W. 185.

Where the insurer was offered an opportunity to rebuild the house destroyed, and failed to do so, a plea that it offered to rebuild, and was refused permission to do so will not avail it. *Id.*

116. Release.—A release procured by an insurance adjuster of a claim on a life policy, by fraudulently representing that the policy was void because not having been delivered in the good health of the insured, would not be binding. *Northwestern Life Ass'n v. Findley*, 29 C. A. 494, 68 S. W. 695.

That insured, injured through the negligence of his employer, settled with the latter and released it from liability, held not a defense to an action for accident insurance. *Ætna Life Ins. Co. v. J. B. Parker & Co.*, 30 C. A. 521, 72 S. W. 621.

In an action to recover the balance due on a life insurance policy, evidence held not to conclusively show a valuable consideration for a release of her claim executed by plaintiff. *Metropolitan Life Ins. Co. v. Lennox*, 103 T. 133, 124 S. W. 623.

117. Subrogation of insurer.—After the delivery of the bill of lading by a carrier, the shipper insured the cotton covered by it. The bill of lading stipulated that in case of loss the carrier should have the benefit of any insurance. The cotton was destroyed in transitu, and the policy was paid to the shipper, who transferred to the insurance company his claim against the carrier. Held, that the insurance company acquired thereby no rights against the carrier. *B. & F. M. Ins. Co. v. G., C. & S. F. Ry. Co.*, 63 T. 475, 51 Am. Rep. 661.

A clause in a bill of lading that the carrier shall have the full benefit of insurance is not void. An open policy which stipulates that "this insurance shall not inure to benefit of carrier" is not void as in restraint of trade. *Insurance Co. v. Easton*, 73 T. 167, 11 S. W. 180, 3 L. R. A. 424.

An action cannot be maintained by the insured against an insurance company when by inconsistent stipulations with the carrier he has defeated the insurer's right of subrogation. In case of such inconsistent stipulations a payment by the insurance company is voluntary, and no subrogation would follow from such payment against the carrier. *Railway Co. v. Insurance Co.*, 84 T. 149, 19 S. W. 459.

Where an insurance policy stipulated that the company, on paying any loss to the mortgagee on which it denied liability to the owner, should be subrogated to the mortgagee's right, held a judgment in a mortgagee's favor should decree subrogation. *Alamo Fire Ins. Co. v. Davis*, 25 C. A. 342, 60 S. W. 802.

An insurer against accidental injury held not subrogated to the rights of assured, injured through the negligence of a third party to recover damages for such negligence. *Ætna Life Ins. Co. v. J. B. Parker & Co.*, 96 T. 237, 72 S. W. 168.

The right of subrogation given to an insurer issuing a fire policy held a valuable right and material to the risk. *Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co.*, 50 C. A. 172, 109 S. W. 1134.

An insurer of property destroyed by fire set by a railroad company held not entitled to recover from the company therefor. *Spring Garden Ins. Co. v. International & G. N. R. Co.* (Civ. App.) 131 S. W. 1147.

118. Interest.—A stipulation that no claim shall bear interest until judicial demand is valid. *Insurance Co. v. Lacroix*, 45 T. 153; *Id.*, 35 T. 249, 14 Am. Rep. 370.

When the policy provides that it shall be paid within 60 days after proof of loss, interest does not run until the expiration of that time. *Queen Ins. Co. v. Jefferson Ice Co.*, 64 T. 578.

119. Conditions precedent to action on policy.—A provision in a policy of insurance on the homestead that in case of garnishment payment shall not be required until garnishment is disposed of is void. *Insurance Co. v. Chase*, 11 C. A. 13, 31 S. W. 1103.

An insurance company, in a suit on a policy, could not complain that plaintiffs had failed to return money paid to them in pursuance of an invalid agreement of release, where the money so paid was credited on the amount recovered. *Northwestern Life Ass'n v. Findley*, 29 C. A. 494, 68 S. W. 695.

120. Limitations by provisions of policy.—See notes under Art. 5714.

121. Defenses in general.—In an action on a fire policy payable to plaintiff, the fact that insured, plaintiff's debtor, obtained from the clerk of the court the premium which had been paid for the policy, held not to affect plaintiff's right to prosecute the action. *German Ins. Co. v. Gibbs, Wilson & Co.*, 42 C. A. 407, 92 S. W. 1068.

In an action by insured's executor on certain life policies, it was no defense that the insurer had paid the proceeds to an assignee under an assignment for moneys advanced, to be used by insured in gambling transactions in cotton futures. *Manhattan Life Ins. Co. v. Cohen* (Civ. App.) 139 S. W. 51.

Insurer having paid the proceeds of policies to an assignee having no insurable interest, with notice of his adverse claim against the insured's estate, held not entitled to justify the payment on the theory that the assignee received the money in trust for those equitably entitled thereto. *Id.*

122. **Defense available against mortgagee.**—Where a fire policy was issued, payable to a mortgagee as his interest might appear, any defense available against the insured was available against the mortgagee. *Hamburg-Bremen Fire Ins. Co. v. Ruddell*, 37 C. A. 36, 82 S. W. 826.

123. **Judgment on policy payable in installments.**—Where a policy was payable in 10 annual installments unless insured should file a written consent to have the same paid at his death, a judgment on the policy in the absence of such consent, requiring payment of the face value of the policy, was error. *New York Life Ins. Co. v. English* (Civ. App.) 70 S. W. 440.

A refusal of a life insurance company to pay the first installment of policy payable in annual installments held not to authorize judgment against it for the whole amount. *New York Life Ins. Co. v. English*, 96 T. 268, 72 S. W. 58.

124. **Reinsurance.**—Where an insurance company which contracted to reinsure the risks of another company expressly restricted its liability to claims arising by reason of death, held, it was not liable upon a cash surrender value provision of a policy. *Mutual Reserve Fund Life Ass'n v. Green* (Civ. App.) 109 S. W. 1131.

125. **Recovery of payment.**—An insurance company that has paid a policy obtained by fraud in ignorance of that fact is entitled to recover the sum paid. *Life Ass'n v. Parham*, 80 T. 518, 16 S. W. 316.

An insurance company held not entitled to recover back money paid because of a mistake due to its ignorance of facts. *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

A marine insurer, which expended money in salvaging a sunken vessel, held entitled to recover back such expenditures, it appearing that it was not liable under the policy. *Mannheim Ins. Co. v. Charles Clarke & Co.* (Civ. App.) 157 S. W. 291.

TITLE 72

INTEREST

Art.	Art.
4973. Definition of interest.	4979. Ten per cent may be stipulated for.
4974. Legal interest.	4980. Contracts for a greater rate than ten per cent void.
4975. Conventional interest.	4981. Judgments to bear six per cent when not otherwise stipulated.
4976. Distinction between the two.	4982. Double the amount of usurious interest recovered, when.
4977. Six per cent in absence of agreement.	4983. Usury, how pleaded.
4978. Six per cent on open accounts where no rate is agreed upon.	

Article 4973. [3097] Definition of "interest."—"Interest" is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money.

See Depositaries.

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| 1. "Interest." | 19. Judgments on liquor dealers' bonds. |
| 2, 3. Interest as damages—Indemnity for loss or injury. | 20. Interest on insurance, dividends and premiums. |
| 4. — Breach of contract. | 21. Interest on costs. |
| 5. — Breach of warranty. | 22. Interest on advances. |
| 6. — Breach of trust. | 23. Interest on mechanic's lien claims. |
| 7. — Negligence. | 24. Interest on claims against insolvent. |
| 8. — Wrongful seizure under attachment. | 25. Interest on note. |
| 9. — Conversion. | 26. Interest on purchase price. |
| 10. — Claim against carrier. | 27. Interest on wages. |
| 11. — Rate and computation. | 28. Interest on rent. |
| 12. — Destruction of property. | 29. Interest on amount of mortgage foreclosure bid. |
| 13. — Discretion of court. | 30. Interest on amount found due on accounting. |
| 14. Detention of money. | 31. Interest on claim of partner. |
| 15. Money paid by mistake. | 32. Tender of principal or interest. |
| 16. Interest on recovery of money paid. | 33. Collection of interest. |
| 17. Taxes and tax judgments in general. | 34. Recovery of interest paid. |
| 18. — Occupation taxes. | |

1. "Interest."—A commission paid a broker to secure a loan upon the borrower's homestead is not interest, and cannot be collected as such. *James v. Chaney* (Civ. App.) 154 S. W. 679.

2, 3. Interest as damages—Indemnity for loss or injury.—When the injured party is entitled to indemnity for loss or injury. *H. & T. C. Ry. Co. v. Jackson*, 62 T. 209; *Willis v. Whitsitt*, 67 T. 673, 4 S. W. 253; *Heidenheimer v. Ellis*, 67 T. 427, 3 S. W. 666.

Interest will not be allowed from date of an injury to date of judgment as part of the damages. *T. & N. O. R. Co. v. Carr*, 91 T. 332, 43 S. W. 18.

4. — Breach of contract.—On breach of contract to deliver personal property when purchase money has been paid. *Calvit v. McFadden*, 13 T. 324; *Masterson v. Goodlett*, 46 T. 403; *Heilbronner v. Douglass*, 45 T. 406.

In action for breach of contract to accept certain sawlogs sold, plaintiff was not entitled to recover for interest on notes of defendant and the cost of idle time. *Sabine Tram Co. v. Jones* (Civ. App.) 43 S. W. 905.

In an action by the purchaser of an ice machine against the seller for failure to deliver, plaintiff held not precluded from recovering interest on sum spent by him in preparing his building for the reception of the machine. *Fred W. Wolf Co. v. Galbraith* (Civ. App.) 94 S. W. 1100.

The measure of damages in cases where a purchaser refuses to receive property contracted for is ordinarily the difference between the contract price and the market value at the time and place of delivery, with interest. *Texas & Louisiana Lumber Co. v. Rose* (Civ. App.) 103 S. W. 444.

Where plaintiff failed to deliver certain hogs as required by a contract for the sale of improvements on land, defendant's measure of damages was the value of the hogs at the time they should have been delivered with interest to the date of the trial at 6 per cent. *Taylor v. McFatter* (Civ. App.) 109 S. W. 395.

Where plaintiff was entitled, as damages for breach of contract, to a much larger sum than the amount he owed defendant, interest on the amount due defendant was properly disallowed. *Kirby Lumber Co. v. C. R. Cummings & Co.*, 57 C. A. 291, 122 S. W. 273.

Interest is recoverable in an action for breach of a verbal contract, though not stipulated for in the contract. *Wells v. Hobbs*, 57 C. A. 375, 122 S. W. 451.

In action for the contract price of building a party wall, held that interest on the amount of recovery could be allowed only from the date of substantial performance. *Stude v. Koehler* (Civ. App.) 138 S. W. 193.

In an action by a street improvement contractor for a balance due on a contract for improvement, the city held liable for interest. *City of Beaumont v. Masterson* (Civ. App.) 142 S. W. 984.

In an action for breach of defendant's contract to relieve two lots from a mortgage, in consideration of a conveyance of one of them, plaintiff's measure of damages was the value of the lot retained by her at the time it was sold under the mortgage, with interest at 6 per cent. *Green v. Gregory* (Civ. App.) 142 S. W. 999.

5. — **Breach of warranty.**—On breach of warranty in sale of chattels. *Anderson v. Duffield*, 8 T. 237; *Scranton v. Tilley*, 16 T. 183; *Anding v. Perkins*, 29 T. 348.

On breach of warranty in sale of land. *Turner v. Miller*, 42 T. 418, 19 Am. Rep. 47; *Glenn v. Mathews*, 44 T. 400. See *Brown v. Hearon*, 66 T. 63, 17 S. W. 395.

In an action for breach of warranty, interest is allowed upon difference between actual worth and what article would have been worth if as represented. *Ash v. Beck* (Civ. App.) 68 S. W. 53.

Where title to land sold with a warranty failed, and the warrantee was liable for rent for the land from the time of judgment of eviction, interest from that time on the damages recovered against his warrantor was properly allowed. *Mayer & Schmidt v. Wooten*, 46 C. A. 327, 102 S. W. 423.

6. — **Breach of trust.**—On failure of a trustee to invest funds. *Murchison v. Payne*, 37 T. 305.

A trustee to loan money held not liable to his cestui que trust for interest, except so far as received from the money loaned. *Watson v. Dodson* (Civ. App.) 143 S. W. 329.

7. — **Negligence.**—Rule as to interest as an element of damage, in an action for negligence, denied. *Western Union Tel. Co. v. Garner* (Civ. App.) 83 S. W. 433.

8. — **Wrongful seizure under attachment.**—Interest is allowed as damages in an action for the wrongful seizure of personal property under an attachment. *Evans v. Reeves*, 26 S. W. 219, 6 C. A. 254.

9. — **Conversion.**—On conversion of personal property. *Grimes v. Watkins*, 59 T. 140; *Hudson v. Wilkinson*, 61 T. 610; *Muse v. Burns*, 3 App. C. C. § 76. *Com. & Agri. Bank v. Jones*, 18 T. 811; *Close v. Fields*, 13 T. 623; *Timon v. San Patricio County*, 58 T. 263.

In a suit to recover damages for the wrongful seizure and conversion of plaintiff's goods under attachment, the measure of actual damages is the value of the goods, with legal interest by way of damages from the date of their unlawful seizure. *Willis v. Whittitt*, 67 T. 673, 4 S. W. 253.

In conversion, where plaintiff asks merely a specified sum actual damages, interest from the conversion is not recoverable. *Sanger v. Thomasson* (Civ. App.) 44 S. W. 408.

Where the property of a taxpayer is acquired by a city under invalid proceedings and sold to a third person, the taxpayer is entitled to interest on the value of the property from the date of its sale by the city. *City of Houston v. Walsh*, 27 C. A. 121, 66 S. W. 106.

Damages for conversion of cattle held to be their value at the time of conversion, with interest. *Daugherty v. Lady* (Civ. App.) 73 S. W. 837.

Interest on recovery in action against assignee for benefit of creditors for appropriation to himself of property belonging to estate held to run from the date of rendition of judgment. *McCord v. Nabours*, 101 T. 494, 109 S. W. 913.

Under the facts plaintiff held not entitled to recover interest as damages for defendant's conversion of a note. *Morris v. Smith*, 51 C. A. 357, 112 S. W. 130.

The general measure of damages for conversion of property is its market value at the time and place of conversion, with legal interest. *Texarkana & Ft. S. Ry. Co. v. Neches Iron Works*, 57 C. A. 249, 122 S. W. 64.

Under the facts, held a garnishee was liable for interest, as having appropriated the money. *City of San Antonio v. Stevens* (Civ. App.) 126 S. W. 666.

The measure of damages for the conversion of building materials is the value thereof, and legal interest from the date of the conversion. *Baldwin v. G. M. Davidson & Co.* (Civ. App.) 127 S. W. 562.

In an action for the conversion of mortgaged personal property, held, that interest might be awarded as damages. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

The measure of damages for the conversion of personal property is the value of the property converted with legal interest from the date of the conversion. *First Nat. Bank v. Mineola State Bank* (Civ. App.) 155 S. W. 603.

10. — **Claim against carrier.**—On failure of a carrier to transport and deliver property. *H. & T. C. Ry. Co. v. Jackson*, 62 T. 209; *Fowler v. Davenport*, 21 T. 635; *Wolfe v. Lacy*, 30 T. 350. But a contrary rule is stated in *T. & P. Ry. Co. v. Wright*, 2 App. C. C. § 341; *T. & P. Ry. Co. v. Martin*, 2 App. C. C. § 343; *T. & P. Ry. Co. v. Davis*, 2 App. C. C. § 196; *T. & P. Ry. Co. v. Ferguson*, 1 App. C. C. § 1253.

In an action against a carrier for damages to a shipment of cattle, the interest allowed is allowed as damages, and not as interest. *St. Louis Southwestern Ry. Co. of Texas v. Dolan* (Civ. App.) 84 S. W. 393.

A shipper held not entitled to interest on the recovery before judgment. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards* (Civ. App.) 86 S. W. 47.

In action against carrier for breach of contract to furnish cars, interest held not allowable as part of damages. *Texas & P. Ry. Co. v. W. Scott & Co.* (Civ. App.) 86 S. W. 1065.

Instructing the jury, in an action for injury to a live stock shipment, if they find for plaintiff, to allow him interest from the date of the injury on the amount they find held proper where the petition claims such interest. *Ft. Worth & R. G. Ry. Co. v. Montgomery* (Civ. App.) 141 S. W. 813.

11. — **Rate and computation.**—When a party is entitled to recover damages for the wrongful destruction of his property, interest on its value should be allowed from the date of its destruction. *Railway Co. v. Tankersley*, 63 T. 57; *Heidenheimer v. Ellis*, 67 T. 427, 3 S. W. 666.

Plaintiff was entitled to interest on the damages sustained from defective quality of goods shipped, from the time he received the goods. *Connor v. S. Blaisdell, Jr., Co.* (Civ. App.) 60 S. W. 890.

Where the 12 per cent. statutory damages are included in the judgment, the whole judgment bears 6 per cent. interest as is provided in Art. 4981. *Mut. Reserve Life Ins. Co. v. Jay*, 50 C. A. 165, 109 S. W. 1120.

Timber owner held entitled to interest on the value of logs lost from date when they would have reached their intended destination but for the obstruction in the stream. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 149 S. W. 358.

12. — Destruction of property.—Interest is allowed on the value of crops destroyed by the wrongful act of the defendant. *Railway Co. v. Dunlap* (Civ. App.) 26 S. W. 655; *Trinity & B. V. Ry. Co. v. Doke*, 152 S. W. 1174.

Interest on value of animal killed by train is recoverable. *Gulf, C. & S. F. Ry. Co. v. Wedel* (Civ. App.) 42 S. W. 1030.

Interest at 6 per cent. on the value of animals killed at a railway crossing, computed from the date of the killing, may be allowed. *Texas & P. Ry. Co. v. Scrivener* (Civ. App.) 49 S. W. 649.

In an action for damages for a horse killed by a railroad, interest cannot be recovered upon the value of the horse from the date of the killing. *International & G. N. R. Co. v. Barton* (Civ. App.) 54 S. W. 797; *Galveston, H. & S. A. Ry. Co. v. Vaughan* (Civ. App.) 54 S. W. 1055.

One who recovers for damages to his barn by a fire set by engine is entitled to interest thereon from the loss. *Gulf, C. & S. F. Ry. Co. v. Sheperd* (Civ. App.) 76 S. W. 800.

In an action against a railroad company for killing plaintiff's mule, plaintiff held not entitled to recover interest on the value of the mule from the time of the injury to the time of the trial. *St. Louis Southwestern Ry. Co. of Texas v. Guthrie* (Civ. App.) 103 S. W. 211.

One suing for the negligent destruction of property by fire may recover interest from the date of the loss. *Steger v. Barrett* (Civ. App.) 124 S. W. 174.

A percentage of the value of the property, claimed as interest in an action for damages, is in fact part of the damages and not interest *eo nomine*. *Rotan Grocery Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 142 S. W. 623.

In a statutory action for the killing of animals, an instruction to award plaintiff such sum as, if paid in cash at the time of trial, would compensate him for his loss, held erroneous, in that under the instruction interest might have been awarded. *Ft. Worth & R. G. Ry. Co. v. Chisholm* (Civ. App.) 146 S. W. 988.

In a statutory action for the killing of animals, interest cannot be awarded as compensation. *Id.*

13. — Discretion of court.—When interest is recoverable as damages it rests within the discretion of the jury under proper instructions. *Heidenheimer v. Ellis*, 67 T. 427, 3 S. W. 666.

14. Detention of money.—See *Com. & Agri. Bank v. Jones*, 18 T. 811; *Close v. Fields*, 13 T. 623; *Timon v. San Patricio County*, 58 T. 263.

An agreement to pay more than the legal rate of interest for the detention of money after the date of the maturity of the note, is void. *Parks v. Lubbock*, 92 T. 635, 51 S. W. 322.

When party entitled to interest for the detention of the money to which he is entitled by reason of the wrong done him. *Watkins v. Junker*, 90 T. 584, 40 S. W. 11.

County treasurer held entitled to interest on commissions wrongfully withheld by county, though it, with the commissions, exceeds the limit of his compensation for a year authorized by statute. *Presidio County v. Walker*, 29 C. A. 609, 69 S. W. 97.

15. Money paid by mistake.—On money paid by mistake. *Fisk v. Holden*, 17 T. 408; *Akin v. Jefferson*, 65 T. 141; *Railway Co. v. Greathouse*, 82 T. 104, 17 S. W. 834; *Porter v. Russek* (Civ. App.) 29 S. W. 72.

16. Interest on recovery of money paid.—A purchaser at a sale under an invalid execution which has been set aside can recover back the money paid for the benefit of the defendant, and interest. And he can recover legal interest only, although the judgment may bear interest at a greater rate. *Burns v. Ledbetter*, 56 T. 282.

In action to set aside contract for sale of land and to recover same, held not error to allow interest on sums paid on contract. *Slaughter v. Coke County*, 34 C. A. 596, 79 S. W. 863.

17. Taxes and tax judgments in general.—Interest is not recoverable on taxes in absence of statute so providing. *Cave v. City of Houston*, 65 T. 619.

Taxes are distinguishable from ordinary debts as to bearing interest; and where an action is given for taxes, interest is not recoverable unless the statute gives it. *Telegraph Co. v. State*, 55 T. 314; *Heller v. City of Alvarado*, 1 C. A. 409, 20 S. W. 1003.

Interest on a judgment for taxes is properly disallowed where the purchaser at the sale was tendered the money the next day, and he refused it. *Moore v. Perry* (Civ. App.) 46 S. W. 878.

18. — Occupation taxes.—See note under Art. 932.

19. Judgments on liquor dealers' bonds.—This article, construed in connection with Art. 4981 and the case of *Johnson v. Rolls*, 97 T. 453, 79 S. W. 513, does not apply to judgments recovered for breaches of conditions of liquor dealer's bond. *Hawthorne v. State*, 39 C. A. 122, 87 S. W. 840.

The judgment on a retail liquor dealer's bond, being in effect one to recover penalties, held it should not allow interest. *White v. Manning*, 46 C. A. 298, 102 S. W. 1160.

Where a judgment was recovered on a liquor dealer's bond, conditioned upon his keeping a quiet and orderly house, the allowance of interest at 6 per cent. on the recovery was erroneous. *Adams v. State* (Civ. App.) 146 S. W. 1086.

20. Interest on insurance, dividends and premiums.—An insurance company which has been subrogated to the rights of insured, by payment of the loss and assignment of insured's right of action for damages, is entitled to interest on the amount of loss paid from the time of payment. *Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co.*, 17 C. A. 498, 44 S. W. 533.

A tontine dividend, becoming by the terms of a policy a part thereof, does not bear interest. *Stevens v. Germania Life Ins. Co.*, 26 C. A. 156, 62 S. W. 824.

An assignee of an insurance policy paying premiums thereon held entitled to recover interest from the time of payment to the date of judgment. *Id.*

Interest held properly assessed against a life insurance company on the amount of a policy from the time proof of death was received by it until the money was tendered into court, but improperly allowed up to the time of trial. *Southwestern Ins. Co. v. Woods Nat. Bank (Civ. App.)* 107 S. W. 114.

In an action on a contract to renew a fire policy, interest held to run from the date of the denial by insurer of liability. *Orient Ins. Co. v. Wingfield*, 49 C. A. 202, 108 S. W. 788.

Interest on the amount due on an insurance policy will begin to run at the expiration of the time given it in the policy in which to pay the amount of the loss. *Mecca Fire Ins. Co. of Waco v. Wilderspin (Civ. App.)* 118 S. W. 1131.

The amount of a loss under a fire policy held not to draw interest, until after 60 days from receipt of proof of loss. *Hamburg-Bremen Fire Ins. Co. v. Swift (Civ. App.)* 130 S. W. 670.

21. **Interest on costs.**—Interest is not allowable on costs, except where they have been actually paid. *Ghent v. Boyd*, 18 C. A. 88, 43 S. W. 891.

A receiver's compensation is classed as court costs, upon which no interest is allowable. *Jones v. United States & Mexican Trust Co.*, 47 C. A. 430, 105 S. W. 328.

22. **Interest on advances.**—Cotton factors, who have cotton on storage, are entitled to interest on advancement up to the time when they should have sold the cotton. *Willis et al. v. Thacker*, 20 C. A. 233, 49 S. W. 128.

Where defendants drew drafts on plaintiff in San Antonio, payable in Boston, with exchange, for advances, defendants were not entitled to charge interest on the advances until they received notice of payment of the drafts. *D. Sullivan & Co. v. Owens (Civ. App.)* 78 S. W. 373.

A factor purchasing cotton for bankrupts with his own funds, held entitled to interest on the amount advanced. *Couturie v. Roensch (Civ. App.)* 134 S. W. 413.

23. **Interest on mechanic's lien claims.**—An owner, admitting at all times his liability in a specified sum to mechanic's lien claimants and holding the sum subject to the court's order, is not liable for interest thereon. *Fall v. Nichols*, 43 C. A. 582, 97 S. W. 145.

24. **Interest on claims against insolvent.**—Where a mortgage provided that in case of default in the payment of interest the mortgage debt should thereafter bear interest at 10 per cent., and the mortgaged premises were destroyed by fire, which rendered the mortgagor insolvent, the mortgagee held entitled to 10 per cent. from the time of default. *Pan Handle Nat. Bank v. Security Co. (Civ. App.)* 61 S. W. 731.

Interest is not allowable on claims against funds in the hands of a receiver or assignee in insolvency, especially claims for fees and costs. *Jones v. United States & Mexican Trust Co.*, 47 C. A. 430, 105 S. W. 328.

The appointment of a receiver on insolvency held not to stop interest on notes secured by liens which specially provided for interest to the time of payment, and interest is payable to that time, so far as possible out of the security, but is payable out of the general fund only up to the appointment of the receiver, unless there is a surplus. *First Nat. Bank of Houston v. J. I. Campbell Co.*, 52 C. A. 445, 114 S. W. 887.

After the property of an insolvent passes into the hands of a receiver or an assignee in insolvency, interest is not allowed on the claims against the fund. *Atlanta Nat. Bank v. Four States Grocer Co. (Civ. App.)* 135 S. W. 1135.

25. **Interest on note.**—Interest held recoverable on the amount of a note, notwithstanding a set-off. *Wentworth v. King (Civ. App.)* 49 S. W. 696.

Interest contracted for in a note is a part of the debt in the same manner as the principal. *First Nat. Bank of Houston v. J. I. Campbell Co.*, 52 C. A. 445, 114 S. W. 887.

Where a vendor accepted the note of the vendee for part of the purchase price, and by a separate agreement declared without value the consideration named in the note concerning the interest, this relinquished the right to interest before maturity only. *Ball v. Belden (Civ. App.)* 126 S. W. 20.

Where parties purchased land agreeing to assume the payment of a note given by a prior grantee under whom they claim as part of the purchase price, they cannot escape payment of interest on the note because the original vendor to whom the note was given had been abroad for a long time. *Id.*

Where, in action on a note bearing no interest, defendant pleaded and proved a counterclaim for more than the amount of the note, plaintiff could not recover interest after suit brought. *Coutourie v. Roensch (Civ. App.)* 134 S. W. 413.

Notes construed, and statement that interest is "payable as it accrues" held to mean payable annually. *O'Shields v. Poff (Civ. App.)* 144 S. W. 1044.

26. **Interest on purchase price.**—Interest held to attach as an incident on failure of party to pay for goods at time of delivery in conformity to contract. *Howard v. Emerson (Civ. App.)* 65 S. W. 382.

A contract for the manufacture and sale of machines held not to entitle the seller to interest on the price, unless the machines were ready for delivery. *Reagan Round Bale Co. v. Dickson Car Wheel Co.*, 55 C. A. 509, 121 S. W. 526.

Each item of shipments of lumber held liable to interest on delayed payments. *Missouri, K. & T. Ry. Co. v. William Cameron Co. (Civ. App.)* 136 S. W. 74.

27. **Interest on wages.**—Plaintiff's right to recover interest on recovering wages for several months stated. *O'Connell v. Storey (Civ. App.)* 105 S. W. 1174.

28. **Interest on rent.**—Where a landlord is allowed interest on his claim against his tenant, held the tenant should be allowed interest on his offset. *Morrow v. Camp (Civ. App.)* 101 S. W. 819; *Allen v. Same, Id.*

A landlord held not entitled to interest on rent, not tendered by the tenant. *Sanborn v. E. R. Roach Drug Co. (Civ. App.)* 137 S. W. 182.

29. **Interest on amount of mortgage foreclosure bid.**—Officers and members of a church, who take assignment of mortgage, and bid in in their own name in foreclosure, held entitled to interest. *Fort v. First Baptist Church (Civ. App.)* 55 S. W. 402.

30. Interest on amount found due on accounting.—Interest on the amount found due in an accounting cannot be allowed for the time the entire funds were on deposit in a bank to abide the result of the accounting. *Gresham v. Harcourt* (Civ. App.) 50 S. W. 1058.

31. Interest on claim of partner.—Sums due by one partner to another do not bear interest until after a settlement, but if the parties agree that interest shall be paid, such agreement shall govern. *McKay v. Overton*, 65 T. 82.

Interest may be allowed on the sum due to a partner before a partnership accounting, where the sum is withheld after due, and accounting prevented by the misconduct of the other partner. *Corralitos Co. v. Mackay*, 31 C. A. 316, 72 S. W. 624.

Under a partnership agreement, a partner owning the real estate used by the partnership held not entitled to interest on the amount so invested. *Hatzfeld v. Walsh*, 55 C. A. 573, 120 S. W. 525.

32. Tender of principal or interest.—In a suit against an administrator he may save interest by tendering into court the money remaining in his hands; but if he resists the proceedings of one entitled thereto, it is proper to charge him with interest from the time the money should have been paid over, or demand made. *Simpson v. Knox*, 1 U. C. 569.

Where a sheriff, wrongfully claiming to withhold fees for money in his hands received from the sale of land for delinquent taxes, makes a tender of the balance, held not to relieve him from interest. *City of San Antonio v. Campbell* (Civ. App.) 56 S. W. 130.

Tender of payment at a bank where a note was payable, before maturity, held not to constitute a valid tender, nor stop the running of interest. *Kelly v. Collins* (Civ. App.) 56 S. W. 997.

A tender of interest held insufficient in amount, justifying the creditor in refusing it and electing to call for the principal. *Schwantowsky v. Dykowsky* (Civ. App.) 132 S. W. 373, 377.

Where a pledgor claimed a conversion of collaterals by the pledgee, and did not tender the balance of the debt, the pledgee was entitled to recover interest on such balance to the time of the trial. *Oriental Bank of New York v. Western Bank & Trust Co.* (Civ. App.) 143 S. W. 1176.

Where a judgment against a city on city warrants drew interest, a tender by the city on condition that no interest could be exacted was insufficient to relieve it from liability for interest. *City of San Antonio v. Alamo Nat. Bank* (Civ. App.) 155 S. W. 620.

33. Collection of interest.—Interest is as much a part of the judgment as the principal, and its collection is enforced by the same means. *Jones v. United States & Mexican Trust Co.*, 47 C. A. 430, 105 S. W. 323.

The remedy for the error in computing interest accrued on a demand or otherwise, so that the judgment is rendered for an excessive sum, is by appeal or certiorari, and not by injunction. *Kansas City Life Ins. Co. v. Warbington* (Civ. App.) 113 S. W. 938.

34. Recovery of interest paid.—In an action for alleged overcharges of interest, plaintiff held not entitled to recover an overcharge of interest after the payment of the advances, not pleaded. *D. Sullivan & Co. v. Owens* (Civ. App.) 78 S. W. 373.

Art. 4974. [3098] "Legal interest."—"Legal interest" is that interest which is allowed by law when the parties to a contract have not agreed upon any particular rate of interest.

What law governs.—Interest, when not expressly stipulated, is payable according to the law of the place where the contract was made, unless payment is to be made at a different place, the law of which will then govern. *Andrews v. Hoxie*, 5 T. 171; *Able v. McMurray*, 10 T. 350.

A note executed in another state, not stipulating the rate, will bear interest at the rate prescribed in Texas, in absence of proof of the legal rate in such state. *Henry v. Roe*, 83 T. 446, 18 S. W. 806.

Interest on a contract executed in another state and to be performed in this state is to be computed according to the law of this state in the absence of a stipulation as to the rate. *Byers v. Brannon* (Civ. App.) 30 S. W. 492.

Interest anterior to date.—A contract may stipulate for interest anterior to its date, if actually due. *Andrews v. Hoxie*, 5 T. 171.

Current statutory interest.—Current statutory interest is governed by the rates in force from time to time. *Ellis v. Barlow* (Civ. App.) 26 S. W. 908.

One paying the note of another by contract is not subrogated to the rights of the payee, and can only recover the amount paid by him with legal interest. *Halbert v. Paddleford* (Civ. App.) 33 S. W. 592; *Id.* (Civ. App.) 33 S. W. 1092.

Liability of guardian for.—See Art. 4150.

Reduction of rate on ward's debts.—See Art. 4172.

Interest on purchase price.—Where the jury find for plaintiff in an action for the purchase price of goods, he is entitled to legal interest from the date of sale. *Schuwirth v. Thumma* (Civ. App.) 66 S. W. 691.

Interest on county warrants.—County warrants, which are silent as to interest and specify no time of payment, do not bear interest. *Ashe v. Harris County*, 55 T. 49.

Interest on claim for paving.—A street railroad company, contracting to pay for paving between the rails, must pay only the legal rate of interest on balance due. *Houston City St. Ry. Co. v. Storrle* (Civ. App.) 44 S. W. 693.

Interest on note.—Where wrongful garnishment merely delayed collection of a note, interest is recoverable at the legal rate for the time during which collection is prevented. *Foster v. Bennett* (Civ. App.) 152 S. W. 233.

Effect of change of legal rate.—How interest, as compensation for detention of money recoverable, is computed, when there has been a change in the legal rate. *Watkins v. Junker*, 90 T. 584, 40 S. W. 11.

Art. 4975. [3099] "Conventional interest."—"Conventional interest" is that interest which is agreed upon and fixed by the parties to a written contract, not to exceed ten per cent per annum.

Rate of interest on city's indebtedness.—See Art. 876.

Municipal bonds.—See Art. 612.

Road bonds.—See Art. 632.

Interest on sum lost through wrongful garnishment.—Where wrongful garnishment results in entire loss of a note, interest is recoverable at the contract rate. *Foster v. Bennett* (Civ. App.) 152 S. W. 233.

Consideration for interest agreement.—Where plaintiff was liable under an original building and loan contract only for the principal, less payments made, because of usury, a second contract purging the original of usury held not void as to the interest for want of consideration. *Cotton State Bldg. Co. v. Jones*, 94 T 497, 62 S. W. 741.

Increase or reduction of rate.—Surrender of a debtor's right to extinguish the debt at once, and his agreement to pay interest thereafter, held a sufficient consideration for the creditor's agreement to reduce the rate of interest. *Delta County v. Blackburn* (Civ. App.) 90 S. W. 902.

In an action involving the extension of a note secured by a deed of trust at a greater rate of interest, evidence held to sustain a finding that the loan was extended upon an increased rate of interest. *Boyles v. Byers* (Civ. App.) 138 S. W. 1112.

One who purchased lumber and assumed certain purchase-money notes of the seller, secured by lien was only liable on the notes for the amount thereof, together with the 10 per cent. interest stipulated therein which had accrued to the date of the judgment in favor of the seller, and 6 per cent. interest on such aggregate amount, instead of 10 per cent., the interest stipulated in the notes. *Continental State Bank of Beckville v. Trabue* (Civ. App.) 150 S. W. 209.

Art. 4976. [3100] Distinction between legal and conventional recognized by law.—The distinction between legal and conventional interest shall be known and recognized by the laws of this state. [Act Jan. 18, 1840. P. D. 3939.]

Art. 4977. [3101] Six per cent the legal rate.—On all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties to the contract, interest shall be allowed at the rate of six per cent per annum from and after the time when the sum is due and payable. [Acts 1892, S. S., pp. 4, 5.]

"Ascertaining the sum payable."—Under this article and Const. art. 5, § 16, which declares that county courts shall have concurrent jurisdiction with district courts when a matter in controversy does not exceed \$1,000, exclusive of interest, held, that where a petition in an action in a county court alleged that plaintiff purchased land of defendant and paid \$1,000 as earnest money, and that under the contract, if the trade fell through on account of defendants' default, such amount was to be refunded; that defendant had defaulted, but had refused to refund the sum in question, and recovery thereof was sought, with interest, the county court had no jurisdiction, as the amount payable was not ascertainable from the terms of the contract, and the interest sued for could be recovered only as damages. *McNeill v. Casey* (Civ. App.) 135 S. W. 1130.

A contract of employment which specified a definite salary ascertained the amount payable, within this article, providing that interest shall be allowed at 6 per cent. per annum on written contracts "ascertaining the sum payable," when no rate is specified, and the interest due under the employment contract does not enter into the "amount in controversy," as constituting damages, as affecting the jurisdiction of the county court of a suit on the contract. *Carter Grocer Co. v. Day* (Civ. App.) 144 S. W. 365.

Computation.—When money is payable at date, or generally, interest runs from date, and the date, when omitted in the written contract, may be proven. *Richardson v. Ellett*, 10 T. 190; *Van Norman v. Wheeler*, 13 T. 316. And see *Cook v. Cook*, 19 T. 434.

A grantee recovering money paid for land which he did not get is entitled to interest from the time it was paid. *Bennett v. Latham*, 18 C. A. 403, 45 S. W. 934.

Where, on appeal, it appeared that the computation of interest in the judgment was on an incorrect basis, held, that the judgment would be reformed in that respect on appeal. *Masterson v. F. W. Heitmann & Co.*, 38 C. A. 476, 87 S. W. 227.

Where one agreed to pay another a specified sum when able, interest did not run until he became able. *Ruzeoski v. Wilrodt* (Civ. App.) 94 S. W. 142.

The holders of certain notes held entitled to interest from maturity, notwithstanding an extension agreement. *Dashiell v. W. L. Moody & Co.*, 44 C. A. 87, 97 S. W. 843.

An order for the payment of money drawn for immediate payment out of funds due the drawer is payable on demand, and interest is rightfully allowed from the date of demand. *Foley v. Houston Co-op. & Mfg. Co.* (Civ. App.) 106 S. W. 160.

A mortgage creditor, who collected on insurance on the improvements more than enough to extinguish the principal of the debt, held not entitled to collect more interest than that which had accrued at the collection of the policy. *Dallas Trust & Savings Bank v. Story*, 55 C. A. 84, 113 S. W. 781.

It being the duty of a broker through whom goods are bought to notify the buyer of the arrival of goods at place of delivery, the broker, upon recovering the price therefor, would be entitled to interest only from the time of such notification. *Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Civ. App.) 122 S. W. 443.

Change of time from which interest runs, either accelerating or delaying it, held a material alteration of an instrument. *Baldwin v. Haskell Nat. Bank*, 104 T. 122, 133 S. W. 864.

In an action on a bond given to a city by the grantee of a municipal franchise to secure operation of its plant within one year, interest was allowable from expiration of

that time, the obligation maturing then. *Grayson v. City of Marshall* (Civ. App.) 145 S. W. 1034.

Compound interest.—A contract may stipulate for interest anterior to its date, if actually due, and for interest upon interest already accrued. *Andrews v. Hoxie*, 5 T. 171.

When payments are by agreement applied to the principal, which is thereby extinguished, the accrued interest which remains unpaid does not bear interest, unless otherwise expressly stipulated. *Tooke v. Bonds*, 29 T. 419.

A stipulation that interest past due shall bear interest is valid. *Lewis v. Paschal*, 37 T. 315; *Roane v. Ross*, 84 T. 46, 19 S. W. 339; *Miner v. Bank*, 53 T. 559; *Crider v. San Antonio Real Estate, Building & Loan Ass'n*, 89 T. 597, 35 S. W. 1047.

When partial payments are made, interest is to be computed to the time when a payment alone, or in conjunction with preceding payments, shall equal or exceed the interest due. Deduct the payment and calculate interest on the balance until the next payment or payments as before, and so on. *Odle v. Frost*, 59 T. 684; *Hampton v. Dean*, 4 T. 455; *Hearn v. Cutberth*, 10 T. 216; *Clark v. Brown*, 43 T. 212.

When interest is payable annually, unpaid interest bears legal interest. *Roane v. Ross*, 84 T. 46, 19 S. W. 339.

The payee of a note is entitled to interest at 6 per cent. on all unpaid annual installments of interest from the date they became due until paid. *Stone v. Pettus*, 47 C. A. 14, 103 S. W. 413.

A deed of trust executed to secure certain vendor's lien notes, bearing simple interest only, held to obligate one of the signers of the deed to pay the notes with compound interest, and to bind the land of the other signer for the payment of the notes and compound interest as surety. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

A written acknowledgment indorsed on a deed of trust held to nullify a provision of the deed for the payment of compound interest. *Id.*

The court in partition of real estate which has been in possession by one of the parties by tenants paying rent to him may not compound the interest on the rents in adjusting the equities of the parties. *Miller v. Odom* (Civ. App.) 152 S. W. 1185.

Guaranty.—A., on the 28th of January, guaranteed the payment for a wagon to be sold by B. to C., payable November 1st following. C. gave his note for the price of the wagon, with interest at 12 per cent. from date. Held, that A. was not liable for interest. *Vogelsang v. Mensing*, 1 App. C. C. § 1165. L. executed to G. his note for the price of goods sold on credit, with interest at 10 per cent. At the same time E. gave to G. his obligation, reciting that he was responsible for the amount bought by L. Held, that E. was liable for interest. *Looney v. Le Geirse*, 2 App. C. C. § 531.

Art. 4978. [3102] Six per cent on open accounts, when.—On all open accounts, when no specified rate of interest is agreed upon by the parties, interest shall be allowed at the rate of six per cent per annum from the first day of January, after the same are made. [*Id.* sec. 2.]

"Open account."—Parties may agree as to the rate of interest on an open account and as to the time when the account shall become due. *Whittaker v. Wallace*, 2 App. C. C. § 560.

The printed heading to an account of goods sold contained the following words and figures:

Terms } 30 days discount 5 per cent.
Cash } 10 " " 6 " "

Held, in the absence of evidence to the contrary, that the price for the goods sold was due on delivery; yet, if the money was paid in 30 days, a discount of 5 per cent., and if paid in 10 days a discount of 6 per cent., would be allowed to the debtor. *Moss v. Katz*, 69 T. 411, 6 S. W. 764.

Money advanced under a contract or at the instance and request of another is not an open account within this article. *Courturie v. Roensch* (Civ. App.) 134 S. W. 413.

Computation.—In the absence of a contract, interest on an open account is computed from the January following the date of the account. *Railway Co. v. Greathouse*, 82 T. 104, 17 S. W. 834; *Railway Co. v. Lewis* (Civ. App.) 23 S. W. 324; *Mills v. Haas*, 27 S. W. 263, 674; *Frick Co. v. Wright*, 23 C. A. 340, 55 S. W. 608; *Erb-Springall Co. v. Pittsburg Glass Co.* (Civ. App.) 101 S. W. 1165; *Browning v. El Paso Lumber Co.*, 140 S. W. 386.

Interest cannot be allowed on an open account for 1897, where it is alleged that the services were performed the latter part of 1896 and the fore part of 1897, where it is not stated when the account became due, nor that there was any agreement as to interest. *Frick Co. v. Wright*, 23 C. A. 340, 55 S. W. 610.

Interest is not recoverable from the date an open account is due as damages for nonpayment. *Erb-Springall Co. v. Pittsburgh Plate Glass Co.* (Civ. App.) 101 S. W. 1165.

Money had and received.—Interest is recoverable on money had and received and on money lent and advanced. *Close v. Fields*, 13 T. 623; *Hicks v. Bailey*, 16 T. 229; *Grimes v. Hagood*, 19 T. 246; *Burnett v. Henderson*, 21 T. 588; *Pauska v. Daus*, 31 T. 67.

Payment when work satisfactorily completed.—This article does not apply to a contract for boring wells to be paid for when work is completed to the satisfaction of the field superintendent. Interest is payable on the claim from the time the work is accepted. *Guffey Petroleum Co. v. Hamill* (Civ. App.) 94 S. W. 460.

Art. 4979. [3103] Ten per cent the conventional rate.—The parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent per annum on the amount of the contract. [*Id.*]

Stipulation as to rate.—Conventional interest runs until payment. *Hopkins v. Crittenden*, 10 T. 189; *Coles v. Kelsey*, 13 T. 75; *Hagood v. Alkin*, 57 T. 511; *Washington v. First Nat. Bank*, 64 T. 4.

On breach of a written contract by the obligee, which by its terms stipulates for ten per cent. interest on deferred payments for specific articles contracted for and to be delivered to such obligee under it, when there is a partial delivery only, and the obligor recovers judgment, he is entitled to the contract price of the articles delivered and the conventional interest specified in the contract. The breach does not entitle the defendant to claim a reduction of the interest to the amount allowed by the statute when no interest is specified by the contracting parties. *Parks v. O'Connor*, 70 T. 377, 8 S. W. 104.

A contract partly in writing and partly oral which stipulates for a prohibited rate of interest is in violation of the statute. *Dunman v. Harrison* (Civ. App.) 41 S. W. 499.

Where a note containing a clause "to bear interest at the rate of _____ per cent. per annum from _____" was filled by drawing a line through the blank after the words "rate of" with a pen, if the note be regarded by reason thereof as containing a patent ambiguity, it should be construed as indicating an essential erasure of the entire interest clause and to show that no interest was to be paid. *Couturie v. Roensch* (Civ. App.) 134 S. W. 413.

Art. 4980. [3104] Contracts for greater per cent void.—All written contracts whatsoever, which may in any way, directly or indirectly, violate the preceding article by stipulating for a greater rate of interest than ten per cent per annum shall be void and of no effect for the amount or value of the interest only; but the principal sum of money or value of the contract may be received and recovered. [Id.]

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1. **In general.**—The restriction in this statute to written contracts is held a violation of section 11 of article 16 of the constitution. The constitution reads "all contracts," etc. *Dunman v. Harrison* (Civ. App.) 41 S. W. 499.

This is the only statute which declares a contract for a greater rate of interest than 10 per cent. void and it has no reference to any other than to written contracts. *Quinlan's Estate v. Smye*, 21 C. A. 156, 50 S. W. 1068.

2. **What law governs.**—A foreign loan company engaging in business without a permit held bound by usury laws of state, though the contract provided for performance in another state, where it would be valid. *National Loan & Investment Co. v. Stone* (Civ. App.) 46 S. W. 67.

A foreign loan association, doing business in Texas under a permit from the state, by making a loan contract showing that both parties intended it should be performed in Texas, subjects the contract to the usury laws of Texas. *Crenshaw v. Hedrick*, 19 C. A. 52, 47 S. W. 71.

A usurious building and loan note negotiated in Texas is governed by the laws of that state, though executed and performable in another state, by the laws of which it is not usurious. *People's Building, Loan & Saving Ass'n v. Bessonette* (Civ. App.) 48 S. W. 52.

3. **Intent.**—The intent to take usury constitutes the offense. *Henry v. Sansom*, 21 S. W. 70, 2 C. A. 150.

Intention of parties that agreement should not be usurious does not authorize reformation, where the mistake was not as to the terms of the agreement, but as to its legal effect. *Bexar Building & Loan Ass'n v. Seebe* (Civ. App.) 40 S. W. 875.

A refusal to submit to the jury whether the parties to a contract intended to violate the statute as to usury held not erroneous. *Galveston & H. Inv. Co. v. Grymes* (Civ. App.) 50 S. W. 467.

The fact that a sum taken as interest by a building association exceeds the legal rate does not show usury, when the amount of the excess is insignificant. *Peightal v. Cotton States Bldg. Co.*, 25 C. A. 390, 61 S. W. 428.

Where, in accumulating interest, the amount charged is to a small extent greater than allowed by law and is so made by mistake, it is not usurious. *Western Bank & Trust Co. v. Ogden*, 42 C. A. 465, 93 S. W. 1102.

4. **Loans in general.**—Interest cannot be charged upon a premium on a loan made by a building and loan association to a member thereof. Such a contract is usurious, and the vice is not cured by an entry made by the association, after foreclosure sale, of a credit to the borrower of a sufficient sum to reduce the interest to the legal rate. *Jackson v. Cassidy*, 68 T. 283, 4 S. W. 541; *Hensel v. International B. & L. Ass'n*, 85 T. 215, 20 S. W. 116; *International B. & L. Ass'n v. Abbott*, 85 T. 220, 20 S. W. 118.

The fact that the agent of a money lender received from the borrower, for his own benefit, a sum of money when a loan was negotiated, which loan was to be repaid with the highest rate of interest allowed by law, will not render the contract usurious if the sum was exacted without the knowledge of the lender. *Williams v. Bryan*, 68 T. 593, 5 S. W. 401.

Contract for the payment of premiums and interest on a loan held usurious, where the premiums and interest together exceed the statutory rate of interest allowed. *Nat. Loan & Inv. Co. v. Stone* (Civ. App.) 46 S. W. 67; *Interstate Building & Loan Ass'n v. Goforth*, 57 S. W. 700.

Contract of loan construed, and held usurious. *Southern Building & Loan Ass'n v. Atkinson*, 20 C. A. 516, 50 S. W. 170; *American Mut. Bldg. & Sav. Ass'n v. Cornibe*, 35 C. A. 385, 80 S. W. 1026.

A deduction by a loan association of a "bonus" of \$120 from a loan of \$1,200, and a charge of \$10 a month interest, held to render the loan usurious. *People's Building, Loan & Savings Ass'n v. Keller*, 20 C. A. 616, 50 S. W. 183.

Where the evidence of a borrower as to facts surrounding a loan claimed to be usurious were not contradicted, it will be assumed that the association knew and agreed to the transactions as testified to by him. *Id.*

Where a pretended subscription to stock was a scheme to avoid the usury laws, and such contract and the contract for the loan were one transaction, the contract is usurious. *Cotton States Bldg. Co. v. Reily* (Civ. App.) 50 S. W. 961.

Upon the withdrawal of a borrower before the maturity of his stock, and payment of a loan admitted to be usurious, the association is entitled to only the original sum loaned, less the interest paid and the value of the stock at the date of withdrawal. *Rogers v. People's Building, Loan & Saving Ass'n* (Civ. App.) 55 S. W. 383.

A contract for a loan from a building and loan association held not usurious on its face. *Interstate Building & Loan Ass'n v. Goforth*, 94 T. 259, 59 S. W. 871.

A loan is not usurious because it draws the highest legal rate of interest from a time previous to the delivery of the money to the borrower, where it was set aside for his use at such time. *Geisberg v. Mutual Building & Loan Ass'n* (Civ. App.) 60 S. W. 478.

Facts held to show that certain stock issued was fictitious, and the whole transaction a cover for usury, and to warrant a judgment cancelling a mechanic's lien securing the loan, and awarding the plaintiff the amount paid the lender in excess of the principal. *Cotton States Bldg. Co. v. Jones* (Civ. App.) 60 S. W. 587.

A contract to pay 10 per cent. interest per annum on principal, interest, and cost of taking up a judgment on a debtor's land, including a note for \$300 as further security, held usurious. *Nesbit v. Goodrich*, 25 C. A. 28, 60 S. W. 1017.

Where a building and loan association, in defense of an action to cancel a loan as usurious, set up a second contract as purging the original of usury, it was error to charge that the jury should find for plaintiff, if they found the original contract was usurious. *Cotton States Bldg. Co. v. Jones*, 94 T. 497, 62 S. W. 741.

Where the by-laws of a building and loan association provided that borrowers should pay a certain interest, together with the premium on the loan, held, that the premium should be considered in arriving at a conclusion as to whether such loan was usurious. *State Nat. Loan & Trust Co. v. Fuller*, 26 C. A. 318, 63 S. W. 552.

By-laws of a building and loan association, and the contract for a loan thereunder, construed to call for more than 12 per cent. per annum interest, and hence to be usurious. *Id.*

To hold stock subscription to building association on making a loan usurious, it must appear that the association intended that the borrower should not in reality become a stockholder. *Interstate Building & Loan Ass'n v. Crawford* (Civ. App.) 63 S. W. 1071.

Evidence examined, and held, that a subscription for stock in a building association, an application for a loan, etc., were but one transaction, and a mere scheme to cover usurious interest. *American Bldg. & Sav. Ass'n v. Daugherty*, 27 C. A. 430, 66 S. W. 131.

That a borrower, in order to secure a loan, agrees to pay, not only legal interest, but also a judgment on which he and the lender are liable, does not render the loan usurious. *Southern Trading Co. v. State Nat. Bank*, 35 C. A. 5, 79 S. W. 644.

5. **Bills, notes and other instruments for the payment of money.**—If a note is offered for discount by the maker, it is usurious between him and the party to whom it is delivered if the discount from the face value is greater than the highest legal per cent. Otherwise, if the transaction was a sale of the note. *Crozier v. Stephens*, 2 App. C. § 802.

K. loaned H. money on notes bearing 10 per cent. interest to maturity and 12 per cent. thereafter, with contract for 10 per cent. attorney fees in the event that the note was placed with an attorney for collection; and as the same time and as a part of the same transaction H. contracted to ship to K. during the cotton season, for sale on a commission of 2½ per cent. to K., one bale of cotton for every \$10 loaned, or in default thereof to pay K. at the end of the season \$1.25 for each bale he failed to ship, as liquidated damages. The claim made being only for the amount of the note, and the loan being made for the purpose of promoting consignments of cotton, held not usurious. *Huddleston v. Kempner*, 1 C. A. 211, 21 S. W. 946.

Usury as to part of a note taints the whole transaction. *Ledbetter v. First Nat. Bank* (Civ. App.) 31 S. W. 840.

Note given to building and loan association for balance due, with maximum legal interest, is usurious, when stock taken by the association was credited at less than withdrawal value in making up the balance. *Bexar Building & Loan Ass'n v. Seebe* (Civ. App.) 40 S. W. 375.

Under the evidence, held, that a note was usurious. *First Nat. Bank v. Ledbetter*, 17 C. A. 613, 42 S. W. 1018.

A stipulation in a note held to impose a penalty to enforce prompt payment only, and not to be usurious. *Parks v. Lubbock* (Civ. App.) 50 S. W. 466.

A note providing for highest legal rate of interest and for exchange is not usurious, where it appears the provision for exchange was not made to cover a usurious contract. *Stuart v. Tenison Bros. Saddlery Co.*, 21 C. A. 530, 53 S. W. 83.

A note which provides for the highest legal rate of interest, and also that, on default, the principal, together with delinquent taxes on property conveyed to secure the note, shall become due, is not usurious. *Id.*

Where a deed of trust securing a note recited that they were in extension of a prior note to which the holder was subrogated, in an action thereon it was error to hold that the holder of the deed was not entitled to interest on account of usury therein;

the prior note not being usurious. *American Mut. Bldg. & Sav. Ass'n v. Harn* (Civ. App.) 62 S. W. 74.

A note binding the maker to pay \$235 for a loan of \$200 held to be a contract stipulating for usurious interest, within this article. *Rosetti v. Lozano*, 96 T. 57, 70 S. W. 204.

Payment of usurious interest by one other than maker of note, calling for such interest, held a payment by maker. *Lasater v. First Nat. Bank*, 96 T. 345, 72 S. W. 1057.

An agreement for the purchase of land held vitiated by usurious notes given for the purchase price of other land taken in exchange therefor. *Webb v. Galveston & H. Inv. Co.*, 32 C. A. 515, 75 S. W. 355.

In an action to foreclose a mortgage, a finding that it provided for the payment of usurious interest, and that coupons and notes were given for interest, held justified. *Norris v. W. C. Belcher Land Mortg. Co.*, 98 T. 176, 82 S. W. 500.

In an action by a national bank to collect a note, evidence held sufficient to authorize the presumption of payment of usurious interest. *Trabue v. Cook* (Civ. App.) 124 S. W. 455.

Evidence held sufficient to sustain a verdict for the cancellation of the note and the deed of trust on the ground of usury. *Interstate Savings & Trust Co. v. Hornsby* (Civ. App.) 146 S. W. 960.

6. — **Renewal note.**—When usurious interest is included in a note given in renewal of a note, the vice of usury will inhere in it and in all subsequent renewals of the note. *National Bank v. Wayburn*, 81 T. 57, 16 S. W. 554.

A recovery of the original indebtedness held warranted in a suit on renewal notes calling for usurious interest. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

Lawful interest on an indebtedness held not recoverable in a suit on usurious renewal notes. *Id.*

A renewal contract to pay money carrying into it an usurious agreement of the former contract held usurious and illegal. *Id.*

7. **Contracts.**—Every contract, without regard to its form, which stipulates for a higher rate of interest than allowed by law is usurious. *International B. & L. Ass'n v. Biering*, 86 T. 476, 25 S. W. 622, 26 S. W. 39; *Duncan v. Hough* (Civ. App.) 27 S. W. 945.

When by the terms of the contract payment by a time certain may avoid usury, the contract is not usurious, the interest in such case being regarded as a penalty for the default. *Crider v. San Antonio Real Estate, Bldg. & Loan Ass'n*, 13 C. A. 399, 37 S. W. 237; *Id.*, 89 T. 597, 35 S. W. 1047.

An agreement in renewal of a usurious contract, and bearing maximum legal interest, is usurious, where the interest paid under the first contract is not deducted from the principal. *Bexar Building & Loan Ass'n v. Seebe* (Civ. App.) 40 S. W. 875.

A contract with a building and loan association held not usurious. *Mathews v. Texas Building & Loan Ass'n* (Civ. App.) 48 S. W. 744; *Guarantee Savings Loan & Investment Co. v. Mitchell*, 39 C. A. 205, 87 S. W. 184; *Rabb v. Texas Loan & Investment Co.* (Civ. App.) 96 S. W. 77.

A contract for the usurious interest due on another contract is also usurious. *State Nat. Loan & Trust Co. v. Fuller*, 26 C. A. 318, 63 S. W. 552.

To determine the question of usury in a contract, it must be tried by the statutory limitation of 10 per cent. per annum, for the use, forbearance or detention of the money for one year. *G. & H. Inv. Co. v. Grymes*, 94 T. 609, 63 S. W. 861.

A contract for the repayment of the purchase money of certain land, bought by defendant with money furnished by plaintiff, held usurious. *Burkitt v. McDonald*, 26 C. A. 426, 64 S. W. 694.

A building and loan contract held usurious. *People's Building, Loan & Savings Ass'n v. Marston*, 30 C. A. 100, 69 S. W. 1034; *Cotton States Bldg. Co. v. Rawlins*, 30 C. A. 428, 70 S. W. 786.

In an action to recover usury, evidence held to sustain a finding that cotton contracts, accompanying notes given to secure the loan, were a mere cover for usury. *Waxahachie Loan & Trust Co. v. Turner*, 32 C. A. 281, 74 S. W. 792.

Where a wife, subsequent to 1892, promised in writing to pay her husband's note, which was barred by limitations, and which contained a promise to pay interest at 12 per cent. until paid, her undertaking, being a new and distinct liability, was subject to the usury law in force at that time, and no interest subsequent to her promise could be allowed; but, the plea of usury being personal to the one asserting it she could not claim any benefit of that which was done by others, and hence interest to the date of such new promise was properly allowed. *Vinson v. Whitfield* (Civ. App.) 133 S. W. 1095.

Where a lease of personalty was uncertain as to whether it provided for usury, plaintiff could not recover a penalty, nor could defendant, in a cross-action, recover an alleged balance due. *Stewart v. Lattner* (Civ. App.) 142 S. W. 631.

If a contract is usurious on its face, any amount of interest collected thereon constitutes usury. *Id.*

8. **Attorney's fees, taxes and assessments.**—Stipulation for attorney's fees not within the statute. *Sturgis Nat. Bank v. Smith*, 30 S. W. 678, 9 C. A. 540.

Where a note bearing the highest legal rate of interest provides for an additional percentage for fees in case it is collected by attorneys, such percentage cannot be recovered, as usurious, where it has actually been paid for such collection. *Stuart v. Tenson Bros. Saddlery Co.*, 21 C. A. 530, 53 S. W. 83.

An agreement between the parties to a mortgage for the mortgagor's payment of a certain tax, under threatened legislation which was not adopted, held not to render the mortgage usurious. *Norris v. W. C. Belcher Land Mortg. Co.*, 98 T. 176, 82 S. W. 500.

A mortgage providing for interest at less than the maximum legal rate held not usurious on its face by reason of a provision requiring the borrower to repay money paid by the lender for taxes and assessments. *Id.*

The laws relating to usury held not to apply to obligations for the payment of taxes. *Nalle v. City of Austin*, 41 C. A. 423, 93 S. W. 141.

9. **Extension of time on contract.**—A debtor desiring an extension of time gave a note for the principal and interest then due, adding thereto legal conventional interest on

the entire amount up to the time to which the extension was given. After maturity the note was to bear interest at 1 per cent. per month, and 10 per cent. attorney's fees added in case of suit. Held not to be usurious. *Miner v. Paris Exchange Bank*, 53 T. 559.

Where, as a consideration for giving time on a contract, a sum in excess of the legal interest on the agreed price is added to the principal, the contract is usurious. *Fisher v. Hoover*, 21 S. W. 930, 3 C. A. 81.

Where a renewal or extension contract to pay money carried into it an agreement of the first contract for the payment of usurious interest, the renewal was also rendered illegal, and payments of interest received thereunder were properly applied in the reduction of the principal. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

10. Compound interest.—Compound interest is not of itself usurious. *Mills v. Johnston*, 23 T. 329; *Lewis v. Paschal*, 37 T. 318; *Miner v. Paris Exchange Bank*, 53 T. 559; *Roane v. Ross*, 84 T. 46, 19 S. W. 339; *Martin v. Land Mortgage Bank*, 5 C. A. 167, 23 S. W. 1032; *Hillsboro Oil Co. v. Citizens' Nat. Bank*, 32 C. A. 610, 75 S. W. 336.

11. Contract or debt originally valid.—An original valid contract is not affected by a subsequent usurious contract. *Cousins v. Grey*, 60 T. 349; *Payne v. Powell*, 14 T. 601; *Tucker v. Coffin*, 26 S. W. 323, 7 C. A. 415.

An original promise to pay interest at a legal rate is not impaired by a subsequent promise to pay usurious interest. *Krause v. Pope*, 78 T. 478, 14 S. W. 616.

If a contract for the loan of money, as made, is not usurious, the fact that the settlement before maturity, by applying to the extinguishment of the debt the value of certain stock which it was necessary to subscribe for in order to obtain the loan, may show that more has been paid than the loan would amount to, with lawful interest, would not render it so. *Interstate Building & Loan Ass'n v. Bryan*, 21 C. A. 563, 54 S. W. 377.

A subsequent usurious agreement held not to invalidate a loan in the hands of one who took under a contract subrogating him to the rights of the original creditor. *State Nat. Loan & Trust Co. v. Fuller*, 26 C. A. 318, 63 S. W. 552.

Where the original contract of indebtedness was not usurious, but the contract of renewal was, no interest may be recovered upon such indebtedness, as usury is not the excess above what might lawfully be collected, but is the entire amount of the interest. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

A contract valid in its inception is not rendered invalid by a subsequent usurious transaction in connection therewith, so that the amount of an original indebtedness may be recovered, though suit is on notes given in renewal, the consideration for which in addition to the renewal was the giving of usurious interest. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

12. Judgment paid with usurious loan.—The mortgage sought to be foreclosed being usurious, held, that the judgment which was paid from the proceeds of the loan secured by the mortgage could be enforced where the pleadings showed plaintiff entitled to recover thereon. *Hennessy v. Clough* (Civ. App.) 40 S. W. 157.

Where a debtor made a usurious contract with one who took up a judgment against his land, he would still be liable for the amount of the judgment, with interest and costs, though the contract was avoided as usurious. *Nesbit v. Goodrich*, 25 C. A. 28, 60 S. W. 1017.

13. Payment of installments of principal.—Where monthly payments of interest and premium on a loan and shares of its stock held as collateral exceed 10 per cent. a year on amount loaned, the contract is usurious. *National Loan & Investment Co. v. Stone* (Civ. App.) 46 S. W. 67; *People's Building, Loan & Savings Ass'n v. Keller*, 20 C. A. 616, 50 S. W. 183.

A contract whereby the principal of a loan, and 10 per cent. interest for 10 years, are added, and the amount divided into equal monthly installments, held usurious. *Galveston & H. Inv. Co. v. Grymes* (Civ. App.) 50 S. W. 467.

A contract to erect a house for a price to be paid in installments held not a contract to loan money, subject to the usury laws. *Cain v. Texas Building & Loan Ass'n*, 21 C. A. 61, 51 S. W. 879.

Charge of interest for full amount of loan during term, notwithstanding payments on principal, held usurious. *Sproule v. McFarland* (Civ. App.) 56 S. W. 693.

Contract held not usurious in providing that payments on stock should apply as of the date they were made, thus reducing the principal. *Geisberg v. Mutual Building & Loan Ass'n* (Civ. App.) 60 S. W. 478.

Where money is borrowed from a building company at the full legal rate of interest, and the borrower is required to subscribe for stock to be paid in monthly installments, an agreement that payments on the stock shall be payments on the loan, when the loan is finally paid, does not make the contract usurious. *Cotton States Bldg. Co. v. Rawlins* (Civ. App.) 62 S. W. 805.

Where an agreement of debtors was to pay an existing indebtedness in monthly installments, half of each installment to be applied on the principal and the other half on the interest for two years, at which time the sum on interest was to be reduced, and the reduction added to the payment of the principal, and the installment payment of interest in the second year at the stipulated amount would have the effect of exacting more than 10 per cent. on the principal owing at that time, the contract was usurious and illegal. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

14. Commissions.—A commission on a loan on which is paid the highest legal rate of interest does not make the transaction usurious, when the person to whom the commission is paid is the agent of the borrower. *Stuart v. Tenison Bros. Saddlery Co.*, 21 C. A. 530, 53 S. W. 83.

A contract, collateral to a note bearing interest, providing for commissions for sale of cotton, held not usurious unless made for the purpose of concealing a design to charge usurious interest on the loan. *Western Bank & Trust Co. v. Ogden*, 42 C. A. 465, 93 S. W. 1102.

15. Compensation for detention of property.—Where the price of property is fixed by agreement, compensation charged for its detention is interest, and, if in excess of the lawful rate, usurious. *Galveston & H. Inv. Co. v. Grymes* (Civ. App.) 50 S. W. 467.

16. **Payment of interest in advance.**—Deducting interest on a note in advance held not usurious, where the note bore interest only from maturity. *Webb v. Pahde* (Civ. App.) 43 S. W. 19.

A contract is not usurious simply because the highest rate of interest is charged, which is payable monthly in advance, and the over-due interest bears interest. *Geisberg v. Mutual Building & Loan Ass'n* (Civ. App.) 60 S. W. 478.

Evidence held to warrant a finding that a loan of money stipulated for 18 per cent. interest payable in advance, and was therefore usurious. *Baum v. Daniels*, 55 C. A. 273, 118 S. W. 754.

17. **Computation.**—Rule for computing interest to determine usury, where the right to declare the debt due in case of default is contained in the contract, defined. *Seymour Opera House Co. v. Thurston*, 18 C. A. 417, 45 S. W. 815.

18. **Rights and remedies of parties.**—The penalty for stipulating in the contract for usurious interest is the loss of the interest only. The principal sum or value of the contract may be received and recovered. *Clayton v. Ingram* (Civ. App.) 107 S. W. 881.

An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest. *Trabue v. Cook* (Civ. App.) 124 S. W. 455.

Remedy available on payment of usury to national bank stated. *Id.*

19. — **Application of payments.**—Payments, in the absence of a contrary intent, will be applied to extinguishment of interest. *Hampton v. Dean*, 4 T. 455; *Hearn v. Cutberth*, 10 T. 216; *Watson v. Mims*, 56 T. 451. But if usurious interest is stipulated, payments will be applied to the principal. *Stanley v. Westrop*, 16 T. 200.

When money is paid with instructions as to appropriation, it cannot be otherwise applied by the creditor without the debtor's assent. *Eylar v. Read*, 60 T. 387; *Proctor v. Marshall*, 18 T. 66; *Taylor v. Coleman*, 20 T. 776.

When partial payment is made to a national bank under a contract to pay usurious interest, in the absence of a stipulation as to how the payment shall be appropriated, the law will apply it in liquidation of that portion of the contract which is legal, and the bank may afterwards avoid the penalty fixed by act of congress for collecting usurious interest by relinquishing claim for it. If a partial payment on the debt is, by agreement, appropriated to the payment of usurious interest, the locus penitentiae cannot exist. *Stout v. Bank*, 69 T. 384, 8 S. W. 808.

It has been held by the supreme court that payment on a contract affected with usury is a payment upon the principal, applied by the law, notwithstanding it was paid and received as a payment of interest. *Int. Nat. Bldg. Ass'n v. Blering*, 86 T. 476, 25 S. W. 622, 26 S. W. 39.

Payments on usurious mortgage amounting to face of loan, however applied by the loan company, held payment in full. *National Loan & Investment Co. v. Stone* (Civ. App.) 46 S. W. 67.

A borrowing member held entitled to have usurious interest paid and stock payments credited on his loan, thus entitling him to a cancellation of the debt and the security on payment of the balance, within a withdrawal clause in the by-laws. *Crenshaw v. Hedrick*, 19 C. A. 52, 47 S. W. 71.

Since the part of a note providing for usurious interest is void, the maker is not confined to his statutory right to recover double interest paid, but may apply such payments on the principal debt. *People's Building, Loan & Saving Ass'n v. Bessonette* (Civ. App.) 48 S. W. 52.

A special finding that plaintiff purchased stock merely to obtain a loan held not to require application of amount paid thereon on the principal's debt as illegal interest. *Leary v. People's Building, Loan & Savings Ass'n*, 93 T. 1, 49 S. W. 632.

Articles and by-laws of an association held to entitle a borrowing stockholder to have payments on stock applied in payment of a usurious loan. *People's Building, Loan & Savings Ass'n v. Keller*, 20 C. A. 616, 50 S. W. 183.

In an action on a note, sureties may plead usury, and have the usurious interest paid credited as a payment on the principal of the debt. *Roberts v. Coffin*, 22 C. A. 127, 53 S. W. 597.

Renewal purchase-money notes, with renunciation of title to vendor and assumption of relation of tenant, being void for usury, payments of rental should be applied to reduce original debt. *Arnold v. Macdonald*, 22 C. A. 487, 55 S. W. 529.

Where a loan of money is made at a usurious interest, all payments of interest will be credited on the principal of the debt. *American Bldg. & Sav. Ass'n v. Daugherty*, 27 C. A. 430, 66 S. W. 131.

Where a building and loan contract was usurious, the court properly charged plaintiff with the amount of the loan and credited him the value of the stock and the sums paid on interest and premium. *People's Building, Loan & Savings Ass'n v. Marston*, 30 C. A. 100, 69 S. W. 1034.

Sureties on a note held entitled to a reduction of principal to a certain amount because of usury. *Titterington v. Murrell* (Civ. App.) 90 S. W. 510.

Where a contract stipulates for usurious interest, all interest payments in excess of 10 per cent. on final settlement will be applied to the principal. *Baum v. Daniels*, 55 C. A. 273, 118 S. W. 754.

Where usury is set up as a defense, the court, if asked, may apply the sums paid as a credit on the principal, but is not warranted in so doing, where only an abatement of further interest is sought. *Taylor v. Shelton* (Civ. App.) 134 S. W. 302.

20. — **Set-off or counterclaim.**—In *Huggins v. National Bank*, 6 C. A. 33, 24 S. W. 926, it was held by a court of civil appeals that the payment of usurious interest to a national bank cannot be pleaded as a set-off or counterclaim against the principal of a note on which suit is brought, following *Barnet v. Bank*, 98 U. S. 555, 25 L. Ed. 212; *Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Driesback v. Bank*, 104 U. S. 52, 26 L. Ed. 658; *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399; *Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282.

The right to set up usury in notes secured by prior liens is not defeated by taking a mortgage subject to such prior liens. *Johnson v. Lasker Real Estate Ass'n*, 21 S. W. 961, 2 C. A. 494.

Usurious interest paid on a note to a national bank cannot be pleaded as a set-off or counterclaim against the principal of the note. *Commanche National Bank v. Dabney* (Civ. App.) 44 S. W. 413.

21. Rights and remedies of third persons—Assignees.—A note is subject to the defense of usury in the hands of a purchaser without notice. *Gilder v. Hearne*, 79 T. 120, 14 S. W. 1031; *Maloney v. Eaheart*, 81 T. 281, 16 S. W. 1030; *First Nat. Bank of Mason v. Ledbetter* (Civ. App.) 34 S. W. 1042.

Where a note for the purchase price of land was transferred to a building and loan association, which made a usurious contract with the purchasers relative to the loan, and subsequently the association transferred the loan to a third party, held, that the purchasers should be credited with the amount paid to the association on premium, interest, and sinking fund under such usurious agreement. *State Nat. Loan & Trust Co. v. Fuller*, 26 C. A. 318, 63 S. W. 552.

Where a building contract bearing legal interest is shown to be but part of a transaction for procuring a usurious loan from a building association, the association, as assignee of such contract, cannot enforce it without respect to the usury in the loan. *American Bldg. & Sav. Ass'n v. Daugherty*, 27 C. A. 430, 66 S. W. 131.

Where a purchaser for value of an indebtedness and a mechanic's lien contract securing it had no knowledge or notice of any facts or agreements that would render the original agreement for the loan usurious, and was induced to make the purchase by representations of the debtor that the debt was valid, his rights as a purchaser would not be affected by any illegality or usury existing. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

22. — Party assuming to pay note or loan.—One assuming to pay a loan is not relieved from any part of the contract by reason of its being tainted with usury. *Johnson v. Association*, 2 C. A. 499, 21 S. W. 961; *Maloney v. Eaheart*, 81 T. 284, 16 S. W. 1030; *Vaughn v. Mutual Bldg. Ass'n* (Civ. App.) 36 S. W. 1013.

A party assuming a note as a part of the consideration of his purchase cannot plead usury against it. *Building & Loan Ass'n of Dakota v. Price*, 18 C. A. 370, 46 S. W. 92.

A party who assumes as a part of the purchase money an existing debt cannot plead usury against it. *People's Building, Loan & Savings Ass'n v. Sellars*, 19 C. A. 201, 46 S. W. 370.

Vendee purchasing land subject to usurious mortgage, agreeing to pay all legal amounts due, may avail himself of defense of usury. *National Loan & Investment Co. v. Stone* (Civ. App.) 46 S. W. 67.

One who, as part consideration of purchase, agrees to pay a certain obligation held estopped to plead usury. *Building & Loan Ass'n of Dakota v. Price*, 18 C. A. 370, 46 S. W. 92.

A purchaser from mortgagor, assuming payment of mortgage, cannot set up usury as a defense. *People's Building, Loan & Savings Ass'n v. Sellars*, 19 C. A. 201, 46 S. W. 370.

Usury cannot be pleaded by a purchaser who assumes a usurious debt as a part of the purchase price. *North Texas Sav. & Bldg. Ass'n v. Hay*, 23 C. A. 98, 56 S. W. 580.

A subsequent purchaser of mortgaged property, who assumed payment of a mortgage debt, cannot raise the question of usury in the original contract. *Southern Home Building & Loan Ass'n v. Winans*, 24 C. A. 544, 60 S. W. 825.

23. — Junior Mortgagee.—A mortgage to secure a debt of which a large part was usury was settled by a conveyance of land. A junior mortgagee by suit set up the usury in the first mortgage and was allowed to redeem for the debt without interest. *Maloney v. Eaheart*, 81 T. 281, 16 S. W. 1030.

One who takes second mortgage from one estopped to pay usury to the first is also estopped. *Building & Loan Ass'n of Dakota v. Price*, 18 C. A. 370, 46 S. W. 92.

24. — Recovery.—Money voluntarily paid in excess of lawful stipulated interest may be recovered. *Bexar B. & L. Ass'n v. Robinson*, 78 T. 163, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. Rep. 36; *Mann v. Brown*, 71 T. 241, 9 S. W. 111. See *Smith v. Stevings*, 81 T. 461, 16 S. W. 986.

A surety who pays a note tainted with usury, having knowledge of the usury when he does so, cannot recover the amount of the usurious interest from his principal. *Boren v. Boren*, 29 C. A. 221, 68 S. W. 184.

Persons entitled to recover penalty for usury paid national bank limited to those who pay or their representatives. *Trabue v. Cook* (Civ. App.) 124 S. W. 455.

25. Penalties and forfeitures.—The entire amount of the interest is forfeited and uncollectible. *Ramsey v. Thomas*, 14 C. A. 431, 38 S. W. 259.

In an action to have a debt declared paid by the application of payments of usurious interest, it is error to charge that a contract for interest over 10 per cent. will cause a forfeiture of all interest. *Cotton States Bldg. Co. v. Rawlins* (Civ. App.) 62 S. W. 805.

Under the statute, the taint of usury forfeits any further interest, and thereafter leaves only the principal as what is actually owing to the creditor. *Taylor v. Shelton* (Civ. App.) 134 S. W. 302.

26. Who may plead.—A bona fide creditor of an insolvent debtor may urge the defense of usury against the claim of another creditor. *Hamilton-Brown Shoe Co. v. Mayo*, 27 S. W. 781, 8 C. A. 164.

27. Waiver and estoppel.—The defense of usury cannot be waived by contract. *Miles v. Kelly* (Civ. App.) 25 S. W. 724; *Sturgess Nat. Bank v. Smyth*, 30 S. W. 678, 9 C. A. 540.

The maker of a usurious note, renewing the same to one who had purchased it at solicitation and in ignorance of the taint of usury, is estopped from asserting that defense in an action against him on the note. *Smith v. White* (Civ. App.) 25 S. W. 809.

Art. 4981. [3105] Judgments, rate of interest on.—All judgments of the several courts of this state shall bear interest at the rate of six per cent per annum from and after the date of the judgment, except where the contract upon which the judgment is founded bears a speci-

fied interest greater than six per cent per annum and not exceeding ten per cent per annum, in which case the judgment shall bear the same rate of interest specified in such contract and after the date of such judgment. [Id.]

Former law.—The act of April, 1891 (Acts 1891, p. 87), did not affect the law theretofore in force as to conventional interest. *Williams v. National Bank* (Civ. App.) 26 S. W. 171.

The rate of interest on a judgment is not affected by a subsequent statute reducing the rate. *Railway Co. v. Patton* (Civ. App.) 35 S. W. 477.

Judgment on liquor dealer's bond.—This article, when construed with Art. 4973 and the case of *Johnson v. Rolls*, 97 T. 453, 79 S. W. 513, does not apply to judgments recovered for breaches of conditions of liquor dealer's bond. *Hawthorne v. State*, 39 C. A. 122, 87 S. W. 840.

A judgment in a suit on a retail liquor dealer's bond should not bear interest, as it is in effect a judgment for penalties. *White v. Manning*, 46 C. A. 298, 102 S. W. 1163.

Judgment on contract.—A judgment not expressing the rate of interest will bear interest at the legal rate. *Townsend v. Smith*, 20 T. 465, 70 Am. Dec. 400.

When the rate of interest is not specified in the contract, the judgment will carry with it only the legal rate then existing. *Bush v. Wilson*, 23 T. 148; *Alliance Milling Co. v. Eaton* (Civ. App.) 33 S. W. 588.

The interest due on the principal sum at the date of the judgment, when included in it, also bears interest. *Whittaker v. Wallace*, 2 App. C. C. § 561.

Judgment upon city warrants.—Judgment in an action against a city for an amount due on warrants held, under this article, properly made to bear interest. *City of San Antonio v. Alamo Nat. Bank*, 52 C. A. 561, 114 S. W. 909.

Under this article a judgment against a city for a sum due on city warrants for current expenses of a fiscal year bears interest when payment may only be exacted out of funds then applicable, or which may thereafter become applicable, to the payment of the warrants in numerical order, though the charter of the city specifically provides that warrants shall not bear interest. *City of San Antonio v. Alamo Nat. Bank* (Civ. App.) 155 S. W. 620.

Judgment on note.—Under this article judgment in an action on a note should bear interest at the rate of 10 per cent. stipulated for in the note. *Continental State Bank of Beckville v. Trabue* (Civ. App.) 150 S. W. 209.

One who purchased lumber and assumed certain purchase-money notes of the seller was only liable on the notes for the amount thereof, together with the 10 per cent. interest stipulated therein which had accrued to the date of the judgment in favor of the seller, and 6 per cent. interest on such aggregate amount, instead of 10 per cent., the interest stipulated in the note; the liability being based on the agreement to assume payment of the notes, and not on the notes themselves. *Id.*

Judgment for conversion of note.—An action for conversion of notes is not an action based on them, so that judgment for plaintiff would bear the same rate as the notes, pursuant to this article, and a judgment providing for interest in excess of 6 per cent., the rate provided thereby for judgments in general, violates such section. *Wilkinson v. Bradford* (Civ. App.) 154 S. W. 691.

Attorney's fee.—Attorney's fees included in a judgment bear interest at the same rate as the principal sum. *Chowning v. Chowning*, 3 App. C. C. § 151; *Carver v. J. S. Mayfield Lumber Co.*, 29 C. A. 434, 68 S. W. 711.

Interest on allowance to receiver.—An order making a receiver a partial allowance for compensation is not a final judgment upon which interest is allowed by this article. *Jones v. United States & Mexican Trust Co.*, 47 C. A. 430, 105 S. W. 328.

Where the court made an order fixing the allowance of a receiver to be paid out of the earnings of the property, and there were earnings sufficient to pay the allowance, but instead of taking the amount, the receiver used it for the improvement of the property, he is not entitled to interest on the amount allowed him and used as above stated. *Id.*

Judgment for recovery of usury.—A judgment in an action to recover double usurious interest bears interest as any other judgment. *Baum v. Daniels*, 55 C. A. 273, 118 S. W. 765.

Judgment held by trustee in bankruptcy.—Husband's trustee in bankruptcy held not entitled to interest on a judgment for the amount of community property of bankrupt invested in improvements erected on separate property of bankrupt's wife. *Collins v. Bryan*, 40 C. A. 88, 88 S. W. 432.

Art. 4982. May recover double usurious interest paid.—If usurious interest, as defined by the preceding articles, shall hereafter be received or collected upon any contract, either written or verbal, the person or persons paying same, or their legal representatives, may, by action of debt, instituted in any court of this state having jurisdiction thereof, in the county of the defendant's residence, or in the county where such usurious interest shall have been received or collected, or where said contract has been entered into, or where parties paying same reside when such contract was made, within two years after such payment, recover from the person, firm or corporation receiving the same double the amount of such usurious interest so received and collected. [Acts 1907, p. 277.]

Change in law.—Prior to the act of 1892, only the excess of interest agreed upon above the highest rate allowed by law could be recovered back. *Garza v. Sullivan*, 10 C. A.

189, 30 S. W. 241; *Association v. Robinson*, 78 T. 163, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. Rep. 36; *Smith v. Stevens*, 81 T. 461, 16 S. W. 986.

The rule was different when suit was instituted by the payee of the note to recover interest. In that case no interest could be recovered. *Ledbetter v. Ft. Worth Nat. Bank* (Civ. App.) 31 S. W. 840.

Where a usurious contract was unlawful under the constitution, plaintiff was entitled to recover a penalty imposed by statute on persons receiving usury, though the statute was passed after the contract was made. *Southern Home Building & Loan Ass'n v. Thomson*, 24 C. A. 76, 58 S. W. 202.

This article has not been repealed by the amendatory act of 1907 as to offenses committed prior to the time when the act of 1907 took effect. *Stewart v. Lattner*, 53 C. A. 330, 116 S. W. 861.

Nature and ground of remedy.—A person suing to recover a penalty under this statute must bring himself strictly within its terms. *Whitlow v. Culwell*, 16 C. A. 266, 40 S. W. 642.

If the building and loan association had avoided receiving, in the interest payments, any interest in excess of 10 per cent. on the principal actually existing at the time, the penalty would not have attached. In other words a party, after making a usurious contract, may refrain from taking more interest than is allowed, and avoid the penalty. This has no reference to the other rule which entitles a party to have usurious interest paid credited as principal. The effect of this rule is to allow a recovery for double a limited number of payments of interest. *Mathews v. Interstate B. & L. Ass'n* (Civ. App.) 50 S. W. 604.

A written contract is not affected by an oral agreement for usurious interest, so as to entitle the party paying the usurious interest to recover double the amount paid as usurious interest, but the amount of usurious interest paid on the written instrument under the oral agreement should be credited on the principal of the written instrument. *Quinlan's Estate v. Smye*, 21 C. A. 156, 50 S. W. 1063.

If the contract was unlawful when made, under the constitution the legislature could affix the penalty after the contract was made. *Southern Home B. & L. Ass'n v. Thomson*, 24 C. A. 76, 58 S. W. 203.

Although the first payments are not themselves usurious, yet if the contract as an entirety is usurious the taint of usury will run to all the interest and a double recovery had for all interest paid. *American B. & S. Ass'n v. Daugherty*, 27 C. A. 430, 66 S. W. 135.

The right of action given by this article to one who has paid usurious interest, accrues where such interest is paid in property. *Taylor v. Sturgis*, 29 C. A. 270, 68 S. W. 538.

In an action to recover the penalty for collecting usurious interest on notes, the good faith of a purchaser of the note held not to arise. *Webb v. Galveston & H. Inv. Co.*, 32 C. A. 515, 75 S. W. 355.

The penalty imposed by this article for collecting usurious interest, is not incurred by merely contracting for such interest. *Clayton v. Ingram* (Civ. App.) 107 S. W. 880.

One who pays usury, in the absence of statutory provision, may recover the excess over the legal rate and interest from the date of the payments. *Baum v. Daniels*, 55 C. A. 273, 118 S. W. 764.

An action to recover usurious interest payments under this article held a civil action, and the judgment rendered a civil recovery. *Id.*

Where one sues to recover usurious interest paid by him, he is not entitled to sue for interest on the amount due at time of filing suit; because the suit is for a penalty. *Id.*

The remedies of one paying usurious interest against the payee, to recover the statutory penalty, stated. *Long v. Moore* (Civ. App.) 126 S. W. 345.

A contract provided that defendant had leased from plaintiff certain goods valued at \$2,651.95, for which defendant agreed to pay as rental \$250, with 10 per cent. interest per month in advance, with the understanding that when he had fully paid rent amounting to the value of the goods they should become his property. Plaintiff having paid the entire amount, together with \$225.23 interest, sought to recover double that amount as a penalty for usury, and defendant filed a general denial and a cross-action, seeking to recover an alleged balance of \$19.21. Held, that the contract was uncertain as to whether plaintiff was bound to pay 10 per cent. per annum on the whole amount, or whether he was only required to pay interest on the monthly installments of \$250; and hence plaintiff could not recover a penalty for alleged usury, nor could defendant recover the alleged balance under his cross-action. *Stewart v. Lattner* (Civ. App.) 142 S. W. 631.

A contract under which a money lender received 10 per cent. interest and also a cash payment of \$20 on a loan of \$257 held usurious, entitled the borrower to recover double the amount of any interest he had paid. *Holcomb v. Ely* (Civ. App.) 155 S. W. 695.

Amount and extent of penalties.—A person suing under this article is entitled to recover double the whole amount of interest paid, and not double the excess over what might lawfully have been contracted for and received. *Smith v. Chilton*, 90 T. 447, 39 S. W. 287.

In an action by the administratrix to recover double the amount of usurious interest paid on a contract, and to cancel a note, held, that an exception to a claim by the holder of the note for taxes paid on decedent's property securing the same was properly overruled. *Cassidy v. Scottish-American Mortg. Co.*, 27 C. A. 211, 64 S. W. 1023.

Where usurious interest is paid, but the principal debt is unpaid, penalty for usury can be recovered only on what remains after extinguishment of the debt by application of such paid interest. *Cotton States Bldg. Co. v. Peightal*, 28 C. A. 575, 67 S. W. 524.

For receiving or collecting usurious interest the penalty is double the amount of the interest received or collected. *Clayton v. Ingram* (Civ. App.) 107 S. W. 881.

If a contract is usurious on its face, then any amount of interest collected constitutes usury, and the defendant is entitled to recover double the amount so collected as interest. *Stewart v. Lattner* (Civ. App.) 142 S. W. 631.

This article does not limit the amount recoverable to double the amount of inter-

est paid in excess of the lawful contractual rate. *Nocona Nat. Bank v. Bolton* (Civ. App.) 143 S. W. 242.

—“**Usurious Interest.**”—The phrase “usurious interest” in this article means that double the amount of all the interest paid (if usurious) may be recovered, and not double the excess of the interest over the lawful rate. *Baum v. Daniels*, 55 C. A. 273, 118 S. W. 755; *Taylor v. Shelton* (Civ. App.) 134 S. W. 302.

Persons entitled to enforce penalties.—The recovery of the penalty is confined to the person paying it, or his legal representative. Therefore the sureties are not entitled to demand it. They can plead usury and have the principal of the debt credited with the usurious interest paid. *Roberts v. Coffin*, 22 C. A. 127, 53 S. W. 597.

The right of action for double the amount of the usurious interest paid is assignable so as to authorize the assignee to maintain suit therefor. It is immaterial whether the usurious interest was paid in property or money. *Taylor v. Sturgis*, 29 C. A. 270, 68 S. W. 538.

Continuing partner held entitled to recover penalty provided by statute for payment of usurious interest on firm note. *Lasater v. First Nat. Bank*, 96 T. 345, 72 S. W. 1057.

Payment of certain notes by surety held not to give the principal a cause of action to recover a penalty under the federal statutes relative to exaction of usury by national bank. *Lasater v. First Nat. Bank*, 40 C. A. 237, 88 S. W. 429.

Persons liable.—A corporation to whom usurious notes were indorsed, and who received the usurious interest, was alone liable for the penalty. *Webb v. Galveston & H. Inv. Co.*, 32 C. A. 515, 75 S. W. 357.

Recovery is only allowed against the party “receiving or collecting” the interest. Where plaintiff borrowed from defendant \$225, and gave his note for \$274, and cotton contracts to secure same and at different times paid defendant \$203.50, which was endorsed on the note, and defendant assigned the note and contracts to a third party, inasmuch as the payments did not amount to the principal sum borrowed, the defendant had received no interest and plaintiff could not recover from him the statutory penalty. *Western Bank & T. Co. v. Ogden*, 42 C. A. 465, 93 S. W. 1104.

Defendant made a loan of \$5,500 to the plaintiffs taking their note secured by deed of trust of lands, and for one year and eight months collected interest at 12 per cent. per annum, amounting to \$1,100, and at maturity the land covered by the deed of trust was sold, and a credit of \$3,300 applied on the note which was then assigned without recourse. In a suit on the note by the assignee, the plaintiffs pleaded specially that the assignee ought not to recover interest, and did not ask a credit of usurious interest on the principal, but the assignee offered a credit on the principal debt of the amount of usurious interest and judgment was so entered. At about the same time the plaintiffs sued under this article to recover from the defendant double the usurious interest received by him. Held, that, notwithstanding the judgment, the assignee’s act in allowing the credit on the principal was a voluntary credit, of which the defendant who had no title to the note and who was not a party to the assignee’s action thereon, could take no benefit, so that he was liable for the statutory penalty. *Taylor v. Shelton* (Civ. App.) 134 S. W. 302.

Actions for penalties.—In an action for the penalty for usury, where the transaction is usurious on its face, it is error to direct a verdict for defendant. *Mathews v. Interstate Building & Loan Ass’n* (Civ. App.) 50 S. W. 604.

The recovery provided for in this article can only be had in “an action” therefor and not merely by a purely defensive pleading setting up usury and payment. This right of recovery is a cause of action and not a mere defense and the statute which gives it prescribes that it is to be recovered “in an action of debt.” The defendant in such a case cannot recover the penalty claimed by him in any way without a basis in the pleading and that basis must be a plea sufficiently setting up a cross action against the plaintiff for the penalty. *Rosetti v. Lozano*, 96 T. 57, 70 S. W. 205.

An action under this article to recover penalty for receiving usurious interest is not an action for a tort required by Art. 2308, subd. 6, to be brought in county where injury is inflicted, but is an action for debt and must be brought in county of defendant’s residence. *Wartman v. Empire Loan Co.* (Civ. App.) 101 S. W. 501.

All the makers of a note upon which usurious interest has been paid must join in a suit to recover double the amount of interest paid, even if some have paid different amounts and some have paid none. *Alston v. Orr* (Civ. App.) 105 S. W. 236.

The right of recovery under this article is a distinct cause of action, and not a mere defense, and a right of action thereunder did not exist in an action on a usurious note or until the debtor paid the judgment obtained therein, so that the failure to set up the usury in that action would not bar a subsequent action under the statute for the penalty. *Long v. Moore* (Civ. App.) 126 S. W. 345.

Where usurious interest is charged and actually paid and received, and the payment is intentionally appropriated by the parties to the discharge of the usurious interest, the right to the penalty of twice the amount of interest paid, given by this article, attaches at once, though the principal has not been paid. *Taylor v. Shelton* (Civ. App.) 134 S. W. 302.

Limitations.—Even if the right to recover double usurious interest paid were available to a surety, he cannot set it up after the lapse of two years from the payment. *Roberts v. Coffin*, 22 C. A. 127, 53 S. W. 597.

Cross-action.—One who has paid usurious interest may, when he is sued on the debt, recover the statutory penalty for collecting such interest in a cross-action in such suit, or may, at his election, subsequently bring an independent suit for the penalty under this article. *Long v. Moore* (Civ. App.) 126 S. W. 345.

Compromise.—A right to sue for usurious interest paid may be the subject of compromise. *Whitlow v. Culwell*, 16 C. A. 266, 40 S. W. 642.

A compromise agreement in settlement of a usurious claim held not to purge the transaction of usury. *Dunman v. Harrison* (Civ. App.) 41 S. W. 499.

Presumption as to rate of interest.—See notes under Art. 3709.

Burden of proof.—See notes under Art. 3687, Rule 12.

Parol evidence to establish usury.—See notes under Art. 3687, Rule 25.

Interest on amount recovered.—In an action for double usurious interest payments under Arts. 4981, 4982, plaintiff held not entitled to recover interest until after judgment. *Baum v. Daniels*, 55 C. A. 273, 118 S. W. 754.

Art. 4983. [3107] Usury, how pleaded.—No evidence of usurious interest shall be received on the trial of any case, unless the same shall be specially pleaded and verified by the affidavit of the party wishing to avail himself of such defense.

Necessity of pleading usury.—Usury must be specially pleaded. Art. 1906, subd. 12; *Moseley v. Smith*, 21 T. 441; *Harrison v. S. C. Bank*, 1 App. C. C. § 375; *W. E. M. Co. v. Curtis*, 1 App. C. C. § 740; *Martin v. Perrill*, 77 T. 199, 13 S. W. 975; *Rogers v. O'Barr & Dinwiddie* (Civ. App.) 81 S. W. 750.

Where the maker of two notes permits judgment to be entered on one without pleading usury, he cannot have the amount of usurious interest in such judgment deducted from the second note. *Henry v. Sansom*, 21 S. W. 70, 2 C. A. 150.

Sufficiency of pleading.—Plaintiff's petition held not to show usury in the contract set out, or a scheme to evade the law against usury. *Interstate Building & Loan Ass'n v. Bryan*, 21 C. A. 563, 54 S. W. 377.

A petition that does not distinctly aver that plaintiff's decedent did in fact pay usurious interest or that the person alleged to have paid the interest was plaintiff's agent is defective. *Cassiday v. Scottish Am. Mort. Co.*, 27 C. A. 211, 64 S. W. 1030.

Where defense of usury is set up as originating in one of two contracts sought to be enforced, it is error to treat both contracts as usurious. *Harn v. American Mut. Bldg. & Sav. Ass'n*, 95 T. 79, 65 S. W. 176.

The answer of the maker of a note, when sued thereon, held, when not excepted to, sufficient to support a judgment for double the amount of usurious interest paid. *Rosetti v. Lozano*, 96 T. 57, 70 S. W. 204.

A petition to recover double the amount of usurious interest paid held required to allege when and to whom the interest was paid. *Western Bank & Trust Co. v. Ogden*, 42 C. A. 465, 93 S. W. 1102.

Verification.—Where usury appears from the plaintiff's pleadings, it may be raised by exception not verified. *Krause v. Pope*, 78 T. 478, 14 S. W. 616.

Defense of usury held not available, unless specially pleaded and verified. *First Nat. Bank v. Penman* (Civ. App.) 47 S. W. 68.

A plea setting up payment of usurious interest must be sworn to before the question of usury can be inquired into on the facts. *Cassidy v. Scottish-Am. Mort. Co.*, 27 C. A. 211, 64 S. W. 1030.

Under Art. 4982, which authorizes recovery of double the amount of usurious interest charged and received, and this article, held, that where a petition alleged that plaintiff executed his note, and that plaintiff does not remember the exact consideration received, "but believes and here alleges that the same was given in renewal of former loans," that on each of such former loans plaintiff was charged usurious interest, the exact amount of which he is unable to state, but that it was greatly in excess of 10 per cent. per annum, and that "if at such time plaintiff received any money, the advance interest * * * as also the interest for such sums as was renewed in said note, was counted in the face of said note at a rate greatly in excess of" 10 per cent. per annum, as this article applies to actions to recover the statutory penalty, the word "defense" meaning "cause of action," and the petition merely alleging plaintiff's belief as to the usurious interest, it was insufficient as a verified petition. *Nocona Nat. Bank v. Bolton* (Civ. App.) 143 S. W. 242.

TITLE 73

IRRIGATION AND OTHER WATER RIGHTS

Chap.
1. Regulating the Mode of Irrigation and
the Use of Water.

Chap.
2. Irrigation Districts.

CHAPTER ONE

REGULATING THE MODE OF IRRIGATION AND THE USE
OF WATER

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

Articles 4984-4990. Repealed. See note under Art. 4991.

Notice.—Before commissioners' court can assume jurisdiction, where irrigating ditches and farms are owned jointly by two or more persons, such persons should be notified by some means beforehand. *Cordero v. State* (Cr. App.) 58 S. W. 102.

Art. 4991. [3115] Certain waters declared state property.—The unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the gulf of Mexico, collections of still water, and of the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the state of Texas, the title to which has not already passed from the state, are hereby declared to be the property of the state, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided. [Acts 1913, p. 358, sec. 1.]

Note.—Acts 1913, p. 358, sec. 101, repeals chapters 1 and 2 of Title 73, Revised Statutes 1911, and all other laws in conflict.

DECISIONS RELATING TO PRIOR ACT

Cited, *Granger v. Kishi* (Civ. App.) 139 S. W. 1002; *Orange County v. Cow Bayou Canal Co.*, 143 S. W. 963; *Matagorda Canal Co. v. Markham Irr. Co.*, 154 S. W. 1176; *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, 155 S. W. 286.

Constitutionality.—Neither these articles nor Arts. 5003, 5008, authorizing canal corporations, for the purpose of irrigation to condemn lands necessary for their uses and purposes, violates Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for public use without adequate compensation being made, unless by his consent. *Cotulla v. La Salle Water Storage Co.* (Civ. App.) 153 S. W. 711.

These articles are not invalid because of the failure to provide a method for determining what portions of the state are arid, and what amount of land is necessary, since these questions are determinable by the courts, especially in view of the provision that the property should be condemned as is prescribed in the case of railroads, and the requirement of Art. 6506, applicable to railroads, that if the company and owner cannot agree upon the damages, the company shall state, in writing, the property sought to be condemned, the object for which it is sought to be condemned, the name of the owner and residence, and file such statement with the county judge, to enable the court to determine if the property is necessary for the purposes of the corporation. *Id.*

Construction.—All the provisions of Act of 1895 (of which these articles are a part) apply to canal corporations whether formed under said act or under the general incorporation statute, if formed for the purpose of supplying water to any of the industries named in said act. The rights conferred and duties imposed by said act upon canal corporations formed for the purposes of irrigation apply as well to a canal corporation formed under the general incorporation law "for the purpose of irrigation and milling, navigation and stock raising" as to one formed under the provision of said act for "irrigation, mining, milling, the construction of water works for cities and towns and for stock raising." *Borden v. Trespalacios Rice & Irr. Co.* (Civ. App.) 82 S. W. 464.

These articles make a public grant for the purpose of reclaiming public school lands in the arid and semiarid regions by irrigation, and must be liberally construed to carry out the legislative purpose. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

These articles assume that the legislature was familiar with the condition of the arid and semi-arid portions of Texas where a major part of the public school lands are located; and, in view of such assumption, the act discloses a legislative intent to provide for the acquisition of dam and reservoir sites on the public school lands as well as on all other lands when necessary for the creation of irrigation projects, and hence the act must be construed to give to irrigation corporations the right by implication to acquire easements for such sites on public school lands. *Id.*

What waters are public property.—Waters of the Pecos river are public property, subject to the easement of public owners, and a statutory appropriation of the excess is effective. *Biggs v. Lee* (Civ. App.) 147 S. W. 709.

Arid portion of the state.—The "arid portion of the state," to which the act applied, was defined to be "lands in that part of the state where rainfall was insufficient for agricultural purposes, and irrigation therefore necessary." This as to any given tract of land is a question of fact, to be determined as any other fact; nor have courts judicial knowledge as to such facts. *McGhee Irrigation Co. v. Hudson*, 85 T. 587, 22 S. W. 398.

The act was not inoperative because it does not declare what part of the territory of the state should be subject to its operation. *Id.*

Instruction held to properly define arid portion of state. *Hall v. Carter*, 33 C. A. 230, 77 S. W. 19.

Art. 4992. [3116] Purposes for which storm, flood or rain waters may be diverted.—The storm, flood or rain waters described in the preceding section may be held or stored by dams, in lakes or reservoirs, or diverted by means of canals, ditches, intakes, pumping plants, or other works, constructed by any person, corporation, association of persons, or irrigation district created under the statutes, for the purpose of irrigation, mining, milling, manufacturing, the development of power, the construction and operation of waterworks for cities and towns, or for stock raising. [Id. sec. 2.]

See *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Former law.—Section 2 of the act of 1889 did not operate and probably was not intended to operate, on the rights of riparian owners existing when the law was passed, but was intended to operate only on such interests as were in the state by reason of its ownership of lands bordering on rivers or natural streams. *McGhee Irrigation Co. v. Hudson*, 85 T. 587, 22 S. W. 398.

Art. 4993. [3117] The ordinary flow and underflow of flowing streams may be diverted, etc.—The ordinary flow and underflow of the flowing water and tides of every natural river, or stream, within the state of Texas, may be taken or diverted from its natural channel by any of the persons named in the preceding section [Art. 4992] for any of the purposes stated therein; provided, that such ordinary flow and underflow shall not be diverted to the prejudice of the rights of any riparian owner without his consent, except after condemnation thereof in the manner hereinafter provided. The waters of any arm or inlet of the gulf of Mexico, or of any salt water bay, may be changed from salt to sweet or fresh water, and held or stored by dams, dikes or other structures, and taken or diverted by any of the persons named in this section for any of the purposes stated herein. [Id. sec. 3.]

See *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Change in law.—The common-law rule that the ownership of riparian rights is inseparable from the ownership of the land was abrogated by this article; the statute recognizing the right of sale or condemnation of riparian rights. *Matagorda Canal Co. v. Markham Irr. Co.* (Civ. App.) 154 S. W. 1176.

Priorities.—Riparian rights are superior to any right of appropriation under this article and Art. 4995 providing that as between appropriators the first time is the first in right. *Matagorda Canal Co. v. Markham Irr. Co.* (Civ. App.) 154 S. W. 1176.

Art. 4994. [3118] Purposes of appropriation.—The appropriation of water must be for irrigation, mining, milling, manufacturing, the development of power, the construction and operation of waterworks for cities and towns, or for stock raising. Provided that so far as practicable and within the limits of the public welfare the water engineering board hereinafter created shall subordinate the appropriation of water for power to the appropriation of water for irrigation. [Id. sec. 4.]

See *Granger v. Kishi* (Civ. App.) 139 S. W. 1002.

Art. 4995. [3119] Priority of appropriation.—As between appropriators, the first in time is the first in right. [Id. sec. 5.]

Prescriptive right.—Where dam is built above another and water of stream diverted and emptied into stream below lower dam for over 20 years, owner of upper dam thereby acquired prescriptive right to maintain his dam and race. *Cape v. Thompson*, 21 C. A. 681, 53 S. W. 368.

Point to which water would flow held proper measure of extent of prescriptive right acquired to the same. *Hall v. Carter*, 33 C. A. 230, 77 S. W. 19.

Prescriptive right to use water for irrigation only embraces extent of use actually made of water while acquiring right. *Id.*

Facts held to authorize a finding that defendant's prescriptive right to use water did not go to extent of use exercised by him in certain years. *Id.*

In an action to establish riparian rights, evidence held insufficient to show that defendants had acquired the right to appropriate one-half of the flow of a spring by prescription. *Watkins Land Co. v. Clements*, 98 T. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653.

Prescriptive right to waters of a stream held not acquired as against certain lands by its use through a canal. *Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Civ. App.) 92 S. W. 1014.

Where the holder of a contract easement for the taking of water from a stream for irrigation purposes always claimed under the contract, he could not acquire a right by prescription. *Metcalfe v. Faucher* (Civ. App.) 99 S. W. 1038.

Occupation of a mill site and water power privilege held not adverse. *Briggs v. Avary*, 47 C. A. 488, 106 S. W. 904.

Priorities.—Nonriparian lands acquire rights to water by statutory appropriation alone, and the first appropriator in time is first in right. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

Art. 4995a. State divided into water divisions.—The state shall be and is hereby divided into three water divisions, as follows:

All that portion of the state of Texas lying north of the twenty-ninth parallel, north latitude, and west of the one hundredth meridian west longitude, shall constitute water division No. 1.

All that portion of the state of Texas lying east of the ninety-seventh meridian west longitude, and south of the thirtieth parallel north latitude, together with all that portion lying north of the thirtieth parallel north latitude and east of the one hundredth meridian west longitude, shall constitute water division No. 2.

All that portion of the state of Texas not embraced in water division No. 1 or water division No. 2, as hereinbefore defined, shall constitute water division No. 3. [Id. sec. 6.]

Art. 4995b. Board of water engineers created.—There shall be and is hereby constituted a board of water engineers, to be composed of three members, one of whom shall be appointed from each of the respective water divisions described in the preceding section [Art. 4995a]. The members of such board shall be appointed by the governor, by and with the advice and consent of the senate, and shall each hold office for a term of six years, and until his successor is appointed and qualified; provided, that at the first appointment made under this Act, one member shall be appointed to serve for two years, one member shall be appointed to serve for four years, and one member shall be appointed to serve for six years, to the end that one member may be appointed every two years after the passage of this Act. No person shall be appointed a member of the board who has not such technical knowledge and such practical experience and skill as shall fit him for the duties of the office. Each member of such board shall enter into bond to be approved by the governor, made payable to the governor and his successors in office, in the penal sum of ten thousand dollars, with not less than two personal sureties, or with one surety or guaranty company authorized to do business in this state, conditioned for the faithful discharge of the duties of his office, and for the delivery to his successor or other officer appointed by the governor to receive same, of all moneys, books and other property belonging to the state then in his hands or under his control or with which he may be legally chargeable as a member of such board. The governor shall have power to remove at any time, for cause, any member of the state board of engineers, after said member shall have been given a full, free and public hearing by the governor, in his own behalf, before final action is taken, and shall appoint a successor. [Id. sec. 7.]

Art. 4995c. Salary.—Each member of such board shall receive a salary of thirty-six hundred dollars per annum, payable in monthly installments. [Id. sec. 8.]

Art. 4995d. Sessions, clerks, etc.—The members appointed shall meet at Austin and organize and elect one of their number chairman of said board. A majority of said board shall constitute a quorum to transact business. Said board shall appoint a secretary at a salary of not more than two thousand dollars per annum, and may appoint such experts and employés as may be necessary to perform any duty that may be required of them by this Act, and fix their compensation. The secretary shall keep full and accurate minutes of all transactions and proceedings of said board and perform such duties as may be required by the board. The board shall have power to make all needful rules for its government and proceedings; and shall have a seal, the form of which it shall prescribe. The board shall be furnished with an office at Austin with necessary furniture, stationery, supplies, etc., at the expense of the state, to be paid for on the order of the governor. [Id. sec. 9.]

Art. 4995e. Expenses.—The members, secretary, experts, and employes of the board shall be entitled to receive from the state their necessary traveling expenses while traveling on the business of the board, to be paid out on the order of the governor, upon an itemized statement sworn to by the party who incurred the expense and approved by the board. [Id. sec. 10.]

Art. 4995f. May hold sessions at any place, etc.—The board may hold sessions at any place in this state when deemed necessary to facilitate the discharge of its duties. [Id. sec. 11.]

Art. 4996. [3120] Record of appropriations to be filed, etc.—Every person, association of persons, corporation or irrigation district who shall have heretofore constructed or partially constructed any dam, reservoir, lake, canal, ditch or other work for any of the purposes named in this Act, who have not heretofore done so, shall, within one year after this Act goes into effect, and not thereafter, file for record in the office of the county clerk of the county where the dam, lake, reservoir, pumping plant, intake, or headgate, ditch or canal may be situated, or to which said county may be attached for judicial purposes, and which shall be recorded by said clerk as hereinafter provided, a sworn statement in writing showing approximately the number of acres of land that will be irrigated, the name of such ditch or canal, the point at which the headgate thereof is situated, the size of the ditch or canal and width and depth, and the carrying capacity thereof in cubic feet per second of time, the name of said stream from which said water is taken, the time when the work was commenced, the name of the owner or owners thereof, together with a map showing the route of such ditch or canal; and when the water is to be taken from a reservoir, dam or lake, the statement above provided for shall show in addition to the ditch and other things provided for, the locality of the proposed dam, reservoir or lake, giving the names or numbers of the surveys upon which it is to be located, its holding capacity in cubic feet of water, the acreage and surface feet of land that will be covered, and the limits of such lake, reservoir or dam, and the area of the watershed from which the storm or rain water will be collected. [Id. sec. 12.]

See *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575; *Granger v. Kishi* (Civ. App.) 139 S. W. 1002.

Affidavit of president of corporation.—The affidavit of the president of the irrigation company, although it purports to have been made by him as an individual and not by the corporation through him, yet as it was made in pursuance of a duty enjoined on the corporation, which had to be performed before it could use the water under its charter, it will be presumed that it was done by the authority and at the instance of the corporation. *Bay City Irr. Co. v. Sweeney* (Civ. App.) 81 S. W. 548.

Art. 4996a. County clerk shall record, etc.—The clerk of the county court shall promptly record the statements and maps, the filing and record whereof is provided for in section twelve [Art. 4996] hereof; and shall index the same as is provided for the indexing of deeds of conveyance to real estate; and shall receive for such filing and recording the same fees provided by law for the recording of deeds; and shall make and furnish certified copies of such instruments upon demand, in the same manner, and receive the same fees therefor, as is now provided for the making and supplying of certified copies of the records in his office. [Id. sec. 13.]

Art. 4996b. Statement to be filed with board, etc.—Every person, association of persons, corporation, or irrigation district, who shall have heretofore filed for record, or shall hereafter, in compliance with the provisions of section twelve [Art. 4996], file for record the sworn statement in writing as set out therein, shall, within one year after this Act shall take effect, file in the office of the board a certified copy of such sworn statement and a true copy of the map as described in section twelve [Art. 4996], and in addition thereto, a sworn statement showing what has been done under or in pursuance of such filing or statement;

what work or construction has been completed or partially completed; what portion of said work is in use and what portion is in possession and not in actual use; what amount or volume of water is being actually taken, diverted or used and for what purpose; and the amount or volume of water, as near as may be, that has been diverted, taken or used, and for what purpose, in each and every year since such original filing was made; and if such water was diverted, taken or used for irrigation, the statement shall show, as near as may be, a description and the area of lands being irrigated at said time, and the number and names of the users and consumers of water at said time. Every such statement shall be accompanied by a designation of the name and postoffice address to which any notice authorized or required under this Act shall be directed, and such address shall continue in force until written notice of a change in such address is filed with the board.

Every person, association of persons, corporation or irrigation district, who has, prior to the first day of January, 1913, actually taken or diverted any water and applied same to any of the uses and purposes named in this Act, and is at the date of the filing of the statement herein provided to be filed, continuing to use and apply such water, who shall, within one year after this Act shall go into effect, file with the board the sworn statement last described in this section, shall, as against the state, have the right to take and divert such water to the amount or volume thus being actually used and applied; provided, that nothing herein shall be construed to affect or relate to any priority or right as between any claimants, appropriators, or users from any source of water supply. [Id. sec. 14.]

Art. 4996c. Application to appropriate water.—Every person, association of persons, corporation, or irrigation district, who shall, after this Act shall take effect, desire to acquire the right to appropriate for the purposes stated in this Act, unappropriated water of the state, shall, before commencing the construction, enlargement, or extension of any dam, lake, reservoir, or other storage work, or of any ditch, canal, headgate, intake, pumping plant, or other distributing work, or performing any work in connection with the storage, taking, or diversion of water, make an application in writing to the board for a permit to make such appropriation, storage, or diversion.

Such application shall be in writing, and sworn to; shall be in duplicate, and shall set forth the name and postoffice address of the applicant; the source of water supply; the nature and purposes of the proposed use; the location and description of the proposed dam, lake, reservoir, headgate, intake, pumping plant, ditch, canal or other work; the time within which it is proposed to begin construction; and the time required for the application of the water to the proposed use; and if such proposed use is for irrigation, a description of the lands proposed to be irrigated and, as near as may be, the total acreage thereof.

Such application shall be accompanied by a map or plat drawn on tracing linen on a scale not less than two inches to the mile, showing substantially the location and extent of the proposed works; the location of the headgate, intake, pumping plant or point of diversion by course and distance from permanent natural objects or land marks; the location of the main ditch or canal and of the laterals or branches thereof; the course of the river, stream or other source of water supply; the position and area of all lakes, reservoirs, or basins intended to be used or created, and the water line thereof; the intersection with all other ditches, canals, laterals, lakes or reservoirs, the proposed work will touch or intersect, or with which connections will be made; and shall represent in ink of different color from that used to represent the proposed works, the location of all ditches, canals, laterals, reservoirs, lakes, dams, or other work of like character then existing on the ground, with

a designation of the name of the owner thereof. Such map or plat shall contain the name of the proposed work or enterprise; the name or names of the applicant or applicants, and a certificate of the surveyor, giving the date of his survey, his name and postoffice address, and also the date of the application which it accompanies.

Provided, however, that nothing in this Act shall be held or construed to require the filing of an application or procuring of any permit for the alteration, enlargement, extension, or addition to any canal, ditch, or other work that does not contemplate or will not result in an increased appropriation or the use of a larger volume of water. [Id. sec. 15.]

Art. 4996d. Additional data may be required.—If the proposed taking or diversion of water for irrigation is of greater volume than thirty cubic feet of water per second of time, the board may require the following in addition: A continuous longitudinal profile of the main ditch or canal, showing the grade or level of the bottom thereof, and of the top of the levies, and of the maximum discharge line, the horizontal scale of which profile shall be not less than one inch to one thousand feet and the vertical scale not less than one inch to twenty feet; a plat showing cross sections of such main ditch or canal at a sufficient number of points to show the different forms, whether in excavation, in fill, in siphons or flumes, and which plat shall be drawn on a horizontal and vertical scale of one inch to twenty feet; plats of any dams, cribs, embankments or other proposed construction to obstruct any river, stream, lake, pond or other source of water supply, which shall be on a longitudinal scale of not less than one inch to two hundred feet, and cross sections thereof on a scale of not less than one inch to twenty feet; the nature of the material to be used and the method of proposed construction; and a plat on a scale of not less than one inch to four feet, showing in detail the timber, brush, stone or other construction except earth.

The maps or plats of all proposed lakes or reservoirs shall show the maximum area to be submerged, with a description thereof, and with sufficient topographical details to enable the contents thereof to be approximately determined, and the contours of such lake or reservoir shall be on a scale of not less than five-foot vertical intervals.

The board may also require the filing of a copy of the engineer's field notes of any survey of such lake or reservoir, and may require plans and specifications, showing in detail all headworks, wasteways, wastegates and of construction for the control or drawing off of all flood or impounded waters.

The board may, in case the applicant is an incorporated company, require the filing of certified copies of the applicant's articles of incorporation, together with a statement of the names and addresses of its directors and officers; and of the amount of its authorized and of its paid-up capital stock.

If the applicant be other than an incorporated company, the board may require the filing of a sworn statement, showing the names and addresses of the person or persons interested in same and the extent of such interest and of the financial condition of each such person.

Every such application shall be accompanied by the fees hereinafter provided, and shall not be filed or considered until such fees are paid. [Id. sec. 16.]

Art. 4996e. Preliminary examination.—Upon the filing of such application, accompanied by the data and fees hereinbefore provided, it shall be the duty of the board to make a preliminary examination thereof; and if it appear that there is no unappropriated water in the source of supply, or that for other reasons the proposed appropriation should not be allowed, the board may thereupon reject such application; in which case, if the applicant shall elect not to proceed further, the board may

return to such applicant any part of the fees accompanying such application.

The board shall determine whether the application, maps, plats, contours, plans, profiles and statements accompanying same, are in compliance with the provisions of this Act and with the regulations of the board and may require the amendment thereof. [Id. sec. 17.]

Art. 4996f. Applications to be recorded.—All applications filed with the board shall be recorded in a well bound book kept for that purpose in the office of said board, and shall be indexed alphabetically in the name of the applicant, of the stream or source from which such appropriation is sought to be made, and the county in which appropriation is sought to be made. [Id. sec. 18.]

Art. 4996g. Action upon application.—It shall be the duty of the board to reject all applications and refuse to issue the permit asked for, if there is no unappropriated water in the proposed source of supply; or if the proposed use conflicts with existing water rights, or riparian rights, or is detrimental to the public welfare. It shall be the duty of the board to approve all applications and issue the permit asked for, if such application is made in proper form in compliance with the provisions of this Act and the regulations of said board; and is accompanied by the fees required in this Act; and if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this Act; and does not impair existing water rights or riparian rights, and is not detrimental to the public welfare. [Id. sec. 19.]

Art. 4996h. Notice of hearing of application, etc.—Before the board shall approve any such application and issue any such permit, notice of such application shall be given substantially in the following manner:

Such notice shall be in writing; shall state the name of the applicant and his residence; the date of the filing of the application in the office of the board; the purpose and extent of the proposed appropriation of water; the source of supply; the place at which the water is to be stored; or to be taken or diverted from the source of supply; together with such additional information as the board may deem necessary. If the proposed use is for irrigation, such notice shall contain a general description of the location and area of the land to be irrigated. Such notice shall also state the time and place when and where such application will be heard by the board. [Id. sec. 20.]

Art. 4996i. Publication of notices, etc.—Such notice shall be published once in each week for four consecutive weeks prior to the date stated in such notice for the hearing of such application in some newspaper having a general circulation in that section of the state in which the source of water supply is located. In addition to such publication, a copy of such notice shall be transmitted by the secretary of the board, by registered mail, addressed to each claimant or appropriator of water from such source of water supply, the record of whose claim or appropriation has been filed in the office of the board. Such notices shall be mailed not less than twenty days before the date set for the hearing. [Id. sec. 21.]

Art. 4996j. Hearing upon application.—At the time and place stated in the notice, the board shall sit to hear such application. Any person, association of persons, corporation, or irrigation district, may appear, in person or by attorney, and enter appearance in writing in said matter, and present objection to the issuance of permit. The board may receive evidence, orally or by affidavit, in support of and in opposition to the issuance of such permit; and may also hear arguments. It shall have power to adjourn such hearing from time to time and from place to place, and after full hearing to render decision in writing approving or rejecting such application. Such application may be approved or

rejected in whole or in part. Provided, however, that nothing herein contained shall prevent the board from rejecting any application in whole without the issuance of the notice herein required. [Id. sec. 22.]

Art. 4996k. Cost of publication.—The cost of publication of the notice herein required and the postage for mailing thereof shall in each case be paid by the applicant. [Id. sec. 23.]

Art. 4996l. Suit upon rejected application.—If the board shall reject any application in whole, the applicant or applicants may, within sixty days after the entry of such order, institute a suit in the district court of the county in which such appropriation is sought to be made, in which such applicant or applicants shall be plaintiff, and all claimants or appropriators of water from the same source of water supply who have filed in the office of the board a record of their claims or appropriations as hereinbefore provided, shall be made defendants. In any such case, the process, pleading, and practice shall be in accordance with the practice of the district court as provided in other civil cases. [Id. sec. 24.]

Art. 4996m. Appeals.—If any application be granted in whole or in part, any party, or number of parties acting jointly who may feel aggrieved by any such decision of the board may appeal from its action to the district court of the county in which the appropriation of water is sought to be made. All persons appealing shall be joined as plaintiffs in the district court, and all other parties who have entered their appearance in writing before said board in said matter shall be joined as defendants. [Id. sec. 25.]

Art. 4996n. Petition and bond.—The party or parties appealing shall, within sixty days next after the date of the decision of the board appealed from, file in the district court to which the appeal is taken a petition in writing, setting forth the order of the board appealed from and their objections thereto, together with a prayer for the relief sought; and shall also, within such time, enter into a bond, to be approved by the district clerk, in such amount as the district clerk shall fix, payable to all defendants in said suit, conditioned that he, they, or it shall prosecute such appeal to effect and pay all costs and damages which may be adjudged against them, or either or any of them. Upon the filing of such petition and bond, and the approval of the bond by the district clerk, the appeal shall be deemed perfected. [Id. sec. 26.]

Art. 4996o. Proceedings stayed.—The clerk of the district court shall immediately upon the perfecting of the appeal in his court, transmit to the office of the board a certificate, under the seal of the court, to the effect that said appeal has been perfected. Such certificate shall be entered of record in the office of the board; and thereupon further proceedings by said board in said matter shall be suspended until the determination of such appeal. Process shall issue out of said district court to all parties defendant in said proceeding in the same manner as provided by law in other civil cases originally instituted in such court. [Id. sec. 27.]

Art. 4996p. Transcript.—The party or parties appealing shall, within ninety days after the appeal is perfected, file in the office of the clerk of such district court a certified copy or transcript of all records in the office of the board relating to such application and the action of the board thereon. By agreement of all parties filed with the secretary, any part of such records may be omitted from such transcript. [Id. sec. 28.]

Art. 4996q. Trial de novo.—When appeal to the district court is perfected, a trial de novo shall be had. The process, pleadings and practice shall follow, as near as may be, the procedure provided in other civil cases originally instituted in said court. [Id. sec. 29.]

Art. 4996r. New parties may be made.—Any claimant or appropriator of water from the same source of supply, and any party having or claiming an interest in the rights involved in any such suit, shall have the right to intervene therein in the district court, new or additional parties may be made to such suit; and any party shall have the right to interplead any other person, association of persons, corporation or irrigation district. [Id. sec. 30.]

Art. 4996s. Board may intervene.—The board, in behalf of the state, may intervene in any suit or proceeding authorized by this Act. [Id. sec. 31.]

Art. 4996t. Attorney general to represent board.—In all litigation to which the board may be a party the attorney general shall represent the board. [Id. sec. 32.]

Art. 4996u. Precedence on appeal.—When an appeal is taken as provided in this Act from any decision of the board, such cause shall have precedence in the district court over other civil causes not entitled to a like precedence; and if an appeal be taken from the district court to the court of civil appeals, or from the court of civil appeals to the supreme court, such cause shall have like precedence; provided, that all appeals or writs of error from any judgment rendered in any of such courts shall be perfected or sued out within ninety days from the date of such judgment, and not thereafter. [Id. sec. 33.]

Art. 4996v. Decree of court filed with board.—It shall be the duty of the clerk of the district court, immediately upon the entering of any final judgment, order or decree in any suit or proceeding in which an appeal is taken to the district court as provided in this Act to transmit a certified copy of such judgment, order or decree to the board. If such judgment, order or decree of the district court be appealed from, then upon final determination thereof in the appellate court, it shall be the duty of the clerk of such court to transmit a certified copy of said judgment, order or decree to the board. Same shall be forthwith entered upon the records of the board. Upon the termination of such litigation the board shall comply with the final order or decree therein. [Id. sec. 34.]

Art. 4996w. Transmission of certified copy of judgment to board of water engineers.—When any court of record in this state shall render any judgment, order or decree affecting in any manner the title to any water right, claim, appropriation or irrigation works, or any matter over which the board of water engineers is given supervision under the provisions of this Act, it shall be the duty of the clerk of such court to forthwith transmit to the office of the board a certified copy of such judgment, order or decree. [Id. sec. 35.]

Art. 4996x. Permit stayed pending appeal.—No permit shall be issued by the board until the expiration of sixty days after the date of the decision of the board granting the application, in whole or in part; or if an appeal be taken as provided in this Act, no such permit shall be issued until the final termination of such appeal. [Id. sec. 36.]

Art. 4996y. Form of permit, etc.—Every permit issued by the board under the provisions of this Act shall be in writing, attested by the seal of said board, and shall contain substantially the following: The name of the applicant to whom issued; the date of the issuance thereof; the date of the filing of the original application therefor in the office of the board; the use or purpose for which the appropriation of water is proposed to be made; the amount or volume of water authorized to be appropriated; a general description of the source of supply from which the appropriation is proposed to be made; and if such appropriation is for irrigation, a description and statement of the approximate area of the lands to be irrigated; together with such other data and information

as the board may prescribe. If such permit is issued in pursuance of the judgment or decree of any court as provided in this Act, same shall in all respects conform to the requirements of such judgment or decree. Upon the issuance of such permit, same shall be transmitted by the secretary of the board by registered mail to the county clerk of the county in which the appropriation is to be made; and upon receipt of a recording fee of one dollar to be paid by the applicant, such clerk shall file and record the same in a well-bound book provided and kept for that purpose only, and to index the same alphabetically under the name of the applicant and of the stream or source of water supply, and thereupon to deliver such permit upon demand to the applicant. Such permit, when thus filed in the office of the county clerk, shall be constructive notice of the filing of the application with the board; of the issuance of the permit; and of all the rights arising thereunder. [Id. sec. 37.]

Arts. 4997, 4998.—Repealed. See note under Art. 4991.

See *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575; *Granger v. Kishi* (Civ. App.) 139 S. W. 1002.

Art. 4999. Work to begin in ninety days, etc.—Within ninety days after the date of issuance of the permit provided for in this Act, the applicant seeking to appropriate water thereunder shall begin actual construction of the proposed ditch, canal, dam, lake, reservoir or other work, and shall prosecute the work thereon diligently and continuously to completion; provided, that the board may by an order entered of record, extend the time for beginning the actual construction of such work for a period not to exceed twelve months from the date of issuance of such permit; and further provided, that if any applicant shall fail to comply with the requirements of this section, he, they, or it shall thereby forfeit all rights under such permit. If any applicant to whom a permit is issued shall, after beginning the actual construction of work as provided in this section, fail to thereafter prosecute the same diligently and continuously to completion, the board may, after notice to the applicant, and giving him an opportunity to be heard, by an order entered of record, revoke and cancel such permit, in whole or in part. A certified copy of such order shall be forthwith transmitted by the secretary of the board, by registered mail, to the clerk of the county in which such permit is recorded, and which order shall be recorded by said county clerk; provided, that any applicant whose permit is thus canceled or revoked or sought to be canceled by the board shall have the right to contest same in the district court in the same manner as provided in this Act for the rejection of an application. [Id. sec. 38.]

Arts. 5000, 5001.—Repealed. See note under Art. 4991.

See *Granger v. Kishi* (Civ. App.) 139 S. W. 1002; *Cotulla v. La Salle Water Storage Co.*, 153 S. W. 711.

Art. 5001a. Use of water permit forbidden.—Any person, association of persons, corporation or irrigation district, or any agent, officer, employé or representative of any person, association of persons, corporation or irrigation district, who shall wilfully take, divert or appropriate any of the water of this state, or the use of such water, for any purpose, without first complying with all the provisions of this Act, shall be deemed guilty of a misdemeanor; and on conviction thereof shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment; and each day that such taking, diversion or appropriation of water shall continue shall constitute a separate offense; and the possession of such water, except when the right to its use is acquired in accordance with the provisions of law, shall be prima facie proof of the guilt of the person, association of persons, corporation, irrigation district, or the agent, officer, employé or representative of any person, association of persons, corporation or irrigation district. [Id. sec. 39.]

Art. 5001b. State may recover penalty.—In addition to the punishment prescribed in the last preceding section [Art. 5001a], any person, association of persons, corporation, or irrigation district, or any agent, officer, employé or representative of any such person, association of persons, corporation, or irrigation district, who shall wilfully take, divert, or appropriate water of the state, or the use of such water, without first complying with the provisions of this Act, shall be liable to a penalty of one hundred dollars per day for each and every day that such taking, diversion, appropriation, or use may be made, and the state may recover such penalties by suit brought for that purpose in any court of competent jurisdiction. [Id. sec. 40.]

Art. 5001c. Date of priority.—When any permit is issued under the provisions of this Act, the priority of the appropriation of water or the claimant's right to the use of such water shall date from the date of the filing of the original application in the office of the board. [Id. sec. 41.]

Art. 5001d. Board to measure streams, make reports, etc.—It shall be the duty of the board to make or cause to be made measurements and calculations of the flow of streams from which water may be appropriated as provided in this Act, commencing such work in those streams most used for irrigation or other beneficial uses; to collect data and make surveys; to determine the most suitable location for constructing works to utilize the waters of the state; to ascertain the location and area of the lands best suited for irrigation; to examine and survey reservoir sites; and wherever practicable, to make estimates of the cost of proposed irrigation works, and of the improvements of reservoir sites. It shall be the duty of the board to make itself conversant with the water courses of the state and of the needs of the state concerning irrigation matters and the storage and conservation of the waters of the state for other purposes. The board shall make biennial reports in writing to the Governor, in which shall be included the data and information collected by said board, and in which shall be included such suggestions as to the amendment of existing laws and the enactment of new laws as the information and experience of the board may suggest. The board shall keep in its office full and proper records of its work, observations and calculations, all of which shall be the property of the state. [Id. sec. 42.]

Art. 5001e. Board to make rules, etc.—The board may adopt and enforce such rules, regulations and modes of procedure as it may deem proper for the discharge of the duties incumbent upon it under the provisions of this Act. [Id. sec. 43.]

Art. 5001f. Fees.—The board shall charge and collect for the benefit of the state the following fees:

For filing each and every application for the storage of water, a fee of twenty-five dollars; provided, that if the application shall contemplate and propose the storage of water in excess of five thousand acre feet, an additional fee of one dollar shall be charged for each additional one thousand acre feet or fractional part thereof.

For filing each and every application which contemplates and proposes the taking or diversion of water for irrigation purposes, one cent per acre for each and every acre proposed to be irrigated.

For filing each application contemplating and proposing the taking, diversion or use of flowing water for any other purpose than storage or the irrigation of land as hereinbefore provided, seventy-five cents for each cubic foot of water per second of time sought to be appropriated; provided, that if the appropriation shall contemplate the storage and diversion and use of water, for any two of such purposes, the fee charged and collected shall be based upon only one of such purposes, and that shall be the one for which the highest fee is provided herein.

For the filing of each and every exhibit, map, affidavit or other paper authorized to be filed in the office of the board of water engineers, a filing fee of ten cents.

For the recording of each and every paper authorized or required to be recorded in the records of the office of the board, a fee of fifteen cents per folio of one hundred words.

For making and certifying each and every copy of any instrument or paper authorized to be certified under the seal [seal] of such board, a fee of fifteen cents per folio, including the certificate.

For making and certifying copies of any map or blue print thereof authorized to be filed in the office of the board, the same fees as are now or may be prescribed by law for the making and certifying of such copies by the commissioner of the general land office.

For filing each application for extension of time within which to complete work a fee of twenty-five dollars. [Id. sec. 44.]

Art. 5001g. Extension of time.—When the holder of any permit issued under the provisions of this Act has actually commenced construction of work thereunder, and has prosecuted and is prosecuting same with diligence as provided in this Act, the board may, upon an application in writing, presented to the board, for good cause shown, by an order entered of record, extend the time within which construction is required to be completed; provided, the board shall not consider or grant any application for such extension until the applicant has first paid the fees provided therefor. [Id. sec. 45.]

Art. 5001h. Standard of measure.—A cubic foot of water per second of time shall be the standard unit for the measurement of flowing water, both for the purpose of determining the flow of water in streams and for the purpose of distributing water for beneficial uses. The standard unit of volume of static water shall be the acre foot.

Units Defined.—A cubic foot per second of time is the quantity of water that will pass through a square foot opening in one second when flowing at an average velocity of one foot per second. An acre foot is the quantity of water required to cover one acre one foot deep. [Id. sec. 46.]

Art. 5001i. Water right.—A water right is the right to use the water of the state when such use has been acquired by the application of water under the statutes of this state and for the purposes stated in this Act. Such use shall be the basis, the measure and the limit to the right to use water of the state at all times, not exceeding in any case the limit of volume to which the user is entitled and the volume which is necessarily required and can be beneficially used for irrigation or other authorized uses. [Id. sec. 47.]

Art. 5001j. Right limited to beneficial use.—Rights to the use of water acquired under the provisions of this Act shall be limited and restricted to so much thereof as may be necessarily required for the purposes stated in this Act irrespective of the carrying capacity of the ditch, and all the water not so applied shall not be considered as appropriated. [Id. sec. 48.]

Art. 5001k. Right forfeited by abandonment.—Any appropriation or use of water heretofore made under any statute of this state or hereafter made under the provisions of this Act which shall be wilfully abandoned during any three successive years, shall be forfeited and the water formerly so used or appropriated shall be again subject to appropriation for the purposes stated in this act. [Id. sec. 49.]

Art. 5001l. Dams constructed prior to March 28, 1913; right to appropriate waters, etc.—Any person, association of persons, corporation or irrigation district, having prior to March 28th, 1913, constructed any dam or dams across any river, or other stream, for the purpose of stor-

ing water for any of the purposes set forth in section 2 [Art. 4992] of this Act shall have the right to appropriate the ordinary flow or underflow, or the storm, flood or rain waters of such stream, in amounts and quantities equal to the holding capacity of such dam or dams, by making application as provided for in section 14 [Art. 4996b] of this Act, and such application shall have priority over all other applications; and, provided, that any such person, association of persons, corporation or irrigation district thus impounding water in any river channel, lake or reservoir and appropriating the same shall have the right to collect from any riparian owner who shall divert such impounded water from said reservoir by pumping or otherwise a reasonable sum for the water so diverted, such sum to be determined by the board of water engineers, based upon the benefits accruing to such riparian owner by reason of the construction of such dam, lake or reservoir and the impounding of such waters therein, provided, the owner of such dams, lake or reservoir, and the owner of riparian rights using such water cannot agree upon the price to be paid therefor. [Id. sec. 49a.]

Art. 5001m. Conservation of storm water authorized.—Any person, association of persons, corporation, or irrigation district having in possession and control storm, flood, or rain waters conserved or stored under the provisions of this Act may enter into contract to supply same to any person, association of persons, corporation, or irrigation district having the right to acquire such use; provided, that the price and terms of such contract shall be just and reasonable and without discrimination and subject to the same revision and control as hereinafter provided for other water rates and charges; provided, that if any person shall use such stored or conserved water without first entering into contract with the party having stored or conserved the same, such user shall pay for the use thereof such charge or rental as the board shall find to be just and reasonable, and subject to revision by the court as herein provided for other water rates and charges. [Id. sec. 50.]

Art. 5001n. Use of streams for conveying stored water.—For the purpose of conveying and delivering storm, flood or rain water from the place of storage to the place of use as provided in the preceding section [Art. 5001m], it shall be lawful for any person, association of persons, corporation or irrigation district to use the banks and bed of any flowing natural stream within this State; under and in accordance with such rules and regulations as may be prescribed by the board of water engineers; and such board shall prescribe rules and regulations for such purpose. No person, association of persons, corporation, or irrigation district who has not acquired the right to the use of such conserved or stored waters as provided in the last preceding section shall take, use, or divert same. [Id. sec. 51.]

Art. 5001o. Penalty for unlawful interference.—Any person, association of persons, corporation, or irrigation district, of [or] the agent, officer, employee, or representative of any such person, association of persons, corporation, or irrigation district who shall wilfully interfere with the passage of or take, divert, or appropriate such conserved or stored water during the passage and delivery thereof as provided in the last two preceding sections [Arts. 5001m, 5001n], shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. [Id. sec. 52.]

Art. 5001p. Injunction authorized.—It shall be the duty of the district court, or the judge thereof, of any judicial district in or through which the conserved or stored waters described in the last three preceding sections [Arts. 5001m—5001o] may pass, at the suit of any par-

ty having an interest therein, upon it being made to appear that any person, association of persons, corporation, or irrigation district or any agent, officer, employee, or representative thereof is interfering with or threatening or about to interfere with, the passage, or is taking, diverting, appropriating, or threatening, or about to take, divert, or appropriate, any conserved or stored waters, in violation of the provisions of the last three preceding sections; to issue such writ or writs of injunction, mandamus, or other process as may be proper or necessary to prevent such wrongful acts. [Id. sec. 53.]

Art. 5002. [3125] **Formation of corporations authorized.**—Corporations may be formed and chartered under the provisions of this Act and of the general corporation laws of the state of Texas, for the purpose of constructing, maintaining and operating canals, ditches, flumes, feeders, laterals, dams, reservoirs, lakes and wells, and of conserving, storing, conducting and transferring water to all persons entitled to the use of the same for irrigation, mining, milling, manufacturing, the development of power, to cities and towns for waterworks, and for stock-raising. [Id. sec. 54.]

See *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575; *Biggs v. Maulding* (Civ. App.) 147 S. W. 681.

Construction of prior act—Eminent domain.—See, also, notes under Art. 5004a.

This article conferred the right of eminent domain only upon corporations and associations formed for the purpose of supplying water to the various industries named in the act of which it formed a part, and to cities and towns to enable them to furnish water to the public and did not confer that right upon corporations formed for the purpose of conducting the various industries named in the act. *Borden v. Trespalacios Rice & Irr. Co.* (Civ. App.) 82 S. W. 466.

A corporation formed for irrigation purposes under this article may exercise the power of eminent domain subject to legislative regulations. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Under this article and Art. 5004, providing that all corporations and associations formed for the purpose of irrigation, etc., as provided in that chapter, may obtain the right of way over private lands, and also land for dams and reservoirs, by condemnation, a corporation formed under Art. 1121, subd. 23, providing that corporations may be formed for the construction, maintenance, and operation of dams, reservoirs, etc., and other necessary appurtenances, for the purposes of irrigation, navigation, etc., is entitled to acquire land by eminent domain proceedings. *Cotulla v. La Salle Water Storage Co.* (Civ. App.) 153 S. W. 711.

Nature of irrigation company.—A corporation formed for irrigation purposes under this article is a quasi public corporation. *Colorado Canal Co. v. McFarland & Southwell* (Civ. App.) 94 S. W. 400; *Id.*, 50 C. A. 92, 109 S. W. 435; *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Where an irrigation company acquired under the irrigation statutes superior rights to use the waters of a river, it became a quasi public corporation chargeable with duties as such, though an ancient grant to its vendors vested in them the riparian rights to the waters of such river. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

Acceptance of right of way.—Acts of individual member of irrigation company held not an acceptance by company of right of way. *Toyaho Creek Irr. Co. v. Hutchins*, 21 C. A. 274, 52 S. W. 101.

Gift of right of way.—Gift of right of way to irrigation company held revocable, there being no estoppel. *Toyaho Creek Irr. Co. v. Hutchins*, 21 C. A. 274, 52 S. W. 101.

Art. 5002a. [3125] **Sale of water rights authorized.**—All such corporations shall have full power and authority to make contracts for the sale of permanent water rights, and to have the same secured by liens on the land or otherwise, and to lease, rent, or otherwise dispose of the water, controlled by such corporation for such time as may be agreed upon, and in addition to the lien on the crops hereinafter provided for, the lease or rental contract may be secured by a lien on the land or otherwise. [Id. sec. 55.]

Art. 5002b. [3125] **Persons entitled to use water.**—All persons who own or hold a possessory right or title to land adjoining or contiguous to any dam, reservoir, canal, ditch, flume or lateral constructed and maintained under the provisions of this Act, and who shall have secured a right to the use of water in said canal, ditch, flume, lateral, reservoir, dam or lake, shall be entitled to be supplied from such canal, ditch, flume, lateral, dam, reservoir or lake with water for irrigation of such land, and

for mining, milling, manufacturing, development of power, and stock-raising, in accordance with the terms of his or their contract. [Id. sec. 56.]

Duty to supply water.—An irrigation company, being a quasi public corporation, owed the owner of land contiguous to its canals the duty to provide water for irrigating such land upon reasonable notice from the landowner, and upon reasonable terms and within its ability to supply same by the exercise of reasonable diligence. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

Contracts to supply water.—Limitation of the liability of an irrigation canal company for damages for failure to furnish water to its lessee held not prevented by the fact that the company is a common carrier. *Moore-Cortes Canal Co. v. Gyle*, 36 C. A. 442, 82 S. W. 350.

An irrigation company under its contract to furnish water held required to furnish facilities for delivering the water on the land. *Sisk v. Gravity Canal Co.*, 52 C. A. 12, 113 S. W. 195.

A corporation organized under this article, which contracts with a person entitled to water for irrigation to furnish him with a full supply of water to make a crop, cannot excuse nonperformance by proving shortage in the supply from drought, accident, or other cause, so that it cannot comply with the contract without discriminating against other consumers of water. *Erp v. Raywood Canal & Milling Co.* (Civ. App.) 130 S. W. 897.

A stipulation in a contract by a corporation to furnish water for irrigation for a crop held not unreasonable. *Id.*

In an action to recover against an irrigation company for failure to furnish water resulting in damage to plaintiff's crop of rice, evidence held to show that the crop for the year was short one-third of a sack per acre. *Beaumont Irrigating Co. v. Gregory* (Civ. App.) 136 S. W. 545.

A contract for the furnishing of water for irrigation construed. *Id.*

One who merely owned an irrigation canal not shown to have been constructed under this article, with a lateral running through plaintiff's land with his consent, and who agreed to furnish plaintiff water to irrigate his rice crop, could make a valid contract limiting damages from his failure to do so to a certain sum per acre; the irrigation plant owner not undertaking the discharge of a public duty, so that the reasonableness of the provision of the contract is for the parties to decide. *Granger v. Kishi* (Civ. App.) 139 S. W. 1002.

Under this article one maintaining an irrigation canal could not impose unjust or unreasonable terms by contract upon water users; any such terms being void. *Id.*

In an action against an irrigation company for damages for failure to furnish sufficient water to raise a full crop on a stipulated number of acres, whether a later contract, by which the company agreed to furnish a limited amount of water, was executed by plaintiff under duress, was immaterial, where the failure to furnish the water was occasioned by drought or accident, both contracts being subject to the provisions of this article. *Raymond Rice Canal & Milling Co. v. Erp*, 105 T. 161, 146 S. W. 155.

A contract by an irrigation company to supply only sufficient water to produce an average crop of a certain amount per acre is not manifestly illegal, but might be valid under certain circumstances; but a provision limiting the amount of damages per acre is invalid. *Id.*

In an action against an irrigation company on an oral contract, whether a later contract was executed under duress held immaterial, where the failure to furnish the water was occasioned by accident or drought. *Id.*

A contract by an irrigation company to supply only sufficient water to produce an average crop of a certain amount per acre is not manifestly illegal, but might be valid under certain circumstances, but a provision limiting the amount of damages per acre is invalid. *Id.*

An irrigation company chartered under this article, being a quasi public corporation, owed a duty to supply water to land contiguous to its canals without a contract therefor, and the only matters open to verbal contract with reference to the water were the price and terms upon which, and the time at which, it would be delivered. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

Where a plantation company entitled to be supplied with water by an irrigation company makes a demand therefor, it is bound by the language of such demand, though the demand be unnecessary. *Id.*

Notice to an irrigation company that a plantation company had about "20,000 cabbage plants pulled" which would be a total loss unless water was obtained at once held sufficient to notify it of all special damages growing out of the loss of the cabbage plants. *Id.*

A provision in a contract by an irrigation company limiting its liability to \$10 per acre for negligent failure to supply water was void. *Id.*

— **Liability for breach.**—Measure of damages, in action for breach of contract to furnish water for irrigating purposes, stated. *Raywood Rice, Canal & Milling Co. v. Wells*, 33 C. A. 545, 77 S. W. 253.

Where defendant contracted to furnish water for irrigation, but plaintiff refused to execute a proper contract tendered him, he could not recover for failure to furnish sufficient water to save his crop. *Colorado Canal Co. v. Mayes*, 38 C. A. 271, 85 S. W. 448.

In action by owner of land for breach of contract to furnish water for irrigation, expense held to be deducted from owner's share of crop in estimating damages. *Barstow Irr. Co. v. Cleghon* (Civ. App.) 93 S. W. 1023.

In action for breach of contract to furnish water for irrigation, plaintiff held entitled to recover for crops lost by his inability to plant. *Id.*

An irrigation company can only excuse its failure to furnish water according to contract by proof that its failure resulted from inevitable accident, or a cause that could not be obviated by ordinary care and foresight. *Colorado Canal Co. v. McFarland & Southwell* (Civ. App.) 94 S. W. 400.

An irrigation company, having negligently or willfully failed to furnish water to a consumer according to contract, held liable for any damages suffered in loss of or injury to the consumer's crops by reason of the breach of contract. *Id.*

In an action by a lessee for damages for failure of the lessor to furnish water to irrigate the land for a crop, evidence held insufficient to sustain the judgment for the amount of damages awarded. *Dunlap v. Raywood Rice Canal & Milling Co.*, 43 C. A. 269, 95 S. W. 43.

Plaintiff irrigation company held not liable for breach of a contract to furnish water, for any damage that accrued prior to five days after written demand made by defendants for water, as provided by the contract. *Gravity Canal Co. v. Sisk*, 43 C. A. 194, 95 S. W. 724.

That plaintiff's 1903 crop was destroyed by a natural overflow of waters did not relieve an irrigation company from liability for destroying his 1904 crop by overflowing his land. *McLellan v. Brownsville Land & Irrigation Co.*, 46 C. A. 249, 103 S. W. 206.

Plaintiff held not barred from recovering for the overflow of his crops by an irrigation company for failing to build levees or embankments to avoid such overflow. *Id.*

In an action against an irrigation company for overflowing crops, it was no defense that it did not turn the water directly on plaintiff's land, but caused it to flow first over others' lands. *Id.*

An irrigation company, having contracted to furnish water to irrigate defendant's land, held not a necessary or proper party to a suit by defendants' tenants for breach of defendants' agreement to furnish water to irrigate the leased land. *Stockton v. Brown* (Civ. App.) 106 S. W. 423.

Statement of damages for breach by an irrigation company of its contract to supply water for cultivation of a crop. *Sisk v. Gravity Canal Co.*, 52 C. A. 12, 113 S. W. 195.

Division of a crop between the lessee and lessor held not to estop the lessee from claiming damages for breach of the lessor's contract to furnish water for irrigation. *Beaumont Irrigating Co. v. Gregory* (Civ. App.) 136 S. W. 545.

On suit for breach of defendant's contract to supply plaintiff, a tenant, with water for a rice crop, held error to authorize recovery of a share of the additional rice which would have been raised if the land had been properly irrigated, which would have gone to the landlord. *Lone Star Canal Co. v. Cannon* (Civ. App.) 141 S. W. 799.

In an action against an irrigation company for failure to supply water, instruction that the measure of damages was the difference in the market value of the crop as raised and what it would have been if sufficient water had been supplied, less the cost of harvesting the additional crop, and that if failure to supply sufficient water was caused by accident or drought plaintiff could not recover, held proper. *Raywood Rice Canal & Milling Co. v. Erp*, 105 T. 161, 146 S. W. 155.

The cost of marketing crops held a proper feature of damages in an action for a failure to supply water for irrigation purposes under a contract. *Biggs v. Maulding* (Civ. App.) 147 S. W. 681.

A water company contracted to give an owner a permanent right to water, on payment of a certain sum, and provided that the "vendee" should receive water during the life of the agreement. Held, that a lessee of premises before payment of the amount provided was not entitled to maintain an action for a failure to supply water. *Id.*

The rule requiring a person whose cabbage plants were destroyed through the failure of an irrigation company to furnish water to mitigate his damages merely required that he make a reasonably diligent inquiry for other plants in the vicinity and did not require that he seek plants elsewhere. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 236.

The damages for the destruction of the crop of cabbage should have been measured by the average price from the date of the destruction to the date when it would have been harvested. *Id.*

The measure of damages for the destruction of cabbage plants to be transplanted, through failure to furnish water to irrigate the land, was the value of the probable yield under proper cultivation when mature and ready for sale, less the expense of such cultivation and the cost of marketing. *Id.*

Where an irrigation company's failure to furnish water was primarily due to its own neglect, it did not relieve it from liability for damages that the low water in the river contributed to the result. *Id.*

In order to entitle a plantation company to recover damages from an irrigation company for failure to furnish water as it had contracted to do, it was not essential that the plantation company continually repeat a request for water which it knew could not be supplied. *Id.*

Limitation of liability.—Irrigation companies authorized to exercise the power of eminent domain are quasi public corporations, and cannot limit their liability to the public by contract. *Colorado Canal Co. v. McFarland & Southwell* (Civ. App.) 94 S. W. 400; *Colorado Canal Co. v. McFarland & Southwell*, 50 C. A. 92, 109 S. W. 435.

An irrigation canal company sued for failure to furnish sufficient water held not entitled to rely upon a release of liability contained in a contract for service for the succeeding season. *Lone Star Canal Co. v. Cannon* (Civ. App.) 141 S. W. 799.

Art. 5002c. [3125] No discrimination against users.—If the person, association of persons or corporation owning or controlling such water, and the person who owns or holds a possessory right or title to land adjoining or contiguous to any canal, ditch, flume or lateral, lake or reservoir, constructed or maintained under the provisions of this Act, fail to agree upon a price for a permanent water right, or for the use or rental of the necessary water to irrigate the land of such person, or for mining, milling, manufacturing, the development of power, or stockraising; such person, association of persons or corporation shall, nevertheless,

less, if he, they or it, have or control any water not contracted to others, furnish the necessary water to such person to irrigate his lands or for farming, milling, manufacturing, the development of power or stockraising, at such prices as shall be reasonable and just, and without discrimination. [Id. sec. 57.]

Prior act.—Art. 5002 reserved to those owning land adjoining or contiguous to the canal a definite right to the use of the water in the canal, and imposed upon the canal company such reciprocal duties to the public as to make the corporation quasi public in character and charged it with public trust. It could not sell to any one person more than his proportionate share of the water in the canal. It could establish reasonable rules as to when application for use of water shall be made, and if one having right to use of the water failed to make demand at proper time, and when he did make demand, if all the water that the canal could furnish was contracted for, he could not enforce his demand. *Borden v. Trespalacios Rice Irr. Co.* (Civ. App.) 82 S. W. 466, 468.

Art. 5002d. [3125] Water to be prorated.—In case of shortage of water from drouth, accident or other cause, all water to be distributed shall be divided among all consumers pro rata, according to the amount he or they may be entitled to, to the end that all shall suffer alike, and preference be given to none; provided, that nothing in this section contained shall be held to preclude any such person, association of persons or corporation owning or controlling such water from supplying the same to any person having a prior vested right thereto under the laws of this state. [Id. sec. 58.]

Prior act.—Under Art. 5002, a failure by an irrigation company to furnish a customer sufficient water to raise a full crop on a stipulated number of acres according to contract will not subject the company to damages if compliance therewith would, on account of shortage of water from such causes, deprive other customers of the right to pro rata distribution. *Raywood Rice Canal & Milling Co. v. Erp*, 105 T. 161, 146 S. W. 155.

While the statute contemplates that an irrigation company may be unable to supply all consumers with an adequate amount of water, this could not defeat recovery for failure to supply water, where the failure did not arise from the fact that other consumers used the whole supply. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Civ. App.) 155 S. W. 286.

Art. 5002e. [3125] Permanent water right and easement.—The permanent water right shall be an easement to the land and pass with the title thereto; and the owner thereof shall be entitled to the use of the water upon the terms provided in his or their contract with such person, association of persons or corporation, or, in case no contract is entered into, then at just and reasonable prices, and without discrimination. Any instrument of writing conveying a permanent water right shall be admitted to record in the same manner as other instruments relating to the conveyance of land. [Id. sec. 59.]

Art. 5002f. Regulation of rates; discrimination; complaint; deposit.—If any person entitled to receive or use water from any canal, ditch, flume, lateral, dam, reservoir or lake, or from any conserved or stored supply, shall present to the board his petition in writing, showing that the person, association of persons, corporation or irrigation district, owning or controlling such water has a supply of water not contracted to others and available for his use, and fail or refuse to supply such water to him, or that the price or rental demanded therefor is not reasonable and just or is discriminatory; and that the complainant is entitled to receive or use such water and is willing and able to pay a just and reasonable price therefor; and shall accompany such petition with a deposit of twenty-five dollars; it shall be the duty of the board to make a preliminary investigation of such complaint and determine whether there is probable ground therefor. If said board shall determine that no probable ground exists for such complaint, same shall be dismissed, and the deposit may, at the discretion of the board, be returned to the complainant or paid into the state treasury. [Id. sec. 60.]

Art. 5002g. Order on complaint; deposit and bond for costs; certified copy of complaint to be sent to defendants.—If the board shall determine that probable ground exists for such complaint, it shall enter an order setting said matter for hearing at a time and place to be named therein. The board may, in its discretion, require the complainant to

make an additional deposit, or to enter into bond in an amount fixed by the board, conditioned for the payment of all costs of such proceeding, and which bond shall be approved by the board. Thereupon it shall be the duty of the secretary of the board to transmit a certified copy of the petition of complainant and of the order setting same for hearing, by registered mail, addressed to the party or parties against whom such complaint is made, and which notice shall be deposited in the mails at least twenty days before the date set for such hearing. [Id. sec. 61.]

Art. 5002h. Hearing; evidence; adjournments; decision.—At the time and place stated in such order, the board shall sit to hear such complaint. It may hear evidence orally or by affidavit in support of or against such complaint, and may hear arguments, and shall have power to adjourn such hearing from time to time and from place to place, and upon completion thereof shall render decision in writing. [Id. sec. 62.]

Art. 5002i. Appeal; supersedeas.—Appeal from such decision of the board may be taken within the time and in the manner as hereinbefore provided for other appeals from the decision of such board. The decision may be suspended by the filing of a supersedeas bond in the same manner as now provided in other civil cases; provided, that the board shall fix the amount of the bond necessary to stay the execution of any such order. [Id. sec. 63.]

Art. 5002j. Issuance of subpoenas authorized, etc.—In any examination, investigation or proceeding authorized before the board of water engineers, such board shall have power to issue subpoenas for the attendance of witnesses under such rules as the board may prescribe. Each witness who shall appear before the board by order of the board, at a place outside of the county of his residence shall receive for his attendance, one dollar per day and three cents per mile travelled by the nearest practicable route in going to and returning from the place of meeting of said board, which shall be ordered paid by the comptroller of public accounts upon the presentation of proper vouchers sworn to by such witness and approved by the chairman of the board; provided, that no witness shall be entitled to any witness fees or mileage who is directly interested in such proceeding. [Id. sec. 64.]

Art. 5002k. Who may administer oaths, etc.—In any examination or hearing held before the board of water engineers, the board shall have authority to adjourn such hearing from time to time and from place to place. Each member of such board and the secretary thereof shall be authorized to administer oaths. [Id. sec. 65.]

Art. 5002l. Certified copies.—Upon application of any person, the board shall furnish certified copies of any order or decision of record of such board, or of any paper, map or other document filed in the office of such board, and such certified copies under the hand of the secretary and the seal of the board shall be admissible in evidence in any court in the same manner and with like effect that the original would be entitled to. [Id. sec. 66.]

Art. 5002m. Rules may be prescribed, etc.—Every person, association of persons, corporation or irrigation district, conserving or supplying water for any of the purposes authorized by this Act shall have the right to make and publish all reasonable rules and regulations relating to the method and manner of supply, use and distribution of water, and prescribing the time and manner of making application for the use of water and of payment therefor. [Id. sec. 67.]

Art. 5002n. Conveyances, how made.—Every conveyance of a ditch, canal or reservoir, or other irrigation work, or any interest therein, shall hereafter be executed and acknowledged in the same manner as the conveyance of real estate, and recorded in the deed records of the county or counties in which such ditch, canal or reservoir is situated,

and any such conveyance which shall not be made in conformity with the provisions of this Act shall be null and void as against subsequent purchasers thereof in good faith and for valuable consideration. [Id. sec. 68.]

Note.—Sections 69–71 are purely criminal in their nature, and are here omitted.

Art. 5002o. Partnership ditches.—In all cases where irrigation ditches are owned by two or more persons, or by mutual or co-operative companies or corporations, and one or more of such persons, or shareholders shall fail or neglect to do or to pay for his proportionate share of the work necessary for the proper maintenance and operation of such ditch, the owners or shareholders, desiring the performance of such work as is reasonably necessary to maintain and operate the ditch may, after having given ten days' written notice to such joint owner, or owners, or shareholders who have failed to pay for or perform their proportionate share of work necessary for the operation and maintenance of said ditch, proceed themselves to do such work or cause the same to be done, and may recover therefor from such person so failing to perform or pay for his share of such work, in any court having jurisdiction over the amount, the reasonable expense or value of such work or labor so performed. [Id. sec. 72.]

Art. 5002p. Surplus water to be returned.—All surplus water taken or diverted from any running stream not used by the appropriator or disposed of to consumers for the purposes stated in this Act, shall, wherever reasonably practicable, be conducted back to the stream from which taken or diverted. [Id. sec. 73.]

Art. 5003. [704] Preliminary surveys.—Every person, association of persons, corporation, or irrigation district shall have power to cause an examination and survey for its proposed work to be made as may be necessary to the selection of the most advantageous reservoir sites and rights of way for any of the purposes authorized by this Act and for such purposes shall have the right to enter upon the lands or waters of any person. [Id. sec. 74.]

Constitutionality.—See notes under Art. 4991 et seq.

Not a grant of right of way.—Rights of way over private lands for irrigation canal held not granted by statute itself, company being obliged to obtain a grant or condemnation. *Toyaho Creek Irr. Co. v. Hutchins*, 21 C. A. 274, 52 S. W. 101.

Art. 5004. [3126] Right of way over public lands.—Every person, association of persons, corporation, or irrigation district formed for any of the purposes authorized by this Act, are hereby granted the right of way not to exceed one hundred feet in width and the necessary area for any dam and reservoir site over all public, public free school, university and asylum lands of this state, with the use of the rock, gravel and timber on such reservoir site and right of way for construction purposes, after paying such compensation as the board of engineers may determine, and may acquire such reservoir site and rights of way over private lands by contract. [Id. sec. 75.]

See *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Nature and extent of right.—Filing of map of proposed irrigation canal held not an acceptance of statutory grant of right of way over public lands. *Toyaho Creek Irr. Co. v. Hutchins*, 21 C. A. 274, 52 S. W. 101.

This article grants over public lands only the right of way with the use of materials therein for construction purposes, and does not grant the right to appropriate such lands for dam sites and reservoirs, and the fact that the use of public lands for a reservoir may be indispensable to the project as designed by a corporation does not justify it in taking public lands for such a purpose. *Jayne v. Imperial Irr. Co.* (Civ. App.) 127 S. W. 1137.

This article does not prevent condemnation of a way 200 feet wide over private land. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

An irrigation corporation held possessed of right by implication to use a part of the public school lands for a dam and reservoir site. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Grants of the power of eminent domain are strictly construed, and the methods set forth in the statute granting the power must be strictly followed. *Reitzer v. Medina Valley Irrigation Co.* (Civ. App.) 153 S. W. 380.

Proceedings.—Under this article and Art. 6483, which provides that no railroad shall enter upon private property except for a lineal survey, until it shall agree with and pay

the owner all damages, the court, in condemnation proceedings by an irrigation company, has no right to permit an inspection of the land sought to be condemned for the purpose of qualifying its own witnesses as to the value of the property, or for any purpose. *Byrd Irr. Co. v. Smythe* (Civ. App.) 146 S. W. 1064.

Art. 5004a. Eminent domain.—Any person, association of persons, corporation, or irrigation district or any city or town may also obtain the right of way over private lands and also the land for pumping plants, intakes, headgates and storage reservoirs, by condemnation by causing the damages for any private property appropriated by any such person, association of persons, corporation, or irrigation district, or city or town to be assessed and paid for as provided in cases of railroads, provided that in exercising the right of eminent domain, as authorized in this section, there shall be no condemnation of the water rights of riparian owners or appropriators now using or appropriating said water, or who may use or appropriate same, in any stream or lake, or water impounded by them in the channel of such stream or lake by damming same. This provision shall not affect the common law right of condemnation for municipal use by cities and towns. [Id. sec. 76.]

In general.—The act (Gen. Laws 1889, p. 100) gave to corporations formed for irrigating purposes the right to condemn any property necessary for the uses and purposes of the enterprise in the business for which the corporation was created, if such property will pass or may be included under the term "lands." *McGhee Irrigation Co. v. Hudson*, 85 T. 587, 22 S. W. 398.

Under the power to condemn lands would be included the right to take water, but the water should be paid for, regardless of whether taken above or upon the land of a riparian owner whose right to have the water flow in its accustomed course and quantity is invaded. *Id.*

The fact that a corporation is authorized by its charter to construct, maintain and operate a canal for other purposes as well as that of irrigation does not change its character as a canal corporation for the purpose of irrigation, or disqualify it as a donee of the power of eminent domain conferred by these articles. It is not intended to restrict the right of eminent domain conferred in these articles to corporations formed exclusively for purposes of irrigation. The purpose of these articles is to confer additional powers upon corporations formed for irrigation purposes. *Borden v. Trespalacios Rice & Irr. Co.* (Civ. App.) 82 S. W. 464.

When a corporation has been formed, and its charter is valid and permits it to engage in the business of irrigation alone, this article grants it the power of condemnation. *Borden v. Trespalacios Rice & Irr. Co.*, 98 T. 494, 86 S. W. 11, 107 Am. St. Rep. 640.

State held entitled to improve navigable streams without compensation for injuries to right to use the water for irrigation. *Bigham Bros. v. Port Arthur Canal & Dock Co.* (Civ. App.) 91 S. W. 848.

Where the petition alleges that plaintiff has under Art. 5009 a statutory lien on all the rice raised on the lands described in the contract, and the contract is attached to petition as an exhibit, and is such a contract as is appropriate to be made only by a corporation created for purposes of irrigation under Arts. 4991 to 5010, it is sufficient to show the character of the corporation. *Colorado Canal Co. v. McFarland & Southwell*, 50 C. A. 92, 109 S. W. 438.

Generally each of several owners of land sought to be condemned is entitled to have the damages due him separately awarded, but where ownership of land is in dispute a single award is proper; the fund being held for apportionment on settlement of the dispute. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

A deposit by condemnor of land held to have sufficiently conformed to the award. *Id.*

In a condemnation proceeding, held, that the commissioners, on the hearing as to damages, cannot inquire into the truth of the facts on which the jurisdiction is invoked. *Id.*

That plaintiff and another claimed the same land shows prima facie that there could be no such agreement as to damages between plaintiff and a company seeking to acquire a right of way as would defeat the company's right to institute condemnation proceedings. *Id.*

In a proceeding to condemn land for an irrigation project, a document filed by petitioner, tendering defendant the use of water from the proposed reservoir on stated conditions, in mitigation of damages was not a pleading and was properly stricken. *Byrd Irr. Co. v. Smyth* (Civ. App.) 157 S. W. 260.

In a proceeding to condemn land, an instruction authorizing the jury to consider special damages, if any, to land not taken, and allow defendant the difference in the market value of the land, if any, before and after the taking, which damage, if any, the jury will find in addition to the value of the land taken for the reservoir, held erroneous as authorizing a double recovery for the land not taken. *Id.*

Art. 5005. Repealed. See note under Art. 4991.

Art. 5006. [3128] Public roads and bridges.—All such persons, association of persons, corporations, and irrigation districts shall have the right to run along or across all roads and highways necessary in the construction of their work and shall at all such crossings construct and maintain necessary bridges, culverts, or siphons and shall not impair

the uses of such road or highway; provided, that if any public road or highway or public bridge shall be upon the ground necessary for the dam site, reservoir, or lake, it shall be the duty of the commissioners' court to change said road and to remove such bridge that the same may not interfere with the construction of the proposed dam, reservoir, or lake; provided further, that the expense of making such change shall be paid by the person, association of persons, corporation or irrigation district desiring to construct such dam site, lake or reservoir. [Id. sec. 77.]

Liability for repairs.—Under this article and Art. 7014, which empowers county commissioners to cause all necessary bridges to be kept in repair, on a company's refusal to comply with its duty, the county can make the repairs and enforce reimbursement from the company therefor without first applying for mandamus to compel the company to make them. *Orange County v. Cow Bayou Canal Co.* (Civ. App.) 143 S. W. 963.

Art. 5007. Repealed. See note under Art. 4991.

Art. 5008. [704] **May cross streams, etc.**—Such person, association of persons, corporation or irrigation district shall have power to construct its ditch or canal across, along or upon any stream of water. [Id. sec. 78.]

Art. 5009. [3130] **Liens, etc.**—Every person, association of persons, corporation or irrigation district, who has heretofore constructed or may hereafter construct any ditch, canal, dam, lake or reservoir for the purposes of irrigation, and who shall lease, rent, furnish, or supply water to any person, association of persons, or corporation for the purpose of irrigation, shall, irrespective of contract, have a preference lien superior to every other lien upon the crop or crops raised upon the land thus irrigated. [Id. sec. 87.]

Art. 5009a. **Enforcement of liens.**—For the enforcement of the lien provided for in the preceding section [Art. 5009], every such person, association of persons, corporation or irrigation district shall be entitled to all the rights and remedies prescribed by chapter 1, title 80, of the Revised Civil Statutes of this state for the enforcement of the lien as between landlord and tenant. [Id. sec. 88.]

Art. 5010. Repealed. See note under Art. 4991.

Art. 5011. **Surveys under reclamation act.**—When in the examination of any irrigation or reclamation project under the provisions of the act of congress, known as the reclamation act, approved June 17, 1902, it shall be found advisable or necessary to irrigate or reclaim lands within the limits of this state, the secretary of the department of the interior is authorized to make all necessary examinations and surveys for and to locate and construct irrigation or reclamation works within this state and to perform any and all acts necessary to carry into effect the provisions, limitations, charges, terms and conditions of said reclamation act. [Id. sec. 79.]

Art. 5011a. **Reclamation projects.**—The provisions of this Act shall in all things apply to the construction, maintenance and operation of any irrigation works in this state, constructed under what is known as the federal reclamation act, approved June 17, 1902, and the amendments thereto in so far as the provisions of this Act are not inconsistent with said act of congress or the amendments thereto or the regulations prescribed by the secretary of the department of the interior in conformity to such reclamation act and the amendments thereto. [Id. sec. 80.]

Art. 5011b. **Diversion of water from watershed prohibited when.**—It shall be unlawful for any person, association of persons, corporation, or irrigation district to take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, water course, or watershed in this state into any other natural stream, water course, or watershed to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted. [Id. sec. 81.]

Art. 5011c. Application to board of water engineers; hearing; appeals.—Before any person, association of persons, corporation, or irrigation district shall take any water from any natural stream, water course, or watershed in this state into any other watershed, such person, association of persons, corporation, or irrigation district shall make application to the board of water engineers for a permit so to take or divert such waters, and no such permit shall be issued by the board until after full hearing before said board as to the rights to be affected thereby, and such hearing shall be held and notice thereof given at such time and such place in such mode and manner as the board may prescribe; and from any decision of the board an appeal may be taken to the district court of the county in which such diversion is proposed to be made in the mode and manner prescribed in this Act for other appeals from the decision of the board. [Id. sec. 82.]

Note.—Section 83 is purely criminal, and is here omitted.

Art. 5011d. Reservoirs and canals, etc., to be fenced.—Unless the person, association of persons, corporation, or irrigation district owning or controlling any ditch, canal, reservoir, dam, or lake shall keep the same securely fenced, no cause of action shall accrue in their favor against owners of livestock for any trespass thereon. [Id. sec. 84.]

Art. 5011e. Alienation of land required, etc.—Any corporation organized under the provisions of the general laws of this state, or the provisions of this Act for any of the purposes stated in this Act, shall have the power to acquire lands by voluntary donation or purchase in payment of stock or bonds or water rights; and to hold, improve, subdivide, and dispose of all such land and other property; and to borrow money for the construction, maintenance and operation of its canals, ditches, flumes, feeders, reservoirs, dams, lakes, wells and other property and franchises to the extent of the value thereof to secure the payment of any debts contracted for same; provided, no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increases of stock or indebtedness shall be void: and provided further, all lands acquired by such corporation except such as are used for the construction, maintenance, or operation of such canals, ditches, laterals, feeders, reservoirs, dams, lakes, wells and other necessary works, shall be alienated within fifteen years from the date of acquiring said lands or be subject to judicial forfeiture. [Id. sec. 85.]

Art. 5011f. Directors may be elected.—Any corporation organized under the provisions of the general laws of this state or the provisions of this Act, for any of the purposes stated in this Act, may elect directors or trustees to hold office for a period of three years and may provide for the election of one-third in number thereof each year. [Id. sec. 86.]

Note.—Section 90 makes it a misdemeanor to permit Johnson grass and Russian thistle to go to seed near a reservoir or water course, and is omitted as inappropriate to the Civil Statutes.

Art. 5011g. Artesian wells.—An artesian well is defined for the purposes of this Act to be any artificial well in which, if properly cased, the waters will rise by natural pressure above the strata in which they are found. [Id. sec. 91.]

Art. 5011h. Certain artesian wells declared nuisances.—Any artesian well which is not tightly cased, capped and furnished with such mechanical appliances as will readily and effectively arrest and prevent the flow from such well, either over the surface of the ground about the well or wasting from the well through the strata through which it passes is hereby declared a public nuisance and subject to be abated as such. [Id. sec. 92.]

Art. 5011i. Waste defined.—Waste is defined for the purposes of this Act in relation to artesian wells to be the causing, suffering or permitting the waters of an artesian well to run into any river, creek or other natural water course or drain, superficial or underground channel, bayou, or into any sewer, street, road, highway, or upon the land or any other person than that of the owner of such well, or upon the public lands, or to run or percolate through the strata above that in which such water is found: unless it be used for the purposes and in the manner in which it may be lawfully used on the premises of the owner of such well; provided, that nothing in this section shall be construed to prevent the use of such water, if suitable, for the proper irrigation of trees standing along or upon any street, road or highway, or for ornamental ponds or fountains, or the propagation of fish or for the purposes authorized by this Act. [Id. sec. 93.]

Note.—Section 94 makes the wasting of water a misdemeanor, and is omitted.

Art. 5011j. Record of boring, etc.—Any person boring or causing to be bored any artesian well shall keep a complete and accurate record of the depth and thickness and character of the different strata penetrated, and when such well is completed, shall transmit by registered mail to the board of water engineers a copy of such record. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction therefor shall be fined in any sum not less than ten dollars nor more than one hundred dollars. [Id. sec. 95.]

Art. 5011k. Oil wells.—Nothing in the preceding sections numbered ninety-one to ninety-five [Arts. 5011g–5011j], inclusive, shall be construed to apply to any oil well, and the status of such oil wells shall be unaffected by this Act. [Id. sec. 96.]

Art. 5011l. Certain riparian rights.—Nothing in this Act contained shall be construed as a recognition of any riparian right in the owner of any lands the title to which shall have passed out of the state of Texas subsequent to the first day of July, A. D. 1895. [Id. sec. 97.]

Art. 5011m. Vested rights not affected.—Nothing in this Act contained shall be held or construed to alter, affect, impair, increase, destroy, validate or invalidate any existing or vested right, existing at the date when this Act shall go into effect. [Id. sec. 98.]

Art. 5011n. Certain rights not impaired.—Nothing in this Act shall be held or construed to in any manner impair any right of any riparian land owner as same has been heretofore and is now recognized under the laws of this state as construed by the decisions of our supreme court. [Id. sec. 98a.]

Art. 5011o. Partial unconstitutionality not to invalidate, etc.—If any provision of this Act shall be held unconstitutional, it shall not be held to invalidate any other provision of this Act. [Id. sec. 99.]

Art. 5011p. Water-users' associations incorporated under United States reclamation act; no charter fees or franchise taxes.—Whereas, The congress of the United States has set apart certain funds arising from the sale of public lands of the United States, for the reclamation of arid land in certain states of the Union, by the construction of reservoirs and irrigation works therein; and,

Whereas, By special act of the congress of the United States, the benefits of such reclamation act have been extended to the state of Texas; and,

Whereas, By the terms of such Act the beneficiaries thereunder are required to refund to the government the cost of such works, and under the regulations of the department of the interior the farmers applying for water from such irrigation works are required to incorporate themselves into water-users associations, having an authorized capital

equivalent to their debt to the United States government, such capital stock being appurtenant to the land and representing the mortgage placed upon the land to reimburse the government the cost of the irrigation works;

Now, therefore, be it enacted: That water-users associations, incorporated under the terms of the United States reclamation act, approved June 17, 1902, and the regulations of the United States department of the interior, made in pursuance of such Act, organized and carried on for the purpose of enabling citizens and residents of this state to avail themselves of the benefits of said reclamation act, shall not be subject to the laws of this state relating to charter fees and franchise taxes. [Acts 1911, p. 42, sec. 1.]

Art. 5011q. Lease of water rights in Guadalupe river; purposes of lease; supply to consumers; monopoly prohibited; rights of lienholders or purchasers.—The governor, the attorney general and the commissioner of the general land office of the state of Texas, or any two of them, be and are hereby authorized to lease to Cuero Light and Power Company or any other person, firm or corporation upon such terms and for such consideration as they may prescribe for a period not to exceed fifty years, any or all the water rights belonging to the state of Texas in and to the Guadalupe river in DeWitt county; Provided, also that the governor, the attorney general and the commissioner of the general land office, shall lease said water rights to said Cuero Light & Power Company, or to any other parties, at a rate of not less than one-tenth of one per cent annually, upon the gross earnings of said lessees.

Provided, however, that the water rights granted shall be for hydro-electric and power purposes only, and no one person, firm or corporation shall be granted the right to construct a greater number of dams in said river than is sufficient to generate with machinery ordinarily used for such purposes, not exceeding 1800 h.p. measured when the river is at its minimum flow, calculated by the standard method of hydraulic measurement.

Provided, further, that any firm, corporation or person to whom such lease is made shall distribute the power when sold to the public without discrimination, and shall sell the same to consumers in the same class and under like conditions at the same price and upon the same terms.

Provided, however, said leasehold may be sold, but no encumbrance or sale of leasehold which creates a trust or monopoly shall ever be made, nor shall any sale or leasehold ever be made to any trust or monopoly.

Provided, also, that any lien-holder, bond-holder or purchaser shall have no greater rights than the lessee hereunder, and shall be subject to the same liabilities and duties to the State. [Acts 1913, S. S., p. 29, sec. 1.]

Art. 5011r. Mode of use; priority of right; compensation to third persons; duties of governor, attorney general and commissioner of the general land office; arbitration.—Said lessee or lessees shall have the right, power, privilege and authority to maintain any dam already in existence and to erect, build, construct, maintain and operate additional dams across the Guadalupe river in DeWitt county, Texas, and to build reservoirs, lakes, locks, abutments and buildings across the Guadalupe river in said county, necessary for the use of the privileges and rights hereby granted them, and any person firm or corporation now owning dams or having acquired property for the purpose of building a dam or dams under this Act, shall have priority over others in making such lease or leases and in the event a lease or leases shall be made to some person, firm or corporation other than one having a dam or dams or having acquired property for the purpose of constructing a dam or dams across said river in said county, then the person, firm or corporation so

leasing said water rights and bed of said stream shall under the condition of such lease or leases be required by the governor, attorney general and commissioner of the general land office, or any two of them, to compensate the owner of said dam or dams now constructed, or property now acquired in such amount, and upon such terms as may be fixed by the governor, attorney general and commissioner of the general land office, and if lease or leases are made to others than the owners of the property above described, then the fact of leasing will require party leasing to submit to the arbitration herein provided. [Id. sec. 2.]

Art. 5011s. Right to dam river.—Said lessee shall have the right, power, privilege and authority, in any manner to dam and overflow the Guadalupe river and its tributaries in said county, and in any manner to deepen, lower, drain and excavate said channel to said river, its bed and banks and up said stream as far as the water from said dams may be backed or impounded and to include said Guadalupe river and its tributaries from said point up said stream as far as the water being backed or impounded from said dam shall extend. [Id. sec. 3.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Rights of riparian owners.—The appropriation of water for natural uses, such as for the use of people and cattle, and for household purposes, which must be absolutely supplied, can afford no ground of complaint by the lower proprietors, even if it were entirely consumed. *Rhodes v. Whitehead*, 27 T. 304, 84 Am. Dec. 631; *Baker v. Brown*, 55 T. 377.

The owner of a head spring cannot exhaust the water flowing from it for the purpose of irrigation, to the injury of proprietors lower down on the natural channel of the stream. *Fleming v. Davis*, 37 T. 173. See *Tolle v. Correth*, 31 T. 362, 98 Am. Dec. 540.

The rights of a riparian proprietor to the use of the water may be restricted or lost by grant or by prescription. *Baker v. Brown*, 55 T. 377.

Waters of natural streams in the arid districts may be appropriated for irrigation, subject to the right of the lower proprietor to water for drinking, washing, cooking purposes and for his stock. *Barrett v. Metcalfe*, 12 C. A. 247, 33 S. W. 758; *Rhodes v. Whitehead*, 27 T. 309, 84 Am. Dec. 631; *Tolle v. Correth*, 31 T. 363, 98 Am. Dec. 540; *Fleming v. Davis*, 37 T. 173; *Baker v. Brown*, 55 T. 377; *Ditch Co. v. Hudson*, 85 T. 587, 22 S. W. 398.

The rights of an upper riparian proprietor to use the stream for irrigation purposes are superior to those of a lower proprietor. *Cornick v. Arthur*, 31 C. A. 579, 73 S. W. 410.

An upper owner has no right to convey waters of a stream to nonriparian lands as against a lower riparian owner. *Clements v. Watkins Land Co.*, 36 C. A. 339, 82 S. W. 665.

The doctrine of "reasonable use" of water for irrigation purposes obtains in Texas. *Id.*

Riparian lands must be both within the limits of the original survey or grant by the government of a stream, and within the watershed of such stream, and actually touch its waters. *Id.*

A riparian proprietor held not ordinarily entitled to divert water to land lying beyond the watershed of the stream, unless the supply is so abundant that other riparian proprietors will not be deprived of water. *Watkins Land Co. v. Clements*, 98 T. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653.

Subject to the right of natural use, each riparian proprietor is entitled to the reasonable use of the waters of a stream for irrigation. *Id.*

A riparian proprietor cannot sell water to others to irrigate nonriparian lands. *Id.*

Riparian rights cannot extend beyond the original survey as granted by the government. *Id.*

A canal forming a deep water connection between a navigable stream and the sea was a practical improvement of the navigation of the stream, to which a riparian owner's right to use the water for irrigation was subservient. *Bigham Bros. v. Port Arthur Canal & Dock Co.* (Civ. App.) 91 S. W. 848, judgment reversed 100 T. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 656.

Taking of water from stream for irrigation held not within rule giving riparian owners right to use water for ordinary or natural uses. *Id.*

A riparian owner injured by a pollution of a stream held entitled to maintain an action therefor. *Teel v. Rio Bravo Oil Co.*, 47 C. A. 153, 104 S. W. 420.

In an action by a riparian owner for damages to his cattle by the pollution of a stream, the measure of his damages was the difference in the market value of the cattle and their market value had they not been so damaged. *Benjamin v. Gulf, C. & S. F. Ry. Co.*, 49 C. A. 473, 108 S. W. 408.

Where a riparian owner used the water of a stream for his cattle, and had no other water for them to drink, he was not obliged to remove the cattle from the premises to prevent their injury from drinking oil emptied into the stream by another riparian proprietor, unless he could do so at moderate expense, nor was he bound to sell his cattle as soon as he could find a market or at all if he did not wish to. *Id.*

In an action by a riparian proprietor for damages to his cattle caused by drinking oil emptied into the stream by another proprietor, plaintiff need not show, in order to recover, that the cattle were in a healthy condition prior to the time they drank the oil. *Id.*

A railroad riparian owner which pollutes the water of a stream and materially injures another riparian proprietor is liable for any injury resulting from its acts. *Id.*

One may lawfully remove gravel accumulated in the bed of a river, so long as he does not interfere with the rights of other citizens in the gravel. *Goar v. City of Rosenberg*, 53 C. A. 218, 115 S. W. 653.

Whether a legal right of a riparian owner or one living near a stream has been invaded by the use of another riparian owner is a question of fact depending upon whether such use is reasonable. *Boyd v. Schreiner* (Civ. App.) 116 S. W. 100.

One may leave his hogs on his premises, and recover for the killing thereof, where another negligently allows oil to escape into a stream thereon, by drinking which they are killed. *Mexia Light & Power Co. v. Johnson* (Civ. App.) 120 S. W. 534.

One, negligently allowing oil to escape onto the premises of another, and into a stream thereon, by drinking which hogs kept there are killed, held liable. *Id.*

The right of a riparian owner to the water of a stream for irrigation purposes held not confined to a use of the water as it flows by, but he may store it in reservoirs for future use, provided this can be done consistently with the rights of the lower owners. *Stacy v. Delery*, 57 C. A. 242, 122 S. W. 300.

Each riparian owner has for irrigation purposes equal rights in the stream, and the use of each must be reasonable as to the rights of the others. *Id.*

A purchaser of land bounded on a stream held not required to submit to injurious effects on his land resulting from an obstruction existing at the time of the purchase. *Knight v. Durham* (Civ. App.) 136 S. W. 591.

The canal of an irrigation company which has condemned all the waters of a stream should be treated the same as the stream as affecting the question whether land of a purchaser from the company on the line of the canal is riparian land. *McKenzie v. Beason* (Civ. App.) 140 S. W. 246.

Riparian lands, without reference to location on the stream or to any statutory appropriation, have equal rights to a reasonable use of the water. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

A riparian owner has no right to have any certain amount of water flow on past his land even as against one irrigating nonriparian lands; his right being limited to that needed to irrigate. *Biggs v. Lee* (Civ. App.) 147 S. W. 709.

If the water of a river is sufficient only for the riparian owners, it must be equally divided between them. *Id.*

The waters of the Pecos river are public property, subject to the easement right of riparian owners to use such water as is reasonably sufficient for domestic and stock raising purposes and for irrigating the riparian lands, and a statutory appropriation of the water in excess of the riparian owners' needs is effective. *Id.*

A riparian owner was entitled to the amount of water reasonably necessary to irrigate his land after making due allowance for that water which at times, by reason of the small flow, was so charged with mineral substance as to be useless for irrigation. *Id.*

All land abutting upon a running stream is "riparian" as to that part of the survey which lies within the watershed of the stream. *Matagorda Canal Co. v. Markham Irr. Co.* (Civ. App.) 154 S. W. 1176.

The rights of riparian owners to use water of a stream for irrigation are equal as between upper and lower owners; the water being proportioned in accordance with the number of acres of riparian land owned by each. *Id.*

Rights under grants or conveyances.—Ditches and waters necessary for beneficial use of land conveyed held to pass by the deed as appurtenances. *Toyaho Creek Irr. Co. v. Hutchins*, 21 C. A. 274, 52 S. W. 101.

A partition deed construed, and held to reserve to the owners of the respective tracts the right to maintain the irrigating ditches and tanks for watering stock, and use the water, as was done before the partition. *Stratton v. West*, 27 C. A. 525, 66 S. W. 244.

A contract for the construction of a dam and the taking of water from the stream for irrigation purposes held not to create in the grantee an exclusive right to the water impounded by the dam. *Metcalf v. Faucher* (Civ. App.) 99 S. W. 1038.

The grantor of an easement for the maintenance of a dam and the taking of water from the stream for irrigation purposes held entitled, also, to similarly use the waters of the stream under an equitable apportionment. *Id.*

"Appurtenance" defined, and held that grantee of lot with all rights and appurtenances thereto acquired right to use of water main constructed by former owner, but no rights to the main itself. *Hunstock v. Limburger* (Civ. App.) 115 S. W. 327.

Grantee of lot and appurtenances, including right to adequate water supply, held not entitled to moneys received by vendee of former owner from sales of rights to connect with the main where the sale of such rights did not interfere with his adequate water supply. *Id.*

An instrument whereby one landowner granted another the right to erect a dam and carry water across the first landowner's land held to give the second landowner exclusive right to the water impounded by the dam. *Metcalf v. Faucher* (Civ. App.) 138 S. W. 1114.

Ancient Mexican grants of water rights held to grant to each grantee water rights in common. *San Juan Ditch Co. v. Cassin* (Civ. App.) 141 S. W. 815.

Where grantees of water rights have only equal rights in the waters of a stream, each must use the water with a due regard to the rights of the other grantees. *Id.*

Actions to establish or protect rights.—Consumers of water taken by statutory appropriation from a public stream, who obtained their rights by contract from the appropriating company, have no direct right in the water which makes them necessary parties to an action against the company for an infringement of the right of appropriation of another appropriator, and a right to have them made parties was waived by a failure to object. *Biggs v. Miller* (Civ. App.) 147 S. W. 632.

Consumers of a company having a right to appropriate water which has been infringed may be properly made parties to an action against the infringer by allegation and proof that the appropriator had refused to protect its appropriation to their injury. *Id.*

Contracts to supply water.—By irrigation companies, see notes under Art. 5002b.

The measure of damages in an action by a lessee for failure of the lessor to furnish water to irrigate the land to raise a crop determined. *Raywood Rice Canal & Milling Co. v. Langford Bros.*, 32 C. A. 401, 74 S. W. 926; *Dunlap v. Raywood Rice Canal & Milling Co.*, 43 C. A. 269, 95 S. W. 43; *McFaddin v. Sims*, 43 C. A. 598, 97 S. W. 335.

Under a lease requiring the lessor to furnish water for irrigation, and limiting its liability for damages resulting from failure to furnish sufficient water, the limitation of liability held to apply, not only to a failure to furnish sufficient water, but to a failure to furnish any. *Moore-Cortes Canal Co. v. Gyle*, 36 C. A. 442, 82 S. W. 350.

Provision of a contract of renting of land construed as to duty of landlord to furnish water for irrigation. *Duson v. Dodd*, 46 C. A. 140, 101 S. W. 1040.

In an action by tenants against their landlords on a contract to furnish water for irrigation, plaintiffs could not recover by proving a contract by which the landlords warranted that an irrigation company would perform its contract with the landlords to furnish such water. *Stockton v. Brown* (Civ. App.) 106 S. W. 423.

In an action for breach of a landlord's agreement to furnish water to irrigate the tenant's crop, evidence that the landlord had no water for that purpose held immaterial. *Id.*

Damages to a tenant, through injuries to his crop by the landlord's failure to furnish water as agreed, are not objectionable as speculative. *Dunbar v. Montgomery* (Civ. App.) 119 S. W. 907.

Where a lease required the landlord to furnish water at prices to be thereafter agreed on, and the price was agreed on for the years 1904 and 1905, the contract for those years was complete. *Id.*

A landlord held not liable for injuries to a tenant's crop for failure to furnish water, in the absence of an agreement therefor. *Id.*

A landlord entitled by contract to receive from an irrigation company water for his land may recover the damages incurred by the company's failure to furnish the requisite amount of water, though he received one-half of the crop raised on the land by a tenant. *Texas Irr. Co. v. Moore, Bryan & Perry* (Civ. App.) 153 S. W. 166.

Right to repel surface water.—A landowner who so uses his land as to repel surface water is not liable therefor to an adjoining owner. *Barnett v. Matagorda Rice & Irrigation Co.*, 98 T. 355, 83 S. W. 801, 107 Am. St. Rep. 636.

Damages for rendering water unfit for irrigation.—A canal and dock company, authorized to connect a navigable stream by canal with the gulf, will not be required to construct locks therein at an expense of from \$6,000 to \$12,000, to prevent the water of the stream from becoming salty by the action of the tides through the canal, and thus destroying the value for irrigation. *Bigham Bros. v. Port Arthur Canal & Dock Co.* (Civ. App.) 91 S. W. 848, judgment reversed, 100 T. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 656.

In an action for constructing a canal from salt water, thereby rendering the waters of a bayou salty and unfit for irrigation, a charge on proximate cause held proper under the evidence. *Bigham Bros. v. Port Arthur Canal & Dock Co.* (Civ. App.) 126 S. W. 324.

Liability for injury to property.—Construction of railroads, see notes under Art. 6495.

While for tort in so placing irrigation ditches as to injure adjacent land the officer superintending the work would be personally liable, yet in a suit to abate the ditch the irrigating company would be a necessary party. In such action, joined with one for damages against the president alone, it was error to order the removal of the ditch. A chartered company is liable for its torts, and has no more right to commit them than a natural person. An irrigation company is bound to construct its works so as not to trespass upon the rights of adjacent land-owners. Its officers and servants committing such wrong would also be liable for a trespass. *Bates v. Van Pelt*, 1 C. A. 185, 20 S. W. 949.

An irrigation company, working on the lands of a patron, held not liable to an adjoining landowner for obstructing flow of surface water. *Barnett v. Matagorda Rice & Irrigation Co.*, 98 T. 355, 83 S. W. 801, 107 Am. St. Rep. 636.

A corporation constructing an irrigation canal embankment so as to obstruct natural drainage, and providing an insufficient substitute therefor, held liable for resulting damage from flood. *Barstow Irr. Co. v. Black*, 39 C. A. 80, 86 S. W. 1036.

Persons whose land was flooded by the obstruction of a natural drain by an irrigation canal embankment held not prevented from recovering damage by their failure sooner to cut the embankment, so as to drain the land. *Id.*

A corporation which constructed an irrigation canal embankment so as to obstruct the natural drainage from plaintiff's land was not relieved from liability for a resulting flood by the fact that it had employed a competent engineer to superintend the construction of its plant. *Id.*

In an action for damages by flooding plaintiff's land held that his action was not barred on the theory that he could have prevented the damage by closing the opening in an irrigation ditch on defendant's land. *Cody v. Lowry* (Civ. App.) 91 S. W. 1109.

In an action for damages to plaintiff's rice crop owing to an overflow of water from defendant's canal, the measure of damages as to the rice destroyed determined. *Colorado Canal Co. v. Sims*, 42 C. A. 442, 94 S. W. 365.

In an action against an irrigation company for overflowing crops, held error to exclude evidence as to the heavy expense plaintiff would have incurred in protecting the crops. *McLellan v. Brownsville Land & Irrigation Co.*, 46 C. A. 249, 103 S. W. 206.

Where land is permanently injured by the withdrawal of waters of an artificial lake, the measure of the owner's damages is the difference in value of the land before and after such withdrawal. *Fin & Feather Club v. Thomas* (Civ. App.) 138 S. W. 150.

Where a landowner acquires the right to flood adjoining land, the owner acquires a reciprocal right to have the ordinary height of water maintained. *Id.*

Pollution of wells.—In a suit to enjoin defendants from locating a cemetery in a certain place, evidence examined, and held to sustain the finding that the establishment and use of the cemetery as proposed would pollute the water used by plaintiffs. *Elliott v. Ferguson* (Civ. App.) 103 S. W. 453.

The measure of damages for temporary injury to a well on a farm making it unfit for use is the actual damages up to the time of trial by being deprived of its use for domestic or farm purposes. *Texas Co. v. Giddings* (Civ. App.) 148 S. W. 1142.

— By oil or gas.—See notes at end of Title 134.

Use of well as affecting rights of adjoining owners.—Railroad's use of a well, constructed on its land and fed by percolating waters, held limited to a reasonable use, in connection with its land as land, as against an adjoining well owner. *East v. Houston & T. C. R. Co.* (Civ. App.) 77 S. W. 646.

Digging and unreasonable use of a well by owner of land thereon and thereby depriving owner of adjacent land of use of a well on his land held not an actionable wrong. *Houston & T. Cent. Ry. Co. v. East*, 98 T. 146, 81 S. W. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827.

Actions for conversion of water—Evidence.—In an action for the alleged conversion of water from a well, evidence examined, and held to show that the well was not on plaintiff's land and that he could not recover. *Couch v. Texas & P. Ry. Co.* (Civ. App.) 87 S. W. 847.

CHAPTER TWO

IRRIGATION DISTRICTS

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Articles 5012—5107.—Repealed. See Art. 5107—105.

Art. 5107—1. Commissioners' courts authorized to establish irrigation districts; boundaries; petition; notice of hearing, etc.—The county commissioners' court of any county in this state, at any regular or called session thereof, may hereafter establish one or more irrigation districts in their respective counties in the manner hereinafter provided. Said districts may or may not include within their boundaries, villages, towns, and municipal corporations, or any part thereof, but no land shall at the same time be included within the boundaries of more than one irrigation district created under this Act. Such irrigation district, when so established, may make irrigation improvements therein, or may purchase improvements already existing or may purchase improvements and make additional improvements and issue bonds in payment therefor, as hereinafter provided.

Upon the presentation to the county commissioners' court of any county in this state, either at a regular or any called session of said court, of a petition signed by a majority in number of the holders of title or evidence of title to lands situated within the proposed districts and representing a majority in value as indicated by the state and county assessment rolls of all of said lands praying for the establishment of an irrigation district and setting forth the necessity, public utility and feasibility, and setting forth the proposed boundaries thereof and designating a name for such irrigation district, which name shall include the name of the county. The said commissioners' court shall, at the session when said petition is presented, set the same down for hearing at some regular or special session of said court called for the purpose not less than thirty nor more than ninety days from the presentation of said petition, and

shall order the clerk of said court to give notice of the date and place of said hearing by posting a copy of said petition and the order of the court thereon in five public places within said proposed district, and one at the county court house door of said county. Said clerk shall receive as compensation for such service one dollar for each notice so posted and five cents per mile for each mile necessarily traveled in posting such notices. Such notices shall be posted for at least twenty days prior to the date of such public hearing. The clerk shall make due return of a true copy of such notice, showing the time when and the places where such notices were posted, and shall file the same in his office and among the papers affecting such district. [Acts 1913, p. 380, sec. 1.]

Art. 5107—2. Who may contest, etc.; jurisdiction, etc.—Upon the day set by said county commissioners' court for the hearing of said petition, any person whose lands would be affected by the creation of said district may appear before said court and contest the creation of such district or contend for the creation thereof, and may offer testimony to show that such district is or is not necessary, and would or would not be of any public utility, and that the creation of such district would or would not be feasible or practicable. Said county commissioners shall have exclusive jurisdiction to hear and determine all contests and objections to the creation of such district and all matters pertaining to the same, except as is hereinafter provided, and may adjourn the hearing of any matter connected herewith from day to day, and all judgments rendered by said court in relation thereto shall be final, except as herein otherwise provided. [Id. sec. 2.]

Art. 5107—3. Court to make findings, etc.—If, at the hearing of such petition, it shall appear to the satisfaction of the court that the organization of such district and the construction or purchase or the construction and purchase of the proposed irrigation plant is feasible and practicable, and that it is needed and would be a public benefit and a benefit to the lands included in the district, then the court shall so find, and cause its findings to be entered of record. But if the court should find that the irrigation of such district is not feasible and practicable and that it would not be a public benefit or is not needed or would not be a public utility, then the court may enter such findings of record and dismiss the petition at the cost of the petitioners. [Id. sec. 3.]

Art. 5107—4. Appeals from order granting or dismissing petition.—If at the hearing provided for in section 3 [Art. 5107—3] of this Act the court shall enter an order granting or dismissing the petition for the organization of said district at the cost of petitioners, then and in that event the petitioners, or any one or more of them, or any one owning lands situated in such proposed district, may appeal from said order to the district court, and in the event of such appeal, said cause shall be tried under the rules prescribed for practice in the district court, and shall be tried de novo and the clerk of the commissioners' court shall transfer to the clerk of the district court within thirty days from the date of notice of appeal, all records filed with the county commissioners' court, and it shall be unnecessary to file any other or additional pleadings in said court. The final judgment on appeal shall be certified to the commissioners' court for their further action. [Id. sec. 4.]

Art. 5107—5. Election to be held, when, etc.—After the hearing of the petition as provided for in section 2 and 3 [Arts. 5107—2, 5107—3] of this Act, if the commissioners' court shall find in favor of the petitioners for the establishment of a district according to the boundaries as set forth in said petition, the county commissioners' court shall order an election to be held within said proposed irrigation district at the earliest possible legal time, at which election there shall be submitted the following propositions: "For the Irrigation District," "Against the Irrigation

District," and the election of five directors and an assessor and collector as is hereinafter provided. [Id. sec. 5.]

Art. 5107—6. Notice of election.—After the ordering of the election as provided in the preceding section [Art. 5107—5], notices of such election shall be given stating the time and place or places of holding the election and showing the boundaries of said proposed district, and such notices shall also show the presiding officer or officers appointed for the holding of said election. Such notices shall be posted in four public places in such proposed district, and one shall be posted at the court house door of the county in which such proposed district is situated, shall be posted for twenty days previous to the date of the election, and shall contain the proposition to be voted upon and names of offices to be filled at such election. [Id. sec. 6.]

Art. 5107—7. Election, how conducted; ballots.—The manner of conducting such election shall be governed by the election laws of the state of Texas, except as herein otherwise provided, and at such election none but resident property tax payers, who are qualified voters of said proposed district shall be entitled to vote on any question submitted to the voters thereof at such election. The county commissioners' court shall name a polling place for such election in each voting precinct or part of a voting precinct embraced in said district, and shall also select and appoint two judges, one of whom shall be the presiding judge, and two clerks at each polling place named, and shall provide one and a half times as many ballots for said election as there are qualified resident tax-payer voters within such district, as shown by the tax rolls of said county. Said ballots shall have printed thereon the following: "For the Irrigation District," "Against the Irrigation District," and said ballot shall also contain a space in which to write the name or names of the officer or officers to be selected at such election, and each voter at such election may write or have printed upon said ballot the name of the parties voted for as directors and as assessor and collector, and there shall be no other matter placed upon said ballot. [Id. sec. 7.]

Art. 5107—8. Oath of voter.—Every person who offers to vote in any election held under the provisions of this Act, shall first take the following oath before the presiding judge of the polling place where he offers to vote, and for such purpose the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of _____ county, and that I am a resident property tax payer of the proposed irrigation district voted on at this election, and have not voted before in this election." [Id. sec. 8.]

Art. 5107—9. Return and canvass of votes; directors.—Immediately after the election, the presiding judge at each polling place shall make returns of the result in the same manner as provided for in general elections for the state and county officers and the commissioners' court shall, at a regular session or a special session called for that purpose, canvass such vote, and if it be found that the votes of two-thirds of the resident property taxpayers voting thereon shall have been cast in favor of the irrigation district, then the court shall declare the result of said election in favor of the establishment of said district, and shall enter the same in the minutes of said court, and shall also canvass the vote for directors and assessor and collector, and issue or cause to be issued to the five directors receiving the highest number of votes certificates of their election and to the person receiving the highest number of votes for assessor and collector, a certificate of his election as provided under the general election law. Provided, however that should it be found that two or more persons had received the same number of votes for the fifth position or the position of the fifth director, then the said commissioners' court shall select one of said persons to fill said position. [Id. sec. 9.]

Art. 5107—10. Orders establishing district; name and number.—If the commissioners' court shall declare the result of said election to be in favor of the establishment of the irrigation district, then said court shall cause to be made and entered in the minutes of said court an order setting forth facts substantially as follows: "In the matter of the petition of _____ and _____ others, praying for the establishment of an irrigation district as in said petition described and designated as _____ County Irrigation District No. ____; Be it known that an election was called for that purpose in said district and held on the _____ day of _____, A. D. 19____, and two-thirds majority of the resident property tax-payers voting thereat voted in favor of the creation of said irrigation district. Now, therefore, it is ordered by the court that said irrigation district be and the same is hereby established under the name of _____ County Irrigation District No. ____, with the following metes and bounds (which field notes shall be copied in the record)."

All irrigation districts hereafter created shall bear the name of the county in which it may be located as a part of its name, and shall be numbered consecutively as created and established under the order of the commissioners' court. Provided, however, that all districts heretofore established and otherwise named shall not be required to change its name, but may do so by filing with the commissioners' court a declaration in writing declaring such intentions, such declaration to be recorded as is hereinafter provided for the record of the order of the commissioners' court establishing irrigation districts, but the numbers assumed thereby shall not conflict with the numbers of irrigation districts hereafter created. [Id. sec. 10.]

Art. 5107—11. Copy of order to be filed and recorded.—After the making and entering by the commissioners' court of the order establishing irrigation districts as herein provided, the said court shall cause to be made a certified copy of such order, which shall be filed with the county clerk of the county in which such district is situated and shall cause same to be duly recorded in the deed records of said county and properly indexed in the same manner providing for the recording and indexing of deeds, and such recordation shall have the same effect, in so far as notice is concerned, as is provided for the record of deeds and all costs in connection with the making and recording of such copies shall be paid by the district. [Id. sec. 11.]

Art. 5107—12. Bonds and oaths of directors.—Within ten days after the making and entry of the order of the commissioners' court declaring the result of the election and the establishment of the irrigation district as hereinbefore provided, or as soon thereafter as is practicable, the directors elected at such election shall each make and enter into a good and sufficient bond in the sum of five thousand dollars, each, payable to the irrigation district, conditioned upon the faithful performance of their duties to be approved by the commissioners' court; provided, however, that after the organization of such district, all bonds required to be given by any director, officer or employee of such irrigation district shall be approved by the directors of such districts, and said directors shall take the oath of office prescribed by statute for the commissioners' court, except that the name of the irrigation district shall be substituted for the name of the county in said oath of office; and the bond and oath herein provided for shall be filed with the county clerk of the county within which said district is situated and be by him recorded in the official bond records for said county, and after its record, said bond shall be delivered by the county clerk to the depository selected by such district under the provisions of this Act, and shall be by it safely kept and preserved as part of the records of said district. [Id. sec. 12.]

Art. 5107—13. President and secretary; quorum.—The directors for such irrigation district shall organize by electing one of their number as

president and one as secretary; and any three of whom shall constitute a quorum; and a concurrence of three shall be sufficient in all matters pertaining to the business of their district except the letting of contracts and the drawing of warrants on the depository, which shall require the concurrence of at least four of said directors. [Id. sec. 13.]

Art. 5107—14. Qualifications of directors.—No person shall be elected a director for any irrigation district created under this Act unless he is a resident of the state of Texas and owns land subject to taxation within said irrigation district, and who, at the time of such election, shall be more than twenty-one years of age. [Id. sec. 14.]

Art. 5107—15. Assessor and collector; bond, etc.; qualifications; compensation.—The office of assessor and collector herein provided for shall be filled by the same person, and before entering upon his duties as such assessor and collector, he shall qualify by making and entering into a good and sufficient bond in the sum of five thousand dollars, conditioned for the faithful performance of his duties as assessor and collector, and for the paying over to the district depository of all sums of money coming into his hands as such collector; provided, however, that the directors shall require additional security in the event in their judgment the same may become necessary; and such assessor and collector shall be a resident of the district, or any town within the general boundaries of the district, and a qualified voter in the county, and shall receive such compensation for his services as may be provided by the board of directors, not to exceed fifteen hundred dollars per annum. [Id. sec. 15.]

Art. 5107—16. Survey of boundaries, etc.—It shall be the duty of the directors, immediately after they qualify as such, to cause an actual survey of the boundaries of such district to be made according to the boundaries designated in the petition for the establishment of such district, or to adopt in whole or in part such boundaries where already established, and to have said boundary marked by suitable monuments. [Id. sec. 16.]

Art. 5107—17. Petition for exclusion of lands.—The owner or owners of the fee of any land constituting a portion of any irrigation district may, within thirty days after the election, qualification and organization of the first board of directors for such irrigation district, file with said board a petition praying that such lands may be excluded from and taken out of said district. The petition shall describe the lands which the petitioners desire to have excluded by metes and bounds, and such petition must be acknowledged in the same manner and form as is required in cases of conveyance of real estate. [Id. sec. 17.]

Art. 5107—18. Notice of hearing, etc.—Upon the filing of a petition for the exclusion of any lands from said district with the board of directors, they shall immediately set said petition down for hearing for a day certain, not to exceed ten days, however, from the date of the filing thereof, and shall cause notice of such hearing to be given by the posting of written or printed notices of the time and place of such hearing at three public places within said district. Such notice shall contain a copy of the petition for exclusion. [Id. sec. 18.]

Art. 5107—19. Hearing; board of directors to determine whether lands shall be excluded, etc.—The board of directors, at the time and place mentioned in such notice, shall proceed to hear the petition and all objections thereto, and shall determine whether or not said lands, or any portion thereof, shall remain as a portion of such district; and if upon such hearing said directors shall determine that the land desired to be withdrawn from said district or any portion thereof is not susceptible to irrigation from the system proposed to be provided, then such non-irrigable lands shall be excluded therefrom; provided, however, that in the event such petition is not filed within thirty days from the date of

the qualification of the first board of directors, then no such petition shall thereafter be filed or considered by such board, and such excluded lands and the owners thereof thereby waive all rights to be served with water from such irrigation system. [Id. sec. 19.]

Art. 5107—20. Petition for inclusion of lands; survey; lands, when admitted, etc.; application, how executed and recorded.—The owner or owners of the fee to lands contiguous to any irrigation district created under this Act may file with the board of directors of said district a petition in writing, praying that such land be included in such district. The petition shall describe the tract or body of land owned by the petitioners by metes and bounds, and upon the filing of such petition with the board of directors, said board of directors shall cause an accurate survey of the said tract of land to be made and the boundaries thereof marked upon the ground, and said tract of land may be admitted as a part of the irrigation district provided it can be irrigated without prejudice to the rights of any of the lands originally contained therein to be first furnished with an adequate supply of water, and when said lands are so admitted, they shall immediately become subject to their proportionate share of any taxation or bonded indebtedness that may have been created against said district and subject to such reasonable charge against such lands for the purpose of defraying its part of the expense of maintenance, operation or other necessary expenditures previously made as may be determined by the board of directors. If the lands described in said petition are admitted as a part of the district, the application for such admission shall be signed and acknowledged as provided for deeds, and shall be recorded in the deed records of the county in which such district is situated, together with the order of the directors endorsed thereon. [Id. sec. 20.]

Art. 5107—21. Powers and duties of directors.—The board of directors herein provided for shall have control over and management of all the affairs of such irrigation district, shall make all contracts pertaining thereto, and shall employ all necessary employés for the proper handling and operation of such district, and especially may employ a general manager, attorneys, a bookkeeper, an engineer, water master and such assistants and laborers as may be required, and they may also buy all necessary work animals, motors, pumps, engines, boilers, machinery and supplies as may be required in the erection, operation and repair of the improvements of the district. [Id. sec. 21.]

Art. 5107—22. Director not to be interested in contract; penalty.—No director of any irrigation district, irrigation engineer or employé thereof shall be directly or indirectly interested either for themselves or as agents for any one else in any contract for the purchase or construction of any work by said irrigation district, and if any such person shall directly or indirectly become interested in any such contract, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine in any sum not to exceed one thousand dollars, or by confinement in the county jail for not less than six months nor more than one year, or by both such fine and imprisonment. [Id. sec. 22.]

Art. 5107—23. Defined districts; powers; judicial notice.—All irrigation districts established under the provisions of this Act are hereby declared to be defined districts within the meaning of section 52, article 3, of the constitution and may, by and through its directors, sue and be sued in any and all courts of this state in the name of such irrigation district, and all courts of this state shall take judicial notice of the establishment of such districts and said districts shall contract and be contracted with in the name of such districts. [Id. sec. 23.]

Art. 5107—24. Districts may acquire lands, how.—Irrigation districts created under the provisions of this Act are hereby empowered to

acquire the necessary right of way for all reservoirs, dams, wells, canals, laterals, sites for pumping plants and all other improvements contemplated by this Act by gift, grant, purchase or condemnation, and it may acquire the title to any and all lands necessary or incident to the successful operation thereof in addition to any of the above in the manner herein provided, except that in no event shall such irrigation district have the right to acquire by condemnation any irrigation system that may be now or may hereafter be built by any individual or corporation authorized to appropriate water and construct irrigation plants under the irrigation laws of this state or any of the rights of such person or corporation appertaining to such system, but any and all such plants and rights may be acquired by contract from the owners thereof in the same manner that any other property may be acquired, and all such irrigation districts shall have full authority and right to acquire water rights and privileges in any way that any individual or corporation may acquire same and to hold the same either by gift, purchase, devise, appropriation or otherwise. [Id. sec. 24.]

Art. 5107—25. Assessments; duties and powers of assessor and collector; statements and lists; penalties, etc.—Immediately upon the qualification of the assessor and collector, as hereinbefore provided, he shall enter upon the discharge of his duties, and shall at once proceed to make an assessment of all of the taxable property, both real, personal and mixed, in his said district; and such assessment shall be made annually thereafter. Said assessment shall be made upon blanks to be provided by the directors for such district. Said assessment shall consist of a full statement of all property owned by the party rendering same in said district and subject to taxation therein, and shall state the full value thereof. There shall be attached to each such assessment an affidavit made by the owner or his agent rendering said property for taxation to the effect that said assessment or rendition contains a true and complete statement of all property owned by the party for whom said rendition is made in said district and subject to state and county taxation therein; and in addition to all such assessment or renditions made by the owner or agents of such property, the tax assessor shall make out similar lists of all property not rendered for taxation in such districts that is subject to state and county taxation therein. Each and every person, partnership or corporation owning taxable property in such district shall render same for taxation to the assessor when called upon so to do, and if not called upon by the assessor, the owner shall, on or before June first of each year, nevertheless, tender for taxation all property owned by him in the district subject to taxation. And all laws and penal statutes of this state providing for securing the rendition of property for state and county taxes, and providing penalties for the failure to render such properties shall apply to all persons, partnerships or corporations owning or holding property in any irrigation districts. The tax assessor shall have authority to administer oaths to fully carry out the provisions of this section. [Id. sec. 25.]

Art. 5107—26. Board of equalization; appointment; duties; secretary, etc.—The directors for each irrigation district created under the provisions of this Act shall, at their first meeting, or as soon thereafter as practicable, and annually thereafter, appoint three commissioners, each being a qualified voter and resident property owner of said district, who shall be styled the "Board of Equalization," and at the same meeting the said board of directors shall fix the time for the meeting of such board of equalization for the first year; and said board of equalization shall convene at the time fixed by the directors to receive all assessment lists or books of the assessor for said district for examination, correction, equalization, appraisalment and approval, and at all meetings of said board, the secretary of the board of directors shall act as secretary

thereof, and keep a permanent record of all the proceedings of said board of equalization. [Id. sec. 26.]

Art. 5107—27. Oaths of members.—Before entering upon the duties as such board of equalization, each of the members thereof shall take and prescribe the following oath: “I, _____, do solemnly swear (or affirm) that I will, to the best of my ability, make a full and complete examination, correction, equalization and appraisal of all property contained within said district, as shown by the assessment lists or books of the assessor for said district,” and said oath shall be spread upon the minutes to be kept by the secretary of said board. [Id. sec. 27.]

Art. 5107—28. Duties and powers of board of equalization.—The board of equalization herein provided for shall cause the assessor to bring before them, at the time fixed for the convening of said board, all the assessment lists or books of the assessor of said district for their examination, that they may see that each and every person has rendered his property at its full value; and said board shall have power to send for persons and papers, to swear and qualify persons who testify, to ascertain the value of such property, and if they are satisfied it is too high, they shall lower it to its proper value; and if too low, they shall raise the value of such property to a proper figure. Said board shall have power to correct any and all errors that may appear on the assessor's lists or books, and shall have further authority to add any and all property to said lists or inventories that may have been omitted therefrom. [Id. sec. 28.]

Art. 5107—29. Value, how equalized; complaints.—The board of equalization shall equalize, as near as possible, the value of all of the property situated within said district, having reference to the location of said property and the improvements thereon situated. And any person may file with said board at any time before the final action of said board, a complaint as to the assessment of his or any other person's property, and said board shall hear said complaint, and said complainant shall have the right to have witnesses examined to sustain said complaint as to the assessment of said property, or as to a failure to render any property owned by any person, partnership or corporation situated within said district subject to taxation which has not been properly assessed. [Id. sec. 29.]

Art. 5107—30. Assessor to furnish lists; board to appraise.—The assessor for such district, at the same time that he delivers to said board his lists and books, shall also furnish to said board a certified list of the names of all persons who either refuse to swear to, or to sign, the oath or affirmation as required by this law, together with the list of the property of such persons situated within said district, as made by him through other information, and said board shall examine the list and appraise the property so listed by the assessor. [Id. sec. 30.]

Art. 5107—31. Value, when raised; notice to owner.—In all cases where the board of equalization shall find it their duty to raise the value of any property appearing on the lists or books of the assessor, they shall, after having fully examined such lists or books, and corrected all errors appearing therein, adjourn to a day not less than ten nor more than fifteen days from the date of adjournment, such day to be fixed in the order of adjournment, and shall cause the secretary of said board to give written notice to the owner of such property, or to the person rendering same, of the time to which said board may have adjourned, and that such owner or person may at that time appear and show cause why the value of such property should not be raised, which notice may be served by depositing the same, properly addressed and postage paid, in any postoffice within the county. [Id. sec. 31.]

Art. 5107—32. Hearing; may lower value; approval and return of lists; general rolls and approval of same.—The board of equalization shall meet at the time specified in said order of adjournment and shall hear all persons the value of whose property has been raised; and if said board is satisfied they have raised the value of such property too high, they shall lower the same to its property value; and said board of equalization, after they have finally examined and equalized the value of all the property on the assessor's lists or books, or that may have been placed thereon by said board of equalization, shall approve said lists or books and return them, together with the lists of unrendered property to the assessor that he may make up therefrom his general rolls as required by this Act; and when said general rolls are so made up the board shall immediately reconvene to examine said rolls, and approve the same if found correct, and the action of the board at the meeting last provided for in this article shall be final and shall not be subject to revision by said board or by any other tribunal thereafter. [Id. sec. 32.]

Art. 5107—33. Compensation of members and secretary.—The members of the board of equalization and the secretary, while acting as secretary of said board, shall each receive such compensation for their services to be allowed by the directors for said district as they may deem just and reasonable, not to exceed, however, the sum of three dollars per day for the time actually engaged in the discharge of such duties. [Id. sec. 33.]

Art. 5107—34. Assessor and collector to make up assessment; duplicate rolls; records.—After the return to the assessor and collector of the assessment lists and books duly approved by the board of equalization, as hereinbefore provided for, the said assessor and collector shall make up the assessment of all taxable property situated in said district upon duplicate rolls, and after the approval of said rolls by the board of equalization, one of same shall deliver the same to the directors of said irrigation district, to be by them kept as a permanent record in their office, and all lists and books of said assessor shall be caused to be substantially bound and by him kept as a permanent record of his office, and be delivered, together with all other records of his office to his successor, upon his election and qualification, or, in case of a vacancy in such office to the directors for said irrigation district. [Id. sec. 34.]

Art. 5107—35. Collection of taxes; duties of assessor and collector, etc.—The assessor and collector shall collect all taxes due to said irrigation district, and shall, at the expiration of each week, pay over to the depository selected by said district all moneys by him collected, and shall report to the directors for such irrigation district on the fourth Saturday in every month all moneys so collected by him and paid over to the depository as hereinbefore provided, and shall perform all such other duties, and in such manner and according to such rules and regulations as the board of directors may prescribe, and for the convenience of the persons, firms or corporations owing such tax, shall keep and maintain an office with the board of directors for such irrigation district, where all such taxes may be paid. [Id. sec. 35.]

Art. 5107—36. Assessor and collector to be charged and credited, etc.; settlement and report.—The assessor and collector shall be charged by the directors for such irrigation district, upon a permanent finance ledger to be kept for said purpose by said district, with the total assessment as shown by the assessment rolls; and proper credit shall be given to the assessor and collector for all sums of money paid over to the depository as shown by his monthly reports as hereinbefore provided for, and upon the final annual settlement, the said assessor and collector shall make up a full, complete report of all taxes that have not been collected,

which said report shall be audited by said board of directors, and proper credits given therefor, and such annual settlements shall be made on the first Monday in May of each year. [Id. sec. 36.]

Art. 5107—37. Term of assessor and collector.—The assessor and collector for said district shall hold office for the term of two years, and until his successor has been elected and qualified; provided, that the assessor and collector first elected to said office shall hold office only until the next general election to be held in said district for the election of officers, as provided by this Act. [Id. sec. 37.]

Art. 5107—38. Assessment, when made.—The assessment provided for in this Act shall be made upon all property subject to taxation in said district on the first day of January of each year, and such assessment shall be completed and the lists and books ready to deliver on or before the first day of June of each year. [Id. sec. 38.]

Art. 5107—39. Board of equalization shall convene, when; shall complete, when.—The board of equalization, after the first year, shall convene annually on the first Monday in June of each year to receive all of the assessment lists or books of the assessor of said district for examination, correction, equalization, appraisal and approval, and for the addition thereto of any property found to be unrendered in said district, and shall complete the examination and equalization of said lists and rolls by the second Monday of said year, and shall complete and deliver said rolls to the assessor and collector by the second Monday in July of said year, and the said assessment rolls shall be completed by the assessor and approved by the board of equalization, and returned to said assessor and collector by the first Monday in September of each year after the first assessment as hereinbefore provided. [Id. sec. 39.]

Art. 5107—40. Taxes, when due and payable.—All taxes provided for by this Act shall become due and payable on the first day of October of each year, and shall be paid on or before the 31st day of January thereafter. [Id. sec. 40.]

Art. 5107—41. Property returned delinquent; taxes, when lien, etc.—All lands or other property which have been returned delinquent or which may hereafter be returned delinquent shall be subject to the provisions of this Act, and said taxes shall remain a lien upon said land, although the owner be unknown, or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and cost shown to be due by such assessment for any preceding year. [Id. sec. 41.]

Art. 5107—42. Delinquent tax roll.—It shall be the duty of the directors for such irrigation district to cause to be prepared by the tax collector, at the expense of such district, a list of all lands upon which the taxes remain unpaid on the 31st day of January of each year and such list of lands shall be known as a delinquent tax roll, and such delinquent tax roll shall be delivered to the secretary of such district, to be by him safely kept as a part of the record of his office. Such delinquent record shall carry a sufficient description to properly identify the land shown to be delinquent therein. Such description may be made by reference to lot or block number. [Id. sec. 42.]

Art. 5107—43. Delinquent tax record.—Upon receipt of such delinquent tax roll by the directors of said irrigation district, the said directors shall cause said record to be recorded in a book which shall be labeled "The Delinquent Tax Record of County, Irrigation District No. . ." and shall be accompanied by an index showing the name of delinquents in alphabetical order. [Id. sec. 43.]

Art. 5107—44. Delinquent tax record to be published.—Upon the completion of said delinquent tax record by any irrigation district, it shall be the duties of the directors thereof to cause the same to be published in some newspaper published in the county in which said district is situated for three consecutive weeks, but if no newspaper is published in the county, such list may be published in a newspaper outside of the county to be designated by such directors by a contract duly entered into, and a publisher's fee of not to exceed twenty-five cents for each tract of land so advertised; and said publication and any other publication in a newspaper provided for in this Act may be proven by the affidavit of the proprietor of the newspaper in which the publication was made, his foreman or principal clerk, annexed to a copy of the publication, specifying the time when and the paper in which the publication was made. [Id. sec. 44.]

Art. 5107—45. Suit to collect; petition, etc.—Twenty days after the publication of such notice, or as soon thereafter as practicable, the directors for such irrigation district shall employ an attorney to bring suit in the name of the irrigation district in the district court of said county for the purpose of collecting all taxes, interest, penalty and costs due upon said land. Said petition shall describe all lands upon which taxes and penalties shall remain unpaid and the total amount of taxes and penalties due thereon with interest computed thereon to the time fixed for the sale of said land at the rate of six per cent per annum, and shall pray for a judgment for said amount, and for the fixing, establishing and foreclosing of the lien existing against said land; that said lands be sold to satisfy said judgment for all taxes, interest, penalty and costs, and for such other relief to which such district may be entitled under the law and facts. All suits to enforce the collection of taxes as provided in this Act shall take precedence and have priority over all other suits pending in the district court. [Id. sec. 45.]

Art. 5107—46. Suit, how conducted; foreclosure; land, when may be sold in subdivisions; disposition of surplus.—The proper persons shall be made parties defendants in all such suits, and shall be served with process and other proceedings due therein as provided by law for suits of like character in the district court of this state, and in case of foreclosure, order of sale shall issue to the lands sold thereunder as in other cases of foreclosure; but if the defendant or his attorney shall, at any time before the sale, file with the sheriff or other officer in whose hands any such order of sale shall be placed a written request that the property described therein shall be divided and sold in less tracts than the whole, together with a description of such subdivision, then such officer shall sell the lands in said subdivision as the defendant may request, provided same are reasonable, and in such case, shall sell only as many subdivisions as may be necessary to satisfy the judgment, interest, penalties and cost, and after the payment of the taxes, interest, penalties and costs adjudged against it, the remainder of the purchase price, if any, shall be paid by the sheriff or other officer executing said order of sale to the defendant or his attorney of record. [Id. sec. 46.]

Art. 5107—47. Tax deeds; effect.—In all cases in which lands may be sold for default in the payment of taxes under the preceding section, it shall be lawful for the sheriff or other officer selling the same, or any of his successors in office, to make a deed or deeds to the purchaser, or to any other person to whom the purchaser may direct the deed to be made, and any such deed shall be held in any court of law or equity in this state to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud. [Id. sec. 47.]

Art. 5107—48. Compensation of attorney; fees of officers.—The attorney representing such district in all suits against delinquent taxpayers

that are provided for in this Act shall receive for such services such compensation as may be allowed by the directors for such irrigation district; provided, however, that in no event shall said fees exceed fifteen per cent of the amount of taxes so collected. The sheriffs, district clerks and other officers, executing any writ or performing any service in the foreclosure of delinquent taxes on any lands situated in such irrigated district shall receive the same fees for such services as is provided by statute as fees for like services performed in connection with the discharge of the duty of their respective offices. [Id. sec. 48.]

Art. 5107—49. Penalty for failure to pay tax; how enforced, etc.— If any person shall fail or refuse to pay the taxes imposed upon him or his property by this Act, until after the 31st day of January next succeeding the return of the assessment roll for said irrigation district, a penalty of ten per cent on the entire amount of such tax shall accrue, which penalty, when collected, shall be paid over to such district. And the collector of taxes shall by virtue of his tax roll seize and levy upon and sell so much personal property as shall be sufficient to make the amount of such taxes, together with the penalty above provided, interest thereon at the rate of six per cent per annum and all costs accruing thereon. If no personal property be found for seizure and sale as above provided, the collector shall make up and file with the secretary of the district the delinquent tax list hereinbefore provided for, charging against same all taxes, penalties and interest assessed against the owner thereof. [Id. sec. 49.]

Art. 5107—50. Redemption before sale.—Any delinquent taxpayer whose lands have been returned delinquent, or any one having an interest therein, may redeem the same at any time before his lands are sold under the provisions of this Act, by paying to the collector the taxes due thereon with interest at the rate of six per cent and all costs and the penalty of ten per cent as provided for in this Act. [Id. sec. 50.]

Art. 5107—51. Engineer; appointment and duties; maps and surveys.—After the establishment of any such irrigation district, and after the qualification of the board of directors, and after the return of the list of assessments of the taxable property situated in such district the board of directors for such district may appoint an engineer, whose duty it shall be to make a complete survey of the lands contained in said district, and to make a map and profile of the several canals, laterals, reservoirs, dams and pumping sites in such district and connected therewith, which shall also show any part of said canals, laterals, reservoirs and dams or pumping sites extending beyond the limits of such district, which said map shall show the name and number of each survey and shall also show the area in number of acres contained in such district. Provided, however, that such engineer may adopt any and all surveys heretofore made by any person, firm or corporation who have applied for or appropriated any water for irrigation under the general laws of this state; and provided, further, that said engineer may adopt all surveys for canals, laterals, reservoirs, dams or pumping sites shown on said maps or plats, or may adopt other maps, plats and surveys of the correctness of which he may be satisfied. [Id. sec. 51.]

Art. 5107—52. Maps and profiles shall show what, etc.—The maps hereinbefore provided for shall show the relation that each canal and lateral bears to each tract of land through which it passes and the shape into which it divides each tract, and how much and what part of each tract can be irrigated therefrom, and where the canal or lateral cuts off any less than twenty acres of land from any tract, the map shall show the number of acres so divided therefrom and the number of acres in the whole tract, showing the shape of such small tract and its relation to the canal or lateral. And such profile map shall also show in detail

the number of cubic yards necessary to be moved or excavated in order to make such reservoir, canal or lateral, and shall show in detail the specification for all other works necessary to the construction of all improvements proposed to be made in such district, and give the estimated cost of each, and when said map, profile specifications and estimates shall have been completed by the engineer as herein provided, he shall sign the same in his official capacity and file them with the secretary of said board. Provided, however, that where said district contains any pumping plants, canals, dams, ditches or reservoirs, heretofore created and which is contemplated to be purchased or acquired by said irrigation district, then such map or plat and estimates as hereinbefore provided for shall show such improvements and the price or probable price at which the same may be acquired, and where additional improvements of canals, ditches, laterals, reservoirs or pumping plants are to be constructed, such report shall contain the detailed information with reference to such additional improvements as is provided for in this section. [Id. sec. 52.]

Art. 5107—53. Election for issuance of bonds, etc.—After the establishment of any such irrigation district and the qualification of the directors thereof, and after the making and filing of such maps, profiles, specifications and estimates as provided for in the preceding section of this Act [Art. 5107—52], and after the making and return of the assessment roll by the assessor and collector for said district as provided for in this Act, the board of directors may order an election to be held within such irrigation district at the earliest possible legal time, at which election there shall be submitted the proposition and none other “For the Issuance of Bonds and Levy of Tax and Payment Therefor,” “Against the Issuance of Bonds and Levy of Tax and Payment Therefor.” [Id. sec. 53.]

Art. 5107—54. Notice of election.—Notice of such election, stating the amount of bonds, which shall not exceed the engineer’s estimate and all necessary incidental expenses and the cost of additional work which may become necessary by any change or modification made by the directors for such irrigation district, stating the time and places of holding the election, shall be given by the secretary of the board of irrigation directors by posting notices thereof in four public places in such irrigation district, and one at the court house door of the county in which such proposed irrigation district is situated. Such notice shall be posted for twenty days previous to the date of the election, and shall contain the proposition to be voted upon as set forth in the preceding section of this Act [Art. 5107—53], together with the engineer’s estimate of the probable cost of construction of the proposed improvement, and estimate of incidental expenses or of the purchase of improvements already existing, or of the purchase of such existing improvements and construction of additions thereto, as the case may be. [Id. sec. 54.]

Art. 5107—55. Election, how conducted, etc.—The manner of conducting such election shall be governed by the election laws of the state of Texas, except as herein otherwise provided. None but resident property taxpayers who are qualified voters of said proposed district shall be entitled to vote at any election on any question submitted to the voters thereof by the directors for such irrigation district at such election. The directors for such irrigation district shall name a polling place for such election in each voting precinct or part of the voting precinct embraced in said irrigation district, and shall also select and appoint two judges, one of whom shall be the presiding judge, and two clerks, for each voting place designated in said order; and shall provide one and one-half times as many ballots for said election as there are qualified resident taxpaying voters within such irrigation district, as shown by the tax rolls of said county. Said ballot shall have written or printed thereon these words

and no others: "For the Issuance of Bonds and Levy of Tax in Payment Thereof," and "Against the Issuance of Bonds and Levy of Tax in payment therefor." [Id. sec. 55.]

Art. 5107—56. Oath of voter.—Every person who offers to vote in any election held under the provisions of this Act shall first take the following oath before the presiding judge of the polling place where he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of _____ County Irrigation District No. _____, and that I am a resident property tax-payer of said district, and that I have not voted before at this election." [Id. sec. 56.]

Art. 5107—57. Return and canvass of votes.—Immediately after the election, the presiding judge at each polling place shall make return of the result in the same manner as provided for in general elections for state and county officers, such return to be made to the secretary of such district, who shall keep same in a safe place, and deliver them, together with the returns from the several polling places, to the directors of such irrigation district, who shall, at a regular session, or a special session, called for the purpose of canvassing said vote, at such session canvass the vote, and if it be found that the votes of two-thirds majority of the resident taxpaying voters voting therein shall have been cast in favor of the issuance of the bonds, and levy of tax, then said directors shall declare the result of said election to be in favor of the issuance of the bonds and levy of tax and payment therefor, and shall cause the same to be entered in their minutes. [Id. sec. 57.]

Art. 5107—58. Order for issuance of bonds; limit of amount; additional bonds may be issued, when.—After the canvass of the vote and declaring the result as provided for in the preceding section [Art. 5107—57] the directors for said irrigation district shall make and enter an order directing the issuance of bonds for such district sufficient in amount to pay for such proposed improvements together with all necessary, actual and incidental expense connected therewith; provided, however, that said bonds shall not exceed in amount one-fourth of the actual assessed value of the real property in such district, as shown by the assessment thereof made for the purpose of determining the value thereof, or at the last annual assessment, as provided for in this Act, and not to exceed the amount specified in said order and notice of election. Provided, however, that if, after an election has been held for the issuance of bonds and the tax authorized and levied, and bonds have been authorized to be issued, or have been issued as provided for in this Act, the directors for said irrigation district shall consider it necessary to make any modifications in said irrigation district, or in any of the improvements thereof, or shall determine to purchase or construct any further or additional improvements therein and issue additional bonds upon the report of the engineer made as hereinbefore provided and authorized by this Act, or upon its own motion shall have the right to order a hearing for said purpose, or either or any of them, a notice thereof shall be given as for the original hearing, and if upon such hearing the directors for said irrigation district shall find it necessary to make said additional improvements, or purchase such additional property in order to carry out the purposes for which said district was organized, or to best serve the interest of such district, said finding shall be entered on record, and notice of an election for the issuance of said bonds shall be given, and such election held within such times and the returns of such election made as hereinbefore provided for in cases of original election, and if two-thirds majority of the property taxpaying voters of the district voting thereon vote in favor of additional bond issue and levy of tax and payment therefor, said directors shall declare such result, and enter the same in the minutes

of said directors, and order such bonds to be issued as in the manner otherwise provided in this Act. [Id. sec. 58.]

Art. 5107—59. Execution and terms of bonds.—The bonds issued under the provisions of this Act shall be issued in the name of the irrigation district, signed by the president and attested by the secretary, with the seal of said district affixed thereto, and such bonds shall be issued in denominations of not less than one hundred dollars nor more than one thousand dollars each, and such bonds shall bear interest at the rate of not to exceed six per cent per annum, payable annually or semi-annually. Such bonds shall by their terms provide the time, place or places, manner and conditions of their payment, and the interest thereon as may be determined and ordered by the directors for such irrigation district, and none of such bonds shall be made payable more than forty years after the date thereof. [Id. sec. 59.]

Art. 5107—60. Suit to contest validity, etc.—No suit shall be permitted to be brought in any court of this state contesting or enjoining the validity of the formation of any irrigation district created under the provisions of this Act, on any bonds issued hereunder, except in the name of the state of Texas by the attorney general, upon his own motion, or upon the motion of any party affected thereby upon good cause shown, except as herein provided. [Id. sec. 60.]

Art. 5107—61. Action to determine validity of bonds before sale; summons; notice to attorney general.—Any irrigation district in this state desiring to issue bonds in accordance with this Act shall, before such bonds are offered for sale, bring an action in the district court in any county of the judicial district in which said irrigation district may be situated, or in the district court of Travis county, to determine the validity of any such bonds. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of summons for at least three weeks in some paper of general circulation published in the county where the action is pending, and in the county in which said district is situated. Notice shall also be served upon the attorney general of the state of Texas of the term of court to which said suit is made returnable. Such notice to the attorney general shall contain a copy of all of the proceedings had in the formation of such district, and in connection with the issuance of said bonds. [Id. sec. 61.]

Art. 5107—62. Duty of attorney general; issue, how determined, etc.—It shall be the duty of the attorney general to make a careful examination of all such proceedings and require such further evidence and make such further investigation as may seem to him advisable. He shall then file an answer tendering the issue as to whether or not such district has been legally established and as to whether such bonds are legal and binding obligations upon such district. The issue thus made shall be tried and determined by the court and judgment entered upon such finding. Upon the trial of such cause the court may permit any person having an interest in the issue to be determined, to intervene and participate in the trial of the issues made. All suits brought under the provisions of this Act shall have preference over all other actions in order that a speedy determination as to the matters involved may be reached. [Id. sec. 62.]

Art. 5107—63. Errors in proceedings may be pointed out by court and corrected; judgment after correction.—Upon the trial of the issues made under the preceding section of this Act [Art. 5107—62], if the judgment of the court shall be adverse to the district, then such judgment may be by said district accepted, and the errors pointed out in such proceedings may be corrected, in the manner designated or directed by said court, and when so corrected, the judgment of the dis-

strict court shall be rendered showing that said corrections had been made, and that the bonds issued thereunder are binding obligations upon said district. And thereafter the judgment, when so finally made and entered, shall be received as *res adjudicata* in all cases arising in connection with the collection of said bonds or any interest due thereon, and as to all matters pertaining to the organization and validity of said district. [Id. sec. 63.]

Art. 5107—64. Copy of decree to be filed with comptroller of public accounts; record; evidence.—After the making and entry of the judgment of the district court, as hereinbefore provided, the clerk of said court shall make a certified copy of such decree, which shall be a part of the orders and decrees connected with such election, and said court decree shall be filed with the comptroller of public accounts, and to be by him recorded in a book kept for that purpose, and said certified copy, or a duly certified copy of said record made by the comptroller shall be received in evidence in all litigation thereafter arising which may affect the validity of such bonds, and shall be absolute evidence of such validity. [Id. sec. 64.]

Art. 5107—65. Comptroller to register bonds; certificate.—Upon the presentation of said bonds, together with a certified copy of the decree of the district court, as provided for in the preceding article, the comptroller shall register said bonds, together with a certified copy of the judgment, as herein provided for, in a book to be provided for that purpose, and shall attach to each of said bonds a certificate of the fact that the decree of the district court as required by this Act has been filed with him in his office; such certificate to be signed by him officially, and the seal of his office attached thereto. [Id. sec. 65.]

Art. 5107—66. County clerk to keep record of bonds, etc.; duty of secretary of district; fees.—Before the issuance of any bonds under the provisions of this Act, the county commissioners court in which said district is situated, in whole or in part, shall provide a well bound book in which a record shall be kept by the county clerk of all bonds issued, with their numbers, amount, rate of interest, date of issue, when due, where payable, and the annual rate per cent of tax levy made each year to pay the interest on said bonds, and to provide a sinking fund for their payment, and said book shall at all times be open to the inspection of all parties interested in said district, either as taxpayers or bond holders, and upon the payment of any bond an entry shall be made in said book, showing such payment, and the secretary of such irrigation district shall furnish to the county clerk certified copies of all orders made in connection with the issuance and levy and assessment of taxes for the payment of interest and creating a sinking fund for the final payment of such bonds. The county clerk shall receive for his service in recording all instruments of the irrigation district required to be recorded the same fees as are provided by law for other like service. [Id. sec. 66.]

Art. 5107—67. Bonds, how sold or disposed of.—After the issuance of said bonds, and after the registration by the comptroller of public accounts for the state of Texas, as provided by this Act, the board of directors for such district shall offer for sale and sell said bonds on the best terms and for the best possible price, but none of said bonds shall be sold for less than the face value thereof and the accrued interest thereon, and as fast as said bonds are sold, all moneys received therefrom shall be immediately paid over by the board of directors to the depository for said district. Provided, however, that the board of directors may exchange bonds for property to be acquired by purchase under contract, or in payment of the contract price for work to be done for the use and benefit of said irrigation district. [Id. sec. 67.]

Art. 5107—68. Construction and maintenance fund; expenses.—All expenses, debts and obligations necessarily incurred in the creation, establishment and maintenance of any irrigation district organized under the provisions of this Act shall be paid out of the construction and maintenance fund of such irrigation district, which fund shall consist of all moneys received by said district from the sale of the bonds of such district, or as hereinafter provided. [Id. sec. 68.]

Art. 5107—69. Taxes for interest, sinking fund and expenses.—Whenever any such irrigation district bonds shall have been voted, and before the issuance thereof the directors for such irrigation district shall levy taxes upon all property within said irrigation district, whether real, personal or mixed, and sufficient in amount annually to pay the interest on such bonds, as it shall fall due, together with an additional amount to be annually placed in a sinking fund sufficient to discharge and redeem said bonds at their maturity, and the said directors for such irrigation district may annually levy and cause to be assessed and collected taxes upon all property within said district, whether real, personal or mixed, sufficient in amount to pay for the expenses of assessing and collecting such taxes from year to year until said bonds, together with all interest thereon, are fully paid and discharged. [Id. sec. 69.]

Art. 5107—70. Interest and sinking fund.—There is hereby created what shall be termed the "Interest and Sinking Fund" for such district, and all taxes collected under the provisions of this Act shall be credited to such fund, and shall never be paid out, except for the purpose of satisfying and discharging the interest on said bonds, or for the cancellation and surrender of such bonds and to defray the expense of assessing and collecting such tax, and such fund shall be paid out upon order of the directors for such irrigation district upon warrants drawn therefor, as hereinbefore provided, and at the time of such payment the depository for said district shall receive and cancel any interest coupon so paid or any bond so satisfied or discharged, and when such interest coupon or bond shall be turned over to the directors, the account of such depository shall be credited with the amount thereof, and such bond or interest coupon shall be cancelled and destroyed. [Id. sec. 70.]

Art. 5107—71. Maintenance and operating fund.—There shall also be created a fund to be known as "Maintenance and Operating Fund," and such fund shall consist of all moneys collected by assessment or otherwise for the maintenance and operation of the properties purchased or constructed or otherwise acquired by such district, and out of this fund shall be paid the salaries of all officers other than the assessor and collector, and of all employes of every kind whatsoever, all expenses of operation of every kind, whether the same be for water distribution or for operation of machinery, canals, ditches, laterals or otherwise, such debts to be paid upon a warrant executed as otherwise provided herein. [Id. sec. 71.]

Art. 5107—72. Terms of officers elected.—The term of office of all officers elected for such district shall be for two years, and until their successors are elected and qualified; provided, however, that all officers elected at the first election held under the provisions of this Act shall hold office only until the next regular election to be held in said district for the election of such officer. [Id. sec. 72.]

Art. 5107—73. Annual election for district officers.—There shall be held on the first Thursday in January, 1914, and every two years thereafter, a general election, at which time there shall be elected five directors for such district, and one assessor and collector, who shall be the elective officers for such district. [Id. sec. 73.]

Art. 5107—74. Other employees.—All other persons employed or representing said district shall be employed by the board of directors for such time and under such terms and conditions as said board of directors shall deem best for the interest of said district; provided, however, that no contract shall ever be made with any person or employee for a longer period of time, at any one time, than one year, and the salaries of all such employes, or the compensation to be received by them, shall be fixed by the Board of Directors at the time of the employment. [Id. sec. 74.]

Art. 5107—75. Vacancies in office of assessor and collector.—The directors for any irrigation district created under this Act shall have authority to fill all vacancies in the office of assessor and collector by appointment, and the party so appointed shall hold his office until the next regular election and until his successor shall have been elected and qualified. [Id. sec. 75.]

Art. 5107—76. Vacancies in office of director, etc.—All vacancies in the office of director for such irrigation districts shall be filled by the board of directors by appointment, and the director so appointed shall hold office until the next regular election, and until his successor has been elected and qualified. Provided, however, that where the number of directors shall have been reduced by the death or resignation or from other cause to less than three, then such vacancies shall be filled by a special election to be ordered by the president of said board of directors, or by any two members of said board, said election to be ordered and held after the giving of notice for the election of said officers as provided for the holding of general elections; and further provided, that if said president or two of the directors shall fail or refuse to order such election, then said election may be ordered by the district judge of any judicial district in which said irrigation district may be situated upon a petition signed by any five parties interested in the election of said directors, whether said interested parties be taxpayers or bondholders; and when so ordered, notices shall be given of said election, and such election held in the manner provided for the holding of general elections, and the directors elected at such election shall hold their office until the next general election, and until their successors shall have been elected and qualified. In the event that less than a quorum exists to approve the bonds of such elected directors, then such bonds shall be approved by the county commissioners' court in which such directors reside. [Id. sec. 76.]

Art. 5107—77. Compensation of directors.—The directors provided for by this Act shall receive as compensation for their services the sum of five dollars per day for each and every day necessarily taken in the discharge of their duties as such directors, and said directors shall file with the secretary for such district a statement verified by their affidavit of the number of days actually taken by them in the service of said district, said statement to be filed on the last Saturday in each month, or as nearly thereafter as practicable, and before a warrant shall issue for the payment of such services. [Id. sec. 77.]

Art. 5107—78. Eminent domain.—The right of eminent domain is hereby conferred upon all irrigation districts established under the provisions of this Act for the purpose of condemning and acquiring the right-of-way over and through all lands, private and public, except as hereinafter indicated, necessary for making reservoirs, canals, laterals and for pumping sites, drainage ditches, levees and all other improvements necessary and proper for such districts, and the authority hereby conferred shall authorize and empower such irrigation districts to condemn all lands, private and public, for the purpose herein indicated beyond the boundary of such irrigation districts and in any county within

the state of Texas; the right of eminent domain shall not extend to land used for cemetery purposes, nor to property owned by any person, association of persons, corporation or irrigation district, and used for the purpose of supplying water under the laws of this state and necessary for the making of reservoirs, canals, laterals, pumping sites, levee and drainage ditches, or other appurtenant works by such owner. All such condemnation proceedings shall be under the direction of the directors and in the name of the irrigation district, and the assessing of damages and all procedure with reference to condemnation, appeal and payment, shall be in conformity with the statutes of the state for condemning and acquiring right-of-way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings shall be paid out of the construction and maintenance fund of said district. [Id. sec. 78.]

Art. 5107—79. District, when and how dissolved; debts, how collected, etc.—In the event that any irrigation district heretofore established shall not within two years after the taking effect of this Act, or any irrigation district which may hereafter be established, shall not within two years after the conclusion of the organization of such district, begin to acquire the necessary canals, ditches, flumes, laterals, reservoirs, sites, dam-sites, pump plants, and all other things necessary to the successful operation of an irrigation district, by lease, purchase or construction, and diligently pursue the purposes for which said district was created, then and in that event said district shall be dissolved without the necessity of taking any action in connection therewith, and any party having interest therein, or to whom any debt may be due and owing by said district, may collect such debt in the manner provided by law for the collection of any debt due by any person, association of persons, or corporations, and such debt shall be a lien upon the property of such district when established by any court of competent jurisdiction, and the judgment of said court shall provide for the enforcement and payment of such debt and judgment, in the same manner as judgments for a debt against cities or towns that have been dissolved, may be enforced; and provided further that any district heretofore organized, or hereafter organized under the provisions of this Act, may voluntarily dissolve by the same vote and in the same manner provided herein for the organization of districts; but provided further that no dissolution shall be had until all debts and obligations have been fully paid and discharged. [Id. sec. 79.]

Art. 5107—80. Districts in two or more counties; how established, etc.—Where any irrigation district proposed to be established lies partly within two or more counties, the petition provided for in this Act shall be presented to the county commissioners' court of each county in which a portion of said district shall lie, and all notices provided for in this Act to be given in the formation of an irrigation district shall be given in each and every county in which any portion of said territory proposed to be included in such district shall lie. The elections herein provided for, for the establishment of an irrigation district, shall be ordered as herein provided by the county commissioners' court of each county in which any portion of said district may lie, for the portion of said district lying in said county. The election returns in such county shall be made to the commissioners' court, and the said commissioners' court shall appoint all necessary officers, furnish all necessary supplies and give all necessary notices as herein provided in the same manner as if the territory lying in said county was in itself to be incorporated in an irrigation district. The said election shall be held in each county in the portion of the district therein situated and the return of such election shall be made to the county commissioners' court or any other officer authorized to receive same, and shall be by them duly canvassed and the result duly declared.

After canvassing, determining and declaring the result of said election, the county judge or presiding officer of the commissioners' court shall certify and report the result of said election to the county judge of the county in which the largest portion of any such district is situated and said county judge shall canvass said vote and declare the result thereof, and if it be determined that at least two-thirds of the property tax-payers voting thereon in said entire district have voted in favor of the creation of said irrigation district, the said county judge shall declare the result thereof in the manner herein provided. Said county judge shall make and publish the order provided for in this Act, relating to districts wholly within one county and shall cause copies of such order to be filed with the county clerk of each county in which any portion of said district may lie which shall be held to be a proclamation of the result of said election. The board of directors elected for such district shall meet and qualify and shall have charge of the affairs of the district in the same manner as herein above provided for districts lying wholly within one county. The bonds of such directors shall be approved by the commissioners' court of the county in which they reside, a copy of the order approving the bond or bonds shall be filed with the county clerk of the county in which such district is situated, who shall cause same to be duly recorded in the deed records of said county and properly indexed in the same manner provided for the recording and indexing of deeds. [Id. sec. 80.]

Art. 5107—81. Official bonds and oaths.—Where a district lies in two or more counties, the officers of such district shall furnish bonds and take the oath of office and qualify before the commissioners' court of the county in which the portion of the district lies in which they reside or in which their property is situated. [Id. sec. 81.]

Art. 5107—82. Petition for district in two or more counties, how heard; appeal from dismissal, etc.—When a petition asking for the establishment of an irrigation district is filed in two or more counties, the commissioners' court of each county shall proceed to hear and determine the matters therein set forth with reference to the territory within their said county in the same manner as provided herein for territory wholly within one county, and in the event any one or more commissioners' courts in which any part of said district is situated shall dismiss the petition and find against the petitioners, then the said petitioners or any part of them may appeal from the decision of such court to the district court, in which event they shall file notices of appeal with the commissioners' court of each county in which said petition has been acted upon and the clerk of each said court shall transmit all original papers and a true copy of all orders made by each said courts to the court to which said appeal is taken and the said court shall hear and determine said matter by consolidating said causes. The appeal herein provided for shall be taken in the same manner as provided in section 4 [Art. 5107—4] of this Act, and the district court of any county in which any portion of said irrigation district is situated shall have jurisdiction to hear and determine said appeal and said cause shall be tried in said court as provided for the trial and appeal of any civil action, except that no formal pleadings shall be required other than the notices of appeal herein provided for. [Id. sec. 82.]

Art. 5107—83. Lands in adjoining county may be included, how, etc.—Wherever an irrigation district has been formed under this Act lying wholly within one county, and it is to the advantage of such district and of land owners lying in the adjoining county or counties to have such adjoining lands added to or included in such established irrigation district, then same may be so included in or added to the territory already included in such established irrigation district in the following manner: The owners of the fee shall make application to the

directors of the established district to which they desire to be annexed, which application shall be in writing, and shall describe the lands covered by the application by metes and bounds and same shall be acknowledged in the same manner and form as now required for the acknowledgment of deeds, and if said land is a homestead or the separate property of a married woman, it shall be acknowledged by both husband and wife. The directors of the irrigation district shall set said petition or application down for hearing on some certain date and shall give notice of such hearing in the same manner as provided in section 1 [Art. 5107—1] of this Act and shall consider same in the same manner as provided for the consideration of petitions by the county commissioners' court as set out and provided in sections 2 and 3 [Arts 5107—2, 5107—3] of this Act, and in the event that they shall find and determine that it is for the advantage of such established district and for the advantage of the lands sought to be added thereto, to so include said lands in said district, then they shall so find and enter said finding of record in the minutes of said directors, and they shall thereupon order an election to be held in said established district to determine whether or not said additional territory shall be permitted to be added thereto, which election shall be held after thirty days' notice, which notice shall be given by posting copies of such notice in five public places in said district for at least twenty days next preceding the day of election, and if there be a newspaper published in said district, by publishing such notice for at least once a week for three weeks next preceding the day of said election. The said notice shall be given by the irrigation directors, which said directors shall furnish all necessary supplies for said election and shall appoint two judges and two clerks for all polling places in said district to conduct said election and make return thereof, when officers shall take the oath of office prescribed by the general election laws of the state, and they shall make returns of said election to the irrigation directors of the district, but in all other things said election shall be held in conformity with the general election laws of the state. At such election there shall be submitted the question, and none other, "Shall the proposed territory be added to the district?" and there shall follow said sentence the word "yes" and just below the word "no."

If two-third majority of the resident property tax payers of said district vote yes, then the said territory may be added and become a part of said district in the same manner as if originally incorporated therein and subject to all laws governing said district; provided that the directors of said district may require the owners of said lands to pay into the interest and sinking fund of said district their proper pro rata part of charges theretofore made against the lands in said district to pay interest and sinking fund upon bonds of said district. If the application or petition for the addition of lands to the district as herein provided for shall cover a number of different tracts of land, or if there be included in the territory so described in said application or petition property tax payers other than those signing and acknowledging such application, or if there be included in such territory as many as ten property tax paying voters, then, at the same time the election above provided for is held in said established district, there shall also be held and conducted under the same rules and regulations as above provided for elections within such established territory, an election in such territory that is proposed to be added except that the notice of election shall include a full description by metes and bounds of the territory included within such proposed addition. The ballot for such election shall have printed thereon "for addition to irrigation district" and "against addition to irrigation district," but shall not contain any other matter whatever. In the event that two-thirds majority of the resident property tax paying voters voting thereon at said election vote in favor of the addition of such territory, then same may be added to such irrigation district

by a proper order of the irrigation commissioners entered upon the minutes of such irrigation district, said order to be made within twenty days after the holding of such election, and said territory so added shall thereafter be and become an integral part of said district subject to all laws governing said district as completely and as fully as if same had been included in the district in its original formation; provided, however, that no water shall be furnished for irrigation of land included within said district until the owners and holders thereof shall have fully paid the charges fixed against such land by the directors as a condition to their admission into the district as provided for in this Act. Such additions to such irrigation district shall not in any manner affect the officers, employes and affairs of such district, but the voters of such added territory shall have a right to participate in all matters of the district considered or voted upon thereafter. [Id. sec. 83.]

Art. 5107—84. Directors and officers may enter lands, etc.; preventing entry misdemeanor.—The irrigation directors of any district and the engineer and employes thereof are hereby authorized to go upon any lands lying within said district, for the purpose of examining same, locating reservoirs, canals, dams, pumping plants and all other improvements, to make maps and profiles thereof; and are hereby authorized to go upon the lands beyond the boundaries of such districts in any county for the purposes stated, and for any other purposes necessarily connected therewith, whether herein enumerated or not. And any person who shall wilfully prevent or prohibit any such officers or employes from entering any lands for such purposes shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding one hundred dollars for each day he shall so prevent or hinder such officer or employe from entering upon any lands. [Id. sec. 84.]

Art. 5107—85. Contracts, how let; notice.—Contracts for making and constructing reservoirs, dams, canals, laterals, pumping plants, check gates, sluice gates, and all improvements whatsoever of said irrigation district shall be made by the irrigation directors, to the lowest responsible bidder, after giving notice by advertising same in one or more newspaper of general circulation in the state of Texas, and in one newspaper published in the county, if there be one in the county, and one newspaper in such irrigation district if there be one in the irrigation district, which notice shall be published once a week for four consecutive weeks; and also by posting notices for at least twenty days in five public places in the irrigation district, and one at the court house door of the county or counties in which such district is situated. [Id. sec. 85.]

Art. 5107—86. Bidders to receive copies of reports and profiles; bids, how made, etc.—Any person, corporation or firm, desiring to bid on the construction of any work advertised as provided for herein, shall upon application to the irrigation directors be furnished with a copy of the engineer's report, and profile, showing the work to be done, provided the irrigation directors may charge therefor the actual cost of having such report and profiles made and furnished. All bids or offers to do any such work shall be in writing, and sealed and delivered to the president or secretary of the irrigation directors, together with a certified check for at least five per cent of the total amount bid, which said amount shall be forfeited to the district in the event the bidder refused to enter into a proper contract for his bid as accepted. Any or all bids may be rejected in the judgment of the directors. All bids shall be opened at the same time. [Id. sec. 86.]

Art. 5107—87. Contracts to conform to act, etc.; how executed, filed and recorded.—All contracts made by the irrigation district shall be in conformity with and subject to the provisions of this Act, and the provisions of this Act shall be a part of all contracts in so far as ap-

plicable to either the contractor or the district, and the provisions of this Act shall govern whenever the contract is in conflict herewith. The contracts shall be reduced to writing and signed by the contractors and irrigation directors, and a copy of same so executed shall be filed with the county clerk of the county or counties in which said district is situated, which said copy so filed with said county clerk shall be recorded in a book kept for that purpose, and be subject to public inspection. [Id. sec. 87.]

Art. 5107—88. Contractors' bonds.—The person, firm or corporation to whom such contract is let shall give bond payable to the irrigation district in such amount as the directors may determine not to exceed the contract price, conditioned that he, they or it, will faithfully perform the obligations, agreements and covenants of such contract, and that in default thereof they will pay to said district all damage sustained by reason thereof. Such bond shall be approved by the irrigation directors, and shall be deposited with the depository of the district, a true copy thereof being retained in the office of such directors. [Id. sec. 88.]

Art. 5107—89. Contracts to contain specifications; supervision; reports of engineer; bridges and culverts across railroads.—All such contracts shall contain a full statement of the specifications for all the work included in the contract, and all such work shall be done in accordance with the specifications under the supervision of the irrigation directors and the irrigation district engineer. As the work progresses the engineer of such district will make full reports to the irrigation directors, showing in detail whether the contract is being complied with or not in the construction and when the work is completed the engineer shall make a detailed report of same to the irrigation directors, showing whether or not the contract has been fully complied with according to its terms, and if not in what particular it has not been so complied with. The irrigation directors, however, will not be bound by such report, but may in addition thereto fully investigate such work and determine whether or not such contract has been complied with. The irrigation district is hereby authorized and empowered to make all necessary bridges and culverts across or under any railroad track and roadway of such railway to enable them to construct and maintain any canal, lateral or ditch necessary to be constructed as a part of the improvements of such district. Such bridges or culverts shall be paid for by the irrigation district; provided, however, that notice shall first be given by such irrigation district directors by delivering a written notice to any local agent, division superintendent, or roadmaster of such railway, and the railway company shall be allowed thirty days to build such bridges or culverts at their own expense, if they should desire to do so, and according to their own plans; provided, such canal, culvert or ditch shall be constructed of sufficient size not to interfere with the free and unobstructed flow of water passing through the canal or ditch, and shall be placed at such points as are designated by the irrigation district engineer, or directors. [Id. sec. 89.]

Art. 5107—90. Bridges and culverts across canals, etc.—Irrigation districts are hereby authorized and required to build all necessary bridges and culverts across and over all canals, laterals and ditches made and constructed by such district, whenever the same crosses a county or public road, and shall pay for the same out of the funds of such district. [Id. sec. 90.]

Art. 5107—91. Surplus moneys, how used.—After the full and final completion of all the improvements of such district as herein provided for, and after the payment of all the expenses incurred under the provisions of this Act, the irrigation directors are authorized to use the re-

maintaining funds of the irrigation district for the best interests of such district in preservation, up-keep and repair of the works of such district; provided, however, such additional expenditures shall in no event exceed the amount of surplus money, or bonds to the credit of such district, except as herein otherwise provided. [Id. sec. 91.]

Art. 5107—92. Duties of directors; inspection; payment of contract price; contracts with partial payments.—The irrigation directors shall have the right, and it is hereby made their duty, at all times during the progress of the work being done under any contract, to inspect the same; and upon the completion of any contract in accordance with its terms, they shall draw a warrant on the depository of the district for the amount of the contract price in favor of the contractor, or his assignee; and if the irrigation directors shall deem it advisable in order to obtain more favorable contracts, they may advertise a contract to be paid for in partial payments as the work progresses, and such partial payments shall not exceed in the aggregate seventy-five per cent of the amount of work done, the said amount of work completed to be shown by certified report of the engineer of the district. [Id. sec. 92.]

Art. 5107—93. Directors to make semi-annual reports.—The irrigation directors shall make a semi-annual report on the first days of July and December of each year, showing in detail, the kind, character and amount of work done in the district, the cost of same, the amount of each warrant drawn, and to whom paid, and for what purpose paid, and other data necessary to show the condition of improvements made under the provisions of this Act, and each report shall be verified by them, a copy of which shall be filed in the office of the county clerk of the county or counties in which such district is situated, and shall be open to public inspection. [Id. sec. 93.]

Art. 5107—94. District acquiring established system to continue to supply water, etc.—When an irrigation district acquires an established irrigation system which has supplied water to lot owners in a city, town or village and such city, town or village is not included in such district, such district shall continue to supply water to such lot owners for a reasonable annual rental. [Id. sec. 94.]

Art. 5107—95. Persons desiring to receive water to furnish statements; directors to estimate expense; expense, how paid; assessments; contracts with users; directors may borrow money; liens; interest; list of delinquents; sale or lease of water right by directors.—Between the first day of January and the first day of March of each year, every person desiring to receive water during the course of the year, or at any time during the year from the irrigation district, shall furnish to the secretary of the board of directors a specific statement of the acreage intended by him to be put under irrigation and for which water is to be used, and as near as may be a statement of the different crops to be planted by him, and the acreage of each. If such statements should not be furnished within this time, there shall be no obligation on the part of the irrigation district to furnish such water to such person for that year. On the first day of March of each year, or as soon thereafter as practicable, the board of directors shall carefully estimate the expense to be incurred during the course of the next succeeding twelve months for the maintenance of the irrigation system and its operation. One third of the amount so estimated shall be paid by the assessments against all irrigable lands within the district, pro rata per acre, that is to say, against all lands to which the district is in condition to furnish water, but without reference as to whether such land is to be actually irrigated or not; the other two-thirds of the expense of maintaining and operating the plant shall be paid by the persons taking water under the system. This amount shall, as nearly as may be, equitably pro rated among the

water takers, and in making such assessments the board of directors may take into consideration the acreage to be planted by each water taker, and the crop to be grown by him; provided, however, that each water user shall be charged the same price per acre for use of water upon the same class or character of crops. All assessments shall be paid in three installments, the first of which shall be for one-fourth of the total assessment, and shall be payable on April first of each year; the second installment shall be for one-fourth of such assessment and shall be payable on the first day of July of each year; the balance of the assessment shall be payable on or before December first of each year. And if the crop for which such water was furnished shall be harvested prior to the time of the payment of any installment the entire assessment shall become due and shall be paid within ten days after the harvesting of such crop, and before the removal of such crop from the county or counties in which the district is situated. The board of directors may, at their discretion, require every person desiring water during the course of the year to enter into a contract with the irrigation district, which contract shall indicate the acreage to be watered, the crops to be planted, and the amount to become due, and the terms of payment; and it may be further required that the water taker shall execute a negotiable note or notes for such amounts, or for parts thereof. The making of such contracts shall not constitute a waiver of the lien given by this Act upon the crops of the water taker for the service furnished to him. If the water taker shall water more land than is called for in his contract, he shall pay for the additional service rendered as and at the times hereinbefore indicated. To secure money for the operating and maintenance expense of the district, the board of directors shall have authority to borrow money with interest not exceeding ten per cent per annum, and may hypothecate any of its notes or contracts with water takers or accounts against them. The irrigation district shall have a first lien superior to all other liens upon all crops of whatsoever kind grown upon each tract of land in the district to secure the payment of the assessment herein provided for, and all such assessments shall bear interest from the time due and payable at the rate of ten per cent per annum. All land owners shall be personally liable for all assessments herein provided for, and if they shall fail or refuse to pay same when due, the water supply shall be cut off and no water shall be furnished to the land until all back dues are fully paid. This provision shall bind all parties persons and corporations owning or thereafter acquiring any interest in said lands. The directors of all irrigation districts shall, within ten days after any assessment is due, post at a public place in said district a list of all delinquents and shall thereafter keep posted a correct list of all such delinquents; provided, however, that if the parties owning such assessments shall have executed notes and contracts as hereinbefore provided, they shall not be placed upon such delinquent list until after the maturity of such notes and contracts. In the event said board of directors in the utilization of the water shall sell or lease any water right for any other purpose than irrigation, said contract shall be so conditioned and restricted as to be subservient to the use of the water for irrigation. [Id. sec. 95.]

Art. 5107—96. When assessments are more than sufficient, or are insufficient; notice of additional assessments.—In the event the assessments made as provided for in the preceding section [Art. 5107—95] should be more than sufficient to meet the necessary obligations of the district, the balance shall be carried over to the next season; and in the event the assessments made are not sufficient to meet the necessary expenses of such district, the balance unpaid shall be assessed, pro rata, in accordance with the assessments previously made for the then current year, and shall be paid under the same conditions and penalties within

ninety days from the time such assessment is made. Public notice of all such assessments shall be given by posting printed notices thereof in at least three public places in the irrigation district, and printed notices shall be mailed to each land owner; provided, however, each land owner shall furnish to the board of directors his correct post office address. Such notice shall be given by posting and mailing such notice five days before the assessment is due, and in the event of special assessments such notice shall be given within five days after such assessments are levied. [Id. sec. 96.]

Art. 5107—97. Irrigation district may purchase system of drainage district.—Included in the plans of any irrigation district may be the necessary drainage ditches, or other facilities for drainage, and necessary levees for the protection of land under the system; and every irrigation district may purchase the system or any part of any system belonging to a drainage district. The purchase, however, shall provide for the payment of the debts of the drainage district or the assumption of such debts, and the amount of such debts paid or assumed is to be considered in determining the bond issuing capacity of the irrigation district. [Id. sec. 97.]

Art. 5107—98. Assessments for operation and maintenance, how collected; bond and duties of collector.—All assessments for operation and maintenance expenses made under the provisions of this Act shall be collected under the direction of the irrigation directors, by an officer designated by them, which said officer shall give bond in such sum as they may direct conditioned upon the faithful performance of his duties and accounting for all moneys collected. He shall keep a true account of all money collected, and deposit the same as collected in the district depository, and shall file with the secretary of the directors a true statement of all money collected once each week. The collector shall use a duplicate receipt book, and shall give a true receipt for each collection made, retaining in such book a true copy thereof, which shall be preserved as a record of the district. [Id. sec. 98.]

Art. 5107—99. Accounts and records of district.—The directors of an irrigation district shall keep a true account of all their meetings and proceedings, and shall preserve all contracts, records of notices, duplicate vouchers, duplicate receipts, and all accounts and records of whatsoever kind, in a fire-proof vault or safe, and the same shall be the property of the district and shall be delivered to their successors in office. [Id. sec. 99.]

Art. 5107—100. District depositories.—The directors of such irrigation district shall select a depository for such district under the same provisions as are now provided for the selection of depositories for the counties in this state; and the duties of such depositories shall be the same as now prescribed by law for county depositories. However, in the selection of depositories, the directors of such irrigation districts shall act in the same capacity and perform the same duties as is incumbent upon the county judge and members of the commissioners' court in the selection of county depositories; and all laws now in force or hereafter to be enacted for the government of county depositories shall apply to and become a part of this Act. [Id. sec. 100.]

Art. 5107—101. Monthly reports of depositories, etc.—The irrigation district depository shall make a report of all moneys received, and of all moneys paid out, at the end of each month, and file such reports with such vouchers among the records of said district in its own vault, and shall furnish a true copy thereof to the irrigation directors, and shall when called upon allow same to be inspected by any taxpayer or resident of such irrigation district. Such records shall be preserved as

the property of such district, and shall be delivered to the successor of such depository. [Id. sec. 101.]

Art. 5107—102. Directors to maintain office; meetings.—The directors of each irrigation district shall have and maintain a regular office suitable for conducting the affairs of such district, within such irrigation district, or within a town situated within the general boundary lines of such irrigation district, and not removed therefrom. And such directors shall hold regular meetings at said office on the first Monday in February, May, August and November of each year, at ten o'clock a. m., and shall hold such other regular and special meetings as they may see fit. And any resident tax payer or interested party may attend any such meeting of such directors, but shall not participate in any such meetings without the consent of the directors, and shall have no authority to vote upon any matter considered by such directors, but may present such matters as they desire to such directors in an orderly manner. [Id. sec. 102.]

Art. 5107—103. Surety company bonds.—All officers and employes of an irrigation district, who may be required to give bond or security may furnish bonds of surety companies to the approval of the directors; provided, however, whenever such a surety company bond is furnished by any such officer or employe, the surety company furnishing same shall file for record in the office of the county clerk where such irrigation district is situated a duly executed power of attorney, showing the authority of the person signing such bond for said company, to so sign same, and said power of attorney shall be duly executed by the officers of said company, and have attached the company seal; and such power of attorney shall remain on file in said office. All such official bonds shall be deposited with the district depository and be preserved by it as the property of said district. [Id. sec. 103.]

Art. 5107—104. Meetings, where held; vouchers; accounts, etc.—All meetings of the irrigation directors shall be held at the regular office of the district. All vouchers issued for the payment of any funds of the district shall be signed by at least four directors and shall refer to the book and page of the minutes allowing such account. All vouchers shall be issued from a regular duplicate book retaining a duplicate which shall be preserved. The directors shall have kept a complete book of accounts for such district, and shall, on June first of each year select a competent auditor who shall examine the accounts, books and reports of the depository, the assessor and collector and the directors, and make a full report thereon a copy of which shall be filed with the depository and a copy with the directors and one with the county clerk of the county or counties in which such district is situated. Such report shall be filed by September 1st of each year. [Id. sec. 104.]

Art. 5107—105. Laws repealed; districts organized under prior law.—The act of the twenty-ninth legislature, being chapter 50 of the Acts of 1905, and being articles 5012 to 5107 inclusive of chapter 3, title 73 of the Revised Civil Statutes of the State of Texas is hereby repealed. All irrigation districts heretofore organized under the terms and in accordance with the provisions of the said Act, are hereby expressly declared to be validly created, organized, described and defined, with boundaries as prescribed by the order of the commissioners' court organizing the same, or as the same have since been changed by the board of directors thereof, in the manner provided in the said Act. Such districts, however, shall hereafter be governed by the provisions of this Act; provided, however, that the duly constituted and qualified officers of such district shall continue to perform the duties of such officers until the next general election held under the provisions of this Act. [Id. sec. 105.]

TITLE 74

JAILS

<p>Art. 5108. Commissioners' court to provide. 5109. Sheriff keeper, etc. 5110. Shall be constructed to enable executions to be had in death penalty.</p>	<p>Art. 5111. Commissioners to see that jails are properly kept. 5112. United States marshal may use jails. 5113. Marshal liable for fees.</p>
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Article 5108. [3132] Commissioners' court shall provide jails, etc.—The commissioners' courts of the several counties shall provide safe and suitable jails for their respective counties, and shall cause the same to be kept in good repair. [Act July 22, 1876, p. 57, sec. 4.]

Art. 5109. [3133] Sheriffs the keepers of jails, etc.—Each sheriff is the keeper of the jail of his county; and he shall safely keep therein all prisoners committed thereto by lawful authority, subject to the order of the proper court, and shall be responsible for the safe keeping of such prisoners. [Act Aug. 26, 1856; May 12, 1846. P. D. 2504, 5718. C. C. P. 49.]

Art. 5110. [3134] Jails shall be so constructed that the penalty of death may be executed within the walls thereof.—All jails hereafter erected shall be so constructed that the penalty of death may be conveniently executed within the walls thereof; and it shall be the duty of the commissioners' court of any county having a jail already erected, if the same is not so constructed as that the penalty of death can be conveniently executed therein, to have the construction of the same so altered as that the penalty of death may be conveniently executed within its walls, if practicable to do so without too great an expense to the county.

Art. 5111. [3135] Duty of commissioners' courts to see that jails are properly kept.—It shall be the duty of the commissioners' courts of the counties to see that the jails of their respective counties are kept in a clean and healthy condition, properly ventilated, and not over-crowded with prisoners, and that they are furnished with clean and comfortable mattresses and blankets sufficient for the comfort of the prisoners therein confined.

Appointment of physician.—Commissioners' court held authorized to appoint county physician at stated salary to attend prisoners at county jail and paupers at poorhouse. *Galveston County v. Ducie*, 91 T. 665, 45 S. W. 798.

Responsibility of marshal for condition of jail.—A city marshal delivering a prisoner to the jail janitor is not responsible for the unhealthy condition of the cells, in the absence of evidence that he had control thereof. *Bishop v. Lucy*, 21 C. A. 326, 50 S. W. 1029.

Art. 5112. [3136] United States marshal may use jail.—Sheriffs and jailers shall receive into the jails of their respective counties such prisoners as may be delivered or tendered to them by any United States marshal or his deputy for any district of Texas, and shall safely keep such prisoners until they are demanded by such marshal or his deputy, or are discharged by due course of law. [Act Aug. 30, 1856, p. 88, sec. 1. P. D. 4796.]

Art. 5113. [3137] Marshal liable for jail fees.—In the cases provided for in the preceding article the marshal, by whose authority such prisoners are received and kept, shall be directly and personally liable to the sheriff or jailer for the jail fees and all other expenses of the keeping of such prisoners, such fees and expenses to be estimated according to the laws regulating the same in other cases. [Id. sec. 2. P. D. 4797.]

TITLE 75

JURIES IN CIVIL CASES

Chap.		Chap.	
1.	Jurors—Their Qualifications and Exemptions.	6.	Selected Jurors—How Summoned, etc.
2.	Jury Commissioners for the District Court, Their Appointment, Qualifications, etc.	7.	Juries for the Week—How Made Up.
3.	Jury Commissioners for the County Court, Their Appointment, Qualifications, etc.	8.	Jury Trials—Authorized, When and How.
4.	Proceedings of the Jury Commissioners in the Selection of Jurors.	9.	Challenges.
5.	Selection of Jurors in Counties With Cities of Certain Population.	10.	Formation of the Jury for the Trial of a Cause.
		11.	Oath of Jurors in Civil Cases.
		12.	Juries—How Constituted and Their Verdicts.
		13.	Compensation of Jurors of the District and County Court in Civil Cases.

CHAPTER ONE

JURORS—THEIR QUALIFICATIONS AND EXEMPTIONS

Art.		Art.	
5114.	Who are competent jurors.	5119.	Where several fire companies in one town.
5115.	Who are disqualified in general.	5120.	List of members selected to be delivered to the clerk.
5116.	Exceptions to certain cases.	5121.	Filing of legal exemptions.
5117.	Jurors disqualified in certain cases.		
5118.	Who are liable to jury service.		

Article 5114. [3138] Who are competent jurors.—All male persons over twenty-one years of age are competent jurors, unless disqualified under some provision of this chapter.

Art. 5115. [3139] Who are disqualified, in general.—No person shall be qualified to serve as a juror who does not possess the following qualifications:

1. He must be a citizen of the state and of the county in which he is to serve, and qualified under the constitution and laws to vote in said county; provided, that his failure to pay poll tax as required by law shall not be held to disqualify him for jury service in any instance.
2. He must be a freeholder within the state, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write, except in cases provided for in the succeeding article.
5. He must not have served as a juror for six days during the preceding six months in the district court, or during the preceding three months in the county court.
6. He must not have been convicted of felony.
7. He must not be under indictment or other legal accusation of theft or of any felony. [Act Aug. 1, 1876, p. 78. Const., art. 16, p. 19. Amended Acts 1903, 1 S. S., p. 15, sec. 1. Amended Acts 1905, p. 207.]

Payment of poll tax.—The court can dispense with the payment of poll tax as a qualification of jurors whenever such prerequisite would encumber or hinder the district and other inferior courts of the county in the administration of justice and a proper and expeditious trial of cases. But the qualification cannot be dispensed with where there are at least 3,000 qualified poll tax paying jurors in the county, and who are not disqualified to sit as jurors. *Taylor v. State*, 47 Cr. R. 101, 81 S. W. 934.

Jurors are not disqualified for not having paid poll tax if the requisite number of jurors could not be found in the county who had paid their poll taxes. *S. A. & A. P. Ry. Co. v. Lester* (Civ. App.) 84 S. W. 403.

It must be made to appear to the judge, that is, shown by evidence furnished by either party, that the requisite number of qualified jurors cannot be had in a county to try a case before a party can be forced to take a juror who has not paid his poll tax. The fact that the judge is satisfied in his own mind that such is the case, is not sufficient. *San Antonio & A. P. Ry. Co. v. Lester*, 99 T. 214, 89 S. W. 754.

It is neither a disqualification nor cause of challenge that a juror has not paid his poll tax. *King v. State* (Cr. App.) 100 S. W. 333.

Householder.—Discharge of juror on the ground that he was not a householder held proper. *McArthur v. State*, 41 Cr. R. 635, 57 S. W. 847.

Where a juror owned and controlled a room, he was qualified as a householder. *Mays v. State*, 50 Cr. R. 165, 96 S. W. 329.

Education.—Facts held to show a Mexican juror was not disqualified for insufficiently understanding the English language. *Essary v. State*, 53 Cr. R. 596, 111 S. W. 927.

Discretion of court.—When objection to juror is on ground other than those contained in the statute the discretion of the trial judge in passing upon the objection will not be revised unless it appears that the ruling results in preventing a fair and impartial trial. Because a juror is unable to calculate interest on notes, it cannot be held that the trial was not fair and impartial. *Stone v. Pettus*, 47 C. A. 14, 103 S. W. 415.

Art. 5116. [3140] Exception in certain cases.—Whenever it shall be made to appear to the court that the requisite number of jurors able to read and write can not be found within the county, the court may dispense with the exception provided for in the fourth subdivision of the preceding article; and the court may in like manner dispense with the exception provided for in the fifth subdivision, when the county is so sparsely populated as to make its enforcement seriously inconvenient. [Id. secs. 16, 26.]

Art. 5117. [3141] Jurors disqualified to try a particular case.—The following persons shall be disqualified to serve as jurors in any particular case:

1. Any witness in the case.
2. Any person interested, directly or indirectly, in the subject matter of the suit.
3. Any person related by consanguinity or affinity within the third degree to either of the parties to the suit.
4. Any person who has a bias or prejudice in favor of or against either of the parties.
5. Any person who has sat as a petit juror in a former trial of the same case, or of another case involving the same questions of fact. [Act Aug. 1, 1876, p. 83, sec. 26.]

Competency in general.—Competency of jurors determined. *Arnold v. State*, 38 Cr. R. 1, 40 S. W. 734; *Id.*, 38 Cr. R. 5, 40 S. W. 735.

That jurors belong to an opposite political party is no ground for challenge in an election contest. *Gray v. State*, 19 C. A. 521, 49 S. W. 699.

Jurors held competent. *Smith v. State* (Cr. App.) 65 S. W. 186; *Hubbard v. Same*, 43 Cr. R. 564, 67 S. W. 413; *Tardy v. Same*, 46 Cr. R. 214, 78 S. W. 1076; *Kegans v. Same* (Cr. App.) 95 S. W. 122; *Green v. Same*, 49 Cr. R. 645, 98 S. W. 1059; *Gregg v. Same* (Cr. App.) 100 S. W. 1161; *San Antonio Traction Co. v. Davis* (Civ. App.) 101 S. W. 554; *Ellis v. Brooks*, 101 T. 591, 102 S. W. 94; *Early v. State*, 51 Cr. R. 382, 103 S. W. 868, 123 Am. St. Rep. 889; *Hubbard v. Same*, 52 Cr. R. 399, 107 S. W. 351; *Russell v. Same*, 53 Cr. R. 500, 111 S. W. 658; *Rice v. Same*, 54 Cr. R. 149, 112 S. W. 299.

That jurors selected to try defendant for a violation of a local option law were Prohibitionists held no ground for reversal of a conviction. *Lively v. State* (Cr. App.) 73 S. W. 1048.

Jurors held not competent. *St. Louis & S. F. R. Co. v. Hooser*, 44 C. A. 229, 97 S. W. 708; *Gregg v. State* (Cr. App.) 100 S. W. 1161; *Quinn v. Same*, 51 Cr. R. 155, 101 S. W. 248; *Hanes v. Same* (Cr. App.) 107 S. W. 818; *Kenecht v. Same*, 53 Cr. R. 55, 108 S. W. 1183.

Member of organization.—Parties may ask jurors on their *voir dire* if they belong to a secret order. *Burgess v. Singer Mfg. Co.* (Civ. App.) 30 S. W. 1110.

Interrogatories asked of jurors as to whether they did not belong to a law and order society, etc., held properly excluded. *Dodd v. State* (Cr. App.) 82 S. W. 510.

In trespass to try title, jurors otherwise qualified held not disqualified because members of an organization known "as actual settlers." *Jones v. Wright* (Civ. App.) 92 S. W. 1010.

In a prosecution for violating the local option law, held not error to refuse to set aside the jury because many of the jurors were members of a local option league, and some had voted for local option. *Deadweyler v. State*, 57 Cr. R. 63, 121 S. W. 863.

Witnesses.—The fact that a person subpoenaed as a witness was received as a juror is not error when he did not testify on the trial. *Railway Co. v. Brinker*, 68 T. 500, 3 S. W. 99.

Witnesses on application for change of venue in criminal cases held not incompetent jurors. *Hardin v. State*, 40 Cr. R. 208, 49 S. W. 607.

It is not error to exclude a witness in the case from the jury before the jury is sworn, even though the party objecting to such exclusion has exhausted all his challenges and has to take another juror from the talesman. *Mundine v. Pauls*, 28 C. A. 46, 66 S. W. 255.

Where a juror during the progress of the trial is called as a witness and testifies, and is then excused by both sides as a juror and the case is finished with only eleven jurors, this of itself does not constitute reversible error. *Walker v. Dickey*, 44 C. A. 110, 98 S. W. 660, 661.

That jurors were subpoenaed as witnesses held not to disqualify them under the circumstances. *Edgar v. State*, 59 Cr. R. 491, 129 S. W. 141.

A constable, who had been deputy sheriff and had acted as bailiff during the term at which accused was tried, and had waited on the court and had charge of the jury in a felony case at the same term, was not competent as a juror in accused's case. *Chapman v. State* (Cr. App.) 147 S. W. 580.

Pecuniary Interest.—That a juror lives upon the land involved, so as to be interested in the particular suit, or is related within the third degree to any of the parties, is ground for challenge. *Veramendi v. Hutchins*, 56 T. 414.

Taxpayers of a city are not, for that reason, disqualified to sit as jurors in a suit against the city for damages. *City of Marshall v. McAllister*, 18 C. A. 159, 43 S. W. 1043.

Residents and taxpayers are not disqualified by Art. 5117 as jurors in a case in which the county is an interested party. *Watson v. Dewitt County*, 19 C. A. 150, 46 S. W. 1061.

The husband of the niece of the plaintiff's wife is incompetent as a juror in a suit for damages for personal injuries. If the plaintiff should recover, the recovery will be community property. If he should fail, the community property of himself and wife will be liable for costs, and therefore his wife has an interest in the suit. *Railroad Co. v. Elliott*, 22 C. A. 31, 54 S. W. 410.

That a juror in an action against a city has a damage suit pending against the city growing out of a totally different subject-matter is no disqualification. *City of San Antonio v. Diaz* (Civ. App.) 62 S. W. 549.

Relationship to party or person interested.—That the wife of a brother of a party is a sister or niece of a juror does not disqualify. *Johnson v. Richardson*, 52 T. 481.

That a juror is related within the third degree to any of the parties is ground for challenge. *Veramendi v. Hutchins*, 56 T. 414.

A juror whose wife's sister is the wife of the plaintiff, in a suit for damages, is incompetent. *Railway Co. v. Terrell*, 69 T. 650, 7 S. W. 670.

A juror whose wife's sister is the wife of a plaintiff to a suit at the time of trial may, in an action by such plaintiff for the recovery of damages for personal injuries, be challenged for cause. The damages, when recovered, would be community property of the plaintiff and his wife, and she, though not a nominal party, would be substantially a party to the suit. *Railway Co. v. Horne*, 69 T. 643, 9 S. W. 440.

A brother of a tenant who disclaims, but has a claim for improvement on land which both parties agree to pay, is incompetent as a juror. *Davidson v. Wallingford* (Civ. App.) 30 S. W. 286.

The trial court did not abuse its discretion by sustaining a challenge for cause to jurors related within the third degree of consanguinity to stockholders of a bank which is sued to recover usurious interest. *National Bank of Dangerfield v. Ragland* (Civ. App.) 51 S. W. 661.

A juror, in a prosecution for murder, whose wife was the first cousin of decedent's wife, who had died leaving sons who were private prosecutors in the case, was disqualified, and a new trial should have been granted for such reason. *Stringfellow v. State*, 42 Cr. R. 588, 61 S. W. 719.

A juror, who states that he is a warm personal friend of one of the state's principal witnesses, and who states that he does not know accused or his principal witnesses, and who declares that he can give accused a fair and impartial trial, is not disqualified. *Giles v. State* (Cr. App.) 148 S. W. 317.

Where a juror is related in the third degree to a person who owns a house, built on the land in controversy by permission of defendant, the juror is disqualified. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

The sustaining of the state's challenge to a juror because his sister had married accused's brother was not erroneous. *Holmes v. State* (Cr. App.) 157 S. W. 487.

Business connection or transaction with attorney.—It is no ground for challenge that defendant's counsel had been involved in litigation against a juror. *Goodall v. State* (Cr. App.) 47 S. W. 359.

Age of juror.—That a juror was over 60 years of age was not, under the former law, a cause for challenge. *Breeding v. State*, 11 T. 257.

Prior service as juror.—The fact that a juror had tried defendant for a similar offense held no ground for challenge. *Arnold v. State*, 38 Cr. R. 1, 40 S. W. 734.

A juror who heard the testimony of the same prosecuting witness in a similar prosecution against another person, and who has formed an opinion as to defendant's guilt, is disqualified. *Drye v. State*, 40 Cr. R. 125, 49 S. W. 83.

Fact that jury has just tried a charge against prosecutor for abusive language against a third party immediately following defendant's assault on such witness held not ground of challenge. *Gruesendorf v. State* (Cr. App.) 56 S. W. 624.

Jurors having fixed opinions as to guilt, formed from having heard a companion case against accused, are incompetent. *Goble v. State*, 42 Cr. R. 501, 60 S. W. 968.

Service of party as juror in a murder prosecution, such party having served in a prior suit involving many of the same facts, held not ground for a new trial; defendant's attorney having also been counsel in such former prosecution. *Garcia v. State* (Cr. App.) 63 S. W. 309.

On a prosecution for receiving stolen property, held error to allow on the jury those who had served on the jury on the trial of the thief. *Clark v. State*, 44 Cr. R. 536, 72 S. W. 591.

In a criminal prosecution, jurors who had sat on the jury in a similar prosecution of the same defendant held properly excluded for cause. *Holmes v. State*, 52 Cr. R. 352, 106 S. W. 1160.

That part of a panel had just convicted accused on a trial involving the same issues and the rest of the panel had heard the testimony in that case and had formed a fixed opinion on its merits held sufficient ground for quashing the panel. *Ross v. State*, 53 Cr. R. 162, 109 S. W. 153.

Overruling a challenge for cause to jurors who had convicted in other cases of the same character on the testimony of the same prosecuting witness held error. *Green v. State*, 54 Cr. R. 3, 111 S. W. 933.

The relation of prosecuting witness to another prosecution held not to disqualify jurors. *Irvine v. State*, 55 Cr. R. 347, 116 S. W. 591.

That jurors in a prosecution for violation of the local option law had sat on a former prosecution of accused for an illegal sale of liquor and had convicted him would not disqualify them as having formed an opinion, where the alleged sales in the two cases were made to different persons and the state relied on different witnesses. *Ross v. State*, 56 Cr. R. 275, 113 S. W. 1034.

That a part of the panel had sat in another local option case, in which the verdict of guilty was founded upon the testimony of one who was also a witness in the present case, held not to render the jury incompetent. *Bailey v. State*, 56 Cr. R. 226, 120 S. W. 419.

That one was a member of a grand jury which indicted a party for swindling did not of itself disqualify him as a juror in a civil action against such party for fraud and deceit based on the same charge, there being no attempt to show injury resulting from the juror's past service on the grand jury. *Mounce v. Crowson* (Civ. App.) 126 S. W. 915.

In a prosecution for violating the local option law, certain jurors held not disqualified for bias because of having previously convicted accused of another similar offense. *Edgar v. State*, 59 Cr. R. 252, 127 S. W. 1053.

Compelling defendant to select a jury from a panel including jurors who had sat in a case in which the principal defensive matter was the same as in the present case held error. *Edgar v. State*, 59 Cr. R. 488, 129 S. W. 140.

It was error to compel accused to accept jurors who had served in previous trials of others for the same offense, where the only witnesses against accused had testified for the state. *Hardgraves v. State*, 61 Cr. R. 422, 135 S. W. 144.

Where a prosecution rested upon the testimony of the same witness as in other similar prosecutions in which defendants had been convicted, held, that defendant was entitled to another jury. *Smith v. State*, 61 Cr. R. 328, 135 S. W. 154.

That a juror was also a member of the grand jury which returned the indictment held not to disqualify him as a juror, but to be only ground for challenge. *Bryan v. State*, 63 Cr. R. 200, 139 S. W. 981.

In a prosecution for illegally selling liquor, accused's motion to discharge the regular jury on the ground that it had already tried and convicted two other defendants in cases of the same character on the testimony of the same witnesses who would appear against accused held properly refused. *Ausbrook v. State* (Cr. App.) 156 S. W. 1177.

Bias and prejudice.—The examination of a juror may extend to the bias or prejudice relating to the subject-matter of the litigation as well as to the parties personally. *Railway Co. v. Terrell*, 69 T. 650, 7 S. W. 670.

A party should use reasonable diligence to ascertain whether jurors are impartial. *Blanton v. Mayes*, 72 T. 417, 10 S. W. 452.

Under the statute disqualifying a juror who has a bias or prejudice a railroad employé is disqualified from being a juror in an action against the railroad company. *Houston & T. C. Ry. Co. v. Smith* (Civ. App.) 51 S. W. 506.

Defendant cannot complain of prejudice of a juror formed from trying the case in which he was convicted. *Griffin v. State* (Cr. App.) 53 S. W. 848.

Statements by a juror prior to trial held to show him disqualified on the ground of prejudice and partiality. *Hughes v. State* (Cr. App.) 60 S. W. 562.

Jurors who state on their voir dire that they have no prejudice against one indicted for violating the local option law held not disqualified by reason of having contributed for the employment of counsel in a local option election contest. *Taul v. State* (Cr. App.) 61 S. W. 394.

In a prosecution for violating a local option law, defendant held entitled to ask the jury whether they were prejudiced against a person who was in a position at the time to violate the law in question. *Patrick v. State*, 45 Cr. R. 587, 78 S. W. 947.

A challenge for cause on the ground of bias of a juror because of expressed friendly relations to plaintiff held improperly overruled. *Texas Cent. R. Co. v. Blanton*, 36 C. A. 307, 81 S. W. 537.

A challenge of a juror may be properly sustained under this article where he is prejudiced against an important witness of one of the parties, if in the opinion of the court this prejudice renders him an unfit person to sit on the jury. *Southern Kansas Ry. Co. v. Sage*, 43 C. A. 38, 94 S. W. 1074.

It is not an objection to a juror that he is prejudiced against an important witness of one of the parties. *Id.*

In a prosecution for homicide, facts held insufficient to show prejudice on the part of a juror. *Wallace v. State* (Cr. App.) 97 S. W. 1050.

Jurors in a murder trial held not disqualified for prejudice. *Cason v. State*, 52 Cr. R. 220, 106 S. W. 337.

In a trial of one negro for murdering another, jurors held not objectionable because they would give more weight to a white person's testimony than to a negro's. *Moore v. State*, 52 Cr. R. 336, 107 S. W. 540.

Bias or prejudice by a juror in favor of or preconceived ideas of the rights of one of the parties, are incompatible with a fair trial by an impartial jury. *Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 C. A. 637, 118 S. W. 612, 618.

A juror held not incompetent to sit on the trial of a negro. *Bass v. State*, 59 Cr. R. 186, 127 S. W. 1020.

Where a juror in an action in which a negro was a party stated on his voir dire that he had no prejudice against the negro race, while he was so prejudiced against the race that he would not believe what a negro said when opposed to the statement of any white person, the court on the application of the negro who was defeated must grant a new trial on the ground of the prejudice of the juror. *Makey v. Dryden* (Civ. App.) 128 S. W. 633.

It was proper to refuse a question asked of a juror on his voir dire as to whether he would give a witness the same credit in case he was employed by the sheriff's department that he would otherwise give him, as tending to commit the juror on the question of the credibility of a witness before he had testified. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

— **Influence on verdict.**—Jurors stating that they could try defendant impartially held competent. *Deon v. State*, 37 Cr. R. 506, 40 S. W. 266.

Acceptance of a juror who had formed an impression not sufficient to influence his verdict held no error, where he did not serve, and defendant's peremptory challenges were not exhausted. *Dancy v. State* (Cr. App.) 46 S. W. 247.

Where a juror who had formed an opinion stated that he could give defendant a fair trial, held not error for the court to overrule a challenge for cause. *Parker v. State*, 45 Cr. R. 334, 77 S. W. 783.

Formation and expression of opinion as to cause.—The fact that the juror had an opinion held not to render him incompetent. *Bratt v. State* (Cr. App.) 41 S. W. 624.

Opinions as to guilt, expressed on the voir dire, held not to disqualify jurors. *Sawyer v. State*, 39 Cr. R. 557, 47 S. W. 650.

Jurors who heard arguments of former prosecution of defendant held competent. *Armstrong v. State* (Cr. App.) 47 S. W. 1006.

One who has formed an opinion as to accused's guilt, derived from statements of witnesses before the trial, is disqualified to sit as a juror. *Keaton v. State*, 40 Cr. R. 139, 49 S. W. 90.

Evidence held insufficient to show that a juror had expressed an opinion as to defendant's guilt before he was selected. *McGrew v. State* (Cr. App.) 49 S. W. 226.

A juror who had a fixed opinion of defendant's guilt held disqualified. *Gallaher v. State*, 40 Cr. R. 296, 50 S. W. 388.

One who was on the ground immediately after a homicide, if not actually present at the killing, and is familiar with all the main points of the case, is not a proper juror at the trial. *Nelson v. State* (Cr. App.) 58 S. W. 107.

Veniremen held not disqualified by reason of having formed an opinion. *Tellis v. State*, 42 Cr. R. 574, 61 S. W. 717.

An examination of a juror held not to show he had such an opinion as to disqualify him. *Taylor v. State*, 44 Cr. R. 547, 72 S. W. 396.

Where several prosecutions were pending against defendant, he was entitled to inquire of jurors who had heard the evidence in a case previously tried if they would have a fixed opinion as to the guilt of accused, if it should transpire that the evidence in the two cases was similar. *Barnes v. State* (Cr. App.) 88 S. W. 805.

A juror in a criminal case held qualified, though he had formed a prior opinion. *Bice v. State*, 55 Cr. R. 529, 117 S. W. 163.

A juror held not disqualified by reason of the fact that he had formed an opinion of the guilt or innocence of accused relying on insanity. *Tubb v. State*, 55 Cr. R. 606, 117 S. W. 858.

While the statute does not in express terms allow a juror to be challenged on the ground that he has expressed an opinion about the merits of the case still under this article and Art. 5196 the court is given general power to entertain a challenge on any ground that unfits a person to sit on a jury. The law exacts a fair and impartial trial, and this requirement becomes a delusion if men with bias or prejudice are permitted to sit in judgment on a case. *Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 C. A. 637, 118 S. W. 615.

Jurors who have formed and expressed an opinion prior to the time of their acceptance on the jury to the effect that accused is guilty are disqualified jurors. *Slack v. State* (Cr. App.) 149 S. W. 107.

— **From rumor and newspaper report.**—In a prosecution for murder, a juror testified on his voir dire that he had talked of the case with one who had been a juror on a former trial, and who had assessed the death penalty; that he had an opinion not based on talking with a witness, or on knowledge, and not fixed, but an impression of defendant's guilt from newspapers, hearsay, and general talk; and that he could render a fair verdict. The juror on the former trial was not introduced as a witness, and what was ascertained from him was not disclosed. Held not sufficient to require a dismissal for cause. *Johnson v. State*, 49 Cr. R. 314, 94 S. W. 224.

Juror in a criminal case held not disqualified by an opinion, based on a newspaper account. *Campos v. State* (Cr. App.) 97 S. W. 100.

A juror held qualified, notwithstanding an opinion formed from reading the newspapers. *Groszohmigen v. State*, 57 Cr. R. 241, 121 S. W. 1113.

— **From evidence at former trial.**—Where an action had been twice tried, the jury disagreeing each time, the fact that a juror had heard of such trials and the result, but not how the juries stood, is not ground for excluding him. *Texas M. R. Co. v. Crowder*, 25 C. A. 536, 64 S. W. 90.

In a murder trial, retention of a juror who knew that accused had been convicted on a former trial held not prejudicial error. *Moore v. State*, 52 Cr. R. 336, 107 S. W. 540.

That jurors stated on their voir dire that they knew of the verdict on defendant's former trial would not disqualify them. *Arnwine v. State*, 54 Cr. R. 213, 114 S. W. 796, 802.

— **From evidence at trial of other cause.**—A juror who states that he believes, from what he had heard other jurors say, that the testimony of the prosecuting witness in another case, that defendant sold him liquor, is true, is disqualified. *Drye v. State*, 40 Cr. R. 125, 49 S. W. 83.

In a prosecution for unlawfully carrying a pistol, held, that there was no error in refusing to allow the jurors to be examined as to whether they knew anything about the facts of a former case. *Woodroe v. State*, 50 Cr. R. 212, 96 S. W. 30.

— **Influence of opinion on verdict.**—A juror who had an opinion as to defendant's guilt, but stated he could give defendant an impartial trial, held competent. *Hamlin v. State*, 39 Cr. R. 579, 47 S. W. 656.

If a juror's opinion is based on the truth of rumors and newspaper articles, and he states that, if the evidence presents a different state of facts, he will disregard his opinion, the juror is competent. *Morrison v. State*, 40 Cr. R. 473, 51 S. W. 358.

A challenge to jurors expressing a "fixed opinion" that appellees "ought to recover" should doubtless have been sustained by the court, although they said that their judgment would not be influenced thereby. But as no injury is shown to have resulted to

appellant the assignment raising the question will be overruled. *Choctaw, O. & T. Ry. Co. v. True*, 35 C. A. 309, 80 S. W. 121.

Personal opinions and scruples.—In the trial of a suit on a liquor dealer's bond, it is not a cause of challenge to a juror that he has a bias in favor of, or a prejudice against, the business of selling liquors by retail. *Grady v. Rogan*, 2 App. C. C. § 263. See *Railway Co. v. Terrell*, 69 T. 650, 7 S. W. 670; *Houston Waterworks Co. v. Harris*, 3 C. A. 475, 23 S. W. 46.

A juror, because of his statement as to conscientious scruples against inflicting the death penalty, held disqualified to sit in a prosecution for rape. *Sawyer v. State*, 39 Cr. R. 557, 47 S. W. 650.

It was held proper to refuse to let defendant ask the jury whether they were prejudiced against the offense, as distinguished from other offenses. *Leach v. State* (Cr. App.) 49 S. W. 581.

Where a juror has scruples against the infliction of the death penalty on circumstantial evidence, it is not error for the court to explain circumstantial evidence by means of an illustration, though the illustration states an extreme case. *Morrison v. State*, 40 Cr. R. 473, 51 S. W. 358.

A juror who was prejudiced against the defense of insanity in general because often unfounded, but had no opinion on defendant's plea of insanity, was not disqualified. *Cannon v. State*, 41 Cr. R. 467, 56 S. W. 351.

On prosecution for homicide, it was not error for the state, in examining jurors on their voir dire, to ask whether they had scruples against inflicting the death penalty on circumstantial evidence. *Johnson v. State*, 44 Cr. R. 332, 71 S. W. 25.

In homicide, a challenge to jurors who had conscientious scruples against inflicting the death penalty in case of circumstantial evidence held well taken. *Martin v. State*, 47 Cr. R. 29, 83 S. W. 390.

Prejudice against the crime of murder does not disqualify a juror. *Franks v. State*, 47 Cr. R. 633, 88 S. W. 923.

Prejudice against the plea of insanity held not to disqualify a juror on a prosecution for murder. *Id.*

The testimony of a juror as to his competency on a trial for rape held not to show his incompetency. *Dies v. State*, 56 Cr. R. 32, 117 S. W. 979.

A juror was disqualified to sit in a murder case in which the sole defense was insanity, who stated on his voir dire that he would require overwhelming proof of insanity before acquitting on that ground. *Jones v. State*, 60 Cr. R. 139, 131 S. W. 572.

The testimony of jurors on their voir dire examination held not to show bias. *Williams v. State*, 60 Cr. R. 453, 132 S. W. 345.

A juror who testified on his voir dire that he would require accused to prove the defense of insanity beyond a reasonable doubt was properly received as a juror, where he further stated that he would be governed by the charge of the court. *Maxey v. State* (Cr. App.) 145 S. W. 952.

Jurors were subject to challenge for cause in a murder case, where they stated that they had conscientious scruples against, and would not impose, the death penalty on circumstantial evidence. *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428.

Examination of juror on voir dire in general.—See notes under Art. 5195.

Time for making objection.—See notes under Art. 5206.

Inhabitants of county eligible as jurors in suits against county.—See note under Art. 1367.

Art. 5118. [3142] Who are liable to jury service; who are exempt from jury service.—All competent jurors are liable to jury service, except the following persons:

1. All persons over sixty years of age.
2. All civil officers of this state and of the United States.
3. All overseers of roads.
4. All ministers of the gospel engaged in the active discharge of their ministerial duties.
5. All physicians and attorneys engaged in actual practice.
6. All publishers of newspapers, school masters, druggists, undertakers, telegraph operators, railroad station agents, ferrymen, and all millers engaged in grist, flouring and saw mills.
7. All presidents, vice-presidents, conductors and engineers of railroad companies when engaged in the regular and actual discharge of the duties of their respective positions.
8. Any person who has acted as jury commissioner within the preceding twelve months.
9. All members of the national guard of this state under the provisions of the title, "Militia."
10. In cities and towns having a population of fifteen hundred or more inhabitants, according to the last preceding United States census, the active members of organized fire companies, not to exceed twenty to each one thousand of such inhabitants. [Id. p. 78, sec. 25.]

Notaries public.—A notary public is not exempt by reason of his appointment. See Art. 6002.

Fireman.—An active member of a voluntary fire company held exempt from jury service, under Art. 5118 et seq. Ex parte Krupp, 41 Cr. R. 355, 54 S. W. 590.

Art. 5119. [3143] Where several fire companies in one town, etc.—If there be more than one organized fire company in such town or city, the whole number of exemptions provided for under subdivision 10 of the preceding article shall be equally divided between such companies. [Id. sec. 2.]

Art. 5120. [3144] List of members selected to be delivered to the clerk.—Before such exemption of any member of such fire company shall be made available, the members so to be exempted shall be selected by their respective companies; and their names shall be handed in to the clerks of the district and county courts, respectively, by the chief of the fire department of such city or town, or in case there be no such officer, then by the foreman of the company. [Id. sec. 2.]

Art. 5121. Filing of exemptions.—All persons summoned as jurors in any court of this state, who are exempt by statutory law from jury service, may, if they so desire to claim their exemptions, make oath before any officer authorized by law to administer oaths, or before the officers summoning such persons, stating their exemptions, and file said affidavit at any time before the convening of said court with the clerk of said court, which shall constitute sufficient excuse without appearing in person. [Acts 1907, p. 216.]

CHAPTER TWO

JURY COMMISSIONERS FOR THE DISTRICT COURT, APPOINTMENT, QUALIFICATION, ETC.

[Repealed by Acts 1907, p. 272, sec. 13, as to counties designated in Chapter 5.]

Art.	Art.
5122. Jury commissioners.	5127. Failure of commissioners, etc.
5123. Shall serve but once in each year.	5128. To be instructed in their duties.
5124. Commissioners to be notified.	5129. How they shall be kept.
5125. Failing to attend shall be fined.	5130. Clerk to furnish stationery, etc.
5126. Oath of jury commissioners.	5131. To have use of assessment rolls.

Article 5122. [3145] Jury commissioners, appointment and qualifications.—The district court of each county shall, at each term thereof, appoint three persons to perform the duties of jury commissioners for said court, who shall possess the following qualifications:

1. They shall be intelligent citizens of the county and able to read and write.
2. They shall be qualified jurors and freeholders of the county.
3. They shall be residents of different portions of the county.
4. They shall have no suit in such court which requires the intervention of a jury. [Act Aug. 1, 1876, p. 79, sec. 4.]

Commissioners from different parts of county.—There was no error in overruling a motion to quash a venire, because selected by jury commissioners taken from different parts of the county, where there was no proof that the commissioners were not from different portions of the county. Dailey v. State (Cr. App.) 55 S. W. 321.

Interest in suits pending.—A person is not disqualified to serve as a commissioner on the ground that his father is a party to a suit, or that he is transacting business as a merchant with persons parties to pending suits. Veramendi v. Hutchins, 56 T. 414.

A motion to quash a venire in a criminal case will not be sustained because one of the jury commissioners was interested as a party in several suits on the jury docket of that term. Whittle v. State, 43 Cr. R. 468, 66 S. W. 771.

Prejudice as disqualifying.—That jury commissioners selected to try defendant for a violation of a local option law were Prohibitionists held no ground for reversal of a conviction. Lively v. State (Cr. App.) 73 S. W. 1048.

Review of discretion of court.—The discretion of a trial judge in selecting jury commissioners is not subject to review by an appellate court. Columbo v. State (Cr. App.) 145 S. W. 910.

Same commission summoning jurors for three terms.—See note under Art. 5123.

Appointing new commission to summon additional jurors.—See note under Art. 5127.

Art. 5123. [3146] Shall serve but once in a year.—The same person shall not act as a jury commissioner more than once in the same year. [Id. sec. 5.]

Same commission summoning jurors for three terms.—Const. art. 16, § 19, declares that the Legislature shall prescribe by law the qualifications of grand and petit jurors. Art. 5122 provides that the district court of each county, at each term, shall appoint jury commissioners. Code Crim. Proc. art. 384, also declares that the district judge, at each term of the district court, shall appoint three persons to act as jury commissioners, and article 389 provides that the commissioners shall select from the citizens of the different portions of the county 16 persons to be summoned as grand jurors for the next term of court. Held that, where there were six terms of court a year in a judicial district, the judge at the November, 1911, term had no jurisdiction to direct jury commissioners for that term to draw three grand juries for the succeeding January, March, and May, 1912, terms, and an indictment found by a grand jury so drawn was invalid. *Woolen v. State* (Cr. App.) 150 S. W. 1165.

Art. 5124. [3147] Commissioners to be notified of their appointment, etc.—The court shall cause the persons appointed as jury commissioners to be notified by the sheriff or any constable of such appointment, and of the time and place when and where they are to appear before the court. [Id. sec. 4.]

Waiver of citation.—The issuance of a citation to jury commissioners held waived by their appearance in response to a notice. *Williams v. State*, 45 Cr. R. 218, 75 S. W. 859.

Art. 5125. [3148] Failing to attend, shall be fined.—If any person appointed a jury commissioner shall fail or refuse to attend and perform the duties required without a reasonable excuse, he shall be fined by the court in any sum not less than twenty-five dollars nor more than one hundred dollars. [Id. sec. 5.]

Art. 5126. [3149] Oath of jury commissioners.—When the persons appointed appear before the court, the judge shall administer to them the following oath: "You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as a jurymen whom you believe to be unfit and not qualified; that you will not make known to any one the name of any jurymen selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a jurymen concerning the merits of any case to be tried at the next term of this court until after said cause may be tried or continued, or the jury discharged." [Id. sec. 4.]

Art. 5127. [3150] Failure of commissioners, etc.—If from any cause the jury commissioners should not be appointed at the time prescribed, or should fail to select jurors as required, or should the panels selected be set aside, or the jury lists returned into court be lost or destroyed, the court shall forthwith proceed to supply a sufficient number of jurors for the term under the provisions of this title, and may, when it may be deemed necessary, appoint commissioners for that purpose. [Id. sec. 13.]

Appointing new commission to summon additional jurors.—Juries were selected for the second and third weeks of a term then in session. The term having continued longer than anticipated, the judge appointed other commissioners, who selected other jurors for the residue of the term. On a challenge to the array it was held that the first commissioners should have been reconvened to have selected additional jurors, but the course pursued was a mere irregularity, from which no injury appeared to have resulted. *Rountree v. Gilroy*, 57 T. 176.

When regular jury has been discharged for the term, court can appoint three jury commissioners and have them select jurors for trial of causes still pending in the court. *Lang v. Henke*, 22 C. A. 490, 55 S. W. 375.

Under Code Cr. Proc. art. 715, providing that, when there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon forthwith such number of qualified persons as it may deem sufficient, and from those summoned a jury shall be formed to try the case, and this article, the action of the court in appointing jury commissioners to draw the jury for the trial of a criminal prosecution at the term of court then in session was not error. *Schuh v. State*, 58 Cr. R. 165, 124 S. W. 908.

The jury commission appointed at one term of court selected jurors for six weeks of the following term. At the expiration of that time, there still being a number of cases on the docket, the trial judge appointed a new commission to draw jurors for four weeks longer. Held that, although he might have reassembled the old commission, if that were

possible, or have directed the sheriff to summon jurors as provided by Code Cr. Proc. art. 715, the action taken by him was proper under this article. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Ordering sheriff to summon jurors.—The court has power to have venire summoned through the sheriff, when jury commissioners have not been appointed. *Smith v. Bates* (Civ. App.) 28 S. W. 64; *H., E. & W. T. Ry. Co. v. Vinson* (Civ. App.) 38 S. W. 540.

When the jury commissioners fail to elect jurors, the statute clearly authorizes the court to order the sheriff to summon a jury. *I. & G. N. Ry. Co. v. Hatchell*, 22 C. A. 498, 55 S. W. 187.

Authority is given the court in clear and unmistakable terms to order the sheriff to summon the jury, if the jury commissioners have failed to select jurors. *Railroad Co. v. Fambrough* (Civ. App.) 55 S. W. 188; *Lang v. Henke*, 22 C. A. 490, 55 S. W. 375.

Where the jury commissioners have failed to select a jury for a certain week of a term, the sheriff, in summoning a venire for such week, is not confined to jurors selected by the jury commissioners for other weeks of the term. *Lucas v. Johnson* (Civ. App.) 64 S. W. 823.

When from any cause jury commissioners have failed to provide a jury for the term or part of a term the court can order the sheriff to summon a jury. *Green v. State*, 53 Cr. R. 490, 110 S. W. 924, 22 L. R. A. (N. S.) 706.

This article and Art. 5170 give the court authority to order the sheriff to select jurors to try a case when the jury commissioners have not made selections. *Gray v. Phillips*, 54 C. A. 148, 117 S. W. 877.

Necessity of happening of contingency.—When none of the contingencies mentioned in this article have occurred the court has no power to force a party to try his case before a jury not selected in the manner prescribed by the statute. *Texas & N. O. Ry. Co. v. Pullen*, 33 C. A. 143, 75 S. W. 1085.

Review of court's discretion.—The right and discretion to select jury commissioners is confided in the judge and not subject to review. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Art. 5128. [3151] To be instructed as to their duties.—When the jury commissioners have been sworn and organized, the judge shall proceed to instruct them as to their duties, and shall designate to them for what weeks they shall select petit jurors, and the number of jurors selected for each week. Each person serving as jury commissioner shall receive as compensation therefor the same amount as now provided by law for the services of petit and grand jurors; provided, that no such commissioner shall receive any pay as such for any day for which he has received, or is entitled to receive, compensation as petit or grand juror. [Id. sec. 6. Amended Acts 1909, p. 178.]

Art. 5129. [3152] To be kept free from intrusion and not to separate.—The jury commissioners shall retire in charge of the sheriff or constable to some suitable apartment, and shall be kept free from the intrusion of any person during their session, and shall not separate, without leave of the court, until they have completed the duties required of them. [Id.]

Art. 5130. [3153] Clerk to furnish stationery and list of exempt persons, etc.—It shall be the duty of the clerk to furnish the jury commissioners with all necessary stationery, and also with a list of the names of all persons appearing, from the records of the court, to be exempt or disqualified from serving on the petit jury at each term. He shall also deliver to them the envelope mentioned in article 5148, and shall take their receipt therefor, showing whether or not such seal remained unbroken. [Id. secs. 4, 6. Act Aug. 18, 1876, p. 170, sec. 6. Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Art. 5131. [3154] To have use of assessment roll.—It shall be the duty of the county clerk, or other legal custodian of the same, to furnish the jury commissioners with the last assessment roll of the county. [Act Aug. 1, 1876, p. 79, sec. 6.]

CHAPTER THREE

JURY COMMISSIONERS FOR THE COUNTY COURT, APPOINTMENT, QUALIFICATIONS, ETC.

[Repealed by Acts 1907, p. 272, sec. 13, as to counties designated in Chapter 5.]

Art.	Art.
5132. Jury commissioners, appointment and qualification, powers and duties.	5133. Oath. 5134. To select jurors for six months.

Article 5132. [3155] Jury commissioners for the county court, appointment and qualification, powers and duties.—The county court shall, at its first term after the thirty-first day of December and the thirtieth day of June of each year, appoint three persons to perform the duties of jury commissioners for said court, who shall possess the same qualifications as jury commissioners for the district court, and the same proceedings shall be had in the county court by the officers thereof and by the commissioners for procuring jurors as are required by this title for similar proceedings in the district court, except as modified by the provisions of this chapter. [Id. p. 81, sec. 15. Acts 1884, p. 27.]

Effect of disregarding statute.—The intentional disregard by a county judge of the statute requiring him to appoint jury commissioners to select jurors for the term of the county court is a violation of the right of trial by jury guaranteed by the bill of rights. *White v. State*, 45 Cr. R. 597, 78 S. W. 1067.

Art. 5133. [3156] Oath.—The oath to be administered to the jury commissioners for the county courts shall be as follows: "You do solemnly swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as a jurymen whom you believe to be unfit and not qualified; that you will not make known to any one the name of any jurymen selected by you and reported to the court; that you will not, directly or indirectly, communicate with any one selected by you as a jurymen concerning the merits of any case to be tried by this court within the next six months, until said case shall have been tried or otherwise disposed of." [Acts 1876, p. 79, sec. 4.]

Art. 5134. [3157] To select jurors for six months.—Such commissioners shall select jurors for all the terms of the county court to be holden within six months next after the adjournment of the first term of said court after the said thirty-first day of December and the thirtieth day of June of each year, and the county judge shall designate the number of jurors to be so selected for each term and week. [Acts 1884, p. 28.]

Sheriff's summoning jurors instead of commission.—A motion to quash the array of jurors should be sustained, where they were not chosen by commissioners as the law directs, but selected and summoned by the sheriff. *Irwin v. State*, 57 Cr. R. 331, 123 S. W. 127.

CHAPTER FOUR

PROCEEDINGS OF THE JURY COMMISSIONERS IN THE SELECTION OF JURORS

[Repealed by Acts 1907, p. 272, sec. 13, as to counties designated in Chapter 5.]

Art.	Art.
5135. Selection of jurors, how made.	5144. And by him to the commissioners for his court.
5136. Drawing of jurors, how conducted.	5145. Persons included in such lists not to be selected as jurors in county court.
5137. Venire facias, special, how drawn.	5146. County court commissioners to make out lists for district court.
5138. List to be certified, sealed, etc.	5147. To be delivered to district clerk.
5139. To be delivered to the judge.	5148. And by him to commissioners for his court.
5139a. And by him to the clerk.	5149. Persons included in such lists exempt.
5140. Clerk and deputies to be sworn.	5150. Lists of jurors to be destroyed.
5141. Same.	
5142. District court commissioners to make out jury list for county court.	
5143. Which shall be delivered to the county clerk.	

Article 5135. [3158] Selection of jurors, how made.—The jury commissioners shall select from the citizens of the different portions of the county, liable to serve as jurors, one hundred persons, or a greater or less number if so directed by the court, free from all legal exceptions, of good moral character, of sound judgment, well-informed, and, so far as practicable, able to read and write, to serve as petit jurors at the next term, if in the district court, and for the next six months, if in the county court, and shall write the names of such persons on separate pieces of paper, as near the same size and appearance as may be, and fold the same so that the names can not be seen. [Acts 1876, p. 79, sec. 7.]

In general.—It is the policy of the law that jurors be drawn by commissioners and not selected by the sheriff or any officer. *Knight v. State* (Cr. App.) 147 S. W. 268.

Negroes.—That the three negroes on a trial jury panel summoned to try a negro were peremptorily challenged by the state held not a denial of equal protection of laws to defendant. *Whitney v. State*, 43 Cr. R. 197, 63 S. W. 879.

Facts held not to show discrimination against negroes in drawing jurors. *Hubbard v. State*, 43 Cr. R. 564, 67 S. W. 413.

Evidence examined, and held to show that there was discrimination against the colored race in the formation of the jury which tried defendant. *Smith v. State*, 44 Cr. R. 90, 69 S. W. 151.

A motion to quash a special venire on the trial of a negro charged with crime, because the negro race was discriminated against in the selection of the jury, held properly denied. *Thompson v. State*, 45 Cr. R. 397, 77 S. W. 449.

Impanelment of a jury composed entirely of white men for the trial of a negro held in violation of Const. Amend. 14, guarantying equal protection of the law. *Smith v. State*, 45 Cr. R. 405, 77 S. W. 453.

Misconduct of a juror held waived by defendant's consent to an order excusing him, and to proceed with 11 jurors. *Texarkana & Ft. S. Ry. Co. v. Toliver*, 37 C. A. 437, 84 S. W. 375.

Error in overruling defendant's challenges to certain jurors held ground for reversal. *San Antonio & A. P. Ry. Co. v. Lester*, 99 T. 214, 89 S. W. 752.

Considering the testimony as to negroes qualified and the evidence regarding exemptions, the court is not prepared to say that the jury commissioners did not, in the selection of both the grand and petit jurors, allow the negro race their pro rata of qualified jurors. *Thomas v. State*, 49 Cr. R. 633, 95 S. W. 1072, 1073.

On motion to quash an indictment and a petit jury panel on the ground of race discrimination, certain testimony held irrelevant. *Washington v. State*, 51 Cr. R. 542, 103 S. W. 879.

Under the facts, a motion to quash a venire in the trial of a negro for murder on the ground of racial discrimination held properly denied. *Macklin v. State*, 53 Cr. R. 197, 109 S. W. 145.

The objection that talesmen were drawn by the sheriff before exhausting the regular panel of jurors cannot be raised first on review. *Houston Electric Co. v. Seegar*, 54 C. A. 255, 117 S. W. 900.

Evidence, on a motion to quash the special venire, held not to sustain the ground of discrimination as to race in the composition of the jury. *Pollard v. State*, 58 Cr. R. 299, 125 S. W. 390.

That for many years no negro had been selected or impaneled as a grand or petit juror cannot be considered, on a motion to quash a special venire, where the law has been in every respect complied with. *Id.*

The asking of a question of the jurors on their voir dire examination held not ground for reversal. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 138 S. W. 188.

Change in term of court.—That the jury was drawn by jury commissioners for another term of court, the term of court having been changed by the legislature after the commissioners were appointed, was not error. *Carter v. State*, 45 Cr. R. 430, 76 S. W. 437.

Art. 5136. [3159] Drawing of jurors, how conducted.—The names of the persons so written and folded shall be deposited in a box, and, after being well shaken and mixed, the commissioners shall draw therefrom the names, one by one, of thirty-six persons, or a greater or less number where the judge has so directed, for each week of the term of the district court or terms of the county court for which a jury may be required, and shall record such names as they are drawn upon as many separate sheets of paper as there are weeks of such term or terms for which juries will be required. [Id.]

Cited, *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

Drawing jurors for more than week.—An objection that the jury panel was not drawn for each week of the term, but was drawn for the whole term (of three weeks) cannot be sustained because the statute does not make this a ground of challenge. The only ground being that the officer has acted corruptly in summoning the jury. *G., H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 368.

Art. 5137. [3159a] Special venire list.—The jury commissioners shall furthermore select one man for every one hundred of population in any county, or a greater or less number if so directed by the court, and these shall constitute a special venire list, from which shall be drawn the

names of those who shall answer summons to the special venire facias, after the petit jurors for the term have been drawn on any venire one time during such term, and the drawing of the veniremen from the special venire list shall be done in the same manner as prescribed for other jurors, and no citizen who has served as a petit juror for one week during any term of court shall, during said term, be compelled to answer summons to more than one special venire facias; nor shall any citizen be compelled to answer summons to a special venire facias more than twice during any one term of court; provided, that the provisions of this chapter shall not apply in counties having a population of less than two thousand inhabitants. [Acts 1905, p. 17.]

Repeal.—Acts 1907, p. 272, § 13, repeals this article as to counties designated in Chapter 5.

How long jurors may be required to serve.—This article provides that after the petit jurors for the term have served one week they can be drawn on a venire one time during said term, and that no citizen who has served as a petit juror for one week during any term of court, shall, during said term, be compelled to answer summons to more than one special venire facias. Nor can he be compelled to answer summons to a special venire more than twice during one term. *Moore v. State*, 49 Cr. R. 629, 95 S. W. 515.

When recourse may be had to special venire.—This article and Art. 5161 provide for the special venire list to be drawn by the jury commissioners appointed by the court out of which talesmen are to be drawn or selected when the special venire authorized by the old law has been exhausted. No recourse is to be had to this special venire list until the original special venire drawn in the case from the jury for the term has been exhausted, unless the contingency arises as provided in amended Art. 661. *Code Cr. Proc. 1911; Gabler v. State*, 49 Cr. R. 623, 95 S. W. 523.

Manner of drawing from special venire.—This article does not change the venire law, which requires the names of all the veniremen to be placed in the box prior to the drawing of the venire. *Wallace v. State*, 50 Cr. R. 374, 97 S. W. 471.

Art. 5138. [3160] Lists to be certified, sealed up and indorsed.—The several lists of names drawn, as provided in the preceding article [5136], shall be certified under the hands of the commissioners to be the lists drawn by them for the said several weeks, and shall be sealed up in separate envelopes, indorsed, “List of petit jurors for the _____ week of the _____ term of the _____ court of _____ county,” [filling the blanks]. [Acts 1876, p. 79, sec. 7.]

Art. 5139. [3161] To be delivered to the judge.—The commissioners shall write their names across the seals of the envelopes and deliver them to the judge. [Id.]

Art. 5139a. [3162] And by him to the clerk.—The judge shall deliver such envelopes to the clerk, or to one of his deputies in open court, and the court may instruct the clerk to indorse on any of such envelopes that the jury for that week shall be summoned for some other day than Monday of said week. [Id. sec. 8.]

Art. 5140. [3163] Clerk and deputies to be sworn.—The judge shall at the same time administer to the clerk and each of his deputies an oath, in substance as follows: “You do solemnly swear that you will not open the jury lists now delivered to you, nor permit them to be opened until the time prescribed by law; that you will not, directly nor indirectly, converse or communicate with any one selected as a juror concerning any case pending for trial in this court at its next term,” if in the district court; or if in the county court, “within the next six months.” [Id. secs. 8, 28.]

Art. 5141. [3164] Same.—If for any reason such oath should not be administered to any of the deputies, or should the clerk subsequently appoint a deputy, the clerk shall administer to such deputy a like oath. [Id. sec. 8.]

Art. 5142. [3165] District court commissioners to make out jury lists for county court.—The jury commissioners for the district court shall, in addition to the other duties required of them, make out for the use of the jury commissioners of the county court a complete list of the names of all the persons selected by them as grand and petit jurors, and

shall place said list in an envelope and seal the same and write their names across the seal; and shall address said envelope to the jury commissioners of the county court of the proper county, and shall deliver the same to the district judge in open court. [Act Aug. 18, 1876, p. 170, sec. 1.]

Art. 5143. [3166] Which shall be delivered to the county clerk.—The district judge shall, without delay, deliver said envelope to the county clerk or one of his deputies, and, at the time of delivery, administer to said clerk or deputy, as the case may be, the following oath: "You do solemnly swear that you will, to the best of your ability, safely keep this envelope, and that you will neither open the same nor allow it to be opened, except as provided by law; and that you will cause it to be delivered to the jury commissioners of the county court next hereafter appointed in and for this county." [Id. sec. 2.]

Art. 5144. [3167] And by him to the commissioners for his court.—At the first term of the county court thereafter held, at which jury commissioners are appointed, it shall be the duty of the county clerk to deliver said envelope to the jury commissioners or one of them appointed at said term, and take a receipt therefor; and said receipt shall state whether the seal of said envelope be broken or not. [Id. sec. 3.]

Art. 5145. [3168] Persons included in such lists not to be selected as jurors in county court.—After the jury commissioners, appointed by said county court, shall have assembled for business, they shall open said envelope and read said list of names, and no person named on said list shall be selected as a juror by said commissioners. [Id. sec. 4.]

Art. 5146. [3169] County court commissioners to make out lists for district court.—The jury commissioners of the county court shall, in addition to the other duties required of them, make out for the use of the jury commissioners of the district court a complete list of the names of all persons selected by them as jurors, and shall place said list in an envelope and seal the same, and write their names across the seal and address said envelope to the jury commissioners of the district court of the proper county, and shall deliver the same to the county judge in open court. [Act Aug. 18, 1876, p. 170, sec. 5.]

Art. 5147. [3170] To be delivered to the district clerk.—The county judge shall, without delay, deliver said envelope to the district clerk, or one of his deputies, and, at the time of delivery, administer to said clerk, or his deputy, as the case may be, the following oath: "You do solemnly swear that you will, to the best of your ability, safely keep this envelope, and that you will neither open the same nor allow it to be opened, except as provided by law, and that you will cause it to be delivered to the jury commissioners of the district court next hereafter appointed in and for this county." [Id. sec. 6.]

Art. 5148. [3171] And by him to the commissioners for his court.—At the first term of the district court thereafter held, it shall be the duty of the clerk to deliver said envelope to the jury commissioners or one of them appointed at said term, and to take a receipt therefor, and said receipt shall state whether the seal of said envelope be broken or not. [Id. sec. 7.]

Art. 5149. [3172] Persons included in such lists not to be selected as jurors in district court.—After the jury commissioners appointed at said term of the district court shall have assembled for business, they shall open said envelope and read said list of names, and no person named on said list shall be selected as juror by said commissioners. [Id. sec. 8.]

Art. 5150. [3173] Lists of jurors to be destroyed.—It shall be the duty of the jury commissioners, in both the district and county courts,

before leaving the apartment in which they shall have selected jurors, to destroy said list of names; and it shall be unlawful for them, or any of them, to make known to any person the name of any juror on said lists. [Id. sec. 9.]

CHAPTER FIVE

SELECTION OF JURORS IN COUNTIES WITH CITIES OF CERTAIN POPULATION

Art.	Art.
5151. Selection of jurors in certain counties.	5155. List delivered to judge, etc.
5152. Names to be written on cards.	5156. Judge shall deliver to clerk.
5153. Cards placed in wheel; description of wheel.	5157. Disposition of cards containing names of jurors drawn.
5154. Jurors drawn by whom, when, how, etc.	5158. Proceedings in case of loss of wheel, etc.

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

Article 5151. Selection of jurors in certain counties.—That between the 1st and 15th days of August of each year, in all counties in this state having therein a city or cities containing a population aggregating twenty thousand (20,000) or more people, as shown by the United States census of date next preceding such action, the tax collector of such county or one of his deputies, together with the tax assessor of such county or one of his deputies, together with the sheriff of such county or one of his deputies, together with the county clerk of such county or one of his deputies, together with the district clerk of such county or one of his deputies, shall meet at the court house of such county and shall select from the list of qualified jurors of such county as shown by the tax lists in the tax assessor's office for the current year, the jurors for service in the district and county courts of such county for the ensuing year in the manner hereinafter provided. [Acts 1907, p. 269, sec. 1. Amended Acts 1911, p. 150, sec. 1.]

Cited, *Todd v. State*, 60 Cr. R. 199, 131 S. W. 606.

Constitutionality.—This law is constitutional in the opinion of the majority of the court, but Judge Davidson dissents, and is of the opinion that the law is unconstitutional and void. *Logan v. State*, 54 Cr. R. 74, 111 S. W. 1028; *Huddleston v. State*, 54 Cr. R. 93, 112 S. W. 64, 130 Am. St. Rep. 875; *Brown v. State*, 54 C. A. 121, 112 S. W. 80; *Smith v. State*, 54 Cr. R. 298, 113 S. W. 289; *Jones v. Same*, 54 Cr. R. 507, 113 S. W. 761; *Dallas Consol. Electric St. R. Co. v. Chase* (Civ. App.) 118 S. W. 783; *Same v. Chambers*, 55 C. A. 331, 118 S. W. 851; *Oates v. State*, 56 Cr. R. 571, 121 S. W. 370; *Beaver v. State*, 63 Cr. R. 581, 142 S. W. 11.

This law has been held to be constitutional by the court of criminal appeals in *Smith v. State*, 54 Cr. R. 298, 113 S. W. 289, and this court in deference to that court holds the act to be constitutional. *Northern Texas Traction Co. v. Danforth*, 53 C. A. 419, 116 S. W. 148.

This article held constitutional. *Razor v. State*, 57 Cr. R. 10, 121 S. W. 512.

This article is a "general" and not a special law, within Const. art. 3, § 56, prohibiting the passage of any local or special law regulating the summoning or impaneling of juries. *Houston Electric Co. v. Faroux* (Civ. App.) 125 S. W. 922.

Denial by the supreme court of a writ of error to review a decision of the court of civil appeals adjudging the validity of this article amounts to a decision that the law is valid and is conclusive on the court of civil appeals in a subsequent case. *Rice & Lyon v. Lewis* (Civ. App.) 125 S. W. 961.

Does not repeal provisions relative to summoning talesmen.—This act does not repeal the statutory provision relating to the summoning of talesmen, and where less than 24 names are drawn from the wheel the judge can order the sheriff to summon talesmen to fill up the panel. *Houston Electric Co. v. Seegar*, 54 C. A. 255, 117 S. W. 902, 903.

Art. 5152. Names written on cards.—The aforesaid officers shall write the names of all men who are known to be qualified jurors under the law, residing in their respective counties, on separate cards of uniform size and color, writing also on said cards, whenever possible, the post-office address of the jurors so selected. [Acts 1907, p. 269, sec. 2.]

Art. 5153. Cards placed in wheel, etc.—The cards containing the aforesaid names shall be deposited in a circular, hollow wheel, to be

provided for such purpose by the commissioners' court of the county; and said wheel shall be made of iron or steel and shall be so constructed as to freely revolve on its axle; and said wheel shall be kept locked at all times, except when in use as hereinafter provided, by the use of two separate locks, so arranged that the key to one will not open the other lock; and said wheel, and the clasps thereto attached into which the locks shall be fitted, shall be so arranged that said wheel can not be opened unless both of said locks are unlocked at the time the wheel is opened; and the keys to such locks shall be kept, one by the sheriff and the other by the district clerk; and the sheriff and the clerk shall not open such wheel, nor permit the same to be opened by any person, except at the time specified in this chapter, and in the manner and by the persons herein specified; but said sheriff and clerk shall keep such wheel, when not in use, in a safe and secure place, where the same can not be tampered with. [Id. sec. 3.]

Constitutionality.—See notes under Art. 5151.

This article held constitutional. *Lee v. State* (Cr. App.) 148 S. W. 706.

Art. 5154. Jurors drawn by whom, when and how.—Not less than ten days prior to the first day of a term of court, the clerk of the district court, or one of his deputies, and the sheriff, or one of his deputies, in the presence and under the direction of the district judge, if jurors are to be drawn for the district court, or the clerk of the county court, or one of his deputies, and the sheriff, or one of his deputies, in the presence and under the direction of the county judge, if jurors are to be drawn for the county court, shall draw from the wheel containing the names of jurors, after the same has been well turned so that the cards therein are thoroughly mixed, one by one the names of thirty-six jurors, or a greater or less number where such judge has so directed, for each week of the term of the district or county courts for which a jury may be required, and shall record such names as they are drawn upon as many separate sheets of paper as there are weeks for such term or terms, for which jurors will be required; and, at such drawing, no person other than those above named shall be permitted to be present; and the officers attending such drawing shall not divulge the name of any person that may be drawn as a juror to any person. [Id. sec. 4.]

District clerk to draw jury.—The district clerk and not the clerk of the criminal court is the proper person to draw the jury. *Jones v. State*, 55 Cr. R. 535, 117 S. W. 128.

Art. 5155. List to be certified, etc.—The several lists of names drawn, as provided in the preceding article, shall be certified under the hand of the clerk or the deputy doing the drawing, and the district or county judge in whose presence said names of jurors were drawn from the wheel, to be the list drawn by said clerk for the said several weeks, and shall be sealed up in separate envelopes indorsed, "List of petit jurors for the week of the term of the court of county," (filling in the blanks properly) and the clerk, or his deputy doing the drawing, shall write his name across the seals of the envelopes and shall then immediately deliver the same to the judge in whose presence such names were drawn, or to his successor in office, in case of the death of such judge before such delivery can be made to him. [Id. sec. 5.]

Art. 5156. Judges to deliver list to clerk.—The judge shall deliver such envelopes to the clerk, or to one of his deputies, and shall in his discretion instruct the clerk to indorse on any of such envelopes that the jury for that week shall be summoned for some other day than Monday of said week, and the judge shall, at the same time, administer to the clerk and to each of his deputies an oath in substance as follows: "You and each of you do solemnly swear that you will not open the jury lists now delivered to you, nor permit them to be opened, until the time prescribed by law, nor communicate to anyone the name or names of the men appearing on any of the jury lists, that you will not, directly

or indirectly, converse or communicate with any one selected as juror concerning any case pending for trial in this court at its next term. So help you God." [Id. sec. 6.]

Art. 5157. Jurors drawn; disposition of cards.—When the names are drawn, as provided in article [5154], the cards containing such names shall be sealed in separate envelopes, indorsed, "Cards containing the names of jurors for the week of the term of the court of county," (filling in the blanks properly); and said envelopes shall be retained securely by the clerk, unopened, until after the jury has been impanelled for such week; and, after such jurors so impanelled have served four or more days, the envelopes containing the cards bearing the names of the jurors for that week shall then be opened by the clerk, or his deputy, and those cards bearing the names of men who have not been impanelled and who have not served as many as four days, shall be immediately returned to the wheel by the clerk, or his deputy; and the cards bearing the names of the men serving as many as four days shall be put in a box provided for that purpose for the use of the officers mentioned in article 5151, who shall next select the jurors for the wheel. [Id. sec. 7.]

Art. 5158. Loss of wheel, etc.—If, for any reason, the wheel containing the names of jurors be lost or destroyed, with the contents thereof, or if all the cards in said wheel be drawn out, such wheel shall immediately be refurnished, and cards bearing the names of jurors shall be placed therein immediately, in accordance with articles 5151, 5152 and 5153; and the judge of the court desiring jurors for a regular or special term of his court may have the same selected in accordance with chapters 2, 3 and 4 of this title, in the event that such new wheel can not be furnished in time to comply with the provisions of this chapter. [Id. sec. 8.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Applicability of wheel law to certain cities only.—The provision of the Code requiring that a venire should be drawn from a wheel applies only to counties containing a city of more than 20,000 population. *Asbeck v. State* (Cr. App.) 156 S. W. 925.

CHAPTER SIX

SELECTED JURORS—HOW SUMMONED, ETC.

Art.	Art.
5159. Clerk to make out jury lists and deliver to sheriff.	5162. Notice to jurors, how served.
5160. Sheriff to notify jurors.	5163. Time of service.
5161. Special venire, how summoned.	5164. Sheriff's return.

Article 5159. [3174] Clerk to make out jury lists and deliver to sheriff.—Within not more than thirty days and not less than ten days prior to each term of the court, it shall be the duty of the clerk of the district and county courts, respectively, to open the list of jurors selected for such term, and to make out a copy of the same, duly certified under his hand and the seal of his office, and deliver the same to the sheriff. Where the judge has directed that the jurors for any week shall be summoned for some other day than Monday, the clerk shall note such order for the information of the sheriff. [Act Aug. 18, 1876, p. 171, sec. 10.]

Art. 5160. [3175] Sheriff to notify jurors.—On the receipt of such lists it shall be the duty of the sheriff immediately to notify the several persons named in such lists to be in attendance on the court on the

day and week for which they were respectively drawn to serve as jurors for said week. [Id.]

Disqualification of sheriff.—In suit on liquor dealer's bond to recover damages for unlawful sale of liquor to plaintiff's son, a motion to quash a venire, summoned by the sheriff because of his having made affidavits charging the alleged illegal sales held properly denied. *Lucas v. Johnson* (Civ. App.) 64 S. W. 823.

Duty in general.—A sheriff must summon a juror though he be sick. *Gay v. State*, 40 Cr. R. 242, 49 S. W. 612.

A sheriff must summon a juror though he claim to be exempt as being over age. *Id.*

Art. 5161. Special venire, how summoned.—Whenever district court shall have convened, and a day shall have been set for the trial of the different capital cases which call for a special venire, the men whose names may have been drawn to answer summons to the venire facias in the different capital cases shall be immediately notified by the sheriff to be in attendance on the court on the day and week for which they were respectively drawn to serve as veniremen for said day and week; and such notice shall be given at least one day prior to the time when such duty is to be performed, exclusive of the day of service. [Acts 1905, p. 17.]

Art. 5162. [3176] Notice to jurors, how served.—Such notice may be orally delivered by the sheriff to the juror in person, or in case such juror can not be found, then a written memorandum thereof, signed by the sheriff officially, may be left at the juror's place of residence, with some member of his family over sixteen years of age. [Acts Aug. 18, 1876, p. 171.]

Notice by mail.—The method of summoning jurors prescribed by this article should be obeyed, and the sheriff who attempts to summon jurors personally should not merely give them notice by mail. *Freeman v. Wilson* (Civ. App.) 149 S. W. 413.

Jurors attending because of notice given in another manner than as provided in this article are not subject to challenge, the statute not being mandatory but merely directory, and so where talesmen were given notice by mail, challenges to their competency were properly overruled where it did not appear that the challenging party was in any way prejudiced. *Id.*

It was not ground for a challenge to array that the jury had been summoned by postal card, instead of orally, where the actual attendance of the jurors was thereby secured; the statute being merely directory, and no such grounds of challenge to array being specified by Arts. 5188-5201, relating thereto. *Miller v. Burgess* (Civ. App.) 154 S. W. 591.

Art. 5163. [3177] Time of service.—Such notice shall be served at least three days prior to the first day of the term of court, exclusive of the day of service.

Art. 5164. [3178] Sheriff's return.—The sheriff executing such summons shall return the lists on the first day of the term of the court at which such jurors are to serve, with a certificate thereon of the date and manner of service upon each juror; and, if any of said jurors have not been summoned, he shall also state the diligence used to summon them, and the reason why they have not been summoned. [Id.]

CHAPTER SEVEN

JURIES FOR THE WEEK—HOW MADE UP

Art.
5165. Jurors for the week, how selected.
5166. If not selected on day appointed may be subsequently done.
5167. If practicable, to be of jurors selected by jury commissioners.
5168. May be filled up, how.

Art.
5169. May be adjourned.
5170. Oath to be administered to the sheriff when jurors not selected are to be summoned by him.
5171. Court may hear excuses of jurors.
5172. Defaulting juror to be fined.

Article 5165. [3179] Jurors for the week, how selected.—On Monday of each week of the court for which a jury shall be summoned, and for which there may be jury trials, or where the jury trials for the week have been set for some other day, then on such day the court shall

select thirty qualified jurors, or a greater or less number, in its discretion, to serve as jurors for the week. [Id.]

Ordering sheriff to summon venire.—The court has no authority to order the sheriff to summon a venire for the trial of a civil cause. *Lewis v. Merchant*, 4 App. C. C. § 115, 16 S. W. 173; *Cassidy v. Kluge*, 73 T. 155, 12 S. W. 13.

Art. 5166. [3180] If not selected on day appointed, may be subsequently done.—Should such selection from any cause not be made on the day appointed, it may be made on any subsequent day.

Art. 5167. [3181] If practicable, to be of jurors selected by jury commissioners.—Such jurors shall be selected from the names included in the jury list for the week, if there be the requisite number of such in attendance who are not excused by the court.

Dismissing jury until later date.—Construing this article and Art. 5169, the court has power to dismiss a jury selected for any week of a term until another week or further day of the term for service. *Howard Oil Co. v. Davis*, 76 T. 630, 13 S. W. 665.

Sheriff to summon additional jurors.—See note under Art. 5168.

Art. 5168. [3182] May be filled up, how.—If the requisite number of such jurors be not in attendance at any time, the court shall direct the sheriff to summon a sufficient number of qualified persons to make up the requisite number of jurors. [Act Aug. 1, 1876, p. 80, sec. 11.]

Sheriff to summon additional jurors.—If there is no dereliction of duty or intentional disregard of the statute on the part of the judge, whereby there is forced upon the defendant a part only of the jurors summoned by the jury commissioners for the week, it is the judge's duty under this article and Art. 5167 to require a sufficient number of talesmen to make up the requisite number to be summoned. *G., H. & S. A. Ry. Co. v. Perry*, 38 C. A. 81, 85 S. W. 64.

Appointing new commission to summon additional jurors.—See notes under Art. 5127.

Taking jurors from another court.—Where there are two district courts in one county, the judge of one has no right to order sheriff to bring in regular jurors of the other courts to serve in his court. They should be summoned as provided by law. *G., C. & S. F. Ry. Co. v. Gilvin* (Civ. App.) 55 S. W. 985.

Talesman at trial of cause.—See notes under Art. 5205.

Art. 5169. [3183] May be adjourned.—The court may adjourn the whole number of jurors for the week, or any part thereof, to any subsequent day of the term, but jurors shall not be paid for the time they may so stand adjourned. [Id. p. 83, sec. 24.]

Dismissing jury until later date.—The court has power to dismiss a jury selected for any week of a term until another week or further day of the term for service. *Oil Co. v. Davis*, 76 T. 630, 13 S. W. 665.

Art. 5170. [3184] Oath to be administered to the sheriff when jurors not selected are to be summoned by him.—Whenever it may be necessary to summon jurors who have not been selected by jury commissioners under the provisions of this title, the court shall administer to the sheriff and each of his deputies the following oath: "You do solemnly swear that you will, to the best of your skill and ability, and without bias or favor toward any party, summon such jurors as may be ordered by the court; that you will select none but impartial, sensible and sober men, having the qualifications of jurors under the law; that you will not, directly or indirectly, converse or communicate with any jurymen touching any case pending for trial; and that you will not by any means attempt to influence, advise or control any jurymen in his opinion in any case which may be tried by him. So help you God." [Id. sec. 12.]

Failure to administer oath.—The sheriff, having been sworn at the beginning of the term, need not be sworn again prior to summoning talesmen to fill out a special venire. *Deon v. State*, 37 Cr. R. 506, 40 S. W. 266.

Though in a civil action the officer sent to summon talesmen was not sworn according to law, the irregularity was not available to defendant as error. *San Antonio Trac-tion Co. v. Davis* (Civ. App.) 101 S. W. 554.

The failure of the court to administer to officers summoning jurors not selected by jury commissioners the oath required by this article is error. *Sewall v. State* (Cr. App.) 148 S. W. 569.

Art. 5171. [3185] Court may hear excuses of jurors.—The court may hear any reasonable excuse of a juror, supported by oath or affirmation, and may either release him entirely or until some other day of the term.

Excusing juror after being impaneled.—The judge, for good cause, may excuse a juror after he has been impaneled. *Railway Co. v. Ross* (Civ. App.) 28 S. W. 254.

Art. 5172. [3186] Defaulting juror to be fined.—Should any juror who has been lawfully notified fail to be in attendance on the court in obedience to such notice without some reasonable excuse, to be judged of by the court, he shall be fined in any sum not less than ten nor more than one hundred dollars. [Id. sec. 10.]

CHAPTER EIGHT

JURY TRIALS—AUTHORIZED WHEN AND HOW

Art.	Art.
5173. Right of trial by jury to remain inviolate, subject, etc.	5181. Oath of inability to make deposit.
5174. Must be demanded and jury fee paid.	5182. Cases heretofore entered on jury docket excepted.
5175. Time of demand.	5183. Order of court.
5176. Same.	5184. Clerk to keep jury docket.
5177. Rules for justices' courts elsewhere prescribed.	5185. Jury trial day to be fixed.
5178. Call of docket for demands for jury trials.	5186. Application for jury not to be withdrawn, unless, etc.
5179. Same as to appearance docket.	5187. When application withdrawn, court may permit jury fee withdrawn also.
5180. Jury fee.	

Article 5173. [3187] Right of trial by jury to remain inviolate, subject, etc.—The right of trial by jury shall remain inviolate, subject to the following rules and regulations. [Const., art. 1, sec. 15.]

Functions of court and jury.—See notes under Art. 1971.

Action of court infringing right of trial by jury.—The direction of a verdict in a civil action held not a violation of the constitutional guaranty of trial by jury. *Henry v. Mc-New*, 29 C. A. 288, 69 S. W. 213.

Constitutional right of trial by jury held not violated in instructing a verdict for defendants. *Henry v. Thomas* (Civ. App.) 74 S. W. 599.

Primarily all questions of fact are for the jury, and unless it appears without doubt that what would ordinarily be a question of fact has, from the state of the evidence, become a question of law, a court cannot deprive a party of his constitutional right of trial by jury by deciding the question. *Merritt v. State*, 42 C. A. 495, 94 S. W. 372.

Plaintiff, after the erroneous denial of its motion for a jury trial, having submitted its entire case to the court, could not insist on a reversal where the undisputed evidence required a verdict for the defendants. *Wm. D. Cleveland & Sons v. Smith* (Civ. App.) 113 S. W. 547.

In an action by a parent to recover the custody of her minor child, an order overruling plaintiff's motion for a new trial, and upon its own motion decreeing that plaintiff should have custody of the child for one month in each year, was an invasion of the province of the jury. *Cobb v. Works* (Civ. App.) 125 S. W. 349.

Trial by jury in probate matters.—See, also, notes under Art. 3221.

A contestation of the probate of a will must on demand be tried by a jury. *Cockrill v. Cox*, 65 T. 669.

Right to jury trial.—The right of trial by jury cannot be defeated by a legislative enactment. *C. & M. Ry. Co. v. Morris*, 68 T. 49, 3 S. W. 457.

If the pleadings and evidence present a controverted question of fact, it is error to refuse a jury trial. *Burnett v. Ft. Worth Light & Power Co.* (Civ. App.) 117 S. W. 175.

Defendant held entitled to trial by jury. *Hays v. Housewright* (Civ. App.) 133 S. W. 922.

A defendant may not arbitrarily be deprived of his statutory right of a trial by a jury selected by the jury commissioners. *Kansas City, M. & O. Ry. Co. of Texas v. Big-ham* (Civ. App.) 138 S. W. 432.

Suits in equity.—On request of plaintiff a suit in equity was properly submitted to a jury on special issues. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

On submitting issues in an equity case, only such matters of fact as in some way tend to establish or defeat a cause of action need be submitted. *Id.*

Contempt proceedings.—A party prosecuted by contempt proceedings for the violation of an injunction cannot demand a jury trial. *Ex parte Allison*, 48 Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684.

Mandatory injunction.—In a suit for a mandatory injunction to compel obedience to a decree that defendant open a public highway across its property, it was not error to grant a jury trial. *Santa Fe Townsite Co. v. Norvell*, 55 C. A. 488, 118 S. W. 762.

Inquisition proceedings.—In guardianship proceedings, an issue as to the ward's sanity held formed, which the court could determine without a jury where no jury was demanded. *Ferguson v. Ferguson* (Civ. App.) 128 S. W. 632.

Determination of venue.—On the question whether a defendant was a resident of the county in which an action was brought, so as to give the court jurisdiction of his person, he was entitled to trial by jury. *J. D. Hudgins & Bro. v. Low*, 42 C. A. 556, 94 S. W. 411.

Issues of fact presented by a plea of privilege are triable by a jury, unless a jury is waived. *Koip v. Shrader* (Civ. App.) 131 S. W. 860.

Effect of denial of jury trial.—A judgment will not be reversed on account of the denial of the right of trial by jury, when no other judgment could be rendered on the facts. *Caldwell County v. Harbert*, 68 T. 321, 4 S. W. 607.

Findings of jury in divorce suits.—In suits for divorce, neither the trial court nor the court of civil appeals is bound by the finding of the jury upon questions of fact, but may, in their sound discretion, disregard the verdict and render the judgment that justice requires. *De Fierros v. Fierros* (Civ. App.) 154 S. W. 1067.

Waiver of right.—Plaintiff's right to trial by jury in a suit to restrain the collection of certain taxes held waived. *Nalle v. City of Austin*, 41 C. A. 423, 93 S. W. 141.

One on trial for a misdemeanor held not entitled to waive a jury after the hearing of the evidence and require the court to assess the punishment on a plea of guilty. *Johnson v. State*, 55 Cr. R. 507, 116 S. W. 1148.

The statute providing that in misdemeanor cases a jury may be waived by accused requires a formal waiver. *Id.*

A jury question cannot be waived in criminal cases. *Davis v. State*, 64 Cr. R. 8, 141 S. W. 264.

Art. 5174. [3188] Must be demanded and jury fee be paid.—No jury trial shall be had in any civil suit, unless an application therefor be made in open court and a jury fee be deposited, or an affidavit be made of inability to make such deposit, as hereinafter prescribed. [Const., art. 5, secs. 10, 17.]

Necessity of jury when demanded.—When a demand for a jury has been made, and the fee therefor paid by one of the parties when the case is regularly reached, neither the judge nor the opposite party has authority, in his temporary absence and without his assent, to proceed in the trial without a jury. *Lacroix v. Evans*, 1 App. C. C. § 749.

Where a defendant at a previous term demanded a trial by jury and paid the fee, it was improper at a subsequent term and in his and his attorney's absence for the court, upon a statement by the plaintiff's attorney that the defendant would waive a jury, to pass on the action himself. *Hays v. Housewright* (Civ. App.) 133 S. W. 922.

Failure to demand jury.—A party not having demanded a jury cannot complain that the court had discharged several of the jurors. *Doll v. Mundine*, 7 C. A. 96, 26 S. W. 87.

Manner of demanding jury to be strictly enforced.—Demand for a jury made by defendants joined by plaintiff during the trial held properly refused. *Goldman v. Broyles* (Civ. App.) 141 S. W. 283.

The law as to how a jury shall be demanded in order to entitle a party to jury trial should be strictly enforced, where, even admitting his witnesses would testify as he states, a directed verdict for the other party would be justified. *Gibson v. Singer Sewing Mach. Co.* (Civ. App.) 147 S. W. 285.

Demand in open court.—Written application filed with the clerk, and not brought to the court's attention, is not made in "open court," within Art. 5174, providing that no jury trial shall be had, unless application therefor be made in open court. *Gibson v. Singer Sewing Mach. Co.* (Civ. App.) 147 S. W. 285.

Time for demanding jury.—See notes under Art. 5175.

Jury fee.—Where the one demanding a jury trial withdraws the jury fee, he cannot complain that the case was not tried by a jury. *Harris v. Kellum & Rotan Inv. Co.* (Civ. App.) 43 S. W. 1027.

Where no jury fee has been paid, plaintiff is entitled to have the case tried as a nonjury case, although it is entered on the jury docket. *Ranson v. Leggett* (Civ. App.) 90 S. W. 668.

The refusal of a jury trial was not error, where plaintiff neither offered to pay the jury fee nor made affidavit of his inability to pay it. *Kruegel v. Murphy & Bolanz* (Civ. App.) 126 S. W. 680.

Time for depositing jury fee.—See note under Art. 5180.

Review of court's discretion.—In the absence of a clear showing of an abuse of discretion, the refusal of the trial court to grant a jury trial, where the demand for a jury was not made within the time prescribed by statute, will not be disturbed on appeal. *Kenedy Town & Improvement Co. v. First Nat. Bank* (Civ. App.) 136 S. W. 558.

Art. 5175. [3189] Time of demand.—Any party to a civil suit in the district or county court desiring to have the same tried by jury, shall make application therefor in open court on the first day of the term of the court at which the suit is to be tried, unless the same be an appearance case, in which event the application shall be made on default day. [Act Aug. 18, 1876, p. 171, sec. 11.]

Excuse for failure to demand on first day.—The failure to demand a jury on the first day of the term is excused when the presiding judge was not competent to enter the order. *Hays v. Hays*, 66 T. 606, 1 S. W. 895.

Demand on appearance day.—On the call of the docket on default day no jury was demanded in the case; after the call was completed, and the jury cases were set for a future day, the non-jury cases were called for trial, and, an application for a continuance of the case having been overruled, plaintiff demanded a jury. Held, the application came too late. *Hunt v. Makemson*, 56 T. 9.

A jury may be demanded at any time on appearance day when the case is called for trial. *Cook v. Cook*, 23 S. W. 927, 5 C. A. 30. See *Burgess v. Singer Mfg. Co.* (Civ. App.) 30 S. W. 1110; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 28 S. W. 1027, 8 C. A. 227; *Hardin v. Blackshear*, 60 T. 132.

The terms "default day" and "appearance day" have the same meaning, and an application on the fourth day of the term is too late. *Cruger v. McCracken* (Civ. App.) 26 S. W. 282.

Failure to demand in time.—When a proper demand for a jury has not been made, the defendant is not entitled to have the damages assessed by a jury. *Bumpass v. Morrison*, 70 T. 756, 8 S. W. 596.

If a jury is not demanded at the proper time a party cannot, as a matter of right, afterwards demand that his case shall be tried by a jury. *Cabell v. Hamilton-Brown Shoe Co.*, 81 T. 104, 16 S. W. 811; *McFaddin v. Preston*, 54 T. 403; *Hardin v. Blackshear*, 60 T. 132; *Berry v. T. & N. O. Ry. Co.*, 60 T. 654; *Gallagher v. Goldfrank*, 63 T. 473; *Ellis v. Bonner*, 27 S. W. 687, 7 C. A. 539; *Brooks v. Pegg* (Sup.) 8 S. W. 595. If demanded at a subsequent term it should be granted. *Noel v. Denman*, 76 T. 306, 13 S. W. 318.

A demand for a jury after the jury docket is disposed of and four days before the case is called for trial is properly refused. *Petri v. Bank*, 83 T. 424, 18 S. W. 752, 29 Am. St. Rep. 657; *Denton Lumber Co. v. Bank* (Sup.) 18 S. W. 962.

One who was negligent in not being present at the trial in person or by attorney cannot complain that his case was not retained on the jury docket. *Harris v. Kellum & Rotan Inv. Co.* (Civ. App.) 43 S. W. 1027.

A demand for a jury trial was held to have come too late. *Western Union Tel. Co. v. Thompson*, 18 C. A. 279, 44 S. W. 402.

Where defendant had performed every requirement for a jury trial, but was absent on the day of the trial, it was error to try the cause without a jury, since her right was not forfeited by absence. *Fitzgerald v. Wygal*, 24 C. A. 372, 59 S. W. 621.

Where, after a case had been called and postponed, defendant's counsel paid the jury fee, but made no demand for a jury trial, and did not call the court's attention thereto until after the case was regularly called for trial on the nonjury docket, and the granting of a jury trial would necessitate a postponement of the trial to a subsequent week, and greatly inconvenience plaintiff, who was a nonresident, and who had twice journeyed from his home to attend the trial, the refusal to grant a jury trial was proper. *City Loan & Trust Co. v. Sterner*, 57 C. A. 517, 124 S. W. 207.

This article, enacted pursuant to Const. art. 1, § 15, empowering the legislature to pass laws regulating the right to trial by jury, is not mandatory, and a litigant may only be deprived of a jury trial when his delay in demanding a jury and tendering the jury fee will probably work injury to the adverse party. *Kenedy Town & Improvement Co. v. First Nat. Bank of Victoria* (Civ. App.) 136 S. W. 558.

In the absence of a clear abuse of discretion, the refusal of the trial court to grant a jury trial, where the demand for a jury was not made within the time prescribed by statute, will not be disturbed on appeal. *Id.*

Application in open court for jury trial, without which Art. 5174, provides there shall be no jury trial, was properly denied, where not made till the case was called for trial, subsequent to the first day of the court, and the other party was ready for trial, with its witnesses in court; and a postponement of three weeks would be necessary for a jury trial. *Gibson v. Singer Sewing Mach. Co.* (Civ. App.) 147 S. W. 285.

Jury necessitating continuance.—Where a demand for a jury, not made within the prescribed time, if acceded to would continue a case for the term, it may properly be refused. *Petri v. Lincoln Nat. Bank*, 83 T. 424, 18 S. W. 752, 29 Am. St. Rep. 657; *Id.*, 84 T. 153, 19 S. W. 379. See *Cabell v. Shoe Co.*, 81 T. 104, 16 S. W. 811.

Where a party complies with the requirements of the statute he is entitled to a jury trial although to grant such right may compel a continuance when one party is ready and anxious to try. *Wm. D. Cleveland & Sons v. Smith* (Civ. App.) 113 S. W. 549.

Where a party did not demand a jury trial on the first day of the term, and his delay in demanding a jury might, if granted, result in carrying the case over the term, because of the necessity of further postponement of the case at the time fixed, to permit the trial of other cases having precedence, the refusal to grant a jury trial was within the discretion of the court. *Kenedy Town & Improvement Co. v. First Nat. Bank of Victoria* (Civ. App.) 136 S. W. 558.

Demand after application for continuance.—A demand for a jury may be made after an application for continuance is overruled, no prejudice having resulted from the delay. *Cook v. Cook*, 5 C. A. 30, 23 S. W. 927.

Trial by jury on transfer to another court.—When a case, in which a trial by jury has been demanded and fee paid, has been transferred to another court, the party is entitled to a trial by jury. *Warner v. Crosby*, 75 T. 295, 12 S. W. 745.

Time for depositing jury fee.—See notes under Art. 5174.

Art. 5176. [3190] Same.—Should any court be in session when the preceding article shall go into effect, the application for a jury trial in any cause pending therein, and which is to be tried at such term, may be made at any time before the case is called for trial.

Art. 5177. [3191] Rules for justices' courts elsewhere prescribed.—The manner of applying for a jury trial in the justices' courts, and the proceedings thereon, are prescribed in the title relating to justices' courts.

Art. 5178. [3192] Call of docket for demands for jury trial.—On the first day of each term of the court, the court shall call over the docket, except appearance cases, and shall note thereon in each case whether or not a jury trial is applied for therein, and by which party.

Jury not waived by failure to demand at preceding term.—A jury trial at one term is not waived by a failure to demand it at a preceding term, as is made plain by the provision that at each term the docket is to be called to give parties the opportunity to make the demand. *San Jacinto Oil Co. v. Culberson*, 100 T. 462, 101 S. W. 198.

Art. 5179. [3193] Same as to appearance docket.—On the call of the appearance docket at each term of the court, the court shall in like manner note in each appearance case whether or not a jury trial is applied for, and by whom.

Art. 5180. [3194] Jury fee.—The party applying for a jury trial in the district or county court shall, on the same day, deposit with the clerk, to the use of the county, a jury fee of five dollars if in the district court, and of three dollars if in the county court. [Act Aug. 18, 1876, p. 171, sec. 11.]

Time for depositing jury fee.—A discretion may be exercised by the judge in allowing the deposit of the jury fee if made before trial and no injury results to the adverse party. *Hardin v. Blackshear*, 60 T. 132. See *Wood v. Kieschbaum* (Civ. App.) 31 S. W. 326.

The plaintiff filed an affidavit under Art. 2053, and the clerk thereupon placed the case on the jury docket. While the parties were engaged in selecting a jury the defendant objected to the case being tried by a jury on the ground that the affidavit did not conform to Art. 5181. Plaintiff asked leave to amend his affidavit, which was refused. He then deposited the jury fee with the clerk and demanded a trial by jury, which was refused. Held, that a trial by jury should have been allowed. *Berry v. T. & N. O. Ry. Co.*, 60 T. 654.

A jury was demanded on the first day of the term and the jury fee paid on the second day. Held, that when no injury resulted to the opposing party, and neither the business of the court nor the trial of the cause was delayed thereby, the jury fee should have been accepted and the jury allowed. *Gallagher v. Goldfrank*, 63 T. 473.

A jury was demanded by the plaintiff at the proper time and the cause was placed on the jury docket, but the jury fee was not then paid. A motion to strike the case from the jury docket on the ground that the jury fee was not paid on the first day of the term was sustained, although it appeared that it was paid before the motion was filed. Held error. *Allyn v. Willis*, 65 T. 65.

This article is not mandatory regarding the deposit, which may be made on the second day and before the case is called for trial. *Allen v. Plummer*, 71 T. 546, 9 S. W. 672; *Gallagher v. Goldfrank*, 63 T. 473; *Hardin v. Blackshear*, 60 T. 132.

The failure to pay the jury fee on the day required should not deprive a party of a jury trial when the plaintiff is not prejudiced thereby or the business of the court disturbed. *W. U. Tel. Co. v. Everheart*, 10 C. A. 468, 32 S. W. 90.

Case transferred from county to district court.—When a jury has been demanded in the county court and fee paid, on the transfer of the case to the district court the party making the demand has a right to a jury. *Warner v. Crosby*, 75 T. 295, 12 S. W. 745.

Art. 5181. [3195] Oath of inability to make jury fee deposit.—The deposit mentioned in the preceding article shall not be required when the party shall, within the time limited for making such deposit, file with the clerk an affidavit in writing signed by him, to the effect that he is unable to make such deposit, and that he can not, by the pledge of property or otherwise, obtain the money necessary for that purpose. [Act Aug. 1, 1876, p. 81, sec. 18.]

Defective affidavit.—A party having filed a defective affidavit was on the call of the case for trial permitted to deposit the fee in cash. *Berry v. T. & N. O. Ry. Co.*, 60 T. 654.

Art. 5182. [3196] Cases heretofore entered on jury trial docket, excepted.—The preceding article shall not apply to cases which have been heretofore properly entered on the jury trial docket in accordance with former laws.

Art. 5183. [3197] Order of court.—Upon a compliance with the foregoing provisions, the court shall order the clerk to enter the suit on the jury docket. [Act Aug. 18, 1876, p. 171, sec. 11.]

Late demand for jury necessitating continuance.—See notes under Art. 5175.

Art. 5184. [3198] Clerk to keep jury docket.—It shall be the duty of the clerks of the district and county courts each to keep a docket, to be styled, "The Jury Docket," in which shall be entered in their order the cases in which jury trials have been ordered by the court. [Id.]

Art. 5185. [3199] Jury trial day to be fixed.—The court shall, by an order entered on the minutes, designate any day during the term for the taking up of the jury docket and the trial of causes thereon; and such order may be revoked or changed at discretion. [Act Aug. 1, 1876, p. 81, sec. 14.]

Changing order of cases on jury docket.—The court may require a cause to be tried out of its order upon the jury docket without reference to the consent of the parties.

The exercise of this power may be revised on appeal, it appearing that a party has been injured. *Railway Co. v. Shuford*, 72 T. 165, 10 S. W. 408.

Absence of jury as ground for continuance.—The absence of a jury under the orders of the court on the day set for trial is not a ground for continuance. *Cole v. Terrell*, 71 T. 549, 9 S. W. 668.

Art. 5186. [3200] Application for jury not to be withdrawn, unless, etc.—When one party has applied for a jury trial, as herein provided, he shall not be permitted to withdraw such application without the consent of the parties adversely interested.

Art. 5187. [3201] When application withdrawn, court may permit jury fee to be withdrawn also.—When a party who has applied for a jury trial has been permitted under the preceding article to withdraw such application, the court may, in its discretion, by an order permit him to withdraw also his jury fee deposit.

CHAPTER NINE

CHALLENGES

Art.		Art.	
5188.	Challenge to the array of jurors.	5195.	On trial of challenge for cause, evidence to be heard.
5189.	Not allowed, when.	5196.	Certain questions not permissible.
5190.	Challenge to array must be in writing.	5197.	Peremptory challenge.
5191.	Court shall decide at once.	5198.	Number in district court.
5192.	Proceedings when challenge to array is sustained.	5199.	In the county court.
5193.	Challenge to a particular juror.	5200.	Challenge to a particular juror made orally.
5194.	Challenge for cause.	5201.	Court to decide challenges promptly.

Article 5188. [3202] Challenge to the array of jurors.—Any party to a suit which is to be tried by a jury may, before the jury is drawn, challenge the array of jurors upon making it to appear that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. [Id. p. 83, sec. 25.]

Applies only to venires summoned by sheriff.—This article only applies to venires which have been summoned by the sheriff under a valid order of the court, and does not restrict the right of the litigant to question the power of the court to order a venire to be summoned by the sheriff and to substitute such a venire for one regularly drawn by the jury commissioners and which had been duly sworn and impaneled. *Texas & N. O. Ry. Co. v. Pullen*, 33 C. A. 143, 75 S. W. 1085.

Necessity of corruption or misconduct.—In order to challenge an array selected as talesmen, there must be alleged corruption, or such other conduct on the part of the officer as the statute requires. *G., H. & S. A. Ry. Co. v. Perry*, 38 C. A. 81, 85 S. W. 64.

Jurors were drawn for the second, third and fourth weeks of the term, but the case was not tried during these weeks. The judge summarily ordered the sheriff to summon a jury for the 6th week, to try the case. Only one or both of the causes stated in this article can be urged to support the challenge to the array and as neither was interposed the motion to quash the venire was properly overruled. *Haywood Lumber Co. v. Cox* (Civ. App.) 104 S. W. 404.

An objection to a jury that the panel was not drawn for a particular week, but was drawn for the whole term of three weeks is not good. There is only one ground of challenge to the array, and that is the corruption of the officer summoning the jury. *G. H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 368.

Summons by mail.—Under this article and Art. 5189, which prohibits challenge to an array where the jurors have been selected by jury commissioners under title 75, it is not ground for such challenge that 10 names were taken from the jury wheel at a time, where the names were written down in the order in which they were taken out, nor that some of the jurors were not summoned in person, notice being mailed to them, where 35 regular jurors obeyed summons and the court excused for good cause down to 24, who were regularly impaneled, and where no challenges were made for cause. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

It was not ground for a challenge to array that the jury had been summoned by postal card, instead of orally, as provided by Art. 5162, where the actual attendance of the jurors was thereby secured; such statute being merely directory, and no such grounds of challenge to array being specified by this and the following articles. *Miller v. Burgess* (Civ. App.) 154 S. W. 591.

Time for objection.—An exception to the manner of impaneling a jury is waived, unless taken at the time the jury is impaneled; and it cannot be raised by embodying the entire motion for new trial in a bill of exceptions. *Black v. State*, 46 Cr. R. 590, 81 S. W. 302.

Where accused, tried at one term, accepted, without objection, the jury selected at a prior term, he could not after trial complain of the time of the selection of the jury. *Kinch v. State* (Cr. App.) 156 S. W. 649.

Nature of motion.—A motion to quash the jury panel must be deemed a challenge to the array, though not expressly purporting to be such. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

Art. 5189. [3203] Not allowed, when.—No challenge to the array shall be entertained where the jurors have been selected by jury commissioners under the provisions of this title.

Prejudice—remedy.—Under the express provisions of this article, where jurors have been selected by jury commissioners, a challenge to the array will not be entertained, and hence such a challenge on the ground that the array was so constituted as to be prejudiced against an accused person was properly overruled, his proper remedy being by motion for a change of venue. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Art. 5190. [3204] Challenge to array must be in writing, etc.—All challenges to the array must be in writing, setting forth distinctly the grounds of such challenge, and must be supported by the affidavit of the party, or some other credible person.

Challenging each juror.—Where jurors are improperly brought in and offered to a party, and he challenges each one as presented, this is not a challenge to the array. *G., C. & S. F. Ry. Co. v. Gilvin* (Civ. App.) 65 S. W. 985.

Oath of officer.—Challenge to the array, under Code Cr. Proc. 1895, arts. 661, 663, must be based on oath that the officer summoning has acted corruptly. *Arnold v. State*, 38 Cr. R. 1, 40 S. W. 734.

Art. 5191. [3205] Court shall decide at once.—When a challenge to the array is made, the court shall hear evidence, and shall decide without delay whether the challenge shall be sustained or not.

Art. 5192. [3206] Proceedings when challenge to the array is sustained.—If the challenge be sustained, the array of jurors summoned shall be discharged, and the court shall order other jurors to be summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on account of whose misconduct the challenge has been sustained, shall not summon any other jurors in the case. [Id.]

Art. 5193. [3207] Challenge to a particular juror.—A challenge to an individual juror is either—

1. A challenge for cause; or
2. A peremptory challenge.

Challenge for cause.—See notes under Art. 5194.

Art. 5194. [3208] Challenge for cause.—A challenge for cause is an objection made to a particular juror, alleging some fact which, under the provisions of the first chapter of this title, disqualifies him to serve as a juror in any case, or in the particular case, or which, in the opinion of the court, renders him an unfit person to sit on the jury.

See *Wolf v. Perryman*, 82 T. 112, 17 S. W. 772; *Jones v. Ford*, 60 T. 130; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 C. A. 233, 28 S. W. 1029.

Competency in general.—See notes under Arts. 5115, 5117.

Grounds not specified in statute.—Construing this article and Art. 5116 held, that the trial court may allow the challenge of a juror for cause on other grounds than those which the statute declares shall render him disqualified in the particular case. This power is discretionary, and when exercised it will not be reversed, unless it has resulted in preventing a fair and impartial trial. *Couts v. Neer*, 70 T. 468, 9 S. W. 40.

Necessity for challenge.—Where defendant had not challenged a juror for cause or otherwise, held not error to allow the juror to act. *Kugaft v. State*, 38 Cr. R. 681, 44 S. W. 989.

Where an accused failed to question a juror, the fact that he was not qualified held not ground for reversal. *Corley v. State* (Cr. App.) 65 S. W. 1073.

Accused, having failed to strike a talesman when he had the opportunity, could not complain because such juror was disqualified. *Bice v. State*, 55 Cr. R. 529, 117 S. W. 163.

Time for raising objections.—See notes under Art. 5208.

Right to complain of failure to sustain challenge.—Denying defendant's challenge to certain jurors held not prejudicial error where he afterwards peremptorily challenged them. *Sawyer v. State*, 39 Cr. R. 557, 47 S. W. 650.

Accused cannot complain of the action of the court in overruling a challenge for cause, whereby he was compelled to exhaust his peremptory challenges, if, after the juror was excused, but one more juror was drawn, and accused accepted him without objection. *Morrison v. State*, 40 Cr. R. 473, 51 S. W. 358.

Where the bill of exceptions did not show defendant had at any time exhausted his peremptory challenges, held not error for the state to accept a juror, thereby compelling

defendant to exhaust one of his peremptory challenges. *Renfro v. State*, 42 Cr. R. 393, 56 S. W. 1013.

Grounds for challenge to jurors not interposed in trial court will not be considered on appeal. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365.

When a challenge for cause was overruled, accused should have excused the juror peremptorily, if he had any peremptory challenges left. *Chapman v. State* (Cr. App.) 147 S. W. 580.

One accused of murder is not entitled to complain of the sustaining of challenges for cause to jurors, where he had several unexhausted peremptory challenges. *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428.

Examination of juror.—See notes under Art. 5195.

Art. 5195. [3209] On trial of challenge for cause, evidence to be heard.—Upon a challenge for cause the examination shall not be confined to the answers of the juror, but other evidence may be heard in support of or against the challenge.

Examination of juror.—In examining a juror on his voir dire it is not improper to ask him if he knows anything about the facts of the case or if he has made up his mind about the case. The examination need not be confined to the literal language of the statute, but may extend to an inquiry as to the bias or prejudice relating to the subject-matter of the litigation as well as to that which may be felt toward the parties personally. A refusal to allow such examination touching the qualification of a juror affords cause for a reversal. *Railway Co. v. Terrell*, 69 T. 650, 7 S. W. 670.

Parties should be allowed full opportunity to ascertain the state of feeling existing between proposed jurors and litigants. *Davis v. Panhandle Nat. Bank* (Civ. App.) 29 S. W. 926.

A motion to require state's attorney to disclose the names of parties employing counsel to assist him to enable defendant to inquire of the jurors if they were related to them held properly refused. *McGee v. State*, 37 Cr. R. 668, 40 S. W. 967.

Question on voir dire examination of a juror in the trial of a negro for murder of a white man considered, and held proper, as tending to show whether or not he was prejudiced against the negro for killing a white man. *Fendrick v. State*, 39 Cr. R. 147, 45 S. W. 589.

Defendant was not entitled to ask the jurors what was meant by various legal terms, as bearing on their mental fitness. *San Antonio & A. P. Ry. Co. v. Belt*, 24 C. A. 231, 59 S. W. 607.

Where the court refuses to permit a party to ask jurors improper questions touching their competency, it is not the duty of the court to indicate what questions he would permit to be asked. *Id.*

Where one of the jurors on his examination stated he had expressed no opinion, defendant held not estopped, by his failure to examine the juror further, from thereafter objecting to him on the ground that he expressed an opinion. *Hughes v. State* (Cr. App.) 60 S. W. 562.

In criminal cases certain conduct on trial held not erroneous as a challenge to a juror during his absence from courtroom. *Dodd v. State*, 44 Cr. R. 480, 72 S. W. 1015.

One on trial for homicide held not entitled to ask jurors certain questions to enable him to properly exercise his peremptory challenges. *Yardley v. State*, 50 Cr. R. 644, 100 S. W. 399, 133 Am. St. Rep. 869.

Where, before accused had been called on to exercise his right of challenge, the court had interrogated the entire jury as to whether or not they had served as jurors in that court for as many as six days within the last six months, and they had all either answered "No," or made no dissent to the question, accused might assume in challenging that they had not so served. *Benton v. State*, 52 Cr. R. 360, 107 S. W. 838.

In a prosecution for seduction, exclusion of certain question to juror on voir dire examination held not error in view of juror's answer to another similar question which was allowed. *Faulkner v. State*, 53 Cr. R. 258, 109 S. W. 199.

A question asked prospective jurors in a trial for violating the local option law held proper. *Irvine v. State*, 55 Cr. R. 347, 116 S. W. 591.

In a prosecution for illegally selling liquor, it was not error to permit a private prosecuting attorney to ask the jury concerning their attitude towards testimony of detectives, that he might intelligently exercise his peremptory challenges. *Morrow v. State*, 56 Cr. R. 519, 120 S. W. 491.

Questions to jurors on their voir dire held not improper as tending to commit them to a large verdict. *Rice v. Ragan* (Civ. App.) 129 S. W. 1148.

The court's action in excluding a question to the jury on voir dire examination as to whether they would give accused the benefit of any reasonable doubt on the question of his insanity held proper. *Jones v. State*, 60 Cr. R. 139, 131 S. W. 572.

On a trial for rape, where a juror testified that he served as juror in a criminal assault case, the exclusion of a question asked juror as to the verdict therein was not error. *Wragg v. State* (Cr. App.) 145 S. W. 342.

Defendant held entitled to ask each of the veniremen whether they would give him the benefit of the presumption of innocence and the benefit of reasonable doubt throughout the trial. *Caton v. State* (Cr. App.) 147 S. W. 590.

A statement by the district attorney, in examining the jurors before impanelment, that the law made it a felony to engage in the occupation of selling intoxicants in local option counties, followed by a question whether the jury believed that was a good and wholesome law and ought to be enforced as any other law, to which they answered, "Yes," was not reversible error on the ground that it tended to prejudge the facts. *Wilson v. State* (Cr. App.) 154 S. W. 571.

— **Discretion of court.**—Discretion of court on challenge of juror for cause will not be reviewed unless clearly abused. *Riddles v. State* (Cr. App.) 46 S. W. 1058.

The scope of the preliminary examination of jurors, though resting in the discretion

of the trial judge, may be reviewed by the appellate court. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 141 S. W. 1011.

The refusal to allow the defendant to ask certain questions on the preliminary examination of jurors held an abuse of the discretion of the trial court. *Id.*

In the absence of anything showing an abuse of the trial court's discretion in disposing of an attack on the juror, its action will not be disturbed; the presumption being that the trial court satisfied himself that there was no misconduct on the juror's part. *Stratton v. Riley* (Civ. App.) 154 S. W. 606.

The discretion of the trial court in overruling the motion in such case held abused. In view of the testimony of the jurors as to discussion as to attorney's fees and medical bills. *Id.*

Art. 5196. [3210] Juror not to be asked certain questions.—In examining a juror, he shall not be asked a question the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by indictment or other legal accusation with theft or any felony.

Does not excuse negligence in ascertaining qualifications.—This article does not excuse want of diligence in other respects to ascertain a juror's qualifications, and after trial it is too late to object that a juror was under indictment. *Sinsheimer v. Edward Well Co.* (Civ. App.) 129 S. W. 187.

Art. 5197. [3211] Peremptory challenge.—A peremptory challenge is made to a juror without assigning any reason therefor.

In general.—In a prosecution for theft, refusal to allow defendant peremptory challenges held not error. *Smith v. State* (Cr. App.) 75 S. W. 298.

Examination of juror.—Examination in trial for cause, see notes under Art. 5195.

Certain question to jurors with a view of peremptory challenges held improper. *Drye v. State* (Cr. App.) 55 S. W. 65.

Art. 5198. [3212] Number of peremptory challenges in district court.—Each party to civil suit in the district court shall be entitled to six peremptory challenges. [Act Dec. 1, 1871, p. 61, sec. 6.]

More than one plaintiff or defendant.—Where there is more than one defendant the challenges are limited to six, when the issues to be tried between the plaintiff and the defendant are the same. This rule is not affected by the fact that the extent of liability may be different. *Hargrave v. Vaughn*, 82 T. 347, 18 S. W. 695; *Wolf v. Perryman*, 82 T. 112, 17 S. W. 772.

When two or more defendants have a common defense, they are considered as one party. *Allen v. Waddill* (Civ. App.) 26 S. W. 273; *Jones v. Ford*, 60 T. 127; *Wolf v. Perryman*, 82 T. 112, 17 S. W. 772; *Hargrave v. Vaughn*, 82 T. 347, 18 S. W. 695.

If the issues are different, each is entitled to challenges. *Rogers v. Armstrong*, 30 S. W. 848. When the plaintiff and an intervener are making a common fight against a garnishee and none against each other, they constitute one party. *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 28 S. W. 1027, 8 C. A. 227.

On the trial of right of property between the attaching creditors of the vendee and the vendor, the former constitute a single party and are allowed but six challenges. *Raby v. Frank*, 12 C. A. 125, 34 S. W. 777.

On a trial of the right of property between a mortgagee and the purchasers at an execution sale, the purchasers held entitled only to the challenges allowed to a single party. *Watts v. Dubois* (Civ. App.) 66 S. W. 698.

Where defendants did not exercise or attempt to use all the six challenges which they were allowed, they could not complain on appeal of a refusal to allow them separate jury list and six peremptory challenges each. *Wells v. Houston*, 29 C. A. 619, 69 S. W. 183.

Where there are two defendants in a case and one as warrantee pleads over against his codefendant as warrantor for recovery on his warranty they are each entitled to six challenges. If there are no antagonistic interests among several defendants to a suit, they are considered but one party and are collectively entitled to but six challenges. *Waggoner v. Dodson*, 96 T. 6, 69 S. W. 994.

Where the interests of two defendants jointly sued were identical, they were not entitled to separate jury lists or more than six peremptory challenges. *St. Louis Southwestern Ry. Co. of Texas v. Barnes* (Civ. App.) 72 S. W. 1041.

Each of several defendants, having conflicting claims, held entitled to six peremptory challenges. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 97 T. 201, 77 S. W. 410.

In an action against several defendants, entitled to six peremptory challenges each, it was not error to allow the defendants to consult in exercising their challenges. *Id.*

Defendants having conflicting interests are distinct parties within the statute relating to challenges to jurors. *Sweeney v. Taylor Bros.*, 41 C. A. 365, 92 S. W. 442.

Each defendant was not entitled to six peremptory challenges, where there was no fact issue between them, though one raised an issue between himself and plaintiff not raised by the other defendant. *Witliff v. Spreen*, 51 C. A. 544, 112 S. W. 98.

In an action against two street railway companies and a city for injuries to a traveler on a street rendered defective because the track protruded over the surface thereof, the two companies held entitled to only six peremptory challenges between them. *Citizens' Ry. & Light Co. v. Johns*, 52 C. A. 489, 116 S. W. 62.

Each defendant is entitled to six peremptory challenges when there is a controversy between them. *Hogsett v. Northern Texas Traction Co.*, 55 C. A. 72, 118 S. W. 807.

In trespass to try title, where one of the defendants pleaded over against the other as his warrantor to the land, and the other pleaded a general denial, each were entitled to six challenges, though there was no real contest between them. *Hannay v. Harmon* (Civ. App.) 137 S. W. 406.

Where connecting carriers made a common defense to the same attorneys at suit for injury to live stock in transit, and did not require separate jury lists, it was not error to limit the number of their peremptory challenges to six between them. *Galveston, H. & S. A. R. Co. v. Saunders* (Civ. App.) 141 S. W. 829.

— **Intervener.**—When there is an intervener but there is no contested issue between him and the defendants, it is proper to treat them all as defendants and restrict them to the number of challenges allowed defendants in a civil action. *Baum v. Sanger* (Civ. App.) 49 S. W. 650.

Conflict of laws.—One is entitled only to the number of challenges allowed by law at the time of the trial. *Edmonson v. State* (Cr. App.) 44 S. W. 154.

Art. 5199. [3213] In the county court.—Each party to civil suit in the county court shall be entitled to three peremptory challenges. [Act Aug. 1, 1878, p. 83, sec. 27.]

Antagonistic interests of codefendants.—When suit is brought against two or more railroads for damages under Acts 1899, p. 214 (Art. 1830, § 25), each defendant is entitled to three peremptory challenges in the county court in selecting the jury. *T. & P. Ry. Co. v. Stell* (Civ. App.) 61 S. W. 981.

Where there is more than one defendant in a case in the county court and the interests of the codefendants are antagonistic, each defendant is a party to the suit in the sense in which that term is used in the statute and is entitled to the number of challenges named in the statute. *International & G. N. Ry. Co. v. Bingham*, 40 C. A. 469, 89 S. W. 1114.

Art. 5200. [3214] Challenge to a particular juror made orally, etc.—Challenges for cause and peremptory challenges to a particular juror may be made orally on the formation of a jury to try the case, as provided in articles 5206 and 5208.

Art. 5201. [3215] Court to decide challenges promptly.—The court shall decide without delay any challenge to a particular juror; and when the challenge is sustained the juror shall be discharged from further attendance or from the particular case, as the case may be.

Time for raising objections—Walver.—See notes under Art. 5208.

CHAPTER TEN

FORMATION OF THE JURY FOR THE TRIAL OF A CAUSE

Art. 5202. Clerks to provide a box.
5203. Shall place names of jurors in the box.
5204. Shall draw and record names of jurors.
5205. Where names of full jury not found in the box.

Art. 5206. Challenge for cause to be made, when.
5207. When number of jurors reduced, etc.
5208. Peremptory challenge to be made.
5209. Lists to be returned to clerk, and jury to be called.
5210. Where jury is left incomplete.
5211. Jurors to be sworn.

Article 5202. [3216] Clerks to provide a box for use in drawing jurors.—The clerks of the district and county courts shall each provide and keep a box with a sliding lid, suitable for the purposes indicated in this chapter. [Act Aug. 1, 1876, p. 82, sec. 21.]

Art. 5203. [3217] Shall place names of jurors in the box.—When the parties to a civil cause, which is to be tried by a jury, have announced themselves ready for trial and no challenge to the array is made, the clerk shall write the names of all the regular panel for the week on separate slips of paper, as near the same size and appearance as may be, and shall place such slips in the box provided for in the preceding article, and shall mix them well. [Id.]

Time for making challenges for cause.—See note under Art. 5206.

Art. 5204. [3218] Shall draw and record names.—The clerk shall draw from the box, in the presence of the court, the names, one by one, of twenty-four jurors, if in the district court, or so many as there may be, if there be a less number in the box; and the names of twelve jurors if in the county court, or so many as there may be if there be a less number in the box; and shall write the names as they are drawn upon sev-

eral slips of paper and deliver one slip to each of the parties to the suit or their attorneys. [Id. sec. 22.]

When to be drawn.—The names of the jurors should be drawn and the lists made after the parties have announced ready for trial. *Railway Co. v. Keith*, 74 T. 287, 11 S. W. 1117.

Panel containing less than 24.—That the panel from which the jury is drawn is not full is immaterial. *Railway Co. v. Greenlee*, 70 T. 559, 8 S. W. 129; *Railway Co. v. Duvall*, 12 C. A. 348, 35 S. W. 699.

The parties may be compelled to strike the jury from a panel containing more than 12 but less than 24 names. *Gray v. State ex rel. Langham*, 19 C. A. 521, 49 S. W. 699.

Art. 5205. [3219] Where names of full jury not found in the box.—Where there are not so many names drawn from the box as twelve, if in the district court, or six, if in the county court, the court shall direct the sheriff to summon such number of qualified persons as it may deem necessary to complete the panel; and the names of the persons so summoned shall be placed in the box and drawn and entered upon slips as provided in the preceding article.

In general.—Where a juror, after selection, cannot be found, permitting a talesman to go on the jury held without prejudice. *Moore v. Dunn*, 16 C. A. 371, 41 S. W. 530.

Appellant held to have consented to the selection of the jury by any means adopted by the court, and hence not entitled to object to the manner of such selection on appeal. *International & G. N. R. Co. v. Foster*, 26 C. A. 497, 63 S. W. 952.

Where, when a case is called for trial, a jury was out, and, after exhausting the remainder of the panel, talesmen were called and qualified, and plaintiff had exhausted his challenges on the list before the other jury returned, it was not error to complete the trial jury from such talesmen. *Texas & N. O. R. Co. v. Wright*, 31 C. A. 249, 71 S. W. 760.

Party consenting to setting cause for trial at a time at which trial must be had before a picked up jury held to have waived objection to such jury. *Texas & P. Ry. Co. v. Coggin & Dunaway*, 44 C. A. 423, 99 S. W. 1052.

Under the statute permitting trial to proceed with less than 12 jurors in certain cases, a motion to withdraw a juror for interest developed by the evidence held properly denied. *Zarate v. Villareal (Civ. App.)* 155 S. W. 328.

Talesmen not to be summoned while 12 remain on panel.—Construing this article and Arts. 5207, 5208, held, that the object of the statute was, as far as practicable, to secure the formation of a jury from the names selected by the jury commissioners, and to prevent delay in the formation of a jury. If, when a jury is to be impaneled, as many as 12 names remain of the panel for the week, no talesman should be summoned until challenges for cause have been made. If, after challenge for cause, as many as 12 remain in the jury box, both parties must then proceed to make their peremptory challenges. Whenever the number is less than 12, either when first drawn or after challenges for cause, or peremptory challenges, then, and not before, the court may order others to be summoned by the sheriff. *Railway Co. v. Greenlee*, 70 T. 553, 8 S. W. 129.

Where as many as 12 regularly drawn jurors remained it is reversible error to add the names of talesmen until the list of those regularly drawn has been reduced by challenge. *Houston Electric Co. v. Seegar*, 54 C. A. 255, 117 S. W. 903.

Art. 5206. [3220] Challenge for cause to be made, when.—When as many as twelve or more jurors, if in the district court, or six or more, if in the county court, are drawn, and the slips containing their names are delivered to the parties, if either party desire to challenge any juror for cause, such challenge shall now be made.

Time for objection.—Grounds of challenge not presented at the proper time are waived. *McGehee v. Shafer*, 9 T. 20; *Givens v. State*, 6 T. 343; *Rector v. Hudson*, 20 T. 234; *Boetge v. Landa*, 22 T. 105.

Construing Art. 5203 and this article, held, it is contemplated by the statutes that the challenge of jurors for cause should be made after their names are drawn by the clerk and the jury lists delivered to the parties, but this may be waived by counsel. If, before the delivery of the list, an exception be taken to the questions propounded to test the qualification of the juror, it cannot be objected on appeal that the examination was conducted at an improper time, when no such objection was urged before. *Railway Co. v. Terrell*, 69 T. 650, 7 S. W. 670.

A party failing to make any effort to ascertain whether jurors are impartial, or failing to object when discovered after trial commenced, cannot urge the objection after a verdict. *Blanton v. Mayes*, 72 T. 417, 10 S. W. 452.

Where a juror stated on his voir dire that he had expressed no opinion, but during the trial defendant discovered that an opinion had been expressed by the juror, and he immediately moved for suspension of the trial and the juror's removal, he was in the exercise of due diligence. *Hughes v. State (Cr. App.)* 60 S. W. 562.

Objection to juror, because not a freeholder in the state or householder in the county, cannot be made after verdict. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

Where defendant failed to question a juror as to his ability to read or write, the discovery after the trial that he could not read or write or understand the English language is not sufficient ground for setting aside the verdict. *San Antonio & A. P. Ry. Co. v. Gray (Civ. App.)* 66 S. W. 229.

Failure to investigate jurors' competency on voir dire held to preclude urging their prejudice on motion in arrest. *Russell v. State*, 44 Cr. R. 465, 72 S. W. 190.

Refusal to permit challenge of juror after impaneling held not error. *Andrews v. State (Cr. App.)* 76 S. W. 918.

Permission granted to plaintiff's counsel, after the jury had been impaneled, to interrogate a juror as to an opinion expressed derogatory to plaintiff, held not error. *Galveston, H. & S. A. Ry. Co. v. Paschall*, 41 C. A. 357, 92 S. W. 446.

An objection that a juror who sat in the trial was not qualified is too late when not made until after verdict. *Rice v. Dewberry* (Civ. App.) 93 S. W. 715.

Jurors held not disqualified, especially when the objection to their competency was made after the jury was impaneled. *King v. State*, 50 Cr. R. 321, 97 S. W. 488.

An objection that a juror is disqualified because he had served more than six days within the six months preceding the trial comes too late after verdict. *Waggoner v. Porterfield*, 55 C. A. 169, 118 S. W. 1094.

There is no negligence in relying on what a juror professes on his voir dire, which will preclude a grant of new trial asked for on the ground of disqualification subsequently discovered. *Makey v. Dryden* (Civ. App.) 128 S. W. 633.

The grounds of disqualification of jurors in this article are of equal importance, and it being too late after trial to raise the question of a juror not being a freeholder or householder, and not knowing how to read and write, it is likewise too late after trial to object that a juror was under indictment for a felony, though Art. 5196 prohibits a juror being questioned as to his having been indicted or convicted; that not excusing want of diligence in other respects to ascertain qualifications. *Sinsheimer v. Edward Well Co.* (Civ. App.) 129 S. W. 187.

If accused was not accorded the right to challenge any member of the petit jury at the time of its organization, it could be raised by him when called on to announce ready for trial. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Objection that a juror was not competent because he could not read and write the English language comes too late after verdict. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

The competency of a juror accepted by parties cannot be attacked after the verdict has been rendered. *Stratton v. Riley* (Civ. App.) 154 S. W. 606.

Error in overruling challenge for cause—Failure of record to show that peremptory challenges were exhausted.—See notes under Title 37, Chapter 20.

Art. 5207. [3221] When number reduced, etc., by challenge for cause.—If the number of jurors be reduced by challenge for cause to less than twelve in the district court, or six in the county court, the court shall order other jurors to be drawn or summoned, as the case may be, and entered upon the slips in place of those who have been set aside for cause.

In general.—Where a party had exhausted his challenges on the list of jurors furnished, it was error to so draw talesmen that he was obliged to accept them without opportunity to challenge. *Gulf, C. & S. F. Ry. Co. v. Mitchell*, 18 C. A. 380, 45 S. W. 819.

Completing a jury by summoning talesmen held not error. *Gonzales v. State*, 58 Cr. R. 257, 125 S. W. 395.

Filling vacancy after trial has begun.—After the full jury of 12 men has been selected and the trial commenced, and a juror is disabled so that he cannot continue to serve, the court is not authorized to have talesmen summoned and force the parties to select a juror from the talesmen to fill up the jury. But under Art. 5215 the court can compel the parties to proceed with the trial before the 11 remaining jurors. *Waggoner v. Sneed*, 53 C. A. 278, 118 S. W. 549.

Art. 5208. [3222] Peremptory challenge to be made, when.—When a juror has been challenged and set aside for cause, his name shall be erased from the slips furnished the parties; and, if there be remaining on such slips not subject to challenge for cause, twelve names, if in the district court, or six names, if in the county court, the parties shall proceed to make their peremptory challenges if they desire to make any. [Id.]

List not to be read until both parties have stricken.—The defendant is not entitled to have the list of jurors remaining after the striking by plaintiff, called before he passes on the jury. *Insurance Co. v. Brown*, 2 U. C. 160.

Art. 5209. [3223] Lists to be returned to the clerk and jury to be called.—When the parties have made their peremptory challenges, or when they decline to make any, they shall deliver their slips to the clerk; and the clerk shall, if the case be in the district court, call off the first twelve names on the slips that have not been erased, and if the case be in the county court, the clerk shall call off the first six names on the slips that have not been erased, who shall constitute the jury to try the case.

Right of parties to jury list.—Refusal of a separate jury list to defendants jointly sued on a bond held not error. *Janes v. Ferd Helm Brewing Co.* (Civ. App.) 44 S. W. 896.

Art. 5210. [3224] When jury is left incomplete.—When, by peremptory challenges, the jury is left incomplete, the court shall direct such number of other jurors to be drawn or summoned, as the case may be, as the court may consider sufficient to complete the jury; and the

same proceedings shall be had in selecting and impaneling such jurors as are had in the first instance.

Challenging talesmen.—A party who has not exhausted his challenges may exercise his right to challenge when talesmen are called to complete the jury. *Mitchell v. Mitchell*, 80 T. 101, 15 S. W. 705.

Art. 5211. [3225] Jurors to be sworn.—When the jury has been selected, such of them as have not been previously sworn for the trial of civil causes, shall be sworn by the court, or under its direction.

Effect of not swearing.—Judgment will not be reversed because record falls to show that jury were sworn, no point having been made in trial court. *Gay Ranch Co. v. Rowland* (Civ. App.) 50 S. W. 1086.

Judgment rendered on a verdict of a jury which was not sworn is not necessarily void. *Texas & P. R. Co. v. Butler*, 52 C. A. 327, 135 S. W. 1064.

Waiver of objections.—It is too late after trial to object that a juror was not sworn. *Burns v. Mathews* (Civ. App.) 46 S. W. 79.

Defendant, failing to object that the jury had not been sworn, held to have waived the defect, and a judgment entered on a verdict against defendant was not void though it recited that the jury was not sworn. *Texas & P. Ry. Co. v. Butler*, 52 C. A. 323, 114 S. W. 671.

CHAPTER ELEVEN

OATH OF JURORS IN CIVIL CASES

Art.
5212. Jury shall be sworn.

Art.
5213. Form of oath.

Article 5212. [3226] Jury shall be sworn.—Before the trial of any civil cause, the jurors shall be sworn by the court, or under its direction. [Act Feb. 13, 1858, sec. 10. P. D. 3984.]

Cited, *State v. W. C. Ward & Sons* (Civ. App.) 135 S. W. 182.

Presumption that jury was sworn.—See notes under Art. 3687, Rule 12.

Art. 5213. [3227] Form of oath.—The form of the oath to be administered to jurors in civil cases shall be in substance as follows: "You, and each of you, do solemnly swear that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law, as it may be given you in charge by the court, and to the evidence submitted to you under the rulings of the court. So help you God." [Id. P. D. 3984.]

Affirmance.—Error in discharging a juror, who desired to affirm, but would not be sworn, is not cured because defendant had not exhausted his peremptory challenges when the jury was completed. *Riddles v. State* (Cr. App.) 46 S. W. 1058.

CHAPTER TWELVE

JURIES—HOW CONSTITUTED, AND THEIR VERDICTS

Art.
5214. Jury in district court.
5215. Death or inability of jurors in district court pending trial.

Art.
5216. Jury in the county and justices' courts.
5217. The entire jury must concur in the verdict.

Article 5214. [3228] Jury in district court.—The jury in the district courts shall be composed of twelve men; but the parties may by consent agree, in a particular case, to try with a less number. [Const., art. 5, sec. 13.]

In general.—The discharge of a juror because improper influence was exercised on him does not warrant the court in proceeding to trial with the remaining jurors, over objection. *Sunset Wood Co. v. Broadnax* (Civ. App.) 136 S. W. 487.

Necessity of less than 12 signing verdict.—When a juror is excused from service by counsel for both parties after the trial has begun, and a verdict is rendered by the remaining 11, it is not necessary that all should sign it. *Lumber Co. v. Hancock*, 70 T. 312, 7 S. W. 724.

Where a juror becomes sick during the trial and is excused by both parties, it is not necessary for remaining 11 to sign the verdict; but it is proper for it to be signed by the foreman. If the juror had died or been disabled, the remainder could have re-

turned the verdict; but all the remaining jurors should have signed the verdict. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1110.

Record need not show names of jurors.—When the record recites that “thereupon came a jury of 12 good and lawful men,” and names but 11, in the absence of an objection in the trial court on that ground, it will be presumed on appeal that the last name was omitted by mistake. *Foster v. Van Norman*, 1 T. 636. It is not necessary to set out the names of the jurors. *Clark v. Davis*, 7 T. 556.

Interest of juror developed by evidence—Remedy.—Since the statute does not permit a trial to proceed with less than 12 jurors, except in case jurors, not exceeding 3, may die or be disabled, and disqualification is not provided for, a motion to withdraw a juror for interest developed by the evidence would be denied, as the only remedy would be to move to withdraw announcement of ready for trial and have the case withdrawn from the jury and another trial ordered. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

Art. 5215. [3229] Death or inability of jurors in district court pending trial.—Where, pending the trial of any case in the district court, one or more of the jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury shall have power to render the verdict; but in such case the verdict shall be signed by every remaining member of the jury. [Id. Act Aug. 1, 1876, p. 82, sec. 19.]

Compelling parties to proceed with less than 12 jurors.—Where a juror is disabled, so as to be incapacitated from serving, after the trial has begun, the court may compel the parties to proceed with the remaining jurors. *Waggoner v. Sneed*, 53 C. A. 278, 118 S. W. 549.

Necessity for signing verdict.—Where a juror dies or becomes disabled, the verdict should be signed by the remaining jurors. *Gray v. Freeman*, 37 C. A. 556, 84 S. W. 1110.

Mental distress caused by sickness in family.—A juror is not disabled from sitting “by mental distress caused by sickness in his family demanding his presence at home. It may be cause for suspending the trial.” If a juror becomes so sick as to be unable to sit longer, he is plainly disabled. If by reason of some casualty or otherwise a juror is physically prostrated, so as to be wholly incapable of sitting as a juror, or loses his mental powers, so as to become insane or idiotic, he would be disabled from acting. *H. & T. C. Ry. Co. v. Waller*, 56 T. 331, citing *Ray v. State*, 4 App. 454.

Insanity.—Under Const. art. 5, § 13, providing that, when, pending trial, one or more jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury may render the verdict, and this article, to the same effect, where a juror became insane, he was properly discharged, and the trial continued before the remaining jurors. *Sunset Wood Co. v. Broadnax* (Civ. App.) 136 S. W. 487.

Review of court's discretion.—The question of disability rests in the judgment and discretion of the trial judge, and unless this discretion appears to have been abused the court's action will not be revised. *Routledge v. Elmendorf*, 54 C. A. 174, 116 S. W. 160, 161.

Art. 5216. [3230] Jury in county and justices' courts.—The jury in the county courts and in courts of justices of the peace shall be composed of six men. [Id. sec. 27.]

Art. 5217. [3231] Entire jury must concur in verdict.—No verdict shall be rendered in any cause except upon the concurrence of all the members of the jury trying the same. [Id. sec. 19. Const., art. 5, sec. 13.]

Necessity of full number.—Under the constitution, providing that a county court jury shall consist of six men, the court cannot discharge one and force a trial by the remaining five. *Jackson v. J. A. Coates & Sons* (Civ. App.) 43 S. W. 24.

Coercion.—Jurors should not be coerced to find a verdict. *Burgess v. Singer Mfg. Co.* (Civ. App.) 30 S. W. 1110.

Correction of verdict.—The court, in the presence and at the request of the jury, may correct the verdict, the jurors assenting thereto. *Hilburn v. Harrell* (Civ. App.) 29 S. W. 925.

Method of arriving at verdict.—Where, in an action on an order drawn on funds due a contractor, a verdict is rendered for the only amount for which it could be rightfully rendered, a contention that it is a subtraction verdict is unavailing. *Foley v. Houston Co-op. & Mfg. Co.* (Civ. App.) 106 S. W. 160.

The action of the court in upholding a verdict as against the objection that it was a quotient verdict held not an abuse of discretion. *Chicago, R. I. & G. Ry. Co. v. Trippett*, 50 C. A. 279, 111 S. W. 761.

Verdict held to have been arrived at by lot, and erroneous. *Texas Midland R. R. v. Atherton* (Civ. App.) 123 S. W. 704.

Arriving at a verdict by dividing the sum of the amounts each juror thought plaintiff entitled to recover by 11, and adopting the quotient as the amount of the verdict, held not to be commended. *International & G. N. R. Co. v. Lane* (Civ. App.) 127 S. W. 1066.

A verdict reached by an agreement made beforehand that each juror should write down the amount he would award, and that the total of such amounts should be divided by 12, and the quotient should be the verdict, and rendered for a sum equal to the quotient, will be reversed. *Missouri, K. & T. Ry. Co. of Texas v. Bounds* (Civ. App.) 136 S. W. 269.

Quotient method of obtaining part of a verdict for damages, held to render the verdict illegal. *Whisenant v. Schawe* (Civ. App.) 141 S. W. 146.

Where the jury differed as to the amount of the recovery and agreed to divide by 12 the sum each should name, but it was understood that the method was not to be

binding as to the result, and a verdict was thereafter agreed to by all, the court properly refused to set aside the verdict. *Northern Texas Traction Co. v. Evans* (Civ. App.) 152 S. W. 707.

New jury on disagreement.—Where the first jury disagreed, the court may again set the case for trial during the same term and call a new jury. *Texas Midland R. Co. v. Crowder*, 25 C. A. 536, 64 S. W. 90.

CHAPTER THIRTEEN

COMPENSATION OF JURORS OF THE DISTRICT AND COUNTY COURTS IN CIVIL CASES

Art.

5218. Pay of jurors.

5219. Certificate of jury service.

Art.

5220. Jury scrip receivable at par for all county taxes.

Article 5218. [3232] Pay of jurors.—Each juror in civil cases shall receive two dollars and fifty cents for each day, and for each fraction of a day, he may serve or attend as such juror. [Acts 1911, p. 104, sec. 1, amending Art. 3232, Rev. St. 1895.]

Art. 5219. [3233] Certificate of jury service.—The amount due to jurors shall be paid by the county treasurer upon the certificate of the clerk of the district or county court in which such service was rendered: which certificate shall state the service, when rendered, by whom rendered, and the amount due therefor. [Act Nov. 12, 1866, p. 201, sec. 1.]

Mandamus to compel issuance of certificate.—It not being the duty of the clerk to deliver certificates evidencing jury service to any person than to those who rendered the service, he cannot be compelled by mandamus to deliver them to any other person. *Pace v. Ortiz*, 72 T. 437, 10 S. W. 541.

Art. 5220. [3234] Jury scrip receivable at par for all county taxes.—All certificates issued under the provisions of the foregoing article shall, without further action by any authority, be receivable at par for all county taxes. The same may be transferred by delivery, and no rule or regulation made by the commissioners' court or other officer or officers of a county shall defeat the right of the holder of any such certificate to pay county taxes therewith. [Id.]

TITLE 76

JUVENILES

Chap.
1. State Juvenile Training School.

Chap.
2. Girls' Training School.

CHAPTER ONE

THE STATE JUVENILE TRAINING SCHOOL

Art.	Art.
5221. Board of trustees.	5228. Who to be confirmed.
5222. Meetings of boards.	5229. Same.
5223. Board to have advisory control; employment of superintendent; annual reports.	5230. Leave of probation.
5224. Shall provide instruction, etc.	5231. Duration of sentence.
5225. The superintendent.	5232. Inmates to be divided into classes.
5226. Powers and duties of the superintendent.	5233. Clothing, books, etc., to be furnished.
5227. Salaries, etc., how paid.	5234. Escapes.
5227a. Religious services; chaplain; salary.	5234a. Corporal punishment prohibited, except; mode of punishment; violation of act; penalty.

Article 5221. [2941] Name of institution; board of trustees; tenure; qualifications; compensation; approval of accounts.—The institution known as “The State Institution for the Training of Juveniles,” located at Gatesville, shall be named and known as “The State Juvenile Training School,” hereafter to be designated as “The Training School.” The government of the said school shall be vested in a board of trustees, composed of six persons. The members of the board shall be appointed by the governor, with the advice and consent of the senate, and may be removed by him for cause stated in writing, after an opportunity to be heard. Two members of the board so appointed shall serve for a term of two years; two members for a term of four years, and two members for a term of six years, the length of their respective terms to be determined by lot. All succeeding appointments shall be for a term of six years each; provided, that if vacancies occur, appointments shall be made for the unexpired term. The members appointed shall be persons of high character and ability, known for their interest in the welfare of the unfortunate classes. Each member shall receive \$5.00 per day and traveling and other necessary expenses while engaged in the performance of official duties, for which the comptroller shall issue his warrant on the account, verified by said member and approved by the chairman of the board. The chairman of said board shall not approve any expense account of any trustee until same has been allowed by a majority of the board. [Acts 1909, p. 103. Acts 1913, S. S., p. 7, sec. 1, amending Art. 5221, Rev. St. 1911.]

Art. 5222. [2942] Election of chairman and secretary; meetings of board.—Said board shall elect one of their members as chairman and one as secretary of the board. The board shall hold four regular meetings each year and shall hold such special meetings at such times and places as are deemed necessary, when requested so to do in writing by two members of the board. [Id. sec. 2, amending Art. 5222, Rev. St. 1911.]

Art. 5223. [2943] Board to have advisory control; employment of superintendent; annual reports.—The board of trustees shall have advisory control of the said training school. It shall employ the superintendent. It shall make an annual report to the governor setting forth in full all the facts pertaining to the school, including receipts and dis-

bursments; the number and salaries of all employés; the number of inmates received and discharged and the number still on hand, and estimates for appropriation required for two years of maintenance. It shall include in its report the general condition of the students committed to its care, and the success with which the reformatory measures of the school have been administered. [Id. sec. 3, amending Art. 5223, Rev. St. 1911.]

Art. 5224. [2944] Provision of suitable instruction; what shall be taught.—Said board of trustees and the superintendent shall provide for, establish and maintain suitable instruction and training of the inmates of said institution. Said instruction shall include common school, as well as industrial, or agricultural branches, or either or all, as may be deemed desirable by said board and superintendent; provided that it shall be the duty of said board and superintendent to arrange that each student of said training school shall receive a reasonable amount of instruction in the school of letters and industrial branch each year. Each inmate shall be given definite instruction and training in some useful occupation. Each inmate shall be given such moral training and discipline as he is capable of receiving. The prime end to be sought by said board is to reform, educate and train the children committed to the institution, into industrious and useful law-abiding citizens, strengthen their self-control and place them in a moral environment that will build character and inculcate correct ideas of civic virtue and responsibility. [Id. sec. 4, amending Art. 5224, Rev. St. 1911.]

Art. 5225. [2945] The superintendent; removal; qualifications; oath and bond.—The board of trustees shall appoint a superintendent of said school who shall not be removed without cause, which shall be stated by said board in writing and filed with the secretary of state for public record, and in case board desires to dismiss said superintendent it shall give him two months' notice. The superintendent shall be a man of high moral character, education and training, and who shall have had experience in handling wayward and delinquent boys. The superintendent shall before entering upon the duties of his office take the oath of office prescribed by the constitution, and shall give a bond in the sum of \$10,000 payable to the governor or his successors in office, conditioned for the faithful performance of the duties of his office. Said bond shall be signed by the superintendent and two good and sufficient sureties, or by himself and some solvent surety company, authorized to transact business in Texas, and shall be approved by the secretary of state and be deposited in his office. [Id. sec. 5, amending Art. 5225, Rev. St. 1911.]

Art. 5226. [2946] Powers and duties of superintendent.—The superintendent shall have control and management of the training school, subject to the provisions of this law and the regulations adopted by the board.

1. It shall be the duty of the superintendent to keep a register in which he shall enter the name, date of reception, previous moral character, habits and education, so far as can be ascertained, his conduct and deportment, educational and vocational advancement while in said school, the discharge, death, escape, commutation of time, parolment and punishment of each inmate or person admitted to said institution.

2. He shall see that the buildings are kept in good and sanitary order, and that the premises are kept in a healthful and cleanly condition.

3. He shall keep or cause to be kept, the books of the institution fully exhibiting all moneys received and disbursed, the source from which received and purposes for which the same is expended; provided, that all supplies for the institution shall be purchased by the state purchasing agent the same as for other similar institutions. The said books shall give a complete record of all products produced on the farm, or received from any source, and shall show the disposition made of the same,

whether sold or consumed. Said books shall at all times be open for the inspection of the board of trustees or the governor, or to any one appointed by the governor to inspect or audit said books.

4. At the first regular meeting after the first of the months of March and September the superintendent shall make a semi-annual report in duplicate, in writing under oath, showing in detail the fiscal operations of the institution since the last report, giving under appropriate heads the total number of inmates in the institution at the date of the report, the number received since last report, the number discharged since last report, the number paroled, or otherwise discharged, with such recommendations for the improvement of management or other matter as he may deem proper. One of said reports, shall be presented to the board of trustees at their regular quarterly meeting and the other shall be forwarded to the governor.

5. It shall be the duty of the superintendent to make supplemental reports in writing to the board of trustees on any matter within the scope of his duties, when requested to do so by the president of the board of trustees. [Id. sec. 6, amending Art. 5226, Rev. St. 1911.]

Art. 5227. [2947] Employment of subordinate officers, teachers and employés; character and habits of employés; salaries; accounts.—The superintendent shall employ and may dismiss for cause stated in writing to the board, such sub-ordinate officers, teachers and employees as may be deemed requisite, and necessary to the conduct, administration and maintenance of said institution, up to the standards of efficiency and utility essential to accomplish the best results; provided that it shall be a violation of the rules of said institution for any employee to use tobacco or intoxicating liquors in any form while on duty, and should any employ be guilty of violating this rule, it shall be the duty of the superintendent to discharge such employee.

The salaries and compensation of all subordinate officers, teachers and employés aforesaid, shall be fixed by the board of trustees, not to exceed the amounts appropriated for same, and the same shall be prescribed by said board in the form of an itemized account sworn to by said superintendent; and the same shall be paid monthly on the comptroller's warrants based upon such sworn itemized account aforesaid. Said account shall contain the name and address of each person and the amount due and for what service; provided, that no account for salary shall be presented by said superintendent until the same has been fixed by said board as herein provided. [Id. sec. 7, amending Art. 5227, Rev. St. 1911.]

Art. 5227a. Religious services; chaplain; salary.—The board of trustees shall provide for religious services at said state institution, for the benefit of the inmates thereof, and to that end shall employ a chaplain, who shall be an ordained minister of the gospel, and the superintendent shall require all inmates in said institution, who are physically able, to attend at least one religious service on each Sunday. Such chaplain shall, under the direction of the superintendent, devote his time to the religious and moral training and education of said inmates, and to visiting sick inmates at such times and occasions as may be necessary, and shall receive an annual salary not to exceed (\$720.00) seven hundred and twenty dollars; provided, such chaplain may also be a teacher, such as is provided in article 2947. [Acts 1911, p. 211, sec. 1.]

Art. 5228. [2948] Who to be confined; discharge of inmates.—There shall be confined in said state training school for boys all persons confined in the state institution for the training of juveniles at the time this law takes effect, and all persons committed to the state training school for boys, and all persons who may be sentenced to a term in said state institution for the training of juveniles before this law takes effect, and their present status and terms of sentence shall not be affected by

this law; also all juveniles committed to said institution by any court within this state acting under authority of law. Provided, that all inmates sentenced to the state institution for the training of juveniles shall only be required to serve out their unexpired terms in said institution, at which time they shall be released. [Acts 1909, p. 103. Acts 1913, S. S., p. 7, sec. 8, amending Art. 5228, Rev. St. 1911.]

Art. 5229. [2949] Same; separation of races.—Hereafter all male persons under the age of seventeen years who shall be convicted of a felony, or other delinquency in any court within this state, unless his sentence be suspended, as provided by law, or otherwise disposed of or unless by reason of the length of the term for which he is sentenced, he is required under the law to be confined in the state penitentiary, shall be confined in the Texas training school for boys, provided that the white boys shall be kept, worked and educated entirely separate from the boys of other races, and shall be kept apart in all respects. [Id. sec. 9, amending Art. 5229, Rev. St. 1911.]

Art. 5230. [2950] Grading and promotion of inmates; leave of probation; final discharge; return to institution.—The said board of trustees shall establish and maintain in the said school a system of grading and promotion on a basis of the moral, intellectual and industrial advancement of the pupils. When the superintendent is satisfied that any inmate has acquired sufficient self-control, moral habits and industrial efficiency, and suitable employment, under responsible, sober and moral person, can be found for the said inmate, he shall with the approval of the chairman of said board of trustees, grant said inmate a "leave of probation." For the purpose of securing homes and employment for the inmates of the school and of visiting and supervising them while on probation, a furlough officer shall be employed who shall, when not engaged with his duties as furlough officer, assist in teaching, and in the general work of the school, under the direction of the superintendent. When employment has been secured for any inmate he shall be sent out on a furlough, with the condition that the person furloughed, and his employer, shall send a written report, at the end of each month thereafter for a period of twelve months, to the furlough officer, stating the habits and demeanor of the said furloughed person. If each of the said reports be favorable the superintendent shall recommend to the governor that a full release be granted to the said furloughed person and that his term of commitment be terminated. Upon the termination of the term of commitment by the governor the furloughed person shall be finally discharged, with none of his legal rights impaired or abrogated. In the event any of said monthly reports shall be deemed unfavorable, or for any reason be not sent as herein provided, and the said superintendent should for any reason become convinced before the expiration of the said twelve months that the said furloughed person should be returned to the state training school for further training or discipline, the said furloughed person shall, in that event, forfeit his leave of probation, and shall be returned to said institution. If his said employers shall fail or refuse to return said furloughed person to said institution, it shall be the duty of the furlough officer, any sheriff, or other peace officer, upon notice from the superintendent, to take said furloughed person into custody, under the same conditions as if said person were an escaped inmate, and return him to said institution in the manner prescribed in the law for apprehending and returning escaped inmates. No inmate of the said state training school for boys, who shall be committed to said school by a judgment of a district court after the conviction upon a charge of felony, shall be granted a leave of probation, furloughed or released before the expiration of the term for which he shall be so committed, unless same be recommended by the superintendent and a majority of the board of trustees, and is approved by the governor. In case any such inmate

convicted of a felony or other delinquency is granted a leave on probation, as herein provided, the procedure shall be the same as herein provided for inmates not confined on a judgment of felony; provided, that the governor shall, at all times, have full power to grant an unconditional pardon or commute sentence of any inmate committed to said school. [Id. sec. 10, amending Art. 5230, Rev. St. 1911.]

Art. 5231. [2951] Indeterminate sentence; limitation of term; majority of inmate.—Commitments to the training school shall be upon the indeterminate sentence plan; provided that no inmate shall be committed to said institution for a longer period than five years; provided, that no inmate shall remain or be detained in said institution or upon parole under the control of the officers of said school, after he has reached the age of twenty-one years. [Id. sec. 11, amending Art. 5231, Rev. St. 1911.]

Art. 5232. Inmates to be classified; care and training.—The superintendent shall divide inmates into such classes and shall house, feed and train such inmates in such manner as he may deem best for the development and advancement of the child. [Id. sec. 12, amending Art. 5232, Rev. St. 1911.]

Art. 5233. [2952] Shelter, food, clothing, books, etc.—All inmates of said institution shall be provided with shelter, wholesome food and suitable clothing, books, means of healthful recreation, and other material necessary for their training, at the expense of the state, except as otherwise provided by law. [Id. sec. 13, amending Art. 5233, Rev. St. 1911.]

Art. 5234. [2953] Escape of inmates; failure to return on breach of furlough; apprehension; costs.—If any inmate confined in the state training school for boys shall escape therefrom, or if on leave of probation or furlough, and is ordered returned and the employer of said furloughed person fails or refuses to return him as provided in this law, it shall be the duty of the superintendent of said institution or any officer or employee of same, or the sheriff or any peace officer, to apprehend and detain him. It shall be lawful for any person to apprehend such escaped inmate and forthwith deliver him to any sheriff or peace officer; any such escaped inmate shall be returned to said school by any sheriff, peace, furlough or probation officer; and the costs of his return shall be paid by the county from which said inmate was sentenced; provided, if any inmate committed to said institution on a charge of felony shall escape, the costs of his return to said institution shall be paid by the state, on warrant of comptroller, based upon a sworn itemized statement of said expense account, approved by said superintendent. [Id. sec. 14, amending Art. 5234, Rev. St. 1911.]

Art. 5234a. Corporal punishment prohibited, except; mode of punishment; violation of act; penalty.—Corporal punishment in any form shall not be inflicted upon the inmates of said institution except as a last resort to maintain discipline, and then only in the presence of the superintendent, and a resident nurse; and at no time shall any inmate be struck more than twenty times, and that only with such instrument and in such manner as will inflict reasonable and moderate punishment, considering the age, size and strength of the culprit and the strength of the person administering such punishment, and at no time shall any weapon or instrument of torture be used, or any instrument which by its make, coupled with the manner of its use would be calculated to inflict bodily injury. Any one violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than \$25.00 nor more than \$100.00 or sentenced to not less than thirty days, nor more than ninety days in jail, or by both such fine and imprisonment. [Id. sec. 15.]

CHAPTER TWO

GIRLS' TRAINING SCHOOL

Art.

- 5234b. School to be established.
- 5234c. Purpose of school; duties of board of control; hospital.
- 5234d. School shall be under state board of control for eleemosynary institutions; if no such board, shall be under board of control, composed and appointed, how; terms; site, etc.
- 5234e. Superintendent, officials and teachers; salaries; removal of superintendent.

Art.

- 5234f. Dismissal or parole of inmates; duties and powers of board, superintendent, etc.
- 5234g. Rules and regulations; time of pupils, how distributed, etc.
- 5234h. Expenses of members of board, etc.
- 5234i. Appropriation, not accessible until subscriptions from counties and cities, etc.; committee to secure funds.

Article 5234b. School to be established.—That there be established and maintained at some place in the state of Texas, to be selected by persons in authority, where suitable farm lands may be secured, a school upon the cottage plan for the education and training of the dependent and delinquent girls of the state, to be known as the girls' training school. [Acts 1913, p. 289, sec. 1.]

Art. 5234c. Purpose of school; duties of board of control; hospital.—It shall be the purpose of this home and school to provide an institution of training for girls who, by their own misconduct, or by their unfavorable surroundings, have become dependent or delinquent and need the care and attention not heretofore provided, and in the accomplishment of the purposes of this Act, the board of control shall provide wholesome and proper quarters, and exercise and diversion, and shall make provision for training in all of the useful arts and sciences to which women are adapted, to prepare them for future womanhood and independence. A proper hospital is to be provided, and instructions given therein in nursing, sanitation and hygiene. [Id. sec. 2.]

Art. 5234d. School shall be under state board of control for eleemosynary institutions; if no such board, shall be under board of control, composed and appointed, how; terms; site, etc.—The girls' training school shall be under the control and management of the state board of control for the eleemosynary institutions of this state. Should there be no such board created, then the school shall be under the management of a board of control, composed of five persons, one of whom shall be the superintendent of public instruction of the state of Texas; another shall be the ranking professor of domestic economy in the college of industrial arts; the remaining three to be appointed by the governor, at least one of whom shall be a woman.

One of three members to be selected by the governor shall be appointed for a term to end January 1, 1915, one other for a term to end January 1, 1917, and the third for a term to end January 1, 1919. At the expiration of each term a successor shall be appointed by the governor then in office for a term of six years. The said board is hereby empowered to select a site for the location of said school, to purchase the same and to build and equip such modern buildings, on the cottage plan, as the appropriation herein provided for will permit. [Id. sec. 3.]

Art. 5234e. Superintendent, officials and teachers; salaries; removal of superintendent.—The board of control shall employ as superintendent of this school a woman of previous experience and training in a similar or like institution, who shall have power to appoint and discharge all subordinate officials and teachers for the school which it may be necessary to employ. The board of control shall fix the salary of the superintendent and all employees. The said board shall also

have authority to remove the superintendent on account of inefficiency, incompetency, inattention to the duties of a superintendent, misconduct or malfeasance in office, and the decision of said board as to such inefficiency, incompetency, inattention to the duties of a superintendent, misconduct or malfeasance in office shall be final. [Id. sec. 4.]

Explanatory.—Sections 5 and 6 relate to commitment of delinquents to the institution by the juvenile court, and have been placed in Title 38, Chapter 2, as Art. 2201a and 2201b.

Art. 5234f. Dismissal or parole of inmates; duties and powers of board, superintendent, etc.—No girl shall be dismissed or paroled until some suitable home has been found for her and only then upon the written recommendation of the superintendent to the board of control, or she has become married with the consent of the authority of such institution and the superintendent, provided, that the provision of this Act shall not be construed to interfere with the governor of the state in exercising executive clemency when in his judgment it may seem best. Any girl who is thus paroled from the institution shall be under the supervision and guidance of the superintendent, who shall require that she write bi-weekly letters to the superintendent or matron of the school for the first six months, and monthly letters thereafter; that the person under whose care or employ the girl is placed shall write monthly letters to the superintendent or matron of the school for the first six months and semi-annually thereafter.

The board of control, superintendent or some other employé of said training school may visit the place where the girl is living or is employed, and it shall be the duty of the person having the girl in custody to answer all questions asked by said visiting committee concerning the conduct, employment or treatment of said girl. If, in the judgment of the board, it should be to the best interests of the girl that she be returned to the school, the board is hereby empowered to have her returned. [Id. sec. 7.]

Art. 5234g. Rules and regulations; time of pupils, how distributed, etc.—The superintendent, with the approval of the board of control, shall make all necessary rules and regulations for the government of the training school, and shall provide that the time of the pupils is properly distributed between the school of letters and the industrial and domestic pursuits, according to the needs of pupil and the facilities at hand. Provision shall be made for giving diplomas or certificates of proficiency for graduates from the nurses training school or any industrial school that may be established by the directors. [Id. sec. 8.]

Explanatory.—Section 9 makes it a misdemeanor to persuade or coerce a girl to leave the institution, and has been omitted.

Art. 5234h. Expenses of members of board, etc.—If, at the time this bill becomes effective, there shall be no board of control and it becomes necessary for the board herein authorized to be created, to act, they shall be paid such amounts as will be necessary to cover the actual expenses incurred in the discharge of the duties as members of such board. [Id. sec. 10.]

Art. 5234i. Appropriation, not accessible until subscriptions from counties and cities, etc.; committee to secure funds, etc.—There is hereby appropriated out of the general revenue of the state of Texas, not otherwise appropriated, the sum of twenty-five thousand dollars (\$25,000.00) for the purchase of land for a site and for the erection of buildings herein provided for, provided, however, that such appropriation shall not be accessible until a like sum of \$25,000.00 shall have been subscribed and paid to said board of control, by private subscription or gifts from counties and cities and for the purpose of securing such funds of \$25,000.00 and such other funds as they may be able to secure by private subscription or gifts from counties and cities of this state,

there is hereby created the following committee composed of five members to work in conjunction with said board of control: President Humane Society of Texas, President Federated Clubs of Texas, President Mothers' Council and Parent-Teachers Association, and two other persons to be selected by the governor.

This committee in conjunction with the board of control of said school, are hereby empowered to adopt such plans as they deem wise and expedient to be used in the securing of such funds.

Authority is hereby granted unto the several cities and counties of this state to donate from their general funds such amounts as the proper authorities deem wise to be used in the establishment of the said school. [Id. sec. 11.]

TITLE 77

LABOR

Chap.

1. Bureau of Labor Statistics.
2. Labor Organizations.
3. Hours of Labor of Females.

Chap.

4. Hours of Labor upon Public Works.
5. Employers' Liability—Insurance.

CHAPTER ONE

BUREAU OF LABOR STATISTICS

Art.		Art.	
5235.	Bureau to be under commissioner of labor.	5240.	Reports and returns, how long preserved.
5236.	Oath; bond; office at the capitol; governor may remove.	5241.	Commissioner may enter factories, mills, etc., in the performance of his duty.
5237.	Biennial report of commissioner; his general duties.	5242.	Commissioner to report to county and district attorneys certain violations of this chapter.
5238.	Biennial report to contain what; to be printed and distributed.	5243.	Salary and compensation of commissioner and other employés.
5239.	Commissioner may issue process, administer oaths, etc.		

Article 5235. Bureau to be under commissioner of labor.—The bureau of labor statistics shall be under the charge and control of a commissioner of labor statistics. [Acts 1909, p. 59, sec. 1.]

Art. 5236. Oath; bond; office to be at capitol; governor may remove.—The commissioner of labor statistics shall be appointed by the governor, whose term of office shall begin on the first day of February of every odd-numbered year, and shall continue for two years and until his successor is appointed and qualified. The commissioner may be removed for cause by the governor, record thereof being made in his office, and any vacancy shall be filled in the same manner as the original appointment. Said commissioner shall give bond in the sum of two thousand dollars, with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of his office, and he shall also take the oath of office prescribed by the constitution. He shall have an office in the capitol building; and, except as hereinafter provided, he shall safely keep and shall deliver to his successors all records, papers, documents, correspondence and property pertaining to or coming into his hands by virtue of his office. [Id. sec. 2.]

Art. 5237. Biennial report of commissioner; his general duties.—The commissioner shall collect, assort, systematize and present in biennial reports to the governor, statistical details relating to all departments of labor in Texas, and especially as affecting or bearing upon the commercial, social, educational and sanitary conditions of the employés and their families, the means of escape from dangers incident to their employment, the protection of life and health in factories and other places of employment, the labor of children and of women and the number of hours of labor exacted of them, and, in general, all matters and things which affect or tend to affect the prosperity of the mechanical, manufacturing and productive industries of this state, and of the persons employed therein. Said commissioner shall, also, as fully as may be done, collect reliable reports and information from each county, showing the amount and condition of the mechanical, mining and manufacturing interests therein, and all sites offering natural or acquired advantages for the location and operation of any of the different branches of industry, and he shall, by correspondence with interested parties in other parts of the United States, or in foreign countries, impart to them such infor-

mation as may tend to induce the location of manufacturing and producing plants within the state, together with such information as may tend to increase the employment of labor and the products of such employment in Texas. [Id. sec. 3.]

Art. 5238. Report to contain what; to be printed and distributed.—In each biennial report, the commissioner shall give a full statement of the business of the bureau since the last preceding report, and such information as may be of value to the industrial interests and to persons employed therein, showing, among other things, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics and apprentices, the wages earned, the savings from the same, the age and sex of the persons employed, the number and character of accidents, the sanitary conditions of places where persons are employed, the restrictions put upon apprentices when indentured, the proportion of married employes living in rented houses, with the average rental paid, the value of property owned by such employes, and a statement as to the progress made in schools in operation for the instruction of students in mechanic arts, and what systems have been found most practical; but such reports shall not contain more than six hundred printed pages, and the same shall be printed and distributed in such manner as is or may be provided by law. [Id. sec. 4.]

Art. 5239. Commissioner may issue process, administer oaths, etc.—The commissioner shall have power to issue subpoenas, administer oaths and take testimony in all matters related to the duties herein required of the said bureau, but such testimony must be taken in the vicinity of the residence or office of the person testifying. [Id. sec. 5.]

Art. 5240. Reports and return, how long preserved.—No report or return made to the bureau under the provisions of this chapter, or the penal laws of this state, and no schedule, record or document gathered or returned by its officers or employes shall be destroyed within two years of the collection or receipt thereof; but, at the expiration of two years all such reports, returns, schedules, records and documents as shall be considered by the commissioner to be of no further value, shall be destroyed, provided that the permission of the governor shall first be obtained for such destruction. [Id. sec. 8.]

Art. 5241. Commissioner may enter factories, mills, etc.—Upon the written complaint of two or more persons, or upon his failure otherwise to obtain information in accordance with the provisions of this law, the commissioner shall have the power to enter any factory, mill, workshop, mine, store, business house, public or private work, or other establishment or place where five or more persons are employed at work when the same is open and in operation, for the purpose of gathering facts and statistics, such as are contemplated by this chapter, and for the purpose of examining into the methods of protecting employes from danger and the sanitary conditions in and around such building or place, of all of which the said commissioner shall make and return the bureau of labor statistics a true and detailed record in writing. [Id. sec. 9.]

Art. 5242. Commissioner to report violations to district and county attorneys.—If the commissioner shall learn of any violation of the law with respect to the employment of children, or fire escapes, or the safety of employes, or the preservation of health, or in any other way affecting the employes, he shall at once give written notice of the facts to the county or district attorney of the county in which the law has been violated, or of some other county, if any there be, having jurisdiction of the offense, and the county or district attorney to whom such notice has been given shall immediately institute the proper proceedings against the guilty person. [Id. sec. 10.]

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Art. 5243. Salary and compensation of commissioner and employés.—The commissioner of labor statistics shall receive a salary of \$2,000.00 per annum, payable monthly, and he shall be allowed a clerk and statistician at a salary of \$125.00 per month, two factory inspectors, and one safety appliance inspector at a salary of \$125.00 per month each, to be appointed by him, and such other employés and assistants as the legislature at any time in the future authorize. The commissioner shall also be allowed all necessary postage and stationery and other expense of a similar character necessary to the transaction of the business of the bureau, and the said salaries shall be paid as in the case of other state officers. In addition to his salary the commissioner and any employé of the said bureau shall be allowed his actual and necessary traveling expenses while in the performance of his duties under this Act, but the total expenses of the said bureau, outside of the salaries paid, shall not exceed six thousand dollars per annum. [Acts 1909, p. 59, sec. 12. Acts 1911, p. 17. Acts 1913, p. 237, sec. 1, amending Art. 5243, Rev. St. 1911.]

CHAPTER TWO

LABOR ORGANIZATIONS

Art.

5244. Right to organize.
5245. Other rights and privileges.

Art.

5246. Not to apply to what organizations.

Article 5244. Right to organize.—It shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments. [Acts 1899, p. 262, sec. 1.]

See *St. Louis S. W. Ry. Co. of Texas v. Griffin*, 154 S. W. 533.

Contracts in general.—Where a contract between boilermakers and apprentices and a railroad's receiver provided against discharge except for cause, the receiver was not authorized to discharge an employé for failure to execute a release of liability for injuries sustained by the employé through the receiver's alleged negligence. *Freeman v. Morrow* (Civ. App.) 156 S. W. 284.

A contract between boilermakers and apprentices and a railroad's receiver, prohibiting discharge except for cause, held not subject to modification by a custom against continuing the service of an employé having an unadjusted claim against the receiver. *Id.*

Suspension of trade union.—Suspension from a trade union without notice or hearing held invalid. *Cotton Jammers' & Longshoremen's Ass'n No. 2 v. Taylor*, 23 C. A. 367, 56 S. W. 553.

Art. 5245. Other rights and privileges.—It shall not be held unlawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit in which such person may then be engaged; provided, that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof. [*Id.* sec. 2.]

Art. 5246. Not to apply to what organizations.—The foregoing articles shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade; provided, that nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employés; provided,

further, that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies. [Id. sec. 3.]

CHAPTER THREE

HOURS OF LABOR OF FEMALES

Art.

5246a. Certain manufacturing and mercantile establishments, etc.

5246b. Laundries.

Art.

5246c. Seats to be provided.

5246d. Not applicable to stenographers.

Article 5246a. Certain manufacturing and mercantile establishments, etc.—No female shall be employed in any manufacturing or mercantile institution engaged in the manufacture of clothing, shirts, overalls, jumpers or ladies garments or any mercantile establishment or work shop or printing office, dressmaking or millinery establishment, hotel restaurant or theatre or telegraph or telephone office or establishment for more than fifty-four (54) hours during any one week, the hours of such employment to be so arranged as to permit the employment of such females at any time so that she shall not work more than a maximum of ten (10) hours, during the twenty-four (24) hour period for one day. Provided, however, that at the time of great disaster, calamity or epidemic, telephone establishments may work their operators with their consent a greater number of hours in any one day, than above stated, said operators to be paid not less than double their regular compensation for such extra time; provided this Act shall not apply to females who are registered pharmacists; provided, this Act does not apply to cities containing a population of 5000 or less as shown by the last federal census. [Acts 1913, p. 421, sec. 1.]

Note.—By section 4 the act took effect October 1, 1913.

Art. 5246b. Laundries.—No female shall be employed in any laundry for more than fifty-four hours in any one week; the hours of such employment to be so arranged as to permit the employment of such female at any time so that she shall not work more than a maximum of eleven hours during the twenty-four hour period of one day, provided that if such female is employed for more than ten hours in any one day she shall receive pay at the rate of one and one-half times her regular pay for such time as she is so employed for more than ten hours per day. [Id. sec. 1a.]

Art. 5246c. Seats to be provided.—Every employer in any manufacturing, mechanical or mercantile establishment, or workshop, laundry, printing office, dressmaking or millinery establishment, hotel, restaurant or theater, or telegraph or telephone establishment and office or any other establishment employing any female shall provide suitable seats for all female employees and permit them to use such seats when not engaged in the active performance of the duties of their employment. [Id. sec. 2.]

Art. 5246d. Not applicable to stenographers.—Provided that this Act shall not apply to stenographers. [Id. sec. 2a.]

Note.—Section 3 is purely criminal and is here omitted.

CHAPTER FOUR

HOURS OF LABOR UPON PUBLIC WORKS

Art.

5246e. Eight hour day.

5246f. Contracts deemed on basis of eight

Art.

hour day; laborers employed by
contractors; emergencies, etc.

5246g. Laws repealed.

Article 5246e. Eight hour day.—Eight hours shall constitute a day's work for all laborers, workmen or mechanics now employed or who may hereafter be employed by or on behalf of the state of Texas, or by or on behalf of any county, municipality, or political subdivision of the state, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics. [Acts 1913, p. 127, sec. 1.]

Art. 5246f. Contracts deemed on basis of eight hour day; laborers employed by contractors; emergencies, etc.—All contracts hereafter made by or on behalf of the state of Texas, or by or on behalf of any county, municipality or other legal or political subdivision of the state, with any corporation, persons or association of persons for the performance of any work, shall be deemed and considered as made upon the basis of eight hours constituting a day's work. It shall be unlawful for any corporation, person or association of persons having a contract with the state or any political subdivision thereof, to require or permit any such laborers, workmen, mechanics or other persons to work more than eight hours per calendar day in doing such work, except in case of emergency, which may arise in times of war, or in cases where it may become necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements. In such emergencies the laborers, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work; provided that not less than the current rate of per diem wages in the locality where the work is being performed shall be paid to the laborers, workmen, mechanics or other persons so employed by or on behalf of the state of Texas, or for any county, municipality or other legal or political subdivision of the state, county or municipality, and every contract hereafter made for the performance of work for the state of Texas, or for any county, municipality or other legal or political subdivision of the state, county or municipality, must comply with the requirements of this section; provided, that nothing in this Act shall affect contracts in existence at the time of the taking effect of this Act; provided further, that nothing in this Act shall be construed to affect the present law governing state and county convict labor while serving their sentences as such. [Id. sec. 2.]

Note.—Section 3 is purely criminal and is here omitted.

Art. 5246g. Laws repealed.—All laws or parts of laws in conflict herewith are hereby repealed, and expressly an Act passed at the regular session of the thirty-second legislature, known as House Bill No. 98, and being the same Act that was attempted to be vetoed by the governor, but which veto was held ineffective by the supreme court because the veto message was filed with the secretary of state after the expiration of twenty days as held by the supreme court in the case of R. B. Minor, et al., vs. C. C. McDonald, Secretary of State. [Id. sec. 4.]

CHAPTER FIVE

EMPLOYERS' LIABILITY—INSURANCE

Part.

- I. Employers' liability for injuries, and compensation therefor.
- II. Industrial accident board.

Part.

- III. Texas employers' insurance association.
- IV. General provisions.

PART I

EMPLOYERS' LIABILITY FOR INJURIES, AND COMPENSATION THEREFOR

Art.

- 5246h. Actions for personal injury or resulting death; defenses excluded.
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Article 5246h. Actions for personal injury or resulting death; defenses excluded.—In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was guilty of contributory negligence; but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employee, provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence where the violation by such employer of any statute enacted for the safety of the employees contributed to the injury or death of such employee.

2. That the injury was caused by the negligence of a fellow employee.

3. That the employee had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the wilful intention of the employee to bring about the injury.

4. Provided, however, in all such actions against an employer who is not an [a] subscriber as defined hereafter in this Act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment. [Acts 1913, p. 429, sec. 1.]

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II. Appliances and places for work—

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I. DUTIES AND LIABILITIES OF MASTER IN GENERAL

1. Injuries to or death of railroad employés.—See Title 115, Chapter 14.

2. Nature of master's duty in general.—An employer does not insure the safety of his employé, being bound only to use ordinary care for his safety. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 117 S. W. 451.

An employer is not required to foresee the negligence of an employé and guard against it. *San Antonio Brewing Ass'n v. Wolfshohl* (Civ. App.) 155 S. W. 644.

3. Relation of parties.—An employer's duty to one who volunteers to do certain work is different from its duty to one regularly employed to do it. *Davis, Pruner & Howell v. Woods* (Civ. App.) 143 S. W. 950.

4. — Independent contractors.—A person employed by the day to do a piece of work, and allowed by the contract to adopt his own methods in performing it,—the employer paying the expenses incurred, and looking to him for results only,—is an independent contractor. *City of Groesbeck v. Pinson*, 50 S. W. 620, 21 C. A. 44.

Where plaintiff, an experienced paper hanger and painter, contracted to do certain decorating for defendant at a specified price, to be paid for on completion of the work—plaintiff to furnish all the materials and appliances and employ his own help—he was an independent contractor, and not a servant of defendant. *Southwestern Telegraph & Telephone Co. v. Paris*, 87 S. W. 724, 39 C. A. 424.

One contracting to erect a building and deliver it completed, hiring his own assistants, and not subject to the direction of the company building it as to the details, held an "independent contractor." *Edmundson v. Coca-Cola Co.* (Civ. App.) 150 S. W. 273.

A building contract held not rendered other than one with an independent contractor by a provision permitting the other party to check and approve the pay rolls and bills for material after the building is completed. *Id.*

Mere advances to a contractor for the erection of a building not shown to have been used in purchasing material held not to render him a mere agent or employé of the company. *Id.*

A person erecting a building under a contract providing that the contract price should be the cost, plus a per cent. held not rendered an employé of the company with whom the contract was made by the payment by such company of telephone, printing, and stamp bills, and the cost of a trip to the city where the building was in course of construction. *Id.*

5. — Acts done under employment or by invitation of master's servants.—Plaintiff was employed to work in the bottling department of defendant's brewery, and was injured in defendant's washhouse while taking empty beer kegs from stacks and painting them; the washhouse being a different department, the superintendence of which was intrusted to a different foreman from the one in charge of the bottling department. Plaintiff was not employed to work in the department in which he was injured. The foreman of the bottling department had no authority from defendant, as plaintiff knew, to put him or any of defendant's employés to work in a different department. Held, that in respect to the work plaintiff was doing when he was injured, the relation of master and servant did not exist between him and the defendant, and plaintiff could not recover, as a servant of defendant, for his alleged injuries. *Freeman v. San Antonio Brewing Co.*, 85 S. W. 1165, 38 C. A. 396.

A servant, inexperienced and under age, was injured while at work on the double-board of a derrick. The foreman saw him go up the derrick to work on the double-board, and knew his inexperience, but did not instruct or warn him of danger, but permitted him to work there. Held, that he was not a volunteer, but must be regarded as having been put to the work by the foreman. *Producers' Oil Co. v. Barnes* (Civ. App.) 120 S. W. 1023.

Where a master divided his business into departments, and required employés idle in their own departments to help in some other department, and the foreman of a department received an employé of another department and accepted his services and directed him, the employé was not a volunteer, but was engaged in the performance of his duties. *Hugo, Schmeltzer & Co. v. Palz* (Civ. App.) 128 S. W. 912.

A traction company is not liable to plaintiff injured while employed by or assisting its servant in cleaning electrical machinery, where the plaintiff looked to the servant for his pay. *Blalack v. Texas Traction Co.* (Civ. App.) 149 S. W. 1086.

6. Scope of employment.—Plaintiff, while directly employed as a cake runner or trucker, in the press room of defendant's oil mill, having been familiar with the duties of a former puller, and he and his co-employés in such room having frequently exchanged work with each other, and this practice having been known to and acquiesced in by defendant, he, when injured in working the puller, while temporarily relieving the former puller, was not a mere volunteer, but a servant of the defendant. *Belton Oil Co. v. Duncan* (Civ. App.) 127 S. W. 884.

Though there was a custom in defendant's mill before plaintiff's injury therein while temporarily exchanging work with another employé for men to exchange work, yet defendant's foreman not having approved of or consented to the custom, but used ordinary care to prevent the exchange of positions, defendant was not liable for the injury. *Id.*

A lumber company's teamster held a mere licensee in passing along a logging railroad track to his work as affecting the company's liability for injury caused by a passing train. *Hopkins v. Garrison-Norton Lumber Co.* (Civ. App.) 144 S. W. 310.

7. Medical attendance on injured employé.—A company employed and paid physicians, and undertook to treat its employés when sick or injured, deducting 50 cents per month from each employé's wages. The employés had no interest in the fund thus raised, nor in its distribution, and when they ceased their employment their right to treatment ended. The surplus of the fund each year was retained by the company. Held, that the company was liable to an injured employé for unskillful treatment by its physician. *Texas & P. Coal Co. v. Connaughton*, 50 S. W. 173, 20 C. A. 642.

Defendant, a mining company, is not entitled to immunity from liability for malpractice in treatment of plaintiff, an injured employé, by the company's physician, on the ground that the physician was selected by plaintiff's employés' union, and defendant only acted gratuitously in taking from employés' wages a certain amount monthly, and paid out the same for medical treatment of injured employés, where the evidence fails to show that the union selected or employed the physician who, after the first few days, treated plaintiff for a number of months. *Texas & Pacific Coal Co. v. McWain*, 57 C. A. 512, 124 S. W. 202.

Where a mining company undertakes to furnish medical treatment for its employés, it is liable for the negligence of the physician employed by it in discharge of such undertaking, though it makes no deduction therefor from the wages of the employés. *Id.*

8. Cause of injury.—In an action for injury caused by defendant's lumber falling on his employé, a charge authorizing a recovery though the falling of the lumber was not due to defendant's negligence was properly refused. *Mayton v. Sonnefeld* (Civ. App.) 48 S. W. 608.

Where an employé engaged in stacking flour was injured in consequence of the stack giving way because of the defective manner in which the flour had been stacked, the

failure of the employer to employ a helper did not contribute to the injury. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

A servant suing for personal injury must, to recover, prove not only that the master was negligent as alleged, but also that such negligence was the proximate cause. *Producers' Oil Co. v. Barnes* (Civ. App.) 120 S. W. 1023.

A master is not liable to his servant for the negligent act of the servant of an independent contractor; but, where the master is negligent, and the negligence of the servant of the independent contractor concurs with his own in causing the injury to his servant, he is liable therefor to the same extent as if the injury had been caused by his negligent act alone. *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973.

An employer may become liable for negligently exposing a servant to a hidden danger, known to the master and unknown to the servant, which is incurred by the latter in doing the work which he is employed to do, although the danger arise from the conduct of strangers. *Medlin Milling Co. v. Boutwell*, 104 T. 87, 133 S. W. 1042, 34 L. R. A. (N. S.) 109, reversing judgment (Civ. App.) 122 S. W. 442.

9. **Accidental or Improbable Injury—Duty to anticipate consequences.**—A master cannot be held responsible for the consequence of an act which ought not reasonably to have been foreseen, though the servant injured thereby was a minor. *G. A. Duerler Mfg. Co. v. Dullnig* (Civ. App.) 83 S. W. 889, judgment affirmed *Dullnig v. G. A. Duerler Mfg. Co.* (Sup.) 87 S. W. 332.

A master is not bound to furnish a servant, handling bottles filled with charged mineral water, a mask to prevent injuries from an explosion, where bottles charged to the pressure of those which the servant was handling had never been known to explode, and such explosions could not be and were not anticipated. *Dullnig v. G. A. Duerler Mfg. Co.* (Sup.) 87 S. W. 332, affirming *G. A. Duerler Mfg. Co. v. Dullnig* (Civ. App.) 83 S. W. 889.

A master is not exempt from responsibility for negligent injury to a servant merely because the particular injury could not have been anticipated, if he could have reasonably anticipated that some injury might result as the natural consequence of the negligence. *Rice v. Dewberry* (Civ. App.) 93 S. W. 715.

Where, in an action for the death of an employé while performing his duties as foreman in a lumber yard, the evidence showed that the accident was caused by the combined action of a defective engine and a defective railroad track, causing the track to sink and slide, throwing the footboard over against a plank sidewalk, a charge that, if decedent was injured by the sliding of the track, and if the employer by the exercise of ordinary care could not have anticipated such an occurrence, a verdict should be found for defendant, was properly refused; it not being necessary, to render the employer liable, that he should have foreseen the exact occurrence which caused the accident, but it being enough that he might reasonably have anticipated an accident of this nature to occur as a result of the defective track or defective engine, or both. *Kirby Lumber Co. v. Chambers*, 95 S. W. 607, 41 C. A. 632.

Where a defect in machinery is liable to cause some injury to a servant, the fact that the particular accident which did result was improbable and not to be reasonably anticipated will not relieve the master from liability therefor. *Industrial Lumber Co. v. Bivens*, 47 C. A. 396, 105 S. W. 831.

A master is not liable to his servant for an injury resulting from pure accident, or from causes which could not be reasonably anticipated, unaccompanied by lack of ordinary care on the master's part, but the fact that an accident was so unusual and extraordinary that it could not reasonably have been expected to happen does not relieve the master from the effect of his negligence; and, where an injury is such that it might have been reasonably anticipated, he is liable, where his negligence proximately caused the injury. *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973.

An employer held not required to anticipate that oil would be ignited by lightning. *Butler v. Gulf Pipe Line Co.* (Civ. App.) 144 S. W. 340.

10. **Joint liability of separate employers.**—Where one company made an executory sale of its property to another, under an agreement that they were to have joint possession, they are both liable for injuries to an employé. *San Antonio Waterworks Co. v. White* (Civ. App.) 44 S. W. 181.

Plaintiff, an employé of one of defendant corporations, was injured by reason of defective appliances, while assisting both corporations in the placing of certain oil tanks, under the supervision and direction of a common foreman for both corporations. Held, that both defendants were bound to use ordinary care to furnish plaintiff with reasonably safe appliances, and that a failure to perform that duty through their common foreman rendered both or either of such corporations liable for plaintiff's injuries. *American Cotton Co. v. Simmons*, 87 S. W. 842, 39 C. A. 189.

11. **Contracts limiting or releasing liability.**—An agreement by a parent, as an inducement to the employment of a minor child, to hold the employer harmless for any injury to the child occasioned by the employer's negligence, is contrary to public policy and void, whether applied to active or passive negligence. *Pacific Express Co. v. Watson*, 57 C. A. 111, 124 S. W. 127.

II. APPLIANCES AND PLACES FOR WORK

12. **Nature of master's duty and liability and care required in general.**—The limit of the duty of a master is to exercise ordinary and reasonable care to provide reasonably safe appliances and working places and to keep them in a reasonably safe condition. *Quintana v. Consolidated Kansas City Smelting & Refining Co.*, 37 S. W. 369, 14 C. A. 347; *The Oriental v. Barclay*, 41 S. W. 117, 16 C. A. 193; *Oriental Inv. Co. v. Sline*, 41 S. W. 130, 17 C. A. 692; *Bering Mfg. Co. v. Peterson*, 67 S. W. 133, 28 C. A. 194; *Hightower v. Gray*, 83 S. W. 254, 36 C. A. 674; *Price v. Consumers' Cotton Oil Co.*, 90 S. W. 717, 41 C. A. 47; *Ham v. Hayward Lumber Co.*, 43 C. A. 566, 96 S. W. 938; *Vilter Mfg. Co. v. Kent*, 47 C. A. 462, 105 S. W. 525; *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973; *Ablene Light & Water Co. v. Robinson*, 131 S. W. 299; *Texas Co. v. Strange*, 132 S. W. 370; *Kampmann v. Mendoza*, 141 S. W. 161; *Arcola Sugar Mills Co. v. Luckey*, 144 S. W. 1148; *Freeman v. Grashel*, 145

S. W. 695; *Farmers' Gin & Milling Co. v. Jones*, 147 S. W. 668; *Gamer Co. v. Gamage*, Id. 721; *Southwestern Telegraph & Telephone Co. v. Luckie*, 153 S. W. 1158; *Yellow Pine Paper Mill Co. v. Wright*, 154 S. W. 1168; *City of Austin v. Gress*, 156 S. W. 535.

An employe, after complaining of insufficient light, continued to work on the promise of the foreman to furnish more light, which was not done, and was injured while performing work which he had been ordered to do by the foreman. Held, that the employer was guilty of actionable negligence. *Hillje v. Hettich* (Civ. App.) 65 S. W. 491, judgment reversed 67 S. W. 90, 95 Tex. 321.

An employer, employing men to stack lumber in its lumber yard, is required to exercise ordinary care only to provide a reasonably safe foundation for the lumber stacks, and a like degree of care to maintain it in such condition. *Kirby Lumber Co. v. Dickerson*, 94 S. W. 153, 42 C. A. 504.

Where defendant had employed deceased to do certain work on and about certain oil tanks furnished and controlled by another, which work required him to go on top of the tanks, it was defendant's duty to see that the tanks were properly constructed, in so far as their improper construction might involve danger to deceased while engaged in the performance of his duties, or to warn him of the improper construction and the dangers arising therefrom. *Yellow Pine Oil Co. v. Noble* (Civ. App.) 97 S. W. 332, questions from court of civil appeals certified 100 T. 358, 99 S. W. 1024, and judgment reversed on rehearing (Civ. App.) 101 S. W. 276, affirmed 101 T. 125, 105 S. W. 318.

The master's duty to furnish reasonably safe appliances for the use of his servants does not require him to attend to the regulation of parts which necessarily have to be adjusted in the course of their use for particular work, and the adjustment of which is incident to their ordinary use. *Lone Star Brewing Co. v. Willie*, 52 C. A. 550, 114 S. W. 186.

The employer is required to exercise care as to the safety of premises only in case the injury to the employe could have been foreseen by an ordinarily prudent person. *Dawson v. King* (Civ. App.) 121 S. W. 917.

It is a master's duty to provide his employes a reasonably safe place to work. *Fer-ris Press Brick Co. v. Thompson* (Civ. App.) 124 S. W. 499; *Athens Cotton Oil Co. v. Clark*, 126 S. W. 322; *Freeman v. Mireles*, 127 S. W. 1162; *Fraser-Johnson Brick Co. v. Baird*, 128 S. W. 460; *Texas Co. v. Strange*, 132 S. W. 370.

A master must exercise care to furnish the servant a safe place to work and safe instrumentalities to work with, and he must take precautions for the safety of the servant when he has knowledge of facts which suggest danger to the servant in the prosecution of his work. *Hugo, Schmeltzer & Co. v. Paiz* (Civ. App.) 128 S. W. 912.

The law held to impose on a master stated duties as to the safety of servants. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

Owners and operators of cotton gins held required to provide suitable and reasonably safe machinery of a kind used by skilled gin operators for their employes. *Guitar v. Randel* (Civ. App.) 147 S. W. 642.

An employer must furnish a safe place for work and reasonably safe tools and conveyances for transportation, etc. *Beck v. Texas Co.*, 105 T. 303, 148 S. W. 295, reversing judgment *Texas Co. v. Beck* (Civ. App.) 133 S. W. 439.

13. **Delegation of duty.**—Where the contract of hiring requires the workmen to provide or erect the scaffolds upon which to work, the employer is not responsible for injuries sustained by defects therein. *Maughmer v. Behring*, 46 S. W. 917, 19 C. A. 299.

Where a deck hand on a tugboat was injured by stepping on a siphon pipe, which another deck hand had carelessly left lying on the deck—it being the duty of the deck hands to keep the deck clear—the negligence was in a mere detail of the business, for which the owner of the boat was not responsible. *Direct Nav. Co. v. Anderson*, 69 S. W. 174, 29 C. A. 65.

Where plaintiff, a truckman of defendant express company, was injured by being struck by the tongue of a truck, owing to the wheels of the truck falling into a hole in a crossing over railroad tracks, and it was shown that defendant's agent directed the performance of the duty undertaken by plaintiff, and knew of the defect in the crossing before the accident, and had complained thereof to the agents of the railroad company, defendant was not released from liability by reason of a contract between it and the railroad company under which the duty of keeping the premises in repair devolved upon the latter. *Pacific Express Co. v. Shivers*, 92 S. W. 46, 41 C. A. 291.

The duty of a master to furnish a reasonably safe working place for the servant cannot be delegated. *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973; *Buchanan & Gilder v. Blanchard*, 127 S. W. 1153; *Hugo, Schmeltzer & Co. v. Paiz*, 128 S. W. 912.

The duty of a master as to the safety of servants may be delegated without affecting responsibility of the master for its proper performance. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

14. **Failure to furnish tools or appliances.**—In a suit for personal injuries received by plaintiff while attempting to clean an alleged defective linter in a cotton-oil mill, it is error to charge that if plaintiff was not provided with proper implements to perform the services incident to his immediate employment, and through inexperience did not know it was dangerous to undertake to do such work with said implements, he can recover, as the jury should be instructed that they must first determine whether suitable implements were provided, and whether defendant was negligent in not providing such implements; and also, even though defendant did not provide suitable implements, yet plaintiff cannot recover unless such failure to provide him proper implements was the proximate cause of the injury. *Hillsboro Oil Co. v. White* (Civ. App.) 41 S. W. 874.

Where a servant required to keep a machine running had to put in place an iron bolt thereon, which required a nut to hold it, and the master failed to furnish a bolt with a nut for that purpose, and the servant, exercising ordinary care, attempted to supply the place of the nut by wrapping a string around the end of the bolt, and, while so doing, was injured, the master was liable. *Greenville Oil & Cotton Co. v. Harkey*, 48 S. W. 1005, 20 C. A. 225.

A sugar mill company operating a railroad on its plantation held not required to carry jack screws upon the engine for use in putting it back upon the track, if derailed. *Arcola Sugar Mills Co. v. Luckey* (Civ. App.) 144 S. W. 1148.

15. Custom and usage.—An instruction in an action for injuries to an employé while stacking lumber in consequence of the foundations of the stack giving way, making it the duty of the employer to provide such safe foundations for its stacks as were commonly used by skilled and experienced millmen, was erroneous, for the employer could not absolve itself from responsibility by providing a foundation such as was commonly used by experienced millmen, if ordinary care required another foundation; nor would it be liable for a failure to do so, if ordinary care did not require it. *Kirby Lumber Co. v. Dickerson*, 94 S. W. 153, 42 C. A. 504.

That defendant's equipment was in general use in the same business is not conclusive that defendant exercised ordinary care. *Lyon v. Bedgood*, 54 C. A. 19, 117 S. W. 897.

In a personal injury action by a servant, where the only inference to be reasonably drawn from the evidence was that the master conformed to the usage of prudent men in well regulated concerns in the same business, he could be declared as a matter of law to have been in the exercise of due care. *Taylor v. White* (Civ. App.) 156 S. W. 349.

Where a master failed to guard an exciter used to generate electricity, which was wholly enclosed except for a few openings necessary for the adjustment of the machine, held, that he was not guilty of negligence; it appearing that no other manufacturer of electricity guarded the machine. *Id.*

16. Appliances or places owned, controlled or provided by third persons.—An electric lineman was injured by coming in contact with two live wires placed within a few inches of each other on the same side of the pole, when they should have been placed on opposite sides and on opposite ends of the cross-arm. The lineman did not know that the current was on, though he had heard that it was to be turned on as soon as repairs were completed. The employer knew that the wires were improperly placed and that the current was on, though the actual placing of the wires had been done by the previous owner of the plant. Held, that the employer was negligent. *General Electric Co. v. Murray*, 74 S. W. 50, 32 C. A. 226.

A master who rents ballast cars for use in his business held required to use ordinary care to furnish reasonably safe cars and maintain them in such condition. *Texas Trac-tion Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

Where a master owes to servant the duty of exercising ordinary care to furnish him a reasonably safe place to work, he cannot be heard to say, in justification of a failure to discharge such duty, that he did not control the place where he had put the servant to work. *Cooper v. Robischung Bros.* (Civ. App.) 155 S. W. 1050.

17. Defects in tools, appliances and places for work in general.—In an action by an employé to recover damages for personal injuries sustained by reason of a defective hand car, the court erred in instructing the jury that it was the duty of the master to furnish its employé safe machinery; the only duty of the master being to use ordinary care to avoid such defects as might expose employés to danger while using the machinery with ordinary care. *Eddy v. Adams* (Sup.) 13 S. W. 490.

The duty of an employer to his servant engaged in setting up a machine in a building is to exercise ordinary care to make the premises safe for him while engaged at his work, and if the employer is negligent in having an object in such a place and in such condition as to fall on him, while he was where his work called him, the master would be liable, in the absence of contributory negligence. *Dawson v. King* (Civ. App.) 121 S. W. 917.

Where a servant of a manufacturer of structural work, employed in a building as a member of the rivet gang, was ordered to pick up scraps of iron between piles of steel beams in the yard of the factory, the manufacturer was required to exercise reasonable care to make the place for the servant to work reasonably safe, and where the beams were unsafely piled, and the servant was injured in consequence of a pile falling on him, the master was liable. *Mosher Mfg. Co. v. Boyles* (Civ. App.) 132 S. W. 492.

The death of a servant, caused by the falling of a pile of cotton seed, held not the result alone of the action of gravity on the pile, but of the nonperformance of the duty of the master to protect him. *Alamo Oil & Refining Co. v. Curvier* (Civ. App.) 136 S. W. 1132.

18. Temporary appliances, structures or dangers.—A master constructing a building is not liable for a transitory danger to which an employé is exposed, due to no fault of plan or construction. *Armour & Co. v. Dumas*, 95 S. W. 710, 43 C. A. 36.

A master is not responsible for injuries from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he has furnished a reasonably safe appliance and place, and he need not keep the place safe at every movement so far as such safety depends on the due performance of the work by the workmen. *Hugo, Schmeltzer & Co. v. Paiz* (Civ. App.) 128 S. W. 912.

Generally, an employer owes a nonassignable duty to furnish a safe place in which his employés are to work, but not when the danger is transitory and due to no fault of plan or construction, but to the nature of the work. *Lantry-Sharp Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 363.

The rule that the master is not liable for injuries to a servant while engaged in making a dangerous place safe held not to apply where a coal digger is preparing an entry in a mine for props, at the time and in the manner directed by the vice principal. *Reid Coal Co. v. Nichols* (Civ. App.) 136 S. W. 847.

The rule requiring a master to furnish a servant with a safe place to work does not apply, where the servant is at work on a structure which is undergoing constant changes. *Lowrey v. Fitzhugh* (Civ. App.) 153 S. W. 1190.

The rule that one of the nondelegable duties of an employer is to provide a reasonably safe place in which to work is subject to the exception that the employer need not keep the working place safe when the work of the employé makes the place more or less dangerous as the work advances. *Producers' Oil Co. v. Bush* (Civ. App.) 155 S. W. 1032.

The allowing of excelsior from a cutter to pile up around the machine for baling it, in the absence of the servant, who fed the machine, on an errand for the master, rendering the work of feeding the machine dangerous, was not a mere transitory condition,

not to have been anticipated by the master in providing a safe place to work. *Hartshorn Bros. v. Williamson* (Civ. App.) 156 S. W. 264.

19. Defective or dangerous machinery.—A wooden platform over the rollers of an oil mill, containing a slot through which the machine was fed, was broken, and sagged down until it almost touched the rollers, though it should have been several inches above them. The teeth on the rollers were so dull that the oil cakes had to be forced against the rollers in feeding the machine, and the hand of a servant so engaged was caught and injured while forcing a cake of oil meal between the rollers. Held, in an action against the master, that it was negligent in failing to remedy such defects. *Ladonia Cotton Oil Co. v. Shaw*, 65 S. W. 693, 27 C. A. 65.

Where defendant assigned plaintiff to work consisting of pulling shucks out of a feed machine operated by belts and rollers, knowing that one of the belts was defective, plaintiff having but slight knowledge of the machinery, and being told that the work involved no danger, defendant was chargeable with knowledge of the effect which the breaking of the belt would have in increasing plaintiff's danger. *P. E. Schow & Bros. v. McCloskey* (Civ. App.) 109 S. W. 386, judgment affirmed 113 S. W. 739, 102 T. 129, 20 Ann. Cas. 1.

Where a cotton mill company, with knowledge that an employé employed by it as a doffer boy, with his mother's consent, was a minor, changed his work and put him to work around a carding machine without his mother's knowledge, which work was more dangerous, and while so working he was injured as the proximate result of such change and his capacity to earn money diminished, the cotton mill company is liable. *Hillsboro Cotton Mills v. King*, 51 C. A. 518, 112 S. W. 132.

Where a paper manufacturing company maintained wood pulp digesters covered by a heavy lid, fitting in a groove in which it was necessary to place a hydraulic gasket to prevent the escape of steam and acid vapor, it was guilty of negligence in using a gasket known to be defective, as a result of which steam and acid vapor escaped, causing injuries to an employé. *Yellow Pine Paper Mill Co. v. Wright* (Civ. App.) 154 S. W. 1168.

20. Buildings.—Where 50-pound sacks of flour were stacked without laying the sacks in alternate cross layers, thereby tying the sacks, the employer was negligent in placing an employé on a stack eight feet high with instructions to work thereon. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

21. — Fire escapes.—Ordinances of city of Dallas require the owners or lessees of factories over two stories high in a city to provide the same with suitable fire escapes. Defendant was a wholesale drug company, occupying a four-story building, with its city department and offices on the ground floor, its packing room and heating plant in the basement, and its stock on the remaining floors. On the third floor defendant's chemist, plaintiff's minor son, and two others, were employed in bottling goods and compounding prescriptions, the room containing vessels for fluids and a drug mill, but no other machinery; the entire output of the laboratory being less than 2 per cent. of the business, and three-fourths of that was rebottled goods. No one was employed on the top floor. A fire broke out on the first floor, and plaintiff's son jumped from a window on the third floor to a building below and was injured. Held, in an action for loss of his services, that the evidence was not sufficient to present the issue as to whether defendant was operating a factory requiring fire escapes. *Hernischel v. Texas Drug Co.*, 61 S. W. 419, 26 C. A. 1.

22. Scaffolds, ladders and supports.—A master is bound to furnish the servant with a safe place to work and must use ordinary care in doing so; therefore, where a master had a servant painting a roof, and he was using two ladders which were tied together, one on each side of the roof ridge, if they were tied with a chain in the usual manner which the master had reason to believe was safe, and which an ordinarily prudent person under those circumstances would have believed to be safe, the master is not liable because they came apart and caused an injury to the servant. *Planters' Gin Co. v. Washington* (Civ. App.) 132 S. W. 880.

In an action for injuries to a servant by the fall of a loose plank being used as part of a scaffold under circumstances wherein the material was being constantly removed from one place to another, defendant held not negligent in failing to provide a safe place to work. *Lowrey v. Fitzhugh* (Civ. App.) 153 S. W. 1190.

23. Mines and other excavations.—Where the timber crew in a mine had commenced to brace the roof of one of the rooms, and while at work there a member of the track crew, whose duty it was to lay track and clear away obstructions, was killed by the caving in of the roof and deceased had nothing to do with the work of timbering or propping, the master was not absolved from liability under the rule as to the liability to servants who are engaged in the business of making safe an unsafe place. *Lone Star Lignite Mining Co. v. Caddell* (Civ. App.) 134 S. W. 841.

The rule that a master must furnish a safe place to the servant in which to work is applicable to a mineowner. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

Where employés in drilling oil wells were supplied with necessary tools, including a jet, for their safety, and they decided that they would not use the jet, and one of them was killed by gas escaping as the work progressed, the employer did not fall to provide a reasonably safe place in which to work. *Producers' Oil Co. v. Bush* (Civ. App.) 155 S. W. 1032.

24. Electrical apparatus and structures.—Where it was the duty of a lineman to inspect the poles erected by him, and determine whether they were suitable, and to reject those found unfit, the master was not negligent in sending to him a defective pole, which defect could be plainly seen. *Abilene Light & Water Co. v. Robinson* (Civ. App.) 131 S. W. 299.

Where it is the duty of the general manager of an electric light company to determine whether poles were suitable for the use intended, and it is not the duty of the lineman to inspect them, the general manager must exercise ordinary care to select poles reasonably safe for use. *Id.*

The rule of safe place applies to electric light poles and wires. *City of Greenville v. Branch* (Civ. App.) 152 S. W. 478.

25. Shipping.—On the loading of a vessel merchandise was drawn up an inclined plane to the deck level, and then by a derrick and sling swung over a certain hatch.

The arm of the derrick was too low to swing the merchandise over the center of the hatch, but swung it six inches from the center, and that much nearer another hatch, under which plaintiff was working. When the load, when reaching the deck level, was not opposite the center of the hatch, it was the duty of the gangwayman to adjust it, so it would swing over the center. A load swung over the hatch under which plaintiff was working, and fell, injuring him. Held sufficient to show the injuries to be due to defective rigging or handling. *Young v. Hahn* (Civ. App.) 69 S. W. 203, judgment reversed 70 S. W. 950, 96 Tex. 99.

26. **Covering or guarding dangerous machinery or places.**—A petition showing that plaintiff, an employé in defendant's service, while undertaking, in the course of his employment, to pass over a line shaft, became entangled in it and the pulley attached to it, and was injured thereby; alleging that it was negligence to construct the shaft without a covering to protect employés from it while the machinery was in operation, as it was dangerous in that condition, and that the danger was known to defendant, or might have been by the exercise of reasonable care, and was not known to plaintiff,—is sufficient in its allegations of negligence. *Miller v. Itasca Cotton Seed Oil Co.* (Civ. App.) 41 S. W. 366.

Plaintiff, an employé in defendant's foundry, while carrying a ladle of molten metal stepped into a hole which defendant had excavated a few minutes before in an unusual place—in a pathway used by employés—and left unguarded. Plaintiff had no knowledge of the hole, and when he stepped into it he was burned by spilled material from the ladle. Held, that plaintiff was injured by defendant's negligence. *San Antonio Foundry Co. v. Drish*, 85 S. W. 440, 38 C. A. 214.

27. **Latent defects.**—Where the evidence allows of a finding that the parting of a wire cable from a hook at its end, resulting in an employé being struck by a car moved thereby, was caused by the breaking of the cable within the socket, forming part of the hook, to which the cable was fastened by passing through an opening, and then having the wires at the end within the socket untwined, spread out, turned back, and then filled with melted lead, it is proper to charge on latent defects; there being evidence that this was the most approved method of fastening, and that there was no perceptible defect in the cable before it was put in. *Quintana v. Consolidated Kansas City Smelting & Refining Co.*, 37 S. W. 369, 14 C. A. 347.

A charge that defendant was not required to guard against latent defects which could not have been discovered by such inspection as a reasonably cautious person would have given, and that, if the elevator fell by reason of latent defects that could not have been discovered prior to the accident by the use of reasonable care (that is, such care as an ordinarily prudent person would have used in defendant's position), defendant was not liable, did not require a higher degree of care than is imposed by law. *The Oriental v. Barclay*, 41 S. W. 117, 16 C. A. 193.

If defects in a rope used by defendant in loading a vessel were such as to be undiscoverable by an inspection made with ordinary care, defendant was not negligent toward an employé injured by the rope breaking and the chute supported by it falling on him by permitting the rope to be used. *Suderman & Dolson v. Woodruff*, 47 C. A. 229, 105 S. W. 217.

Plaintiff was sent to the top of a telephone pole to cut wires, and after the wires were cut, the pole fell, injuring plaintiff. The pole was white cedar, and its fall was caused by its rotten condition. It had not been inspected by defendant, other than the superficial observation of the pole after its erection. Plaintiff, when he was directed to ascend the pole, kicked it for the purpose of ascertaining whether it was sound, and discovered no defect. Held, that there was no negligence on the part of defendant in failing to discover the condition of the pole. *Southwestern Telegraph & Telephone Co. v. Tucker*, 114 S. W. 790, 102 T. 224, reversing 50 C. A. 476, 110 S. W. 481.

28. **Inspection and test.**—It is the duty of an electric company stringing its wires on a pole belonging to another to inspect it before sending its employés to work there. *San Antonio Edison Co. v. Dixon*, 42 S. W. 1009, 17 C. A. 320.

Where a derrick was erected by experienced men, but was thereafter removed, under direction of the master, by inexperienced workmen, and the master made no inspection to see whether it had been properly erected after removal, he was guilty of such negligence as rendered him liable to a servant for injuries received by its fall. *Westbrook v. Crowds* (Civ. App.) 58 S. W. 195.

An employé while raising a smokestack, was injured by its fall, caused by the straightening of a hook in the block and tackle. The only test as to the sufficiency of the hook consisted in striking the smokestack with the hands while it was being lifted from a wagon to the ground. Held, to justify a finding that the employer was negligent in failing to properly test the appliance. *El Paso Foundry & Machine Co. v. De Guereque*, 46 C. A. 86, 101 S. W. 814.

A master purchasing an appliance of an approved pattern from a reputable dealer is not thereby released from the duty of inspecting the same until something happens in its use which directs attention to an imperfection, as reasonable inspection is imposed by law at all times. *Alamo Dressed Beef Co. v. Yeargan* (Civ. App.) 123 S. W. 721.

A defect in an appliance, procured by a master from a reputable dealer, which ordinary care in the course of reasonable inspection will disclose, is not a latent defect, but is a defect for which the master, in the performance of his duty of inspection, is responsible. *Id.*

Where brick burners had been in the habit for two or three years of using a shed along the side of a kiln to go upon to avoid the gases and heat, and cleats of wood had been nailed thereon to keep them from slipping while so doing, the duty of inspection to see that the shed was in a safe condition for so doing was upon the employer. *Ferris Press Brick Co. v. Thompson* (Civ. App.) 124 S. W. 499.

Where an employé in a cotton oil mill was injured through the use of a defective cloth in forming a cake of cotton seed meal, held, that the master was not necessarily exonerated, because he supplied a sufficient number of good cloths. *Leonard Cotton Oil Co. v. Burnes* (Civ. App.) 138 S. W. 1082.

Defendant held bound, not only to use reasonable care to furnish reasonably safe tools, but to use the same care in keeping them in reasonably safe condition. *Freeman v. Starr* (Civ. App.) 138 S. W. 1150.

In an action for injuries to a coal miner, instruction held to correctly state the duty of a master to furnish a safe place. *Adams v. Consumers' Lignite Co.* (Civ. App.) 138 S. W. 1178.

A mineowner has the duty of inspecting the mine. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

It is the employer's duty to inspect electric light poles and wires, and see that they are reasonably safe from defects and dangers. *City of Greenville v. Branch* (Civ. App.) 152 S. W. 478.

29. Knowledge by master of defect or danger.—Defendant was a wholesale drug company occupying a four-story building, and on the third floor were the chemist, plaintiff's minor son, and others employed in compounding prescriptions. A fire occurred at noon, when it was the custom of most of the employes including plaintiff's son, to be absent; but he had been requested by the chemist to remain and his presence in the building was known only to the chemist, who was not present when the fire broke out. The first and third floors were connected by a speaking tube, so that the boy could have been notified, had his presence been known. The fire spread with such rapidity that the employes on the first floor had but little time to escape, and plaintiff's son, being unable to escape otherwise, jumped from the third-story window and was seriously injured. Held, that in an action to recover for his injuries, there being no contention that the fire was caused by defendant's negligence or that it could have been extinguished, it was not error to direct a verdict for defendant. *Hernischel v. Texas Drug Co.*, 61 S. W. 419, 26 C. A. 1.

The mere fact that defendant's foreman, plaintiff's superior, was not aware of the defect which caused plaintiff's injury, is not sufficient to relieve defendant from liability for failure to exercise ordinary care to keep the tools, machinery, and appliances reasonably safe for his servant's use. *Industrial Lumber Co. v. Bivens*, 47 C. A. 396, 105 S. W. 831.

Actual knowledge is not necessary to fix liability for injuries through dangerous instrumentalities, but the master will be liable if he has failed to exercise due care in ascertaining the condition of affairs bringing about the injury. *Lone Star Brewing Co. v. Solcher* (Civ. App.) 126 S. W. 26.

If it is notorious that an appliance is defective or unfit, knowledge of its condition will be imputed to the master, and, where a dangerous agency continues for such length of time that due care would cause discovery by the master, he is charged with knowledge of it. *Id.*

A master is chargeable with constructive notice of what naturally and probably will happen as the result of what he knows, and he must foresee what experience will teach him is likely to follow from a given state of facts. *Hugo, Schmeltzer & Co. v. Palz* (Civ. App.) 123 S. W. 912.

A master held chargeable with knowledge of the condition of machinery and the unsafe character of work in connection therewith. *Hugo, Schmeltzer & Co. v. Palz*, 104 T. 563, 141 S. W. 518.

If the master knows, or by the exercise of ordinary care can know, that the tools or place of work furnished to the servant are not reasonably safe, he is chargeable with negligence. *Yellow Pine Paper Mill Co. v. Wright* (Civ. App.) 154 S. W. 1168.

30. Repairs.—An employer is not bound to so repair an appliance as to make it suitable and reasonably safe for the purpose for which it is used, but merely to use ordinary care to so repair it. *Glenn Lumber Co. v. Quinn* (Civ. App.) 149 S. W. 285.

The duty of a master to furnish safe places to work includes the duty of maintaining them in that condition. *Raney v. Houston Lighting & Power Co.* (Civ. App.) 153 S. W. 178.

31. Improper or unusual use or test.—There was no negligence in failing to furnish a servant with a reasonably safe hammer, where the hammer furnished was ordinarily as safe as any other for doing the work, could have been used without danger at any other place, and was rendered dangerous solely by the act of the servant in using it, without necessity therefor, at a place where it could readily be caught in the machinery. *Hettich v. Hillje*, 77 S. W. 641, 33 C. A. 571.

Fact that an employe injured by being caught by bolts and nuts projecting from a revolving spliced shaft came into contact with them because of his arms giving way when he attempted by seizing rafters to draw himself up over the shaft did not affect the question of the employer's negligence in using the shaft without first covering the splice. *Longview Cotton Oil Co. v. Thurmond*, 55 C. A. 499, 119 S. W. 130.

A master is liable for injuries caused by a defective window sill customarily used with his knowledge and acquiescence to stand on while oiling machinery, though it was not primarily intended for that purpose. *Williams v. Hennefield*, 57 C. A. 54, 120 S. W. 567.

32. Proximate cause of injury.—Deceased was employed at the bottom of a mine shaft in shifting empties and placing loaded cars on the cage. The timber supporting the cage, and the sheet-iron surface surrounding it, had become decayed or misplaced, so that loaded cars could not be placed thereon without some one getting on the cage to pull them on and adjust them. While deceased was so engaged, the cage, without negligence of the mine owners, was suddenly hoisted, and deceased was caught between the cage and shaft, and injured. Held, that the untimely hoisting of the cage, and not defendants' negligence in permitting the timbers and sheet-iron surface surrounding the cage to become misplaced, was the proximate cause of the injury, and hence there could be no recovery. *Roe v. Thomason*, 61 S. W. 528, 25 C. A. 67.

An instruction, defining "proximate cause" as "such a cause in the absence of which injury would not have happened," was erroneous as ignoring the distinction between proximate and remote cause, and leaving out the essential element that the result must be such as a person of ordinary prudence should have foreseen as likely to occur, as a probable consequence in the light of all the attending circumstances. *Gulf Cooperage Co. v. Abernathy*, 54 C. A. 137, 116 S. W. 869.

Plaintiff, a night shoveler in defendant's seedhouse, slipped just after entering and stepped into a conveyor box and was injured. Negligence was alleged, in that the conveyor had been lengthened without notice to him, and that additional lights had not been furnished, as promised. Plaintiff knew, when he entered the building, that the conveyor box extended beyond the point where he stepped, prior to its extension, and the box and conveyor were plainly distinguishable by the available light. Held, that defendant's failure to provide the light promised and to warn plaintiff of the extension of the conveyor was not the proximate cause of the injury. *Brazos Oil & Light Co. v. Crawford*, 57 C. A. 389, 122 S. W. 916.

Negligence of an employer held not the proximate cause of injury to an employé. *Thompson Bros. Lumber Co. v. Bryant* (Civ. App.) 144 S. W. 290.

Where plaintiff attempted to pull from a sprocket wheel a sprocket chain, which from its worn condition had wound itself round the wheel, and was injured by the chain suddenly coming off by breaking or unhooking, causing his hand to fly back against a saw, the worn condition of the chain was not the proximate cause of the injury. *Dayton Lumber Co. v. Hastings* (Civ. App.) 152 S. W. 863.

Where an employé of a paper mill company, on seeing steam and acid vapor escaping from a defective gasket on a wood pulp digester, climbed out of a window, and hung on the sill to avoid being scalded, and while in that position lost his hold, and fell to the ground, and was injured, the negligence of the employer in maintaining a defective gasket was the proximate cause of the injury. *Yellow Pine Paper Mill Co. v. Wright* (Civ. App.) 154 S. W. 1168.

The proximate cause of the injury to an employé, fireman of a stationary engine, was the negligent starting of it by the engineer, a fellow servant, before the fireman had time to get away, after turning the fly wheel by hand, as a preliminary to starting; the defect in the engine, on account of which it had been stopped, being only the occasion. *Mansfield Oil Mill Co. v. Edgmon* (Civ. App.) 155 S. W. 1012.

III. METHODS OF WORK, RULES, AND ORDERS

33. **Methods of work and duty to protect servant in general.**—That a business might have been carried on in a less dangerous manner is immaterial, where the servant has been sufficiently instructed. *Mitchell v. Comanche Cotton Oil Co.*, 51 C. A. 506, 113 S. W. 158.

34. **Delegation of duty.**—The duty to furnish a safe place to work, which an express company owes to a servant employed to ride in one of its cars, extends only to the construction and equipment of the car, and loading express matter by another servant in a dangerous manner is not a breach of this duty. *Wells, Fargo & Co. v. Page*, 68 S. W. 528, 29 C. A. 489.

35. **Knowledge of danger.**—Duty of a lumber mill sawyer on discovering peril of a employé announced. *Williams v. Kirby Lumber Co.* (Civ. App.) 136 S. W. 1182.

36. **Rules—Reasonableness and sufficiency.**—In a suit for personal injuries received by an inexperienced hand while attempting to clean an alleged defective lint in a cotton-oil mill, the jury should be instructed that, even though they believe plaintiff was ordered to do this work in addition to the work he was originally employed to do, that of itself does not entitle him to recover, but that they must find that defendant was guilty of negligence, and that plaintiff himself was not guilty of negligence contributing, directly and proximately, to his injuries. *Hillsboro Oil Co. v. White* (Civ. App.) 41 S. W. 874.

Deceased was killed by the throwing down of a platform on which he was repairing a cable over railroad tracks in his employer's factory yard, the accident being caused by the smokestack of an engine striking the cable. Decedent's employer had made rules that the gate for the admission of railroad engines into the yard should be opened only on orders of the weighmaster, and it was customary, when engines desired to enter the yard, to give four blasts of the whistle. Engines did not usually enter the yard oftener than once a day, and on the day in question, before deceased started to work on the platform, he had been ordered by his foreman not to begin work until the engine had left the yard, which he did. The accident was caused by the engine again entering the yard without the gate being opened according to the custom, and without whistling. Held that, decedent's employer having promulgated rules, which, if followed, would have provided for decedent's safety, it was not guilty of negligence in failing to make other rules therefor. *Merchants' & Planters' Oil Co. v. Burns*, 74 S. W. 758, 96 T. 573, reversing (Civ. App.) 72 S. W. 626.

37. **Construction and operation.**—A rule of an owner of a coal mine held not to require a miner to discover the condition of the roof to the extent of relieving the owner from the duty of maintaining a safe place to work. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

38. **Negligence in giving orders.**—While plaintiff was running a log carriage in a sawmill, the saw veered, and struck the head block of the carriage, and displaced it, and on the return trip scraped against it, making a loud noise, whereupon the engines were stopped. Held, that defendant's foreman, in ordering the engineer to go ahead, before examining the saw, was guilty of negligence, though the saw was new and of standard make. *Sulphur Lumber Co. v. Kelley* (Civ. App.) 30 S. W. 696.

The negligence of a yardmaster in pulling a pin and uncoupling a car, pushed by the engine, to let it run down a grade, and then signaling the engine to stop, after the car had acquired too great speed, is not excused by the fact that he was prevented from sooner uncoupling it and stopping the engine by the sticking of the pin. *Texas & P. R. Co. v. Reed* (Civ. App.) 32 S. W. 118.

IV. WARNING AND INSTRUCTING SERVANTS

39. **Duty to warn and instruct in general.**—Plaintiff's son was employed by a drug company, and a fire occurred in the building at noon, when it was the custom of most of the employés, including plaintiff's son, to be absent; but he had been requested by the chemist to remain, and his presence in the building was known only to such chemist, who was not present when the fire broke out. The first and third floors were connected

by a speaking tube, so that the boy, who was on the latter floor, could have been notified of the fire, had his presence been known. The fire spread with such rapidity that the employes on the first floor had little time to escape, and plaintiff's son jumped from a window and was injured. Held, that no issue of liability of defendant on the theory of discovered peril was presented by the evidence. *Hernischel v. Texas Drug Co.*, 61 S. W. 419, 26 C. A. 1.

An employé was instructed to use a chisel in repairing a piece of cast iron by cutting off a portion of it, but reported to the foreman that the chisels were dull. He was told to apply to another employé to sharpen the chisels, and by him was directed to use one that he thought was all right. This he used until it became dull, so that to accomplish his purpose he struck the chisel harder, and was injured by a particle of iron striking him in the eye. Held, that the master could not be supposed to know from plaintiff's conduct that he would use a dull chisel, and was not bound to warn him of the danger. *San Antonio Sewer Pipe Co. v. Noll*, 83 S. W. 900, 37 C. A. 269.

A sleeping car company could not reasonably anticipate that a match would be in one of its berths, and that a servant in cleaning the berth would ignite it, and cause bedbug poison, which he was using in the berth, to explode and injure him, so that it was not, in failing to warn him, guilty of negligence causing the injury. *Pullman Co. v. Caviness*, 53 C. A. 540, 116 S. W. 410.

A master is bound to know conditions making extrahazardous the place where he puts his servant to work, and a failure to warn him of danger is not excused because the master did not know of the conditions creating it. *Producers' Oil Co. v. Barnes* (Civ. App.) 120 S. W. 1023.

An employer held not required to warn employes that oil would be ignited by lightning. *Butler v. Gulf Pipe Line Co.* (Civ. App.) 144 S. W. 340.

40. **Delegation of duty.**—The duty of a master to instruct a servant as to all abnormal or extraordinary risks beyond the comprehension of the servant, or which he has no means to safeguard himself against, is not delegable, and the failure of the master to perform this duty is negligence. *Industrial Lumber Co. v. Bivens*, 47 C. A. 396, 105 S. W. 831.

41. **Inexperienced or youthful employé.**—Where plaintiff was employed by defendant to drive one of its teams after he told defendant that he was not an expert driver, and required a gentle team, which defendant promised to give him, but instead it knowingly gave him a dangerous team, without notice to him, and plaintiff, while exercising due care, was run away with and injured, a verdict in his favor is sustained by the evidence. *Wrought Iron Range Co. v. Martin* (Civ. App.) 28 S. W. 557.

A youthful and inexperienced servant's knowledge that it is dangerous to come in contact with saws does not relieve the master from warning him that, in repairing a machine in a certain manner, he is in danger of coming in contact with a saw therein. *Greenville Oil & Cotton Co. v. Harkey*, 48 S. W. 1005, 20 C. A. 225.

Plaintiff, while employed by defendant company, was ordered by a vice principal of defendant to paint a hot boiler with coal tar. While painting the boiler, some of the tar popped into his eye, eventually causing its loss. Plaintiff was ignorant of such work, and was not told of such danger by the vice principal. Coal tar was a proper material to paint boilers with, and no such accident was shown to have occurred before, and the vice principal was not aware of any danger that might arise from its use. Held, that the master was not liable for negligence in not instructing the servant of the danger, as it was not such a danger as would require special precautions to avoid. *San Antonio Gas Co. v. Robertson*, 56 S. W. 323, 93 T. 503, reversing (Civ. App.) 55 S. W. 347.

Plaintiff, an inexperienced minor, was employed in trucking oil cake to a crusher. An elevating belt frequently became choked, and the foreman would then call plaintiff and others to assist him in unchoking it. Plaintiff was directed to get on the crusher, and press with one foot on the belt, and in doing so he slipped, and his foot was crushed. Held, that the court properly instructed that it was the duty of a master who puts an inexperienced minor at work more dangerous than that for which he was engaged to warn him of the danger. *Waxahachie Cotton Oil Co. v. McLain*, 66 S. W. 226, 27 C. A. 334.

A servant, who had worked for five or six weeks about the premises and machinery in repairing which he was injured, a part of whose duties had been oiling the machinery, and who knew the manner of repairing the same, having repaired similar parts before, could not be considered an inexperienced workman in the sense of imposing on his employer the duty of instructing him, or warning him in such a way as to save him from exposure to the danger which brought about his injury. *Hettich v. Hillje*, 77 S. W. 641, 33 C. A. 571.

Where an inexperienced servant operating a planing machine was injured by the timber he was working on being thrown back by the knives having been reset by the foreman in the servant's absence and without his knowledge, the master was guilty of negligence in having failed to warn him of the change. *Texarkana Table & Furniture Co. v. Webb* (Civ. App.) 86 S. W. 782.

Where, in an action for injuries to a servant caused by a defective driftpin used by him, plaintiff alleged that the pin when in proper condition was adapted to the use and purpose intended, and if the pin had been suitable, and the head thereof surrounded with soft or malleable iron, particles would not have been thrown therefrom nor the injury occurred, plaintiff was not entitled to object to certain instructions on the theory that the work in which the servant was engaged was dangerous of itself, and that defendant was bound to warn such servant, who was a minor and inexperienced, though the danger was obvious. *Wood v. Texas Cotton Product Co.* (Civ. App.) 88 S. W. 496.

An employer's vice principal was not relieved of the duty of warning an employé of the danger incident to work on a building, because the servant represented he was experienced and competent to do the work, if the vice principal saw immediately before the employé's accident, from his acts, that he was inexperienced. *McCracken v. Lantry-Sharpe Contracting Co.*, 45 C. A. 485, 101 S. W. 520.

A master need not warn a servant, though an infant, of ordinary risks and dangers which the servant actually knows and appreciates, or which are so apparent that one of

his age and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate. *Mitchell v. Comanche Cotton Oil Co.*, 51 C. A. 506, 113 S. W. 158.

An employer need not warn an employé against dangers incident to the work, where the latter has represented himself to be competent and the employer is ignorant of his inexperience. *Lantry-Sharpe Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 363.

One held bound to warn his employé against dangers incident to work outside of the ordinary employment. *Henry v. McCown* (Civ. App.) 140 S. W. 1170.

It is the duty of a master to warn a boy of all dangers not obvious, or not brought home to his knowledge by the exercise of ordinary care in the performance of his duties; a failure to do so being negligence. *Hartshorn Bros. v. Williamson* (Civ. App.) 156 S. W. 264.

42. Dangers known to employé.—Where a servant has knowledge of certain dangers incident to his employment, the failure of the master to give adequate warning of such dangers does not render him liable for an injury resulting therefrom. *Ladonia Cotton Oil Co. v. Shaw*, 65 S. W. 693, 27 C. A. 65.

A boy between 19 and 20 years of age, who had worked on a farm for 6 years, and was well acquainted with farm work, including the handling of oats, loaded sheaf oats on a wagon, and while sitting on the oats and driving over a well-known road the wagon struck a rough place, and he was thrown off and injured. Held, that the master was not liable, though he had not warned the boy of the danger. *Tucker v. Nat. Loan & Investment Co.*, 80 S. W. 879, 35 C. A. 474.

If a servant knew enough to put one of ordinary prudence on inquiry as to the charged condition of a wire, the master was relieved of giving notice of its condition. *Western Union Telegraph Co. v. Burton*, 53 C. A. 378, 115 S. W. 364.

If a servant knows the danger and the means of avoiding it as well as the master, there is no need of instructing him. *Brownwood Oil Mill v. Stubblefield*, 53 C. A. 165, 115 S. W. 626.

Where an employer promised his stationary engineer at the close of the workday on Saturday to remedy a defective condition in the engine room made by the dripping of oil onto the floor, the employer was not bound to warn the engineer when he went to work on the next Monday morning of the dangerous condition created by the oil on the floor, in addition to the fact that the oil was still there; the engineer being familiar with the danger. *Dallas Oil & Refining Co. v. Carter* (Civ. App.) 134 S. W. 418.

43. Obvious or latent dangers.—Where a servant is of mature years, and the danger is open to observation to any man of ordinary capacity, and as apparent to the servant as the master, there is no duty to instruct or warn. *Brownwood Oil Mill v. Stubblefield*, 53 C. A. 165, 115 S. W. 626.

A master need not warn a servant of dangers open and obvious to one of the servant's age and intelligence. *Gulf Cooperage Co. v. Abernathy*, 54 C. A. 137, 116 S. W. 869.

Where a servant was engaged in setting up a rock crusher more than 30 feet in height, the master is not bound to warn him of the danger of falling off, or from the negligence of fellow servants; such dangers being apparent to the most inexperienced. *Lantry-Sharpe Contracting Co. v. McCracken*, 105 T. 407, 150 S. W. 1156.

44. Dangers from extraneous sources.—Decedent, a railroad switchman, having taken the knuckle from the coupler of his switch engine, in order to haul a defective car, was informed by his foreman that he would proceed up the track to examine other cars that were to be moved, and directed decedent after placing the car to return to the same track. This decedent did, and, while readjusting the knuckle of the coupler, was caught between the engine and the next car, shoved along the track by another crew entering from the other end of the switch, without warning to him. Held, that decedent's foreman, having knowledge of decedent's position, was negligent in failing to warn decedent of the danger. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

Any negligence of the master in not warning an inexperienced employé as to dangers of moving saws in a machine which he was directed to clean held not the proximate cause of his injury from accidental slipping and falling into the saws. *Vernon Cotton Oil Co. v. Jones* (Civ. App.) 137 S. W. 424.

General warning to an employé against a danger does not extend to a piece of work, not in the general line of his employment, and directed by the employer to be performed. *Henry v. McCown* (Civ. App.) 140 S. W. 1170.

45. Sufficiency and effect of warnings or instructions.—Where the master warned and instructed a servant when first employed, he need not repeat the warning. *Mitchell v. Comanche Cotton Oil Co.*, 51 C. A. 506, 113 S. W. 158.

If defendant's foreman warned plaintiff in time for him to have removed his hand from the place of danger, and plaintiff heard the warning, this would be a defense, whatever its proper denomination. *Waggoner v. Sneed*, 53 C. A. 278, 118 S. W. 547.

46. Proximate cause of injury.—Where a sleeping car company for many years used an insect poison to clean up its cars without any accident, and there was nothing in its composition to show that it was dangerous when properly used, the failure of the company to warn a servant that it was dangerous was not negligence which proximately caused an injury to the servant by an explosion of the poison. *Pullman Co. v. Caviness*, 53 C. A. 540, 116 S. W. 410.

V. NUMBER AND COMPETENCY OF FELLOW EMPLOYÉS

47. Number required for work.—A wire cable, running between two of defendant's buildings, and over a railroad track, was lowered for repairs. There was an engine working on the track, and defendant's superintendent directed the man in charge of the work to wait until the engine was out of the yard, and station a man to stop the engine, and warn the workmen, if it returned. The watchman was not so stationed. The engine returned, struck the lowered cable, and killed plaintiff's husband. Held, that defendant was negligent in not furnishing a watchman, or seeing that he was stationed so as to stop the engine. *Burns v. Merchants' & Planters' Oil Co.*, 63 S. W. 1061, 26 C. A. 223.

Decedent was killed by the throwing down of a platform on which he was at work repairing a cable over railroad tracks, the accident being occasioned by the smokestack

of an engine striking the cable. The premises were those of the decedent's employer, and were inclosed by a high fence, railroad trains having access thereto. It was customary for an engine to whistle when about to enter, and the employer had a man to open the gate, but there was no one to warn employes engaged in the work decedent was. An approaching engine was not visible from the platform where decedent was stationed. On the occasion in question the gateman was absent when the engine entered. Held, that the employer was negligent in failing to furnish a safe place to decedent in which to work. *Merchants' & Planters' Oil Co. v. Burns* (Civ. App.) 72 S. W. 626, judgment reversed 74 S. W. 758, 96 T. 573.

Defendant was not guilty of negligence in failing to provide a watchman to look out for engines approaching the yard. *Merchants' & Planters' Oil Co. v. Burns*, 74 S. W. 758, 96 T. 573, reversing (Civ. App.) 72 S. W. 626.

Where a servant, ordered to assist in handling a wooden beam with inadequate assistance, was ignorant, by reason of his inexperience, of the weight of the beam, and the number required to safely handle it, and the master was charged with a knowledge of the danger of the undertaking, the master was liable for the injuries received by the servant while assisting in handling the beam. *San Antonio Traction Co. v. De Rodriguez* (Civ. App.) 77 S. W. 420.

A master's liability to adopt a reasonably safe and practicable method of work includes the duty to provide a sufficient number of men therefor. *Judson & Little v. Tucker* (Civ. App.) 156 S. W. 225.

48. Competency.—The employment of men to assist in the erection of telegraph poles, without making any inquiry as to their competency for such work, is negligent, and the employer is liable to a fellow servant for an injury resulting therefrom. *Postal Tel. Cable Co. of Texas v. Coote* (Civ. App.) 57 S. W. 912.

The mere fact that a servant is incompetent does not make the master liable for his negligence, if he has exercised proper care in selecting the servant and ascertaining his fitness. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 C. A. 18.

One act of negligence on the part of a servant held insufficient to charge the master with negligence in employing him. *Butler v. Gulf Pipe Line Co.* (Civ. App.) 144 S. W. 340.

49. Proximate cause of injury.—To render a master liable for injuries to a servant, caused by the negligence of an incompetent fellow servant, such incompetency must have been the cause of the injury. *Campbell v. Wing*, 5 C. A. 431, 24 S. W. 360.

Decedent was killed by the throwing down of a platform on which he was at work repairing a cable over railroad tracks; the accident being occasioned by the smokestack of an engine striking the cable. The premises were those of the decedent's employer, and were inclosed by a high fence; railroad trains having access thereto. It was customary for an engine to whistle when about to enter, and the employer had a man to operate the gate; but there was no one to warn employes engaged in the work decedent was. An approaching engine was not visible from the platform where decedent was stationed, and on the occasion in question the gateman was absent when the engine entered. Held, that the employer's negligence in failing to have a watchman was a concurring proximate cause with the negligence of the railroad company in entering the yard without a signal, and in colliding with the cable, so as to charge the employer. *Merchants' & Planters' Oil Co. v. Burns* (Civ. App.) 72 S. W. 626, judgment reversed 74 S. W. 758, 96 T. 573.

VI. NEGLIGENCE OF FELLOW SERVANTS

50. Operation of railroads.—See Title 115, Chapter 14.

51. Negligence as ground of liability in general.—A servant cannot recover at common law for injuries caused by the negligence of a fellow servant. *Price v. Houston Direct Nav. Co.*, 46 T. 535; *Lantry-Sharpe Contracting Co. v. McCracken*, 53 C. A. 627, 117 S. W. 453; *Taylor v. White* (Civ. App.) 156 S. W. 349.

In an action by a railroad employe against his employer for personal injuries to his wife, caused by the negligence of another employe, the rule that an employe cannot recover of the master for injury caused by the act of a fellow servant has no application. *Campbell v. Harris*, 4 C. A. 636, 23 S. W. 35.

Under Art. 4694, subs. 1, 2, private corporations other than common carriers are not liable for the death of an employe caused by the negligence of another employe, but are liable for deaths caused by the negligence of a vice principal. *William Miller & Sons Co. v. Wayman* (Civ. App.) 157 S. W. 197.

52. Nature of common service in general.—The operator of an elevator in an hotel is a fellow servant of a chambermaid riding on the elevator in the discharge of her duties. *Oriental Inv. Co. v. Sline*, 41 S. W. 130, 17 C. A. 692.

A guard employed to ride on an express car and protect it from robbers is a fellow servant of the express messenger, not entitled to recover for injuries inflicted by his negligence. *Wells Fargo & Co. v. Page*, 68 S. W. 528, 29 C. A. 489.

Plaintiff was employed in a cotton gin as a millwright, his duties being to look after the machinery and everything pertaining to that part of the business, and requiring him to go to various places where the work was being carried on. While passing along a passway from one part of the works to another, he was injured by being struck by a bale of cotton thrown, according to custom, by another servant from the second story of the building. Held, that plaintiff and the one who threw the bale were fellow servants. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 C. A. 18.

An employe engaged in mixing concrete for a building in process of construction is a fellow servant of the carpenters and employes engaged in sweeping rubbish into the basement, all being engaged in the common work of erecting the building, with no one having authority over the others. *Armour & Co. v. Dumas*, 95 S. W. 710, 43 C. A. 36.

Plaintiff and P. were common day laborers in defendant's employ. P., at the direction of his superior, neither of whom were authorized to employ or discharge plaintiff, called him to assist in holding a chisel which was being driven into a piece of timber. The chisel was insecurely fastened, so that, when plaintiff pulled down on it as he was directed to do, it flew out, and he fell, and was injured. Held, that P. was plaintiff's

fellow servant, and that plaintiff could not recover for his negligence, if any, in setting the chisel. *Vilter Mfg. Co. v. Kent*, 47 C. A. 462, 105 S. W. 525.

A bricklayer, having no duty to erect scaffolds as a place to work, such structures being furnished by the master and erected by carpenters separately engaged, is not a fellow servant with the carpenters. *Texas Co. v. Strange* (Civ. App.) 132 S. W. 370.

A servant of a manufacturer engaged in structural work, who is employed in a building as a member of the rivet gang, and a coservant engaged in piling steel beams in the yard, are not fellow servants. *Mosher Mfg. Co. v. Boyles* (Civ. App.) 132 S. W. 492.

Servants held fellow servants. *Vernon Cotton Oil Co. v. Catron* (Civ. App.) 137 S. W. 404.

Employés in a sawmill, engaged in removing planks from a saw as fast as they are sawed, are fellow servants. *Bledsoe v. Thompson Bros. Lumber Co.* (Civ. App.) 151 S. W. 910.

Employés engaged in drilling oil wells, each doing a specific part of the work, and neither having the power to employ and discharge, are fellow servants. *Producers' Oil Co. v. Bush* (Civ. App.) 155 S. W. 1032.

A fireman engaged to assist plaintiff who had charge of the engines in an electric power house is plaintiff's fellow servant. *Taylor v. White* (Civ. App.) 156 S. W. 349.

53. Nature of act of fellow servant and performance of duties of master.—A servant cannot recover for injury from negligence of a coservant in moving the lever of a machine, though the coservant's duties were merely to take away the product of the machine and he had been directed not to touch the machine. *Southern Cotton Oil Co. v. De Vond* (Civ. App.) 25 S. W. 43.

In loading and arranging express matter in the car, an express messenger is acting within the scope of his ordinary duties as servant, and a fellow servant cannot recover because of the negligent manner in which the arranging is done. *Wells Fargo & Co. v. Page*, 68 S. W. 528, 29 C. A. 489.

The failure of a servant to stop machinery when he observes that another servant is working in close proximity to it, if negligence, is the negligence of a fellow servant, for which the master is not responsible. *Bering Mfg. Co. v. Femelat*, 79 S. W. 869, 35 C. A. 36.

A servant having authority to direct and control another servant in the performance of his duties is not a fellow servant of the latter while giving orders to the latter. *Id.*

If a servant's death resulted from the negligence of the employer's agents placed in charge of its plant to control and direct the employés, the act of such servants would be the employer's act so as to make it liable. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 129 S. W. 852.

Where one employé is placed under the control of another, the latter's orders respecting the work are the employer's orders regardless of the grade which the directing employé otherwise holds. *Lantry-Sharpe Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 363.

A servant in a cotton oil mill held not entitled to recover for the negligence of another servant in inspecting certain appliances, unless that servant inspected them with regard to their safety as appliances. *Leonard Cotton Oil Co. v. Burnes* (Civ. App.) 138 S. W. 1082.

Negligence of an engineer in an electric power house charged with the duty of watching an indicator showing contacts between live and dead wires held to render the master liable for injury to a lineman. *City of Greenville v. Branch* (Civ. App.) 152 S. W. 478.

The rule that a master is not liable to a servant for a fellow servant's negligence does not apply to negligence consisting of the omission of a duty owed by the master to the servant. *Id.*

The duty of a master to furnish a servant a reasonably safe scaffold on which to work is not delegable to fellow servants. *Texas Co. v. Strange* (Civ. App.) 154 S. W. 327.

Where employés drilling oil wells were supplied with proper appliances, including a jet to protect them from escaping gas, and it was the duty of one of them to use the jet when necessary, his failure to use it to protect against escaping gas, causing the death of a coemployé, was a breach of duty of the employé, for which the employer was not liable. *Producers' Oil Co. v. Bush* (Civ. App.) 155 S. W. 1032.

A master is liable for the negligence of a servant who is discharging the primary or nonassignable duty of the master to provide a safe method for work. *Judson & Little v. Tucker* (Civ. App.) 156 S. W. 225.

54. Vice principals.—Where a superintendent, having power to hire, discharge, and control men, possesses knowledge necessary to an employé's safety, the principal is chargeable with his neglect to impart it to the employé. *Connor v. Saunders*, 9 C. A. 56, 29 S. W. 1140.

A foreman who has no power to employ or discharge is a fellow servant, and not a vice principal. *Maughmer v. Behring*, 46 S. W. 917, 19 C. A. 299.

A longshoreman was injured on account of the defective adjustment of a derrick used for loading a ship. The one acting as foreman in the absence of the regular foreman had absolute charge of the work and the adjustment of the machinery, and had taken the place of another employé, and permitted the latter to go and hire more men. The employer gave no testimony to show that such acting foreman was not in authority. Held, that the acting foreman was not a fellow servant, but a vice principal. *Young v. Hahn* (Civ. App.) 69 S. W. 203, judgment reversed 70 S. W. 950, 96 Tex. 99.

Where defendant corporation employed C., and placed him in charge of its shipping department as superintendent, giving him control thereof, defendant was liable for C.'s negligence whereby a laborer employed by him was injured. *Roberts v. Fielder Salt Works* (Civ. App.) 72 S. W. 618.

The washhouse foreman in a brewery, who has no authority to employ or discharge, and the person who piles up kegs to be washed, are fellow servants of one engaged in washing them, so that he cannot recover of the master for injury from the falling of the kegs on account of the negligent piling, or the negligence of the foreman in giving no notice when seeing the kegs leaning. *Houston Ice & Brewing Co. v. Pisch*, 77 S. W. 1047, 33 C. A. 684.

Mere passive consent by an employer that one employé direct another, when unaccompanied with a duty on the part of the directed employé to obey the directions given, will not fix liability on the employer for negligent directions of the directing employé. *Texas & P. Coal Co. v. Manning*, 78 S. W. 545, 34 C. A. 322.

Where neither express authority to one employé to direct another, nor knowledge of authority assumed by such employé brought home to the employer or to any one standing in the relation of vice principal, was shown, consent on the part of the employer to the exercise by the employé of such authority will not support an inference or presumption of authority to such employé to direct and control the other. *Id.*

An employer is not liable for the negligence of a foreman by which an employé is injured, unless the foreman had the power to employ or discharge the employé. *Bering Mfg. Co. v. Femelat*, 79 S. W. 869, 35 C. A. 36.

An assistant general manager of a corporation, who has general authority in the conduct of its business and the direction of its work, is a vice principal and not a fellow servant with inferior servants engaged in the actual operation of the business, although he has no power to employ and discharge such inferior servants. *Abilene Cotton Oil Co. v. Anderson*, 91 S. W. 607, 41 C. A. 342.

A foreman directing an employé to work in a particular place is not a fellow servant of the employé. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

Authority to employ and discharge makes an employé a "vice principal," regardless of his grade of service. *Lantry-Sharpe Contracting Co. v. McCracken*, 53 C. A. 627, 117 S. W. 453.

Mere proof that an employé was a foreman, unaccompanied by any proof that he was deputed by the employer to perform the personal and nondelegable duties of the employer, did not show that the employé was a vice principal for whose acts the employer was liable. *Quinn v. Glenn Lumber Co.* (Civ. App.) 118 S. W. 733, reversed, 103 T. 253, 126 S. W. 2.

Though W., foreman of defendant's sawmill, had authority to employ and discharge employés only after consultation with defendant's president, yet he, having authority to direct and control the other employés and supervise their work, was a vice principal as to plaintiff's intestate, an employé therein in taking B., another employé, from his regular work of block setting, and sending him below the floor to unscrew the nuts from bolts in a broken floor plate, in doing which B. came in contact with a lever, setting machinery in motion, killing intestate; so that defendant was liable for the foreman's negligence in so sending B., knowing he was incompetent and inexperienced and ignorant of the character and use of the machinery amidst which he was instructed to work. *Sullivan-Sanford Lumber Co. v. Cooper* (Civ. App.) 126 S. W. 35.

One who is the foreman of a department in an establishment divided into departments, with power to hire and discharge employés in that department, is a "vice principal" in the conduct of that department, and any negligence on his part in the conduct of the business committed to him is negligence of the master. *Hugo, Schmeltzer & Co. v. Paiz* (Civ. App.) 128 S. W. 912.

One is a "vice principal" who is employed to hire, direct, and discharge employés or to whom the employer has delegated a duty owing to workmen, though otherwise he may be a fellow servant; it being the authority given in a particular matter, and not the grade of service, which determines the issue of vice principal or fellow servant. *Lantry-Sharpe Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 363.

Where a master places a servant in charge of certain work with authority to control and direct other servants, such superior servant represents the master while in the performance of such duties. *Southwestern States Portland Cement Co. v. Riser*, 137 S. W. 1188.

It is not essential that one have the power to employ and discharge employés in order to be a vice principal. *Wichita Cotton Oil Co. v. Hanna* (Civ. App.) 139 S. W. 1000.

A servant held a vice principal. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

A fire boss of a mine represents the mineowner in the performance of the duties of inspection. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

A foreman of a factory in full charge thereof, in the absence of the manager, was a vice principal, as concerns the liability of the common employer for injury to a factory hand resulting from the explosion negligently caused by the foreman. *Williams v. Coca-Cola Co.* (Civ. App.) 150 S. W. 759.

A foreman giving orders to those placed under him to work by the employer in reference to the work under his control and supervision necessarily speaks for the employer, and is a vice principal as to the employés over whom he had authority. *City of Greenville v. Branch* (Civ. App.) 152 S. W. 478.

Where a servant by whose negligence plaintiff was injured had authority to direct and control plaintiff, but was without authority to employ and discharge employés, he was plaintiff's fellow servant, except as to nondelegable duties with which he might have been invested. *Lowrey v. Fitzhugh* (Civ. App.) 153 S. W. 1190.

A servant without power to employ or discharge is not a vice principal, but as to servants of the same master is a fellow servant. *Judson & Little v. Tucker* (Civ. App.) 156 S. W. 225.

55. — Nature of act or omission, and performance of duties of master.—One of two employés, in the erection of a compress, superintended the carpenter work, and the other the machinery. The latter, in hoisting a heavy girder, called the former to his assistance, and while there a hoisting block slipped, on account of its greasy condition, and fell, striking him a fatal blow. Held, that as it was the duty of the company in the first instance to remove the grease, and as such duty was nontransferable, the failure of the superintendent of the machinery to do so was not such negligence of a fellow servant as precluded a recovery. *Terrell Compress Co. v. Arrington* (Civ. App.) 48 S. W. 59.

The foreman of a telegraph company in charge of the construction of its lines is the vice principal of the company, and it is responsible for an injury resulting from his negligence in hiring incompetent men. *Postal Tel. Cable Co. of Texas v. Coote* (Civ. App.) 57 S. W. 912.

Where plaintiff was employed by the superintendent, and told to report to a foreman, and plaintiff was not instructed in his duties, or warned of danger by the superintendent, and the plaintiff and others were called by the foreman to assist him in starting an elevating belt on certain machinery managed by him, the foreman was a vice principal, and not a fellow servant, of plaintiff. *Waxahachie Cotton Oil Co. v. McLain*, 66 S. W. 226, 27 C. A. 334.

A vice principal having control of the loading of a vessel, who takes the place of the gangwayman whose duty it is to give orders for the movements of a derrick used in hoisting goods, is not, while so acting, a fellow servant. *Young v. Hahn* (Civ. App.) 69 S. W. 203, judgment reversed 70 S. W. 950, 96 T. 99.

Where plaintiff was injured by the fall of a barrel which had been negligently set on a joist above where plaintiff was working, and the barrel fell when another servant went on the joist to get a barrel in obedience to the order of his foreman, the latter's act did not constitute negligence on the part of plaintiff's fellow servant. *G. A. Duerler Mfg. Co. v. Eichhorn*, 44 C. A. 638, 99 S. W. 715.

Where an employer places a foreman in charge of the construction of a building, with authority to control and direct the workmen, who are instructed to obey his orders, and a workman receives injury while obeying the foreman's order, the foreman's negligence is the employer's. *McCracken v. Lantry-Sharpe Contracting Co.*, 45 C. A. 485, 101 S. W. 520.

An employé while working on the top of a stack of flour was injured in consequence of the fall thereof. The flour had been stacked before his employment began. He was directed by the employer's foreman to work on the top of the stack. Held, that the injury was not caused by a fellow servant. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

A servant, while actually engaging in the work with other servants, is not a vice principal as to such servants, though he has power to direct and control them. *Lantry-Sharpe Contracting Co. v. McCracken*, 53 C. A. 627, 117 S. W. 453.

Where it is the duty of the servant to keep the machine he is operating in proper condition for use, the act of the foreman in undertaking to repair a defect therein is that of a mere intruder, for whose unauthorized act the master is not responsible. *Quinn v. Glenn Lumber Co.*, 103 T. 253, 126 S. W. 2, reversing (Civ. App.) 118 S. W. 733.

Where it is the duty of the foreman in a sawmill to keep the machinery in proper condition, he represents the master in the performance of a nondelegable duty, and is not a fellow servant of the sawyer. *Id.*

A servant was killed while attempting to release a freight elevator. A truck loaded with merchandise was wheeled into the elevator, and when the two front wheels got on the elevator it went down, and a fellow employé grabbed the cable, and the elevator started up so that the front wheels were caught between the floor of the elevator and the floor of the building. The work of releasing the elevator was done under the directions of the vice principal. Held, that the master was liable on it appearing that the release of the elevator was within the sphere of the duties committed to the vice principal and that the direction he gave was, under the circumstances, negligent, though he was not liable for the unsafe condition of the elevator arising during the progress of the work. *Hugo, Schmeltzer & Co. v. Paiz* (Civ. App.) 128 S. W. 912.

The rule that a master is not liable ordinarily for the negligent act of a foreman proximately resulting in injury to a servant, unless the foreman had the power to employ or discharge the servant, does not apply to a foreman giving orders to those who have been placed by the master under him to work, and in reference to work under his control, but he speaks for the master and is a vice principal. *Mosher Mfg. Co. v. Boyles* (Civ. App.) 132 S. W. 492.

Though one be a vice principal as to general management and control of work, if his negligence be that of a colaborer and not in exercising his authority, he is, as to such negligence, a fellow servant and not a vice principal. *Lantry-Sharpe Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 363.

If a vice principal on hearing a negligent order given permits it to be obeyed, he thereby makes it his own. *Id.*

A servant superintending the erection and shifting of scaffolds on a building held a vice principal. *Southwestern States Portland Cement Co. v. Riser* (Civ. App.) 137 S. W. 1188.

In determining the liability of the master for injuries to a servant, certain questions held immaterial. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

A vice principal held authorized to direct a servant to assist in releasing a stalled freight elevator used in the work. *Id.*

A foreman in a mill held a vice principal. *Sullivan-Sanford Lumber Co. v. Cooper*, 105 T. 21, 142 S. W. 1168.

The act of a foreman, throwing a lighted match into a pool of oil, held not an act for which the master was liable. *Butler v. Gulf Pipe Line Co.* (Civ. App.) 144 S. W. 340.

A servant, injured in setting up a rock crusher through the negligence of the carpenter, who, though directing operations, had no power to hire and discharge, cannot recover from the master; the carpenter being a mere fellow servant. *Lantry-Sharpe Contracting Co. v. McCracken*, 105 T. 407, 150 S. W. 1156.

Death of employé struck by hoisting bucket held caused by the negligence of a vice principal who directed another employé to signal the engineer to permit the bucket to drop without warning the employé or ascertaining whether he was in a position of danger. *William Miller & Sons Co. v. Wayman* (Civ. App.) 157 S. W. 197.

56. Existence of relation of master and servant in general.—Where no proof is offered in support of the allegation that plaintiff was engaged in expediting the business of his master when he was injured by the negligence of defendant's servants whom he was assisting to move certain cars, he cannot recover, since in such case he would be a mere volunteer standing in the same position as a regular employé. *Bonner v. Bryant*, 79 T. 540, 15 S. W. 491, 23 Am. St. Rep. 361.

A servant injured in consequence of negligent work done by servants before his employment began and such servants are not fellow servants. *Mosher Mfg. Co. v. Boyles* (Civ. App.) 132 S. W. 492.

Plaintiff, a servant of a transfer company who was directed to take a team and do some moving for a well driving company, was, while engaged in such work under the direction of the well driving company's foreman, a servant of that company and a fellow servant of its servants. *Judson & Little v. Tucker* (Civ. App.) 156 S. W. 225.

57. Servants of separate masters in same work.—Lessees of a penitentiary are not responsible for an injury to a convict by the defective construction of a bunk made by a servant of the penitentiary commissioners having charge of the convicts. *Cunningham v. Moore*, 55 T. 373, 40 Am. Rep. 812.

When the injured person, plaintiff's wife, was working for her husband, who was boarding the men of defendant company under an agreement that the company should retain their board and pay it to plaintiff, the wife and the engineer were not fellow servants. *Brown v. Sullivan*, 71 T. 470, 10 S. W. 288.

A servant of a contractor erecting a building and a servant of an independent contractor are not fellow servants. *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973.

58. Concurrent negligence of master and fellow servant.—An action for the death of plaintiff's son, through negligence of a railroad company in allowing slabs to obstruct the side of a switch, where the negligence of the defendant is shown, in the absence of contributory negligence on the part of the deceased, recovery is not defeated by the contributory negligence of fellow servants. *Howe v. St. Clair*, 8 C. A. 101, 27 S. W. 800.

The employer is liable for an injury to an employé from the concurrent negligence of the master and fellow servants. *Sincere v. Union Compress & Warehouse Co.* (Civ. App.) 40 S. W. 326.

A foreman who directs a servant to work beneath a place where another servant is working, and fails to warn the lower servant that the end of a timber being sawed off by the upper servant is about to fall, is guilty of such negligence as will render his master liable, though the upper servant is also negligent. *American Cotton Co. v. Smith*, 69 S. W. 443, 29 C. A. 425.

Where a servant employed in a cotton gin, while passing from one part of the works to another, was struck by a bale of cotton thrown from the second story of the building by another servant in the discharge of his duty, the fact that the injured servant and the one discharging the bale were fellow servants would not preclude a recovery, if the injured servant was hurt through the negligence of the master in failing to provide a safe passage, or in failing to employ a competent servant to discharge the cotton, or in failing to instruct him to give a proper warning before discharging the bale. *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847.

If negligence of the master concurs with that of a fellow servant in producing the injury, the master is as liable for the consequences thereof as though his negligence was the sole cause of the injury. *G. A. Duerler Mfg. Co. v. Eichhorn*, 44 C. A. 638, 99 S. W. 715.

Plaintiff, a laborer employed by defendant, which operated a railroad, was ordered to ride on flat cars loaded with telephone poles, the cars being pushed by a locomotive. The road was uneven, and the rocking of the cars caused the end of the poles on the front car to fall, whereupon defendant's general manager cried out, and plaintiff, noticing the condition of the poles, jumped from the car and was injured. The poles would not have fallen had a certain pin been placed in a standard on the front of the car. All of the hands had been engaged in loading the car, but plaintiff had not assisted in fixing the standard, and knew nothing as to its condition. Held, that an instruction that, if there was negligence in failing to secure the standard and negligence in allowing the track to be rough and uneven, a verdict should be returned for plaintiff was proper. *Lodwick Lumber Co. v. Mounce*, 46 C. A. 230, 102 S. W. 142.

If the breaking of a rope and consequent injury to an employé was due to the concurrent negligence of the master in selecting and using the rope and of the employé's fellow-servants in using it, the employers are liable. *Suderman & Dolson v. Woodruff*, 47 C. A. 229, 105 S. W. 217.

An employé in a sawmill was injured while adjusting a guide pin of a circular saw, by the slipping of the wrench used to tighten the pin. The wrench was worn, and loosely fitted the head of the pin, which was also worn. A co-employé had put cloth in the threads of the guide pin to hold it more securely, and the employé put a severer strain on the wrench than ordinary. Held, that the act of the co-employé was not the proximate cause of the injury. *Quinn v. Glenn Lumber Co.* (Civ. App.) 118 S. W. 733, reversed 103 T. 253, 126 S. W. 2.

Where a servant of a contractor erecting a building was injured by the fall of a ladder because of the negligence of the contractor in improperly securing it, and in putting a servant to work beneath it where he might be injured by its fall if displaced, the contractor failed to use ordinary care to furnish the servant a reasonably safe place to work, and his negligence was the proximate cause of the injury, though the displacement of the ladder was caused by the negligence of a fellow servant. *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973.

A master is liable for injury to a servant through its negligence, though there is concurrent negligence of a fellow servant. *Sullivan-Sanford Lumber Co. v. Cooper* (Civ. App.) 126 S. W. 35.

Where the negligence of the master concurs with the negligence of a servant, the master is liable. *Consumers' Lignite Co. v. Cameron* (Civ. App.) 134 S. W. 283.

Act of a fellow servant in untying a rope, whereby a scaffold was precipitated to the ground injuring plaintiff, held not the proximate cause of the injury. *Southwestern States Portland Cement Co. v. Riser*, 137 S. W. 1188.

Where the master's negligence in failing to guard dangerous machinery is the proximate cause of injury, he is not relieved from liability by the fact that plaintiff's fellow servant was negligent in operating the machine. *Armour & Co. v. Morgan* (Civ. App.) 151 S. W. 861.

59. Willful acts and gross negligence of fellow servants.—A corporate employer is not liable for injuries to a new employé inflicted by its officers and employés while attempting, in sport, to lay the new employé across a barrel for the purpose of padding

him, as an initiation into the service, though the custom of initiating all new officers and employes had existed for years with the knowledge and acquiescence of the officers and managers; the act both of the officers and of the employes being wholly without the scope of their authority. *Medlin Milling Co. v. Boutwell*, 104 T. 87, 133 S. W. 1042, 34 L. R. A. (N. S.) 109, reversing (Civ. App.) 122 S. W. 442.

VII. ASSUMPTION OF RISK

60. **Operation of railroads.**—See Title 115, Chapter 14.

61. **Nature and extent in general.**—A policeman does not, by virtue of his employment, assume risks incident to defective sidewalks and highways. *City of Galveston v. Hemmis*, 72 T. 558, 11 S. W. 29, 13 Am. St. Rep. 828.

Where a servant is injured from one of the known dangers ordinarily incident to his service without negligence on his part, his injury is ascribed to one of the ordinary risks of the employment which he assumed in entering the service, and the relation of master and servant must appear before the doctrine of assumed risk is applicable. *Louisiana & T. Lumber Co. v. Brown*, 60 C. A. 482, 109 S. W. 950.

The risks assumed by a servant stated. *Leonard Cotton Oil Co. v. Burnes* (Civ. App.) 138 S. W. 1082.

The defenses of assumption of risk and contributory negligence are inconsistent, and the existence of one necessarily excludes the other. *Armour & Co. v. Morgan* (Civ. App.) 151 S. W. 861.

62. **Reliance on care of master.**—In an action for injuries received through the negligence of a co-laborer, an instruction that plaintiff would be put on inquiry to ascertain, before engaging in work with such laborer, whether he was a man of ordinary intellect, and understood the English language, was erroneous, since, in the absence of actual knowledge of such want of capacity, plaintiff could assume that the master had exercised reasonable discretion in selecting the servant. *B. Lantry Sons v. Lowrie* (Civ. App.) 58 S. W. 837.

Where plaintiff was injured by the fall of a barrel insecurely placed on a joist above the floor of the room in which plaintiff was working, she did not assume the risk, she being under no obligation to inspect the premises for such dangers, nor to presume that defendant would negligently place the barrel in an insecure position. *G. A. Duerler Mfg. Co. v. Elchhorn*, 44 C. A. 638, 99 S. W. 715.

Where a bricklayer goes upon a scaffold as a place of work, the scaffold having been built by carpenters engaged in the same general employment, he has the right to assume that the master has performed his duty to provide a safe place to work. *Texas Co. v. Strange* (Civ. App.) 132 S. W. 370.

A servant need not anticipate the master's negligence, and he does not assume the risks of the failure of the master to perform his duty. *Alamo Oil & Refining Co. v. Curvier* (Civ. App.) 136 S. W. 1132.

A servant is not bound to use ordinary care to see whether the master has discharged his duty of furnishing a safe place for work, but may presume that the master has discharged his duty, without assuming the risk arising from the failure to do so, unless he knows or should have known that the place was dangerous. *Cooper v. Robischung Bros.* (Civ. App.) 155 S. W. 1050.

63. **Dangers incident to nature of work.**—A servant assumes the risk of all dangers ordinarily incident to his employment. *Western Union Telegraph Co. v. Burton*, 53 C. A. 378, 115 S. W. 364; *Alamo Dressed Beef Co. v. Yeagan* (Civ. App.) 123 S. W. 721; *Freeman v. Irving*, 136 S. W. 810; *Arcola Sugar Mills Co. v. Luckey*, 144 S. W. 1148; *Brown Cracker & Candy Co. v. Johnson*, 154 S. W. 684; *Taylor v. White*, 156 S. W. 349.

In a servant's action for injuries an instruction that plaintiff assumed as matter of law all risks of injury ordinarily incident to the employment; that, if his injury resulted from risks ordinarily incident to the work, the verdict should be for defendant; that by the expression "risk ordinarily incident to the work" is meant a risk of injury that does not grow out of an act of negligence on the part of defendant or his other employes, etc.—correctly stated the law. *Freeman v. Fuller* (Civ. App.) 127 S. W. 1194.

64. **Defective or dangerous tools, appliances and places.**—Plaintiff in entering the employ of defendant assumed the ordinary risks of the service for which he was employed, and if he was employed for the purpose of "riveting," and the flying or chipping of the tools used for this purpose was one of such risks, and he was injured thereby, he could not recover. *H. S. Hopkins Bridge Co. v. Burnett*, 85 T. 16, 19 S. W. 886.

Plaintiff was injured by a piece of steel which flew off a rivet hammer used by a co-employe, while holding a sledge hammer against a rivet. He had been at the work five or six days, and knew nothing as to the condition of the rivet hammers. The tool company making the hammers had a high reputation, and its tools were in high standing. Such hammers must be highly tempered, to serve their purpose, and, being so, are liable to chip and crack when in use. All of the rivet hammers were cracked and shivered, and had been for five or six days. Employes testified that there was little likelihood of the hammers cracking or shivering when sound, but that, becoming cracked, there was great liability of pieces chipping off. It was further shown that the cracked condition of the hammer from which the piece causing the injury flew was apparent on a casual examination; also, that defendant had a man on the scene as superintendent of the work. Held, that an instruction that, it being shown that the hammers by which plaintiff was injured were made by a company whose tools were of high standing, and that such hammers must be highly tempered, and therefore liable to chip and crack when in use, plaintiff assumed the risk of being injured by such chipping or cracking, and therefore the finding should be for defendant, was properly refused, since the facts, as shown, did not apply to hammers which had become cracked and chipped from use. *De La Vergne Refrigerating Mach. Co. v. Stahl*, 60 S. W. 319, 24 C. A. 471.

Where a deck hand on a tugboat, a part of whose duties consisted in keeping the deck clear, stepped on a siphon pipe lying on the deck, causing him to slip and be caught in a coil of rope attached to a tow, the risk of such an accident was one which he had assumed. *Direct Nav. Co. v. Anderson*, 69 S. W. 174, 29 C. A. 65.

The question of a master's negligence in failing to provide his servant with a reasonably safe place to work does not arise where it is clearly shown that the servant himself selected the place at which he performed the work for convenience sake, and without any order or suggestion from his foreman, whereas the work could have been done elsewhere without incurring the danger incident to the performance of the work in the place chosen. *Hettich v. Hillje*, 77 S. W. 641, 33 C. A. 571.

An employé in charge of a gin stand, and required to watch the machinery, look out for defects, and unchoke the same on it becoming choked up with cotton seed, assumed the risk of injury resulting to him in consequence of his hand being carried into the saws while unchoking the machinery. *Thompson v. Planters' Compress Co.*, 48 C. A. 235, 106 S. W. 470.

Where it is the duty of the servant to keep the machine he is operating in proper condition for use, he assumed the risk of injury from defects therein. *Quinn v. Glenn Lumber Co.*, 103 T. 253, 126 S. W. 2, reversing (Civ. App.) 118 S. W. 733.

Where temporary structures, erected to complete a main structure, are put up by the same workmen as are engaged on the main structure, the workmen who have put it up assume the risk of such structure being unsafe. *Texas Co. v. Strange* (Civ. App.) 132 S. W. 370.

The rule that a master must exercise ordinary care to furnish a servant a reasonably safe place to work does not apply where the place becomes unsafe during the work. *Adams v. Consumers' Lignite Co.* (Civ. App.) 138 S. W. 1178.

An operator of an electrical ironer in a laundry does not assume the risk of injury from explosions caused by defective wiring. *Kampmann v. Mendoza* (Civ. App.) 141 S. W. 161.

A servant engaged in winding up doors of ballast cars rented by his master for use in his business does not assume a risk of injury caused by the breaking of a chain. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

Where a telephone lineman was not instructed to use a ladder in ascending poles, he did not assume the risk of injury from defects in a pole, received while climbing the same in the usual manner. *Abilene Light & Water Co. v. Robinson* (Civ. App.) 146 S. W. 1052.

An employé may assume that the place in which he works is reasonably safe. *Farmers' Gin & Milling Co. v. Jones* (Civ. App.) 147 S. W. 668.

65. Dangerous operations and methods of work.—A servant in entering the master's employ assumed the ordinary risks of the service for which he was employed, and if he was employed for the purpose of "riveting," and the flying or chipping of the tools used for this purpose was one of such risks, and he was injured thereby, he could not recover. *H. S. Hopkins Bridge Co. v. Burnett*, 19 S. W. 886, 85 T. 16.

Where a servant went into the mouth of an elevator bin to cave cotton seed which had become lodged therein, he assumed the risk of digging in the bottom of the bin, whereby the seed slipped and crushed him. *Brown v. Miller* (Civ. App.) 62 S. W. 547.

Plaintiff was employed in an oil mill, and was directed to get on the crusher, and put one foot on the belt, which had choked, to press it down, and in doing so he slipped, and his foot was caught in the crusher. It was not shown that there was any rule as to how the work should have been performed. Held, that it was not error to refuse to instruct that, if the defendant knew or ought to have known how the business was conducted, he assumed the extraordinary hazard arising from the manner in which it was conducted. *Waxahachie Cotton Oil Co. v. McLain*, 66 S. W. 226, 27 C. A. 334.

A longshoreman working in the hold of a vessel under an open hatch, and injured by the fall into the hatch of merchandise which is being loaded into another hatch, did not assume the risk. *Young v. Hahn* (Civ. App.) 69 S. W. 203, judgment reversed 70 S. W. 950, 96 Tex. 99.

While an employé may assume that the master has done his duty in furnishing a reasonably safe place to work, and is not required to make an inspection, yet, when he is instructed to do work in a particular manner and knowingly violates such instructions, he assumes the risk of any resulting injury. *Athens Cotton Oil Co. v. Clark* (Civ. App.) 126 S. W. 322.

A servant employed to shovel cotton seed from a seed pile into a conveyor assumes the risk of injury occasioned by the fall of the pile by gravity. *Vernon Cotton Oil Co. v. Catron* (Civ. App.) 137 S. W. 404.

On facts stated, held, that a servant injured by attempting to lift a pipe from a ditch had not assumed the risk. *Gulf Pipe Line Co. v. Clayton* (Civ. App.) 150 S. W. 268.

66. Inadequate rules or direction of work.—Decedent was killed by the throwing down of a platform on which he was at work repairing a cable over railroad tracks, the accident being occasioned by the smokestack of an engine striking the cable. The premises were those of the decedent's employer, and were inclosed by a high fence, railroad trains having access thereto. It was customary for an engine to whistle when about to enter, and the employer had a man to operate the gate, but there was no one to warn employés engaged in the work decedent was. An approaching engine was not visible from the platform where decedent was stationed, and on the occasion in question the gateman was absent when the engine entered. The engine occasioning the accident had entered the yards once before that morning, and the employer's superintendent instructed decedent's foreman in decedent's presence not to go to work until the engine left the yard. After the engine left, and the gate had been closed, decedent went to work. On its return the engine gave no signal. Held, that the decedent did not assume the risk. *Merchants' & Planters' Oil Co. v. Burns* (Civ. App.) 72 S. W. 626, judgment reversed 74 S. W. 758, 96 Tex. 573.

67. Incompetency or negligence of fellow servants.—A guard employed to ride on an express car and protect it from robbers, by accepting employment, assumes the risk of injury resulting from the negligence of fellow servants in the usual course of the company's business. *Wells, Fargo & Co. v. Page*, 68 S. W. 528, 29 C. A. 489.

An employé engaged in mixing concrete for a building in process of construction was injured in stepping on upturned nails protruding through a piece of board lying on the floor on which he was at work. Employés engaged in taking care of the rubbish had placed the board there. Held, that the employé received his injuries from a cause, the risk of which he assumed. *Armour & Co. v. Dumas*, 95 S. W. 710, 43 C. A. 36.

A servant assumes the dangers arising from the negligence of his fellow servants when committed in the performance of their own duties as well as those which are obvious and incidental to their employment. *Judson & Little v. Tucker* (Civ. App.) 156 S. W. 225.

68. **Knowledge by servant of defect or danger.**—Plaintiff was employed in taking cinders and ashes from a pit covered with two loose, heavy plates of iron. He placed one plate on its edge, propping it with a stick, and while at work in the pit the plate fell, injuring him. He had worked there six weeks, and knew of the condition of the plate covers, and had full opportunity to know of any defects which would render the plate thus secured dangerous. Held, that he could not recover. *Brown v. Brown*, 71 T. 355, 9 S. W. 261.

Where an employé knew or should have known that a hammer used by him for "riveting" was unsuited to the work, he was not entitled to recover from the master for an injury occasioned by its use. *H. S. Hopkins Bridge Co. v. Burnett*, 19 S. W. 886, 85 T. 16.

Plaintiff was engaged in loading iron for defendants. While attempting to lift on a car a piece of iron, one end of which was not raised to the top of the car, it struck the side of the car, and bounded back on plaintiff. Plaintiff was accustomed to loading iron, and knew how many men were necessary to load iron of that size. He testified that it required from six to ten men to load that kind of iron, while only five handled this one. Held, that plaintiff was not entitled to recover, since he knew, as well as defendants, the danger of loading the iron with that number of men. *Eddy v. Rogers* (Civ. App.) 27 S. W. 295.

Though plaintiff had applied for and been given employment, and put to doing certain work, yet from this it could not be presumed that he knew the danger of other work, which, over his protest, he was thereafter, on the discharge of the person who had done it, told that he must do. *Hillsboro Oil Co. v. White* (Civ. App.) 54 S. W. 432.

An instruction that, if plaintiff knew that a fellow servant was of low order of intellect, he assumed the risks that might result from engaging in the same work with him, in so far as such injury might result from that condition, was correct. *B. Lantry Sons v. Lowrie* (Civ. App.) 58 S. W. 837.

A wooden platform over the rollers of an oil mill, containing a slot through which the machine was fed, was broken and sagged, until it almost touched the rollers, though it should have been several inches above them. The teeth on the rollers were so dull that the oil cakes had to be forced against the rollers in feeding the machine, and the hand of an employé was caught and injured while forcing an oil cake against the rollers. He had fed the machine but a short time before the accident, and knew of the defective condition of the platform. He did not know that the teeth of the rollers were dull, but knew that the hard oil cakes had to be forced into the rollers, which was the result thereof. Held, that such employé assumed the risk of his hand being caught while feeding the machine. *Ladonia Cotton Oil Co. v. Shaw*, 65 S. W. 693, 27 C. A. 65.

A servant ordered to take a certain number of men with him, and go to a certain place and get a wooden beam, who knew of the weight of the beam and the number of men required to handle it with safety, assumed the risks arising from undertaking to handle it with an inadequate force. *San Antonio Traction Co. v. De Rodriguez* (Civ. App.) 77 S. W. 420.

A servant assumes the risk in performing work alone in a place where the conditions are such that he must necessarily know that he is exposed to danger, whereas the work could be done elsewhere without any such exposure; and he cannot count on the negligence of the master in failing to provide two men to do the work. *Hettich v. Hillje*, 77 S. W. 641, 33 C. A. 571.

A servant who was aware of the fact that a conveyor box was open, and of the danger in working with the hammer just above the revolving screw, and who was not so working under the pressure of a peremptory order from the foreman, assumed the risk, and any negligence in having the conveyor uncovered was immaterial. *Id.*

An employé in a brewery, injured by the falling of a pile of kegs he was to wash, having known of the slanting slippery floor and of the throbbing from the engine, assumed the risk thereof. *Houston Ice & Brewing Co. v. Pisch*, 77 S. W. 1047, 33 C. A. 684.

Though a master is bound to exercise ordinary care to furnish suitable and safe machinery and to employ a sufficient number of competent and skillful servants, he is not responsible for injuries to a servant caused by his failure so to do, if the servant knows, or by the exercise of ordinary care for his own safety would have known, of such failure, as the servant assumed the risk arising from the negligent failure of the master in such particulars. *Smith v. Armour & Co.*, 84 S. W. 675, 37 C. A. 633.

Plaintiff, an employé in defendant's foundry, while carrying a ladle of molten metal, stepped into a hole which defendant had excavated a few minutes before in an unusual place in a pathway used by employés and left unguarded. Plaintiff had no knowledge of the hole when he stepped into it, and was burned by spilled material from the ladle. Held, that the hole being in an unusual place in the pathway, where plaintiff had never known one to be placed before, and his attention not having been called thereto, he did not assume the risk. *San Antonio Foundry Co. v. Drish*, 85 S. W. 440, 38 C. A. 214.

A risk, though known to the servant, is not deemed in law to have been assumed unless the danger arising from such risk is, likewise, known by him. *Peck v. Peck*, 87 S. W. 248, 99 T. 10, affirming judgment (Civ. App.) 83 S. W. 257.

An employé must exercise ordinary care for his own safety, and if he discovers, or in the exercise of ordinary care could have discovered, the defective condition of the appliances and its attending danger, he assumes the risk proximately resulting from the defect. *Price v. Consumers' Cotton Oil Co.*, 90 S. W. 717, 41 C. A. 47.

An employé does not assume the risk of a defect in an appliance, unknown to him, and which the employer knows of, or for which he is responsible. *Smith v. Buffalo Oil Co.*, 91 S. W. 383, 41 C. A. 267.

Where a servant was injured while wheeling salt in defendant's factory by reason of the defective construction of a runway, and such defect was not known to the servant nor patent to observation, he did not assume the risk. *Lone Star Salt Co. v. Allen* (Civ. App.) 97 S. W. 131.

A servant, whose duty it is to move lumber in a truck over a roadway from a sawmill to the place where it is piled, does not assume the risk of injury from the breaking of a plank in the roadway, because he knew that such accidents occasionally happened. *William Cameron & Co. v. Realmuto*, 45 C. A. 305, 100 S. W. 194.

Though an employé struck in the eye by a rivet thrown from a pulley belt on the breaking thereof cannot recover for his injury on the theory that the belt was defective, where it appeared that, if it was defective, he knew of its condition and assumed the risk, he can recover on the theory that the belt's breaking was caused by a pulley negligently permitted to remain in a defective condition; plaintiff not knowing of such defect. *Poindexter v. Receivers of Kirby Lumber Co.*, 107 S. W. 42, 101 T. 322, reversing *Receivers of Kirby Lumber Co. v. Poindexter* (Civ. App.) 103 S. W. 439.

A servant, thoroughly experienced in the work, who continues to operate a defective machine, without promise on the part of the master of guaranty against injury or of mending the machine, assumes the risk, where he has full knowledge of the defect and of its effect on the operation of the machine. *Continental Oil & Cotton Co. v. Scott*, 51 C. A. 117, 112 S. W. 107.

Where a servant's duties required him to adjust one end of a skid to an ice chute and place the other end on his wagon, he was chargeable with knowledge of the condition of the apparatus from his daily use thereof. *Lone Star Brewing Co. v. Willie*, 52 C. A. 550, 114 S. W. 186.

A servant assumes the risk of all dangers from the master's negligence, whose existence he knows, or could have learned of by that care which a prudent man would have used under the circumstances, so that if a servant knew that a wire was dangerously charged, or was warned sufficiently to put an ordinarily prudent man upon notice that it might be, he assumed the risk of injury therefrom. *Western Union Telegraph Co. v. Burton*, 53 C. A. 378, 115 S. W. 364.

A true test of whether a servant, who did not fully comprehend his danger when injured, was relieved from assumption of the risk, is: Would a person of ordinary prudence, of his age and experience, in a similar situation, have comprehended the danger or risk? *Brownwood Oil Mill v. Stubblefield*, 53 C. A. 165, 115 S. W. 626.

Where an employé directed by the foreman to jump on the tongue of a wagon while drawn by an engine knew of the danger of falling and of being injured or such danger was obvious, he assumed the risk of such danger. *Texas Bitulithic Co. v. Hutson* (Civ. App.) 116 S. W. 146.

If a servant stepped into an open elevator shaft when there was sufficient light in the shaft to render the danger of so doing patent and open to the common observation of persons possessing the experience and discretion to appreciate such a danger which the servant possessed, the injuries would be the result of an assumed risk. *Swift & Co. v. Martine*, 53 C. A. 475, 117 S. W. 209.

An employé in a sawmill was injured while adjusting a guide pin of a circular saw, by the slipping of the wrench used to tighten the pin. The wrench was worn, and loosely fitted the head of the pin, which was also worn, both of which facts he knew. He was an experienced man, and was familiar with the tightening of the guide pin. He voluntarily continued to work with the defective appliances. Held, that he assumed the risk as a matter of law, precluding a recovery. *Quinn v. Glenn Lumber Co.* (Civ. App.) 118 S. W. 733, reversed 103 T. 253, 126 S. W. 2.

A mine operator failed to construct an appliance to prevent water cars from being pushed into a shaft. An employé engaged in emptying the water cars was killed by falling into the shaft. He had worked around the mouth of the shaft for a number of months, and he knew that there was no appliance to prevent cars from falling into the shaft if pushed therein in the absence of the cage. There was nothing to show that it was the duty of the operators of the cage not to remove it while the employé was emptying the water cars. The absence of the cage was apparent to the employé if he paid any attention. Held, that the employé assumed the risk as a matter of law. *Mt. Marion Coal Min. Co. v. Holt*, 54 C. A. 411, 118 S. W. 825.

An experienced line man in the employ of a telephone company injured, while climbing one of its poles, by placing one hand on a messenger wire, which he knew to be grounded, and the other one on an iron step, in contact with which, as he could have seen, was an electric light wire of the city, which at such time should have been dead, but which was charged through contact, at a distance, with the wire of a third company, owing to its negligence, assumed the risk from the negligence of the telephone company in not keeping the city wire away from the step, it being the rule with such electricians to deal with each wire as if it were charged, and he, though ignorant of the presence of electricity in the city wire, having equal facility with his master for knowing thereof. *Ft. Worth Light & Power Co. v. Moore*, 55 C. A. 157, 118 S. W. 831.

Plaintiff, after being employed three days in defendant's seedhouse, was injured by his arm being caught in a set screw projecting from the collar of a revolving shaft as he was endeavoring to adjust a belt. The screw was near the end of the shaft, 15 feet from the floor, and, when plaintiff had occasion to be near it, it was difficult for him to observe it, because the shaft and screw were revolving at high speed. He did not know of the screw, which projected from one to two inches above the collar of the shaft, and which was both unusual and dangerous. Held, that plaintiff, being entitled to assume that the machinery was reasonably safe, did not assume the risk of the danger he was subjected to by the screw. *Waggoner v. Porterfield*, 55 C. A. 169, 118 S. W. 1094.

Where a servant working with a cotton bale press was familiar with any supposed defects in it, knew that it would occasionally drop cotton onto the floor, and that it was necessary to replace it between the rollers, and as a man of mature years knew the danger of placing his hand between the rollers, and that there was no shield to prevent his hands from coming into contact with the rollers, he assumed the risk of injury from replacing between the rollers with his hands cotton fallen from the press. *Maxwell Ginning Co. v. Wallan*, 57 C. A. 42, 121 S. W. 182.

A servant knowing of defects in appliances, may recover for injuries resulting therefrom, where he did not know of the danger in their use. *Muse v. Abeel* (Civ. App.) 124 S. W. 430.

A servant does not assume the risk of his master's negligence, unless he knows or is charged with knowledge thereof, and of the danger arising therefrom. *Buchanan & Gilder v. Murayda* (Civ. App.) 124 S. W. 973.

Where the place where a servant was injured did not become dangerous during the progress of the work he was doing, but was dangerous when his master put him there to work, and the servant did not know of the danger, he did not assume the risk. *Id.*

A servant who had for seven months been using a passageway and was thoroughly acquainted with all of the surroundings and with the condition of the lights, and knew all the dangers connected with approaching too close to machinery near the passageway, assumed the risk from insufficient lighting of the way. *Lone Star Brewing Co. v. Solcher* (Civ. App.) 126 S. W. 26.

A servant does not assume the risk from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or in the ordinary discharge of his own duty must necessarily have acquired the knowledge, and so, as regards assumption of risk, is under no duty of exercising ordinary care to discover the danger of removing a pulley belt while the machinery is in motion, which the master, without any warning as to danger, orders him to do in a certain way. *Gentry v. Stephenville Oilmill* (Civ. App.) 127 S. W. 879.

A servant, holding a steel cutter to cut off the heads of rivets while a fellow servant strikes the same with an iron maul, does not assume the risk of injury by the breaking off of slivers of steel by reason of the force of the blows, unless he knows of the defects of the cutter, or the defects are so obvious as to charge him with knowledge of them, and of the danger incident thereto. *Buchanan & Gilder v. Blanchard* (Civ. App.) 127 S. W. 1153.

The test of assumed risk is whether the employé actually knew of the danger in time to avoid it, and, if not, whether an ordinarily careful man in performing his work would have discovered the dangerous condition, and as an ordinarily prudent man have anticipated the peril. *Freeman v. Fuller* (Civ. App.) 127 S. W. 1194.

Where it is the duty of the general manager of an electric light company to determine whether poles are suitable for the use intended and it is not the duty of the lineman to inspect them, the lineman does not assume the risk of injury by climbing a pole which broke with him unless he knows that the pole is defective or in the ordinary discharge of his own duty must have acquired that knowledge. *Abilene Light & Water Co. v. Robinson* (Civ. App.) 131 S. W. 299.

Where plaintiff, while working at night on the double boards of an oil derrick, slipped therefrom and was injured, and when he went there he knew that there was no light on that part of the derrick, and that the manner of doing the work necessarily caused water and mud to be on the boards, he assumed the risk of the absence of light and the slippery condition of the boards incident to the mud and water. *Producers' Oil Co. v. Barnes*, 103 T. 515, 131 S. W. 531, affirming judgment (Civ. App.) 120 S. W. 1023.

If a bricklayer goes upon a scaffold, and there discovers it is in immediate danger of falling, and without using proper care to protect himself from injury remains thereon, waiting for another division of workmen to repair it, he assumes the risk of his position. *Texas Co. v. Strange* (Civ. App.) 132 S. W. 370.

Where a bricklayer has discovered the danger that a scaffold would fall, and immediately after and before he could protect himself from injury by the use of ordinary care, the scaffold fell, he did not assume the risk of injury. *Id.*

Where a servant was injured while painting a roof because two ladders which were tied together, one being on one side of the ridge of the roof and the other on the other, came apart, the servant assumed the risk and cannot recover if he saw how they were tied immediately before the injury, and knew as well as any one whether or not it would hold. *Planters' Gin Co. v. Washington* (Civ. App.) 132 S. W. 880.

Plaintiff was employed by a packing company to work on a sausage grinder, and had worked about a month and a half before he was injured. The day before he was injured the machine was not working well, and plaintiff and the foreman took the machine apart and took the knives out, and, after seeing that they were dull, the foreman put them back, and plaintiff went on with his work. The machine did not feed well, and plaintiff pushed the meat down upon the knives with his hands, and was familiar with the way in which the conveyor cut the meat and drew it into the machine, and knew that, if his hand came in contact with the conveyor, it would be drawn into the machine. His hand was caught by the conveyor while pressing the meat down and drawn into the machine. Held, that his injuries were caused from a risk which he assumed as incident to the employment, and for which his employer was not liable. *Hood v. Houston Packing Co.* (Civ. App.) 133 S. W. 446.

A servant, though he owes no duty of inspection, cannot shut his eyes to dangers obvious to the ordinary man, and he assumes the risks of a danger of which he has actual knowledge and of such hazards as he would have learned by the ordinary circumspection of a prudent man. *Farmers' Cotton Oil Co. v. Barnes* (Civ. App.) 134 S. W. 369.

Where a servant knew of knots in a lever before it broke, and of the effect of the knots as rendering the lever weak and insufficient, he assumed the risk of injury therefrom by continuing in the service. *Texas Co. v. Garrett* (Civ. App.) 134 S. W. 812.

A servant, in order to be charged with an assumption of risk on the ground that he knows of the existence of the defect, must not only know of the situation, but also of the danger that is likely to result from it. *Lone Star Lignite Mining Co. v. Caddell* (Civ. App.) 134 S. W. 841.

A servant, to assume a risk, must know the danger, or, in the prosecution of his work, must necessarily know of it. *Alamo Oil & Refining Co. v. Curvier* (Civ. App.) 136 S. W. 1132.

A servant assumes risks from defects of which he has knowledge. *Leonard Cotton Oil Co. v. Burnes* (Civ. App.) 138 S. W. 1082.

Where a servant appreciated the danger before he was injured, it was immaterial whether he acquired the knowledge from a coemployé or from the master. *Adams v. Consumers' Lignite Co.* (Civ. App.) 138 S. W. 1178.

Where a lathe operator was injured by a defect in the machine, the defense of assumed risk was limited to whether he knew or could have known of the danger by the

use of ordinary inspection. *El Paso Foundry & Machine Co. v. Bennett* (Civ. App.) 141 S. W. 156.

A servant who knew of the defect in one timber of a lumber dock held to have assumed the risk of injury therefrom. *Griffin v. Thompson Bros. Lumber Co.* (Civ. App.) 144 S. W. 303.

An experienced coal miner held to have assumed the risk of a certain injury as a matter of law. *Texas & Pacific Coal Co. v. Beall* (Civ. App.) 144 S. W. 363.

A telephone lineman who did not know of defect in pole, used in the construction of a telephone line, and which he was required to ascend, did not assume the risk of injury from defects in the pole while climbing the same in a careful manner. *Abilene Light & Water Co. v. Robinson* (Civ. App.) 146 S. W. 1052.

A servant injured by falling through a hole in a floor with which he was familiar, and who chose a dangerous way when there were several safe ways for him to use, held to have assumed the risk. *Dallas Gas Co. v. Patton* (Civ. App.) 147 S. W. 313.

If injury to an employé through derailment of a hand car on which he was riding resulted from excessive speed of the car, his knowledge of the car's defective condition would not preclude his recovery on the ground of assumed risk. *Beck v. Texas Co.*, 105 T. 303, 143 S. W. 295, reversing judgment *Texas Co. v. Beck* (Civ. App.) 133 S. W. 439.

A servant is not bound to inspect a pick furnished him by the master to determine whether it is properly tempered. *Freeman v. Wilson* (Civ. App.) 149 S. W. 413.

Where plaintiff was employed by or engaged in assisting a traction company's agent in cleaning electrical machinery and knew of the danger therefrom when the current was on, he assumed the risk of injury, and the company was not liable therefor. *Blalack v. Texas Traction Co.* (Civ. App.) 149 S. W. 1086.

The doctrine that, where a servant undertakes to do work, he assumes the ordinary perils incident thereto, is not applicable to the performance of services with defective machinery, unless such defects are known to him, and he appreciates the danger therefrom. *Orange Lumber Co. v. Ellis*, 105 T. 363, 150 S. W. 582.

A servant having knowledge of defective machinery used in the performance of his work does not assume every possible risk which may result therefrom, including extraordinary risks of which the master should know, unless they be obvious or the servant has knowledge thereof and a complete appreciation of the danger. *Id.*

Where plaintiff, injured by catching his hand in spools while guiding the rope on them, knowing that he could not reach the switch from his position near the spools in order to stop the machine if he caught his hand in the rope, which he knew might happen, he assumed any risk from the location of the switch. *San Antonio Brewing Ass'n v. Wolfshohl* (Civ. App.) 155 S. W. 644.

An experienced employé in drilling oil wells who knows of the danger of escaping gas without using a jet, and who continues in the employment without using a jet, assumes the risk of injury by escaping gas. *Producers' Oil Co. v. Bush* (Civ. App.) 155 S. W. 1032.

A servant knowing that the number of men present to perform a particular piece of work is insufficient assumes the risk involved in the undertaking with such number. *Judson & Little v. Tucker* (Civ. App.) 156 S. W. 225.

Employé engaged on an elevator shaft in an unfinished building, who with knowledge of the negligent manner of operating a hoisting bucket in the shaft placed himself in a position to be struck by a descending bucket, held to have assumed the risk of injury from the employer's negligence. *William Miller & Sons Co. v. Wayman* (Civ. App.) 157 S. W. 197.

69. *Inexperienced or youthful employé.*—Plaintiff made a contract with the defendants, whereby plaintiff's 16 year old son was to be employed in defendants' cotton gin to mark, assort, and weigh the bales of cotton ginned at the round bale press. The boy was inexperienced in the work, and had been employed about two months, when he was injured while assisting one of the workmen, G., in cleaning out a gin stand in one of the square bale gins. Just before the accident the boy was not at his regular place, but was standing near the square bale gin, and G. called to him to help clean out the gin stand, as the same had become "choked," and required to be cleaned at once. The work in the gin was done under the personal supervision of one of the defendants, who, at the time of the accident, was standing near where the boy was cleaning the gin, but he did not see the boy until just before the accident, and because of the noise of the machinery he had not heard G. call. G. was not a foreman, but of equal rank with all the workmen, and he had never been authorized to call others to his assistance, and had never done so before. Held insufficient to show a cause of action against defendants for injuries, since the boy was a mere volunteer in cleaning the gin, G. not having authority to call him to his assistance. *Werner v. Trautwein*, 61 S. W. 447, 25 C. A. 608.

Plaintiff, an inexperienced minor, was employed in an oil mill in trucking oil cake to a crusher. An elevating belt frequently became choked, and the foreman would then call plaintiff and others to assist him in unchoking it. Plaintiff was directed to get on the crusher, and press with one foot on the belt, and in doing so he slipped, and his foot was crushed. Held, that in view of the plaintiff's inexperience, and that he was working under the immediate direction of the foreman, and had little opportunity to consider the act, a verdict in his favor should be sustained. *Waxahachie Cotton Oil Co. v. McLain*, 66 S. W. 226, 27 C. A. 334.

A servant must be held to have known that, if he got underneath an overhanging rock, and struck it with a sledge hammer, portions of it would necessarily fall, and, if he was in the way, he would be struck, although he had previously had no experience in digging under rock. *Hightower v. Gray*, 83 S. W. 254, 36 C. A. 674.

An inexperienced employé who was placed at work on a stack of flour improperly stacked, and who did not know the danger of working thereon, did not assume the risk. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

Where an infant servant has been properly instructed and warned, his minority usually ceases to be a material factor in estimating the master's liability, and the defenses of assumption of risk and contributory negligence are then available against him, if under the same circumstances such defenses would be available against adults. *Mitchell v. Comanche Cotton Oil Co.*, 51 C. A. 506, 113 S. W. 158.

In an action for injuries to a minor servant, an instruction that, if plaintiff was incapable of running the machine, and had not been warned of the danger, he did not assume any risk, was erroneous, since plaintiff assumed the risk of such dangers as were open and obvious to one of his age and experience. *Gulf Cooperage Co. v. Abernathy*, 54 C. A. 137, 116 S. W. 869.

A servant 19 years old, and inexperienced in working on a derrick used in drilling oil wells, does not assume risk resulting from the master permitting the double-board on which he worked to slant, and be slick from oil and water, unless warned of the danger. *Producers' Oil Co. v. Barnes* (Civ. App.) 120 S. W. 1023.

A minor employé held not to have assumed the risk, nor to have been guilty of contributory negligence. *Henry v. McCown* (Civ. App.) 140 S. W. 1170.

It is not enough to establish assumption of risk, as matter of law, by an inexperienced youth that he knew if he got his hand under the knife of the machine, from which he was removing the boards cut by it, it would be cut, but it must be shown he understood the probability of getting it under there when doing his work. *Bryson v. Moore* (Civ. App.) 157 S. W. 233.

70. Obvious or latent dangers.—The main issue was whether the servant knew, or had been warned, of the danger of injury. The defendant introduced testimony that the danger was open to common observation, and that the servant had been duly warned. Held, that it was error to refuse to instruct on the law of assumed risks. *Planters' Oil Co. v. Mansell* (Civ. App.) 43 S. W. 913.

Where a servant of mature years was directed to go to a sand bank for a load of sand, and was injured by the caving of the bank as he alighted from his wagon, and the physical condition of the bank and the probability of its caving were as obvious to the servant as to the master, the servant assumed the risk. *Ft. Worth Stockyards Co. v. Whittenburg*, 78 S. W. 363, 34 C. A. 163.

The risks which the servant assumes are, first, those which are ordinarily connected with his particular work, and with which it is assumed that he is acquainted; and, second, those risks which are manifest, whether they arise from the nature of the business, the manner in which it is conducted, or the use of improper or defective appliances. *Hightower v. Gray*, 83 S. W. 254, 36 C. A. 674.

The employé was of mature years, and his testimony showed that he knew the difference between working with a sharp and with a dull chisel, though he testified that he was inexperienced in this kind of work, and did not know that the particles would fly with force, or would bound back if they struck an iron surface. Held, that, having knowledge of the obvious conditions which led to his injury, he was chargeable with knowledge of the danger, and assumed the risk. *San Antonio Sewer Pipe Co. v. Noll*, 83 S. W. 900, 37 C. A. 269.

An employé in loading a vessel assumed the risk of injury from such defects in a rope used as would not have been disclosed to the master by an inspection conducted with ordinary care. *Suderman & Dolson v. Woodruff*, 47 C. A. 229, 105 S. W. 217.

Danger of the caving of a ditch in which plaintiff, an ordinary laborer, was working at the time of his injury, held not so obvious as to charge him with assumption of the risk. *City of Austin v. Gress* (Civ. App.) 156 S. W. 535.

71. Notice or complaint to master.—Where plaintiff called the attention of the foreman to a defect in the machinery near which he was at work, and was assured by the foreman that he was in no danger therefrom, and, relying on this statement, returned to work, where he was injured in a peculiar manner, not to be ordinarily expected by him, there was no assumption of risk. *Industrial Lumber Co. v. Bivens*, 47 C. A. 396, 105 S. W. 831.

An employé built a scaffold to remove the walls of a building pursuant to the orders of his employer. The employé was an experienced scaffold builder. The employer ordered the employé and co-employés to take down a lintel weighing about 1,200 pounds. The employé expressed the opinion that the scaffold was not strong enough, but the employer urged that it was sufficient, and the employé and co-employés attempted to remove the lintel, and the scaffold broke, injuring the employé. Held, that he assumed the risk as a matter of law. *Gilmartin v. Kilgore*, 52 C. A. 177, 114 S. W. 398.

Where a servant calls the master's attention to a defect in a machine which he is operating, and the master undertakes to repair it and informs the servant he has done so, directing him to use it, the servant is under no duty to inspect. *Hughes-Buie Co. v. Mendoza* (Civ. App.) 156 S. W. 328.

72. Promise to remedy defect or remove danger.—Plaintiff, a brakeman, on the objection of defendant's agent to pulling derailed cars, because of a defective drawhead, replied that he hoped that the same would break, because then defendant would have to repair it. The agent then told a carpenter to fix it immediately, but it was not fixed for 12 days; and plaintiff continued using it, with knowledge of its defective condition, and was injured. Held, that since the instructions given by the agent to repair were intended to facilitate the master's business, and not for the employé's protection, it was not such a promise to repair as relieved plaintiff from the assumption of the risk involved in using it in its defective condition, without objection, after the instructions were given. *Industrial Lumber Co. v. Johnson*, 55 S. W. 362, 22 C. A. 596.

In an action by an employé for injuries resulting from the defendants' failure to furnish lights at the place of accident after the defendants' foreman had promised to do so, the testimony of the foreman that he had general charge and a right to employ and discharge all employés is sufficient to support a finding that he was authorized to bind defendants by his promise to furnish the lights. *Hillje v. Hettich* (Civ. App.) 65 S. W. 491, judgment reversed 67 S. W. 90, 95 Tex. 321.

Where an employé, after complaining of insufficient light at the place of employment, continued to work on the promise of the foreman to furnish more light, which was not done, and the employé was thereby injured, he will not be deemed to have assumed the risk incurred by remaining at work. *Id.*

A promise by a master to furnish light in a place where a servant is required to work, which is dangerous for the want thereof, does not prevent the assumption of risk by the servant in continuing to work therein, after the master has had a reasonable time

to supply the lights. Judgment (Civ. App.) 65 S. W. 491, reversed. *Hillje v. Hettich*, 67 S. W. 90, 95 Tex. 321.

A promise made by a city to an employé to repair a defective bridge would not justify the employé in remaining at work, so as to make the city liable for injuries resulting from the defect, where, by reason of the fact that many like promises to repair the defect had been made and always broken, he must have known that there was no intention to make the repairs. *City of Houston v. Owen* (Civ. App.) 67 S. W. 788.

The promise to repair would not make the city liable for the injuries where it was clear from the evidence that the employé had no intention of quitting work even if the repairs were not made, but made his complaint merely because he thought the bridge might be injured by a failure to repair. *Id.*

Where a servant informs the master of a defect in appliances, and the master promises to correct the defect, the servant, so long as he has reasonable grounds to expect, and does expect, that the master will repair, does not, by continuing in the employment, assume the additional risk from the master's neglect, and, if injured, may recover if one of ordinary prudence would have continued in the service. *Medlin Milling Co. v. Schmidt* (Civ. App.) 126 S. W. 689.

A servant injured because of insufficient light held not to have assumed the risk. *Southwestern States Portland Cement Co. v. Young* (Civ. App.) 140 S. W. 378.

Where a baker requested the master to repair defective lights near his place of work, and had reasonable grounds to believe that a promise to do so would be complied with, he did not assume the risks from such defective lights by continuing his employment for a couple of days after such promise. *Brown Cracker & Candy Co. v. Johnson* (Civ. App.) 154 S. W. 684.

A servant held to have assumed the risk of injury from unguarded machinery as a matter of law, where his first request to have it guarded was not heeded, and upon his last request some two months before the injury his superior promised to have it guarded as soon as he could, but failed. *Taylor v. White* (Civ. App.) 156 S. W. 349.

73. Compliance with commands.—Where a person ordered by his foreman to pass a rope under electric wires understands the danger of coming in contact with such wires, he assumes the risk in obeying the order. *Newnom v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 47 S. W. 669.

Plaintiff was employed in an oil mill, and was directed to get on the crusher, and put one foot on the belt, which had choked, to press it down, and in doing so he slipped, and his foot was caught in the crusher. It was not shown that there was any rule as to how the work should have been performed. Held, that it was not error to instruct that the servant assumed the risk ordinarily incident to the business. *Waxahachie Cotton Oil Co. v. McLain*, 66 S. W. 226, 27 C. A. 334.

Risks involved in carrying out the master's orders are not assumed by the servant, unless the danger is so obvious and threatening that no prudent man would undertake it. *Bering Mfg. Co. v. Femelat*, 79 S. W. 869, 35 C. A. 36.

Where a servant was killed while attempting to obey an order to assist in releasing a freight elevator, the master, to invoke doctrine of assumed risk, must show that ordinary care had been exercised to ascertain the condition of the elevator. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

Servant undertaking by order of master to lift weight beyond his capacity held to assume the risk of so doing. *Gulf Pipe Line Co. v. Clayton* (Civ. App.) 150 S. W. 268.

74. Risks outside scope of employment.—Plaintiff having been instructed by the foreman to perform work other than he had contracted to do, and not in the line of his employment, and with which he was not familiar, it cannot be said, as matter of law, that he assumed the risk of being injured by a danger thereof of which the employer knew, but did not warn him. *Hillsboro Oil Co. v. White* (Civ. App.) 54 S. W. 432.

The fact that the work in the performance of which a servant was injured was outside of his duties does not affect the doctrine of assumed risk, where there was no danger involved in the work itself, and the danger to which the servant became exposed was created by himself in selecting the place he did for its performance, whereas there were other safe places practicable for the purpose, though possibly not so convenient. *Hettich v. Hillje*, 77 S. W. 641, 33 C. A. 571.

Plaintiff, a sawmill employé, was injured by the fall of a ladder leading from the first to the second floor of defendant's mill. The ladder had been fastened both at the top and bottom, and had been provided by defendant for use of the men; but prior to the injury a substantial stairway had been erected, and the ladder had been ordered removed, and the men told not to continue to use it. Plaintiff denied that he had ever heard such orders, and there was evidence that other employés continued to use the ladder with the knowledge of the foreman. The foot of the ladder was located near a rope used in hoisting timber to the second floor, which rope caught under the bottom of the ladder, tilting it over, and causing plaintiff to fall. Held, that plaintiff did not assume the risk incident to the use of the ladder, instead of the stairway, as a matter of law. *Pipkin v. Hayward Lumber Co.*, 94 S. W. 1068, 43 C. A. 304.

Employé riding on employer's log train for his own benefit held a licensee, and not to be so riding on the employer's implied invitation. *Kirby Lumber Co. v. Gresham* (Civ. App.) 151 S. W. 847.

An employé in a paper mill does not assume the risk of an injury received while attempting to escape from a room that is filled with scalding hot steam and acid vapor from a digester that had been insecurely closed with a defective gasket. *Yellow Pine Paper Mill Co. v. Wright* (Civ. App.) 154 S. W. 1168.

75. Concurrent negligence of master.—A servant does not assume risks of the master's own negligence. *Mayton v. Sonnefeld* (Civ. App.) 48 S. W. 608.

The fact that a servant knows that a fellow servant is negligent does not preclude a recovery resulting from the concurring negligence of the fellow servant and a vice principal. *American Cotton Co. v. Smith*, 69 S. W. 443, 29 C. A. 425.

A servant employed in a cotton gin was using a passway, going from one portion of the works to another, when he was struck by a bale of cotton thrown by another servant, according to custom, from the second story of the building. In an action for the

injuries there was evidence showing that, while plaintiff knew that it was dangerous to use the passway, the danger did not exist if the servant who was charged with the duty of throwing the bale was experienced, or had been instructed to give the proper warning before discharging the bale, that no warning was given at the time of the accident, and that plaintiff did not know of the incompetency of the servant who threw the bale. Held, that it was proper to refuse instructions which assumed that plaintiff's mere use of the passway with the knowledge of the danger would justify a verdict in favor of defendant, since plaintiff, under the circumstances, had a right to assume that the servant charged with the duty of throwing the bale would give the proper warning and that he was a competent servant. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 C. A. 18.

A servant cannot claim indemnity, although he is working under the immediate supervision of the master, where the danger is so obvious and apparent that no ordinarily prudent man would incur it. *Hightower v. Gray*, 83 S. W. 254, 36 C. A. 674.

A servant does not assume the risk of injury resulting from the negligence of the master or the foreman who represents him. *Quinn v. Glenn Lumber Co.*, 103 T. 253, 126 S. W. 2, reversing (Civ. App.) 118 S. W. 733.

A servant does not assume the risk incident to the negligent performance of the master, through its foreman, of the duties it owed him, but only the risks of which he had knowledge, actual or constructive. *Sullivan-Sanford Lumber Co. v. Cooper* (Civ. App.) 126 S. W. 35.

An employé's assumption of obvious risks does not release the employer's liability for injury caused by the employer's intervening negligence. *Lantry-Sharp Contracting Co. v. McCracken* (Civ. App.) 134 S. W. 363.

The risks which a servant assumes held only such risks as arise after the master has exercised due care. *Hugo, Schmeltzer & Co. v. Paiz*, 104 T. 563, 141 S. W. 518.

A servant does not assume risks arising from the master's failure to do his duty unless he knows of it and the attendant risks or must have acquired such knowledge. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

A servant may assume that appliances are reasonably safe and the manner of conducting the business reasonably safe. *Id.*

A servant's assumption of obvious risks from machinery does not absolve the master from liability if, concurrently therewith, the extinguishment of the light under which he was working as a result of defendant's failure to repair it contributed to his injury. *Brown Cracker & Candy Co. v. Johnson* (Civ. App.) 154 S. W. 684.

VIII. CONTRIBUTORY NEGLIGENCE

76. Application of the doctrine in general.—Inadvertency is synonymous with inattention, heedlessness, carelessness, negligence, and thoughtlessness, so that a servant cannot recover for injuries caused through his own inadvertence. *San Antonio Brewing Ass'n v. Wolfshohl* (Civ. App.) 155 S. W. 644.

77. Statutory provisions.—An act declaring that contributory negligence of an employé shall not bar a recovery, but that the damages shall be diminished, is not unconstitutional. *Freeman v. Kennerly* (Civ. App.) 151 S. W. 580.

78. Care required of servant.—It is the duty of an employé to use ordinary care for his own safety. *Athens Cotton Oil Co. v. Clark* (Civ. App.) 126 S. W. 322.

It is the duty of a servant in the discharge of his duties to use reasonable care for his own safety. *Arcola Sugar Mills Co. v. Luckey* (Civ. App.) 144 S. W. 1148.

79. Inexperienced or youthful employé.—An employé, a green hand, was put in charge of machinery, which outwardly indicated no danger, as attendant upon the wiping of a certain plate attached to it, and was directed by the superintendent to wipe such plate without any caution, whereby he was injured. Held, that he was not negligent in failing to so examine the machinery as to have perceived the danger. *Howard Oil Co. v. Farmer*, 56 T. 301.

The rule as to the care to be exercised by an inexperienced person set to operate dangerous machinery by his employer is such care in the use of implements and in the operation of the machinery as an ordinarily prudent man of his experience and in his situation would ordinarily use while performing the same duties, and not "such care as a man of his experience and in his situation would ordinarily use." *Hillsboro Oil Co. v. White* (Civ. App.) 41 S. W. 874.

Where a master directed a youthful and inexperienced servant generally to repair a machine, and the servant did it in the precise manner in which he had on a previous occasion been told to fix it, without being warned that that method was dangerous and improper, the servant was not guilty of contributory negligence. *Greenville Oil & Cotton Co. v. Harkey*, 48 S. W. 1005, 20 C. A. 225.

Plaintiff, an inexperienced youth, being suddenly called to go on a crusher to assist in unhooking a belt, fulfilled his duty if he exercised ordinary care in doing so, and was not chargeable with negligence in not having ascertained what dangers were incident to such work. *Waxahachie Cotton Oil Co. v. McLain*, 66 S. W. 226, 27 C. A. 334.

Though the lumber which falls on a minor employé while, by direction of the foreman, doing different work from what he was employed to do, was negligently piled, recovery cannot be had for his injury if, considering his age and intelligence, he was not exercising proper care, or the danger was obvious. *Hildenbrand v. Marshall*, 69 S. W. 492, 30 C. A. 135.

An inexperienced employé who was placed at work on a stack of flour improperly stacked, and who did not know of the danger of working thereon, was not guilty of contributory negligence. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.) 104 S. W. 916.

A minor servant, when not warned, need exercise only such care as one of ordinary prudence, of his age and experience, would use in the similar circumstances, but is guilty of contributory negligence when he fails to exercise such degree of care, and hence, in an action for injuries to a minor servant while operating dangerous machinery, an instruction that, if plaintiff was inexperienced and was not warned, he could not be

guilty of contributory negligence, was erroneous. *Gulf Cooperage Co. v. Abernathy*, 54 C. A. 137, 116 S. W. 869.

Minority places the injured person in the same position as an inexperienced adult so far as machinery is concerned, and where the danger is apparent, or the servant has been warned of the danger, negligence will be imputed to a minor, as well as an adult, if any injury is received from the machinery. *Krisch v. Richter* (Civ. App.) 130 S. W. 186.

A servant, 18 years of age, had worked in a bakery for nearly a year and was familiar with a certain machine containing cog wheels and was ordered by his foreman to clean the machine, which was in motion, and, while cleaning it, his fingers were caught in the cogs. He knew of the situation of the cog wheels and there was evidence that the servants had been instructed to beware of the machinery and cogs. There was no evidence that plaintiff was weak-minded. Held, that he was guilty of contributory negligence. *Id.*

A minor employé held not to have assumed the risk, nor to have been guilty of contributory negligence. *Henry v. McCown* (Civ. App.) 140 S. W. 1170.

In an action for injury to a paper cutter operator caused by the blade unexpectedly falling, held improper to authorize the jury to consider certain matters on an issue of contributory negligence. *National Biscuit Co. v. Scott* (Civ. App.) 142 S. W. 65.

80. Reliance on care of master.—In the absence of knowledge to the contrary, an employé may assume that the employer has exercised ordinary care in furnishing him a reasonably safe place in which to work. *Price v. Consumers' Cotton Oil Co.*, 90 S. W. 717, 41 C. A. 47.

A servant may act on the assumption that an appliance is properly constructed for the purpose for which it is permitted to be used. *Williams v. Hennefield*, 57 C. A. 54, 120 S. W. 567.

A servant may rely on the performance of the duty of the master to furnish a safe place to work and safe instrumentalities with which to work. *Hugo, Schmeltzer & Co. v. Palz* (Civ. App.) 128 S. W. 912.

An employé is not guilty of contributory negligence, where he relies upon the assurance by his employer or a vice principal, as to the safety of a place of work, tools, machinery, or appliances, or upon a promise to protect and guard the employé from danger, unless the danger is so obvious or imminent that no ordinarily prudent person would encounter it. *Beck v. Texas Co.*, 105 T. 303, 148 S. W. 295, reversing judgment *Texas Co. v. Beck* (Civ. App.) 133 S. W. 439.

81. Scope of employment.—In an action for the death of a cotton oil company employé caused by a caving of a mass of cotton seed hulls, it was error to refuse to instruct that if, while decedent was asleep, the hulls in flowing from a chute covered him, and he was thereby suffocated, there could be no recovery. *Commerce Cotton Oil Co. v. Camp* (Civ. App.) 117 S. W. 451.

82. Choice of ways and places for work.—A servant employed in a cotton gin, while using a passway from one part of the works to another, was struck by a bale of cotton thrown from the second story of the building by another servant in the discharge of his duties. Held, that if the injured servant could have used another and convenient passageway, which, in the exercise of ordinary care, he should have taken, his failure to do so was contributory negligence. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 C. A. 18.

Plaintiff, a sawmill employé, was injured by the fall of a ladder leading from the first to the second floor of defendant's mill. The ladder had been fastened both at the top and bottom, and had been provided by defendant for use of the men, but prior to the injury a substantial stairway had been erected, and the ladder had been ordered removed and the men told not to continue to use it. Plaintiff denied that he had ever heard such orders, and there was evidence that other employés continued to use the ladder with the knowledge of the foreman. The foot of the ladder was located near a rope used in hoisting timber to the second floor, which rope caught under the bottom of the ladder, tilting it over, and causing plaintiff to fall. Held, that plaintiff was not guilty of contributory negligence as a matter of law. *Pipkin v. Hayward Lumber Co.*, 94 S. W. 1068, 43 C. A. 304.

83. Occupying dangerous position.—Where plaintiff was thrown from the pilot of defendant's engine attached to a log train on which plaintiff was riding, and the proximate cause of his injury was the dangerous position which he had voluntarily taken, instead of selecting a more secure place on the train, he was guilty of contributory negligence, as a matter of law, precluding a recovery. *Burns v. Chronister Lumber Co.* (Civ. App.) 87 S. W. 163.

84. Knowledge of defects or dangers.—If a servant's injuries were caused by the insecurity of a temporary brace which he and other servants nailed to the structure, he must be held to have known it and at least jointly responsible for its insecurity. *Lantry-Sharpe Contracting Co. v. McCracken*, 53 C. A. 627, 117 S. W. 453.

Where an employé excusably ignorant of the fact that a shaft was spliced sought to cross over the shaft in performing his duty, and was caught by the bolts and nuts projecting from the splice, the court in determining whether the employé in taking the course he did, instead of another way, was guilty of contributory negligence, should not consider the fact that bolts and nuts projected from the shaft. *Longview Cotton Oil Co. v. Thurmond*, 55 C. A. 499, 119 S. W. 130.

A manager of a cotton gin held not guilty of contributory negligence because of knowledge of an insecure wheel, which his employer, on being told, had promised to repair. *Guitar v. Randel* (Civ. App.) 147 S. W. 642.

85. Duty to discover or remedy defects or dangers.—A servant is not required to use diligence to discover defects not obvious in appliances furnished him, or in the place provided for his work, but may assume that the master has discharged his duty in respect thereto. *Terrell Compress Co. v. Arrington* (Civ. App.) 48 S. W. 59.

An employé was injured by the falling of a hoisting block, used in raising a heavy timber, which was caused by its greasy condition. The employé knew of its condition previous to the accident, but the director of the work had undertaken to remove the

grease, and the employé had no notice of his failure to do so. Held, that he had a right to assume that the hoisting block had been put in reasonably safe condition before undertaking the work. *Id.*

In an action for injuries caused by a piece of steel which flew off plaintiff's coemployé's riveting hammer, it was agreed that riveting hammers are necessarily brittle to some degree, and liable to chip while in use. Held, that a charge declaring that unless plaintiff did not know, and by the use of ordinary care could not have known, of the condition of the hammer, he could not recover, was proper. *De La Vergne Refrigerating Mach. Co. v. Stahl*, 60 S. W. 319, 24 C. A. 471.

The fact that the trimmer was required to report by entries in what was called the "Trouble Book" any defect that he saw on the lines did not preclude his recovery for the injury, where he was not instructed to look for defects not observable without the application of some test, and was not furnished with appliances to test the rods, etc. *Dupree v. Tamborilla*, 66 S. W. 595, 27 C. A. 603.

A trimmer employed by an electric light company, who, in caring for a lamp at the top of a 30-foot pole, used the iron rods supporting the lamp to steady himself, his weight resting at the time on the step below, was not guilty of contributory negligence, where the rods appeared to be solid iron three-fourths of an inch in diameter, though they were in fact hollow and rusted, so that they broke, causing him to fall to the ground. *Id.*

A master seeking to excuse himself from liability for failing to inspect his property, which results in the injury of his servant, must show that the duty of such inspection was one of the primary objects of the servant's employment. *Dupree v. Alexander*, 68 S. W. 739, 29 C. A. 31.

Where a deck hand on a tugboat, while fastening a rope attached to a tow, stepped on a siphon pipe which had been carelessly left on the deck, it was a danger that he should have guarded against; and if he failed to do so, and was injured, he was guilty of contributory negligence. *Direct Nav. Co. v. Anderson*, 69 S. W. 174, 29 C. A. 65.

Though diligence to discover defects and dangers in the premises and appliances furnished by a master is not laid on the servant, yet the servant is expected to take such care for his safety as a person of ordinary prudence would take under like circumstances; and therefore if a servant is ignorant of the defect and danger of an appliance, and the ignorance is due to a want of such care as a person of ordinary prudence would use under the circumstances, and is the proximate cause of his injury, the master is not liable. *Horton v. Ft. Worth Packing & Provision Co.*, 76 S. W. 211, 33 C. A. 150.

A servant is not required to inspect the appliances that are furnished him, but can assume that they are reasonably safe. *Peck v. Peck*, 87 S. W. 248, 99 T. 10, affirming judgment (Civ. App.) 83 S. W. 257.

Where, in an action by an employé for injuries received in consequence of the falling of a scaffold on which he was at work, defendant pleaded contributory negligence, an instruction that, where a servant is placed at work by the master in a certain place, the servant has a right to presume that the place is and will be reasonably safe by the master using ordinary care, was not erroneous. *Louisiana & Texas Lumber Co. v. Meyers* (Civ. App.) 94 S. W. 140.

A servant of an express company was not required to inspect the trucks or platform where he worked to ascertain if the company had performed its duty to furnish reasonably safe tools and place to perform his work. *Wells, Fargo & Co. Express v. Boyle* (Civ. App.) 98 S. W. 441, judgment reversed 100 T. 577, 102 S. W. 107.

Plaintiff was injured by the fall of a barrel insecurely placed on a joist above the floor of the room in which she was working. Held, that there was no negligence on plaintiff's part proximately contributing to her injury sufficient to preclude her from recovery. *G. A. Duerler Mfg. Co. v. Eichhorn*, 44 C. A. 638, 99 S. W. 715.

An employé is not required to exercise diligence to discover defects in appliances furnished. *Waggoner v. Sneed*, 53 C. A. 278, 118 S. W. 547.

A servant required to oil machinery is not charged with the duty of discovering defects in a window sill customarily used for the work. *Williams v. Hennefield*, 57 C. A. 54, 120 S. W. 567.

Brick burners who had been in the habit for two or three years of using a shed along the side of a kiln to go upon to avoid the gases and heat, cleats of wood having been nailed thereon to keep them from slipping, were not required to inspect the shed to see that it was in a safe condition, but could rely upon the presumption that the employer had done his duty in inspecting the shed. *Ferris Press Brick Co. v. Thompson* (Civ. App.) 124 S. W. 499.

Where an electric light company was required to furnish a lineman constructing an electric light line with proper poles, and it negligently furnished a defective pole, which broke while he climbed it, the company could not urge that he was negligent in failing to inspect the pole for defects, for he could rely on the assumption that the company exercised ordinary care to select reasonably safe poles. *Abilene Light & Water Co. v. Robinson* (Civ. App.) 131 S. W. 299.

A bricklayer who has discovered that the scaffold on which he is to work is in immediate danger of falling cannot wait thereon for it to be repaired, unless his conduct in so doing is that of an ordinarily prudent man. *Texas Co. v. Strange* (Civ. App.) 132 S. W. 370.

A servant employed as oiler in a mill who knows that there are many unguarded set screws and that there must be a set screw in every set collar, but who does not know that the screws are exposed, need not inspect the appliances, and his failure to make an examination and discover that a set screw which caught him and injured him was exposed did not defeat a recovery. *Farmers' Cotton Oil Co. v. Barnes* (Civ. App.) 134 S. W. 369.

An employé injured while using a defective appliance held not chargeable with knowledge of the defect. *Kampmann v. Mendoza* (Civ. App.) 141 S. W. 161.

An engineer failing to request proper appliances held not entitled to recover for injuries. *Arcola Sugar Mills Co. v. Luckey* (Civ. App.) 144 S. W. 1148.

A rule of a coal mine owner, that employés must use precautions to prevent accidents and should not work in an unsafe place when timber would remedy the danger, did not require a miner to discover the condition of the roof to the extent of relieving the mas-

ter from the duty of maintaining a safe place to work. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

The rule that a servant is under no obligation to use ordinary care to ascertain whether his master has furnished a reasonably safe place to work has no application, where the injury is to a vice principal. *Raney v. Houston Lighting & Power Co.* (Civ. App.) 153 S. W. 178.

A master being bound to exercise ordinary care to furnish a safe place for his servants to work, it is not their duty to inspect the place so furnished. *City of Austin v. Gress* (Civ. App.) 156 S. W. 535.

86. Dangerous methods of work.—Where it was necessary for a brakeman on a logging train to ride on a car loaded with logs, and there was no other place for him to ride than on the stringer, he was not negligent in riding there, so as to preclude a recovery for his death in a collision between the train and a car. *Ragley Lumber Co. v. Parks*, 46 C. A. 539, 103 S. W. 424.

Plaintiff's failure to attach guy wires to a defective telegraph pole before beginning to work thereon held contributory negligence. *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155.

87. Disobedience of rules or orders.—Where a servant of a street railroad company was injured while riding on a car which the company provided for its servants, to be used while going to and from work, the fact that a rule of the company prohibited the workmen from so riding was no defense to an action for negligence causing the death. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

Where an employé violates instructions which are known to him, while engaged in a dangerous employment, and such violation contributes to his injury, he cannot recover. *Athens Cotton Oil Co. v. Clark* (Civ. App.) 126 S. W. 322.

88. Compliance with commands or threats.—Where a fuel oil equipment company was engaged in setting certain oil tanks to be used as a part of the plant of defendant cotton company, in which work plaintiff was injured while under the direction of plaintiff's foreman, who ordered plaintiff to assist in the work, plaintiff was entitled to assume that in so doing he was working for defendant, and that his foreman had authority to have the work done and to order plaintiff to assist therein. *American Cotton Co. v. Simmons*, 87 S. W. 842, 39 C. A. 189.

Where a servant was killed while attempting to release an elevator pursuant to the directions of the vice principal, the doctrine that the master was not liable if the injuries were sustained from the use of the elevator in a manner different from that in which it was intended to be used did not apply. *Hugo, Schmeltzer & Co. v. Paiz* (Civ. App.) 128 S. W. 912.

89. Acts in emergencies.—An act of defendant's superintendent in calling a warning in an excited manner to prevent an injury, which caused plaintiff to jump from a railroad car and sustain the injuries complained of, was not an act of negligence on the part of the superintendent, but might be considered with other circumstances in determining whether plaintiff was warranted in jumping from the car. *Mounce v. Lodwick Lumber Co.* (Civ. App.) 91 S. W. 240.

Where, in suit for injuries to a servant while at work on the double-board of a derrick, it appeared that, because the board slanted and was slick from oil and water, he was in the act of falling, that to save himself he caught at the traveling block while in motion, and his hand caught between the cable and sheaves and was drawn into the block and injured, there was nothing to show he put his hand in the traveling block without exercise of ordinary care, for under the circumstances he was incapable of exercising any care save that arising from instinct of self-preservation. *Producer's Oil Co. v. Barnes* (Civ. App.) 120 S. W. 1023.

In a servant's action for injuries in endeavoring to save a fellow servant's life, it must appear that such fellow servant was in a perilous position through the master's negligence. *Jos. & Simon Lintz Realty Co. v. McDonald* (Civ. App.) 133 S. W. 535.

Plaintiff, an employé of a paper mill company, was not guilty of contributory negligence in attempting to escape by way of a window, and falling from the window to the ground below in an effort to escape from scalding steam and acid vapor which was being emitted from a wood pulp digester owing to a defective gasket. *Yellow Pine Paper Mill Co. v. Wright* (Civ. App.) 154 S. W. 1168.

90. Proximate cause of injury.—Where a person negligently ordered to pass a rope under electric wires is injured by accidentally or negligently coming in contact with the wires, the act of the person injured, and not the negligence in giving the order, is the proximate cause of injury. *Newnom v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 47 S. W. 669.

Where a servant, in the performance of his duties, attempts to mend a certain belt in close proximity to a certain machine for the reason that there is not sufficient light at any other place, but with full knowledge of the position, operation, and dangerous character of the machinery, and is injured thereby, the failure of the master to furnish sufficient light is not the proximate cause of the injury. *Hillje v. Hettich*, 67 S. W. 90, 95 T. 321, reversing (Civ. App.) 65 S. W. 491.

The negligent raising of the lever of a machine by the employé, bringing the carriage forward and injuring him, prevents his recovery of the employer, notwithstanding the absence of a spring from the lever, where in any condition of the machine the effect of raising the lever was to bring the carriage forward, and the lever was raised by hand even where the machine was supplied with the spring to hold the lever down. *Anderson v. Jefferson Cotton Oil & Refining Co.*, 74 S. W. 342, 32 C. A. 288.

91. Injury avoidable by care of master.—It was not error to charge that if defendant by its agents could, by ordinary care, have avoided the consequences of the negligence of the person injured, or if it by direct act of its agents caused the act which produced the injury, defendant is liable. *Brown v. Sullivan*, 71 T. 470, 10 S. W. 288.

A servant employed in a cotton gin was using a passway, going from one portion of the works to another, when he was struck by a bale of cotton thrown by another servant, according to custom, from the second story of the building. In an action for the injuries

there was evidence showing that, while plaintiff knew that it was dangerous to use the passway, the danger did not exist if the servant who was charged with the duty of throwing the bale was experienced, or had been instructed to give the proper warning before discharging the bale, that no warning was given at the time of the accident, and that plaintiff did not know of the incompetency of the servant who threw the bale. Held, that defendant's motion for a new trial on the ground that plaintiff was guilty of contributory negligence was properly overruled. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 C. A. 18.

Where plaintiff selected the pilot of defendant's logging engine on which to ride to the place where he was to continue his work, and just prior to his being thrown therefrom he was preparing to alight, while the train was in motion, in accordance with the order of his foreman, the fact that he was in plain view of defendant's engineer at the time, and that the latter made no effort to stop the train, was insufficient to raise the issue of discovered peril. *Burns v. Chronister Lumber Co.* (Civ. App.) 87 S. W. 163.

Art. 5246hh. Inapplicable to certain classes of employees.—The provisions of this Act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more than five employees. [Acts 1913, p. 429, sec. 2.]

Art. 5246i. No right of action against subscribing employer; compensation from Texas Employees Insurance Association; exemptions.—The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employers for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Texas Employees Insurance Association as the same is hereinafter provided for; provided, that all compensation allowed under the succeeding sections herein, shall be exempt from garnishment, attachment and all other suits or claims, as are current wages now exempted by law. [Id. sec. 3.]

Art. 5246ii. Employees, etc., of nonsubscribing employer may sue; may not participate in benefits of association.—Employees whose employers are not at the time of injury subscribers to said association and the representatives and beneficiaries of deceased employees who at the time of injury were working for nonsubscribing employers cannot participate in the benefits of said insurance association, but they shall be entitled to bring suits, and may recover judgment against such employers, or any of them, for all damages sustained by reason of any personal injury received in the course of employment, or by reason of death resulting from such injury, and the provisions of section 1 [Art. 5246h] of this Act shall be applied in all such actions. [Id. sec. 4.]

Art. 5246j. Recovery of exemplary damages in certain cases not excluded.—Nothing in this Act shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife and heirs, or such of them as there may be, of any deceased employee, whose death is occasioned by homicide, through the wilful act or omission or gross negligence of any person, firm or corporation, the employer of such employee at the time of the injury causing the death of the latter, and in all cases where exemplary damages are sought under this section, in case the injured party has already been awarded actual damages by the board herein provided, said fact and said amount so received shall be made known to the court or jury trying said cause for exemplary damages; and on the issue for exemplary damages he shall have the same defenses as under the existing law. [Id. sec. 5.]

Art. 5246jj. No compensation for incapacity not extending beyond one week.—No compensation shall be paid under this Act for an injury which does not incapacitate the employee for a period of at least one week from earning full wages, but if incapacity extends beyond one

week, compensation shall begin on the eighth day after injury. [Id. sec. 6.]

Art. 5246k. Aid during first week; notice of injury.—During the first week of the injury the association shall furnish reasonable medical aid, hospital services, and medicines when needed, and if it does not furnish these immediately as and when needed, it shall repay all sums reasonably paid or incurred for same, provided, reasonable notice of injury shall be given to the said association, and this provision requiring notice shall apply to all subsequent sections of this Act providing for compensation. [Id. sec. 7.]

Art. 5246kk. Compensation where death results; how distributed.—If death should result from the injury, the association hereinafter created, shall pay to the legal beneficiary of the deceased employee a weekly payment equal to 60 per cent. of his average weekly wages, but not more than \$15.00 nor less than \$5.00 a week, for a period of three hundred and sixty weeks from the date of injury; provided, that the compensation herein provided for shall be distributed according to the law providing for the distribution of other property of deceased. [Id. sec. 8.]

Art. 5246l. Where deceased employee leaves no beneficiaries or creditors; where only creditors, etc.—If the deceased employee leaves no legal beneficiaries, or creditors the association shall pay all expenses incident to his last sickness, and in addition a funeral benefit not to exceed one hundred dollars; provided, where the deceased leaves no beneficiaries as provided herein, but leaves creditors, the association shall be liable to such creditors for an amount not exceeding the amount that would otherwise have been due beneficiaries, which amount paid shall not exceed amount due such creditor or creditors. [Id. sec. 9.]

Art. 5246ll. Compensation while incapacity is total.—While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a compensation equal to 60 per cent. of his average weekly wages but not more than fifteen dollars, nor less than \$5.00 a week, and in no case shall the period covered by such compensation be greater than four hundred weeks. [Id. sec. 10.]

Art. 5246m. Compensation while incapacity is partial.—While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to 60 per cent. of the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter, but in no case to be more than \$15 a week; and the period covered by such compensation to be in no case greater than three hundred weeks. [Id. sec. 11.]

Art. 5246mm. Compensation for specified injuries.—In case of the following specified injuries the amounts hereinafter named shall be paid by the association in addition to all other compensation; (a) For the loss by severance of both hands at or above the wrists, or of both feet at or above the ankle, or the loss of one hand and one foot, or the reduction to one-tenth of the normal vision in both eyes, 60 per cent. of the average weekly wages of the injured employé, but not more than fifteen dollars nor less than five dollars a week for a period of one hundred weeks. (b) For the loss by severance of either hand at or above the wrist, or either foot above the ankle, or the reduction to one-tenth of normal vision in either eye, 60 per cent. of the average weekly wages of the injured employé, but not more than \$15 nor less than \$5 a week, for a period of fifty weeks. (c) For the loss by severance at or above the second joint of two or more fingers, including thumbs and toes, 60 per cent. of the average weekly wages of the injured employé, but not more than \$15.00 nor less than \$5.00 a week, for a period of twenty-five weeks. (d) For the loss by severance of at least one joint of a finger,

thumb or toe, 60 per cent. of the average weekly wages of the injured employé, but not more than \$15.00 nor less than \$5.00 a week, for a period of twelve weeks. [Id. sec. 12.]

Art. 5246n. Guardian of mentally incompetent or minor employé may act.—If an injured employé is mentally incompetent or is a minor at the time when any rights or privileges accrue to him, under this Act, his guardian or next friend may in his behalf claim and exercise such rights and privileges. [Id. sec. 13.]

Art. 5246nn. No waiver of rights.—No agreement by an employé to waive his rights to compensation under this Act shall be valid. [Id. sec. 14.]

Art. 5246nnn. Lump sum for death or total permanent disability.—In cases where death or total permanent disability results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the "Industrial Accident Board" hereinafter created. [Id. sec. 15.]

Art. 5246o. Cause of action for death survives, when.—In all cases of injury resulting in death, where such injury was received in the course of employment, cause of action shall survive. [Id. sec. 16.]

PART II

INDUSTRIAL ACCIDENT BOARD

Art.	Art.
5246oo. Industrial accident board created; how constituted and appointed; term of members.	5246q. Questions to be determined by board; party who does not consent may sue; suits, how brought and determined.
5246ooo. Qualifications of members; legal advisor.	5246qq. Compensation where independent contractor or sub-contractor is employed; indemnity.
5246p. Salaries and expenses; secretary; offices.	5246qqq. Employés to keep record of injuries; to make reports; penalty for failure.
5246pp. Duties and powers of board; employé claiming to be injured shall be examined, etc.	
5246ppp. Notice of injury.	

Article 5246oo. Industrial accident board created; how constituted and appointed; term of members.—There shall be an "Industrial Accident Board" consisting of three members, and the same is hereby created, to be appointed by the governor, one of whom shall be designated as chairman, and the term of office shall be two years for members of the board. [Acts 1913, p. 432, sec. 1.]

Art. 5246ooo. Qualifications of members; legal advisor.—One member of the industrial accident board shall be at the time of its appointment, an employer of labor in some industry or business covered by this Act; one shall be at the time of his appointment a wage earner employed in some industry or business covered by this Act, and the third member shall be, at the time of his appointment a practicing attorney of recognized ability, said member to act in the capacity of legal advisor to the board in addition to his other duties as a member thereof. [Id. sec. 2.]

Art. 5246p. Salaries and expenses; secretary; offices.—The salaries and expenses of the industrial accident board shall be paid by the state. The salary of the chairman shall be three thousand dollars a year, and the salaries of the other members of the board shall be two thousand and five hundred dollars a year each. The board may appoint a secretary at a salary of not more than two thousand dollars a year and may remove him at any time, furnishing him, upon demand with a statement of the cause of his removal. It shall also be allowed an annual sum not exceeding five thousand dollars a year, for clerical services, traveling and other necessary expenses. The board shall be provided suitable offices

in the capitol or some other convenient building in the city of Austin, where its records shall be kept. [Id. sec. 3.]

Art. 5246pp. Duties and powers of board; employé claiming to be injured shall be examined, etc.—The board may make rules not inconsistent with this Act, for carrying out and enforcing its provisions, and may require any employé claiming to have sustained injury, to submit himself for examination before such board or some one acting under its authority at some reasonable time and place within the state and as often as may be reasonably ordered by the board, to a physician or physicians authorized to practice under the laws of this state. If the employé requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. Refusal of the employé to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect of the period of suspension. Process and procedure shall be as summary as may be under this Act. The board or any member thereof shall have power to subpoena witnesses, administer oaths, inquire into matters of fact, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. All rulings or decisions of the board relating to disputed claims shall be based upon questions of fact, and in accord with the provisions of this Act. [Id. sec. 4.]

Art. 5246ppp. Notice of injury.—No proceedings for compensation for injury under this Act, shall be maintained unless a notice of the injury shall have been given to the association or subscriber, as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employé, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity. [Id. sec. 4a.]

Art. 5246q. Questions to be determined by board; party who does not consent may sue; suits, how brought and determined.—All questions arising under this Act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board. Any interested party who is not willing, and does not consent to abide by the final ruling and decision of said board on any disputed claim may sue on such claim or may require suit to be brought thereon in some court of competent jurisdiction, and the board shall proceed no further toward the adjustment of such claim; provided, however, that whenever any such suit is brought, the rights and liabilities of the parties thereto shall be determined by the provisions of this Act, and the suit of the injured employé, or persons suing on account of the death of such employé, shall be against the association, if the employer of such injured or deceased employé is at the time of such injury or death a subscriber, as defined in this Act, in which case the recovery shall not exceed the maximum compensation allowed under the provisions of this Act, and the court shall determine the issues in such cause instead of said board. [Id. sec. 5.]

Art. 5246qq. Compensation where independent contractor or sub-contractor is employed; indemnity.—If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work was executed by employés immediately employed by the subscriber, be liable to pay com-

pensation under this Act to such employés, the association shall pay to such employés any compensation which would be payable to them under this Act if the independent or sub-contractors were subscribers. The associations shall, however, be entitled to recover indemnity from any other persons who would have been liable to such employés independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employés, or in its own name and for its own benefit the liability of such other persons. This section shall not apply to independent or sub-contractors on any contract which is merely auxiliary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber. [Id. sec. 6.]

Art. 5246qqq. Employer to keep record of injuries; to make reports; penalty for failure.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employés in the course of their employment. Within eight days after the occurrence of an accident resulting in a personal injury to an employé, a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for that purpose. Upon the termination of the disability of the injured employé, or if such disability extends beyond a period of sixty days, the employer shall make a supplemental report upon blanks to be procured for that purpose. The said report shall contain the name and nature of the the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employé, and shall state the date and hour of the accident, and the nature and cause of injury, and such other information as the board may require. Any employer failing or refusing to make any such report within the time herein provided, or failing or refusing to give to said board any information demanded by said board relating to any injury to an employé which information is in the possession of, or could have been ascertained by the employer by the use of reasonable diligence shall be liable for and shall pay to the state of Texas a penalty of not more than one thousand (\$1000) dollars for each and every offense, the same to be recovered in a suit to be instituted and prosecuted by the attorney general, or under his direction, either in the district court of Travis county, or in the county in which any defendant resides at the option of the said attorney general. [Id. sec. 7.]

PART III

TEXAS EMPLOYERS' INSURANCE ASSOCIATION

Art.		Art.	
5246r.	Texas Employers' Insurance Association created; corporate powers.	5246vvv.	Assessments shall be made, when.
5246rr.	Governor to appoint directors; term.	5246w.	Dividends; premium assessments and dividends for groups; what funds, etc., available for claims.
5246rrr.	To exercise powers of subscribers until their first meeting.	5246ww.	Premiums, etc., shall be filed with commissioner of banking and insurance; approval.
5246s.	Officers.	5246www.	Rules for prevention of injuries; review.
5246ss.	Quorum; vacancies.	5246x.	Subscriber shall notify employés, etc.
5246sss.	Who may be subscriber.	5246xx.	Same subject; notice on ceasing to be subscriber; shall file copy of notice.
5246t.	First meeting; notice.	5246xxx.	Association shall pay subscriber amount of judgment, when.
5246tt.	Subscriber to have how many votes.	5246y.	Corporate powers shall not expire, etc.
5246ttt.	No policy shall be issued until, etc.	5246yy.	Directors may incur certain expenses, how paid.
5246u.	Same subject.		
5246uu.	No further policies shall be issued, when.		
5246uuu.	License to issue policies, when to be granted.		
5246v.	Groups of subscribers, premiums.		
5246vv.	May fix mutual contingent liability.		

Article 5246r. Texas Employers' Insurance Association created; corporate powers.—The "Texas Employers' Insurance Association" is hereby created a body corporate with the powers provided in this Act and with all the general corporate powers incident thereto. [Acts 1913, p. 434, sec. 1.]

Art. 5246rr. Governor to appoint directors; term.—The governor shall appoint a board of directors of the association consisting of twelve members, who shall serve for a term of one year, or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide. [Id. sec. 2.]

Art. 5246rrr. To exercise powers of subscribers until their first meeting.—Until the first meeting of the subscribers, the board of directors shall have and exercise all of the powers of the subscribers, and may adopt by-laws not inconsistent with the provisions of this Act, which shall be in effect until amended or repealed by the subscribers. [Id. sec. 3.]

Art. 5246s. Officers.—The board of directors shall annually choose by ballot a president who shall be a member of the board, a secretary, a treasurer and such other officers as the by-laws may provide. [Id. sec. 4.]

Art. 5246ss. Quorum; vacancies.—Seven or more of the directors shall constitute a quorum for the transaction of business. Vacancies in any office may be filled in such manner as the by-laws shall provide. [Id. sec. 5.]

Art. 5246sss. Who may be subscriber.—Any employer of labor in the state may become a subscriber excepting as provided in part I, section 2 of this Act [Art. 5246hh]. [Id. sec. 6.]

Art. 5246tt. First meeting; notice.—The board of directors shall, within thirty days of the subscription of twenty-five employers call the first meeting of the subscribers by a notice in writing, mailed to each subscriber at his residence or place of business not less than ten days before the date fixed for the meeting. [Id. sec. 7.]

Art. 5246ttt. Subscriber to have how many votes.—In any meeting of the subscribers each subscriber shall have one vote, and if a subscriber has five hundred employes to whom the association is bound to pay compensation, he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employes to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right, or by right of proxy, more than ten votes. [Id. sec. 8.]

Art. 5246ttt. No policy shall be issued until, etc.—No policy shall be issued by the association until not less than fifty employers have subscribed, who have not less than two thousand employers [employes] to whom the association may be bound to pay compensation. [Id. sec. 9.]

Art. 5246u. Same subject.—No policy shall be issued by the association until a list of the subscribers, with the number of employes of each; together with such other information as the commissioner of banking and insurance may require, shall have been filed with the department of banking and insurance, nor until the president and secretary of the association shall have certified under oath that every subscription on the list so filed is genuine and made with an agreement with every subscriber that he will take the policies so subscribed for by him within thirty days of the granting of a license to the association by the commissioner of banking and insurance to issue policies. [Id. sec. 10.]

Art. 5246uu. No further policies shall be issued, when.—If the number of subscribers falls below fifty, or the number of employes to whom

the association may be bound to pay compensation falls below two thousand, no further policies shall be issued until other employers have subscribed, who, together, with existing subscribers, amount to not less than fifty, who have not less than two thousand employes to whom the association may be bound to pay compensation said subscriptions to be subject to the provisions of the preceding section. [Id. sec. 11.]

Art. 5246uuu. License to issue policies, when to be granted.—Upon the filing of the certificates provided for in the two preceding sections the commissioner of banking and insurance shall make such investigations as he may deem proper and if his findings warrant it, grant a license to the association to issue policies. [Id. sec. 12.]

Art. 5246v. Groups of subscribers; premiums.—The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of hazard incident thereto. Subscribers within each group shall annually pay in cash such premiums as may be required to pay the compensation herein provided for the inquiries [injuries] which may occur in that year. [Id. sec. 13.]

Art. 5246vv. May fix mutual contingent liability.—The association may in its by-laws and policies fix the mutual contingent liability of the subscribers for the payment of losses and expenses not provided for by its cash fund, but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium. [Id. sec. 14.]

Art. 5246vvv. Assessments shall be made, when.—If the association is not possessed of cash funds above its insured premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability. Every subscriber shall pay his proportional part of any assessment which may be levied by the association, in accordance with the laws and his contract, on account of injuries sustained and expenses incurred while he is a subscriber. [Id. sec. 15.]

Art. 5246w. Dividends; premium assessments and dividends for groups; what funds, etc., available for claims.—The board of directors may, from time to time, by vote fix the amount to be paid as dividends upon the policies expiring during each year after retaining sums sufficient to pay all compensation which may be payable on account of injuries sustained and expenses incurred. All premiums assessments and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of such group, but all the funds of the association and the contingent liability of all of the subscribers shall be available for the payment of any approved claim for compensation against the association. [Id. sec. 16.]

Art. 5246ww. Premiums, etc., shall be filed with commissioner of banking and insurance; approval.—Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the commissioner of banking and insurance and shall not take effect until approved by him after such investigation as he may deem proper and necessary. [Id. sec. 17.]

Art. 5246www. Rules for prevention of injuries; review.—The board of directors shall make and enforce reasonable rules for the prevention of injuries on the premises of subscribers, and for this purpose the inspector of the association shall have free access to all such premises during regular working hours. Any subscriber aggrieved by such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend or annul the rule or regulation. [Id. sec. 18.]

Art. 5246x. Subscribers shall notify employés, etc.—Every subscriber shall, as soon as he secures a policy give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment of compensation for injuries with the association. [Id. sec. 19.]

Art. 5246xx. Same subject; notice on ceasing to be subscriber; shall file copy of notice.—Every subscriber shall, after receiving a policy, give notice in writing or print, to all persons with whom he is about to enter into a contract of hire, that he has provided for payment of compensation for injuries by the association. If any employer ceases to be a subscriber, he shall, on or before the day on which his policy expires, give notice to that effect in writing or print to all persons under contract of hire with him. In case of the renewal of his policy no notice shall be required under this Act. He shall file a copy of said notice with the industrial accident board. [Id. sec. 20.]

Art. 5246xxx. Association shall pay subscriber amount of judgment, when.—If a subscriber, who has complied with all the rules, regulations and demands of the association, is required by any judgment of a court of law to pay any employé any damages on account of any personal injury sustained by such employé during the period of subscription, the association shall pay to the subscriber the full amount of the judgment and the cost assessed therewith, if the subscriber shall have given the association notice of the bringing of the action upon which the judgment was recovered, and an opportunity to appear and defend same. [Id. sec. 21.]

Art. 5246y. Corporate powers shall not expire, etc.—The corporate powers of the association shall not expire because of failure to issue policies or make insurance. [Id. sec. 22.]

Art. 5246yy. Directors may incur certain expenses; how paid.—The board of directors appointed by the governor under the provisions of part III, section 2 of this Act, [Art. 5246rr] may incur such expenses in the performance of its duties as may be approved by the governor; such expenses shall be paid by the state out of any funds not otherwise appropriated, not to exceed five thousand dollars. [Id. sec. 23.]

PART IV

GENERAL PROVISIONS

Art. 5246yyy. Terms defined.
5246yyyy. Certain insurance companies may insure liability; provisions applicable, etc.
5246z. Subscriber ceasing to be employer; refund of premium.

Art. 5246zz. Partial invalidity not to affect other provisions, etc.
5246zzz. Laws repealed.
5246zzzz. When to take effect.

Article 5246yyy. Terms defined.—The following words and phrases, as used in this Act, shall, unless a different meaning is plainly required by the context, have the following meaning: "Employer," shall include the legal representatives of any original employer. "Employee" shall include every person in the service of another under any contract of hire, expressed or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of the employer. Any reference to any employee who has been injured shall when the employee is dead, also include the legal beneficiaries of such employee to whom compensation may be payable. "Average weekly wages" shall mean the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury divided by fifty-two; but if the injured employee lost more than two weeks during such period, then the earnings for the remainder of the twelve calendar months shall be divided by the number of weeks

remaining after time last [lost] has been deducted. When, by reason of the shortness of the time of the employment of the employee, it is impracticable to compute the average weekly wages as above defined, it shall be computed by the industrial accident board in any manner which may seem just and fair to both parties. "Association" shall mean the "Texas Employees [Employers'] Insurance Association," or any other insurance company authorized under this Act to insure the payment of compensation to injured employees, or to be beneficiaries of deceased employees. "Subscriber" shall mean any employer who has become a member of the association by paying a year's premium in advance and received the receipt of the association therefor, provided, that the association holds a license issued by the commissioner of banking and insurance as provided for in part III, section 12 of this Act [Art. 5246uuu]. [Acts 1913, p. 436, sec. 1.]

Art. 5246yyyy. Certain insurance companies may insure liability; provisions applicable, etc.—Any insurance company, which term shall include mutual and reciprocal insurance companies lawfully transacting a liability or accident business within this state, shall have the same right to insure the liability to pay the compensation provided for by part one [Arts. 5246h–5246o] of this Act, and when such company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable under this Act; and when such company insures such payment of compensation it shall be subject to the provisions of parts one, two and four [Arts. 5246h–5246qqq, 5246yyy–5246zzzz] and of sections 10 [Art. 5246u], 17 [Art. 5246ww] and 21 [Art. 5246xxx] of part three of this Act, and shall file with the commissioner of banking and insurance its classification of premiums none of which shall take effect until the commissioner of banking and insurance has approved same as adequate to the risks to which they respectively apply and not greater than charged by the association, and such company may have and exercise all of the rights and powers conferred by this Act on the association created hereby but such rights and powers shall not be exercised by a mutual or reciprocal organization unless such organization has at least fifty subscribers, who have not less than two thousand employees. [Id. sec. 2.]

Art. 5246z. Subscriber ceasing to be employer; refund of premium.—Any subscriber who has paid his annual premium as provided in section I, part four of this Act [Art. 5246yyy], but who ceases to be an employer after three months and before the expiration of one year, may by satisfactory proof of such fact made to the industrial accident board as herein created be entitled to a refund of such portion of the annual premium so paid by him as the portion of the year in which he is not an employer bears to the whole year, provided that in no event shall more than three-fourths of the annual premium by any subscriber who claims the benefit of this refund, ever be refunded. [Id. sec. 3.]

Art. 5246zz. Partial invalidity not to affect other provisions, etc.—Should any part of this Act be, for any reason held to be invalid or inoperative, no other part or parts shall be affected thereby, and if any exception to or limitation upon any general provision herein contained shall be held to be unconstitutional or invalid or ineffective the general provision shall nevertheless stand effective and valid as if it had been enacted without exception or limitation. [Id. sec. 4.]

Art. 5246zzz. Laws repealed.—All laws or parts of laws in conflict herewith are hereby repealed. [Id. sec. 5.]

Art. 5246zzzz. When to take effect.—This Act shall take effect and be in force on and after the first day of September, nineteen hundred and thirteen. [Id. sec. 6.]

TITLE 78

LANDS—ACQUISITION FOR PUBLIC USE

Chap.	Chap.
1. Authorizing Governor to Purchase Lands for State Use.	2. United States Government Authorized to Obtain Title to Lands in Texas.

CHAPTER ONE

AUTHORIZING GOVERNOR TO PURCHASE LANDS FOR STATE USE

Art.	Art.
5247. Governor to purchase, when.	5250. Costs.
5248. Land may be condemned.	5251. Right of way for penitentiary railroad.
5249. Land, how condemned.	

Article 5247. Governor to purchase, when.—When any land shall be required by the state for the use of the state penitentiaries, or any other of the public institutions of the state, or for any other public use, the governor of the state is hereby authorized and empowered to purchase said land, or the right to the use thereof, for the purpose for which the same may be required. [Acts 1903, 1 S. S., p. 10, sec. 1.]

Art. 5248. Land may be condemned.—Should the governor in the exercise of the power conferred by the preceding article not be able to agree with the owners of any land which, or the use of which, may be needed for any public use as aforesaid, upon the compensation to be paid therefor, such land may be condemned for such public use in the name of the state of Texas as herein provided. [Id. sec. 2.]

Art. 5249. Land, how condemned.—Whenever it may become necessary to condemn any land for any public use as hereinbefore provided, upon the direction of the governor, proceedings shall be instituted against the owner of said land, and of any interest therein, by the attorney general of the state, or under his direction, by the proper district or county attorney, who shall file with the county judge of the county in which said land, or a part thereof, may be situated, a statement showing the land sought to be condemned, and the purpose thereof, the names and places or residences of the owners of the same, or if not known, stating that fact. Upon the filing of the statement provided for in this article, it shall be the duty of said county judge, in term time or vacation, to appoint three disinterested freeholders of said county who are qualified voters therein, as special commissioners to assess the damages to accrue to the owner of said property by reason of such condemnation. Said special commissioners shall, in their proceedings, be governed and controlled by the laws in force in reference to the condemnation of right of way for railroad companies and the assessment of damages therefor; and the proceedings shall be in accordance with such law, the State of Texas occupying the position of the railroad company; and all laws in reference to the applications for the condemnation for right of way of railroad companies, including the measure of damages, the service of notice, actual or constructive, on the owners of said property, the right of appeal and the like not inconsistent with the other provisions of this chapter, shall apply to the application by the state and these proceedings. But it is expressly provided that in case of such condemnation of property, should the award of damages be deemed by the governor excessive, the same shall not be paid; but in such case the state shall pay the costs of such proceedings, and no further action shall be taken thereunder. [Id. sec. 3.]

Art. 5250. Costs.—Should the damages awarded be less than had been offered by the state to said property owner, the costs of such proceedings shall be taxed against said owner, and may be collected by execution as in other cases or paid by the state and deducted from the amount to be paid said owner upon such award. Should the amount awarded be greater than the amount offered by the state, such costs shall be paid by the state. [Id. sec. 4.]

Art. 5251. Right of way for penitentiary railroad.—Should any land be purchased by the governor, or condemned as herein provided, for the purpose of obtaining right of way for any railroad or train road, to be built or extended and operated in connection with, or for the use of, any of the penitentiaries of this state, or any of the farms of this state, and used in connection with the state penitentiaries, the penitentiary board is hereby authorized and required to pay, out of any money authorized by law to be used for the support and maintenance of said penitentiaries, the damages and costs herein provided for in case of condemnation, or the price of said property if purchased by voluntary purchase by the governor as herein provided. [Id. sec. 5.]

CHAPTER TWO

UNITED STATES GOVERNMENT AUTHORIZED TO OBTAIN TITLE TO LANDS IN TEXAS

Art.	Art.
5252. May purchase lands for certain purposes.	5266. Decision to be in writing, etc.
5253. May institute condemnation proceedings.	5267. County judge to fill vacancies.
5254. Statement to be made in writing.	5268. Commissioners may adjudge costs.
5255. Commissioners to be appointed.	5269. May be tried in county court, when.
5256. Commissioners to be sworn.	5270. County judge to enforce decree, etc.
5257. Hearing, when and how.	5271. The United States to deposit money with commissioners.
5258. Notice to be given.	5272. United States liable for costs, when.
5259. Notice to be served.	5273. Acquisition of public lands by the United States.
5260. Return of notice.	5274. Titles to the United States to be recorded.
5261. In case of minor, lunatic, etc.	5275. Governor may cede jurisdiction.
5262. In case of non-resident.	5276. State to retain concurrent jurisdiction.
5263. Hearing postponed for perfection of service.	5277. United States land to be exempt from taxation.
5264. May compel attendance of witnesses.	
5265. Compensation of commissioners.	

[See notes of decisions relating to law of eminent domain in general, at end of chapter.]

Article 5252. May purchase for certain purposes.—The United States government may purchase, acquire, hold, own, occupy and possess such lands within the limits of the state of Texas as they shall deem expedient and may seek to occupy and hold as sites on which to erect and maintain light houses, forts, military stations, magazines, arsenals, dock yards, custom houses, postoffices, and all other needful public buildings and for the purpose of erecting and constructing dams, locks and dams, for the straightening of streams by making cutoffs, building levees, or for the erection of any other structures or improvements that may become necessary in developing or improving the waterways, rivers and harbors of Texas; and the consent of the legislature of the state of Texas is hereby expressly given to any such purchase or acquisition made in accordance with the provisions of this law. [Acts 1905, p. 101, sec. 1.]

Art. 5253. May institute condemnation proceedings.—All purchases or acquisitions of land by the United States government for any of the purposes mentioned in the preceding article shall be effected by the proper agent of the United States government with the owners thereof, or by any judicial proceedings as hereinafter prescribed; that is to say,

whenever the owners of the land desired by the United States government can not agree with the United States authorities thereto authorized upon the price thereto, then the said United States government is authorized, under the direction of the proper law officer to institute proceedings against the owner of said land, or the owners of any interest therein in the county court of the county in which the land may be situated, and in the same manner as is provided for the condemnation for right of way for railroads, except as hereinafter indicated. [Id. sec. 2.]

Art. 5254. Statement to be made in writing.—If the said government of the United States and said owner can not agree upon the value of said land, or the damages thereto, caused by the erection or construction of the improvement required, it shall be the duty of the United States officer having the matter in hand and authorized thereto by the United States government, to state in writing the real estate and property condemned, the object for which it is to be condemned, the name of the owner thereof and his residence, if known, and file same with the county judge of the county in which said property, or a part thereof, is situated; provided, if the owner resides in either county in which the land is situated, the same shall be filed in the county of his residence. [Id. sec. 3.]

Art. 5255. Commissioners to be appointed.—Upon the filing of said statement, the county judge shall, either in term time or in vacation, appoint three disinterested freeholders of said county as commissioners to assess said damages, giving preference to those that may be agreed upon between the United States government and the owner of said property. [Id. sec. 4.]

Art. 5256. Commissioners to be sworn.—The said commissioners shall be sworn by the county judge, or by any officer qualified to administer oaths, to assess said damages impartially and according to law. [Id. sec. 5.]

Art. 5257. Hearing, when and how.—Said commissioners shall, without delay, appoint a time and place for the hearing of said parties; and the day appointed shall be the earliest day practicable, and the place, the nearest practicable place to the said property, or at the said county seat of the county in which the property is situated, or a part thereof. [Id. sec. 6.]

Art. 5258. Notice to be given.—The commissioners shall issue a notice in writing to each of the parties, notifying them of the time and place selected for the hearing. [Id. sec. 7.]

Art. 5259. Notice to be served.—Said notice shall be served upon said parties at least five days before the date of the hearing, exclusive of the day of service, and shall be served by the delivery of the copy of same to the party, his agent or attorney, and may be served by any person competent to testify. [Id. sec. 8.]

Art. 5260. Return of notice.—The party making such service shall return the original notice to said commissioners, or any one of them, on or before the day set for said hearing, with his statement thereon, showing how and when same was served. [Id. sec. 9.]

Art. 5261. In case of minor, lunatic, etc.—When the property in controversy is the property of a deceased person, or minor, or of a person of unsound mind, and such estate has a legal representative, or such minor, or person of unsound mind, has a guardian, the notice shall be served upon such a legal representative or guardian. But if said minor, or person of unsound mind, have no legal representative, then said commissioner shall appoint a guardian ad litem, as courts of record are authorized to do, to protect the interest of said minor, or person of unsound mind, and shall allow reasonable compensation therefor, which

shall be allowed and taxed as part of the costs of the proceedings. [Id. sec. 10.]

Art. 5262. In case of non-resident.—When the property in controversy belongs to a non-resident of this state, or to an unknown person, or to persons whose residence is unknown, or who secrete themselves so that service can not be had on them, then such notice may be served upon said owner by publication in the same manner as provided in article 1874 of the Revised Statutes of the state of Texas; provided, that said cause may be tried by said commission on any day not less than four weeks after the publication of said notice. [Id. sec. 11.]

Art. 5263. Hearing postponed, for what.—When the service of notice has been perfected, the commissioners shall at the time and place appointed or at any other time or place to which said hearing has been adjourned, proceed to hear said parties, but if upon the day set for the hearing, the serving of notice has not been perfected, the hearing shall be postponed from time to time until the service has been perfected. [Id. sec. 12.]

Art. 5264. Witnesses.—Said commissioners, for the purpose mentioned in this law, shall have the power to compel the attendance of witnesses and the giving of testimony and to administer oath and punish for contempt as fully as is provided by law for the district or county court. The rules for damages to be applied in these cases shall be the same as those prescribed for ascertaining the amount of damages in condemnation for right of way proceedings for railroads. [Id. sec. 13.]

Art. 5265. Compensation.—The compensation for the commissioners shall be the same as is prescribed by law for commissioners in performing similar services in condemnation of right of way for railroads. [Id. sec. 14.]

Art. 5266. Decision in writing.—When the said commissioners shall have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due to the owner of such real estate, if any be found to be due, and shall date same, sign it, and file it with the county judge without delay. [Id. sec. 15.]

Art. 5267. Vacancies, how filled.—If said commissioners, or either of them, from any cause be unable or fail to act as such, the county judge shall appoint another commissioner or commissioners to fill the place or places left vacant by those who are unable or fail to act. [Id. sec. 16.]

Art. 5268. Commissioners may adjudge cost.—The commissioners may adjudge the cost against either party, and shall in their finding state against whom it is adjudged and the amount thereof, and file same with their award with the county judge. [Id. sec. 17.]

Art. 5269. Tried in county court, when.—If either party be dissatisfied with the decision of such commissioners, he may, within ten days after the same has been filed with the county judge, file his opposition thereto in writing, setting forth the particular cause or causes of his opposition, and thereupon the case shall be set down on the county court docket for trial as other civil cases. [Id. sec. 18.]

Art. 5270. County judge to enforce decree, etc.—If no objections are filed to such decision within the time prescribed in preceding article, the said judge shall have same entered on the record and shall make necessary provisions to enforce the same. [Id. sec. 19.]

Art. 5271. United States to deposit money, etc.—Upon the filing of the award of the commissioners with the county judge, stating the amount of damages and costs which the United States government shall pay before taking possession of the property, if the United States government shall deposit the amount of the award of the commissioners,

together with all costs adjudged against the said United States, they may proceed immediately to the occupancy of the said land and to the construction of their said improvements without awaiting the decision of the county court. [Id. sec. 20.]

Art. 5272. United States liable for costs, when.—If, after the filing of the objections to the award, the case shall be retried in the county court and a judgment rendered against the United States for a larger sum than that found in the award of the commissioners, then the said United States government shall be responsible for the costs of said appeal, as well as for the amount adjudged against it in said county court. [Id. sec. 21.]

Art. 5273. [372] [331] Acquisition of public land by United States.—When the state of Texas may be the owner of any land desired by the United State[s] for any of the purposes specified in this title, the governor may sell such land to the United States, and upon payment of the purchase money therefor into the treasury of the state, it shall be the duty of the commissioner of the general land office, upon the order of the governor, to issue a patent to the United States for such land in like manner as other patents are issued. [Act Feb. 13, 1854, p. 102. P. D. 5450.]

Art. 5274. [373] [332] Title to United States to be recorded.—All deeds of conveyances, decrees, patents, or other instruments vesting title in lands lying within this state in the United States, shall be recorded in the land records of the county in which such lands, or a part thereof, may be situate, or in the county to which such county may be attached for such purpose; and until filed for record in the proper county they shall not take effect as to subsequent purchasers in good faith, for a valuable consideration, and without notice. [Act April 4, 1871, p. 19. P. D. 7693, 4th ed., 7810.]

Art. 5275. [374] [333] Governor may cede jurisdiction.—Whenever the United States shall acquire any lands in this state, for any of the purposes and in either of the modes authorized by this title, and shall desire to acquire constitutional jurisdiction over such lands for said purposes, it shall be lawful for the governor of this state, in the name and behalf of the state, to cede to the United States exclusive jurisdiction over any lands so acquired, when application may be made to him for that purpose, which application shall be in writing and accompanied with the proper evidence of such acquisition, duly authenticated and recorded, containing, or having annexed thereto, an accurate description by metes and bounds of the lands sought to be ceded. [Act Dec. 19, 1849, p. 12. P. D. 5449.]

Art. 5276. [375] [334] State to retain concurrent jurisdiction.—No such cession of jurisdiction shall ever be made, except upon the express condition that the state of Texas shall retain concurrent jurisdiction with the United States over the lands so ceded, and every portion thereof, so far, that all process, civil or criminal, issuing under the authority of this state, or any of the courts or judicial officers thereof, may be executed by the proper officers of this state, upon any person amenable to the same, within the limits of the land so ceded, in like manner and with like effect as if no such cession had taken place; and such condition shall be always inserted in any instrument of cession under the provisions of this title. [Id.]

Art. 5277. [376] [335] U. S. lands to be exempt from taxation.—The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this state so long as the same are held, owned, used and

occupied by the United States for the purposes expressed in this title, and not otherwise. [Act April 4, 1871, p. 19. Id.]

DECISIONS RELATING TO LAW OF EMINENT DOMAIN IN GENERAL

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| 1. Nature and source of power. | 14. — By cities and towns for water supply, sewerage disposal or hospitals. |
| 2. Distinction from other powers. | 15. — By private corporations for waterworks in cities and towns. |
| 3. Constitutional provisions. | 16. — By telegraph corporations. |
| 4. Delegation of power. | 17. — For union depot sites. |
| 5. Property subject to condemnation. | 18. — By macadam and plank road companies. |
| 6. Necessity of compensation. | 19. — By sewerage companies for sewer systems. |
| 7. Sufficiency of provision for compensation. | 20. — Pipe lines for oil, gas and salt companies. |
| 8. Taking or injuring property as ground of compensation—In general. | 21. — Right of way for gas and electric companies. |
| 9. — Nature of injury to property not taken. | 22. — Irrigation, mining, milling, waterworks and stockraising. |
| 10. — Damages to abutting property from construction or maintenance of railroad. | 23. — By railroads for right of way and other purposes. |
| 11. Measure of compensation—In general. | 24. — For interurban railroads. |
| 12. — Deduction of benefits. | |
| 13. Condemnation of land for particular purposes—For streets in cities and towns. | |

1. Nature and source of power.—The right of the government to take the property of an individual for public use stated. *Galveston, H. & S. A. Ry. Co. v. De Groff* (Civ. App.) 110 S. W. 1006.

Eminent domain defined. *City of Austin v. Nalle*, 102 T. 536, 120 S. W. 996.

The right of eminent domain is inherent in the Legislature, and is impliedly reserved in all dedications and grants. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Eminent domain is the right or power of a sovereign state to appropriate private property for the promotion of the general welfare. The power is an attribute of government and is inherent in it, and embraces all cases where the property of the individual is taken without his consent by such sovereign power. *Byrd Irr. Co. v. Smythe* (Civ. App.) 146 S. W. 1064.

The power of eminent domain is the right of the sovereign to take private property for public uses. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

2. Distinction from other powers.—Limitation on power of eminent domain, requiring adequate compensation, held not to restrict the proper employment of the police power. *Houston & T. C. Ry. Co. v. City of Dallas*, 98 T. 396, 84 S. W. 648, 70 L. R. A. 850.

Police regulations do not constitute a taking under the right of eminent domain. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

3. Constitutional provisions.—The purpose of the constitutional provision prohibiting the damaging or destroying of private property for a public use without compensation was to place public, or quasi public, corporations upon the same basis with private persons as to liability for such injuries. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

In a constitutional provision requiring compensation before taking of property for public use, the terms "property" and "taken" defined. *McCammion & Lang Lumber Co. v. Trinity & B. V. Ry. Co.*, 104 T. 8, 133 S. W. 247, 36 L. R. A. (N. S.) 662, Ann. Cas. 1913E, 870.

4. Delegation of power.—The right of eminent domain conferred by law on an individual or a corporation can be exercised only by the strictest adherence to the terms of the grant. *Byrd Irr. Co. v. Smythe* (Civ. App.) 146 S. W. 1064.

Grants of power of eminent domain are strictly construed, and methods set forth in the statute granting the power must be strictly followed. *Reitzer v. Medina Valley Irrigation Co.* (Civ. App.) 153 S. W. 380.

The delegated power of eminent domain can only be expressly conferred by statute, and such statutes are construed strictly in favor of the owner of the condemned property. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

The right to take private property for a public use may only be exercised under the protection of a legislative grant and under the conditions attached thereto. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

5. Property subject to condemnation.—The right of eminent domain does not exist as to public land. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

6. Necessity of compensation.—Private property cannot be taken or damaged for public use without compensation. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

7. Sufficiency of provision for compensation.—Under the constitution, a city held not entitled to collect an assessment for benefits resulting from a street improvement without showing that adequate compensation will be made for the assessment, by showing that the improvement will be put in within a reasonable time. *City of Austin v. Nalle* (Civ. App.) 115 S. W. 126.

8. Taking or injuring property as ground of compensation—In general.—A municipal corporation is liable for lands taken for, and damages caused by, the construction of a public improvement, though the contract under which the improvement was constructed was void. *Harrison v. City of Sulphur Springs* (Civ. App.) 50 S. W. 1064.

9. — Nature of injury to property not taken.—Where a city permanently occupied land by turning the channel of a ditch over it, the owner was entitled to the value of the land so taken under Const. art. 1, § 17. *Harrison v. City of Sulphur Springs* (Civ. App.) 67 S. W. 515.

To constitute a damaging of private property within the constitutional provision prohibiting the damaging of private property for public use without compensation, there must be an interference with its free use and enjoyment, resulting in some physical inconvenience, discomfort, or detriment. *Hellbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

A property owner is not bound to keep his premises attractive, or to refrain from making them unattractive or offensive to the æsthetic sense of his neighbors, so long as his use thereof does not interfere with their use of their own property. *Id.*

Where damage to real property is permanent, so that the depreciation in its market value constitutes the measure of damages, recovery may be had for prospective as well as present injuries. *Id.*

Where injuries to a public highway were not permanent, but were capable of being remedied by the wrongdoer or others interested in the highway, abutting owners could not recover for prospective injuries to the property, based upon the depreciation in its market value. *Id.*

10. — Damages to abutting property from construction or maintenance of railroad.—See notes at end of Chapter 8 of Title 115.

11. Measure of compensation—In general.—An owner of land, part of which is condemned, is entitled to the market value of the portion taken and the depreciation in value of that not taken, thus entitling him to the value of that taken, even if the remainder is enhanced in value. *Ft. Worth Improvement Dist. No. 1 of Tarrant County v. Weatherred* (Civ. App.) 149 S. W. 550.

12. — Deduction of benefits.—Special benefits to property injured by the construction of public works held available as an offset against any damages. *Burton Lumber Corp. v. City of Houston*, 45 C. A. 363, 101 S. W. 822.

An owner seeking damages for the maintenance of public work, not encroaching on the half of the street lying next to his property, held required to submit to a deduction for special benefits accruing from the works. *Id.*

13. Condemnation of land for particular purposes—For streets in cities and towns.—See Arts. 1003–1005, 1066, 1067, 1069.

14. — By cities and towns for water supply, sewerage disposal or hospitals.—See Arts. 1003–1005.

15. — By private corporations for waterworks in cities and towns.—See Arts. 1004, 1005.

16. — By telegraph corporations.—See Art. 1232.

17. — For union depot sites.—See Arts. 1247, 1248.

18. — By macadam and plank road companies.—See Art. 1269.

19. — By sewerage companies for sewer systems.—See Art. 1284.

20. — Pipe lines for oil, gas, and salt companies.—See Art. 1306.

21. — Right of way for gas and electric companies.—See Art. 1321d.

22. — Irrigation, mining, milling, waterworks and stockraising.—See Art. 5004.

23. — By railroads for right of way and other purposes.—See Chapter 8 of Title 115.

24. — For interurban railroads.—See Arts. 6733, 6737.

TITLE 79

LANDS—PUBLIC

[See Final Title, §§ 4, 5, 9, 13, 15, and table of Land Laws in Appendix.]

<p>Chap.</p> <ol style="list-style-type: none"> 1. Public Domain. 2. General Land Office. 3. Land Districts. 4. County and District Surveyors. 5. Surveys and Field-Notes. 6. Patents. 	<p>Chap.</p> <ol style="list-style-type: none"> 7. Land Reservations. 8. General Provisions. 9. Sale and Lease of Public Free School and Asylum Lands. 10. Suits to Recover Public Lands, Rents and Damages.
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CHAPTER ONE

PUBLIC DOMAIN

<p>Art.</p> <p>5278. Vacant public lands belong to free school fund.</p>	<p>Art.</p> <p>5279. All public lands retained at annexation.</p>
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Article 5278. Vacant public lands belong to free school fund.—All vacant public lands, not otherwise appropriated, except islands, lakes and bays within tidewater limits along the gulf of Mexico, are the property of the public free school fund. [Acts 1900, p. 29.]

Character as school lands.—When lands by legislation have been appropriated to the public school fund, the legislature cannot by subsequent legislation change their character as public school lands, and if by mistake of the land commissioner they were not charged to the school fund in the adjustment made by Act Feb. 23, 1900, and the school fund has not been compensated therefor, this does not affect their character as school lands. *Eyl v. State*, 37 C. A. 297, 84 S. W. 611.

Art. 5279. [4036] All public lands retained at annexation.—In order that the provisions of law relating to the public domain may be brought together, the following extract is made from the joint resolutions of the congress of the United States for annexing Texas to the United States, approved March 1, 1845, and the joint resolution of the congress of the republic of Texas assenting to the same, approved June 23, 1845, viz.:

“Said state, when admitted into the Union, * * * shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct,” etc. [Joint Res., June 23, 1845.]

See Appendix for tabulation and other representation of omitted or repealed land laws.

Quarantine station.—Land occupied by quarantine buildings erected by the state of Texas on the east end of Galveston Island held not land excepted from a prior grant by the republic of Texas, and therefore did not pass to the United States under the cession of public property on the admission of Texas into the Union. *State v. Jadwin* (Civ. App.) 85 S. W. 490.

DECISIONS RELATING TO SUBJECT IN GENERAL

<ol style="list-style-type: none"> 1. Public domain. 2. Spanish and Mexican grants. 3. Lands subject to colonization. 4. Grant to United States—Accretion. 5. Grant of lands under water. 6. Title and rights of municipalities. 7. Land certificates—Former law. 8. — Headright certificates. 9. — Bounty land certificate. 10. — Confederate certificate. 11. — National road certificates. 12. — Duplicate certificates. 13. — Transfer of certificates. 14. — Good faith in transfer. 15. Entries and locations under former law. 16. — Vacant public land. 17. — Application. 	<ol style="list-style-type: none"> 18. — Surveys. 19. — Location. 20. — Entry. 21. — Lifting certificate. 22. — Transfers and contracts. 23. — Priorities. 24. Homestead donations under former law. 25. — Application. 26. — Affidavit. 27. — Survey. 28. — Occupation and abandonment. 29. — Settlement. 30. — Transfer. 31. Grants to railroads. 32. Rights and liabilities of purchaser from city.
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1. **Public domain.**—The public domain consists of unappropriated lands, which are subject to the control of the state. *Day Land & Cattle Co. v. State*, 68 T. 526, 4 S. W. 865; *State v. Delesdenier*, 7 T. 76; *Sherwood v. Fleming*, 25 T. Sup. 408; *Teague v. Green*, 26 S. W. 518, 7 C. A. 368.

Lands under a void grant issued November 20, 1835, after land offices were closed, held not "titled land," within the meaning of the constitution and statutes. *Williams v. League* (Civ. App.) 44 S. W. 570.

2. **Spanish and Mexican grants.**—As to titles in Cameron, El Paso, Hidalgo, Kinney, Nueces, Presidio, Starr and Webb counties, see *Sayles' Early Laws*, arts. 2255, 3486.

In action of trespass to try title the defendant's title was a colonial grant for which he had received a testimonio properly executed. His title was not affected by the fact that the protocol was not signed by the commissioner. *Titus v. Kimbro*, 8 T. 210.

In 1831 a concession of land was made to Juan Jose Acosta. The surveyor in his report describes the land as having been surveyed for Juan Justo Liendo. The act of possession was dated September 30, 1834. It was held that the mistake in the use of the last name was corrected by the context. *Clay v. Holbert*, 14 T. 189.

In an action of trespass to try title plaintiff claimed the land in controversy under a grant to M. in 1835, and a conveyance by M. to plaintiff in 1840, made in good faith and for a valuable consideration. The plaintiff admitted that he was a native of the United States, that he came to Texas in 1835 without his family, and after remaining three weeks returned to the United States, and had never been in Texas since as a citizen, and had never taken possession of the land. Held, that the issue of the grant precluded an inquiry into the merits and qualifications of the grantee, and that the title in the hands of a purchaser was not affected by the conduct of the grantee. *Johnston v. Smith*, 21 T. 722; *Styles v. Gray*, 10 T. 503; *Hardiman v. Herbert*, 11 T. 656; *Hatch v. Dunn*, 11 T. 708; *Bowmer v. Hicks*, 22 T. 155; *Luter v. Mayfield*, 26 T. 325; *Howard v. Colquhoun*, 28 T. 134; *Ruiz v. Chambers*, 15 T. 586; *Babb v. Carroll*, 21 T. 767; *Bradshaw v. Smith*, 53 T. 474; *Todd v. Fisher*, 26 T. 243; *Lindsay v. Jaffray*, 55 T. 631; *Palmer v. Curtner*, 55 T. 67; *Walters v. Jewett*, 28 T. 201; *McPhail v. Burris*, 42 T. 145; *Cavazos v. Trevino*, 35 T. 133.

The want of authority of the officer in extending a title prior to the revolution of 1836, which rendered it void, must be shown by the law, or that he attempted to exercise his authority beyond the territory over which he had jurisdiction, or something of like character, and not from proof of mere error of the officer in extending title to one not in fact legally entitled, but who he believed was entitled to receive it. *Hanrick v. Jackson*, 55 T. 17.

See Act Aug. 15, 1870 (12th Leg., S. S., p. 201). *State v. De Leon*, 64 T. 553; *Garza v. State*, 64 T. 670.

Conveyance by citizen of the state of Coahuila in 1834 of his right as a colonist to locate land held recognized by constitution of republic of Texas. *Stone v. Crenshaw*, 30 C. A. 394, 70 S. W. 532.

On the extension of final title to a Texas land grant, the fee held to have vested in applicant's attorney in fact and not in the applicant. *Surghenor v. Tallafarro* (Civ. App.) 98 S. W. 648.

Where, in 1824, the government of Coahuila and Texas granted four leagues of land for colonization purposes, and a town was established as the seat of municipal government of the colony, it was within the power of the congress of Texas to place the title in the town to the unsold portion of the grant for the use and benefit of its citizens. *City of Victoria v. Victoria County*, 100 T. 438, 101 S. W. 190.

Where a Spanish grant vested in the grantee, an estate in fee, persons claiming title as heirs of the grantee need not show that he never forfeited the land. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

A Spanish grant held not void because of insufficient description of the land granted. *Id.*

A Spanish grant held to vest a perfect title in the grantee subject to conditions subsequent. *Id.*

3. **Lands subject to colonization.**—Under the general colonization act declaring that there cannot be colonized lands within 10 leagues of the coast of the gulf of Mexico, the interior line of the littoral leagues lying between given coast points is not determined by following the curvatures of the coast. A straight line between the two outer termini of the end lines may be drawn when the line is short and there is no great curvature of the coast; but, if otherwise, the rule is to meander the coast line, plat the surveys, and lay down a straight line between the two coast points; from a point of intersection with that line, run a perpendicular 10 leagues into the interior, and from the apex runs a line to either end of the boundary parallel to the base line. *Hamilton v. Menifee*, 11 T. 718.

4. **Grant to United States—Accretion.**—The grant by the republic of Texas to the United States of specific lands devoted to public defense held not to entitle the latter to lands subsequently attached by accretion to that part of Galveston Island previously used for defense. *State v. Jadwin* (Civ. App.) 85 S. W. 490.

5. **Grant of lands under water.**—Soil under public navigable waters may be the subject of a grant by the sovereign. *Baylor v. Tillebach*, 20 C. A. 490, 49 S. W. 720.

6. **Title and rights of municipalities.**—The republic of Texas held to possess the power to designate the purposes for which the proceeds from the sales of public lands of a municipality might be appropriated. *Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 67 S. W. 147.

Purchasers from grantee in a deed executed by the mayor of Socorro held charged with notice of the power of the mayor to execute the deed. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

7. **Land certificates—Former law.**—See Appendix for omitted or repealed land laws. A file of a certificate made before the reservation of the land by the state or other purposes is superior thereto, though the survey was not made till afterwards; it being made within a year from the file. *Houston & T. C. Ry. Co. v. State* (Civ. App.) 62 S. W. 114.

The issuance of a certificate to those designated therein as heirs of the party entitled is conclusive of their right to it on a collateral inquiry, whether the decision of the board was right or not. *Burkett v. Scarborough*, 59 T. 495; *Fleming v. Giboney*, 81 T. 422, 17 S. W. 13.

An unlocated land certificate is a chattel. *Porter v. Burnett*, 60 T. 220; *Sewell v. Laurence*, 2 U. C. 376; *Barker v. Swenson*, 66 T. 407, 1 S. W. 117. After its location it becomes a chattel real. *Hearne v. Gillett*, 62 T. 23; *East v. Dugan*, 79 T. 329, 15 S. W. 273; *Harvey v. Carroll*, 5 C. A. 324, 23 S. W. 713.

One who for a period of thirty-seven years sleeps upon his claim to an interest in a land certificate, an adverse right to which is openly asserted, and who, during all that period, makes no effort to repel the assertion of the adverse claim, is estopped from asserting his rights by reason of his laches. *Parker v. Spencer*, 61 T. 155.

The mere possession of a land certificate is not evidence of title. *Chamberlain v. Pybas*, 81 T. 511, 17 S. W. 50; *Fisher v. Ullman*, 3 C. A. 322, 22 S. W. 523.

A land certificate issued without authority, defective in terms, rejected by the court of claims, not recommended by the land board, and not established by suit, is void. *White v. Martin*, 66 T. 340, 17 S. W. 727.

Land certificates held personal property, so that title is governed by law of domicile. *Ward v. Cameron*, 97 T. 466, 80 S. W. 69.

Evidence held to sustain the finding that the original certificate under which the land was located was issued to plaintiffs' ancestor. *Buster v. Warren*, 35 C. A. 644, 80 S. W. 1063.

Facts held to show that an act of the legislature intended to confirm in one a right to a tract of land as the head of a family. *Houston Oil Co. v. Gallup*, 50 C. A. 369, 109 S. W. 957.

A land certificate is the obligation of the government entitling the owner to secure the designated quantity of land by following the requirements of the law. *Waterman v. Charlton*, 102 T. 510, 120 S. W. 171.

The title to the land ordinarily depends on and follows the title to the certificate, and the ownership of the certificate constitutes title to land. *Id.*

The issuance of a patent upon location and survey made for owners of certificates vests in the patentee the absolute title to the land, except as against the state or some one having a prior legal or equitable right. *Murphy v. Luttrell*, 56 C. A. 149, 120 S. W. 905.

One locating land under a certificate held not a mere trespasser, but an owner of an interest in the land. *Duren v. Bottoms* (Civ. App.) 129 S. W. 376.

Under Paschal's Dig. arts. 4302 and 4211 et seq., it was the duty of the commissioner of the general land office to satisfy himself that the original certificate was a valid one, before issuing an unlocated balance certificate, and it will be presumed that he discharged this duty; hence, where a survey was made in B. county in 1838, under which land was patented in 1847 and canceled in 1855, because in conflict with older valid claims, and not for any infirmity of the certificate, and another survey, made in B. county in 1847 by virtue of the certificate, was patented during that year, and the commissioner in 1855, after canceling the patent issued on the survey made in 1838, again recognized the certificate as valid by issuing the unlocated balance certificate, the original certificate was *prima facie* valid. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

The right of the holder of a land certificate to obtain title to land by location of the certificate descends to his heirs, but, until location, no title to any land is acquired. *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

Facts held to establish a partition of a land certificate between defendant and his coheirs precluding him from successfully claiming an interest in land located by them. *Robertson v. Brothers* (Civ. App.) 139 S. W. 657.

Under Paschal's Dig. art. 4167, invalidating sales of land under conditional certificates, a sale of land under a conditional certificate passes no title, legal or equitable, to the purchaser. *Sauvage v. Wauhup* (Civ. App.) 143 S. W. 259.

Where a special act, authorizing the issuance of a certificate to the original holder of an unconditional certificate, is a pure donation, conferring no rights upon the holder's assignee, the heirs of the holder are both the legal and beneficial owners of the special act certificate; and a patent thereunder vests them with the legal title. *Broussard v. Cruse* (Civ. App.) 154 S. W. 347.

For laws and decisions relating to certificates for land under colony contracts of Peters, Castro, Fisher and Miller, German Emigration Company, and Mercer, see *Early Laws of Texas*, and *Sayles' Real Estate Laws of Texas*, vol. 1, arts. 164-194.

8. — **Headright certificates.**—A headright certificate was issued in 1838 to the father of plaintiff; the mother died in 1839; in 1851 the father transferred his interest in the certificate to J., and J. made a similar transfer to M.; in 1855 a duplicate certificate, the original having been lost, was issued in the name of the father, and in 1860 the land was patented to M., as his assignee. Up to the issuance of the patent the absence of the defendant from the state would prevent the running of the statute of limitations against him. After the issuance of the patent the statute was suspended and remained suspended until March 30, 1870. From 1874 to 1879 the county in which the land lay was not attached for judicial purposes to any organized county. Held that, under the facts of this case, the heirs of the mother were not estopped from asserting their community interest in the land. *Merrill v. Roberts*, 64 T. 441.

In 1839 L. with his wife and children emigrated to Texas; in the same year his wife died and he married again; on January 10, 1840, a conditional certificate for six hundred and forty acres was issued to him; in the spring of the same year he died leaving surviving his last wife and the children of his first wife. In November, 1849, an unconditional certificate was issued to L. or his heirs, it not appearing which; in September, 1851, the land was surveyed under the certificate, and in 1874 patented to the heirs of L. Held, that the heirs were entitled to the land to the exclusion of the last wife. *Marks v. Hill*, 46 T. 345.

The authority to patent upon first-class headright claims is based upon the report of the traveling board that the certificate is genuine, or, if adverse, upon the certificate

being established as genuine by suit; any other evidence is insufficient authority. *Miller v. Brownson*, 50 T. 583.

A certificate granted by the legislature in lieu of an unrecommended first-class headright certificate is a gratuity, and inures to the benefit of the grantee, and does not confer title upon an assignee of the unrecommended land certificate. *McKinney v. Brown*, 51 T. 94.

The action of a legally constituted board of land commissioners in 1838, deciding who were the heirs of a deceased party who had been entitled under the law to land, and issuing to them a headright certificate, is conclusive of their right to it in a collateral inquiry, and in like manner a patent based on such certificate to those designated therein as heirs of the party entitled, is conclusive on the question of their heirship. *Burkett v. Scarborough*, 59 T. 495, citing *Styles v. Gray*, 10 T. 506; *Hardiman v. Herbert*, 11 T. 661; *Ruis v. Chambers*, 15 T. 590; *Babb v. Carroll*, 21 T. 767; *Bowmar v. Hicks*, 22 T. 155; *Bradshaw v. Smith*, 53 T. 474; *Todd v. Fisher*, 26 T. 243; *Lindsay v. Jaffray*, 55 T. 631; *Howard v. Colquhoun*, 28 T. 134; *Walters v. Jewett*, 28 T. 201; *McPhail v. Burris*, 42 T. 145; *Palmer v. Curtner*, 55 T. 67; *Hanrick v. Jackson*, 55 T. 32.

Patent under unlocated headright certificate issued after the death of the owner to him, "his heirs and assigns," vests the legal title in his heirs. *Hereford v. House*, 16 C. A. 356, 40 S. W. 847.

Contract for location of headright certificate and deed held to vest a legal title. *Stone v. Ellis* (Civ. App.) 40 S. W. 1077.

Recitation in a certificate held conclusive that the grantee of bounty lands fell in the Alamo, and hence the heirs of a soldier by the same name, who survived, could not hold lands under such certificate. *Dick v. Malone*, 24 C. A. 97, 58 S. W. 168.

Location under headright certificate by one owner held not ratified by the others by the sale of the certificate, where they did not know of location. *Kirby v. Estell*, 24 C. A. 106, 58 S. W. 254.

Plaintiff held not entitled to recover on the ground that the evidence was not sufficient to show that the headright certificate to the land under which defendant had obtained title was issued to plaintiff's father, though the person to whom it was issued was of the same name. *Stafford v. Kreinhop* (Civ. App.) 63 S. W. 166.

A headright land certificate, which has not been examined by the traveling board of land commissioners, or which has not been established as genuine and valid by a judgment of the district court, is void, and will not authorize a survey. *Pope v. Anthony*, 29 C. A. 298, 68 S. W. 521.

Findings of a board of land commissioners as to death of the grantee in a conditional headright certificate held not conclusive. *Buster v. Warren*, 35 C. A. 644, 80 S. W. 1063.

Evidence held insufficient to show plaintiffs were the heirs of B., to whose administrator a headright certificate was issued. *Balentine v. Dodge* (Civ. App.) 140 S. W. 465.

Recital in a headright certificate issued by a board of land commissioners to one as administrator of B., that B. was killed at the Alamo held to require strong evidence to overcome it. *Id.*

9. — **Bounty land certificate.**—The pay of soldiers under joint resolution of November 24, 1836, held not limited to money, but to include land grants for service, including the time between the soldier's leaving home and his mustering into the service. *Halsted v. Allen* (Civ. App.) 73 S. W. 1068.

A bounty land certificate held a grant based on the consideration of the soldier's service. *Id.*

A certificate issued to the heirs of those who fell at the Alamo was a mere gratuity evidencing the gratitude of the republic for the soldier's sacrifice, the right to which vested in his heirs; it formed no part of his estate, and was not subject to sale by the administrator for the payment of debts. *Todd v. Masterson*, 61 T. 618, citing *Rogers v. Kennard*, 54 T. 35; *Ames v. Hubby*, 49 T. 710. It is otherwise where a certificate was issued to the heir under a pre-existing contract or obligation in favor of the ancestor. *Goldsmith v. Herndon*, 33 T. 705; *Soye v. Maverick*, 18 T. 100; *Rogers v. Kennard*, 54 T. 30; *Todd v. Masterson*, 61 T. 618; *Allen v. Clark*, 21 T. 404; *Hornsby v. Bacon*, 20 T. 556; *Warnell v. Finch*, 15 T. 163; *Marks v. Hill*, 46 T. 345.

The survey and location of public land by virtue of a bounty warrant issued by the state is sufficient to sever the land from the public domain and vest title in the owner of the warrant for whom the location and survey were made. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

A certificate and patent to the heirs of a soldier of the war of Texas for her independence held a certificate and patent to those who were the heirs of such person at the time of his death. *Waterman v. Charlton* (Civ. App.) 112 S. W. 779.

Effect of a statute, passed to relieve one entitled to a bounty warrant certificate barred by limitations, stated. *Sherman v. Pickering*, 56 C. A. 633, 121 S. W. 536.

Special act directing the issuance of a certificate for two tracts of land to the original owner of an unconditional headright certificate, passed at the instance of his assignee, to whose transferee the patent thereunder issued, held not a bounty or donation to the heirs of the original holder. *Broussard v. Cruse* (Civ. App.) 154 S. W. 347.

10. — **Confederate certificate.**—Where a survey was located and patented to plaintiffs by virtue of a Confederate certificate, and the alternate survey for the school fund was not located contiguous thereto, held, that their location was illegal, and that they could not convey good title. *Maurice v. Upton* (Civ. App.) 41 S. W. 504.

The fact that the lands were located under "Confederate certificates" does not make title thereto invalid. *Brackenridge v. Claridge*, 91 T. 527, 44 S. W. 819, 43 L. R. A. 593.

The unauthorized act of the commissioner of the general land office in issuing patents for lands under veteran donation certificates which had previously been appropriated to the public school fund cannot operate as an estoppel against the state. *Eyl v. State*, 37 C. A. 297, 84 S. W. 607.

11. — **National road certificates.**—Assignment of national road certificates gives title to land patented on a relocation thereof. *Gist v. East*, 16 C. A. 274, 41 S. W. 396.

Under a transfer with warranty of so much of a national road certificate as was located on a certain tract, held, that transferee took a like amount of other land there-after patented under a relocation of the certificate. *Miller v. Gist*, 91 T. 335, 43 S. W. 263.

12. — **Duplicate certificates.**—A duplicate land certificate, issued in place of one lost by the commissioner of the land office, confers no greater right than the original. *Kempner v. State*, 31 C. A. 363, 72 S. W. 888.

Where a duplicate certificate in lieu of one lost could be obtained under existing laws, it was competent for the legislature, under the constitution of 1870, to direct the issuance of an original certificate in satisfaction of a pre-existing right which had once been evidenced by a certificate which had been lost. If such a certificate had been in existence, the fact that the party was entitled to such certificate did not authorize the grant of a new certificate by the legislature under the constitution of 1870. *Holmes v. Anderson*, 59 T. 481, citing constitution of 1870, art. 10, sec. 6; *Bacon v. Russell*, 57 T. 415.

As a duplicate certificate professes to confer no rights other than such as the original gave, if there be no original it confers no rights whatever. Following *Gunter v. Meade*, 78 T. 634, 14 S. W. 562. It seems also to have been held in that case that the fact of an original certificate having been used for one labor would not give such jurisdiction to the commissioner of the general land office as would render a duplicate for a league and labor issued thereon voidable only and not void. *Land & Mortgage Co. v. State*, 1 C. A. 616, 23 S. W. 258.

A duplicate certificate issued where there was no original or where the original has been satisfied is void. *Gunter v. Meade*, 78 T. 634, 14 S. W. 562; *Texas Land & Mortgage Co. v. State*, 1 C. A. 616, 23 S. W. 258.

A special act directing a certificate to issue in lieu of another one pronounced void is, in effect, a donation. *White v. Martin*, 66 T. 340, 17 S. W. 727. The act of March 31, 1883, validating surveys and patent by virtue of certificates issued under special laws passed under the constitution of 1870, cannot retroact and make that, which was no title at all at the time another title accrued, superior to that other title. *White v. Martin*, 66 T. 340, 17 S. W. 727.

A mere irregularity in the issuance of a duplicate cannot avail a subsequent locator claiming the land under a different title. *Seibert v. Richardson*, 5 C. A. 504, 23 S. W. 899.

The owner of a land certificate may assert title to land secured under a duplicate obtained and located in fraud of the owner. *Seibert v. Richardson*, 86 T. 295, 24 S. W. 261. See *Holmes v. Anderson*, 59 T. 481; *Bacon v. Russell*, 57 T. 418.

Validity of locations and surveys made under original certificates held not affected by mistake in having duplicate certificates issued and surveys made thereunder. *Eyl v. State*, 37 C. A. 297, 84 S. W. 607.

Where the land commissioner issues a duplicate certificate, though in fact the original was not lost, the real owners, on establishing their ownership, could accept the location of the duplicate, and would in equity be entitled to recover the land. *Jackson v. Nona Mills Co.* (Civ. App.) 123 S. W. 928.

Issuance of unconditional land certificate and duplicate certificate upon loss of the unconditional certificate held not a judicial determination that the location under the original certificate had been abandoned. *Thompson Bros. Lumber Co. v. Toler* (Civ. App.) 151 S. W. 1111.

13. — **Transfer of certificates.**—A purchaser for value under a patentee is not chargeable with constructive notice of latent defects in the transfer of the certificate upon which the patent issued, when there is nothing upon the face of the patent which would put a prudent man on such inquiry as would lead to notice of such defects. *Wimberly v. Pabst*, 55 T. 587.

Conditional certificates issued to emigrants and settlers under the land law of 1837, and prior to the passage of the act of January, 1839, were transferable by the grantee. *Graham v. Henry*, 17 T. 164.

The prohibition of the grantee of conditional certificates to assign them was first introduced by the act of January 4, 1839, and was confined to claims acquired under that act. *Graham v. Henry*, 17 T. 164; *Perry v. Glass*, 25 T. 368; *Merrifweather v. Kennard*, 41 T. 273.

A sale of a land certificate conveys the equitable title to the land on which it is subsequently located. *Keyes v. Railroad Co.*, 50 T. 174; *Hermann v. Reynolds*, 52 T. 391; *Stone v. Brown*, 54 T. 330; *Sickles v. White*, 66 T. 178, 17 S. W. 543.

A transfer of a land certificate upon which was based the delivery of a patent to the land by the commissioners, when found in the land office, is an archive, and a certified copy thereof is admissible in evidence. *Burkett v. Scarborough*, 59 T. 495.

A verbal sale of a land certificate conveys the vendor's right thereto. In 1838 the assent of the husband to a verbal sale by the wife of her interest in a certificate was not required to be in writing. After a lapse of nearly 40 years such assent was presumed, it being shown that the husband was aware of the sale. *Parker v. Spencer*, 61 T. 155.

The transfer of a land certificate conveys only an equitable title; the conveyance of land after location gives such title that it will at once become a legal title if the patent is issued in the name of the original grantee. *Satterwhite v. Rosser*, 61 T. 173; *Adams v. House*, 61 T. 640; *Abernathy v. Stone*, 81 T. 430, 16 S. W. 1102; *Culmell v. Borroum*, 13 C. A. 458, 35 S. W. 942.

A land certificate after location loses its character as personal property and becomes a chattel real, title to which can no longer pass by parol. *Hearne v. Gillett*, 62 T. 23.

An unlocated land certificate is personal property and passes title by sale and delivery. The owner of a certificate may elect to treat adverse possession as a conversion, and, if he seeks to recover its value, must bring his action within two years from the accrual of his cause of action, but his failure to do so does not annul his right to recover the land located by such certificate. *Barker v. Swenson*, 66 T. 407, 1 S. W. 117. Citing *Andrews v. Smithwick*, 20 T. 111; *Smithwick v. Andrews*, 24 T. 488; *Andrews v. Smithwick*, 34 T. 544. And see *Lindsay v. Jaffray*, 55 T. 626; *Stone v. Brown*, 54 T. 330;

Johnson v. Newman, 43 T. 639; Randon v. Barton, 4 T. 292; Watkins v. Gllkerson, 10 T. 340; Evans v. Hardeman, 15 T. 480; Cox v. Bray, 28 T. 251; Parker v. Spencer, 61 T. 155; Neal v. Bartleson, 65 T. 478.

When a land certificate is sold under execution or in course of an administration, the right to secure land under it passes to the purchaser, as under a voluntary sale. Barker v. Swenson, 66 T. 407, 1 S. W. 117.

A land certificate with a blank indorsement thereon prior to its location is, when unexplained, prima facie evidence of title in the holder. Fisher v. Ullman, 22 S. W. 523, 3 C. A. 322.

The transfer of a located land certificate vests title in the vendee. A transfer before location or survey confers an equitable title in the grantee to be enforced within ten years. Rankin v. Busby (Civ. App.) 25 S. W. 678; Keyes v. Railroad Co., 50 T. 174; Stone v. Brown, 54 T. 330.

Assignment of certificate after patent conveys an equitable title. Hume v. Ware, 28 S. W. 935, 87 T. 380.

An unconditional certificate issued to an assignee is prima facie evidence of his title. Davis v. Bargas, 88 T. 662, 32 S. W. 874.

An instrument conveying all the right, title, and interest in a headright certificate held to pass all the grantor's interest, whether or not the certificate had been located. McCoy v. Pease, 17 C. A. 303, 42 S. W. 659.

Deed conveying certain land, reciting the number of certificate under which it was located, prior to the location, held to convey only an equitable title. Flash v. Herndon (Civ. App.) 44 S. W. 608.

Where one holding certificate conveyed an equitable title to the land located thereunder, and on receiving patent conveyed the land to another, the legal title was vested in such other. *Id.*

The legal title to land patented to assignor of certificate after assignment held to vest in assignee. Batcheller v. Besancon, 19 C. A. 137, 47 S. W. 296.

A land office certificate held transferable, prior to location of land thereunder, without a written assignment. Ehrenberg v. Baker's Ex'rs (Civ. App.) 54 S. W. 435.

Transfer of a land-office certificate prior to location held sufficient to entitle the transferee to recover in an action as against locator's heirs. *Id.*

Evidence held insufficient to raise a presumption of the transfer of a land office certificate necessary to support plaintiff's title. *Id.*

A party claiming to be the assignee of a headright certificate for the land in controversy could not, by mere lapse of time, unaided by acts of ownership, be declared the owner, though no one had asserted a contrary title. Morgan v. Butler, 23 C. A. 470, 56 S. W. 689.

Evidence held to create presumption that the father of plaintiff had assigned a headright certificate to the land in controversy to defendant's predecessor, which would authorize a judgment for the defendant. Stafford v. Kreinhop (Civ. App.) 63 S. W. 166.

A sale of a located headright certificate conveys the land itself. Odell v. Kennedy, 26 C. A. 439, 64 S. W. 802.

Evidence held to show land located under headright transferred to plaintiff's ancestor. Stone v. Crenshaw, 30 C. A. 394, 70 S. W. 582.

The files of a suit for a certificate for land held such that reasonable diligence would have shown one buying land, patent for which was issued on a certificate of the court to claimant, that there was a new trial in which judgment was against claimant. Kempner v. State, 31 C. A. 363, 72 S. W. 888.

Written contract held to show a sale of land certificates. Ward v. Cameron, 97 T. 466, 80 S. W. 69.

A husband's sale of wife's land certificates held a reduction to possession, so as to bar her right. *Id.*

Land certificates in name of wife held choses in action to which husband only gains absolute title, in common-law state, by reducing to possession. *Id.*

By virtue of an instrument executed by a holder of land certificates, the holder held not entitled to mortgage the land on receiving a patent therefor. Mansfield v. Wardlow (Civ. App.) 91 S. W. 859.

The sale of a bounty warrant or certificate issued by the state for public lands prior to the location thereof held to pass title without a written transfer. Stubblefield v. Hanson (Civ. App.) 94 S. W. 406.

The transfer of a bounty warrant passes to the transferee the equitable title to land subsequently entered under it. Clark v. Hoover, 51 C. A. 181, 110 S. W. 792.

An unlocated land certificate was personal property. Phillips v. Palmer, 56 C. A. 91, 120 S. W. 911.

Evidence held insufficient to show the conveyance of a certain headright certificate to the one under whom plaintiff claimed. White v. McCullough, 56 C. A. 383, 120 S. W. 1093.

A certain outstanding title to land held not to be asserted against a purchaser for value without notice thereof. Ingalls v. Orange Lumber Co., 56 C. A. 543, 122 S. W. 53.

Evidence held not sufficient to require a finding by the trial court that the holder of a headright certificate ratified an invalid contract to enter the land and pay the expenses in consideration of the transfer of one-half the land, or accepted the benefit of the contract and verbally or by a deed which had been lost conveyed half of the land. Broocks v. Payne (Civ. App.) 124 S. W. 463.

Land certificates prior to their location are personal property which may be transferred as any other chattel. McLain v. Pate (Civ. App.) 124 S. W. 718.

Under Paschal's Dig. arts. 5612, 5613, 5629-5631, 5633, 5698, 5771, relating to settlement of estates of decedents and the sale of property of the estate, which do not specifically require that an order of court be had for the sale of personalty, the transfer of a land certificate by an administratrix before her discharge is valid without an order of court, though made 18 years after letters were taken out. *Id.*

An unlocated land certificate is a chattel, title to which may pass by parol sale and delivery. Duren v. Bottoms (Civ. App.) 129 S. W. 376.

Evidence held not to show that a purchaser of headright certificates retransferred them. *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

On a conveyance of a headright certificate by the owner, there is a presumption that the certificate was delivered by the grantor to the grantee. *Tompkins v. Creighton-McShane Oil Co.* (Civ. App.) 143 S. W. 306.

The original holder of a headright certificate having assigned the same and then obtained a duplicate on an affidavit of loss of the original, no title passed to an assignee of the duplicate as against those holding under the original. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

Where an original headright certificate was assigned, and thereafter the assignor obtained a duplicate under which land was located, the assignee of the original was entitled to claim such location. *Id.*

Where defendants had the legal and equitable title to land located under an assigned original headright certificate, the doctrine of stale demand did not apply to their claim thereto as against one holding under a duplicate certificate. *Id.*

Under Paschal's Dig. art. 4140, which authorized a board of land commissioners to issue a certificate covering lands to one claiming as assignee of a person entitled, a certificate that a specified person, as assignee of another, proved himself, according to law, to be entitled to one league and one labor of land secured to the assignor or his assigns by the certificate is conclusive on the question of the assignee's rights as such, at least as against all persons other than his claimed assignor and those claiming under the latter, in a proceeding to recover the land. *Early v. Compton* (Civ. App.) 149 S. W. 694.

Rights acquired by an assignee under a headright certificate, by having the land located and surveyed and the field notes returned as required by law, held sufficient to support trespass to try title. *Sabine Valley Timber & Lumber Co. v. Cagle* (Civ. App.) 149 S. W. 697.

Assignment of headright certificate by husband before his divorce from his wife held to pass title to the whole land to the assignee. *Steddum v. Kirby Lumber Co.* (Civ. App.) 154 S. W. 273.

A recital in a duplicate headright certificate that the original certificate had been lost, as shown by the oath of the certificate holder, was sufficient, in the absence of evidence to the contrary, to sustain a finding that the certificate had not been assigned previous to that time. *Id.*

14. — **Good faith in transfer.**—A grant by the state to land to a transferee of a certificate for land holding under a forged transfer held to be divested by the state or by the original holder of the certificate or his heirs on proof of the fraud and forgery. *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

A purchaser from a patentee acquiring title under a forged transfer of a certificate for land held a bona fide purchaser. *Id.*

The remedy of one defrauded of the right to acquire title in consequence of a forgery of a certificate of land held only personal against the one committing the fraud. *Id.*

The purchaser of an unlocated land certificate, though in good faith, for value, and without notice, will not be protected against prior transfers thereof from his vendor, in the absence of facts raising an estoppel. *Tompkins v. Creighton-McShane Oil Co.* (Civ. App.) 143 S. W. 306.

The mere fact that a transfer of an unlocated land certificate was not recorded held not to render a subsequent purchaser from the same holder a purchaser in good faith, and without notice. *Id.*

A headright certificate, before the location of land thereunder, is personal property within the rule that a purchaser can acquire no better title than his vendor has. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

15. **Entries and locations under former law.**—See Appendix for omitted and repealed land laws. Defendant received from plaintiff \$1,000 with which to buy land certificates, two-thirds of the land so located to belong to plaintiff and one-third to defendant. The defendant failed to locate the land certificates according to the terms of the contract, and the plaintiff repudiated the acts of the defendant altogether. In a suit for the breach of the contract, the money received by the defendant, with legal interest from the time he received it, is the measure of damages. *Durst v. Swift*, 11 T. 281; *Sutton v. Page*, 4 T. 147; *Garrett v. Gaines*, 6 T. 443; *Hall v. York*, 16 T. 23; *Mitchell v. McLemore*, 9 T. 151; *Murchison v. Payne*, 37 T. 305; *Eborn v. Zimbleman*, 47 T. 503, 26 Am. Rep. 315; *Close v. Fields*, 13 T. 626; *White v. Affleck*, 1 U. C. 78.

A title to land is not divested by a mere declaration of abandonment. *Railway Co. v. McGehee*, 49 T. 489; *Hanrick v. Cavanaugh*, 60 T. 1; *Hanrick v. Dodd*, 62 T. 75.

Trespass to try title can be maintained by one who has settled upon vacant land, upon which he filed as a pre-emptor, and procured, as such, a survey of the same. The claim of such a one constitutes an equitable though defeasible title, which, on compliance with the pre-emption law, would mature into a legal title. *Buford v. Gray*, 51 T. 331.

The right to land attaches at the date of the file and application and cannot be defeated by the refusal of the officer to accept the location. *De Montel v. Speed*, 53 T. 339; *Hamilton v. Avery*, 20 T. 612; *Sherwood v. Fleming*, 25 T. Sup. 408; *Milam County v. Bateman*, 54 T. 153; *Gullett v. O'Connor*, 54 T. 408; *Groesbeck v. Harris*, 82 T. 411, 19 S. W. 850.

A junior location will support a patent except as against a prior title. *Gullett v. O'Connor*, 54 T. 408; *Thompson v. Johnson*, 2 U. C. 258.

A locator does not lose his right through the fault of the surveyor unless a subsequent locator is misled thereby. *T. & P. Ry. Co. v. Thompson*, 65 T. 186.

The equities of the locator of a land certificate, who locates without contract with the owner, do not extend to fixing a right in the land secured by the location, or even to a lien upon it for his compensation. *Grimes v. Smith*, 70 T. 217, 8 S. W. 33; *Boone v. Hulsey*, 71 T. 176, 9 S. W. 531.

Under Rev. St. 1895, arts. 4055, 4123-4126, 4131, 4138, 4142, a certificate filed with a survey in the land office cannot be withdrawn for any purpose. *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58.

A location is not void on account of a mere irregularity. *Railway Co. v. Carter* (Civ. App.) 24 S. W. 1102.

Prior or subsequent knowledge of a partial location of a certificate, or subsequent conduct, does not estop the purchaser from claiming a subsequent location for his exclusive benefit, where the first location was for the exclusive use of his vendor's co-owner. *Estell v. Kirby* (Civ. App.) 48 S. W. 8.

The owner of an undivided interest in a certificate may locate thereunder for his exclusive benefit to the extent of such interest, free from any claim of his co-owner. *Id.*

Payments of fees at the land office held not to give a claim against the interest of minors in land, in the absence of a contract by a duly qualified guardian. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

General laws authorizing locations or entries upon and surveys of public lands or public domain or vacant lands do not apply to lands that have previously been appropriated, reserved, or set aside. *Roberts v. Terrell*, 101 T. 577, 110 S. W. 733.

Parties claiming a forfeiture of a location of public lands, by virtue of Act Aug. 30, 1856 (4 Laws, p. 499; Paschal's Dig. art. 4210), it having been shown that the land was located under a valid certificate, should bring the case within its terms. *Keith v. Guedry* (Civ. App.) 114 S. W. 392.

The rights of one locating land under a certificate and of those claiming under him held not open to the objection of a stale demand. *Duren v. Bottoms* (Civ. App.) 129 S. W. 376.

Taking land in satisfaction of an agreement to survey a larger tract in consideration of a third interest held to divest the owner of such tract and his heirs of any interest in the smaller. *Addington v. Howard* (Civ. App.) 143 S. W. 268.

Location under an unconditional land certificate held to have exhausted the holder's right to appropriate public lands, and location under an unconditional certificate subsequently issued, and under a duplicate certificate, the unconditional certificate having been lost, was void. *Thompson Bros. Lumber Co. v. Toler* (Civ. App.) 151 S. W. 1111.

The constitution of 1846, article 14, section 2, required that land certificates in existence at its adoption should be surveyed and returned to the general land office within five years after its adoption, or be forever barred.

16. — **Vacant public land.**—The granting of a certificate to be located upon "vacant public land" contemplates vacant land subject to location; the phrase being generally used interchangeably with others to indicate lands subject to location or settlement. *Roberts v. Terrell*, 101 T. 577, 110 S. W. 733.

A certificate granted with the right of location upon any of the vacant public lands of the state within or without the several reservations theretofore created by law held only to be located upon lands subjected to location of which islands are not a part. *Id.*

The patent carries with it a prima facie right to the land granted to the patentee. The adverse claimant must show a superior equitable right to rebut such presumption. *Johnson v. Eldridge*, 49 T. 507.

The words "land titled," used in section 2, article 14, of the constitution, embrace land covered by that evidence or right which the state gives through a patent, and are not restricted to those lands which are held under patent, which, in the absence of this section, would be deemed sufficient to confer title. If for reasons not appearing on the face of a patent the grant would be void or voidable, the land embraced in the calls of the patent would, for the purposes contemplated by the section, be deemed "land titled." *Truehart v. Babcock*, 51 T. 169; *Summers v. Davis*, 49 T. 554; *Westrope v. Chambers*, 51 T. 188; *Bryan v. Crump*, 55 T. 10; *Day Land & Cattle Co. v. State*, 68 T. 526, 4 S. W. 865; *De Court v. Sproul*, 66 T. 368, 1 S. W. 337; *Hanrick v. Dodd*, 62 T. 91; *Woods v. Durrett*, 28 T. 436; *Sherwood v. Fleming*, 25 T. Sup. 427; and *Patrick v. Nance*, 26 T. 301, cited. Under section 2, article 14, of the constitution, any location made on land which, before the adoption of that constitution, had been patented, is illegal, though the patent may have been void, if it emanated from offices of the state authorized to convey title. *Hanrick v. Dodd*, 62 T. 91, and *Miller v. Brownson*, 50 T. 583. When an illegal location is made on "land titled," the subsequent cancellation of the patent will not validate the location. *Winsor v. O'Connor*, 69 T. 571, 8 S. W. 519.

However irregular or illegal may have been the course of procedure which led to the issuance of a patent to land, the land covered by it is not subject to future location. *Adams v. Railway Co.*, 70 T. 252, 7 S. W. 729.

17. — **Application.**—The right of the owner of a land certificate to unappropriated land is fixed by the date of his file and application. *De Montel v. Speed*, 53 T. 339; *Milam County v. Bateman*, 54 T. 153; *Groesbeck v. Harris*, 82 T. 411, 19 S. W. 850.

The law does not require the application for entry to be made by the owner of the certificate. The possession of the certificate with ability to deliver it to the surveyor is sufficient to support the entry. The rightful owner alone can complain, and he may adopt the act and the ownership of the land remains in him. The surveyor may write out the application. *Beatty v. Masterton*, 77 T. 168, 13 S. W. 1014.

A subsequent application for a survey of public lands held not in conflict with a prior one, if the prior application be considered an application in gross. *Texas Mexican Ry. Co. v. Scott* (Civ. App.) 129 S. W. 1170.

18. — **Surveys.**—On the 1st of June, 1840, a tract of land was located by the proper files made in the office of the county surveyor; before the return of the field-notes to the land office the same land was relocated in 1845 and a patent issued in 1848. In 1853 the field-notes of the first location were returned to the land office within the time prescribed by law. In a contest between those claiming under the first location and those claiming under the patent, it was held that the latter were bound by the matters shown by the records of the surveyor's office constituting an appropriation of the land, and that those holding under the location had the better title. *Wyllie v. Wynne*, 26 T. 42.

Failure in the officers of the land office to delineate upon the maps in the office a grant on file in its archives would not affect such grant in favor of a subsequent location for which a patent has been issued. *Elliott v. Mitchell*, 47 T. 445.

By the act of November 29, 1871 (P. D. 7096), it was necessary that the certificate should be filed with the survey in the general land office within twelve months, and the act provided that the withdrawal of such certificate from the general land office should render such location and survey null and void. The withdrawal contemplated by the

statute was intended to designate the act of the owner or some one for him, consenting that by his act the location and survey formerly made should become null. The theft or unauthorized withdrawal of a certificate from the general land office will not have the effect of rendering null a valid location and survey. *Snider v. Methvin*, 60 T. 487; *Snider v. I. & G. N. R. Co.*, 52 T. 306.

The owner of land certificates who employs and pays the deputy surveyor for the work of actually surveying the land on which the certificates are located, and who defrays all his expenses, is not liable to the county surveyor for the fees for surveying, there being no contract between the deputy and the principal surveyor in regard thereto. *Bates v. Thompson*, 61 T. 335.

One who files, in a proper manner, and delivers a valid land certificate to the county surveyor, has twelve months within which to have the land applied for surveyed, as against any one having notice that he has taken these steps to appropriate the land, and this though the county surveyor fails to make the proper file entry, and did not keep either the application or the certificate in his office, but deposited them elsewhere for safe-keeping. *Cassin v. O'Sullivan*, 61 T. 594.

When corrected field-notes are filed in the land office, if the second survey covered land which could not have been embraced in the survey first made, it is necessary for the parties to proceed as in an original appropriation of the land. If the location originally made would cover the land embraced in the survey last made, then the first survey can be corrected so as to conform to the original location. *Railway Co. v. Thompson*, 65 T. 186.

In the absence of evidence to the contrary, it will be presumed that the survey was made in accordance with the location. *Id.*

If the location originally made would cover the land embraced in the survey last made, the first survey cannot be corrected so as to conform to the original location, notwithstanding the first survey and the certificates were still in the general land office. If the second survey covers land not embraced in the first survey, the parties must proceed as in an original appropriation of land. *Id.*

Where a survey is made under two certificates, an acceptance of a patent under one of them does not operate as an abandonment of the location and survey of the land not covered by the patent, in the absence of other evidence showing such an intention. *Id.*

A locator does not lose his right through the fault of the surveyor unless a subsequent locator is misled thereby. *Id.*

A survey made on the location of a land certificate cannot be corrected by making a survey on entirely different land. *Adams v. Railway Co.*, 70 T. 252, 7 S. W. 729.

When a block of surveys embracing many locations under certificates belonging to the same owner is in partial conflict with land previously appropriated, only so much of each location as may be in entire or partial conflict with older surveys can be floated. Although the owner of a land certificate was mistaken in his initial point of survey, yet if he surveyed vacant land which he intended at the time to thus appropriate, such survey deprives him of the right afterwards to float his certificate and locate it on other land. *Id.*

A location not followed by a survey within the time mentioned is void, as to one having an adverse interest. *De La Garza v. Cassin*, 72 T. 440, 10 S. W. 539; *Greenwood v. McLeary* (Civ. App.) 25 S. W. 708.

A location of land by entry or file, not followed by a survey within twelve months, is void, and the land becomes subject to relocation under other land certificates. Relocation of same certificates upon the land is forbidden. *De La Garza v. Cassin*, 72 T. 440, 10 S. W. 539.

A failure to return the certificate to the land office within twelve months after the survey is fatal to any right thereunder. *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58.

Under Rev. St. 1895, arts. 4055, 4123-4126, 4131, 4138, 4142, a certificate filed with a survey in the land office cannot be withdrawn for any purpose. *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58.

See *N. Y. & Texas Land Co. v. Thomson*, 83 T. 169, 17 S. W. 920; *Lockhart v. Keller* (Sup.) 9 S. W. 179.

For rules applicable to question of boundary, see *Rand v. Cartwright*, 82 T. 399, 18 S. W. 794.

The withdrawal from the land office of the certificates and field-notes by an unauthorized person does not make void the location. The most that would be required in such case would be that the owner take means for its return within reasonable time after knowing of the withdrawal of the certificate. *Musselman v. Strohl*, 83 T. 473, 18 S. W. 857. See *Gillespie v. Feris*, 3 App. C. C. § 124.

A survey prior in point of time, in the absence of equities, confers a prior right. *Mohler v. Welge* (Civ. App.) 20 S. W. 850.

If a second set of field-notes made after the expiration of the time prescribed constitute a relocation, then the certificate is barred; otherwise not. The commissioner in issuing the patent decided the second field-notes to be merely a correction of the original survey, which was made in time. Even if this was error, it would not make the patent void and subject to collateral attack. *Tarlton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

While the law requires the two surveys for the individual and state, to be contiguous to each other, yet if made apart, they are irregular but not void, and surveys thus illegally made have been validated by law. See *Railway Co. v. Carter* (Civ. App.) 24 S. W. 1102; *Smith v. McGaughy*, 87 T. 61, 26 S. W. 1073; *Barrow v. Gridley*, 25 C. A. 13, 59 S. W. 602.

The failure to file field-notes in the time prescribed by this article does not invalidate a location. *N. Y. & T. Land Co. v. Gardner*, 11 C. A. 404, 32 S. W. 786; *Garza v. Cassin*, 72 T. 442, 10 S. W. 539.

Where a party complies with the laws in making locations, the validity of the survey will not be affected by refusal of surveyor or commissioner of land office to recognize its validity. *Fardee v. Adamson*, 19 C. A. 263, 46 S. W. 43.

The fact that surveys made under a certificate for the entry of public land are not contiguous is an irregularity of which the state alone can take advantage. *Eyl v. State*, 37 C. A. 297, 84 S. W. 607.

A senior survey of public land must have its quantity of land out of the public domain, and junior surveys must give way to it. *McCaleb v. Campbell* (Civ. App.) 116 S. W. 111.

In the absence of evidence to the contrary, it will be presumed that appropriated school lands were surveyed as required by Rev. St. 1895, arts. 4130-4132. *Elwood, Arnett & Arnett v. Copeland* (Civ. App.) 129 S. W. 146.

A locator of a land certificate must make an entry thereof, or application for survey, in which the land desired is described with sufficient certainty to apprise the surveyor what particular land he is required to survey; and where such application describes the land by metes and bounds the application must be held to have segregated the land described and none other, from the public domain, and a general statement of the locator as to what he intended must yield to the particular description of the land desired. *Texas Mexican Ry. v. Scott* (Civ. App.) 129 S. W. 1170.

Under Paschal's Dig. art. 4573, Act Aug. 30, 1856 (Laws 1856, c. 145), in force at the time a survey was made, holders of the certificates locating public lands were authorized to have them surveyed without first making an application therefor. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

19. — Location.—A valid location and survey is a legal title as distinguished from an equitable right. *Olcott v. Ferris* (Civ. App.) 24 S. W. 848; *Duren v. Railway Co.*, 24 S. W. 258, 86 T. 287.

The location of a land certificate upon the public domain subject to location severs the land covered by it from the mass of the public domain for twelve months from the date of the location. *McKinney v. Grassmeyer*, 51 T. 376; *Threadgill v. Bickerstaff*, 29 S. W. 757, 87 T. 520.

A joint owner of a land certificate may locate separately the interest owned by him, so as not to create therein a tenancy in common in it with those owning the other interests in the certificate. *Glasscock v. Hughes*, 55 T. 461. A sale of a part of a land certificate, as a half interest, gives the vendee the right to locate such interest for himself. *Farris v. Gilbert*, 50 T. 350.

While a valid location of a land certificate on public lands confers a vested right, it is subject to the right of the legislature to prescribe a time within which the owner must perform the remaining acts required by law to the completion of his title, and to annul the imperfect right on non-compliance with the law requiring the performance of such acts. *Snider v. Methvin*, 60 T. 487.

The right of a person who has located a valid land certificate upon vacant public land and caused the same to be surveyed and the surveyor's certificate returned to the general land office within the time prescribed by law, is a vested right, and is entitled to all the protection given to such right under every constitution of the republic and state. *Snider v. Methvin*, 60 T. 487, citing *Sherwood v. Fleming*, 25 T. Sup. 428; *Hart v. Gibbons*, 14 T. 215; *Smith v. Taylor*, 34 T. 607; *Duren v. Railway Co.*, 86 T. 291, 24 S. W. 258; *Illies v. Feriches*, 11 C. A. 575, 32 S. W. 915.

A location is not void on account of a mere irregularity. *Railway Co. v. Carter* (Civ. App.) 24 S. W. 1102.

A location and survey of a land certificate and return of field-notes vests title in the owner of the certificate. *Cresswell Ranch & Cattle Co. v. Waldstein* (Civ. App.) 28 S. W. 260.

Nothing short of the location of a land certificate or other evidence of right on and survey of land will entitle a party to maintain the action of trespass to try title. *Fall v. Nation*, 17 C. A. 160, 43 S. W. 46.

Grantee of a void grant of land issued after land offices were closed November 13, 1835, held not entitled to the land under Act Feb. 8, 1875, where another person had in 1874 located thereon. *Williams v. League* (Civ. App.) 44 S. W. 570.

Evidence held to show that plaintiff's location did not include lands claimed by defendant under another location, and that the locations were not conflicting. *Clawson v. Williams*, 27 C. A. 130, 66 S. W. 702.

Evidence held insufficient to sustain the finding of the jury as to the location of the land in controversy. *Cochran v. Moerer*, 39 C. A. 75, 87 S. W. 160.

The survey and location of land by virtue of a valid bounty warrant is sufficient to segregate land from the public domain and vest title in the owner of the warrant for whom the survey and location were made and is sufficient title to authorize the maintenance of action for trespass to try title. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 409.

One who located a certificate of land under contract to procure patent in the name of another, who should hold one-third of the land for his benefit, held to have acquired equitable title to one-third of the land. *Morris v. Unknown Heirs of Hamilton* (Civ. App.) 95 S. W. 66.

Evidence held to authorize a finding that a survey was located on a prior survey. *Warner v. Sapp* (Civ. App.) 97 S. W. 125.

A holder of a state land certificate on which an unlocated balance remained held entitled to locate land thereunder from the date of the return to the general land office of correct field notes of the survey thereof. *Munson v. Terrell*, 101 T. 220, 105 S. W. 1114.

Whether authority was given to locate a certificate, as between the parties to an action involving the land, was of no importance, as the location inured to the benefit of the owner of the certificate, if he wished to avail himself of it. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

20. — Entry.—The law does not require the application for entry to be made by the owner of the certificate. The possession of the certificate with ability to deliver it to the surveyor is sufficient to support the entry. The rightful owner alone can complain, and he may adopt the act and the ownership of the land remains in him. The surveyor may write out the application. *Beatty v. Masterton*, 77 T. 168, 13 S. W. 1014.

In the absence of additional facts showing that the title to public land, acquired by a subsequent grantee of the entryman, is superior or different from that of the entryman, any defects available against the latter's title are available against such grantee. *Walraven v. Farmers' & Merchants' Nat. Bank*, 96 T. 331, 74 S. W. 530.

Failure of owner of certificate for the entry of public lands to make written entry or application describing the land applied for held a mere irregularity, which does not invalidate the location and survey made by the surveyor. *Eyl v. State*, 37 C. A. 297, 84 S. W. 607.

21. — **Lifting certificate.**—Where land certificates were not located until after the time allowed from the locator's entry, the certificates could not afterwards be lifted and relocated on other land. *Texas Mexican Ry. Co. v. Scott* (Civ. App.) 129 S. W. 1170.

Under the statute, an order authorizing the lifting of a certificate of location of school land held void. *Talley v. Lamar County*, 104 T. 295, 137 S. W. 1125.

22. — **Transfers and contracts.**—Conveyance by one who has made entry vests title in grantee on issuance of patent. *Morgan v. Baker* (Civ. App.) 40 S. W. 27.

The act of December 21, 1837, provided that the lands thereby granted should not be subject to a sale or alienation, mortgage or execution during the lifetime of the person to whom such warrant or patent shall be granted. This only restrained sale or alienation during the lifetime of the grantee, but he could devise or bequeath the land as any other property owned by him. *Ames v. Hubby*, 49 T. 705. And see *Todd v. Masterton*, 61 T. 618, as to the construction of various acts granting lands to soldiers.

The equities of the locator of a land certificate who locates without contract with the owner do not extend to fixing a right in the land secured by location to a lien upon it for his compensation. *Grimes v. Smith*, 70 T. 217, 8 S. W. 33.

The purchaser of a certificate with knowledge of a prior partial location cannot locate the remainder for his exclusive benefit, even where the first location was without knowledge of his grantors. *Estell v. Kirby* (Civ. App.) 48 S. W. 8.

When confederate land scrip has been located, and the land surveyed, the scrip becomes merged in the land, though no patent has issued, and a deed to the land passes title. *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 253.

Evidence held to show the execution of a locative contract, the performance thereof, and to establish equitable title in defendants. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

A pre-emptioner after having fulfilled all the statutory requirements for a patent can only convey his interest by an instrument in writing. *Wilson v. Nugent* (Civ. App.) 91 S. W. 241.

A written transfer of a certificate after the location of public land thereunder operates as an equitable transfer of the land so located. *Alford Bros. & Whiteside v. Williams*, 41 C. A. 436, 91 S. W. 636.

Prior to the location of a public land certificate, the rights of the holder thereunder may be transferred by parol. *Id.*

Actual knowledge by a subsequent locator of the previous location by another precludes him from deriving any advantage from the fact that the surveyor's office contained no evidence thereof at the date of the subsequent location. *Waterhouse v. Corbett*, 43 C. A. 512, 96 S. W. 651.

The location and survey of public land held to separate the land from the public domain so far as the right of the locator to sell was concerned. *Sims v. Sealy*, 53 C. A. 518, 116 S. W. 630.

A location under a land certificate by the administrator of the original holder who had transferred it was not void, but inured to the benefit of the transferee. *Thompson Bros. Lumber Co. v. Toler* (Civ. App.) 151 S. W. 1111.

23. — **Priorities.**—In 1838 a conditional certificate for 640 acres of land was issued to K., and located by him in R. county. An unconditional certificate was afterwards issued to him and located in P. county subsequent to the passage of the act of August 30, 1856 (Laws 1856, c. 145, § 2; Rev. St. 1895, art. 4134). The field notes of the surveys for both locations were duly returned to and filed in the land office. Subsequently a duplicate certificate was issued, reciting the loss of the unconditional certificate, and under this certificate the land in controversy was located. There was no evidence of any abandonment of the location in R. county. Held, that the first location exhausted the right of the holder to appropriate public land, and the subsequent locations were void. *Thompson Bros. Lumber Co. v. Toler* (Civ. App.) 151 S. W. 1111.

Even if the location under the original certificate was abandoned, the location under the duplicate certificate was void, since that made under the unconditional certificate in P. county being valid, the act of 1856 (Laws 1856, c. 145, § 2; Rev. St. 1895, art. 4134) expressly prohibited the lifting or floating of the certificate and its subsequent location upon other land. *Id.*

A prior location, followed by the statutory diligence in making survey and returning the field-notes, is an appropriation of the land against any claim having its inception subsequent to such date. *H. & T. C. Ry. Co. v. McGehee*, 49 T. 481; *Milam County v. Bateman*, 54 T. 153. It cannot be prejudiced by any subsequent wrongful or fraudulent act of the surveyor. *Hughes v. Perry*, 21 T. 778.

A junior location will support a patent except as against a prior title. *Gullett v. O'Connor*, 54 T. 408; *Thompson v. Johnson*, 2 U. C. 258.

A patent issued on a junior location is voidable at the suit of the party having the prior right, but is valid as to all other persons. *Gullett v. O'Connor*, 54 T. 409; *League v. Rogan*, 59 T. 427; *De Court v. Sproul*, 66 T. 368, 1 S. W. 337.

As against a junior locator with notice that a survey upon a prior location was actually made in the field, the certificate of the surveyor failing to show that fact, it may be shown by parol. The failure or refusal of the commissioner of the general land office to patent on such defective certificate cannot affect its validity. *Holmes v. Anderson*, 59 T. 481.

The relocation of a certificate under article 4136, Rev. St. 1895, does not affect a prior location duly made on the land by another. *De La Garza v. Cassin*, 72 T. 440, 10 S. W. 539.

A survey prior in point of time, in the absence of equities, confers a prior right. *Mohler v. Welge* (Civ. App.) 20 S. W. 850.

24. **Homestead donations under former law.**—See *Roberts v. Trout*, 13 C. A. 70, 85 S. W. 323; *Votaw v. Pettigrew*, 15 C. A. 87, 38 S. W. 215. See, also, Appendix for omitted and repealed land laws.

A contract for the joint acquisition of title to vacant land is neither within our statute of frauds nor against public policy. Such contract can be enforced by partition of such lands. Such rights can attach to the land when acquired subject to any burden, legal or equitable, upon it at the time of its occupancy as homestead. A contract to acquire land to be used as homestead does not require the assent of the wife, and it will be enforced without her aid or consent, even after its occupancy as the homestead. *Reed v. Howard*, 71 T. 204, 9 S. W. 109.

Rev. St. 1895, art. 4171, cited, *Gallup v. Thacker*, 103 T. 310, 126 S. W. 1120.

Sayles' Civ. St. 1897, art. 4167, cited, *Phillips v. Campbell* (Civ. App.) 146 S. W. 319.

Rev. St. 1895, art. 4162, cited, *Cook v. Southern Pine Lumber Co.* (Civ. App.) 149 S. W. 716.

The state may exercise such supervisory control as may be necessary to enforce the performance of the trust upon which the land is donated, but it cannot by legislation divert its use to other and different parties and purposes than those contemplated when it was originally granted. *Milam County v. Bateman*, 54 T. 153; *Milam County v. Blake*, 54 T. 169; *Palo Pinto County v. Gano*, 60 T. 249.

When the application of the established rules by which the true location of the boundary of a grant leads to contrary results or confusion, that rule must be adopted which is most consistent with the intention on the face of the grant, read in the light of all the surrounding facts and circumstances. *Lilly v. Blum*, 70 T. 704, 6 S. W. 279; *Meade v. Blum Land Co.* (Civ. App.) 22 S. W. 298.

One residing temporarily on land does not acquire a pre-emption right. *Jones v. Hart* (Civ. App.) 25 S. W. 704.

This article when construed in the light of sections 2, 4, and 5 of article 7 of the constitution of 1876, does not embrace the public free school lands. *T. C. Ry. Co. v. Bowman* (Civ. App.) 75 S. W. 556.

Patent of land as a homestead donation held not subject to collateral attack by defendant in action of trespass to try title brought by the patentee to recover certain other lands. *Carter v. Clifton*, 44 C. A. 132, 93 S. W. 209.

The persons intended by a state grant to the heirs of a certain person are those who would have inherited the right granted had it existed at his death. *Waterman v. Charlton*, 102 T. 510, 120 S. W. 171.

When a legislative grant is not made in discharge of some obligation of the government that the law would recognize, the grant is not in a legal sense anything but an act of sovereign grace and a pure donation. *Sherman v. Pickering*, 56 C. A. 633, 121 S. W. 536.

One cannot acquire the right to a quarter section of state land as a homestead by having others than himself or his assignee actually occupy the land for him, so that one who attempted to do so could not establish an equitable title in himself, as against one to whom the patent was issued as the actual occupant. *Rogers v. Blackshear* (Civ. App.) 128 S. W. 938.

25. — **Application.**—This article was intended to protect land from location by another for the period of 30 days after its occupancy or settlement by one intending to pre-empt it begins. It was intended for the benefit of the occupant seeking a homestead donation, and was never intended to prohibit the occupant from making his application for land at any time after the expiration of the 30 days, if no location made by a third party intervened. *Gammage v. Powell*, 61 T. 629.

A location by virtue of a land certificate upon land occupied by a pre-emption settler, after the expiration of 30 days from his occupancy, and before the application of the settler for land, interposes no bar to the subsequent application of the settler. *Id.*

That application was not made for the land by the pre-emptor within 30 days after his settlement is immaterial, where the application was made before any other valid claim attached to it. *McCarthy v. Gomez*, 85 T. 10, 19 S. W. 999.

An application made for a homestead donation in the name of the wife, but made by the husband for a homestead for the family, is not invalid because not made in name of the husband. *Id.*

The application must be made within the time prescribed by the statute. *Jones v. Hart* (Civ. App.) 25 S. W. 704.

26. — **Affidavit.**—The affidavit is not evidence against one claiming the land adversely. *Jones v. Hart* (Civ. App.) 25 S. W. 704.

The acts of January 27, 1845, February 13, 1854, and November 12, 1866, and Rev. St. 1895, art. 4163, are substantially the same, and if the required affidavit is not made the survey would not be valid. *Miller v. Moss*, 65 T. 179.

Issuance of patent on false affidavits of occupancy of land claimed as homestead donation held not to defeat the equity of another, who took steps to acquire the land as a homestead donation. *Drinkard v. Barnett* (Civ. App.) 41 S. W. 198.

27. — **Survey.**—The lowest grade, course or distance is made to prevail over the highest grade, when, upon applying the calls of the grant to the land, the surrounding and connected circumstances adduced in proof to explain the discrepancy show that course or distance is the most certain and reliable evidence of the true locality of the grant. *Booth v. Strippleman*, 26 T. 441; *Stafford v. King*, 30 T. 257, 94 Am. Dec. 304; *Davis v. Smith*, 61 T. 21; *Fagan v. Stoner*, 67 T. 287, 3 S. W. 44; *Booth v. Upshur*, 26 T. 70; *Bigham v. McDowell*, 69 T. 100, 7 S. W. 315.

To avoid the forfeiture under this article the settler must show a legal excuse for the failure to record and return the field-notes. *Taylor v. Criswell*, 4 C. A. 106, 23 S. W. 424.

A survey may be made after the expiration of the time if no other rights intervene. *Truehart v. Simpson* (Civ. App.) 24 S. W. 842.

Where a homestead donee, after completing the three years' occupancy, removes therefrom without filing proof in the land office of his performance of conditions, another person, in good faith relocating the same, will take a good title from the state. *Gallup v. Thacker*, 103 T. 310, 126 S. W. 1120.

Neither one who failed to apply for a survey of pre-empted land and failed to return the field notes to the General Land Office within the time required by Rev. St. 1895, art. 4171, nor his grantees acquired any preference right to the land. *Cook v. Southern Pine Lumber Co.* (Civ. App.) 149 S. W. 716.

Grant which did not describe land so it could be identified or specify any particular quantity held void for uncertainty. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

28. — **Occupation and abandonment.**—A fair construction of this act authorizes a sale of an incomplete occupation by a pre-emptor of a homestead, and will allow the time of occupancy of the original settler and his assignee to be added together in computing three years. *Palmer v. Chandler*, 47 T. 332; *Houston v. Dickson*, 66 T. 79, 1 S. W. 375; *Johnson v. Townsend*, 77 T. 639, 14 S. W. 233.

To obtain 160 acres of land as a pre-emption, it must be settled upon and occupied by a family. When the family has for its head a husband and wife, the right to the land results from their joint settlement and labor, and is community property. The fact that settlement upon public land was made by a woman and her husband after the wife had, from her own means and before marriage, paid the surveyor's fees will not deprive the property of its community character, when the husband and wife resided on the land in compliance with law until the title issued. *Mills v. Brown*, 69 T. 244, 6 S. W. 612.

A homestead donation is lost by a failure to occupy it. *Garrett v. Weaver*, 70 T. 463, 7 S. W. 766; *McCarthy v. Gomez*, 85 T. 10, 19 S. W. 999; *Jones v. Hart* (Civ. App.) 25 S. W. 704. See *Yochum v. McCurdy*, 39 S. W. 210.

The occupation referred to must be of land titled or equitably owned. And such occupation must be of the owner or some person holding for him, and not a mere occupant without claim of right. *Paston v. Blanks*, 77 T. 330, 14 S. W. 67. See *Yochum v. McCurdy* (Civ. App.) 39 S. W. 210.

One residing temporarily on land does not acquire a pre-emption right. *Jones v. Hart* (Civ. App.) 25 S. W. 704.

Where a single man settled on land for the purpose of acquiring it as a homestead donation, and did everything necessary to that end except to file in the land office evidence that he had done so, his right and title did not become such as to prevent the state from disregarding it after he removed therefrom, and ceased to comply with the law as a basis for a grant. *Gallup v. Thacker*, 103 T. 310, 126 S. W. 1120.

One cannot acquire the right to a quarter section of state land as a homestead by having others than himself or his assignee actually occupy the land for him for the time required by law, so that one who attempted to do so could not establish an equitable title in himself as against one to whom the patent was issued as the actual occupant. *Rogers v. Blackshear* (Civ. App.) 128 S. W. 938.

29. — **Settlement.**—A failure to make settlement upon land claimed as homestead pre-emption, or to occupy the same, will result in a forfeiture of the right of such claimant. *Garrett v. Weaver*, 70 T. 463, 7 S. W. 766. This forfeiture may be taken advantage of by another pre-emptor who is an actual settler, for the land became vacant by such forfeiture. *McCarthy v. Gomez*, 85 T. 10, 19 S. W. 999.

Facts showing a settlement on a homestead donation sufficient to defeat a subsequent patent. *Traylor v. Hubbard* (Civ. App.) 22 S. W. 241; *Busk v. Lowrie* (Civ. App.) 22 S. W. 414.

The applicant must be an actual settler in good faith on the land. *Busk v. Lowrie*, 86 T. 128, 23 S. W. 983; *Martin v. McCarty*, 74 T. 128, 10 S. W. 221; *Luckie v. Watt*, 77 T. 262, 13 S. W. 1035.

As to who is an actual settler, see *Jones v. Hart* (Civ. App.) 25 S. W. 704.

30. — **Transfer.**—Two settlers on vacant land agreed, before a survey was made, on a dividing line, on the faith of which both improved their respective selections. One to whom the land was afterwards patented, and who had notice of the agreements concerning it, cannot recover from the first purchaser the land on which he has his improvements, and which he was to have by the agreements concerning the division line, survey and patent. *Mitchell v. Nix*, 1 U. C. 126.

A fair construction of this act authorizes a sale of an incomplete occupation by a pre-emptor of a homestead, and will allow the time of occupancy of the original settler and his assignee to be added together in computing three years. *Palmer v. Chandler*, 47 T. 332; *Houston v. Dickson*, 66 T. 79, 1 S. W. 375; *Johnson v. Townsend*, 77 T. 639, 14 S. W. 233.

A deed in writing is not essential to the transfer of a pre-emption claim. A verbal sale to a purchaser who immediately becomes the occupant is sufficient. *Hickman v. Withers*, 83 T. 575, 19 S. W. 138.

Under the statute prohibiting the alienation of land, located by virtue of a donation warrant, during the lifetime of the grantee, a lease for 99 years constitutes an alienation in violation of the statute, and is void. *Overby v. Johnston*, 42 C. A. 348, 94 S. W. 131.

Const. art. 14, § 6, gives to every head of a family without a homestead 160 acres of public land on condition that he locate and occupy the same three years. *Sayles' Ann. Civ. St. 1897*, art. 4170, provides that no assignment of a homestead donation right by the occupant or settler before the patent has been obtained shall be valid unless by deed duly authenticated as required by law. Held, that the statute contemplated the assignment of an occupant's homestead claim, and, upon three years of continuous occupancy, the settler or his assignee has a vested right in the equitable fee-simple ownership, and may demand a patent investing him with legal title. *Phillips v. Campbell* (Civ. App.) 146 S. W. 319.

31. **Grants to railroads.**—A railroad held entitled to no land grant, it being prohibited by Const. 1869, art. 10, § 6. *Houston & T. C. Ry. Co. v. State*, 90 T. 607, 40 S. W. 402.

Where a filing on railroad lands was made, and thereafter a survey was made and field notes returned within the prescribed time, the filing gave a right prior to a grant made by the state after the filing, but before the survey. *Houston & T. C. Ry. Co. v. State*, 24 C. A. 117, 56 S. W. 238.

Location of railroad certificates on certain lands subject to the prior location of certificates by another road held valid. *Raoul v. Terrell*, 99 T. 157, 87 S. W. 1146.

Where a railroad company was chartered in 1866, and authorized to condemn private property for a right of way, it was impliedly authorized to construct its line over the public domain. *Ayres v. Gulf, C. & S. F. Ry. Co.*, 39 C. A. 561, 88 S. W. 436.

Where a grant of a right of way to a railroad in public lands rested upon a condition subsequent, failure to perform such condition did not revoke the grant, but merely au-

thorized a forfeiture by judicial proceedings or legislative act. *Ft. Worth & D. C. Ry. Co. v. Western Stockyards Co.* (Civ. App.) 151 S. W. 1172.

32. **Rights and liabilities of purchaser from city.**—A purchaser of land from a city having the absolute power of sale held not required to see that the proceeds of such sale are properly applied in accordance with the purposes for which the land was held. *Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 67 S. W. 147.

CHAPTER TWO

GENERAL LAND OFFICE

Art.	Art.
5280. General land office established.	5286. Lithographic copies of maps to be printed, etc.
5281. Commissioner to have custody of books, etc.	5287. To be copyrighted, etc.
5282. Night watchman.	5288. To be sold at fifty cents, etc.
5283. Papers to be kept in land office, how.	5289. Proceeds to be placed where.
5284. Examination of papers permitted, when.	5290. No transfers to be withdrawn.
5285. Clerk to examine papers after, etc.	5291. Receipts for papers, etc.
	5292. Commissioner and sureties responsible, when.

Article 5280. [4042] General land office established.—There shall be one general land office, which shall be at the seat of government, where all land titles which have emanated, or may hereafter emanate, from the state shall be registered, except those titles the registration of which may be prohibited by the constitution. [Id. sec. 1.]

Historical.—The present land system was substantially established by the act of December 22, 1836 (1st Cong., p. 216), and December 14, 1837 (2d Cong., p. 62). By the fourteenth article of the plans and powers of the provisional government of Texas, land commissioners, empresarios, or persons in anywise concerned in the location of land under the laws of Mexico or Coahuila and Texas, were ordered to cease their operations and desist from further locations until the land offices were established. The act of the consultation closing the land offices took effect November 13, 1835. Constitution of Republic, General Provisions, § 10; Constitution of 1845, art. 7, § 21; Constitution of 1876, art. 13, § 5; *Jones v. Menard*, 1 T. 785; *Donaldson v. Dodd*, 12 T. 381; *Edgar v. Galveston City Co.*, 21 T. 302; *Parker v. Bains*, 59 T. 15.

The general land office was not practically opened until some time in 1844. *Dobbin v. Bryan*, 5 T. 276; *State v. Delesdenier*, 7 T. 76; *Emmons v. Oldham*, 12 T. 18; All transfers of certificates on file in the general land office are archives. *Parker v. Spencer*, 61 T. 155.

Salary of commissioner.—See Title 120, Chapter 1.

Removal of commissioner.—See notes under Title 98, Chapter 1.

Papers, maps and field-notes.—A paper is deemed to have been filed in the general land office only when it shall have been delivered into the custody of the commissioner, or of some one appointed by him under law to receive it, to be kept in its proper place for the inspection of parties interested. *Snider v. Methvin*, 60 T. 487.

An indorsement made in the general land office on the field-notes of a survey of its illegality cannot affect legal rights. *Thomson v. Railway Co.*, 68 T. 392, 4 S. W. 629.

Art. 5281. [4043] Commissioner to have custody of books, etc.—The commissioner of the general land office shall have custody and control of all books, records, papers, maps and original documents appertaining to the titles of lands heretofore and by the provisions of the law denominated archives; and the said books, records, papers and original documents shall become and be deemed the books and papers of said office. [Act Dec. 14, 1837. P. D. 71.]

See Title 8; *Sayles' Early Laws*, arts. 2255, 3486; Act Aug. 15, 1870, 12th Leg., S. S., p. 201; *State v. De Leon*, 64 T. 553; *Garza v. State*, Id. 670; *Elliott's Adm'r v. Mitchell*, 47 T. 445.

Custody.—Where the testimony showed that the county clerk's office of a county was the place where original ancient grants of land had been kept and recorded since the day of the republic, and a witness testified that more than 30 years before when he was deputy county clerk, he had found an original grant in the archives of the office, and another witness testified that he got the original grant from the office of the county clerk, and that the county clerk authorized the witness to bring the document into court, the original grant was properly received in evidence, though under Act Dec. 22, 1836, the commissioner of the general land office was entitled to the custody of the grant, since the fact that such custody was not obtained did not effect the validity of the grant, or render it inadmissible by a party claiming under it. *Flores v. Hovel* (Civ. App.) 125 S. W. 606.

Art. 5282. [4044] Night watchman.—The said commissioner is hereby authorized to employ one night watchman for the general land office, at a salary not to exceed six hundred dollars per annum. [Act Feb. 27, 1875, p. 56.]

See Art. 4410.

Art. 5283. Papers to be kept in land office, how.—The commissioner shall adopt the most convenient method for filing papers and preserving the records of said office; provided, a list of all papers in each file shall be retained in the file, and each employé who files a paper shall place his own name thereon. [Acts 1909, p. 429, sec. 6.]

Art. 5284. [4045] Examination of papers, etc., permitted, when.—Any one desirous to examine any of the papers, records or files in the general land office shall first obtain the consent of the commissioner, or the chief clerk, in writing so to do, and an order for the detail of a clerk of said office to be present and superintend such examination. [Act June 2, 1873, p. 180. P. D. 7099kk.]

Commissioner's discretion.—To the commissioner of the general land office is committed the discretion of permitting anyone to examine the papers, files, and records in the general land office, and the supreme court has no power to compel him to give his consent to such examination. This article and Art. 5285 prescribe the manner in which persons may be allowed to examine the records in the land office. Anderson v. Rogan, 93 T. 182, 54 S. W. 242.

Art. 5285. [4048] Clerk to examine papers after, etc.—After an examination is made, the clerk in charge of same shall carefully examine the papers of said file and see that they are all in place. [Id. sec. 3. P. D. 7099mm.]

Art. 5286. [4049] Lithographic copies of maps to be printed.—The commissioner of the general land office is authorized to contract for the printing and delivery to him of lithographic copies of maps of the various counties of this state; provided, that the cost of such printing and delivery shall not exceed two cents per copy. [Acts 1879, p. 40.]

Art. 5287. [4050] To be copyrighted.—When said commissioner has prepared the official copy of the map of any county from which such lithographic copies are to be printed, he shall copyright the same in the name and for the benefit of the state of Texas, in accordance with the laws of copyright of the United States. [Id. sec. 2.]

Art. 5288. [4051] To be sold at fifty cents.—When such copies are received by the commissioner, he shall offer the same for sale at not less than fifty cents nor more than one dollar per copy, regulating the price by the amount of labor required in the original compilation of such maps, and transcribing same; provided, that when a party desires to purchase at any one time one hundred or more copies of the maps of any county or counties, he shall be allowed a discount on the fixed price of the same of twenty per cent. [Id. sec. 3.]

Art. 5289. [4052] Proceeds to be placed in state treasury.—All moneys received from the sale of maps, as above provided, shall be paid into the state treasury as are all other fees received by the general land office. [Id. sec. 4.]

Art. 5290. [4053] No transfers, etc., shall be withdrawn.—No transfer or deed that may be a link in any chain of title to any certificate on file in the general land office shall be withdrawn by any one; but the commissioner shall, on demand, deliver to the interested party certified copies, which shall have the same force and effect as the originals; provided, if in any suit there is any question as to the genuineness of any such original, the commissioner shall deliver the same to the party to whom the same may be ordered by the court where such suit is pending; and in such case it shall be the duty of the commissioner of the general land office to retain in his office a duly certified copy of such original,

which, in case of the loss of the original, shall have the same force and effect as the original. [Id. sec. 4. P. D. 7099nn.]

See notes at end of Chapter 1.

Admissibility of certified copy.—See notes under Arts. 3696 and 5337.

Archives.—See notes under Art. 82.

Art. 5291. [4061] Receipts for papers, etc.—No paper, certificate, copy or document, other than a patent, shall be delivered by the commissioner to the owner until he has receipted for the same, in which receipt shall be stated his place of residence, his postoffice, and, if delivered to the agent or attorney, shall state in addition his residence and postoffice, which receipt shall be filed by the commissioner with the other papers; provided, that, when the commissioner has good reason to doubt the genuineness of any transfer, power of attorney, or other paper on file in the general land office, he shall not permit any one to obtain an official copy thereof until such doubts have been removed. [Id. sec. 9. P. D. 7099ss.]

Art. 5292. [4062] Commissioner and sureties responsible, when.—The commissioner of the general land office and the sureties on his official bond shall be responsible to any party injured by removal, withdrawal or alteration of any record or file in said general land office, unless said commissioner can show that such removal, withdrawal or alteration has taken place by permission of the party owning said file or record. [Id. sec. 12. P. D. 7099uu.]

CHAPTER THREE

LAND DISTRICTS

Art.		Art.	
5293.	What counties are separate land districts.	5297.	County or district failing to organize as separate district.
5294.	When county becomes a land district.	5298.	Unorganized counties attached to organized counties.
5295.	When county to have a surveyor.	5299.	Counties attached.
5296.	"Land districts" defined.		

Article 5293. [4063] What counties are separate land districts.—Every organized county which has heretofore complied, or may hereafter comply, with the laws in force permitting a county to become a land district, is hereby declared a separate land district. [R. S. 1879.]

For former land districts, see 2 Sayles' Civ. St. 1889, p. 306; Sayles' Supp. 1894, p. 708.

Art. 5294. [4064] When county becomes a land district.—When any organized county shall elect a surveyor, and he shall give bond and be qualified as provided by law, said county shall be a separate land district. [Acts Jan. 26, 1858. P. D. 1082.]

Art. 5295. [4065] When county to have a surveyor.—Each county becoming a land district shall have at least one surveyor, who shall keep his office at the county seat; and such office shall be supplied with a map or maps of all the surveys made in such county, with a file or entry book, and a record book of the field-notes of all surveys in the county.

Surveyor de facto.—The surveyor of one county, who as such assumes, in violation of statute, to make surveys in another county in which another officer is alone empowered to survey, cannot be de facto the surveyor of such other county, even though his acts as such be generally acquiesced in and sanctioned by the commissioner of the general land office. *Cox v. Railway Co.*, 68 T. 226, 4 S. W. 455.

Preservation of transcripts.—Evidence held not to conclusively establish that the surveyor of a land district did not perform his statutory duty, and collect and preserve the transcripts and records. *Pardee v. Adamson*, 19 C. A. 263, 46 S. W. 43.

Validation of surveys.—Surveys made in violation of law in certain counties have been validated. Early Laws, arts. 830, 1226, 3906a.

Art. 5296. [4066] "Land districts" defined.—All "land districts" now created by law and having a district surveyor shall remain and con-

tinue as such, subject, however, to alteration by any organized county within its limits, or any part of such district, becoming a separate land district as provided by law.

Art. 5297. [4067] County or district failing to organize as separate land district.—Any organized county, or newly created district, which may fail or refuse to organize as a separate land district as provided by law shall continue to form a part of the land district to which it was formerly attached until it shall have complied with the provisions of law relating to the election and qualification of a surveyor, and until such surveyor shall have procured the necessary maps, field-notes, copies and records as required by law. [Act Feb. 8, 1860. P. D. 1090.]

See *Marsalis v. Creager*, 2 C. A. 368, 21 S. W. 545.

Historical.—Rev. St. 1879, arts. 3823–3833, defined the former land districts. See, also, Acts March 11, 1881, April 2, 1883, April 9, 1883, March 24, 1885, Feb. 27, 1885, April 1, 1887 (2 Sayles' Civ. St. 1889, arts. 3825a, 3825b, 3833a–3833m), defining other districts. Certified copies of certain maps, field-notes and sketches of surveys were made public archives when filed in the office of the district surveyors (2 Sayles' Civ. St. 1889, art. 3820a).

Art. 5298. [4067a] Unorganized counties attached for land purposes, etc.—Each county in this state that is unorganized, or that has not so completed its organization as to become a separate land district under the requirements of the law, shall be attached to some organized county for surveying purposes; and the county surveyor of such organized county shall be the surveyor for the land district thus constituted, and the records of all files and surveys of land in such district shall be kept at his office. [Amend. 1895, Sen. Jour., p. 481.]

Art. 5299. [4067b] Counties attached.—The land districts composed of more than one county are defined and the unorganized counties are attached for surveying purposes as follows:

The county of Bailey is attached to Crosby county. [R. S., 1895.]

The county of Crane is attached to Ector county. [Act Feb. 3, 1909, p. 11.]

The county of Loving is attached to Reeves county. [Id.]

The counties of Cochran and Hockley are attached to Lubbock county. [Act Mar. 13, 1905, p. 31.]

CHAPTER FOUR

COUNTY AND DISTRICT SURVEYORS

Art.		Art.	
5300.	County surveyor, when elected.	5318.	Deputy surveyor of new county to procure maps.
5301.	Oath and bond.	5319.	Surveys of deputy to be placed on map.
5302.	Commissioners' court to fill vacancy, when.	5320.	Surveys in unorganized counties.
5303.	Duties.	5321.	Special deputies.
5304.	To report to commissioners, etc.	5322.	Surveyor not authorized to survey until, etc.
5305.	Shall record all field-notes.	5323.	Shall return field-notes of.
5306.	Shall plat surveys, etc.	5324.	Transcript to be obtained.
5307.	Record books to be furnished.	5325.	May rent office, when.
5308.	Deputies appointed; oath and bond.	5326.	Rent of office, how paid.
5309.	Chain carriers and markers, etc.	5327.	To have deputy, when.
5310.	Deputies shall return field-notes.	5328.	Right to examine books.
5311.	County surveyor may do work of deputy.	5329.	Transcripts, how paid for.
5312.	Shall keep map in office.	5330.	True meridian to be established.
5313.	Duty on change of boundary.	5331.	Neglect or failure of duty.
5314.	Contested elections, in what court tried, etc.	5332.	Shall turn over books, etc.
5315.	Their duties, how regulated.	5333.	County clerk to take charge of books, when.
5316.	Deputy district surveyors.	5334.	Commissioners may have record transcribed, when.
5317.	Special county surveyor for unorganized counties.		

Article 5300. [4068] County surveyor, when elected.—At each regular biennial election for state and county officers, there shall be elected in each county, by the qualified voters thereof, a county surveyor, who

shall reside in the county and keep his office at the county seat, who shall hold his office for two years and until his successor may be elected and qualified. [Const., art. 16, sec. 44. Act Jan. 26, 1858, p. 199. Act Aug. 19, 1876.]

Surveyor de facto.—To constitute a de facto officer he must have such colorable right to the office, the duties of which he undertakes to discharge, as might induce the public to suppose without inquiry that he is de jure the officer. The surveyor of one county, who, as such, assumes in violation of statute to make surveys in another county in which another officer is alone empowered to make surveys, cannot be de facto the surveyor of such other county, even though his acts as such be generally acquiesced in and sanctioned by the commissioner of the general land office. *Cox v. Railway Co.*, 68 T. 226, 4 S. W. 455.

Scope of powers.—The district surveyor of one county was not authorized to make the surveys in another county, where that county at that time was attached to a different land district than that to which the surveyor belonged. *Houston & T. C. R. Co. v. De Berry*, 34 C. A. 180, 78 S. W. 736.

Art. 5301. [4069] Oath and bond required.—Before entering upon his duties, the county surveyor shall take the oath of office prescribed by the constitution, and shall enter into bond, with two or more good and sufficient sureties, to be approved by the commissioners' court of the county, in such sum as may be fixed by such commissioners' court, not to be less than five hundred dollars nor more than ten thousand dollars payable to the governor and his successors in office, conditioned that he will faithfully perform all of the duties of his office, which bond shall be deposited and recorded in the county clerk's office of the county. [Act Dec. 14, 1837. P. D. 1081, 4522. Amended Acts 1897, p. 26.]

Art. 5302. [4070] Commissioners' court to fill vacancy.—Whenever there shall be a vacancy in the office of county or district surveyor in any of the counties, it shall be the duty of the county commissioners' court of the county in which such vacancy occurs to fill by appointment such vacancy, such appointment to continue in force until the next general election. In the event such commissioners' court shall fail to appoint a person to fill such vacancy, or if they shall appoint a person to fill same and he shall fail to qualify and act as such surveyor, then any county or district surveyor of the nearest county or district to such county, who may be accessible and willing to act shall be authorized to do surveying in such county, and for his services he shall be entitled to receive the same fees and compensation as are now provided by law for county and district surveyors, and such surveyor shall be subject to the same law as is now applicable to county and district surveyors for the faithful performance of their duties. In making a survey under the provisions hereof, said surveyor shall make out and return said field-notes in the manner and form as required under article 5336, but he shall sign the field-notes officially, as the surveyor of his own county or district, and also cause to be attached to said field-notes, so made by him, a certificate of the county clerk of proper county, to the fact that there is no qualified surveyor of such county. [Act Aug. 19, 1876, p. 219. Amended Acts 1905, p. 371.]

Art. 5303. [4071] Duties of county surveyor.—Each county surveyor shall receive and examine all field-notes of surveys which have been, or may hereafter be, made in said county, and upon which patents are to be obtained, and shall certify to the same according to law, and shall record such field-notes in a book to be kept by him for that purpose; and he shall perform such other duties as may be required of him by law. [Act Dec. 14, 1837. P. D. 4522.]

Art. 5304. [4072] Surveyor to report to commissioners' court as to inclosed school lands.—It shall be the duty of the surveyor of each county to make a report to the county commissioners' court on the first Monday in June each year of the number of sections of public school lands in his county inclosed during the past year, and the names of the person or persons controlling such inclosed lands, and the number of sections controlled by him or them respectively. [Acts 1879, p. 101.]

Art. 5305. [4073] Shall record all field-notes in his district.—The surveyors of the several counties of this state shall record in a well-bound book all the surveys in the county or district for which he was elected, with the plats thereof that he may make, whether private or official; and such record shall be open to the inspection of the public: for which service the surveyor may charge, in addition to the fees now allowed by law for field work, twenty cents per hundred words for such record. [Acts 1881, p. 71.]

Filing field-notes.—Filing of field-notes in the district surveyor's office was not essential to an appropriation of school lands. *Elwood, Arnett & Arnett v. Copeland* (Civ. App.) 129 S. W. 146.

Art. 5306. [4074] Shall plat surveys upon map, etc.—It shall be the duty of every district, county and special county surveyor, once in every three months, to plat upon the map of his district or county all surveys made to that date within the three preceding months, and transmit sketches and field-notes of same to the commissioner of the general land office, together with a list of all land certificates or warrants on file in his office, giving the number, date and quantity in acres of each, stating by whom and to whom the same purports to have been issued, and when and by whom filed; and any surveyor failing or refusing to comply with the provisions of this article shall be subject to a fine of five hundred dollars for each offense, to be recovered by the state before the district court on complaint of any party aggrieved, or of the proper county or district attorney, whose duty it shall be to prosecute all such suits. A certificate from a postmaster certifying that a letter or package containing the returns herein provided for was mailed in his office, addressed to the commissioner of the general land office, shall be evidence of the fact in any suit against a surveyor under this article. [Act Jan. 26, 1858. P. D. 1087.]

See *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

Contents of certificate.—The failure in the officers of the land office to delineate upon the maps in the office a grant on file in its archives will not affect such grant in favor of a subsequent location upon which a patent had been issued. *Elliott v. Mitchell*, 47 T. 445.

Under the statute in force in 1855 (*Paschal's Dig.* art. 4573), which only required that the surveyor keep a book and register entries for an application for surveys in his county, and that the certificate must be in his hands when he made the survey, and remain in his office until he returned the field notes to the General Land Office, article 1087, which required him once in every three months to plat upon the map of his county all surveys made to that date within the three preceding months, and articles 1088 and 4522, which declared that his books, maps, etc., should be open at all times for inspection, held, that it was not necessary to embody the description of a certificate in the field notes of a survey made under it. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

Art. 5307. [4075] Record books furnished.—The commissioners' courts of the several counties shall furnish the county surveyors of their respective counties with the necessary books of record pertaining thereto. [Act March 9, 1875. Act Feb. 2, 1860. P. D. 1089.]

Art. 5308. [4076] Deputies appointed; oath and bond required, etc.—The county or district surveyor shall appoint as many deputy surveyors as he may deem necessary for the county or district, and shall administer to them the oath of office, and take the bond hereinafter prescribed, and shall furnish them such instructions as may be furnished to him from time to time by the commissioner of the general land office; and such deputy surveyor, before he enters upon the duties of his office, shall enter into bond with two or more good and sufficient sureties, to be approved by the commissioners' court, in the sum of five thousand dollars, payable to the governor and his successors in office, conditioned for the faithful performance of the duties of his office, which bond shall be deposited and recorded in the clerk's office of the same county; and the county or district surveyor shall immediately report such appointment to the commissioner of the general land office, and state when such dep-

uty entered upon the discharge of the duties of his office. [Act Dec. 14, 1837. P. D. 4522.]

Duties of deputy.—It seems that it is the duty of the deputy surveyors to do the field work; there is no statute which makes it the duty of the principal surveyor to do such work. *Bates v. Thompson*, 61 T. 335.

Liability for fees.—See *Bates v. Thompson*, 61 T. 335.

Individual interest in purchase of public lands.—See *State v. Thompson*, 64 T. 690.

Art. 5309. [4077] Chain carriers and markers.—It shall be the duty of each deputy district or county surveyor to administer an oath to each individual employed by him as chain carrier or marker for the faithful performance of his duties as such, in accordance with the instructions given him; and no person under the age of sixteen years shall be employed in either of the above capacities; and, further, it shall be the duty of said deputy to subscribe the name of each of the chain carriers to his field-notes previous to returning the same to the county surveyor. [Act Dec. 14, 1837. P. D. 4523.]

Art. 5310. [4078] Deputy surveyors shall return field-notes.—It shall be the duty of all deputy surveyors to make returns of the field-notes of every survey by them made, within three months after making the survey, to the county or district surveyor for his approval; and any deputy neglecting to do so shall be liable for damages at the suit of any person thereby injured. [Act Feb. 5, 1840. P. D. 4112.]

Filing field notes.—Filing of field notes in the district surveyor's office was not essential to an appropriation of school lands. *Elwood, Arnett & Arnett v. Copeland* (Civ. App.) 129 S. W. 146.

Art. 5311. [4079] County surveyor may do work of deputy.—Any county surveyor may do the work of a practical surveyor, and may also perform all the duties required of a deputy surveyor, and in such case he shall make out, certify to, record and return the field-notes under his own official signature. [Act Dec. 20, 1837.]

Duties of county surveyor.—The county surveyor is not required to do the work of a deputy. *Bates v. Thompson*, 61 T. 335.

Art. 5312. [4080] Shall keep a map in his office for inspection.—It shall be the duty of each county or district surveyor to make out and keep in his office, free for the inspection of all persons, a map on which all the surveys made in his county shall be laid down and properly connected; which map shall be corrected at the end of every three months. [Act Feb. 5, 1840.]

Art. 5313. [4081] Duty on change of boundary.—Hereafter, when any change may take place in the boundaries of any county, it shall be the duty of the surveyor of any county from which territory may be so taken, to furnish the surveyor of the county including such territory with a full and complete copy of all the field-notes of surveys made in the same. [Act Feb. 5, 1840.]

Art. 5314. [4082] Contested elections, by what court tried.—Whenever the election of any person to the office of county or district surveyor may be contested, like notice shall be given and proceedings had as in case of contested elections for county officers. When the district is composed of one county, the contest shall be tried in such county, but where the district is composed of more than one county, then such contest shall be tried in the county from which the district takes its name. [Act Feb. 7, 1853.]

Art. 5315. [4083] Their duties, how regulated.—All district surveyors shall be governed in the discharge of their official duties by the same provisions of law which regulate and prescribe the duties of county surveyors so far as the same may be applicable; and, upon their removal from office or at the expiration of their term of office, they shall deliver to their successors all records, books, papers, maps and other things appertaining to the office. [Act May 12, 1846.]

Art. 5316. [4084] Deputy district surveyors.—Each district surveyor shall appoint one or more deputy surveyors, who shall qualify and give bond in manner and form as required of deputy county surveyors, and whose duties shall be the same as those of deputy county surveyors so far as the same may be applicable; and, when such surveyor does the work of surveying in a new county, he shall notify the special county surveyor acting under his direction, and report his work to him to be mapped and noted on his records.

Art. 5317. [4085] Special county surveyor for unorganized county.—It shall be the duty of each district surveyor, within twenty days after his election, to appoint as his deputy a special county surveyor for each unorganized county within his district, who shall hold his office during the term of his principal, unless sooner superseded by the appointment of another as his successor. The district surveyor shall immediately notify the commissioner of the general land office of every such appointment. Each special county surveyor so appointed shall have all the powers, perform all the duties and be subject to all the penalties appertaining to county surveyors, and shall keep, in addition to the returns to be made to his principal, a record and map of all the transactions in his office, to become part of the county surveyor's records of such county whenever it may be organized. All such special county surveyors shall reside and keep their offices in their respective counties, if there be settlements in the same, but if there be no settlements in the county, then at the nearest town to such county. Whenever any county may elect a county surveyor, who shall have qualified and given bond, and who shall have procured the maps and records required by law, the district surveyor within whose district such county may have been, or may be at the time, and his deputy shall cease to exercise any official acts within the same. [Act Jan. 26, 1858. P. D. 1085.]

Status.—Deputy surveyors in unorganized counties attached to surveying districts are mere assistants to the district surveyor, and their appointment does not relieve him from the duty of making surveys in such unorganized counties. *Tex. Mex. Ry. Co. v. Locke*, 63 T. 623.

Art. 5318. [4086] Deputy surveyor of new county to procure maps.—Deputy surveyors of the several new counties shall procure from the district surveyors of their respective districts, or make out the same, a map of all the surveyed lands situated in the new county to which such deputy may be assigned, which shall be kept in the office of such deputy at the county site, for the inspection of all persons interested. [Act May 11, 1846. P. D. 4276.]

Art. 5319. [4087] Surveys of deputy to be placed on map.—All surveys made by a deputy surveyor in a new county, after being examined and placed upon the map of the district, shall be placed upon the county map. [Id. P. D. 4277.]

Art. 5320. [4088] Surveys in unorganized counties.—In any unorganized county to which a special deputy surveyor may have been appointed, or may hereafter be appointed, the district surveyor of the land district to which it is attached, or his deputies, may make surveys, the field-notes of which shall be recorded in a separate book for each of such unorganized counties, and also in the ordinary record books of the land district; but before making such surveys he shall notify the special deputy surveyor thereof and afterward report the field-notes to him, to be mapped out and noted on his records. [Act Feb. 8, 1860. P. D. 1091.]

Art. 5321. [4089] Special deputies, bond, etc.—The district or county surveyor of any county shall have the power to appoint a special deputy, who shall be empowered to perform all official acts which said district or county surveyor may legally perform; and the said special deputy surveyor, before entering on the discharge of his duties, shall

give bond with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the governor, for the faithful discharge of the same, which shall be approved by the commissioners' court of the county and filed with the county clerk thereof. [Id. P. D. 1092.]

Art. 5322. [4090] Surveyor not authorized to survey, until, etc.— Any surveyor, elected as provided by law, in a county not previously a separate land district, shall procure a certified map of the surveys in said county, and a certified copy of all files, applications and locations of lands therein from the surveyor's office of the land districts to which said county belonged, and file the same in his office for the inspection of any one interested in examining the same. [Act Jan. 26, 1858.]

See Art. 5335.

Surveyor's noncompliance with law.—The failure of the surveyor to observe the requirements of this article and Arts. 5323 and 5324 will not affect the title of one claiming under an official survey. *Tex. Mex. Ry. Co. v. Locke*, 63 T. 623.

Art. 5323. [4091] To return field-notes of county boundaries.— When the surveyor shall have complied with the provisions of the preceding article, it shall be his duty immediately to make out and return to the general land office field-notes properly certified to, of the boundaries of such county; and the commissioners' court of said county shall make the necessary provision for paying the expenses thereof. [R. S. 1879.]

Art. 5324. [4092] Transcript to be obtained from land office, when.—Whenever the maps, field-notes of surveys or other records, or any part thereof, of the surveyor's office in any county or land district shall from any cause be lost or destroyed, or when any new county shall organize, or new land district is created, it shall be the duty of such county or district surveyor to obtain from the commissioner of the general land office a transcript of such maps, field-notes of surveys or other records of his office of his county or land district, certified to as required by law, and for obtaining which he shall be entitled to five cents per hundred words, and the state shall be entitled to ten cents per hundred words, to be paid by the commissioners' court of his county; said transcript of records so certified shall answer all the purposes and have the same force and effect in law that the original could have. [Acts 1885, p. 92. Amend. 1895, Sen. Jour., p. 482.]

See note under Art. 5322.

Art. 5325. [4093] Authorized to rent office.—The district and county surveyors are authorized to rent some suitable building or room in which to keep their offices in case the said surveyors can not be provided with offices in the court houses of their respective counties. [Act Aug. 18, 1876, p. 196.]

Art. 5326. [4094] Rent of office, how paid.—The county commissioners' court shall make the necessary arrangement for paying the rent of an office rented by said surveyors, upon satisfactory evidence showing that the rent was reasonable and the office necessary, and that there was no office provided for said surveyors in the court house of their county. [Id.]

Art. 5327. [4095] To have a deputy in office, when.—In all cases where the county surveyors do not reside at the county seats of their respective counties, they shall and are hereby required to have deputies in their respective offices residing at said county seats, who shall keep their offices open and the records thereof subject to the examination of any person interested therein, and who shall have authority to receive and file land certificates or other evidences of right to land, and also to receive and record all files or designations of land to be surveyed. [Act Feb. 25, 1863. P. D. 1093.]

Art. 5328. [4098] Right to examine books, etc.—Any person interested for himself, or as agent or attorney of another, shall at all times

have the right to examine the books, papers, plats, maps or other archives belonging to the office of any district, county or special surveyor, on the payment of the fee fixed by law. [Act Jan. 26, 1858. P. D. 1086.]

Art. 5329. [4100] Transcripts, etc., by whom paid for.—The transcripts of records and maps, together with the examination of the same, shall be paid for by the county for the benefit of which they are made, allowing ten cents for every one hundred words in copying said records, and three dollars per day for each day the draftsman may be actually and necessarily engaged in copying maps, as provided by law; and clerks and district surveyors for examining and certifying transcripts of records shall have three dollars per day. [Act March 20, 1848. P. D. 1078.]

Art. 5330. [4101] Surveyors to establish true meridian, etc.—The district or county surveyors of the several counties, in order to secure uniformity in the courses indicated by the different surveyors' compasses or other instruments used within their several jurisdictions, shall, in some convenient place at their respective county seats, establish a true meridian by a substantial monument, to be erected at the expense of the county, and shall adjust, or cause to be adjusted, to the said meridian all such instruments before being used within their respective jurisdictions, and shall keep in their offices a standard chain of the true measurement of ten varas, to which all chains used by themselves or their deputies shall be adjusted before being used in the measurement of lines of surveys. [Act June 2, 1873, p. 173. P. D. 7099sss.]

Art. 5331. [4102] Responsible for neglect or failure, etc.—All surveyors shall be held responsible to parties interested for any cost that may accrue in rectifying any errors that may occur in their work by reason of neglect or failure to comply with the requirements of the preceding article. [Id. P. D. 7099ttt.]

Art. 5332. [4103] Shall turn over records, etc.—Upon the removal from office, or at the expiration of the term of office, of any county or district surveyor, he shall deliver to his successor all records, books, papers, maps and other things appertaining to his office. [Act May 12, 1846. P. D. 4525.]

Historical.—Sayles' Civ. St. 1889, art. 3868, legalized the election of county surveyors on February 15, 1876, and confirmed their official acts.

Art. 5333. [4104] County clerk shall take charge of books, etc., when.—Whenever an organized county from any cause has not a qualified county surveyor, the county clerk of such county is hereby required to take charge of all records, maps and papers belonging to the county surveyor's office and safely keep the same in his office. [Act Oct. 18, 1866, p. 31.]

Art. 5334. [4105] Surveyor's records may be transcribed.—Whenever the county commissioners' court of any county shall deem the same necessary, they shall order the surveyor's records to be transcribed in good and substantial books, in a plain hand, by the surveyor or special deputies sworn to make true copies of the same, for which services they shall be allowed not more than ten cents per hundred words, to be paid out of the county treasury. [Act Nov. 6, 1871, p. 18.]

CHAPTER FIVE

SURVEYS AND FIELD-NOTES

Art. 5335. What authorizes a survey. 5336. Field-notes shall describe what. 5337. Copy obtained on loss of original field-notes. 5338. Surveys on navigable streams.	Art. 5339. Surveys shall be in a square. 5340. Notice to settlers. 5341. Trial as to disputed line before justice of the peace. 5342. Surveys stricken from map, when.
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Art.	Art.
5343. Liability for failing to survey.	5353. General authority of commissioner to have surveys made; compensation of official; state surveys, etc.
5344. Field-notes to be sent back for correction, when.	5354. Official surveyors, how commissioned; qualified.
5345. The same corrected and returned, how.	5355. Field-notes to be returned; force and effect of.
5346. Correction by certificate, when made.	5356. Conflicts in alternate surveys, how adjusted.
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5348. Bond, etc.	5358. In case of conflict, to issue in what cases.
5349. May have lands surveyed, when.	5359. In case of conflict, number of surveys changed; correction made to protect purchasers.
5350. Mineral lands to be surveyed; points marked; surveyor appointed; his salary.	5360. Third persons protected.
5351. Land commissioner to co-operate with United States geological survey; regulations as to co-operation.	
5352. Persons owning private lands may co-operate.	

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

Article 5335. [4142] What authorizes a survey.—All surveys shall be made by authority of law, and by a county, district or deputy surveyor duly appointed or elected and qualified.

See Appendix for omitted and repealed land laws.

Art. 5336. [4144] Field-notes shall describe what.—The field-notes of every survey shall state—

1. The county or land district in which the land is situated.
2. The authority under or by virtue of which it is made, giving a true description of same.
3. The land by proper field-notes with the necessary calls and connections for identification (observing the Spanish measurement by varas).
4. A diagram of the survey.
5. The variation at which the running was made.
6. It shall show the names of the chain carriers.
7. It shall be dated and signed by the surveyor.
8. The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field-notes have been duly recorded, giving book and page.
9. When the survey has been made by a deputy, the county or district surveyor shall certify officially that he has examined the field-notes, has found them correct, and that they are duly recorded, giving book and page of record.

See *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

Field notes.—The survey of certain tracts was not actually made by the surveyor; the calls began at an object stated by course and distance from a certain corner of survey 146, which was actually established on the ground; the objects called for were the same objects designated as the corners of certain grants actually located at different places, but so represented on the maps that the calls for objects at their corners were proper for corners of the surveys made. Held, if the corner of a survey was actually established on the ground, or could be established from other calls, the true position of the tracts designated can be established. *T. & P. R. R. Co. v. Thompson*, 65 T. 186

The statute in force in 1855 (*Paschal's Dig.* art. 4573) only required that the surveyor keep a book and register entries for an application for surveys in his county, and that the certificate must be in his hands when he made the survey, and remain in his office until he returned the field-notes to the general land office. Art. 1087 required him once in every three months to plat upon the map of his county all surveys made to that date within the three preceding months, and arts. 1086 and 4522 declared that his books, maps, etc., should be open at all times for inspection. Held, that it was not necessary to embody the description of a certificate in the field-notes of a survey made under it. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

The term "field-notes" in its ordinary sense means the notes made by the surveyor in the field while making a survey, describing by course and distance, and by natural or artificial marks found or made by him, where he ran the lines and made the corners. *State v. Palacios* (Civ. App.) 150 S. W. 229.

Presumptions as to survey.—See notes under Art. 3687, Rule 12.

Requisites and sufficiency of surveys.—No rights can be acquired under a legislative ratification of an illegal survey as against an intervening survey legally made before the passage of the act. *Cox v. Railway Co.*, 68 T. 226, 4 S. W. 455.

Failure of surveyor of public lands to conform to description embraced in the entry and application held a mere irregularity, not invalidating the surveys. *Eyl v. State*, 37 C. A. 297, 84 S. W. 607.

Description or field-notes of land intended to be mortgaged in application for loan held not essential to validity of mortgage, so that the fact that at time it was signed by the applicant it contained no description, and that a description and field-notes were afterwards inserted, is immaterial. *Pickett v. Gleed*, 39 C. A. 71, 86 S. W. 946.

A description in field-notes of a survey of public lands held sufficient, so that holders of other certificates were estopped to deny notice thereof. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

Where field-notes of a survey of public land contained the words "also by virtue of the same certificate," held, that the description in the field-notes of 708,578 sq. vs. was also contained in the description of 8,676,872 sq. vs. *Id.*

Where a patent has been issued on an office survey alone, the land granted may not be identified on the ground by maps subsequently made, where more conclusive proof is in existence. *Finberg v. Gilbert*, 104 T. 539, 141 S. W. 82.

The court in determining the location of land in a patent, where there has been an insufficient survey, held required to ascertain the intention of the parties gathered from the grant in the light of the acts constituting the survey. *Id.*

A surveyor of a grant of public lands held required to make a survey sufficient to locate and identify it as actually made on the ground. *Id.*

A grant of public land held not invalid because of the failure of the surveyor to make a proper survey; but, where the survey is defective, the grant must be located by a survey made in conformity with the calls as reported by the surveyor. *Id.*

Evidence held to require a finding that a survey was improperly located, and that a ruling of the land office rejecting it for that reason was proper. *Lucas v. McFarland* (Civ. App.) 156 S. W. 1109.

Surveys to be returned in twelve months—Former law.—See *Hart v. Gibbons*, 14 T. 215; *Sherwood v. Fleming*, 25 T. Sup. 428; *Smith v. Taylor*, 34 T. 607; *McKinney v. Grassmeyer*, 51 T. 376; *Snider v. Methvin*, 60 T. 487; *Cassin v. O'Sullivan*, 61 T. 594; *Garza v. Cassin*, 72 T. 442, 10 S. W. 539; *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58; *Duren v. Ry. Co.*, 86 T. 291, 24 S. W. 258; *Threadgill v. Bickerstaff*, 87 T. 520, 29 S. W. 757; *New York & T. Land Co. v. Gardner*, 11 C. A. 404, 32 S. W. 786; *Illies v. Freichs*, 11 C. A. 512, 32 S. W. 915.

Art. 5337. [4146] Copy obtained on loss of original field-notes.—When the original field-notes of any survey made by authority of law shall have been heretofore, or may be hereafter, lost or destroyed, it shall be lawful for the party who owned the same, or his agent, on making affidavit of the loss or destruction of such field-notes and filing the same in the office of the county or district surveyor, to apply to such surveyor of the county where the survey was made and recorded and obtain from him a certified copy of the record thereof, which copy shall be as valid and efficient in law as the original was, and shall secure to the party all the rights before the commissioner of the general land office that the original would have done. [*Id.* P. D. 4552.]

Art. 5338. [4147] Surveys on navigable streams.—All lands surveyed for individuals, lying on navigable water courses, shall front one-half of the square on the water course and the line running at right angles with the general course of the stream, if circumstances of lines previously surveyed under the laws will permit; and all streams, so far as they retain an average width of thirty feet, shall be considered navigable streams within the meaning hereof, and they shall not be crossed by the lines of any survey. [Act Dec. 14, 1837. P. D. 4529.]

See *Shaw v. Schuch* (Civ. App.) 124 S. W. 688.

Legality.—A survey extending across a navigable stream is illegal. *N. Y. & Texas Land Co. v. Thomson*, 83 T. 169, 17 S. W. 920.

The statute is merely directory, and, though a stream was within the statutory definition, the fact that a line of a survey crossed it would not render the survey illegal or void. *Bunnell v. Sugg* (Civ. App.) 135 S. W. 701.

Under this article, held, that a contention that a survey is void on account of crossing a navigable stream is not available against a patent issued by the state on the part of one claiming under a junior grant. *Id.*

Grantee's title.—Navigability of waters is a question for the jury. *Jones v. Johnson*, 6 C. A. 262, 25 S. W. 650.

Where a survey borders on a lake, a strip extending into the water beyond a straight line called for by the surveyor held a part of such survey. *Bland v. Smith* (Civ. App.) 43 S. W. 49.

There is no difference in the effect of a grant fronting a navigable stream and one fronting on a stream declared by statute to be navigable because of its width, and the locator's title extends only to the water mark and title to the channel of the stream remains in the state. *City of Austin v. Hall*, 93 T. 591, 57 S. W. 564.

Public rights.—Under this article the public would have a right to the use of streams more than 3½ feet in width as navigable public highways whenever they have sufficient water for such purpose. *Orange Lumber Co. v. Thompson* (Civ. App.) 126 S. W. 604.

Art. 5339. [4148] Surveys shall be in a square.—All surveys not made upon navigable water courses shall be in a square, so far as lines previously surveyed will permit. [Id.]

Art. 5340. [4150] Notice to settlers.—It shall be the duty of the surveyor in all cases, before he runs a division line between two settlers or occupants claiming lands, to notify in writing the parties interested before running the same; and any survey which may be made contrary to the true intent and meaning of this article shall not be a lawful one. [Act Dec. 14, 1837. P. D. 4528.]

Art. 5341. [4151] Trial as to disputed line before justice of the peace.—When two or more persons can not agree to a division line of any land which has never been surveyed agreeably to law, it shall be lawful for either party to apply to any justice of the county or territory in which the land lies, or if there be no justice of the peace in the county or territory, then to the nearest justice in any county or territory, and make oath that he has tried and has not been able to settle the dispute between himself and one or more other persons (naming them) concerning a division line; and the said justice shall issue a warrant to any lawful officer to summon the party or parties defendant, together with six disinterested jurors, to meet upon the premises in dispute, together with such witnesses as either party may choose to have summoned, to give evidence on a certain day, naming at what time and place; the justice shall also meet the parties, examine all the testimony before the jury, who shall on oath hear and determine the case in dispute, and shall also determine who shall pay the costs of suit; each juror in such case shall be allowed two dollars per day for such services, the other officers, such fees as have already been established by law for other similar services; provided, that, if the land in dispute shall be on a county line, it shall be lawful for a justice of either county in which part of the land may be to act in such case; and in case either party be dissatisfied with the decision they shall have the right to appeal to the county court within ten days upon giving bond and security for the costs. [Id. P. D. 4527.]

Art. 5342. [4152] When surveys void.—All surveys represented upon the maps of the general land office, the field-notes of which shall not be returned to the general land office, under the provisions of this chapter, and for which there are no titles on file in said office, shall be null and void, and be stricken from the maps of said office, when it is made to appear to the commissioner of the general land office, by the certificate of the county clerk of the county in which the land is situated, that there is no title to said survey on record in said county, and by the affidavits of two credible citizens of said county that the said land is not occupied by the owner nor by some person holding for him. [Acts 1885, p. 50.]

See *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58.

Art. 5343. [4153] Liability for failing to survey.—If any district or county surveyor shall fail, neglect or refuse, when the amount of lawful surveying fees of any location of land may be tendered to him by any person legally entitled to the survey, to make or cause the survey of the same to be made within one month of the time of the tender to him of said surveying fees, he and his sureties shall be liable on his official bond to the party or parties legally entitled to the same, in the amount of damages or injury said party or parties may sustain by reason of such neglect, refusal or failure, to be recovered before any competent tribunal. [Id. P. D. 4569.]

See *Bates v. Thompson*, 61 T. 335.

Art. 5344. [4154] Field-notes to be sent back for correction, when.—If, upon examination of the field-notes of a survey in the general land

office, they are found to be incorrect, it shall be the duty of the commissioners to cause a plain statement of the errors, with a sketch of the map, to be forwarded by mail, or by the party interested, to the surveyor who made the survey, with a requisition to correct the same and return corrected field-notes to the general land office. [Act Oct. 24, 1871, p. 11. P. D. 7091.]

See *Tarleton v. Kilpatrick*, 1 C. A. 107, 21 S. W. 405.

Correction.—The commissioner of the general land office being charged with the duty of correcting surveys and field-notes (9 Gammel's Gen. Laws, p. 107) corrected field-notes of surveys approved and adopted by such commissioner identifying the land claimed by plaintiff under his patent, constitutes a prima facie case in his favor. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

Where changes in field-notes as they were originally made were made after the rights of parties contesting the survey had become fixed, such rights could not be affected by the changes. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

Art. 5345. [4155] The same corrected and returned, how.—It is hereby made the duty of surveyors who shall have made and delivered incorrect field-notes, upon the requisition of the commissioner of the general land office, provided for in the preceding article, or of the party interested, to make corrected field-notes and return the same to the general land office without delay and without any additional compensation. [Id. P. D. 7092.]

Art. 5346. [4156] Correction by certificate, when made.—When a conflict of survey does not exist on the ground, but appears only on the maps or in the field-notes, it shall only be required of the surveyor to make an official certificate of the facts and furnish a true sketch of the survey with its connections. [Id.]

See Appendix for omitted and repealed land laws.

Art. 5347. [4261] Commissioner to have surveys made, when.—For the purpose of ascertaining the conflicts and errors in and making proper corrections of surveys of lands made for the common school, university or asylum funds, or other surveys in which the state may be interested, directly or indirectly, in cases where, from discrepancies or imperfections in field-notes, it may become necessary for the proper compilation of maps, or for the proper location and identification of said lands upon the ground, the commissioner of the general land office is hereby invested with full power and authority to have such surveys made as he may deem necessary, and to appoint competent surveyors for this purpose. [Acts 1887, p. 107.]

Resurveys.—Where two surveys appeared to have been contiguous by the record of the original survey, the fact that subsequent resurveys and alterations in the record showed that they were not contiguous did not invalidate the surveys. *Barrow v. Gridley*, 25 C. A. 13, 59 S. W. 602.

The rule for resurvey by the land commissioner of school lands sold to a purchaser and containing an excess of acreage stated. *Wright v. Gale*, 104 T. 450, 143 S. W. 141.

Correction of surveys.—Evidence held to warrant a finding that the numbers of certain surveys were changed in the land office by the commissioner and orders given to the surveyor to make the same changes in the field notes. *Lee v. Simmons* (Civ. App.) 151 S. W. 868.

Art. 5348. [4262] Bonds, etc.—Any surveyor appointed under the provisions of this law shall make and execute a bond in the sum of ten thousand dollars, conditioned and payable the same as bonds of county and district surveyors; he shall also take the oath prescribed by the constitution for other officers; said bond to be approved by the commissioner of the general land office and shall be conditioned as other surveyor's bonds. He shall be under the control and direction of the commissioner of the general land office; and, under such direction, may survey the common school, university and asylum lands, or other lands in which the state may be interested, and prepare and return field-notes of same and certify to any and all facts, and generally do and perform such official acts as might lawfully be done by a county or district surveyor, and shall sign his name officially as "state surveyor." [Id. sec. 2.]

Art. 5349. [4263] May have lands surveyed, when.—The commissioner of the general land office may have any lands belonging to the common school, university or asylum funds, or other lands in which the state may be interested, or lands alternating therewith, surveyed or resurveyed, and field-notes or corrected field-notes of same returned to his office by any surveyor appointed under this law, which field-notes shall have the same force and effect as if made by the county or district surveyor of the county or district in which said land lies; and, upon the adoption and approval of said field-notes by the commissioner of the general land office, he shall forward to the surveyor of the county or district in which said land lies, certified copies of said field-notes, which thereafter shall be a part of the records of said surveyor's office. In carrying out the provisions of this law, the commissioner of the general land office may, when requested by the owner of lands alternating with the lands resurveyed under the provisions of this law, cancel patents, and in lieu thereof issue patents in accordance with said resurvey; provided, that all such owners shall pay the expenses incurred in making such corrected surveys of their lands and in issuing said patents; provided, that no claims shall be created against the state for services performed under this law in the absence of a previous appropriation therefor. [Id.]

Acceptance of resurvey.—It is a condition precedent to the consummation of an agreement for the resurvey of school lands by a state surveyor as authorized by Rev. St. 1895, arts. 4251–4263c, that the resurvey be accepted by the land office, unless waived by the parties. *Crosby v. Stevenson* (Civ. App.) 156 S. W. 1110.

Art. 5350. Mineral lands to be surveyed; points marked; surveyor appointed; his salary.—The commissioner of the general land office of Texas may employ a state surveyor, or surveyors, whose duty it shall be to definitely locate on the ground such school land surveys, or blocks of surveys as the said commissioner may designate between the Pecos river and the Rio Grande, commencing at such point in the mineral bearing territory of Brewster county as may appear to be most advantageous to the state. The said surveyor, or surveyors, shall qualify as now provided by statute for state surveyors before entering upon his duties, and shall be under the direction of and subject to the orders of said commissioner. He shall file in the general land office the field-notes and maps of his work; and, when approved by the commissioner, the lines so established, as evidenced by such field-notes and maps, shall be the established lines of the surveys or blocks of surveys represented thereby. All surveys made shall be marked by permanent natural or artificial objects. The said surveyor shall receive for his services, not to exceed one hundred and sixty-five dollars per month, and to be paid in the same manner as are other employés of the said land office. [Acts 1907, p. 285, sec. 1.]

Art. 5351. Land commissioner to co-operate with United States geological survey; regulations as to co-operation.—The commissioner of the general land office is hereby authorized to confer with the director of the United States geological survey, and to accept the co-operation of the United States with this state in the execution of a topographic survey and map of the territory which is hereby authorized to be surveyed. The said commissioner shall have the power to arrange with said director, or other authorized representative of the United States geological survey, concerning the details of said work and the method of its execution; provided, that the said director of the United States geological survey shall agree to expend on the part of the United States upon said work a sum equal to that hereby appropriated, or so much thereof as may be necessary, to secure the proper topographic map or maps. In arranging details heretofore referred to, the said commissioner shall, in addition to such other provisions as he may deem wise, require that the topographer in charge shall give a bond in the sum of five thousand dol-

lars, conditioned and payable the same as that required of the surveyor provided for above, and that the maps resulting from this survey shall be similar in general design and quality to the Van Horn quadrangle of El Paso county, edition of March, 1906, made by the United States geological survey, and shall show the outlines of all surveys, and kinds of timber and vegetable growth of commercial value, the location of all natural or artificial water roads and shall show the contour lines showing the elevation and depression for every one hundred feet in vertical interval of the surface of the county; that the resulting map or maps shall wholly recognize the co-operation of the state of Texas and that as each manuscript quadrangle of the map or maps is completed, the commissioner shall be furnished by the United States geological survey with photographic copies of the same, and as the engraving on each quadrangle is completed, the commissioner shall be furnished by said director with the resulting maps. [Id. sec. 2.]

Art. 5352. Persons owning private lands may co-operate.—Should any person or persons, owning private lands which alternate with the school land, desire to co-operate with the commissioner of the general land office in having the surveying done and in having the topographic map or maps made, as above provided for, such services and co-operation may be accepted upon a fair division of the expense. [Id. sec. 3.]

Art. 5353. General authority of commissioner to have surveys made; compensation of official; state surveys, etc.—Whenever the commissioner of the general land office shall deem it to the best interest of the state to cause to be made a survey or resurvey of any land or lands which are now, or which may be, owned or claimed by the state of Texas, or which commissioner may deem it expedient to have surveyed, or resurveyed, in order to determine whether such land or lands are owned or should be claimed or sued for by the state of Texas, he may designate and employ one or more competent and experienced surveyors, each to be known as, "Special state surveyor," to do such work, and shall be authorized to allow and pay, as hereinafter provided, reasonable compensation for such services, the amount of such compensation to be determined by such commissioner, not exceeding in any instance the rate of two hundred dollars per month, and may also incur and pay, as hereinafter provided, any and all reasonable expenses which may be incidentally involved in or connected with the making of any and all such surveys and resurveys. [Id. sec. 6.]

Art. 5354. Official surveyors, how commissioned; qualified.—Any such designation of any and all such surveyors shall be evidenced by a written instrument which shall be signed by the commissioner of the general land office, officially, and attested by his seal of office, and such written instrument shall designate, in at least general terms, the land or lands which such surveyor or surveyors may be so designated and employed to survey or resurvey; and before doing any such work, such surveyor or surveyors shall take and subscribe before an officer authorized by law to administer oaths within this state, an affidavit to the effect that affiant will faithfully, impartially and to the best of his knowledge and ability make the survey or resurvey called for in such instrument of designation; and such affidavit shall be endorsed upon or attached to such instrument of designation. Such instrument of designation, together with such affidavits, shall be filed in the general land office before any such work shall be done thereunder. [Id. sec. 7.]

Art. 5355. Field-notes to be returned; force and effect of.—Field-notes and a plat of any and all such surveys and resurveys, signed by such special state surveyor, or surveyors, shall be returned to and filed in the general land office, and shall thereafter have the same force and

effect as if made and returned by a district or county surveyor under existing laws. [Id. sec. 8.]

See note under Art. 5336.

Former law.—Act Feb. 10, 1852 (Laws 1852, c. 69), provided that the field notes of all surveys made previous to the passage of the act "shall be laid out and returned in the manner required by law to the general land office on or before the 31st of August, 1853, or they shall become null and void, and the said surveys shall become vacant land, and be subject to be relocated and surveyed as in other cases by a person holding a genuine land certificate or other legal evidence of claim to land." Held, that the act referred only to surveys of land made under laws of the republic or state of Texas, and not to titles previously granted by the Spanish or Mexican government. *State v. Gallardo* (Civ. App.) 135 S. W. 664.

Conflicting surveys.—Where the field-notes of a survey actually made in 1840 were recorded, and a patent issued in 1846, such patent was held superior to another issued in 1845 on a conflicting survey made in 1844. *Waterhouse v. Corbett*, 43 C. A. 512, 96 S. W. 651.

Where a survey under which plaintiff claimed was the oldest, the superior right was in the plaintiff, notwithstanding that other surveys were patented first. *Compton v. Hatch* (Civ. App.) 135 S. W. 1052.

Where one having a junior survey accepted a patent according to corrected field-notes, he cannot claim any land included in the original survey, but excluded from the corrected survey and patent. *Jones v. Petty* (Civ. App.) 146 S. W. 663.

Where surveys are in conflict, the junior survey must yield to the senior survey to the extent of the conflict. *Guillory v. Allums* (Civ. App.) 147 S. W. 685.

Evidence held to justify a finding of a conflict in surveys of public lands, so that, to the extent of the conflict, the junior survey must yield. *Id.*

Art. 5356. Conflicts in alternate surveys; how adjusted.—In all cases where land certificates granted by the state have been located in a block or blocks of two or more alternate surveys, and either or all of such surveys are found to be either wholly or partly in conflict with older valid surveys, such individual surveys as may not be patented in such block or blocks, and which may conflict as aforesaid, and such school surveys, except those which may be sold, or those which may have been sold and were in good standing on the thirty-first day of October, 1898, or those for which there may be pending purchase applications in general land office at the time said commissioner of the general land office shall issue his instructions to the surveyor, as hereinafter provided, may be adjusted under the direction of the commissioner of the general land office as provided herein. [Acts 1899, p. 330, sec. 1.]

Art. 5357. Surveyor's duties in adjusting conflicts.—When any such adjustment is desired, as mentioned in the preceding article, the said commissioner shall, upon request of the party owning such individual survey or surveys, or, in the absence of such application, upon his own judgment, direct the proper surveyor of the county in which such conflicting surveys may be situated, to survey such sections as may be in conflict, and so alter or change the field-notes of each and every survey for which an adjustment is sought, except where the school survey has been sold or applied for as above provided; and, in making such change or alteration, the said surveyor shall divide the total area of the individual survey and its alternate school survey equally between the individual and the school survey, unless there is an excess, in which case the excess shall go to the school survey, and patents shall issue accordingly; provided, that the state shall not be required to pay any costs in the matter of resurveying and setting the boundary lines of said lands as provided for in this chapter. [Id. sec. 2.]

Segregation of excess.—The land commissioner, on discovery of an excess of school lands in a section or survey purchased from the state in good faith, must segregate the excess by separating it from the body of the section as resurveyed in a body as near a square as practicable, starting at the beginning corner of the original survey. *Wright v. Gale*, 104 T. 450, 140 S. W. 91.

Art. 5358. In case of conflict, to issue in what cases.—The commissioner of the general land office shall ascertain the entire number of acres in the school surveys wholly or partly free from conflict, exclusive of any excess there may be in each of said school sections, in any particular block, and also the entire number of acres in the individual surveys free from conflict in such block, and shall issue patents on enough of the individual surveys, if there be enough, to equal in area the total

area of said school surveys so wholly or in part free from conflict, without considering the excess in each school section; and, in case the total area of the individual surveys in any particular block exceeds the total area of the school surveys, then such excess shall be equally divided between the individual and the school surveys, and patents shall issue accordingly; and if in any case the total area of the school surveys in any particular block, not including any excess there may be in each school section, nor to give any individual any more than their respective total complement by reason of such resurvey, exceeds the total area of the individual surveys, then such excess shall be equally divided between the individual and school surveys, and patents shall issue accordingly; provided, sufficient amount of the school surveys not sold or applied as aforesaid remain to admit of such division. [Id. sec. 3.]

Art. 5359. In cases of conflict number of surveys changed; correction made to protect purchasers.—Where purchasers of school lands have been misled as to the correct lines of their surveys, and have improvements thereon, the commissioner of the general land office may, by the written consent of the purchaser of the school survey and the owner of the individual survey, filed in the general land office, be authorized to change the number of surveys, or have them so corrected as to protect the improvements of the purchaser of the school lands. [Id. sec. 4.]

Art. 5360. Third persons protected.—The provisions of this chapter shall not affect prior valid rights of third persons. [Id. sec. 5.]

BOUNDARIES IN GENERAL

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| 1. Agreements within statute of frauds. | 18. Maps, plats and field notes. |
| 2. Relative importance of conflicting elements. | 19. Adjoining or adjacent lands. |
| 3. — Control of elements consistent with intention. | 20. Waters and water courses. |
| 4. — Control of natural objects and monuments over other elements in general. | 21. — Meandered waters. |
| 5. — Control of water courses, highways and fences over other elements. | 22. — Accretion and avulsion. |
| 6. — Control of metes and bounds or courses and distances over other elements. | 23. — Islands. |
| 7. — Control of lines marked or surveyed over other elements. | 24. Public ways. |
| 8. — Control of calls for adjoiners over other elements. | 25. Railroad rights of way. |
| 9. — Control of maps, plats and field notes over other elements. | 26. Priority of grants and deeds. |
| 10. — Control of quantity over other elements. | 27. Priority of surveys. |
| 11. Natural and permanent objects. | 28. Remedies for establishment of boundaries. |
| 12. Artificial monuments and marks. | 29. — Practice and procedure. |
| 13. Courses and distances. | 30. — Presumptions, burden of proof and admissibility of evidence. |
| 14. — Reversing calls. | 31. — Weight and sufficiency of evidence. |
| 15. Location of corners. | 32. — Instructions and questions for jury. |
| 16. Location of lines. | 33. — Verdict and findings. |
| 17. Designation, quantity and location of land. | 34. — Judgment and enforcement thereof. |
| | 35. Agreements between parties. |
| | 36. Estoppel in general. |
| | 37. Recognition and acquiescence. |
| | 38. Practical location by parties. |
| | 39. Private surveys. |
| | 40. Official surveys. |
| | 41. Apportionment of excess or deficiency. |

1. Agreements within statute of frauds.—See notes under Art. 3965.

2. Relative importance of conflicting elements.—Where a decree for title called for a beginning point, thence south to a given point, thence east to a given point, thence north to a given point, thence east to the point of beginning, it was held that, as the course and point designated in the last call were inconsistent, the point should control the course. *Tison v. Smith*, 8 T. 147.

In ascertaining boundaries, the most material and the most certain calls will control those that are less material and less certain. *Hubert v. Bartlett*, 9 T. 97.

In ascertaining boundaries, or the locality or identity of lands, called for in a deed or grant, recourse is to be had (1) to natural objects; (2) to artificial marks; (3) to course and distance. *Bolton v. Lann*, 16 T. 96.

Where some bounds called for cannot be located with certainty, but others can, there is no question as to which should control, as there is no inconsistency proved, but those certainly located must be followed. *Bass v. Mitchell*, 22 T. 285.

The beginning corner of a survey as given in the field-notes is of no more dignity than any other corner found on the ground. *Davis v. Smith*, 61 T. 18; *Ayers v. Har-riss*, 64 T. 296; *Same v. Lancaster*, Id. 305; *Luckett v. Scruggs*, 73 T. 519, 11 S. W. 529; *Miles v. Sherwood*, 84 T. 485, 19 S. W. 853; *Cox v. Finks* (Civ. App.) 41 S. W. 95, ap-

peal dismissed 43 S. W. 1, 91 T. 318; *Wilkins v. Clawson*, 37 C. A. 162, 83 S. W. 732; *Ramseaur v. Ball* (Civ. App.) 125 S. W. 590; *Francis v. Patterson*, 143 S. W. 678; *Rosenthal v. Sun Co.*, 156 S. W. 513; *Crosby v. Stevenson*, Id. 1110.

Where other calls of a survey are found to be more material and certain, the jury may, if necessary, disregard a particular boundary line called for in the field notes. *Jones v. Andrews*, 62 T. 652.

In tracing a survey, controlling importance need not be given to the line first run. *Ayers v. Harris*, 64 T. 296; *Same v. Lancaster*, Id. 305.

In arriving at a boundary line as originally run, natural objects are controlling calls; artificial objects, second in importance; course, third; and distance, fourth; and, where there is still uncertainty, that rule should be adopted most consistent with the intent of the grant. *Luckett v. Scruggs*, 73 T. 519, 11 S. W. 529.

Where all the calls made by the locating surveyor cannot be strictly observed, as few should be disregarded as possible. *Hill v. Smith*, 6 C. A. 312, 25 S. W. 1079.

Where plaintiff, in a suit to recover land, only established a conflict between a call for a well-established corner of an older survey and one for the established line of another survey, he is not entitled to recover, since the calls are of equal dignity. *Morgan v. Mowles* (Civ. App.) 61 S. W. 155.

Where, on an issue as to the location of a boundary line, it appears that some of the calls in the field notes of the surveyor must be treated as mistakes, those should be selected as made by mistake which will produce the fewest possible conflicts. *Lyon v. Waggoner*, 37 C. A. 205, 83 S. W. 46.

While, in ascertaining boundaries, calls for rivers and streams are, standing by themselves, awarded highest dignity, calls for artificial objects the next, and calls for courses and distances the next, yet the relative weight of the various classes of calls is evidentiary merely, and not absolute, and aided by other facts the weakest may overcome the highest, the purpose of the inquiry being to find the footsteps of the surveyor, thus a call for a river will yield, when it is shown that the surveyor did not actually reach the stream, similarly a call for a marked line of an older survey may be made to yield, and even a call for an unmarked prairie line will prevail over a call for courses and distances, when it reasonably appears from the evidence that the surveyor actually went to it and intended by his field notes to include the land bounded by it. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

In locating boundaries, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances. *Ridgell v. Atherton* (Civ. App.) 107 S. W. 129.

The relative dignity of calls in field notes in ascertaining the location of a survey is, first, natural objects, such as streams and timber; second, artificial objects, such as the fixed line of an adjoining survey about which there is no dispute, and then courses and distances. *Wilkins v. Clawson*, 50 C. A. 82, 110 S. W. 103.

The corner or section of a survey designated by the field notes as the beginning corner or section has no more importance in locating the survey than any other corner or section, so that where all the sections of a survey were surveyed by the same person, in absence of evidence as to how the surveys were actually made, it is permissible to begin at the south boundary line and run the sections north, though the field notes call for the beginning at the northern tier of sections of the survey and each tier of sections calls to begin on the tier to the north of it. *State v. Sulflow* (Civ. App.) 128 S. W. 652.

As a rule, calls in field notes should be given priority as follows: First, calls for natural objects; second, calls for artificial objects; third, calls for courses; fourth, calls for distance; and, as a corollary to the latter two, calls for quantity. But such rule is not absolute, as calls for a higher order may sometimes be made by mistake, when the calls for a lower order may prevail, and those calls should control, even if of a lower order, which, under the circumstances, most clearly indicate the intention of the grant. Id.

Where two calls of a grant of public land descriptive of a line or corner lead to different results, the presumption is that one of the calls was inserted by mistake, and the mistaken call must be disregarded. *State v. Palacios* (Civ. App.) 150 S. W. 229.

Rules relating to the comparative dignity of calls are designed to aid in determining which calls of a survey were made by mistake, but the rules relating to actual surveys are frequently not applicable to office surveys. *Gilbert v. Finberg* (Civ. App.) 156 S. W. 507.

3. — Control of elements consistent with intention.—Where there is a call for a corner, designated in a former deed as "K.'s corner," which was not marked, certain, or notorious, and the purchaser buys by a survey, which is the repetition of a former survey, and its lines were established and notorious, he cannot claim to that corner, when he would thus obtain a very much larger tract of land than he purchased; it being clear that the tract so surveyed was intended to be the one set off on partition to his trustee, grantor, who had only this title to convey. *Bragg v. Lockhart*, 11 T. 160.

Where the boundaries described in a deed to land are inconsistent with each other, those are to be retained which best subserve the prevailing intention, manifested on the face of the deed. *Browning v. Atkinson*, 37 T. 633.

When two descriptive calls are given in a survey, both of equal dignity, as a call for a corner and a marked line, preference will be given to that one which is most consistent with the intention to be derived from the entire description. *Harrell v. Morris* (Sup.) 5 S. W. 625.

On an issue of the north and south boundary between parties claiming under adjacent surveys, the evidence clearly showed that it was the intention of the surveyor to have defendant's (the later) survey join plaintiff's on the west. It was subsequently found that, to join the surveys, the call for distance on defendant's south line would be short 56 varas in a line 1,300 varas long, and would give the survey 306 acres, instead of the 300 acres called for. Held, that the evident intention of the surveyor to leave no vacancy between the surveys should control the slight error of distance. *Brown v. Bedinger*, 72 T. 247, 10 S. W. 90.

A grantor conveyed "lot 1, block 2, town of Concho, M.'s addition to San Angelo, said lot being 60 feet front by 120 feet deep." Afterwards he conveyed to the same gran-

tee "lot 2, block 2," "said lot being 60 feet front by 120 feet deep." The grantor owned the whole block at the time of these conveyances. The addition had been laid out by him, and the plat on file in the county clerk's office divided block 2 into lots 26 feet wide by 120 feet deep. Held that, in the absence of evidence indicating a contrary intention, the word describing the width of the lots must be rejected as *falsa demonstratio*. *Arambula v. Sullivan*, 80 T. 615, 16 S. W. 436.

Where the description in a deed contains no patent ambiguity, but, on its application to the land described, it results in a lot of the most singular shape, plainly never intended by the parties, there is no error in ignoring the calls for courses, and applying only the calls for distance, where the land which the evidence shows was intended to be conveyed may be thereby fully identified. *Talkin v. Anderson* (Sup.) 19 S. W. 350.

Where the evidence shows it was the intention of the parties to a deed that only the land comprised within the description by courses and distances should be included, such description will control one by number of lot and block. *Mullaly v. Noyes* (Civ. App.) 26 S. W. 145.

Where the deeds in plaintiff's chain of title called for the east line of the H. survey as the western boundary, but in the survey made at the request of plaintiff, before his purchase, the surveyor stopped at a "rock" before the call for distance was satisfied, for the sole reason that he believed he had reached the H. line, and plaintiff's deed recited an intention to convey the same number of acres as was conveyed by previous deeds in the chain of title, there was evidence showing an intention to convey all the land within the boundaries named in the deed, and the fact that the survey subsequently made erroneously located the boundary did not preclude plaintiff from obtaining the land up to the exact line of the H. survey. *Wiley v. Lindley* (Civ. App.) 56 S. W. 1001.

It being necessary to disregard one or the other set of calls in the field notes of office surveys, calls found to have been made under a mistake as to the relative position of the surveys may be disregarded, and effect given to the real intention of the person who made the field notes. *Sellman v. Sellman* (Civ. App.) 73 S. W. 48.

Where, in a boundary suit, the intention of the surveyor in making surveys, whose lines are uncertain, is the controlling question, the jury should consider his purpose as gathered from what he did in making the surveys, the description of the land he gave, and all the circumstances attending the transaction, but not a secret intention which found no expression in his acts. *Masterson v. Ribble*, 78 S. W. 353, 34 C. A. 270.

The courts will uphold boundaries where a technical error in a call may be disregarded, and the territory attempted to be described thereby ascertained; and any call may be disregarded in order to ascertain the footprints of the surveyor in establishing the boundary of the territory attempted to be marked out on the land. *Williams v. State*, 107 S. W. 1121, 52 Cr. R. 371.

Where a block of sections of public lands was so marked on a map in the state land office as embraced between two rivers, but the lines of the eastern tier of sections in the block had not been marked on the ground by the surveyor, and it was the intention of the surveyor, the locator, and the state to grant land extending the distance necessary to make up the several tiers of sections as shown on the plat, such intention would not be nullified merely because the surveyor located the sections under the mistaken impression that the F. river was east of them; the mistake in plating being insufficient to control the calls for course and distance embodied in the field notes. *Gilbert v. Harris* (Civ. App.) 109 S. W. 392.

Where different calls in grants of public lands lead to conflicting results, preference must be given to the calls which most probably indicate the intention of the government, as expressed in the face of the grant, read in the light of the surrounding circumstances. *State v. Palacios* (Civ. App.) 150 S. W. 229.

4. — **Control of natural objects and monuments over other elements in general.**— In determining boundaries, natural and permanent objects control courses and distances. *Urquhart v. Burleson*, 6 T. 502; *Hubert v. Bartlett*, 9 T. 97; *Anderson v. Stamps*, 19 T. 460; *Weider v. Hunt*, 34 T. 44; *Galveston County v. Tankersley*, 39 T. 651; *Johns v. Schutz*, 47 T. 578; *Davis v. Smith*, 61 T. 18; *Clark v. Hills*, 67 T. 141, 2 S. W. 356; *Gerald v. Freeman*, 68 T. 201, 4 S. W. 256; *McAninch v. Same*, 69 T. 445, 4 S. W. 369; *Johnson v. Archibald*, 78 T. 96, 14 S. W. 266, 22 Am. St. Rep. 27; *Coughran v. Alderete* (Civ. App.) 26 S. W. 109; *Bland v. Smith* (Civ. App.) 26 S. W. 773.

Calls for marked bearing trees control calls for points supposed to be fixed by other deeds. *Mitchell v. Burdett*, 22 T. 633.

A surveyor, having run one line to and established a corner at a large spring on which a tree was growing, returned to the beginning, and ran the opposite lines, and, having established another corner, called thence by course and distance to the first one; but a line on such course and distance would materially deflect from the first corner. Held, the first corner would prevail over the course and distance, though the tract thereby included 420 acres more than the certificate called for, while, if the course and distance were followed, the excess would only be 64 acres. *Robertson v. Mosson*, 26 T. 248.

When a patent called for fixed and natural objects as corners, and also for the line of another survey, the former is the controlling call, especially when the latter is of uncertain locality. *Jones v. Leath*, 32 T. 329.

Where there were calls for natural objects, and evidence as to their locality, all tending to fix a disputed line of a grant, an instruction, in effect, telling the jury to resort to quantity in determining the line, is erroneous. *Ayers v. Harris*, 64 T. 296.

A requirement in a grant that the boundary lines shall be run so as to include certain culturable lands is a call for a natural object that will control courses and distances. *Clark v. Hills*, 67 T. 141, 2 S. W. 356.

An instruction that a call for a natural object, such as a creek, or for an artificial object, such as a well-marked and long-established public road, will control course and distance, and also the lines of the survey, unless such lines are actually marked upon the ground, is properly refused where the calls for the creek and road in the survey are incidental, and to so locate the survey would force it 2,500 varas away from all its other connections. *Jones v. Andrews*, 72 T. 5, 9 S. W. 170.

Plaintiff alleged a vacancy of 1,590 varas between two surveys having a common east line and three others lying to the east of them. Four of them were made by one sur-

veyor, at about the same time, and all, by mutual use of the same lines and corners, were evidently intended to have a common line, and to include the whole territory. No marked lines were found on the ground, and, to locate their exterior lines by measurement from identified corners of adjacent surveys, several thousand varas distant to the east and west, and measuring the required distances towards the interior, the vacancy would exist as asserted. But, measuring from other nearer identified corners of like surveys, the discrepancy on one side of the line would be trifling. There was evidence from which the court might well find, as it did, that a pile of stones claimed by defendants as a corner in the common line was such corner. No vacancy was shown on the county map. Held, that the identified corner of the surveys in question must prevail over measurements from contiguous surveys, and, while there was an apparent excess of land in some of the surveys, there was no vacancy. *Booker v. Hart*, 77 T. 146, 12 S. W. 16.

Though call for natural objects in a deed as a general rule controls courses and distances, it does not control absolutely. *Linney v. Wood*, 66 T. 22, 17 S. W. 244.

Land had been conveyed to plaintiffs, less "a certain piece or parcel of land heretofore conveyed to W. K. B. [defendant], referring for description to record of deed." The calls of such deed made the north and south lines of the land (a parallelogram) each 135.6 varas long, commencing at the "west boundary line of the Parker county survey," whereas that line, as established by objects, and with reference to which, as so established, the parties had contracted, was 70 varas further east than the calls of the deed for distance. Plaintiffs claimed the intervening strip. Held, that the line as established by objects, and not by the calls of the deed for distance, should prevail, and that defendant was entitled to judgment. *Davis v. Baylor* (Sup.) 19 S. W. 523.

In a controversy over surveys and other boundary lines, courses and distances yield to natural and ascertained objects. *Warden v. Harris* (Civ. App.) 47 S. W. 834.

The field notes of the survey of the J. county school land, described its northeast corner in the same manner as the field notes of a survey adjoining it on the east described its northwest corner. The field notes of the school-land survey called for the southwest corner and the west line of the other survey. A witness testified to having found the northeast corner 20 years ago, on the ground, at a distance north of the place where the call for distance north from the southeast corner placed it. One survey, of a series of surveys made 30 years ago as one block, and calling for another, called for the southwest corner of a survey to the northeast which was well established on the ground, and for the north line of the school-land survey as located by the witness as its south line. The calls for distance in the school-land survey were nearly all erroneous and excessive. The evidence tended to show that, by fixing the northeast corner where witness had found it, it would be a little too far west, and, taking it for the northwest corner of said adjoining survey, one of the calls of the latter would not fit, and the north line of the school-land survey would extend a few varas beyond the south line of the survey located towards the northeast, for whose southwest corner one of the surveys in said block of surveys called. Held, that the call for distance should be disregarded, and the monument found by the witness taken as the northeast corner. *Allen v. Worsham* (Civ. App.) 49 S. W. 525.

Where a boundary line is sufficiently identified along its course by natural objects, it will control distance wherever it is called for in the field notes of a survey, if there is a conflict; the presumption being that the surveyor actually made the survey on the ground, and established the corners as called. *Burge v. Poindexter* (Civ. App.) 56 S. W. 81.

Where there is no ambiguity on the face of a deed which calls for marked corners found on the ground, but the course and distance of one of the lines do not correspond with such corners, the line must run straight between the corners. *Sloan v. King*, 69 S. W. 541, 29 C. A. 599.

Where a deed calls for a line identified by natural and artificial objects called for, such line will prevail over an inconsistent call for distance. *Thaxton v. Wadsworth* (Civ. App.) 95 S. W. 91.

Where a survey called for a specified distance to a stake, the call for distance must yield on the location of the stake being established, the order of control of conflicting calls being, first, natural objects; second, artificial objects; and, third, courses and distances. *Thatcher v. Matthews*, 101 T. 122, 105 S. W. 317.

Where a survey called for a specified distance to a stake, the call for distance must yield on the location of the stake being established. *Thatcher v. Matthews* (Civ. App.) 105 S. W. 1006.

The courts, in grading the dignity of the different classes of calls found in deeds descriptive of land, intended only to establish a rule for arriving at the location of the boundaries actually established, and the rule that monuments and natural objects are superior to course and distance does not impeach the sufficiency of course and distance to locate a boundary, but course and distance must yield to the superior grade in cases of conflict. *Jaggers v. Stringer*, 47 C. A. 571, 106 S. W. 151.

The general rule that monuments and natural objects will prevail over calls for course and distance, in cases of conflict, does not apply where the surrounding circumstances show that the superior marks were placed by inadvertence, or that there was a verbal mistake in the description of the monument or natural object. Id.

A tract was surveyed, and the corners of blocks, lots, streets, and alleys were marked by stakes. The surveyor died soon after, and another surveyor was employed to prepare a plat from the one made at the time of the survey and put it in a condition for record. The corner of a lot as located by the course and distance called for by the plat did not coincide with the corner located by the surveyor's stake. Held, that the stake fixed by the surveyor controlled the calls for course and distance in the plat. *Werkheiser v. Foard* (Civ. App.) 108 S. W. 983.

In determining boundaries where there are conflicting calls, calls for course and distance must yield, first, to natural objects, and, second, to artificial objects. *Weston v. Meeker* (Civ. App.) 109 S. W. 461.

Where the calls for courses in the field notes of the W. survey were general and conflicting, a finding of the court in passing on the facts without a jury that a call for an old building which was nearest the beginning point was more material and certain than

calls for adjoining surveys, and that it was entitled to greater weight in tracing the footsteps of the surveyor who located the W. survey than the calls given by other surveyors in their field notes of adjoining surveys subsequently made, was justified. *Jordan v. James*, 53 C. A. 408, 115 S. W. 872.

Where there is a conflict between distance and artificial objects, calls for distance must yield, except where it is apparent from the face of the grant that the calls for natural and artificial objects were inserted by mistake or were laid down by conjecture, in which case course and distance will prevail, as being the best evidence of the actual intent of the parties. *Ramseur v. Ball* (Civ. App.) 125 S. W. 590.

Where the calls for corners and lines are identified on the ground by bearing trees, they will control over calls for distances, if the calls are conflicting. *Granberry v. Storey* (Civ. App.) 127 S. W. 1122.

In an older survey, where there is a call for an unmarked corner or line where the same can be easily found, it will have the dignity of a call for an artificial object, and will control a call for distance. *Byrd v. Langbein* (Civ. App.) 135 S. W. 206.

The general rule as to descriptions is that a call for a natural object will control calls for distance and for quantity, and an excess of 105 acres in a survey of 1,280 acres is not so great as to require an exception to such rule. *Daughtrey v. McCoy* (Civ. App.) 135 S. W. 1060.

Lines located by monuments or courses in distances control calls for quantity. *Colins v. Warfield* (Civ. App.) 140 S. W. 107.

Where a stake at the southwest corner of a survey and a stake and mound at its northwest corner, called for in the field notes, could not be found, but there was evidence that they were located 1,849 varas west of another survey, such location being established, the call for distance would yield to the call for the monuments. *Wm. M. Rice Institute for Advancement of Literature, Science, and Art v. Gieseke* (Civ. App.) 154 S. W. 612.

5. — **Control of water courses, highways and fences over other elements.**—Where a survey describes the land as lying on one side of a navigable river, the lines will be so run as that none of them shall cross the river, notwithstanding that, if the courses and distances were followed, the tract would include land across the river. *Phillips v. Ayres*, 45 T. 601.

On a question whether a sheriff, in executing a writ of possession, correctly interpreted a part of the decree calling for a line from a point on a lake; "thence southward with the meanders of said lake 405 varas to the mouth of the lane on the south bank; thence south,"—the jury were warranted in finding that he should have run the line south from the mouth of the lane instead of from the point to which the 405 varas carried him, since that point was necessarily variable, depending upon the distance from the water line at which the meanders were run. *Jackel v. Reiman*, 78 T. 588, 14 S. W. 1001.

The patent to a survey, after establishing the northeast corner, called "thence west 6,127 varas, a stake in the south bank of W., a cottonwood 4 inches in dia. brs. S. 45½ deg. W. 217 varas, a do. 12 in. in dia. brs. S. 43¼ deg. W. 210 varas, a bushy topped elm mkd. S. brs. N. 89 deg. E. about 413 varas." Locating the northwest corner 413 varas from the elm as called for in the patent made the distance between the northeast and northwest corners 6,343 varas. Held, that as the river had changed its course since the survey, and there was evidence that the northwest corner when originally located was 203 varas from the elm, the call for the distance between the two corners, and not the call for course and distance from the bearing tree to the northwest corner, should prevail, since the call for the bank of the river was originally the controlling circumstance by which the northwest corner would be located. *Meade v. Leon & H. Blum Land Co.* (Civ. App.) 22 S. W. 298.

Where a survey of land borders on a marsh or lake, a strip of three acres of land extending into the water beyond a straight line called for by the surveyor, and shown on a map of the land, is part of such survey; and this, though the law requires the court to follow the footsteps of the surveyor in determining the boundary of a given tract. *Bland v. Smith* (Civ. App.) 43 S. W. 49.

Calls for course and distance must yield to a call for the meanders of a creek. *Moore v. Loggins* (Civ. App.) 114 S. W. 183.

A call for a creek in the field notes of a survey calling for a stake as the beginning, and from thence north at 3,200 vrs. a creek, at 3,800 vrs. a stake, thence west at 4,152 vrs. a stake, etc., to the point of beginning, is a descriptive and not a locative call, and is not of higher dignity than a call for course and distance. *Runkle v. Smith* (Civ. App.) 133 S. W. 745.

Where, notwithstanding a call for a river or a marked line of an older survey, it is shown by other evidence that the survey did not reach the stream or the marked line, the call for the river or line will yield. *Goodson v. Fitzgerald* (Civ. App.) 135 S. W. 696.

6. — **Control of metes and bounds or courses and distances over other elements.**—A general recital of quantity in a deed or grant must yield to metes and bounds. *Dalton v. Rust*, 22 T. 133.

Course and distance from an established point will prevail over a supposed line and corner which at the time of the grant had not been run and established. *McCown v. Hill*, 26 T. 359.

When the lines called for are of doubtful identity, course and distance should be resorted to, as furnishing the best evidence the case is susceptible of, since it is only when lines called for in a deed are actually marked, and can be identified, that they control calls for course and distance. *Browning v. Atkinson*, 37 T. 633.

Where, from actual corners, lines not marked are run by course and distance, and a stream is found where called for, but of a different name from that called for in the field notes, it may be inferred that the call for the stream was a mistake, and to that extent course and distance would be regarded, instead of the call for a stream elsewhere made in the field notes. *Jones v. Burgett*, 46 T. 284.

While the general rule, in determining the location of a survey where there are conflicting calls, is that courses and distances must yield to natural or artificial monuments or objects, there are cases where courses and distances will control, as where it is ap-

parent from the face of the grant that such monuments or objects were inserted by mistake, or laid down by conjecture and without regard to rule. *Robinson v. Doss*, 53 T. 496.

Where a call in a deed is for "a corner" on a prairie, with no other call to designate it; thence "S. 30 deg. E., with the west line of the A. survey," the call for the older survey does not control the call for distance, the evidence showing a mistake of the surveyor. *Oliver v. Mahoney*, 61 T. 610.

Where one of the lines of a survey is established, the other lines may be determined by course and distance called for from such line, disregarding a call for a survey evidently caused by a mistake arising from the inaccuracy of the map in use at the time. *Boon v. Hunter*, 62 T. 582.

A line or corner of another survey called for in field notes made without an actual survey may be disregarded, when evidently called for by mistake, and to observe them would be inconsistent with all other calls, and with the course and distance called for, and the manifest intention of the parties. *Id.*

Where the upper and lower corners of a tract were identified as located on a river, but the back line of the survey could not be identified by finding either the northwest corner, which was the second called for by the grant, or by identifying the northeast corner by the objects called for, but a marked line was found on the proper course of the east line prolonged beyond what was disputed as the northeast corner, and the first line called for by the grant was the west line, and ran back from one of the established corners on the river, the jury should have been instructed that if they could not fix the northeast corner, or the north or back line, by monuments or marks, they should fix it by courses and distances from the first and second lines of the survey, the second or back line being extended to meet the recognized east line as extended beyond the point disputed as the northeast corner. *Ayers v. Harris*, 64 T. 296.

A deed of conveyance described the land by courses, "to include 571 acres of land, and, if such point will not include sufficient of land to make the complement, 571 acres, it is to run north," under a certain survey, for the deficit. Held, that the grantee was not restricted to 571 acres, if the tract described contained more. *Johnson v. Garrett*, 25 T. Sup. 13.

The upper half of a tract of land was taken by a widow for her community share in the land. Subsequently a person purchased from an heir a portion of the whole tract, which portion was described by metes and bounds, and bordered on the tract taken by the widow. Held, that the purchaser could not complain, in an action for partition by one of the heirs, that the widow's half was not included in the suit. *Franks v. Hancock*, 1 U. C. 554.

A deed purported to convey 160 acres of land, described by metes and bounds, under a survey. The line of the B. survey was once called for, and if treated as controlling, it reduced from 350 to 44 varas a line purporting to have been run according to distance, and reduced the number of acres to 90. The lines and corners connecting the two surveys were in an unoccupied prairie, and the parties knew nothing of the boundaries of either tract. The field notes of that part of the survey did not point to or call for any natural boundary or visible landmark. Held, that the call for distance was controlling. *Webb v. Brown*, 2 U. C. 36.

Courses and distances will not be made subordinate to an unmarked prairie line, which could not itself be ascertained except by running the boundaries of another survey according to course and distance. *Gerald v. Freeman*, 68 T. 201, 4 S. W. 256; *Johnson v. Archibald*, 78 T. 96, 14 S. W. 266, 22 Am. St. Rep. 27.

The southeast corner of a survey was fixed with reasonable certainty, though not by the objects called for, which had disappeared, and the northwestern corner with absolute certainty, and lines run from these corners, on courses called for, would intersect at a point from which the true bearing of a tree referred to in the patent would be S., 30 W., 96 varas. The patent named the bearing of the tree from the corner as S., 30 E., 96 varas. Held, that the point of intersection, found by running lines as described, should be considered as the true corner, rather than that ascertained by adopting the bearing from the tree given in the patent, and rejecting the courses from the southeast and northwest corners. *Davidson v. Killen*, 68 T. 406, 4 S. W. 561.

Where, in an office survey, a line was described as running from a fixed point south to another point described, but not established on the ground, which did not lie in the designated course, it being intended that the line should run north and south, held, that the second point named being descriptive, and not locative, should be disregarded, and that the line should follow the course named. *Lilly v. Blum*, 70 T. 704, 6 S. W. 279.

Though courses and distances are the lowest in dignity and importance of calls employed in grants, yet, when the land can be more certainly identified by running the courses and distances, the grant should be so determined. *Bigham v. McDowell*, 69 T. 100, 7 S. W. 315.

It is not prejudicial error to charge that, if the jury can fix the lines of the survey in harmony with its calls and known corners, then the fact that the lines would include more than the area called for in the grant becomes immaterial, and the extent of the area should not be considered "further than as a circumstance to aid you, in connection with all the evidence in the case, in following the footsteps of the original surveyor, and fixing the true boundaries of said grant," where the lines as claimed by plaintiff include more than was intended to be conveyed by the grant. *Ayers v. Harris*, 77 T. 108, 13 S. W. 768.

Plaintiffs' survey described the courses as running south a certain distance to the north boundary line of survey No. 138, and east along the northern boundary of No. 138 and No. 132; but according to the distance recited in the survey the west line would fall short of the north boundary of No. 138, leaving a strip of land between it and the south boundary of plaintiffs' survey. The survey of No. 132, made about the same time as plaintiffs' survey, called for the south boundary of plaintiffs' survey as its northern boundary, and other adjoining surveys made about the same time made it appear that such was the boundary line. Held, that the courses and boundaries will prevail as against the distance recited in plaintiffs' survey, making it extend south to the north boundaries of Nos. 138 and 132. *Wyatt v. Foster*, 79 T. 413, 15 S. W. 679.

In trespass to try title, there was evidence that one B., the original grantor of the

land, had fixed the outer boundaries of the farm lots of which plaintiff's and defendant's lots were subdivisions, and also that a line had been originally run and marked showing where certain lots fronting on a certain street had terminated. There was further evidence that the grantees of B., through whom plaintiff and defendant, respectively, claimed title, may have fixed by agreement a line between the lots in controversy. Held, that course and distance from the true western line of the street was not the controlling means for the determination of the line between the lots, since there was other evidence authorizing a finding as to the boundary between the parties. *Machon v. Randle*, 66 T. 282, 17 S. W. 477.

Where a surveyor establishes two initial points on the ground itself, and from these the remaining surveys are plotted in on a map, and in the plot calls are made for a river, the true course of which the surveyor has mistaken, the surveys must be run out as plotted, the calls for the river yielding to course and distance. *New York & T. Land Co. v. Thomson*, 83 T. 169, 17 S. W. 920.

The statement of the quantity of land supposed to be conveyed, and inserted in deeds by way of description, must yield to courses and distances. *Rand v. Cartwright*, 82 T. 399, 18 S. W. 794.

When a departure from either course or distance becomes necessary, the distance should yield. *Id.*

Land granted by the state had been simply platted on paper without an actual survey having been made. The second corner called for was 300 yards further distant from the beginning corner than the distance specified in the patent. There were other calls in the patent for well-established monuments. Held, that other calls of the patent, as well as course and distance, should be looked to in determining what was the particular land intended to be conveyed. *Roberts v. Helm*, 1 C. A. 100, 20 S. W. 1004.

A survey called for a course from a certain point south 712 varas; thence east 1,438 varas, calling for the northeast corner of survey No. 1,158, which was an open corner. It was contended that the call for the northeast corner of 1,158 should control, extending the call "south 712 varas" to 986½ varas, and extending the call "east 1,438 varas to 1,555 varas. Held that, as the northeast corner of 1,158 was to be found by running course and distance from some established corner, it was not error to reject the call for that corner as a mistake, since by its rejection there was harmony in the calls, and the requisite quantity of land was secured by the survey. *Robertson v. Mooney*, 1 C. A. 379, 21 S. W. 143.

In trespass to try title, it appeared that J., under whom both parties claimed, conveyed the north 50 feet of a lot to plaintiff, the balance going by mesne conveyances to defendants. At the time of the purchase by plaintiff, J. pointed out a fence as his north line, and a line 50 feet south, marked by stakes, as his south line. Plaintiff adopted both lines as true, and they were true according to the distances mentioned in the deed to J., but according to the courses of said deed both lines were 30 feet too far north. Held, that plaintiff is confined to the 50 feet of land lying between the fence and stakes, since the courses in a deed must yield to distances when such was the evident intention of the parties. *Scott v. Weisburg*, 3 C. A. 46, 21 S. W. 769.

Where the calls in a surveyor's field notes can be ascertained, they control an ascertainable object not called for. *Ratliff v. Burlison*, 7 C. A. 621, 25 S. W. 983, 26 S. W. 1003.

Where there are no monuments, the land must be bounded by the courses and distances named in the patent or deed. *Id.*

The courses and distances in the survey about which there is a dispute will prevail over those of adjacent surveys. *Tippen v. McCampbell* (Civ. App.) 26 S. W. 647.

Where there is a call in the field notes of a younger survey for the west line and southwest and northwest corners of an older survey, the west line of the latter survey cannot be run at a variation different from that called for in its field notes, to reach an unmarked tree not clearly identified as the original corner, but must be run at its proper course and distance. *Williams v. Beckham*, 6 C. A. 739, 26 S. W. 652.

Where a surveyor makes a mistake in supposing that he has reached the western lines of an older survey when running the course and distance called for, the calls for course and distance should control in locating boundaries. *Aransas Pass Colonization Co. v. Flippen* (Civ. App.) 29 S. W. 813.

The International & Great Northern survey No. 500 called for the south line of the Silvey league as its northern boundary. It also called for the northeast corner of I. & G. N. survey No. 11 as its northwest corner. The north line of the I. & G. N. surveys was a continuous one, and at the time such surveys were made the Silvey southern line was shown by the maps of the general land office, and was then supposed to be at the point called for by the field notes of the I. & G. N. surveys. Subsequent surveys showed that the Silvey line was located further north. The I. & G. N. surveys could not be extended so as to reach the Silvey line as it was truly located, without disregarding calls for distance, as well as calls for surveys on which they were based. Held, that the call for the Silvey line, manifestly a mistake, was controlled by the calls for distance and the other surveys. *Layton v. New York & T. Land Co.* (Civ. App.) 29 S. W. 1120.

The rule that marked trees and lines, when found on the ground and identified, control calls for courses and distances, has no application where the survey was not made on the ground, but was copied from other surveys. *Bell v. Preston*, 47 S. W. 375, 753, 19 C. A. 375.

A call in a patent read, "Thence south with the east boundary line of the Thompson survey 1,344 varas, to the northeast corner on the S. B. line of the John Davis survey." The call for the S. B. line of the Davis survey was incorrect, as that line would have to be prolonged westwardly to be reached. Held that, the call for the corner of the Thompson survey and the distance being correct, they would control. *Warden v. Harris* (Civ. App.) 47 S. W. 834.

A survey of plaintiff's land called for the well-established corner of another survey, and did not indicate that the north line extended beyond that corner. At the time of the survey it was accepted that that corner marked the western boundary of another survey adjacent to plaintiff on the east, which the owner occupied, but it was later discovered that the true boundary of such survey was a considerable distance further east. The line from the corner to plaintiff's south line marking his eastern boundary was well

established by the marks and calls for distances, but the survey called for the western boundary of the adjacent survey. Held, that plaintiff's eastern boundary did not extend to the western boundary of such survey. *Morgan v. Mowles* (Civ. App.) 61 S. W. 155.

In a suit to determine a boundary the court cannot properly state to the jury that the location of a certain stake as a corner of the survey was the controlling inquiry, and, if they found where the original surveyor placed it, that would terminate the controversy, as the call for the stake could not control the call for distance from the beginning corner. *Matthews v. Thatcher*, 76 S. W. 61, 33 C. A. 133.

Lines and boundaries described in a deed cannot be controlled by objects found on the ground, indicating the footsteps of the surveyor, where there are no calls for such objects. *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 81 S. W. 781, 36 C. A. 131.

Where, in an action to determine a disputed boundary, there is sufficient evidence to induce the belief that there is a mistake in a call for natural or artificial objects, and not in the call for course and distance, the latter will prevail. *Hamilton v. Blackburn*, 43 C. A. 153, 95 S. W. 1094.

Where the call for distances in a senior survey includes land in a junior survey, and there is nothing to limit the force of the call for distances in the senior survey, the call for distances therein controls. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

Lines and boundaries described in a deed cannot be controlled by objects found on the ground, indicating the footsteps of the surveyor, where there are no calls in the deed for such objects. *Brodhent v. Carper* (Civ. App.) 100 S. W. 183.

The rule that where the lines of a survey were run on the ground, and a monument fixed in a certain place was called for, the call for the monument is superior to the call for course and distance, does not apply where the monument called for was not placed in position by the surveyor, but was merely an office call, and when, in such a case, a call for course and distance will maintain the integrity of an older survey, it will take precedence over the fictitious call for a monument. *Holdsworth v. Gates*, 50 C. A. 347, 110 S. W. 537.

An office survey was intended to follow the line of an older survey, and called for a monument which was not located on the ground. By following the call for course and distance, the original shape of the older survey would be preserved, while, following the call for the monument, the original shape of the older survey would be destroyed. Held, that the call for course and distance governed, and the boundary of the office survey must follow the call for course and distance. *Id.*

In determining the true dividing line between surveys, if, from a definite beginning point, course and distance alone will with reasonable certainty locate and identify the line, course and distance will control. *Gull v. O'Bryan* (Civ. App.) 121 S. W. 593.

Where no marked trees are on a patented survey identified as those of the grant, the true boundary must be ascertained by course and distance given in the patent. *Id.*

Where nothing appears on the face of grants, or from testimony, to indicate that any other course was observed in making the surveys than true north and south lines, and the adoption of magnetic lines would lead to results inconsistent with calls of one of the grants, the true north and south lines should control. *Barrera v. Guerra* (Civ. App.) 122 S. W. 902.

Where there is a discrepancy between the call for quantity in a deed and the boundary calls therein, the call for quantity must yield to the calls in the field notes for the location of the lines. *Pratt v. Townsend* (Civ. App.) 125 S. W. 111.

When land is described by clear and distinct metes and bounds, from which the boundaries can be readily ascertained, such description will control any general words of description added thereto. *Texas Mexican Ry. Co. v. Scott* (Civ. App.) 129 S. W. 1170.

Where the surveyors who located surveys Nos. 13, 6, and 7, believed, in locating such surveys, that the N. W. corner of the H. survey with reference to which they were located was 256 varas west from where it was in fact, at a point due north from the recognized N. E. corner of survey No. 13, the call for course and distance from the undisputed lower S. E. corner of survey No. 6 and N. E. corner of No. 13, instead of the mistaken call for the N. W. corner of the H. survey, should be adopted; the fact that such latter corner was well identified not making the call for it controlling, irrespective of the mistake in its location. *Lafferty v. Stevenson* (Civ. App.) 135 S. W. 216.

The calls for the line of another survey do not prevail over courses and distances. *Love v. Jones* (Civ. App.) 138 S. W. 1128.

Where the land contained in an office survey was described as laid out by courses and distances, it embraced only the amount of the description. *Id.*

Where a line called for in the field notes of a county school land survey was an open unmarked line, the corners of the school survey must be located by course and distance. *Polk County v. Stevens* (Civ. App.) 143 S. W. 204.

Where the field notes of a county school land survey are complete and consistent the calls must control. *Id.*

The calls in the report of commissioners of partition and the decree and deeds pursuant thereto for a certain corner of a league as the starting point and courses and distances therefrom govern, in the absence of agreement to the contrary or estoppel, the question of boundary over calls in the field notes of the commissioners' surveyor for trees identifying corners. *Blair v. McGuire* (Civ. App.) 147 S. W. 354.

Course and distance will control natural marks or boundaries, if it appears that the latter were inserted by mistake, or were laid down by conjecture, and without regard to rule. *Crosby v. Stevenson* (Civ. App.) 156 S. W. 1110.

7. — **Control of lines marked or surveyed over other elements.**—Where the lines of a survey have been run, and can be found, they constitute the true boundaries, which must not be departed from, or made to yield to course and distance, or to any less certain and definite matter of description or identity. *Bolton v. Lann*, 16 T. 96.

Lines actually marked must be adhered to, though they vary from the course or distance. *Dalby v. Booth*, 16 T. 565; *Anderson v. Stamp*, 19 T. 460; *Bartlett v. Hubert*, 21 T. 8; *Booth v. Upsher*, 26 T. 64; *Williams v. Mayfield*, 57 T. 364; *Marshall v. Crawford*, 2 U. C. 477; *Lockett v. Scruggs*, 73 T. 519, 11 S. W. 529; *Worsham v. Morgan* (Civ. App.)

28 S. W. 918; *Burnett v. Gault*, 54 S. W. 268; *Hughes v. State*, 123 S. W. 177, 57 C. A. 306; *Taft v. Ward* (Civ. App.) 124 S. W. 437; *State v. Sulflow*, 123 S. W. 652.

Where the tract granted is a parallelogram, bounded on three of its sides by the lines of former surveys, which lines are called in the grant, but the actual survey, through mistake, has not been made so as to coincide with said lines, the lines actually run will not control the lines of the older surveys. *Anderson v. Stamps*, 19 T. 460.

Calls for marked lines control calls for points supposed to be fixed by other deeds. *Mitchell v. Burdett*, 22 T. 633.

The rule that the corner of a survey is not necessarily a more certain and material monument than the marked line or marked trees called for in a grant, and will not necessarily control calls for those objects, obtains where the grant calls for the southwest corner of another survey as the beginning corner, and no such bearing trees or witness trees as those therein described were to be found there, nor any such marked line running therefrom, but were all found 1,000 yards north of said southwest corner; the surveyor being probably mistaken in supposing, when there, that he was on the corner. *Duren v. Presberry*, 25 T. 512.

Of the calls in a grant, any identified lines or points that were run and established on the ground previous to the grant will prevail over course and distance, regardless of the configuration or excess of area resulting from closing the lines. *McGown v. Hill*, 26 T. 359.

The location of the lines of a survey is to be determined by the lines as actually run upon the ground, where this can be ascertained; nor will this rule be varied because a call is made to run to the line of an older survey, if that line was never reached in the survey actually made, but the surveyor stopped at another line, which was mistaken for it. *Burnett v. Burriss*, 39 T. 501.

The statement of the quantity of land supposed to be conveyed and inserted in deeds by way of description must yield to marked lines. *Id.*

Proof that a surveyor established a line and corner will control a call for an adjoining survey, which would be reached by prolonging the line further. *Castleman v. Pouton*, 51 T. 84.

A call for a corner, which though not recognized by natural or artificial objects at the point, is clearly ascertained by established marked lines called for, there intersecting, will take preference of a call for distance. *Buford v. Gray*, 51 T. 331.

A call for a corner, not recognized by natural or artificial objects, but clearly established by marked lines, will prevail over a call for quantity. *Id.*

Where title has issued to two surveys for a league of land, each located and surveyed at the same time, and which call for a common marked corner and a common divisional line, the location of the dividing line is not affected by the fact that by observing it an excess of 1,000 acres would be contained in one of the surveys. *Bunton v. Cardwell*, 53 T. 408.

The corner of an adjoining survey, called for as a beginning point, does not necessarily control, but will yield to other satisfactory indicia as to where the true line was in fact run, as where the facts show that a call for the corner of another survey as a beginning was a mistake of the surveyor, capable of correction by other objects corresponding with the calls in the grant. *Jones v. Andrews*, 62 T. 652.

Where a marked line is called for in a league grant, and that line can be identified, it will control a call for course and distance; but where the grant calls for no line, but the field notes in the title call for a width of 2,000 varas, and one line being well established, an old line with marks corresponding in age with the date of the grant is found at such a distance from it as will make the grant 2,560 varas wide, the mere fact of such a line being found will not compel the extension of the grant to such line, instead of the 2,000-vara line. *Fagan v. Stoner*, 67 T. 286, 3 S. W. 44.

The grantor described the land by the true distances bounding the tract, but, by mistake, referred to a boundary line which made the grant convey a strip in excess of the land he intended to convey. The grantee moved his fence so as to include the extra strip, recorded his deed, and conveyed to defendant, a bona fide purchaser. In an action by the grantor to recover of defendant, held, that the boundary as fixed on the ground governed the calls for distance recited in the deed to defendant's grantor. *Garrison v. Crowell*, 67 T. 626, 4 S. W. 69.

Where the defendant's title to a certain tract of land depended upon whether the land was included in plaintiff's survey or not, and it appeared that, if the boundaries of plaintiff's land were determined according to the course and distance called for in plaintiff's patent, the tract would not be therein included, while it would if the boundaries were determined according to certain marked corners called for, held, that the marked corners called for should be taken as the true corners, and the course of the lines thence run as designated in the field notes without regard to distance. *McAninch v. Freeman*, 69 T. 445, 4 S. W. 369.

In a controversy concerning the true boundary of a tract of land which had been surveyed at different times and by different methods, the rule that marked lines shall control in establishing the boundary does not prevail, unless it is shown that they were made upon the original survey. *Moore v. Whitcomb* (Sup.) 4 S. W. 373.

If there are conflicting calls indicating two distinct lines of a survey, that actually run by the surveyor will prevail. *Duff v. Moore*, 68 T. 270, 4 S. W. 530.

The rule that a call for a marked line will prevail over a call for distance does not apply where there are no objects, natural or artificial, to show the line. *Id.*

In an action to recover a tract of land lying between a slough and a river, plaintiff claimed title by virtue of a grant which bounded the land granted by the river, and the defendant introduced evidence that the surveyor who surveyed the grant meandered the slough instead of the river. Held that, in determining the true boundaries of the grant, the sole question was to ascertain exactly where the surveyor ran his lines, and, if the jury found that he ran the line along the slough, they should find for the defendant. *Allen v. Koepsel*, 77 T. 505, 14 S. W. 151.

Where the calls of the field notes of the title papers under which both parties claim begin at the corner of a certain survey, and plaintiff's title papers locate that corner at a rock set in the ground, which is there at the time of trial, but the survey made by

order of court shows that this rock is not at the place where the calls in the original survey would place it, the line is not to be determined by the recent survey, nor by the course and distance of the original survey, but it is to be located by the jury where it appears from the evidence to have actually been located originally. *Evans v. Foster*, 79 T. 48, 15 S. W. 170.

In an action involving the location of a boundary line between the M. and the A. surveys, it appeared that the M. survey adjoined the A. on the north, and that the disputed line was located in each survey by reference to the south line of the P. survey, which was marked on the ground. The P. survey adjoined the M. on the west. The three surveys were made by the same surveyor. The calls of the A. survey, which was not shown to have been made on the ground, were as follows for the western and northern boundaries: From the S. W. corner "N. 10,017 varas, to a stake in S. B. line of the P. survey; thence E., passing S. E. cor. of said P. survey, and S. W. cor. of the M. survey, 15,500 varas, to a cor. in the prairie; thence S. 1,064 varas, to beginning." The west and south lines of the M. survey were described therein as follows: From N. W. corner "S. 3,685 varas, pass N. E. cor. of P. survey, 13,685 varas, S. E. cor. of same on N. line of A. survey, a corner-stone mkd. 'X,'" giving bearings, etc.; "thence east, with said line, 8,737 varas, to beginning." The course "N. 10,017 varas" in the A. survey would carry the N. W. corner of that survey 1,084 varas north of the south line of the P. Held, that the south line of the P., being marked on the ground, and being called for in both the A. and the M. surveys, would control the courses and distances given therein, and the south line of the P., extended east, was the boundary between the M. and the A. *Montague County v. Clay County Land & Cattle Co.*, 80 T. 392, 15 S. W. 902.

A deed professed to convey "400 acres, more or less, out of the southeast corner" of a certain survey, and described the tract conveyed by metes and bounds, courses and distances. According to the courses and distances the land conveyed did not reach to the east line of the survey. It was proved that when the tract conveyed was surveyed the east line of the survey could not be found, and that the surveyor only established the west corners of the tract. The position of these corners was not disputed. There were 400 acres within the courses and distances named in the deed. Held, that the deed passed title to all the land between the west corners of the tract and the east line of the survey. *Baker v. Light*, 80 T. 627, 16 S. W. 330.

In surveying and subdividing a grant the northern line was established and marked on the ground south of the true northern line. The northeastern subdivision was conveyed to plaintiff according to the plat made of the survey, the deed also calling for a certain number of acres; the number contained in it taking the line as established and marked for its northern boundary. Plaintiff had not seen the line on the ground, and bought according to the plat, which indicated the subdivision to be in the extreme northeast of the grant; but, for a long time thereafter, he supposed the line as marked to be the true line. Held, that the line as marked fixed the northern boundary of plaintiff's purchase. *Smith v. Boone*, 84 T. 526, 19 S. W. 702.

Where land is actually surveyed, and its lines marked, they control over the general description "up the bayou." *Lutcher & Moore Lumber Co. v. Hart* (Civ. App.) 26 S. W. 94.

Where a purchaser bought a subdivision of an original survey, which survey, as made upon the ground, is shown with certainty, calls in the deed must yield; and the fact that the deed, by mistake, called for a north line 276 varas further north than the surveyor actually ran and established the line, does not entitle such purchaser to go to that line, and take in land not embraced in the original survey. *Shelton v. Bone* (Civ. App.) 26 S. W. 224.

Where there was an inconsistent description in a survey, by reason of a call for two points to be coincident, which in fact were not so, and there was evidence that one point was located on the ground at the time of said survey, and that it corresponded with other descriptions in the survey, thereby tending to show that the line of said survey was run upon the ground, it will control the other description in the field notes of a point which could only be located by course and distance from an established corner several miles away. *Utley v. Smith* (Civ. App.) 32 S. W. 906.

The boundaries of land as actually made and marked on the ground by the surveyor will control over a call in the field notes for the boundary of another tract, erroneously supposed by the surveyor to be identical with the one marked by him. *Busk v. Mangum*, 37 S. W. 459, 14 C. A. 621.

Where, in making an original survey intended to segregate a particular tract of land from the public domain, the surveyor establishes and marks a corner so it can thereafter be identified on the ground as called for in his field notes, such corner will control a call for another object as another corner, when he did not go on the ground, and establish such other corner, but merely supposed that course and distance from the corner established would reach it. *Cox v. Finks* (Civ. App.) 41 S. W. 95, appeal dismissed 43 S. W. 1, 91 T. 318.

Where field notes called for unmarked lines of surrounding older surveys, the position of which could be actually ascertained, and there was no evidence as to how the survey was actually made, it was presumed that the surveyor actually made the survey on the ground, and such unmarked lines prevailed over calls for courses and distances, in case of conflict. *Waggoner v. Daniels*, 44 S. W. 946, 18 C. A. 235.

Where a foreclosure decree covers designated quarter sections of land, but the distance called for in the field notes does not cover all of such quarter sections, the calls for the marked and established corners override the calls for distance, where nothing more certain appears to the contrary, though such calls for corners carry two quarter sections, and the calls for distance but one. *Galloway v. State Nat. Bank* (Civ. App.) 56 S. W. 236.

Where, at one end of the line of an original survey, there are evidences of the remains of trees corresponding with the calls in the survey, it is to be regarded as a marked line, and its location cannot be ascertained by running the lines of the original survey by course and distance. *Wiley v. Lindley* (Civ. App.) 56 S. W. 1001.

Where it appears in a boundary suit that there are well-known and undisputed original corners established on the ground in surrounding surveys, that fact does not control

other calls which are conflicting, but such fact must be considered by the jury, together with all the other circumstances in evidence, to determine the conflicting calls. *Master-son v. Ribble*, 78 S. W. 358, 34 C. A. 270.

A call for a marked line as a boundary, which is well marked and defined, controls a call for a beginning corner evidently not on the true boundary line, but in all probability located after the location of the surveys of the land. *Deaton v. Feazle* (Civ. App.) 90 S. W. 534.

A corner called for in a deed will, if identified, be accorded the weight and dignity of a marked line, and will control a call for distances, unless overcome by force of circumstances and shown to be a mistaken call. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

In order that a call for a marked boundary line may overcome a call for courses and distances, it must be identified on the ground; but, if this is done, it is immaterial that the marked corner has been destroyed. *Id.*

The lines as actually run and the corners as actually established, when consistent with other locative calls, fix the true boundaries of a survey. *Thatcher v. Matthews*, 101 T. 122, 105 S. W. 317.

An owner of 50 acres of land made a subdivision from it which he called a 50-acre subdivision, but there was no evidence that the entire 50-acre tract was included therein. The map of the subdivision purported to have been made from actual survey on the ground, and the only known and fixed object designated was a country road on the west of the tract. The dimensions of all the lots were shown, and they either adjoined each other or were separated by a roadway of designated width. Plaintiff purchased a lot which lay 110 feet from the east line of the subdivision. Held that, in the absence of evidence showing the location of the lot by the original surveyor, it could not be located 110 feet west of the east line of the original undivided tract, which would be 197.93 feet further east from the country road than the distance shown on the map, but the general rule requiring the footsteps of the surveyor to be followed in locating the lines of a survey should be applied. *Cheek v. Foster*, 50 C. A. 387, 110 S. W. 765.

Calls for the corners of adjoining surveys must be rejected when they conflict with the actual work of the surveyor. *Taft v. Ward* (Civ. App.) 124 S. W. 437.

The true location of a survey or any line or corner thereof should be determined by finding the lines and corners actually made on the ground by the surveyor, and if the calls in the field notes are inconsistent so as to make the location of the true line uncertain, those calls should be adopted which are most consistent with the surveyor's intention as shown by the field notes, and the surrounding circumstances. *Lafferty v. Stevenson* (Civ. App.) 135 S. W. 216.

A survey actually made on the ground, and which can be identified, held to control the calls in the field notes. *Grigsby v. Earle* (Civ. App.) 138 S. W. 448.

A line fixed by stipulation is controlling over other calls. *Francis v. Patterson* (Civ. App.) 143 S. W. 678.

Where there is an actual survey of public land granted, and the field notes of the survey are expressed in the grant, it is conclusively presumed that the government intended to convey the land embraced in the survey, and the court in determining the land granted must follow the footsteps of the original surveyor. *State v. Palacios* (Civ. App.) 150 S. W. 229.

The rule that in the identification of a survey the footsteps of the surveyor on the ground should be followed by whatever rule they may be traced cannot be applied, unless the survey and the footsteps of the surveyor are actually found and identified. *Crosby v. Stevenson* (Civ. App.) 156 S. W. 1110.

8. — Control of calls for adjoiners over other elements.—A call for an old established boundary line will control a call for course or distance. *Bolton v. Lann*, 16 T. 96; *Woods v. Robinson*, 58 T. 655; *Langermann v. Nichols* (Civ. App.) 32 S. W. 124; *Morse's Heirs v. Williams*, 142 S. W. 1186.

Where a survey called to commence in the immediate neighborhood of a well-known corner, and to run east 3,160 varas to the corner of another survey, and by following the distance none of the natural or artificial objects called for could be found at the places named, whereas, if the first line stopped at the distance of 750 varas, every crossing of the creek, spring, and artificial object called for was found, the long distance called for should be disregarded, and the survey should be made to stop at 750 varas. *Stafford v. King*, 30 T. 257, 94 Am. Dec. 304.

A description in a deed reciting that the tract contained 200 acres, being part of the C. survey, the other part of which had been sold to G., will control a contradictory description by courses and distances, where the part sold to G. is clearly identified. *Ragsdale v. Robinson*, 48 T. 379.

The field notes of three grants all gave the northern boundary of a fourth grant as their southern boundary. The distance, however, from the south line of such fourth grant to the south line of the three grants, exceeded by 240 varas the distance called for as the width of the southern grant. Held that, notwithstanding such discrepancy, the south line of the three grants would be considered the north line of the other, many years after the surveys were made and the monuments referred to had disappeared. *Freeman v. Mahoney*, 57 T. 621.

A call in a survey for the line of another survey, which is an open line on the prairie at the point of intersection, will not yield to a conflicting call for distances when the location of the open line is certainly determined by natural objects, marked lines, and fixed corners of abutting surveys. *Fordtran v. Ellis*, 58 T. 245.

Where a survey calls for adjacent grants that bound it without dispute on four or more sides, and five of the corners of such survey are established, the boundaries of such survey must be determined by the calls for the previous adjacent grants, and by a line run so as to establish the sixth and last corner as called for in the grant, and from that corner run the crossing lines, disregarding both course and distance, if necessary, so as to embrace within the lines of the patent all of the land lying between the adjacent surveys called for in the patent as constituting the outer boundaries of the grant. *Woods v. Robinson*, 58 T. 655.

A call for the marked line of an older adjoining survey will prevail over a call for distance, the presumption being that the surveyor identified the line called for by the marks on the ground, and that the mistake occurred in the measurement or calculation of the distance. *Duff v. Moore*, 68 T. 270, 4 S. W. 530.

Where it was the evident intention of the officers of the state to include in the locations all the vacant land between the boundaries of surrounding surveys, and it was not shown that more land was embraced in the field notes than they so intended, and the configuration of the land was not changed, held, that the abutting surveys called for would be the correct boundaries, and that the locations should extend to them when no material excess in the land is shown. *Moore v. Reiley*, 68 T. 668, 5 S. W. 618.

In an action involving the boundary to land, an instruction that though "no survey has ever been made, yet if the calls of the patent to the land for other and surrounding surveys are such that thereby the land conveyed by the patent can be identified," there is a sufficient description, is erroneous, where the eastern boundary is in controversy, and no survey is called for except on the north. *Bigham v. McDowell*, 69 T. 100, 7 S. W. 315.

The northwest corner of a survey was plainly marked, and part of the west line was also marked. The rest of the survey had apparently not been run on the ground, but the southeast corner was ascertainable from the field notes, being located on an established line of another survey, and at a given distance from an established point. The lines of survey as called for in the field notes were correct as to courses, but were too short to reach from one of said corners to the other. Held, that the survey included all the land between the corners bounded by the lines as extended so as to reach from one corner to the other. *Randall v. Gill*, 77 T. 351, 14 S. W. 134.

Where a patent calls for unmarked lines of surrounding surveys, the position of which can be accurately ascertained, and there is no evidence as to how the survey was actually made, such unmarked lines will prevail over courses and distances, in case of a conflict. *Maddox v. Fenner*, 79 T. 279, 15 S. W. 237.

The first of certain land certificates was located by starting at a known point on the south side of a river, and running south a certain distance, thence west 950 varas, and thence north to the river, so as to inclose 640 acres; and each succeeding block was located in a similar manner, starting from the northwest corner of the preceding block, and specifying the river as the north side. Held, that where, by reason of a sharp turn in the river towards the south, for which allowance was not made in the field notes, a certain block lies between two and three miles north of the river, if placed according to the call for the corner of the preceding block, or does not adjoin such block, if placed south of the river, the former call must prevail; and a subsequent attempted correction of the survey of the disputed block, and those depending on its location, whereby the river is made the north boundary line, is void, since it is a relocation, and not a correction. *Sanborn v. Gunter*, 84 T. 273, 17 S. W. 117, 20 S. W. 72.

In determining the bounds of a survey a call for another survey definitely located is properly ignored where, if followed, it will necessitate a total disregard of course and distance, and cause the remaining bounds both to conflict with several other surveys and to end so far from the starting point as to exclude about 1,000 acres from the survey. *Gregg v. Hill*, 82 T. 405, 17 S. W. 338.

Where a junior survey was not made on the ground, and the calls are for the surrounding surveys, the lines of such surveys will be the lines of the junior survey. *Kuechler v. Wilson*, 82 T. 638, 18 S. W. 317.

Where, in describing a boundary line, another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded. *Worsham v. Chisum* (Civ. App.) 28 S. W. 905.

Where, in order to give effect to calls for unmarked lines of surrounding surveys, surveyed about the same time, the configuration of three out of the four surveys would have to be changed, and also all calls, except the one requiring the surveys to connect, among which would be included a corner marked by bearing trees, would have to be disregarded, and the north and south lines of the surveys increased 10 per cent., it is proper to disregard the call for the surveys to connect. *Texas Town-Site Co. v. Hunnicutt* (Civ. App.) 31 S. W. 520.

Survey No. 426 is north of survey No. 11. The northwest corner of survey No. 11 is at a point 68 varas south of the southwest corner of survey 426, and bearing trees of the southwest corner of the latter survey do not correspond with the bearing trees described in the patent of survey No. 11 as the northwest corner of said survey. The northwest corner of survey No. 11 is 60 varas south of the south line of survey 426, called for as being the north line of said survey. Held, that there was a vacancy between the two tracts, notwithstanding the field notes in the patent of survey No. 11 gives its north boundary line as identical with the south boundary line of survey 426. *Koch v. Poerner* (Civ. App.) 55 S. W. 386.

Where the boundaries of a survey were in issue, and there was no evidence as to how the survey was made, a call in the field notes for a line fixed with certainty should prevail over a call for distance, which, if followed, would make a shortage in the quantity of land called for by the grant. *Besson v. Richards*, 58 S. W. 611, 24 C. A. 64.

In a controversy as to the boundary of a survey, located by projection from a certain point, the evidence showed that there was no dispute as to the northern boundary of surveys on the south or the southern boundary of surveys on the north. The surveyor's field notes called for a line commencing at the northwest corner of the survey on the north, and running along the boundaries of the adjoining surveys, mentioned by name, but the distances given did not bring such boundary line to within 400 varas of some of such named surveys. Held, that the surveyor was mistaken as to distances, and that his mentioning the other surveys by name showed that it was his intention to include in such survey all the land between the surveys mentioned. *Coleman County v. Stewart* (Civ. App.) 65 S. W. 383.

Where a survey is located by projection from a certain point, and a boundary thereof does not correspond with the boundary line of adjoining surveys, which are mentioned in the field notes of such survey, in determining whether the calls for distance in such survey or the calls for the latter surveys shall control the survey must be con-

strued by reference to the calls in the grant, and such calls cannot be aided by the lines and calls of other surveys not mentioned in the field notes, and the intention of the surveyor at the time of the location must be ascertained and given effect. *Id.*

Where the beginning corner of a survey located on a river cannot be accurately identified on the ground on account of changes in the river, other surveys adjoining, and made subsequently by different surveyors, referring to and identifying the prairie corners of the former survey by artificial objects, may be looked to in identifying the beginning corner; but, if the beginning corner is located, from the evidence, within a radius inconsistent with the reputed prairie corners, the latter must yield. *Matthews v. Thatcher*, 76 S. W. 61, 33 C. A. 133.

Where the surveyor laying out the S. survey, 65 years before the controversy in question, called for every angle and offset in any adjacent survey, and the east line of the adjoining Y. survey was called as the western boundary of the S. survey, which line could be located with absolute accuracy, and its true location was not disputed, and also called for the southeast corner and the east line of the A. survey, which was definitely fixed, such unmarked lines, designated as the eastern boundaries of the Y. and H. surveys, controlled calls for courses and distances which came 2,055 varas short of tying on the east line of the Y. survey. *Steusoff v. Jackson*, 40 C. A. 328, 89 S. W. 445.

A call of a deed for a railroad right of way will, if unexplained, be treated as a call for another tract of land, and will control conflicting calls for distance. Judgment (*Civ. App.* 1905) 87 S. W. 847, reversed. *Couch v. Texas & P. Ry. Co.*, 99 T. 464, 90 S. W. 860.

A survey of a tract of land called for the old surveys on every side thereof and for courses and distances without any distances being measured on the ground. The calls for the old surveys were the most material calls. Held, that the calls for the older surveys controlled, and included in the survey the land bounded by the old surveys though others had subsequently, pursuant to the scrap act, made surveys within such boundaries. *Isaacs v. Texas Land & Cattle Co.* (*Civ. App.*) 99 S. W. 1040.

The line of a tract of land may as well be the subject of a call as any other object, and such a call will control course and distance. *Ridgell v. Atherton* (*Civ. App.*) 107 S. W. 129.

Where it appears from a survey that it was the intention of the surveyor in making an office survey to make the boundary line of an actual survey the boundary line of the office survey, which line was well marked and defined, the fact that the distance called for in the office survey would overlap the boundary of the actual survey is of no consequence, since the call for distance must yield to the course, and this is so, though it is claimed that the survey called for had been abandoned. *Shindler v. Lutchter & Moore Lumber Co.* (*Civ. App.*) 107 S. W. 941.

The calls in a patent constitute a written description, and when not ambiguous or conflicting, the boundaries of the land granted are to be determined from some of the calls of the grant, and extraneous facts can only be used to remove or determine conflicting calls, and hence where patent of the H. survey by its calls ties a boundary line in dispute to the G. and A. surveys, and neither the H. survey nor the G. nor A. survey ties to any call for the B. survey, and the calls in the H., G. and A. surveys are not uncertain, a line traced from the B. survey could not be considered. *Guill v. O'Bryan* (*Civ. App.*) 121 S. W. 593.

The call in a patent of a survey for the south line of another survey as its north line controls a call for distance which will not make its north line reach the other survey. *Goldman v. Hadley* (*Civ. App.*) 122 S. W. 282.

A call in the patent of a survey for a fixed and undisputed line as a boundary cannot be controlled by the lines and corners marked on the ground by the original surveyor in making the survey; his field notes making no reference to such objects. *Id.*

The reason why a call for an unmarked prairie line will usually not control over a call for distance is because the surveyor probably did not know where such line was, being unmarked, but supposed it as indicated by the call for distance, and ran his line the distance called for in the field notes, and called for the unmarked line under the mistaken belief that he had reached it, but a call for an unmarked prairie line will control over a call for distance where its location is easily ascertained by running it from known lines or corners, so that it might be reasonably supposed that the location of such line was more probably accurate than the measurement of the distance thereto. *State v. Sulflow* (*Civ. App.*) 128 S. W. 652.

Where an unmarked line of an older survey is called for and it can be identified with certainty, it will supersede a call for distance. *Goodson v. Fitzgerald* (*Civ. App.*) 135 S. W. 696.

Where a marked line of an adjacent survey is called for, and such line can be ascertained with accuracy, but there is no evidence as to how the survey was actually made, and a controversy arises as to whether course and distance or the marked line shall prevail, objects found on the ground may be considered as indicating the footsteps of the surveyor, though there are no calls for such objects in the grant. *Id.*

Calls in a deed held controlled by reference to partition decree and calls for adjoining. *Morse's Heirs v. Williams* (*Civ. App.*) 142 S. W. 1186.

A call for a line or corner of another survey, made under a misapprehension as to the true location of such survey, will not control as to the location of a survey calling for such corner or line. *Hamilton v. State* (*Civ. App.*) 152 S. W. 1117.

In determining the relative importance of locative calls, designations for adjacent surveys are artificial objects in determining the boundaries of grants. *Crosby v. Stevenson* (*Civ. App.*) 156 S. W. 1110.

9. — Control of maps, plats and field notes over other elements.—Field notes named in a decree of partition as determining the boundaries are conclusive among the parties thereto, although a plat of the commissioners in conflict therewith also forms part of the decree. *Hurt v. Evans*, 49 T. 311.

The lines of a grant cannot be extended in conformity with a map deposited in the land office in 1847 without field notes, but accompanied by an explanatory letter of the surveyor, where such extension would violate distance, quantity, boundaries, and config-

uration, and establish a survey repugnant to all the calls of the grant. *Schaeffer v. Berry*, 62 T. 705.

Where two surveys made by the same surveyor at about the same time call for a common division line, and are mapped as adjoining, the fact that an excess exists in the amount of land included in one or both along the line of junction is not sufficient reason for separating them in favor of one subsequently locating on such excess. *Stanus v. Smith*, 8 C. A. 685, 30 S. W. 262.

A description of land as part of a tract or survey is general, and will be controlled by boundaries indicated on a plat or map. *Bogges v. Allen* (Civ. App.) 56 S. W. 195, judgment affirmed *Allen v. Bogges*, 58 S. W. 333, 94 T. 83.

Where the issue is the location of a boundary line between adjoining lands, that method of constructing the line should be adopted which will present an arrangement of several surveys as nearly identical with that shown by the original map as possible, instead of an observance of courses and distances, which would result in the destruction of the original configuration of the surveys. *Lyon v. Waggoner*, 37 C. A. 205, 83 S. W. 46.

Where the field notes of a survey are complete in themselves, and contain no inconsistent calls, and can be identified by course and distance from the beginning corner, it is not permissible to look to the field notes of another survey to create inconsistency in the calls of the survey which are complete in themselves. *Upshur County v. Le-wright* (Civ. App.) 101 S. W. 1013, modifying 99 S. W. 441, on rehearing.

The lines of a grant must be established by the calls contained in its field notes where there is no conflict or inconsistency in them. *Polk County v. Stevens* (Civ. App.) 143 S. W. 204.

10. — Control of quantity over other elements.—On an issue involving the location of a certain boundary line, it was proper to charge that the jury should not consider any excess in the quantity of land in the survey in question, unless it would assist them in determining the original location of such disputed line. *Branch v. Simons* (Civ. App.) 48 S. W. 40.

In settling a boundary line dispute, its location is not controlled by quantity of land in the respective parcels, where the proper course from a known starting point is given, though quantity may be considered in solving a doubt as to the true variation to be adopted in running the line. *McDonald v. McCrabb*, 47 C. A. 259, 105 S. W. 238.

Where there was no obscurity about the dividing line between tracts of land conveyed by deed and containing in reality only 124 acres, and adjoining land in the same survey, and such line and the respective corners called for in the deed were distinctly marked and established, the grantee was limited to the lands described in the deed, and the mere recital, following the description calling for such line and corners, "Containing 160 acres, being the north half of said survey," did not control, since a general description cannot control a particular description, about which there is no doubt. *Ridgell v. Atherton* (Civ. App.) 107 S. W. 129.

The fact that the number of acres included within the lines run according to courses and distances equalled the number called for, while the adoption of other lines would embrace an area largely in excess thereof, was evidence in support of the judgment adopting the lines run according to courses and distances. *Hughes v. State*, 57 C. A. 306, 123 S. W. 177.

Calls for quantities will not prevail over calls for corners and lines which are identified on the ground by bearing trees. *Granberry v. Storey* (Civ. App.) 127 S. W. 1122.

11. Natural and permanent objects.—Conflict with other elements, see ante.

Lines and boundaries cannot be constructed with reference to objects that may be found on the ground as indicating the footsteps of the surveyor, when there are no calls in the grants for such objects. *Hamilton v. Blackburn*, 43 C. A. 153, 95 S. W. 1094.

Where the bearing trees called for in a senior survey had disappeared, a claimant under a junior survey was entitled to show the location of the trees. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

12. Artificial monuments and marks.—Conflict with other elements, see ante.

The identity of a tree relied on in fixing the northwest corner of the M. survey is not sufficiently shown to call for a change in the lines as fixed by surveyors 50 years ago, where the tree seems to have been recently marked, and the marks are not such as surveyors make in marking bearing trees; where the south line of another survey on which such corner rests is a well-defined line, running much of the way through timber, and such tree is 30 rods south of such line; and where a surveyor who located a younger survey west of it in 1857 testified positively that he found an oak tree called for by the M. survey as its northwest corner, on which he fixed the northeast corner of the younger survey, and that such tree was a bearing tree, the subsequent destruction of which was clearly shown. *Williams v. Beckham*, 6 C. A. 739, 26 S. W. 652.

Lines and boundaries cannot be constructed with reference to objects that may be found on the ground as indicating the footsteps of the surveyor, when there are no calls in the grants for such objects. *Hamilton v. Blackburn*, 43 C. A. 153, 95 S. W. 1094.

Where a stake is placed to locate a corner of a survey, the stake fixes the corner as conclusively as if the corner was marked by a permanent object. *Thatcher v. Matthews*, 101 T. 122, 105 S. W. 317.

The court will attach considerable importance to a call in a grant of a Mexican state for stone monuments in the field notes, where the law of the state required corners to be erected of quarried rock and lime mortar. *State v. Palacios* (Civ. App.) 150 S. W. 229.

13. Courses and distances.—Conflict with other elements, see ante.

Where a marked line can be found, it must be pursued as far as it may be done in its whole extent; but, if it does not extend to the point of intersection, then it must be continued until the intersection is made, taking the course called for or required by the deed. *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612.

Where a division line exists at both extremities, and for a principal part of the distance, it will be considered a continuous line. *Id.*

A grant of flats beginning at the corner of a lot, "and running thence north, 150 varas, to a stake; thence eastwardly, with the channel of the harbor in the bay and with the general course of the island, at the distance of at least 150 varas from the shore, to a stake 150 varas from the easternmost point of the island"—should be construed as running the boundary line from the starting point eastwardly, keeping at least 150 varas from the shore, to the channel, and not, in a direct line, to the nearest point of it. *Galveston v. Menard*, 23 T. 349.

A grant described a third line, by course and distance, to a stake in the line of another survey; thence, along such line, by course and distance, to the upper river corner of such other survey. The line of the other survey ran across a prairie, and was not marked except by blazes on a few scattering trees near the river. To make the intersection called for, the course and distance of the third line called for would have to be materially altered and enlarged. Held, that the third line should be run by course and distance only, and the fourth line by course, with a prolongation of the distance to close the survey, if necessary. *Booth v. Strippleman*, 26 T. 436.

In trespass to try title to determine the northern boundary of Burnet's colony, under the designation in Pasch. Dig. art. 248, "a point clear of the twenty boundary leagues parallel with the river Sabine; thence, on a line, to Navasoto creek; thence down the creek"—the evidence should be confined to a direct west line from said "point," and, if such line would pass north of Navasoto creek, it must be varied so as to strike the northern branch of that creek. *Elliot v. Mitchell*, 28 T. 105.

Where the shape of a tract was intended to be a square, and the lines called for in the patent are of equal length, the fact that the course of one line is S., 85 deg. E., instead of S., 56 deg. E., is an obvious clerical mistake, corrected by the other calls. *Barnard v. Good*, 44 T. 638.

Land was described as "the lower or south half" of a tract. The boundary running nearest north and south ran north, 19 deg. E., and the other ran north, 71 deg. W. Held, that the parcel should be divided by a line run north, 71 deg. W., and that the most southerly part was that conveyed. *Farley v. Deslonde*, 69 T. 458, 6 S. W. 786.

Where neither the corners of plaintiffs' nor defendants' land are satisfactorily established, and there is a well-established and identified corner of another survey, from which, by following course and distance, defendants' survey can be constructed, such course should be followed, though the boundaries thus established include land within the boundaries of plaintiffs' junior survey. *Griffith v. Rife*, 72 T. 185, 12 S. W. 168.

A call in a survey read, "Thence east with the south line of the Davis survey, * * * to a stake and west line of the Becton survey." The south line of the Davis survey did not strike the west line of the Becton survey, but, if the latter were prolonged south, it would strike the Davis survey at the southeast corner. Held, that the call should go to the Davis southeast corner. *Warden v. Harris* (Civ. App.) 47 S. W. 834.

A call in a patent read, "Thence south 744 varas, to place of beginning." To reach such beginning it was necessary to go north 518 varas. Held, that the word "south" should read "north." *Id.*

The rule that, in the absence of natural or artificial objects identifying a survey on the ground, the proper method of locating it is to run course and distance from the nearest identified object or corner called for in the field notes of the survey or its connections, is not a rule of law of universal application. *Smith v. Jarvis*, 47 C. A. 185, 105 S. W. 1168.

14. — Reversing calls.—Only when the lines of a survey were actually run and measured on the ground can the calls be reversed to ascertain the boundaries. *Ayers v. Lancaster*, 64 T. 305.

The order in which the surveyor gives the lines and corners in his certificate of the survey is immaterial; and where the thing to be determined is a line running from a fixed object, directly west a given distance, to another fixed object, and the object called for at the eastern end has been obliterated and that at the western end remains, the line may be determined by reversing the tracing, and running the proper course and distance from the western end. *Griffin v. Roe*, 2 U. C. 511.

In trespass to try title, the issue related to the east boundary line of plaintiff's league and labor of land. By following the calls of the field notes from the northwest corner of the grant (a point on a river), south along the river, then east, then north, and thence west, the point of beginning would not be reached by about 1,000 varas; whereas, by reversing the calls and traveling the lines east, south, and west, the south line would reach the river in about 1,000 varas less than called for in the notes. There was evidence tending to show that the north line had been surveyed, and that the south line had not. Held, that it was not error for the court to reverse the calls, and trace the lines east, south, and west, so as to harmonize the objects of the grant. *Swenson v. Willsford*, 84 T. 424, 19 S. W. 613.

It is not error in ascertaining the true locality of the back line of a survey fronting, with established corners, on a river, to reverse the calls of the survey, if it is found that thereby the discrepancy in the area of the survey is lessened, and the back line falls along the line of the alleged conflicting survey, which is, moreover, of prior date; the recognized rule being that the beginning corner in the certificate of survey is of no higher dignity than any other corner. *Miles v. Sherwood*, 84 T. 485, 19 S. W. 853.

The rule as to reversing the calls of a survey in order to establish a disputed boundary does not apply when the only evidence tending to identify any corner or line of the disputed land is evidence in reference to one corner, and the other boundary can be established by running course and distance. *Pierce v. Schram* (Civ. App.) 53 S. W. 716.

If, by reversing the calls of a grant, a more accurate result can be obtained in locating the land surveyed than by following the order of the field notes, that method should be pursued. *Burge v. Poindexter* (Civ. App.) 56 S. W. 81.

Where it is apparent from the face of a deed that there is a mistake as to the directions in the calls for course and distance, the calls may be reversed in order to ascertain the intention of the grantor. *Moore v. Loggins* (Civ. App.) 114 S. W. 183.

Where the calls mentioned in a deed conveying part of a survey are such that they would extend beyond the survey and would not close, but it is apparent from the

deed itself which part of the survey was intended to be conveyed, the court, looking at the map and the other field notes, and seeing a way to harmonize the calls, may take part of them in reverse direction, so as to close the survey, and may ascertain by calculation from the area mentioned in the deed the direction of the last call, which would make clear the grantor's intention to convey certain land, and the deed is not void. *William Carlisle & Co. v. King*, 103 T. 620, 133 S. W. 241, affirming judgment (Civ. App.) 122 S. W. 681, and rehearing denied (Sup.) 133 S. W. 864.

Calls in the field notes of a survey may be reversed, when a call for a posterior line is more definite than the first line, and more clearly shows the footsteps of the surveyor; but otherwise the calls should be followed in the order given in the field notes. *Daughtrey v. McCoy* (Civ. App.) 135 S. W. 1060.

In determining the location of a survey, it is as lawful and persuasive to reverse the courses as to follow the order in the certificate. *Crosby v. Stevenson* (Civ. App.) 156 S. W. 1110.

15. Location of corners.—Conflict with other elements, see ante.

The ascertainment of any one corner of a survey is sufficient to identify it, where the courses and distances are given; and, in order to ascertain a corner, the surveyor is not confined to the discovery of landmarks called for in the field notes, but may resort to his recollection of objects not mentioned in the field notes. *De Leon v. White*, 9 T. 598.

Effect should be given to all the several corners of a survey if it can be done, and a second or third corner may be as useful in locating the survey as the beginning corner; but a third corner, which is at best doubtful, cannot, in fixing the position of the survey, prevail over the beginning corner; and especially is this the case where the survey in question is based upon an older one, and the beginning corner is identical with a corner of the older survey, which is identified on the ground. *Hord v. Olivari* (Sup.) 5 S. W. 57.

An instruction making the importance of an established northeast corner, in locating the north and west lines of a survey, dependent upon the jury's belief that such western line was not run, is erroneous, as such corner has the same weight for the purpose in question, whether the western line was run or not. *Scott v. Pettigrew*, 72 T. 321, 12 S. W. 161.

Where the beginning corner of a survey is the southwest, but the southeast corner is equally well identified, a charge limiting the jury to finding the unidentified northeast corner by the first and second lines from the southwest corner is erroneous, as the southeast corner is of equal importance, unless the line from the former corner was actually run and measured, and that from the latter not. *Scott v. Pettigrew*, 72 T. 321, 12 S. W. 161; *Lancaster v. Ayers* (Sup.) 12 S. W. 163.

In an action to establish a boundary line, where the beginning corner calls for a wild China tree, and none of the other corners or lines have been marked on the ground, it is error to charge that "a beginning corner is of no higher dignity or importance than any other corner of the survey," since the true location of the beginning corner is controlling. *Ayers v. Beatty*, 5 C. A. 491, 24 S. W. 366.

On an issue as to the location of land conveyed by courses and distances, it is error to instruct that, if a corner of an adjoining survey was a well-marked corner, the jury might adopt it as a beginning corner in locating the land in controversy, where a calculation from the corner of other adjoining surveys would vary such location, and there is testimony that a corner of the land in controversy was established at the place where the calculation from such other adjoining surveys would locate it, though the corner marks testified to as having been placed there are not mentioned in the deed or field notes of the land in controversy. *Davis v. Coleman*, 40 S. W. 606, 16 C. A. 310.

Whether or not land sued for was a part of plaintiff's survey turned on the position of its southwest corner. The field notes of the survey placed the beginning, the southeast corner, on the west line of an old survey, but calls in the north and south line for a railroad conflicted with calls for corners, and showed that the surveyor was mistaken either as to the location of the railroad or the west line of the old survey. From contemporaneous surveys it was apparent that the surveyor knew the location of the road, and actually placed the southeast corner east of such west line. Held, that a judgment for plaintiff was erroneous, since, by placing the beginning corner where the surveyor actually located it, and traversing the length of the south line, the southwest corner would fall short of the land in dispute. *Hunt v. O'Brien* (Civ. App.) 50 S. W. 487.

A deed described land as commencing on an extension of a street a given distance from a city tract line which crosses the street obliquely at an acute angle from northeast to southwest. Held, that the deed called for a line at right angles from the city tract line, and not the longer line extending from the point where the tract line crossed the street. *Raley v. Magendie* (Civ. App.) 116 S. W. 174, motion denied (Civ. App.) 116 S. W. 1198.

16. Location of lines.—Conflict with other elements, see ante.

If the line cannot be traced in its whole extent, still it is to be observed, and cannot be departed from where it can be found and traced, especially after long-continued occupancy in reference to it. *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612.

When a surveyor sought to correct and enlarge a survey, which he had made with plainly marked lines and established corners, by simply running out one line from a corner of the tract, establishing no corner there, but calling for that distance in his field notes, and said notes called for the bearing trees at the corners established in the original survey, it was held that the true boundary line was that formed in the original survey, and that there was in fact no correction of the survey at all. *Bartlett v. Hubert*, 21 T. 8.

A deed purporting to convey "one hundred acres of the land, known in the division of the Morgan league as part of the lot No. 12, having the original lines of the said league for its north and south boundaries, and adjoined on the east by lot No. 11," is a specific grant of 100 acres, having for the western boundary a line running parallel with the west line of lot No. 11, so as to include 100 acres adjoining that lot. *Lenon v. Walker*, 2 U. C. 563.

A surveyor, in running a division line where it strikes the bend of a river, may go around the bend, and continue his line at a point on the river directly in the course of the line he was running, so as to give to the tract on each side of the line its proper quantity of land. *Tucker v. Smith*, 68 T. 473, 3 S. W. 671.

If the beginning point is established, lines should be run in both directions as far as possible, and the gap closed as seems most consistent with all the calls. *Hill v. Smith*, 6 C. A. 312, 25 S. W. 1079.

Where a surveyor does not run on the ground some of the lines of the survey when he makes the location, but adopts lines run by a former surveyor, such lines must be followed, as if he actually ran them on the ground. *Lester v. Hays*, 38 S. W. 52, 14 C. A. 643.

The western boundary of the L. survey as called for in the patent being N., 30° W., and the western boundary of the S. survey as shown by the patent being the same, and the S. survey being north of the L. survey, and the northwest corner of the L. survey and the southwest corner of the S. survey being a common corner, the prolongation N., 30° W., of the west boundary of the L. survey, is the west boundary of the S. survey. *Bullard v. Watkins* (Civ. App.) 58 S. W. 205.

The only question in an action to try title was whether the south line of lot 3 of a certain league extended to the south line of the league. A decree in partition had established six lots, the calls of lot 6 commencing at the northwest corner of the league; thence south 5,891 varas to the south boundary of the league; thence east; thence north to a certain bayou. The west line of each succeeding lot in descending numbers commenced at the northwest corner of the next higher numbered lot, and it was the same as the east line of such lot, and the second call was east. The north line of each of the lots was on the bayou. The field notes of lot 3 showed the first course to be south only 5,830 varas. Held, that the south boundary of lot 3 was at the league boundary, since the difference in distance was accounted for by the meander of the bayou on the north boundary. *Lincoln v. Waddell* (Civ. App.) 59 S. W. 613.

A surveyor's map represented the land surveyed as being in the form of a square, with a straight line midway extending north and south across it, on either side of which line, and perpendicular to it, were eight rectangular parallelograms. Such north and south base line was the only work actually done upon the ground, the other lines being projected from it. A subsequent survey showed that it was not straight; the southwest corner of the northernmost league and the northwest corner of the league adjoining on the south, in the east tier of the block, being east of the line as described in the original survey. Held, in a boundary suit between the owners of the respective leagues, that the division line should be established by extending a line from said corner in an easterly direction, parallel with the north and south lines of the other league surveys in that tier of the block. *Wise v. Sayles*, 38 C. A. 229, 86 S. W. 775.

When some and not all of the lines of a survey were run, it becomes necessary for the jury to determine the location of the lines that were not run, as well as those that may be ascertained by following the footsteps of the surveyor. *Upshur County v. Lewright* (Civ. App.) 101 S. W. 1013, modifying 99 S. W. 441, on rehearing.

Where a boundary of a section line road sought to be opened was disputed, the authorities properly ran the disputed line upon the variation of the needle proved by test to have been employed in the blocks from which the complaining landowners' surveys take their connections. *Smith v. Jarvis*, 47 C. A. 185, 105 S. W. 1168.

Where two lines have been found, and the quantity can be obtained by connecting the termini by a straight line, the description would be so closed instead of running several lines of different courses and length to include the area. *Poitevent v. Scarborough* (Civ. App.) 117 S. W. 443, reversed, 103 T. 111, 124 S. W. 87.

In an action to establish a survey, the east line was in dispute. The evidence showed that the survey began at the southeast corner of an elder survey. The northwest corner and the southwest corner of the disputed survey were defined on the ground by the original bearing trees. Held, that the proper manner of establishing the eastern line of such survey was by running a line east from the northwest corner of the survey in dispute to the southeast corner of the elder survey, as established, by intersecting the south and east line of said survey from the known corners thereof, though it gives the survey in dispute an excess over the field notes, and then by running the line west from such southeast corner of the elder survey to the known northwest corner of the survey in dispute, and then south to its known southwest corner, then east the number of varas called for, thence north to the place of beginning, so that the survey will be run in accordance with its calls except that the calls for distances will be disregarded, which calls will be controlled by the calls for the bearing trees at the northwest and southwest corners of the survey. *Byrd v. Langbein* (Civ. App.) 135 S. W. 206.

A call in a deed held to call for a straight line, and not a line with the bend of a road referred to. *Conner v. Conner* (Civ. App.) 143 S. W. 233.

In all boundary disputes, the primary object is to ascertain the lines as they were located by the original surveyor, to which end his footsteps are to be followed, if possible. *League v. Wm. M. Rice Institute for Advancement of Literature, Science and Art* (Civ. App.) 152 S. W. 1182.

17. Designation, quantity and location of land.—Conflict with other elements, see ante.

A grantor's league extended up a river to the mouth of a creek, thence up the creek a certain distance, and the creek to the point where the league left it was navigable. The deed called for "all the upper half of the league, * * * including half of the front of said league on the river, and back for quantity." Held that, in determining the lines of the grantee's land, the river front referred to in the conveyance should be considered as including the land fronting on the creek as well as that actually on the river. *Swisher v. Grumbles*, 18 T. 164.

The owner of an unsold balance in a league of land made a deed for all and singular a certain piece or parcel of land containing 1,000 acres, situated and described as follows: "In Harris county, and on the Buffalo bayou, adjoining the city of Houston, being the part of the league granted to R." Held that, as against a subse-

quent vendee of the maker of such deed, the unsold balance of the league passed, although it contained more than 1,000 acres. *Hunter v. Morse*, 49 T. 219.

The description in a deed was as follows, viz.: "Beginning at the west corner of the G. survey; thence S., 45° E., to B.'s corner; thence N., 45° E., to B.'s corner on T.'s line; thence N., 45° W., to the south boundary line of the E. survey; thence S., 45° W., to the beginning,—to include 571 acres of land; and, if said point will not include enough land to make the complement, 571 acres, it is to run north on said E. survey for the deficit." Held, that it passed all the grantor's land in the G. league, bounded on one side by B.'s line and on the other by T.'s line, and that what it lacked of 571 acres should be supplied from the E. league. *Johnson v. Garrett*, 25 T. Sup. 13.

A deed conveying a portion of a block of land described the boundaries as "beginning with the southeast corner of the block; thence west, with the south boundary line of said block, — varas, to a stake"; and then gave the remaining boundaries by courses and distances, "so as to contain five acres of land off the east side of the block." Held, that the deed limited the quantity of land intended to be conveyed to five acres, and that the length of the first line called for in the deed was not specified because it was intended for that line to be only long enough, when considered with the other calls in the deed, to make an area of five acres. *Henry v. Whitaker*, 82 T. 5, 17 S. W. 509.

A description of land in a deed gave the length and direction of three lines, running from the beginning point south, east, and north to a well-defined point, thence calling to go west and south far enough to include 400 acres conveyed. There was nothing to indicate that the lines thus given would not close, but a calculation demonstrated that a line running from the northeast corner only such a distance west as that a line running south from the northwest corner would reach the beginning point would not embrace the 400 acres within the boundaries described. The defect in the description consisted in the failure to state the length of two of the lines, and the omission of a line necessary to close the survey. Held, that the description was not fatally defective, but would be sustained by supplying the line necessary to close the survey, which would include the quantity. *Tompkins v. Thomas*, 54 C. A. 440, 118 S. W. 581.

18. Maps, plats and field notes.—Conflict with other elements, see ante.

Where there is a conflict as to the location of land by a survey, but two corners thereof can be definitely identified, the courses and distances may be ascertained from the field notes, and the entire survey constructed therefrom. *Rand v. Cartwright*, 82 T. 399, 18 S. W. 794.

It is error to charge that the intention of a surveyor that a line should run the distance called for in his field notes, rather than to a corner called for, must be determined by evidence outside of the call, in the notes themselves. *Mock v. Hatcher* (Civ. App.) 43 S. W. 30.

The field notes of a surveyor stated that on a line running from a corner he found a corner with bearings, and that the point where he found the bearings was a specified distance south of another corner. Another surveyor, making a survey and map, showed by his measurements that such corner with bearings was not that distance from the corner referred to in the field notes. Held, that the field notes were not evidence of the location of the corner with the bearings. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

Field notes do not locate lines on the ground, but merely furnish data by which surveyors can locate them. *International & G. N. R. Co. v. Morin*, 53 C. A. 531, 116 S. W. 656.

Where two adjoining lots in a block are conveyed in accordance with the plat of the block, their boundaries will be located in accordance with such plat, and they will not be affected by the transfer, by the same owner, of another lot under a prior plat, giving the lots different widths and boundaries. *Toudouze v. Keller* (Civ. App.) 118 S. W. 185.

The term "field notes" in its ordinary sense are the notes made by the surveyor in the field while making a survey, describing by course and distance, and by natural or artificial marks found or made by him, where he ran the lines and made the corners. *State v. Palacios* (Civ. App.) 150 S. W. 229.

Where a map attached to the grant of a Mexican state has letters on which, without any explanation, are meaningless, but under the map in the original grant is an explanation of the same, made by the surveyor general, showing that the letters indicate the boundaries of surrounding surveys, the explanation indorsed on the map is a part thereof. *Id.*

19. Adjoining or adjacent lands.—Conflict with other elements, see ante.

The line of a tract of land may as well be the subject of a call as any other object. *Marshall v. Crawford*, 2 U. C. 477.

Where a deed calls for the corner of a survey as it was supposed to be at the time of execution, and it is afterwards found that the survey was wrongly located, it will, if such was the intention of the parties, convey the land located where the corner of the survey was supposed to be, and not land situated where the true corner is subsequently established. *Koenigheim v. Miles*, 67 T. 113, 2 S. W. 81.

A subsequent locator is not entitled to rely upon a single call in a previous survey of an adjoining grant to determine the boundary line, when such call is in conflict with others. *Davidson v. Killen*, 68 T. 406, 4 S. W. 561.

The boundaries of a survey may be located by surrounding surveys referred to in its field notes, though its corners and lines cannot be found on the ground, and though there is a discrepancy in its area between the field notes and its boundaries as so located. *Longoria v. Shaeffer*, 77 T. 547, 14 S. W. 160.

Where the boundaries of a survey cannot be located by its own calls and field notes, they may be established by the field notes of adjacent surveys. *Kuechler v. Wilson*, 82 T. 638, 18 S. W. 317.

An action of trespass to try title to land involved the question of whether the land sought to be recovered was a part of the Mary Beacham league or a vacancy between that survey and the Punchard league. In the field notes of the Mary Beacham its west line called for the east line of league No. 3. League No. 3 was afterwards resurveyed,

and called the "Punchard league." There was not so much land in the new survey, and the distances and boundaries were not the same, and the north line of the Mary Beacham, on being run from its northeast corner, as called for by witness trees, gets its complement before reaching the east line of the Punchard survey, leaving vacant the amount of land sought to be recovered, except about eight acres, conceded to be in the Mary Beacham. Held, that such land, with the exception of the eight acres specified, did not form a part of the Mary Beacham league, but was a vacancy between that survey and the Punchard league. *Moore v. McCown* (Civ. App.) 20 S. W. 1112.

A junior survey was located between the lines of two older surveys—east of one and west of another. Held, that the older surveys must be determined by their field notes, and, when ascertained, they fixed the location and quantity of the junior dependent survey. *Bennett v. Latham*, 45 S. W. 934, 18 C. A. 403.

Where the field notes of a surveyor concerning the location of bearing trees in another survey are inconsistent, they are no evidence of the location of the bearing trees, which had disappeared. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

The only work actually done on the ground in locating sections of two tracts of land was to establish a corner of one section in one tract and the corner of another section in the other tract, then found to be a designated number of miles apart east and west, and to meander streams and to run lines two miles apart through the territory intended to be appropriated by the sections to form the tracts. From data furnished by such work the tracts were platted and their field notes made in the surveyor's office. Held, that no one of the sections forming the tracts could be regarded as having been actually surveyed, and its lines and corners fixed on the ground. *Austin v. Espuela Land & Cattle Co.* (Civ. App.) 107 S. W. 1138.

Tracts 1 and 2 were surveyed at about the same time by same surveyor, but no survey in either tract called for any survey in the other. The work actually done on the ground consisted in locating a corner of a section in each tract. Thereafter surveys of lands adjacent to tract 1 were made, the field notes of which called for a beginning at a corner in tract 1. Held, that there was nothing to indicate any reason why the surveys in tract 1 and in the lands adjacent should not be constructed from the identified corner in tract 1, without any resort to the corner in tract 2. *Id.*

Where the calls for course and distance of a disputed boundary are inconsistent, lines in adjacent surveys tied to those in controversy can be consulted in determining the true boundary. *Kingsley v. Patterson* (Civ. App.) 115 S. W. 105.

Any facts which tended to show the actual footsteps of the surveyor in making the different subdivisions that compose the respective blocks could be used to ascertain the boundaries of the blocks, which were merely the boundaries of the outside subdivisions, and, where no mark could be found designating and fixing the lines of the outside subdivisions, they could be fixed by marked corners and footsteps around inside surveys to which they were tied by the field notes. *Taft v. Ward* (Civ. App.) 124 S. W. 437.

It is only in the absence of other means of identification that known calls in other surveys can be appealed to, to locate a tract of land. *Id.*

Where the northeast corner and east line of a tract of land conveyed corresponded with the same corner and line of a larger grant, held, that it must be assumed that the southeast corners also corresponded. *Morse's Heirs v. Williams* (Civ. App.) 142 S. W. 1186.

Deeds executed on same day held to be construed together, in determining a boundary line. *Id.*

A survey of a junior grant entirely surrounded by senior grants held an office survey, disclosing an intention of the surveyor to extend the boundaries of the junior grant to the boundaries of the senior grants. *State v. Palacios* (Civ. App.) 150 S. W. 229.

20. Waters and water courses.—Conflicting elements, see ante.

A right in private individuals to the flats in front of their lots out to the channel may be devoted to wharves and the like, without being subject to the control of the public. *City of Galveston v. Menard*, 23 T. 349.

In the absence of all other evidence, where the deed, in defining the boundary of the appellant's land, said, "thence down the main channel of the Comal spring," the thread of the stream of the Comal was the utmost limit of the rights of the appellant. *Muller v. Landa*, 31 T. 265, 98 Am. Dec. 529.

Under a grant to a city of land described as extending to the seashore, and bounded by it, the shore is not included, and the city cannot interfere with bath houses erected on the shore, unless they constitute a nuisance. *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 T. 559.

21. — Meandered waters.—A deed described the property conveyed in part as follows: "Thence down said creek with its meanders as follows: East 200 vrs.; south, 45 deg. E., 590 vrs.; east 620 vrs., corner at junction of branch, whence a lyn brs. N., 86 deg. E., 3 vrs. distant, and an elm brs. N., 10 deg. E., 7 vrs. distant. Thence up said branch with its meanders as follows: North 130 vrs.; N., 45 deg. W., 150 vrs.; north 360 vrs., a lyn brs. N., 70 deg. W., 2 vrs." Held, that the meandering of the branch was the boundary to the end of the call last recited, and a claim that the line should follow course and distance was untenable. *Griffin v. Barbee*, 68 S. W. 698, 29 C. A. 325.

Although a grant calls for marked corners upon the bank of a nonnavigable stream, and for a line or lines between such corners which do not correspond with the center of the stream, yet the boundary line extends to the center of the stream, unless there is a clear intent that the grantor wished otherwise. *Dutton v. Vierling* (Civ. App.) 152 S. W. 450.

22. — Accretion and avulsion.—When a stream, being a boundary, alters its channel by a gradual process of wear, the boundary shifts with the channel; but, if it changes the same violently and visibly, as by making "a cut-off," the boundary adheres to the abandoned channel. *Collins v. State*, 3 T. App. 323, 30 Am. Rep. 142.

Where a river forming a boundary line of plaintiff's premises has, through avulsion, changed its channel, plaintiff is not entitled to recover land beyond the thread of the river as it was before the change. *Rodriguez v. Hernandez*, 79 S. W. 343, 35 C. A. 78.

A city had no authority to prevent the removal by plaintiff of a bank of gravel which had been formed as an accretion to plaintiff's land, which abutted on a river, though a portion of the accretion was within the city limits, where such removal did not interfere with the proper use of the city streets or create a nuisance. *Goar v. City of Rosenberg*, 53 C. A. 218, 115 S. W. 653.

23. — Islands.—Where, by the terms of a grant of islands, the entire area was bounded by the east and west forks of the river, such fact did not preclude the idea that some of such islands, as shown by the maps, were divided from others by smaller streams flowing from such forks. *Petrucio v. Gross* (Civ. App.) 47 S. W. 43.

A finding that the land in controversy, consisting of an island, was embraced within the boundaries of a certain grant, by fixing the extreme northern point of the islands comprising such grant at over three leagues from the mouth of the river, was not erroneous, as being in conflict with the terms of the grant, where such grant, which conceded one league of land bounded by the east and west forks of the river, definitely located its extreme southern point at about one-half league from the mouth of the river, and the maps and sketches in evidence showed that the width thereof was greatly less than the length of a side of a square league. *Id.*

24. Public ways.—An owner platted his land into lots, blocks, and streets. The location of the streets on the ground could not be fixed from information derived from the unrecorded plat or from any defined monuments, either natural or placed on the ground by the surveyor of the plat. The dedicatory sold and pointed out the lines of streets to lots sold, and the city opened the streets in accordance with such designation. Held, that the lines pointed out by the dedicatory should govern as to subsequent purchasers. *Haynes v. City of Dallas* (Civ. App.) 94 S. W. 434.

The sale of land bounded by an alley carries to the purchaser the fee to the center of the alley, unless otherwise provided expressly or by clear implication; that the grantor, after conveying the land, intended to withhold his interest in the alley, being never presumed. *Wiess v. Goodhue*, 46 C. A. 142, 102 S. W. 793.

A deed conveying the blocks on each side of a street passes the title to the fee of the street to the grantee. *Cocke v. Texas & N. O. R. Co.*, 46 C. A. 363, 103 S. W. 407.

25. Railroad rights of way.—The right of way of a railroad is not a public highway, within the rule of construction of deeds to lands bounded by a public highway, in such sense as to make a deed calling for a right of way as a boundary convey the owner's interest in the land between the boundary of the right of way and the railroad track. Judgment (Civ. App.) 87 S. W. 847, reversed. *Couch v. Texas & P. Ry. Co.*, 99 T. 464, 90 S. W. 860.

26. Priority of grants and deeds.—Act Feb. 1, 1845, requiring owners of land by titles from the Mexican government, the lines of which were not correctly marked, to have the same resurveyed and plots returned to the land office, which plots would be delineated on the county maps, after which they were to be regarded as the only true boundaries of said land, not being compulsory, where the owner of such a grant failed to avail himself of it, and the land was patented to another, the elder grant, if capable of identification, must prevail. *Byrne v. Fagan*, 16 T. 391.

Where two surveys are contemporaneous, neither can claim any advantage over the other from mere priority in the date of the final title. Nor can the boundary of one be enlarged by reason of the other being pronounced invalid by the courts years afterwards. *Welder v. Carroll*, 29 T. 317.

It appeared that a certain road, constituting the dividing line between plaintiffs' and defendants' lands, could not be precisely located by physical evidences on the ground; that the meanders of such road were given by calls for courses and distances in the field notes of the original, unauthorized survey of defendants' land only, and not in those of the survey of plaintiffs' land, which was made first, but was not shown to have been authorized; that neither of these sets of field notes called for the other; that a re-survey of plaintiffs' land, upon which their patent was issued, was made subsequent to another survey of defendants' land, and the issue of their patent thereon; and that the meanders of the road, as called for in the respective patents, were irreconcilable. Held, that the original survey of defendants' land was superseded by that upon which their patent was issued, and that the latter will prevail over that of plaintiffs' junior patent. *Griffith v. Rife*, 72 T. 185, 12 S. W. 168.

27. Priority of surveys.—Where, in a conflict as to the boundaries between two surveys, it appears that the later survey was not made on the ground, but in the surveyor's office, and from his memory of a former survey, and that it called for certain trees as an established corner of an adjoining survey, while in fact the trees were not on such survey, the former survey must control. *Fenley v. Flowers*, 5 C. A. 191, 23 S. W. 749.

Where the original surveys agree with maps that have been in use for many years, they should not be held erroneous because they do not agree with resurveys made long afterwards, and based upon the assumption that information furnished by living persons as to the locality of lines and corners is absolutely correct. *McCombs v. Sheldon* (Civ. App.) 26 S. W. 1114.

The location of original corners by a subsequent survey is not conclusive where such location is not based on an actual discovery of then existing corners. *Knippa v. Umlang* (Civ. App.) 27 S. W. 915.

Where marks on a line of a survey were not quite as old as those on the surrounding older surveys, but there was evidence that the marks were not as old as those on other lines of the same survey, no presumption exists that such line was not run by the original surveyor of the tract, but by the patentee thereof, after the original survey. *Morgan v. Mowles* (Civ. App.) 61 S. W. 155.

Where, in an action to establish the boundaries of a senior survey, defendant opposes marked lines made in delineating a junior survey, together with proof of the general reputation and recognition of surveyors in making contiguous surveys, but no witness claims to have found evidence of the original junior survey, and there is no evidence of possession or acquiescence, held, that the courses and distances must control, and the junior yield to the senior survey. *Hornberger v. Giddings*, 71 S. W. 989, 31 C. A. 283.

Where a survey previously located has its beginning and last corners on a river and the other corners in a prairie, other adjoining surveys, made subsequently by different surveyors, identifying the prairie corners by artificial objects, which are not called for in the previous survey, are not admissible to extend the distances in the previous survey from the known corners. *Matthews v. Thatcher*, 76 S. W. 61, 33 C. A. 133.

A party claiming under a prior survey has a vested right in the lands embraced in the boundaries of the survey as against one claiming under a subsequent survey. *Atascosa County v. Alderman* (Civ. App.) 91 S. W. 846.

The field notes of a junior survey cannot be resorted to for the purpose of creating an ambiguity in the calls of a senior survey. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

Where the call for distances in a senior survey includes land in a junior survey, and there is nothing to limit the force of the call for distances in the senior survey, the call for distances therein controls. *Id.*

The rule that a prior location made by an office survey is valid, and will prevail over any subsequent survey, though actually surveyed on the ground, that may conflict therewith, since the prior location appropriates the land, has no application where the calls in an office survey limit the boundary in a certain direction to a line of another survey well marked with a corner established, which was actually made on the ground, and where the call for distance conflicts with the call for such line. *Shindler v. Lutzer & Moore Lumber Co.* (Civ. App.) 107 S. W. 941.

Where the calls in an office survey are based on another survey actually made on the ground and established at the time, both surveys recognizing a landmark which could only be known by an actual survey, the fact that the field notes of the office survey were dated one day earlier than the field notes of the actual survey did not affect the priority of the actual survey. *Id.*

A survey takes its position on the ground according to its own field notes, uncontrolled by calls in the field notes of junior adjacent surveys. *Williams v. McLeroy* (Civ. App.) 135 S. W. 251.

The weight to be given to a call for a line or corner of a senior survey in determining the land included in a junior survey depends on whether the lines or corners of the senior survey were probably known to the surveyor at the time of the junior survey. *State v. Palacios* (Civ. App.) 150 S. W. 229.

28. Remedies for establishment of boundaries.—A suit will not lie to have judicially ascertained and determined a division line, if the line had been run by former owners, and could be in part discovered. *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612.

Where a suit is brought by one of two owners of contiguous land, to compel the other to permit him to run the dividing line, and it appears that the line had been run by former owners, it was held that the right to have a divisional line run and judicially established, if necessary, rests on the same principle as a right to an action for specific performance. *Id.*

Equity does not take jurisdiction of a suit to settle a boundary between adjoining landowners, merely because the line is in dispute, but there must be some additional ground of equity jurisdiction. *Nye v. Hawkins*, 65 T. 600.

An ambiguity in the description in a deed, arising when it is sought to apply the description to the property, may be corrected in an action to establish a boundary, and a resort to equity is unnecessary. *Sloan v. King*, 77 S. W. 48, 33 C. A. 537.

29. — Practice and procedure.—See notes under Titles 37 and 128.

30. — Presumptions, burden of proof and admissibility of evidence.—See notes under Art. 3687.

31. — Weight and sufficiency of evidence.—The verdict gave defendant a lot 20 varas in depth, to sustain which some evidence was given. One witness swore that the depth by actual measurement made by him was 21 varas, but he measured from a point shown to him by plaintiff's son, which was not established as a true point by proof. Held, that the evidence of measurement did not have a conclusive effect on the finding of the jury. *McCarthy v. Cabrera*, 17 T. 629.

If a boundary line between two surveys was marked on the ground, and it can be ascertained by a resurvey, following the calls in the title and map forming part of it and the ancient landmarks made by the original surveyor, or if its locality can be proved by witnesses from their personal knowledge or on information derived from general reputation, or from its having been pointed out to them by the surveyor by whom it was run, or others who were present at the time and cognizant of the fact, this will fix its position, though there may be a discrepancy between its position thus ascertained and that given by the calls or plat on the grant. *Welder v. Carroll*, 29 T. 317.

The fact that a certain line of survey was generally, but erroneously, understood to be at a certain place, should be considered in determining what weight ought to be given to the calls for that line in a deed to a neighboring tract; and in determining what lands were conveyed by such deed, other calls therein may be given a controlling influence. *Jones v. Powers*, 65 T. 207.

The report of a surveyor appointed by the court is entitled to no more weight as evidence than the testimony of a witness who knows the facts. *McAninch v. Freeman*, 69 T. 445, 4 S. W. 369.

If the evidence in the case, from all the surrounding and connecting circumstances, satisfies the jury that the true location of a grant can be more certainly found by running courses and distances, called for in the field notes from such corners as they may find to be marked and established on the ground, than by observing the calls for natural or artificial objects, they must so determine it. *Bigham v. McDowell*, 69 T. 100, 7 S. W. 315.

Where there are two conflicting surveys, and the evidence of a surveyor who ran the lines of both showed with reasonable certainty the true location of the disputed boundary to be as alleged by plaintiff, and there is no evidence to establish a different line, judgment should be for plaintiff. *Houston v. Brown* (Sup.) 8 S. W. 318.

In an action to try title to land, where the title depends upon the location of a line, proof beyond a reasonable doubt is not necessary. *Scott v. Pettigrew*, 72 T. 321, 12 S. W. 161.

Where there is evidence that a surveyor was mistaken as to where he was when he located a certain survey, it is proper to allow the survey to stand as he testifies he located it, without crediting his testimony as to where he was. *Hume v. Hernstadt* (Sup.) 12 S. W. 285.

In trespass to try title it appeared that the northeast corner of plaintiff's land was the northwest corner of defendant's land, but no natural or artificial object was called for by the field notes. Plaintiff's northwest corner and defendant's southwest corner were well identified, and, following course and distance from the corners, located the boundary line as claimed by plaintiff. Defendant's land was surveyed in 1838, and the line located where he claimed it, which was recognized until 1860, when a new survey was made, and the line established about 347 feet east of the line as first located. At that time, commencing at the well-established southwest corner of defendant's land, defendant's west line could be traced by marks and trees, as called for in the field notes, to about three-fourths of a mile from the point where the divergence begins. Afterwards another survey was made, beginning at plaintiff's well-established northwest corner, and course and distance were followed for the northeast corner, defendant's northwest corner, and the line was found to be as claimed by plaintiff. Defendant surveyed again in 1887, and located the line as claimed by him. Held, that a judgment for defendant was without evidence to support it. *Porter v. Miller*, 76 T. 593, 13 S. W. 555, 14 S. W. 334.

In trespass to try title the contention between the parties depended on the proper quantity of land in the original grant under which defendants claimed. The official maps of the county, and the testimony of those who had been the county surveyors for many years, and others who had made surveys of the grant, showed that it cornered at a stone, and at a tree marked with the grantee's initials, which were, according to testimony, established by the colonial surveyor, and had been for 50 years recognized as the true monuments. According to this evidence the grant was as claimed by defendants. Plaintiffs' evidence consisted of old surveys, maps, and field notes purporting to have been made by the colonial surveyor, giving courses and distances, and monuments not easily distinguishable, showing the grant as claimed by plaintiffs. Held, that defendant's evidence should prevail. *Withers v. O'Connor*, 76 T. 185, 13 S. W. 743.

Where the field notes of a survey, and maps made by different county surveyors, show that the west line of a certain survey is the east line of a former survey, and that line is taken as the boundary for more than 47 years, the fact that the courses and distances of the respective surveys show a gap between them is not sufficient, after such lapse of time, to prove that the surveys do not actually adjoin. *Standlee v. Burkitt*, 78 T. 616, 14 S. W. 1040.

Surveys Nos. 323 and 324 were patented to plaintiff's husband. In 1870 his agent employed one B. to survey No. 324, and one W. had him survey No. 323. B. did not find the corners called for in the field notes, and located the lines by their relation to the lines of other surveys as shown by a land-office plat. Soon afterwards W. purchased No. 323 by the description given in the patent. In 1879 the bearing trees called for by the field notes were discovered, and the lines were run in accordance therewith. The survey of 1870 gives the land in dispute to the intervener, who claims under W., and that of 1879 gives it to No. 324. Held, that a verdict sustaining the survey of 1879 should not be disturbed. *Koenigheim v. Sherwood*, 79 T. 508, 16 S. W. 23.

In trespass to try title the controversy was in respect to the location of the boundary between the Stone and Woodford leagues, which was the north boundary of the land in suit. Several leagues, including the Stone and Woodford leagues, were located contiguous to each other by a surveyor in 1834; and the evidence showed that they were surveyed on a common base line. In running out the Duggins league, and the Hood and Stone leagues, north of it, the north boundary of the Duggins was clearly established. The field notes of the Woodford called for the northeast corner of the Duggins, and a continuation of the north line of the Duggins was intended to be the north line of the Woodford. Plaintiff claimed that the northeast corner of the Duggins, which was also the northwest corner of the Woodford, was fixed by an elm about 135 yards north of the base line, as the line was indicated by all the other evidence. The call in the Duggins field notes was "an elm, 15 inches in diameter, brs. S. 88° E., 21 vrs.; and a hackberry, 10 inches in diameter, brs. N., 86° W., 28 vrs." The bearing claimed by plaintiff was "an elm, marked 'H,' in a small prairie," which was described by two witnesses as a tree marked by them as a guide to the corner. There was in fact an elm 135 varas south of the corner, as claimed by plaintiff, marked with old colony marks. The Woodford league was a square, whose sides were 5,000 varas; and, running the west line by course and distance, both trees were near the continuation of the line, but the distance gave out before defendant's elm was reached, and the distance to plaintiff's elm was 5,240 varas. No witness undertook to identify the corner positively. There was even more doubt about the northeast corner of the Woodford. Held, that plaintiff failed to sustain the line as claimed by him. *Stephens v. Motl*, 82 T. 81, 18 S. W. 99.

The northeast and southeast corners of a survey were well known, and marked on the ground. The calls were for north and south boundaries of 698 varas in length. If the southwest corner, designated as the beginning point, be located according to the call in a certain direction, and at a certain distance from a certain corner of another tract, then the north and south boundaries would be 1,900 varas in length, and the survey would contain more than twice the amount of land it was intended to appropriate. Neither the western boundary line, nor either of the corners therein, nor trees or rock piles referred to as being at such corners, could be found on the ground, locating the southwest corner according to the calls therefor. If, however, the west boundary be located 698 varas west of the east boundary, the survey would contain all that it was intended to appropriate, and at the corners would be found rock piles and the stool of a tree, which might be those referred to in the description. Moreover, one of the chain bearers testified that in making the survey the lines were run on the ground commencing at the northeast corner, and that they ran north and south boundary lines, about 700 varas in length. Held, that the jury were justified in finding the western boundary of the survey to be 698 varas west of the east line as determined by the corners on the ground. *Lumpkin v. Draper* (Sup.) 18 S. W. 1058.

Plaintiff and defendant owned adjoining tracts of land, the two together constituting

a parallelogram. The controversy involved a strip of 40 acres lying between the two, caused by a prolongation of defendant's side lines from 1,900 to 2,200 varas as alleged by him. Defendant's survey called for 1,900 varas, but he offered parol evidence to show that the lines actually laid down by the surveyors were 2,200 varas long. The south-east, northwest, and southwest corners of defendant's survey were positively identified, and the distances between them were found to be those set out in his survey. The evidence of two witnesses, relied on by defendant to show the extension, differed as much as 54 varas as to the length of his side lines. Held, in view of such difference, and of the fact that defendant's tract could be located without difficulty according to the calls of his deed, that plaintiff was entitled to judgment. *Williams v. Winslow*, 84 T. 371, 19 S. W. 513.

Courses and distances must yield to the demands of an actual survey when the evidence determines the fact of such survey; so that, where the surveyor's field notes show actual surveys on the ground, and the lines and corners thereof are called for as contiguous, and evidence of such surveys are still found which reasonably indicate an excess in the distance of the lines of 260 varas in 7,116 varas, at the date of the survey (1856), considered trifling, and a slight variance of 75 varas in the course, these discrepancies should not overcome the other evidence pointing to the fact that the surveys are contiguous. *Graham v. Dewees*, 85 T. 395, 20 S. W. 127.

On an issue as to whether there was a vacancy between the east line of the A. survey and the west line of the C. T. R. R. Co. surveys Nos. 1 and 2, which lay contiguous—one north of the other—it appeared that the south line of the A. survey, in terms, ran "east 1,866 varas to the west line of the C. T. R. R. Co. survey No. 2, thence north 3,670 varas to the northwest corner of the C. T. R. R. Co. survey No. 1," and the field notes of the A. survey stated that the east line of that survey and the west line of the C. T. R. R. Co. surveys were coincident. It further appeared that the existence of a vacancy between the two lines would involve a violation of the west call of the A. survey, while the absence of such vacancy would harmonize with the surrounding surveys. Held, that a verdict finding such a vacancy to exist was against the weight of the evidence, and should be set aside. *Waggoner v. Daniels*, 4 C. A. 354, 23 S. W. 738.

In a suit concerning the boundary line between lands of H. and A., the surveyor, who had located the line by order of the court, fixed it as claimed by H., by objects on the ground, which were called for in deeds to H. and his vendors. There was evidence that H. acquiesced in such line, and that his vendors had recognized it, and that a tree called for near a stream had been washed away, but another tree, marked and described as the one called for in the deed, stood in the proper position, and was positively identified by the surveyor as the call in the deed. Held sufficient to establish the boundary line as claimed by H. *Adams v. Halff* (Civ. App.) 24 S. W. 334.

All parties claimed under a partition decree about 35 years old. A surveyor appointed by the court reported that he had run the north line of the survey from east to west, finding most of the bearing trees described in said decree, and some stakes; that he found the east line of the west quarter, which had been set off in the partition, plainly marked; that at defendant's request he then ran the north line east from the point which defendant asserted to be the west corner of the league, said point being 520 varas east of the point asserted by the plaintiff, and fixed by witness in running the line west, and failed to find any bearing trees, and found a conflict of 520 varas. Two county surveyors testified that they had surveyed the same land, and come to the same conclusion. Held, that the west line was as contended by plaintiff. *Butts v. Caffall* (Civ. App.) 24 S. W. 373.

Where, in trespass to try title, the issue is as to the location of a boundary line, and the evidence is conflicting, all that can be required of plaintiff is to show the line, as claimed by him, by a preponderance of the evidence. *Briggs v. Pierson*, 7 C. A. 638, 26 S. W. 467.

Where defendant claims title through a survey whose calls are the lines of certain older surveys which are supposed to surround it, if no vacancy exists between such surveys, the verdict should be for plaintiff. *Galveston, H. & S. A. Ry. Co. v. Hartz* (Civ. App.) 26 S. W. 782.

The field notes of the survey in suit and those of another tract, surveyed at about the same time, called for a common bearing tree at the southwest corner of the tract in suit. A marked tree was found, and the original bearing trees of adjoining surveys, calling for the southwest corner of the tract in suit, were identified. A line run by following the lines of an older survey towards the point where it had a common bearing tree with the southwest corner of the tract in suit fell short only 34 varas of the point at which a surveyor appointed by the court had fixed such corner. Held, that the evidence sufficiently established the position of the southwest corner. *Stanus v. Smith*, 8 C. A. 685, 30 S. W. 262.

In an action involving the question of boundary, the jury adopted a survey reported by S., except that they established the southwest corner 106 varas west of where S. located it. There was evidence that S. measured the south line from the bank of a river, that it was about 106 varas from the bank to the top of a bluff where there were cedar trees, that the surveys made prior to the grant called for a cedar tree at such point, and that the river had materially moved its channel eastward. Held, that the verdict, as to such corner, was supported by the evidence. *Taylor v. Brown* (Civ. App.) 39 S. W. 312.

An original plat called for a tree that was identified by marks made on it by the maker of the original survey, and, starting from the point fixed by the tree, the plat fixed the direction of a line which plaintiff claimed was the boundary in controversy, and on which defendants had erected a stone wall. Defendants' surveyors fixed another line, but they did not deny the existence of the tree nor explain why they disregarded it in making their survey. Held, that a judgment for defendants was not sustained. *Ostrom v. Layer* (Civ. App.) 48 S. W. 1095.

The field notes of the S. survey, under which plaintiff claimed title to the land in dispute, called for the beginning corner at the northwest corner of the L. survey. The southwest corner of the latter survey was well established and recognized, and a line run therefrom N., 30° W., 1,400 varas, reached the point claimed by plaintiff as the be-

ginning corner of the S. survey. This point was designated in the field notes as a rock mound, whence a willow tree bore S., 36° E.; and, though these monuments were not found, a surveyor testified that, in making a survey in 1879, he located the northwest corner of the L. survey by running course and distance from its southwest corner, and found an old mound of rock answering the description in the field notes, and that, while he did not find the willow tree, he did find a branch where the course and distance willows had grown, and there were stumps of willows at the proper bearing and distances from said course. The calls in the field notes of defendant's patent made defendant's east line overlap the west line of the S. survey as thus ascertained 222 varas. Held, that the evidence showed that the true location of the southwest corner of the S. survey was at the northwest corner of the L. survey, and that the land described in defendant's patent overlapped plaintiff's west line 222 varas. *Bullard v. Watkins* (Civ. App.) 58 S. W. 205.

Where to establish the line of a survey at a certain tree, claimed by one party to be an original line tree, would do violence to the course of such line and the width of the survey as originally called for, but to place it according to the contention of the other party would conform to the original calls, a judgment in favor of the latter was proper. *Richardson v. McCullough* (Civ. App.) 60 S. W. 974.

Evidence in suit to establish the boundary between adjoining owners held sufficient to establish that claimed by defendant. *McCulloch v. Patman* (Civ. App.) 69 S. W. 1012.

In an action involving a disputed boundary line, evidence held to sustain a judgment in favor of defendants. *Barrow v. Lyons*, 38 C. A. 585, 86 S. W. 773.

On an issue as to the location of a boundary, evidence held insufficient to show the existence of a monument called for in a deed under which one of the parties claimed. *Chew v. Zweib* (Civ. App.) 86 S. W. 925.

The declaration of a former owner of land as to his boundary line, corroborated by evidence of general reputation during a long period of time, is, in the absence of opposing evidence, sufficient to sustain a finding locating the boundary accordingly. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

In an action of trespass to try title, evidence held sufficient to support a judgment sustaining the contention of the plaintiff as to the location of a boundary. *Camp v. League* (Civ. App.) 92 S. W. 1062.

In trespass to try title, evidence held sufficient to sustain the court's finding as to the location of a boundary. *Harris County Irr. Co. v. Hornberger*, 42 C. A. 450, 94 S. W. 145.

Evidence on the issue of the location of a boundary between senior and junior surveys examined, and held not to locate lost bearing trees called for in the senior survey, and the distances called for therein control. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.) 96 S. W. 64.

In trespass to try title, evidence examined, and held to show that the boundary line of a survey was located as claimed by defendants. *Davidson v. Equitable Securities Co.* (Civ. App.) 96 S. W. 787.

On an issue as to the location of a boundary, evidence considered, and held sufficient to sustain the finding of the jury as to the location. *Beckham v. Thompson* (Civ. App.) 97 S. W. 131.

Where, in trespass to try title, plaintiffs claimed under the P. grant and a witness who was a surveyor, civil engineer, and chief draftsman in the general land office testified that the P. survey could not be identified, mapped, or patented because it did not call for any other surveys or objects that appeared on the official map by which its relative position could be determined, and that he was unable to locate the P. survey by the calls for its lines contained in two adjoining surveys, the field notes of the latter surveys shown to be delineated on official maps, which called for the boundary lines of the P. survey, did not necessarily establish the location of such survey on the ground with such certainty as to require a finding that the land described in plaintiffs' petition was part of the P. grant. *McDonald v. Downs*, 45 C. A. 215, 99 S. W. 892.

Where plaintiff in trespass to try title seeks to overcome the proof that the calls for course and distance and the description of his tract, as shown by his deed, are definite, and sufficient to locate a corner with precision, and the location so made is in accord both with the configuration of the tract and with the quantum of land specified, and establish the corner at another place, he can do so only by showing with reasonable certainty, not only the existence of the monument or natural object mentioned in his field notes, but that the object is in conflict with the calls for course and distance contained in it. *Jaggers v. Stringer*, 106 S. W. 151, 47 C. A. 571.

On the issue of the existence of vacancies between surveys, evidence held to warrant a finding that vacancies did not exist. *Austin v. Espuela Land & Cattle Co.* (Civ. App.) 107 S. W. 1138.

In trespass to try title involving disputed boundaries, testimony by a tenant of one of the tracts that the owner of the other had pointed out the boundary line, but not showing that they had an agreement that it should be placed at that point, was insufficient to establish a boundary by agreement or create an estoppel. *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709.

Evidence, in an action involving the position of a survey, held to sustain a finding as to the location of the corners. *Simpson v. De Ramirez*, 50 C. A. 25, 110 S. W. 149.

Evidence held to establish a boundary line between two surveys as an extension of a particular line. *Kingsley v. Patterson* (Civ. App.) 115 S. W. 105.

In an action involving the location of a boundary line, evidence held to establish plaintiff's claim. *Franklin v. Texas Savings & Real Estate Inv. Ass'n* (Civ. App.) 119 S. W. 1166.

In trespass to try title, in which the defense was that a prior survey fully covered the land called for by plaintiff's patent, evidence held sufficient to sustain a finding that the boundaries of the prior survey were certain and fully covered the land claimed by plaintiff, and left nothing to satisfy plaintiff's patent. *Hackbarth v. Gordon* (Civ. App.) 120 S. W. 591.

In an action to determine the boundary between two surveys, evidence held to show that the true line ran so as to include the disputed land in defendants' survey. *Guill v. O'Bryan* (Civ. App.) 121 S. W. 593.

Evidence held to sustain a judgment establishing a boundary line between certain surveys. *Myers v. Moody* (Civ. App.) 122 S. W. 920.

Evidence held to show that the south boundary line of a tract conveyed out of a survey was the south boundary of such survey, as referred to in the deed, and not a line a certain distance south of a point designated on a plat. *Ramseur v. Ball* (Civ. App.) 125 S. W. 590.

In trespass to try title to determine the location of a boundary, evidence held to sustain a verdict fixing the boundary in accordance with plaintiff's contention. *Walker v. Hollis* (Civ. App.) 127 S. W. 567.

Evidence held to sustain a verdict fixing the south boundary line of a specified survey. *Billups v. Cochran* (Civ. App.) 127 S. W. 1121.

In an action by the state to recover a tract claimed to exist as a vacancy between a survey purchased by defendants under the 50-cent act (Acts Sp. Sess. 16th Leg. c. 52) and certain leagues, evidence held to sustain a finding that no vacancy existed, in that defendant's survey was actually located on the ground along the boundary line of such leagues. *State v. Sulflow* (Civ. App.) 128 S. W. 652.

In trespass to try title, in which the controverted question was the location of the north boundary of a certain survey, evidence held to sustain a finding that such line was as claimed by defendant. *Cochran v. Casey* (Civ. App.) 128 S. W. 1145.

Evidence in a suit to determine the boundary between two surveys held to sustain the finding as to the location thereof. *Cleveland v. Bruce Lumber Co.* (Civ. App.) 128 S. W. 1188.

In trespass to try title to a strip of land plaintiff introduced in evidence deeds under which defendant claimed, which deeds described the land as a lot of a city block fronting on a designated street. According to the position of the block as indicated by monuments erected by the city after plaintiff and a remote grantee of defendant had acquired their respective tracts, the strip was a part of plaintiff's lots. The undisputed evidence did not show that the block had been correctly fixed as to its original position by the monuments, but there was evidence indicating that one of the lines of the block as it originally existed was some distance from the place fixed by the monuments. At the time the deceased husband of plaintiff purchased, the locality was in the brush, and the husband had his lots surveyed and built a fence on the lines then given him. Held that, though the deeds in defendant's chain of title referred to a city block, the deeds were not conclusive between the parties as to the true boundary line between their lots. *Campbell v. San Antonio Machine & Supply Co.* (Civ. App.) 133 S. W. 750.

In trespass to try title to determine the location of a boundary line, evidence held to sustain a special verdict for defendant. *Hermann v. McIver* (Civ. App.) 140 S. W. 798.

Evidence held to sustain a finding locating a boundary line. *Francis v. Patterson* (Civ. App.) 143 S. W. 678.

Evidence that a wall was constructed by adjoining owners as a party wall held not to change the true boundary line. *Fewell v. Kinsella* (Civ. App.) 144 S. W. 1174.

In trespass to try title, evidence held sufficient to warrant a finding that the figure "8" in one call of plaintiff's survey was by mistake inserted, instead of the figure "5." *Jones v. Petty* (Civ. App.) 146 S. W. 663.

In an action to recover land, evidence held to support a finding that the land was within the boundaries of a designated league, and within boundaries described in deeds under which defendant claimed. *Cole v. Webb* (Civ. App.) 149 S. W. 245.

In an action for damages for cutting and removing timber and carrying away gravel, evidence held insufficient to show that a line claimed by the defendants as the boundary line of a section which was the dividing line between the plaintiff's and defendants' tracts was made by the surveyor preparatory to and as a basis for the issuance of a patent to the section. *Burke v. Braumiller* (Civ. App.) 150 S. W. 206.

Evidence held to support a verdict locating a boundary line at the distance called for in field notes from a corner. *Jones v. Burkitt* (Civ. App.) 150 S. W. 275.

Witness' testimony as to location of crossing by which grant was located held valueless to establish a valid grant, where the effect would be to locate the grant in a town whose officers could not legally make such a grant. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

In trespass to try title involving a disputed boundary line, evidence held sufficient to sustain a judgment for plaintiff. *League v. Wm. M. Rice Institute for Advancement of Literature, Science and Art* (Civ. App.) 152 S. W. 1182.

In a boundary dispute evidence of a marked line, recognized for more than 40 years, held sufficient to establish an old marked line. *Wm. M. Rice Institute for Advancement of Literature, Science and Art v. Gieseke* (Civ. App.) 154 S. W. 612.

Evidence in trespass to try title held to show that the survey in controversy was located as claimed by plaintiff, showing that the first call of the field notes "along line of" a certain survey was inadvertent. *Gilbert v. Finberg* (Civ. App.) 156 S. W. 507.

In trespass to try title to a survey of school lands, evidence held insufficient to establish an agreed boundary. *Crosby v. Stevenson* (Civ. App.) 156 S. W. 1110.

Testimony, that in 1859 and subsequently the road to H.'s mill turned northwest before reaching the west line of the B. survey, is without probative force in establishing the south boundary line of plaintiff's land, described in their deed of 1894 as "the old road that formerly ran from H.'s old mill by the old plantation of R., as explained in a deed from L. to R., dated February 18, 1850." *Cramer v. Barfield* (Civ. App.) 157 S. W. 256.

32. — Instructions and questions for jury.—See notes under Art. 1971.

33. — Verdict and findings.—See notes under Title 37, Chapter 14.

34. — Judgment and enforcement thereof.—See notes under Title 37, Chapter 15, and under Art. 7755.

35. Agreements between parties.—It is only where there is a doubt as to the identity of the dividing lines, that the parties may establish their lines by a parol agreement. *Houston v. Sneed*, 15 T. 307.

Courts will not disturb parol agreements of boundaries, but will encourage such settlements of disputed, conflicting, or doubtful boundaries, as a means of suppressing spiteful and vexatious litigation. *McArthur v. Henry*, 35 T. 801.

The east and west halves of a 640-acre tract were, by partition, respectively apportioned to the wives of E. and W. W. being desirous of improving the west half, and no surveyor being convenient, E. and W., as testified to by a third person, who was with them, "stepped off the land the best they could, so as to enable W. to know where to erect his fence." E. remarked that it made no difference whether they were over the line or not. W. accordingly erected his fence, E. making no objection then or afterwards. It did not appear that this fence was adopted as a line, or that any line was marked beyond the fence, which extended but a small part of the distance across the tract, and which varied from the direction of the corresponding lines of the tract 5 degrees. Another witness testified that he had frequently heard E. and W. talk about the land, and never heard either of them say that there was any line established between them, and had never heard that the fence was recognized as a line. Held, that the evidence was insufficient to establish a verbal partition line. *Dement v. Williams*, 44 T. 158.

Where neighbors are in doubt about their boundaries, and both are ignorant where they are, and they in good faith establish divisional lines between them, and these lines are acted upon and acquiesced in, even for a period within the statute of limitations, such agreements ought to be upheld. *Coleman v. Smith*, 55 T. 254.

Where owners of adjoining estates agree, verbally, on a compromise line as the dividing line between them, it is not necessary to the validity of such an agreement that it should have been acquiesced in for a long time. *Cooper v. Austin*, 58 T. 494.

Where adjoining owners, intending to establish a division line according to the true boundary, by mistake agreed on a line which did not conform to the true boundary, the agreement was not void. *Cooper v. Austin*, 58 T. 494; *Harn v. Smith*, 79 T. 310, 15 S. W. 240, 23 Am. St. Rep. 340; *Lecomte v. Toudouze*, 82 T. 208, 17 S. W. 1047, 27 Am. St. Rep. 870.

Plaintiff, whose land was claimed adversely, agreed to the appointment of parties to survey and settle the location of a line, supposing that the controversy only involved the line between two old surveys which had been patented. The adverse claimant had procured a patent to a narrow strip of land which was included in plaintiff's original survey, but not included according to the calls in the patent based thereon. Plaintiff was in ignorance of the character of the adverse claim, and also of the fact that his patent did not correctly set out his field notes. Held, that plaintiff was entitled to have his agreement canceled. *Morrill v. Bartlett*, 58 T. 644.

Two pre-emptioners on adjoining, unsurveyed state lands agreed on a dividing line. One sold his improvements, and the other represented to the purchaser that he did not claim any of the land improved. The purchaser agreed with the nonvendor that all the vacant land should be surveyed in the nonvendor's name, he to convey to the purchaser all the land included in the survey on the purchaser's side of the agreed line, when patented, the purchaser to pay his share of the expenses. Under this agreement the purchaser continued the improvements on his side of the agreed line, and, when the survey was made as agreed, offered to pay his share of the expenses. Held, that a subsequent patentee of the land, having notice of the agreements concerning it, could not recover from the first purchaser the land which he had improved, and which he was to have by the agreements concerning the division line, survey, and patent. *Mitchell v. Nix*, 1 U. C. 126.

Where a division line is run by the agreement and direction of adjoining landowners, for the purpose of settling a dispute, and it is agreed on and acquiesced in by them at the time and for more than a year afterwards, the parties must abide by it. *Eberling v. Weyel*, 2 U. C. 501.

A parol adjustment of boundaries between adjoining owners does not operate as an estoppel, where the party setting it up has not changed his position for the worse, nor the other acquired any rights under it. *Bridges v. Johnson*, 69 T. 714, 7 S. W. 506.

A mere license by the owner of one tract of land permitting the owner of an adjacent tract, the boundary line between which and the former tract is disputed, to fence and occupy over the true line, will not amount to an agreement accepting the line claimed by the license as the boundary, though his possession extends up to the line so claimed. *Wright v. Lassiter*, 71 T. 640, 10 S. W. 295.

The fact that plaintiff's vendor and defendant once agreed to establish a line with reference to the land in controversy, but never executed the agreement, does not affect plaintiff's rights. *Evans v. Foster*, 79 T. 48, 15 S. W. 170.

Allegations that the true location of a certain lot was not well defined and known, and that various surveys had left it uncertain, are sufficient to sustain an agreement fixing the boundary line. *Harn v. Smith*, 79 T. 310, 15 S. W. 240, 23 Am. St. Rep. 340.

Where adjoining proprietors agree verbally upon a certain line, improvements by one up to the line are notice thereof to a purchaser from the other. *Houston v. Sneed*, 15 T. 307.

Where adjacent owners are in doubt as to the boundary, and after a survey agree upon a certain line, their agreement is valid, and the line as established by it will be held to be the true one. *Levy v. Maddox*, 81 T. 210, 16 S. W. 877.

An agreement between adjoining owners as to their boundary, by which one gains several feet more than his deed calls for, cannot affect the question of the proper boundary between him and another adjoining owner on the opposite side. *Bohny v. Petty*, 81 T. 524, 17 S. W. 80.

Where a division line between two tracts of land owned by different persons has been extended in the wrong place, and the parties then expressly agreed that it should be the line between them, it becomes their established division line. *Harrell v. Houston*, 66 T. 278, 17 S. W. 731.

The fixing of a boundary line by parol is not within the operation of the statute of frauds, since, when the boundary is fixed by the parties, they hold up to it, not by virtue of the parol transfer, but by virtue of their title deeds. *Lecomte v. Toudouze*, 82 T. 208, 17 S. W. 1047, 27 Am. St. Rep. 870.

In trespass to try title between adjoining landowners, defendant testified that he had settled the disputed boundary line by oral agreement with plaintiff and her husband, and that a bend in the line was to be made to allow plaintiff to retain certain improve-

ments she had made. The county surveyor testified that, at the request of defendant and plaintiff's husband, who stated that they had settled the disputed line, he surveyed the line under their direction, so as to leave plaintiff her improvements, and that they expressed their satisfaction with the line as run. The surveyor was corroborated by three witnesses as to the agreed line. The parties immediately erected a fence on the line, and each held possession up to the fence till the beginning of suit, 18 months afterwards. Held, that the parties had established the boundary by oral agreement. *Id.*

Where a dispute arises as to the eastern boundary of a certain survey, an agreement by the owner with a neighbor owning part of the land east, bringing the line eastward, does not estop such owner to assert, as against one claiming other land east, that the line as originally claimed by such owner is the true boundary. *Langermann v. Nichols* (Civ. App.) 32 S. W. 124.

Where one of adjoining owners conveys his land to a third person, the location of the division line must be determined by the facts and conditions existing at the time of the conveyance, and cannot be subsequently shifted by an agreement to which all persons interested in the lands are not parties. *Donaldson v. Rall*, 37 S. W. 16, 14 C. A. 336.

Where adjoining landowners agree that a certain hedge is the boundary line, such agreement settles all questions between them as to the extent of their ownership. *Brown v. Johnson* (Civ. App.) 73 S. W. 49.

Where plaintiff and defendant entered into an agreement to fix the boundaries of a survey, and later a modified agreement was drawn up, on defendant being dissatisfied with the boundaries as fixed under the original agreement, a refusal by defendant to enter into the modified agreement, or to accept the boundaries fixed thereunder, left the original in full force, and entitled plaintiff to judgment fixing the boundaries as determined by the survey made thereunder. *Masterson v. Bockel*, 75 S. W. 42, 32 C. A. 509.

A recital in a party wall contract that the wall was built on the line between the lots, coupled with evidence showing knowledge of defendant's grantor of the actual location of the wall, and his acquiescence in the possession of the strip in controversy for 16 years by plaintiff's grantor, was sufficient to sustain a conclusion that the prior owners of the two lots agreed, at the time the wall was built, that the division line should be established as the center of the party wall, as indicated in the agreement. *Roberts v. Fellman Dry Goods Co.*, 42 C. A. 590, 92 S. W. 1060.

Defendant's remote grantor agreed with certain heirs owning land south of his that his south line was a line running east from a bois d'arc stake, excluding the tract in controversy, but the subsequent conveyances bounded the land as adjoining the heir's land and including the disputed tract. Held that, neither defendant nor his immediate grantor having known of the agreed line, he is not bound thereby; the stake being insufficient to give notice thereof, and no possession of the land cut off by the agreed line having been taken by the heirs, nor anything done to put purchasers upon notice of the agreement. *Taylor v. Blackwell* (Civ. App.) 105 S. W. 214.

Where the boundary between two lots of land is in dispute, the owners may agree upon a division line as the true boundary between them, and the agreed line is binding upon them and those claiming under them, whether it be the true boundary or not. *McKeon v. Roan* (Civ. App.) 106 S. W. 404.

A tenant or subtenant had no authority as such to bind the owner of the land by an agreement as to boundaries with an adjoining owner. *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709.

After an uncertain boundary line had been fixed by agreement of the abutting owners, one of them sold to defendant, and an action was subsequently brought by a purchaser of the property on the opposite side of the line to try title to the strip of land between the line as fixed by agreement and the original line. Held, that an instruction to find for defendant if the boundary line was fixed by agreement as alleged, regardless whether the purchaser of the property on the other side of the line at the time of his purchase knew of the agreement fixing such line, was properly refused. *Louisiana & T. Lumber Co. v. Dupuy*, 52 C. A. 46, 113 S. W. 973.

Where an uncertain boundary between two surveys is fixed by agreement of the owners, and defendant purchased the land on one side of the agreed line believing that the same belonged to the survey owned by his vendor, and in good faith paid value therefor, and acted on the agreement locating the line, not knowing that there was any mistake, the owners of the other survey would be estopped to deny that the boundary line fixed by agreement was not properly located. *Id.*

Where the exact location of a boundary line is uncertain, and it is located by an agreement of the abutting owner, knowledge on the part of a person who subsequently purchases a part of the property that the agreed line is not the true line will not defeat his right to hold to said line if he purchases on the faith of such agreement. *Id.*

A boundary line fixed by agreement of adjoining owners is binding upon them, regardless of whether it is the true line. *Provident Nat. Bank v. Webb* (Civ. App.) 128 S. W. 426.

Where there was an excess of land in a block over the acreage embraced in the original field notes, and all but one of the owners of a tier of sections signed an agreement for a resurvey and adjustment of boundaries, one of the signers could not recover a strip from another in conformity to the resurvey, where thereby the latter would lose a portion of the land embraced in the original field notes of his land, because of his inability to obtain any land from the one who refused to sign. *Smith v. Gilley* (Civ. App.) 135 S. W. 1107.

An oral agreement between two landowners to have their boundary line run held a common-law arbitration. *Hill v. Walker* (Civ. App.) 140 S. W. 1159.

The running of a boundary line held an award conclusive upon two landowners. *Id.*

Where the means of information were equally open to both parties to a boundary agreement, a mistake as to the true location of the line as shown by an approved survey was not sufficient to invalidate the agreement, unless one of the parties knew the true line and thereby gained an advantage over the other. *Denton v. English* (Civ. App.) 157 S. W. 264.

Where one of the parties to a boundary agreement, who knew about a survey fixing the true line, concealed that fact from the other and thereby induced him to sign a

boundary agreement to his disadvantage, the action of the first party constituted such fraud as would invalidate the agreement. *Id.*

36. **Estoppel in general.**—The owner of a grant of land employed a surveyor to survey it, under instructions to resurvey and remark the lines and corners. The surveyor established new corners, which cut off a part of the original grant. Held, that the act of the surveyor, being unauthorized, could not be referred to the owner, so as to constitute an estoppel on the ground that a person who subsequently located the land so cut off was misled by the lines marked as the boundaries of the grant at the instance of the owner. *Love v. Barber*, 17 T. 312.

A party's concession that he claims under his deed to a given line of a survey does not admit that such line is elsewhere than where defined by his title, and does not preclude him from showing that the line asserted by an adverse claimant is not the true line. *Jones v. Andrews*, 62 T. 652.

In an action involving the true location of a boundary line between plaintiff's and defendants' lots, it appeared that before the conveyance to defendants the lots were surveyed, and it was found that plaintiff's building stood 20 inches beyond the surveyed line, and upon the other lot; that plaintiff refused to buy this narrow strip, but tore down his building, and he and defendants' grantor built a fence on the surveyed line; that after defendants purchased they told plaintiff that they were going to build, and wanted the matter of boundary line thoroughly understood, and would like to build where it would be no inconvenience to plaintiff; that they then spoke of the surveyed line as the dividing line, and plaintiff suggested that defendants build on a place partly included in the disputed strip, which they did. Held, that plaintiff was precluded from denying that the surveyed line was correct. *Garza v. Brown* (Sup.) 11 S. W. 920.

Where the location of a road constituting the dividing line between plaintiffs' and defendants' lands is in dispute, the purchase and holding of adjacent land by one of the defendants does not constitute such a recognition of the locus of the road as would operate as an estoppel, where plaintiffs were not induced thereby to change their position for the worse. *Griffith v. Rife*, 72 T. 185, 12 S. W. 168.

A. and B., being tenants in common of a section of land, agreed that A. should have the south half, and B. the north half. A. deeded the southwest quarter, and by mistake located the upper boundary too far north. Her grantee deeded it to defendants without any reference to the northern boundary. B. deeded the north half to plaintiff, calling for the proper southern boundary. Held, that plaintiff was not estopped from claiming the boundary line described in his deed. *Carley v. Parton*, 75 T. 98, 12 S. W. 950.

Where a dividing line is established between tracts of land owned by a county, before purchases are made of land on each side of it, and the deeds under which parties claim have been made, and are known by the parties to have been made, with reference to that line, they, and all the persons claiming through them, are bound by it. *Briscoe v. Puckett* (Sup.) 12 S. W. 978.

When one was not influenced in his purchase by a certain survey, no estoppel as to boundaries arises in his favor. *Koenigheim v. Sherwood*, 79 T. 508, 16 S. W. 23.

N., owning surveys 5 and 6, sold to L. survey 5, which lay east of survey 6, pointing out in good faith, as the dividing line, a line east of the true line, on which N. had built a fence. Thereafter L., acting for N., showed survey 6 to defendant, pointing out the same line. N. contracted to sell defendant 160 acres out of survey 6. Subsequently, N. gave defendant a special warranty deed of 160 acres lying immediately west of said fence. Between the making of the contract and the giving of the deed, N. and L. had learned the true dividing line, and L., having taken possession and cultivated up to that line, had deeded survey 5 to plaintiff, to whom he had pointed out the true line, and who had no notice of the contract between N. and defendant, which had not been filed. Held, that plaintiff was not estopped from claiming the land up to that line by reason of the fact that his grantor pointed out to defendant the fence as the dividing line. *Hollingsworth v. Fowkes*, 6 C. A. 64, 22 S. W. 1110, 24 S. W. 708.

Where a landowner surveys a boundary line for his land, which is publicly marked, and sells land with reference thereto, he is estopped from denying the correctness of its location as against one locating land with reference thereto. *New York & T. Land Co. v. Gardner* (Civ. App.) 25 S. W. 737.

A landowner is not estopped from denying lines established by him, as against subsequent adjoining landowners to whom he pointed out the lines as his boundaries when they purchased the adjoining lands, unless they relied on such acts and representations, and were induced by them to make the purchases. *Stanus v. Smith*, 8 C. A. 685, 30 S. W. 262.

Where, in trespass to try title, a strip between adjoining landowners was in question, and defendant claimed that when he bought a certain line was pointed out to him by the grantor, which included the land in question, as the boundary line, the fact that the other party to the action afterwards admitted such line to be the true boundary did not estop him to deny its location, defendant not having bought on his representation. *Davidson v. Pickard* (Civ. App.) 37 S. W. 374.

On an issue as to the location of the true boundary line between two surveys, there was evidence that plaintiff had, prior to the litigation, recovered in a suit the land that he claimed in his survey, and had a writ of possession executed, and appointed an experienced surveyor to receive possession from a sheriff, and that in so doing the surveyor selected the line contended for by defendant. Held, that the acts of plaintiff's agent constituted no estoppel on him. *Hornberger v. Giddings*, 71 S. W. 989, 31 C. A. 283.

W. made a deed to A. of part of a block, describing it as "beginning at its N. E. corner, thence south 82 feet." It was understood that A. desired to buy enough off the north end of the block for a residence, and W. and A. had gone on the land, and, by an erroneous measurement, had fixed the N. E. corner 13 feet further south than it really was. From there they measured 82 feet south. Had they measured from the true N. E. corner, enough land would not have been given A. to build on, because of a gully at the north end. After the lines were thus run, A. built a fence along the south line so fixed, and a house close to it. Held, that A. got title to all land north

of the fence, either on the theory of an agreed boundary or by estoppel, he having acted on the boundary pointed out. *Parrish v. Williams* (Civ. App.) 79 S. W. 1097.

If the owner of land pointed out the boundary line to a tenant occupying the adjoining tract, and such tenant placed a fence on the line designated, the owner was not estopped, independently of adverse holding or limitations, from claiming to the true line. *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709.

Plaintiff and his family had a homestead in one half of a city lot, but a narrow strip thereof was inclosed with the other half of the lot by a fence. Defendant purchased the adjoining lot without any inquiry as to the true boundary, and subsequently erected improvements which encroached upon the strip belonging to plaintiff. Plaintiff did not object to the erection of the improvements on his land, nor did he make any misrepresentations inducing their erection thereon; but his wife, upon learning that defendant was occupying the strip, objected thereto. Held, that plaintiff was not estopped from asserting the true boundary between his homestead and defendant's lot. *Werkheiser v. Foard* (Civ. App.) 108 S. W. 933.

If plaintiff and defendant's grantor in locating a boundary fence acted under a mistake that the line thereof was the boundary line, neither would be estopped from showing that it was not in fact the real boundary line or from showing where such line really is, and plaintiff not having represented, nor induced defendant to believe, when defendant purchased, that the fence was on the line, defendant is in no better position than his grantor, and plaintiff was not estopped to show that the fence was located by mistake and was not on the line. *Weston v. Meeker* (Civ. App.) 109 S. W. 461.

In trespass to try title involving land along a boundary line, defendant was not estopped to claim title to the land by limitation or otherwise because of any act of his remote grantor while acting as a commissioner in the partition of plaintiff's ancestor's estate; it appearing that if the report of partition signed by him embraced the disputed land he did not know it, and that the surveyor for partition, who was, also, a commissioner, recognized, in such remote grantor's presence that the fence now claimed by defendant as the boundary was the boundary. *Id.*

An instrument executed by the general manager of a company which recited that by mistake the company had put its fence on a part of an adjacent survey of another without showing the distance over the line of the survey except that the fence was located "too far west" operated, in the absence of any evidence, as an admission that the fence was not on the boundary between the two surveys, and that the true boundary line was not west thereof, and operated as an estoppel against limitation of title or adverse possession. *Beaumont Irrigating Co. v. Carroll* (Civ. App.) 111 S. W. 1059.

Where there is a dispute as to the boundaries of land conveyed, and the grantor agrees to be bound by a survey of the land, and the survey does not sustain his contention, he is not estopped to claim in opposition to the survey as against a subsequent grantee, who knows of such claim, and does not act or rely on the failure of the original grantor to give him notice of such grantor's repudiation of the survey. *Pierce v. Texas Rice Development Co.*, 52 C. A. 205, 114 S. W. 857.

Adjacent owners made an agreement as to the boundary. Subsequently one of the owners permitted a forfeiture of his land to the state. Thereafter his son was awarded the land by the state, and the son subsequently conveyed it to such owner. Held that, as there was no privity of estate in such owner's present and former holdings, his acts prior to the forfeiture were not available as an estoppel against him in establishing the boundary. *Runkle v. Smith*, 52 C. A. 186, 114 S. W. 865.

Representations by plaintiff's ancestor in defendant's presence as to a boundary line would not estop plaintiffs from asserting the true boundary line as against defendant, where the representations were not made to influence defendant's conduct, and he did not rely thereon. *Gaffney v. Clark* (Civ. App.) 115 S. W. 330, rehearing denied 118 S. W. 606.

Where it did not appear that plaintiff's testator had actual notice of a resurvey of certain land in controversy by defendant's father, or that she had been caused to do or omit to do anything to her prejudice by reason thereof, plaintiff was not entitled to the benefit of a plea of estoppel. *Hill v. Collier* (Civ. App.) 135 S. W. 1084.

A grantee of 200 acres of land, to be taken out of a larger tract, who recorded his deed and, in selecting the land, included land not owned by the grantor, was not estopped from relocating the land, where his original selection was made by mistake. *Wing v. Red* (Civ. App.) 145 S. W. 301.

Grantors are estopped, by pointing out boundaries, from afterwards asserting title to the land within the boundaries pointed out. *Zander v. Schultze* (Civ. App.) 146 S. W. 222.

37. Recognition and acquiescence.—If an infant acquiesces in the settlement of boundaries after coming of age, he is bound. *George v. Thomas*, 16 T. 74, 67 Am. Dec. 612.

Where one of the owners is a married woman, and the line is run fairly and honestly, and is acquiesced in by her, it ought to be as binding on her as on others. *Id.*

Although the presumption in favor of a boundary line acquiesced in by adjoining proprietors is strengthened by lapse of time, there is no period fixed by statute which will render the presumption conclusive. Each case must furnish its own rule, according to its own circumstances, modifying the conclusiveness of the presumption. *Floyd v. Rice*, 28 T. 341.

In a boundary case between two adjoining landowners, it appeared that defendant built his fence and erected his improvements with reference to a particular line contended for by him as the true division line. The parties derived their respective title from the same source. There was some evidence that plaintiff had acquiesced in such a line, but his acquiescence could only have endured three years or less. There was evidence that on one occasion plaintiff's ancestor pointed out to a witness a line different from that now claimed by plaintiff, and possibly the same line claimed by defendant. Held, that a verdict for defendant would not be disturbed. *McArthur v. Henry*, 35 T. 801.

Though one of two adjoining proprietors has been led to establish, or acquiesce in the establishment of, a line as the true boundary between the estates, by the misrepresentation of the other, still the line is binding on him as to purchasers from the other, who make improvements relying upon the supposed boundary. Notice to such purchasers that he does not recognize the line as the true boundary is sufficient, however, to save his rights, and he need not actually take steps to prevent their trespass. *Hefner v. Downing*, 57 T. 576.

The presumption that a boundary line acquiesced in is the true one, though strengthened by lapse of time, does not become conclusive in any fixed period, and depends for its strength largely upon the degree of information as to his rights possessed by the person to be affected. *Medlin v. Wilkins*, 60 T. 409.

Acquiescence for more than 30 years in a division line precludes either party from setting up a new line. *Davis v. Mitchell*, 65 T. 623.

Where, in an action to recover land, there is no evidence that plaintiff assented to the location of the boundary line claimed and used by the defendant, he is not estopped, unless by limitation, from asserting his claim. *Horst v. Herring* (Sup.) 8 S. W. 306.

Plaintiff's father, who conveyed the land to him as a gift, while owner caused the boundary line to be established and permanently marked, and defendant, while the line was so recognized, bought the adjoining tract, relying on such boundary, and made improvements, and occupied the land for many years without adverse claim by plaintiff. Held, that the latter was estopped to deny that such line is the true boundary. *Anderson v. Jackson* (Sup.) 13 S. W. 30.

An acquiescence by one of the heirs of a testator in a boundary line established by the executor does not bind the other heirs. *Lagow v. Glover*, 77 T. 448, 14 S. W. 141.

An owner's failure to object to improvements on that part of his lot lying beyond his fences, and his recognition of them as the true boundaries for several years, he being ignorant of a mistake in their location, is not such acquiescence in the boundaries so established as prevents him from recovering up to the true line. *Bohny v. Petty*, 81 T. 624, 17 S. W. 80.

Where a division line between two tracts of land owned by different persons has been extended in the wrong place, and accepted and acquiesced in as the dividing line from 1875 to 1883, it becomes their established division line. *Harrell v. Houston*, 66 T. 278, 17 S. W. 731.

Where adjoining landowners agree on a disputed division line, and such line is acted on and acquiesced in by them, it is binding on them, and those claiming under them, without regard to the length of time it was so acted on and acquiesced in. *Bailey v. Baker*, 4 C. A. 395, 23 S. W. 454.

Plaintiff is not estopped from asserting title to property to a given line by recognizing another line prior to receiving the deed under which he claims. *Reed v. Phillips* (Civ. App.) 33 S. W. 986.

A boundary line may be established by agreement or by acquiescence in and acceptance and recognition of a line as a boundary. *Wardlow v. Harmon* (Civ. App.) 45 S. W. 828.

In an action involving a disputed boundary line, claimed by defendant to be identical with a line shown to have been run by a surveyor for a county road, an instruction implying that any acquiescence by plaintiff and defendant, or those under whom they claim, however small, in the line run by the surveyor, should defeat recovery, is error. *Vogt v. Geyer* (Civ. App.) 48 S. W. 1100.

Acquiescence in a boundary line, not amounting to an estoppel, is merely a fact to be weighed by the jury in determining the correct boundary. *Id.*

Where one adjoining owner occupied up to a certain line, and allowed the other owner to do so, under the belief, induced by a mistake in a survey, that such was the true line, it cannot be presumed that such line was agreed on as the boundary. *Stier v. Latreyte* (Civ. App.) 50 S. W. 589.

The fact that adjoining landowners acted on a boundary line for six years, and until plaintiff discovered a shortage in his acreage, when he contended that the line was established by mistake, did not constitute an estoppel against plaintiff's obtaining a determination of the true boundary, but his acquiescence was a fact proper to be submitted to the jury. *Wiley v. Lindley* (Civ. App.) 56 S. W. 1001.

Where all parties interested in a tract of land purchase their interests with reference to a fence line, and such line is recognized as the dividing line for more than 20 years, it must be taken as the true line. *Sullivan v. Michael*, 39 C. A. 564, 87 S. W. 1061.

Long acquiescence in a boundary line raises no presumption of law that the line is the properly established and determined boundary line. *Atascosa County v. Alderman* (Civ. App.) 91 S. W. 846.

To establish a boundary by agreement or create an estoppel, somebody must have been misled to their injury, and mere acquiescence in a boundary, where no one has been induced to change his situation, for a period short of the longest period of limitation, would not be sufficient. *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709.

Where a line coinciding with a fence between two parcels was fixed and determined by original owners, and for more than 30 years was recognized and acquiesced in by all claiming under them, it would not avail plaintiff, in trespass to try title, that this was not the true boundary. *Roberts v. Blount* (Civ. App.) 120 S. W. 933.

38. Practical location by parties.—Where the position of one of the corners called for was not accurately known to either party, and each had equal opportunity to inform himself in regard to it, and they, acting together, disregarded information given to them, and ran the lines as they agreed to be right at the time, but in such a manner that, as it afterwards appeared, one got 50 acres of land more than he was entitled to upon an equal division which they intended to have made, it was held the losing party was nevertheless bound by the division so made. *Hoxey v. Clay*, 20 T. 582.

Where a deed calls for a certain corner and line of a known survey, but the parties, by mistake, lay other lines and corners on the ground, and the rights of innocent parties afterwards become fixed by the lines and corners as laid down, such lines and corners will control those of the survey. *Blumberg v. Mauer*, 37 T. 2.

A dividing line fairly agreed upon and marked out by the owners of adjoining tracts of land will be conclusive upon both, and those claiming under them, as to the true locality of their dividing line, though it may subsequently, after long acquiescence, be ascertained to vary from the course called for in the deeds under which the parties claimed prior to agreeing upon the line; and the rule is the same whether the marked line be recognized and called for in a deed, or whether it be subsequently marked and established by the parties. *Browning v. Atkinson*, 46 T. 605.

One who marks and records evidence of the boundaries of his land is estopped from afterwards alleging, as against a subsequent locator of adjoining land, that the boundary so marked was incorrect. *Timon v. Whitehead*, 58 T. 290.

Where, in 1858, parties owning adjoining land took possession, and afterwards, by mutual consent, moved their fences, reducing the width of a lane between them, and in 1874 caused a survey to be made resulting in one's withdrawal of his fence, the other, in an action of trespass to try title brought in 1880, was estopped from asserting a different line. *Davis v. Smith*, 61 T. 18.

In an action to recover a strip of land as a part of survey 25, defendant claimed that the land was a part of survey 24. It appeared that plaintiff and defendant's grantor built a fence between the two surveys, which was agreed by them to be the true boundary line; that the fence stood for 12 years, and during that time had been acquiesced in by them as the correct line; that plaintiff, with the consent of defendant's grantor, had joined a fence to this line, inclosing survey 25 and the strip in question. Held, that the line as established was the true boundary, and that the strip in question was a part of survey 25. *King v. Mitchell*, 1 C. A. 701, 21 S. W. 50.

Where defendant and plaintiff's grantor agreed on the line between their lots, and built a fence thereon, plaintiff, as subsequent grantee, is bound by such line. *Eddie v. Tinnin*, 7 C. A. 371, 26 S. W. 732.

If the grantee fenced to his south line as he knew it to be, and as it had actually been surveyed on the ground by the surveyor and by himself, as assistant, and another grantee, relying on such designation of boundary, bought from their common grantor the land lying south of this fence, those claiming under the first grantee would be estopped from claiming land south of the fence. *Holland v. Thompson*, 12 C. A. 471, 35 S. W. 19.

An owner of land held estopped by his acts in building a fence and maintaining a line as a boundary for several years from asserting that the line was at some other point. *Schiele v. Kimball* (Civ. App.) 150 S. W. 303.

39. Private surveys.—The boundary of land, the legal title to which is in the state, cannot be fixed, as against the state, by a surveyor merely employed to survey it, and who makes a mistake in the boundary line, nor by failure to correct the mistake, as the state cannot be bound by estoppel. *Saunders v. Hart*, 57 T. 8.

A boundary line fixed by a surveyor employed by various property owners is not binding on such owners, as against an adjoining owner, who was not a party to the surveying, and who never acquiesced in the line as fixed by the surveyor. *Kampmann v. Heintz* (Civ. App.) 24 S. W. 329.

Where, on a private survey of land described in a deed, the surveyor abandons a call for the beginning corner, which was clearly erroneous, and adopts a new beginning corner, whereby the boundaries are made to substantially comply with the other calls of the deed, in determining what land was conveyed by the deed the boundaries as fixed by the survey will control. *Blackburn v. Norman* (Civ. App.) 30 S. W. 718.

A boundary line fixed in 1857 by the court, and accepted by the adjoining owners for 20 years, will not be changed to conform with a survey made in 1877 by one of the owners, who thereafter claimed to the new line, and built a fence along that line the following year, and occupied the strip between the old line and the new 15 years. *Stark v. Homuth* (Civ. App.) 45 S. W. 761.

Where the purchaser of a tract of land bounded by one of the lines of an original survey caused the same to be surveyed at the time of his purchase, he is not bound by the latter survey, and the original boundary line can be located on the ground. *Wiley v. Lindley* (Civ. App.) 56 S. W. 1001.

40. Official surveys.—See notes under Art. 5336 et seq.

41. Apportionment of excess or deficiency.—Where a block is subsequently found to contain more land than the aggregate amount called for by the surveys of the tracts within it, the proper course is to divide the surplus proportionably among the several tracts. *Welder v. Carroll*, 29 T. 317.

Where an entire tract of land is conveyed by two deeds, that for each portion calling for the line of the other as a boundary line, and the tract contains more land than the amounts expressed in the deeds, the excess must be divided between the two grantees in proportion to amounts called for in the deeds, irrespective of the prices paid therefor. *Sellers v. Reed*, 46 T. 377.

In an action to settle the boundary line between two tracts of land, where the surveys were made at the same time, by the same person, and call for each other, but no boundary line was fixed on the ground, a space left between them, according to the surveyor's field notes, will be apportioned to the owners of the tracts in proportion to their respective interests. *Ware v. McQuinn*, 7 C. A. 107, 26 S. W. 126.

On an issue as to the boundary between two surveys, none of whose original corners can be found, where but one corner of an adjacent survey on the north and one corner of a survey on the south are found, and the distance between such corners is in excess of that called for by the field notes, the boundary in question should be determined by apportioning such excess to the two surveys whose corners are found, and measuring the distance called for in the field notes from the line thus ascertained on the north. *Knippa v. Umlang* (Civ. App.) 27 S. W. 915.

Two adjacent tracts were surveyed by locating a corner in each tract a specified distance apart. On a resurvey, it was found that the distance was greater, and the surveyor in making a resurvey disposed of the excess by apportioning it between the sections resurveyed. Held, that the excess was properly disposed of. *Austin v. Espuela Land & Cattle Co.* (Civ. App.) 107 S. W. 1138.

Where a plat of lots in a block specifies the frontage of each lot, with one exception, any deficiency in the width of the block will fall on that lot, and its width will be the

length of the block minus the sum of the width of the other lots. *Toudouze v. Keller* (Civ. App.) 118 S. W. 185.

Where a block of surveys are made by the same surveyor as one piece of work, each of such surveys fronting on a river, but only one corner on the river is found on the northern survey, and one on the southern survey, and none found on any of the intervening surveys, and the field notes of each survey call for lines and corners of the adjoining surveys for its own lines and corners, and there is an excess in distance over that called for in the field notes of the different surveys between the two original corners found and identified, and no ambiguity or conflicting calls appear in the field notes or on the surveyor's sketch, the excess should be prorated between the several surveys according to their respective widths as called for in the original field notes. And, when the dividing lines between said surveys are so found, the western boundary of each being the river, which is not shown to have changed its position, the north and south lines and the eastern boundary of any of the surveys are established by running east the course and distance called for from the river, and thence north or south as called for in the field notes, the distance called for, by adding the proportion of the excess in distance found to belong to such survey. *Johnson v. Knippa* (Civ. App.) 127 S. W. 905.

Where there is an excess of land left on the west side of a block of land by reason of the fact that the entire tier of surveys from east to west is tied to the east line of the block by specific calls for courses and distances, it would require an agreement by all the owners of such tier of sections before it could be apportioned among them. *Gilley v. Smith* (Civ. App.) 152 S. W. 838.

CHAPTER SIX

PATENTS

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Article 5361. [4175] Requisites of patent.—Every patent for land emanating from the state shall be issued in the name and by the authority of the state, under the seal of the state, and under the seal of the general land office, and shall be signed by the governor and countersigned by the commissioner of the general land office; and before the delivery thereof to the party entitled thereto it shall be registered in a well-bound book kept in the general land office for the recording of patents. [Act May 12, 1846. P. D. 4279, 4281.]

See *Texas Mexican Ry. Co. v. Scott* (Civ. App.) 129 S. W. 1170.

Historical.—Act Feb. 7, 1884, reserved a right of way for public roads across patented lands. See *Sayles' Civ. St.* 1889, art. 3952a.

Validity.—As to who are permitted to question the validity of a patent, see *Todd v. Fisher*, 26 T. 239; *Martin v. Brown*, 62 T. 485; *Decourt v. Sproul*, 66 T. 371, 1 S. W. 337; *N. Y. & T. Land Co. v. Gardner*, 11 C. A. 404, 32 S. W. 786.

A patent for a survey of land will not be held void because of difficulty in determining its locality, or because it is not susceptible of being located in the usual way, where there exists any means of identifying the land sought to be included. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

The issuance of a patent to public lands is a ministerial act and must be performed according to law. *Texas Channel & Dock Co. v. State* (Civ. App.) 133 S. W. 318.

Where no actual survey of public lands was made, all matters of description in the patent must be considered to determine the particular lands conveyed. *Finberg v. Gilbert*, 104 T. 539, 141 S. W. 82.

Grantees under a legislative act held to be presumed to have accepted the patent and thereby have become bound by the survey upon which it was based. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

Conclusiveness.—Upon the questions of fact upon which the patent is based, in the absence of fraud, the patent is conclusive. *Styles v. Gray*, 10 T. 503; *Russell's Heirs v. Randolph*, 11 T. 460; *Decourt v. Sproul*, 66 T. 368, 1 S. W. 337; *Taylor v. Lewelyn*, 79 T. 96, 14 S. W. 1052; *Boon v. Hunter*, 62 T. 582.

A patent to the plaintiff is evidence of title, unless the defendant shows a valid grant to some one else previous to the date of the location and survey on which plaintiff's patent was issued, or that defendant had the prior and superior equitable title to the land at the date of said patent. *Miller v. Brownson*, 50 T. 583.

It can be attacked only by the state or one having color of title to the land. *Bryan v. Shirley*, 53 T. 440; *League v. Rogan*, 59 T. 427.

When title is sought to be deraigned through one to whom the patent issued, as the assignee of another, it is not necessary to go behind the patent to show a legal or equitable right of the assignee to the certificate on which the patent issued as against one who asserts no legal or equitable claim to such certificate. *Tom v. Sayers*, 64 T. 339.

If suit be brought upon lands patented but upon illegal surveys, the certificate being genuine, no one not claiming under a right prior to the issuance thereof can question their validity. *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58.

The decision of the officer, commissioner or tribunal authorized to issue titles to land is 'conclusive of the facts necessary to sustain the grant. *Smith v. Walton*, 82 T. 547, 18 S. W. 217.

Priority of title is determined by priority of location and not of patent. *Whitman v. Rhomberg* (Civ. App.) 25 S. W. 451.

The patent is evidence conclusive that the land, if vacant, was subject to sale and patent under act of March 11, 1881. *Koch v. Poerner* (Civ. App.) 55 S. W. 386.

A patent purporting to have been issued by virtue of a purchase and payment under a certain act establishes in the patentee at least a prima facie right to the land. *Burkhead v. Bush* (Civ. App.) 75 S. W. 67.

One whose claim is subsequent to issuance of a patent to school land held not authorized to attack it. *Frontrouy v. Atkinson*, 45 C. A. 324, 100 S. W. 1023.

Party other than state or one claiming title to land under reservation in favor of the state held not entitled to have patent declared invalid. *Keenan v. Slaughter*, 49 C. A. 180, 108 S. W. 703.

Where a resurvey of land was had, and the former field notes corrected so that the survey embraced less land, and a patent issued on the corrected field notes only, the owner, in the absence of a showing of mistake, is bound by the patent calls. *Gulliv v. O'Bryan* (Civ. App.) 121 S. W. 593.

Proof of a patent to a third person held not to preclude plaintiff's recovery on prior possession. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

A patent to school land held not subject to attack by subsequent purchaser of school land. *Millar v. Ward* (Civ. App.) 124 S. W. 440.

After land sold by the state under one act is subsequently acquired and patented under a subsequent contract made under a different act, it is too late to question the validity of the patent as against parties holding land thereunder, whether the first purchaser's right was forfeited or not. *Breen v. Morehead* (Civ. App.) 126 S. W. 650.

Improvements made on land by one knowing that it belonged to the state do not prevent the state from patenting the land to any one else, or affect the right of the patentee to recover title and possession. *Dunn v. Wing*, 103 T. 393, 128 S. W. 108.

A patent of state land can only be attacked by the state, or by one having a right in the land prior to that of the patentee. *Id.*

Recitals.—A purchaser is charged with notice of all facts recited in the patent under which he claims title. *Renick v. Dawson*, 55 T. 102.

When the recitals in a patent to land show that one of the mesne conveyances of the certificate on which the patent issued was made by a bankrupt to his assignee in bankruptcy, the patentee acquires by virtue of his patent only such estate as the bankrupt could convey, and took the property subject to all the equities with which it was chargeable in the hands of the bankrupt. *Id.*

Where other recitals identified a certificate as No. 907, the officials of the general land office correctly treated the No. 707 as a clerical error. *Jackson v. Nona Mills Co.* (Civ. App.) 128 S. W. 928.

Patent as evidence of title.—A patent is prima facie evidence of title. *Rutherford v. French*, 2 U. C. 724; *Stevens v. Geiser*, 71 T. 140, 8 S. W. 610; *Clements v. Eggleston*, 2 U. C. 483; *Gullett v. O'Connor*, 54 T. 408.

Field notes and maps referred to in grant may be considered in aid of description contained in grant. *Goodson v. Fitzgerald*, 40 C. A. 619, 90 S. W. 898.

Transfer.—See this case for facts upon which it was held that the issuance of a patent upon a land certificate transferred after its location inured to the benefit of the transferee. *Bachelor v. Besancel*, 19 C. A. 137, 47 S. W. 296.

Prior improvements as bearing on patent rights.—Improvements made on land by one knowing that it belonged to the state, and without having done anything entitling him to hold it, do not prevent the state from patenting the land to any one else, and do not affect the right of the patentee to recover title and possession. *Dunn v. Wing*, 103 T. 393, 128 S. W. 108.

Parties affected by judgment canceling patent.—The judgment in a proceeding between parties canceling a patent does not affect those not parties to the suit. *Musselman v. Strohl*, 83 T. 473, 18 S. W. 857.

One, by filing new field notes as corrected field notes of the original survey and taking a patent thereon, held to have canceled the original field notes and annulled his title to land in the original notes omitted from the new notes. *Montgomery County v. Angier*, 32 C. A. 451, 74 S. W. 957.

Art. 5362. [4176] When patent to be issued.—Whenever the field-notes of a survey and the land certificate by virtue of which the same was made have been returned to and filed in the general land office

within the time prescribed by law, if it shall appear after due examination that such survey was correctly and legally made upon vacant and unappropriated land, and that the land certificate is genuine and unsatisfied, it shall be the duty of the commissioner of the general land office to make out and deliver to the rightful owner thereof, his agent or legal representative, a patent for the land described in said survey. [Act Jan. 20, 1840. P. D. 4286.]

Presumptions.—See notes under Art. 3687, Rule 12.

Persons entitled.—An inchoate right to a patent for a disputed tract of land may be abandoned by filing new surveys excluding such tract and including another, and obtaining a patent thereunder. *Wise County Coal Co. v. Phillips*, 21 C. A. 293, 51 S. W. 331.

Effect of mistake.—When the commissioner of the general land office was mistaken as to the boundaries of a county, the claimant of land depending on the commissioner's acts ought not to be held responsible. *Magee v. Chadoin*, 30 T. 644.

A patent issued by mistake to one having no right to the land is invalid. *McWhirter v. Allen*, 1 C. A. 649, 20 S. W. 1007.

A patent to Jarard E. G. held to pass title to Jared E. G., Jr. *Clark v. Groce*, 16 C. A. 453, 41 S. W. 668.

Claimants under a patent held not entitled to have it corrected so as to interfere with the rights of claimants under a later patent conflicting with the certificate and survey on which the former patent was based. *Lubbock v. Binns*, 20 C. A. 407, 50 S. W. 584.

Where a state land certificate was located for one Hanaford, but the patent was issued to one Hansford, a finding that the certificate had been located for Hansford will be reformed, to comply with the certificate, as a clerical error. *Hanaford v. Morton*, 22 C. A. 587, 55 S. W. 987.

Field notes set out in a patent containing less land than the original patent, under which plaintiff claimed, held not to constitute a fatal variance, where all the land was included in the original patent. *Id.*

The fact that an error was made in the name of the patentee in a state land patent did not change the patentee's legal title to an equitable claim, subject to the defense of state demand. *Id.*

Where the commissioner of the general land office, in issuing patents, acts on the surveyor's correction of original field notes, a presumption arises that the correction was authorized. *Ward v. Forrester* (Civ. App.) 87 S. W. 751.

Certain discrepancy between power of attorney to sell land and patent for the land held immaterial. *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 937.

Art. 5363. [4177] When to be referred to attorney general.—Should it appear to the commissioner of the general land office, from the records of his office or from information on oath given him, that there is some illegality in the claim, he shall, if he deems it necessary, refer the matter to the attorney general, whose decision in writing shall be sufficient authority for him to issue or withhold the patent as the case may be.

Art. 5364. [4178] Map of county to be filed.—No patent shall be issued upon any claim, unless a map of the county in which the same is situated shall be on file in the general land office. [Act Jan. 19, 1841. P. D. 4305. Acts 1879, ch. 121, p. 129.]

Mistake as to county boundaries.—When the commissioner of the general land office was mistaken as to the boundaries of a county, the claimant of land depending on the commissioner's acts ought not to be held responsible. *Magee v. Chadoin*, 30 T. 644.

Failure to delineate on maps.—The failure in the officers of the land office to delineate upon the maps in the office a grant on file in its archives will not affect such grant in favor of a subsequent location upon which a patent had been issued. *Elliott's Adm'r v. Mitchell*, 47 T. 445.

Art. 5365. [4179] Patents on surveys in two counties.—The commissioner of the general land office is hereby authorized and required to issue patents in all cases upon surveys of land lying in two or more counties or districts, where no conflict between such surveys and others exist, and to which there is no other objection than that of a division in said surveys, occasioned by a county or district boundary passing through them; provided, the field-notes shall have been recorded in the office of the county or district surveyor of both counties or districts. [Act May 9, 1846. P. D. 4315.]

Art. 5366. [4180] Patents on more than two surveys, when.—The commissioner of the general land office is hereby authorized and required to issue patents to the legal owner of a land certificate in all cases where the same has been located in two surveys, and where the same is bounded by other surveys. [Act April 7, 1846. P. D. 4314.]

Art. 5367. [4181] In case of conflict, how patent may issue.—In cases where conflicts exist between surveys, the commissioner of the general land office shall be authorized and is hereby required to issue patents to such portions of such surveys as are free from conflicts. [Act May 9, 1846. P. D. 4316.]

Art. 5368. [4182] Shall issue patent to assignee, when.—The commissioner of the general land office is hereby required to issue patents to, and in the name of, the assignee of any genuine land certificate issued in conformity to law. [Act May 12, 1846. P. D. 4294.]

Rights of assignees.—Transfers of certificates prior to the issuance of patents to the original owners or their heirs or legal representatives will inure to the benefit of those to whom the certificates were transferred. *Burkett v. Scarborough*, 59 T. 495; *Satterwhite v. Rosser*, 61 T. 166; *Adams v. House*, 61 T. 639; *Neal v. Bartleson*, 65 T. 478; *Capp v. Terry*, 75 T. 391, 13 S. W. 52; *Davis v. Bargas*, 12 C. A. 59, 33 S. W. 548. See *De Cordova v. Bliss*, 12 C. A. 530, 34 S. W. 146.

The sale of a land certificate after its location effects an equitable transfer of the land located by virtue of it. *Lewis v. Johnson*, 68 T. 448, 4 S. W. 644.

The defense of innocent purchaser is inapplicable to cases involving conflicting claims as purchasers of school land. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

Record.—See notes under Title 118, Chapter 3.

Art. 5369. [4183] Before issuing to assignee, transfers, etc., must be filed.—Before any patent shall issue to the assignee under the preceding article, he must present and file a sufficient and properly authenticated chain of transfer, assignment or obligation for title, or a power of attorney showing a transfer from the original grantee to the assignee. [Id.]

Filing chain of transfer.—Unless the chain of title of transfer, assignment, or obligation for title, or power of attorney is filed, the commissioner cannot issue patent. *Peterson v. Rogan*, 94 T. 176, 59 S. W. 252.

Art. 5370. [4184] Patent may issue to assignee without transfer, when.—All patents may issue in the name of the assignee when the certificate was granted in the name of the assignee, without an exhibition of a chain of transfers as prescribed in the preceding article. [Act Feb. 3, 1845. P. D. 4292.]

Assignment.—A patent inures to the benefit of the assignee of the certificate by virtue of which the land was located. *Burkett v. Scarborough*, 59 T. 495.

Art. 5371. [4185] Patents to deceased persons shall inure to whom.—All patents which have heretofore been issued by the authorities of the republic or the state of Texas, in the names of persons deceased at the time of issuing such patents, and all patents for lands which may be issued hereafter by authority of the state of Texas, in the names of persons deceased at the time at which said patents may be issued, shall be, to all intents and purposes, as valid and effectual to convey and secure to the heirs or assignee, as the case may be, of such deceased persons, the land so patented, or which may be so patented, as though such deceased persons had been in being at the time such patents bear date. [Act Dec. 24, 1851. P. D. 4228a.]

See *Cole v. Grigsby*, 89 T. 223, 35 S. W. 792.

Construction.—Under Act March 31, 1883, p. 38, surveys and patents on warrants issued under special laws enacted after March 31, 1870, and prior to April 11, 1876, were validated. See *Sayles' Civ. St. 1889*, art. 3964a. The following rulings were made under the act of 1883:

When the proviso to an act of the legislature restricts its benefits to designated persons, the fact that a claimant of such bounty belongs to the designated class must be shown before he can recover. *Blum v. Looney*, 69 T. 1, 4 S. W. 857.

The provision of Act March 31, 1883, is legal, but in order to be effective to one claiming its benefits as a settler entitled to a headright, he must allege and show that he was an actual settler in Texas as far back as March 2, 1836. The issuance of a patent cannot afford evidence of this fact. *Id.*

That act did not retroact and make that which was no title at all at the time another title accrued superior to that other title. *White v. Martin*, 66 T. 340, 17 S. W. 727.

Where a land certificate was granted to R. by special act, passed February 19, 1873, it is held, under the authority of *Ralston v. Skerrett*, 82 T. 486, 17 S. W. 843, that the validating act of March 31, 1883, inured to the benefit of the heirs of R., although patent had issued to him thereon, and he had died prior to the date of such validating act. *Russell v. Bates*, 1 C. A. 609, 21 S. W. 132.

Rights of heirs.—The issuance of a patent to those designated in the certificate as heirs of the parties entitled to the land is conclusive as to the question of their heirship. *Burkett v. Scarborough*, 59 T. 495; *Grigsby v. May*, 84 T. 240, 19 S. W. 343. See *Vera-*

mendi v. Hutchins, 48 T. 531. A grant to two persons, heirs of J. P., deceased, it appearing from the recitals in the grant that it was based on the emigration to and settlement in Texas of J. P., vested the title in the parties named, in trust for the benefit of all his heirs. *Delk v. Punchard*, 64 T. 360.

The fact that a patent was subsequently issued to the heirs of a testator held not to affect the right of devisees under his will to recover the land. *Dean v. Jagoe*, 46 C. A. 389, 103 S. W. 195.

A widow, applying as the head of a family for land, held to acquire an equity thereto perfected by an act of the legislature, so that the title passed by her will to her devisee. *Houston Oil Co. v. Gallup*, 50 C. A. 369, 109 S. W. 957.

While ordinarily a patent to the heirs of a decedent conveys the title to those who are the true heirs at law, yet, where the certificate on which the patent is based shows that it was granted by a board or a court to particular persons as such heirs, the patent is to be regarded as a grant to those persons. *Houston Oil Co. v. Hayden*, 104 T. 175, 135 S. W. 1149.

A land certificate having been located, a portion of the land was allotted to defendant, and he subsequently sold parts thereof to others. The other heirs having applied to the state land commissioner to float the certificate, defendant objected so far as it affected the land so awarded to him and a balance certificate was issued to the other heirs which they floated on other land. Held, that such facts established partition of the certificate between defendant and the other heirs, and that he was estopped to claim any part of the land located by them. *Robertson v. Brothers* (Civ. App.) 139 S. W. 667.

Art. 5372. [4186] In what order patents shall issue.—The commissioner of the general land office is authorized and required to patent surveys in the order in which they may be made ready for patenting, without regard to the order of filing in the general land office or the order of application; provided, that, when application is made for patent on any claim, and the office fees therefor have been paid, such claim shall have preference over claims for which no application has been made; provided, such surveys shall have been regularly mapped, or there be sufficient evidence that no previous survey has been legally filed in the land office covering the same ground as represented on the maps of the office. [Act April 8, 1861. P. D. 4300. Acts 1879, S. S., ch. 27.]

Art. 5373. [4187] Patents on unrecommended certificates prohibited.—The commissioner of the general land office is hereby prohibited from issuing a patent upon any survey that shall have been made by authority of a certificate issued prior to March 16, 1840, and has not been returned as genuine and legal by the commissioners appointed by the act of January 29, 1840, or by authority of a warrant issued for military services, unless the same shall have been presented to and approved by the secretary of war, the adjutant general, or the commissioner of the court of claims, as heretofore prescribed by law, or unless said certificate or warrant shall have been issued by authority of a special act of the legislature; and any patent issued contrary to the provisions of this article shall be null and void, unless the person claiming such patent shall produce to the commissioner of the general land office the judgment or decree of a district court of the republic or state of Texas, from which no appeal was taken within the time prescribed by law, that he is justly entitled to the amount of land under the constitution and laws. [Act Jan. 29, 1840. P. D. 4288. Acts 1879, ch. 121, p. 129.]

See Appendix for repealed and omitted land laws.

Art. 5374. [4189] Patent may be canceled in whole or in part, where issued by mistake.—Where a patent to land has been or may hereafter through mistake be issued upon any valid claim for land which is afterward found to be in conflict with any older title, it shall be competent for the owner of such patent, or any part of the land embraced therein, and within such conflict, to return the same to the commissioner of the general land office for cancellation, or in case the owner of such land in conflict can not obtain the patent, then he shall return instead thereof legal evidence of his title to such patent, or part thereof; and in either case he shall make and file with the said commissioner an affidavit in writing that he is still the owner of the same, and has not sold or transferred it; and, should it appear from the records of the general land

office, or from a duly certified copy of a judgment of any court of competent jurisdiction before which the title to such land may have been adjudicated, that such conflict really exists, it shall be lawful for him to cancel the patent, or such part thereof as shall appear to belong to the party so applying. [Act March 10, 1885, p. 76.]

Fraud.—Sale of school lands under a false representation of the grantor that he had resided thereon for three years, which would entitle him to a patent, held fraudulent, so as to authorize cancellation. *Settle v. Stephens*, 18 C. A. 695, 45 S. W. 969.

The state is not required to refund the purchase money paid for school lands on setting aside a patent for fraud in obtaining it. *State v. Burnett* (Civ. App.) 59 S. W. 599.

The fraud which will vitiate a patent issued by the proper authority of the state must be fraud practiced on the state or its duly constituted agents, and not on a claimant of the land. *Hulett v. Platt*, 49 C. A. 377, 109 S. W. 207.

Purchaser for value.—A grantee, taking a deed from a patentee of land in consideration of advances previously made, held not a purchaser for value, as against the state's right to set aside the patent for fraud. *State v. Burnett* (Civ. App.) 59 S. W. 599.

Where plaintiff's application and survey of public lands were fraudulently altered, and the land was subsequently patented to defendant's grantor, plaintiff held not entitled to the land as against such grantor. *Robles v. Cooksey* (Civ. App.) 70 S. W. 584.

That the patentee of land defrauded the state in procuring the patent held not to entitle another who illegally attempted to have it patented for himself to recover the land from the patentee, or his grantee, with notice. *Rogers v. Blackshear* (Civ. App.) 128 S. W. 938.

Art. 5375. [4190] When in partial conflict, may be canceled.—In cases where there is only a partial conflict, the commissioner of the general land office may, under like circumstances and in like manner as is provided for in the preceding article, cancel any patent presented to him, and issue a patent to the applicant for such portion of the land covered by his patent as may not be in conflict with the older title, where from the field-notes the same may be done. [Act Feb. 3, 1874. P. D. 4302.]

Art. 5376. [4191] Commissioner required to deliver patent, when.—The commissioner of the general land office is hereby authorized and required to issue and deliver all patents now or hereafter ready for delivery to the person entitled to receive the same, when it appears from the books of said office that the legal fee for said patent has been at any time heretofore deposited in said office and not withdrawn. [Acts 1891, p. 182.]

Art. 5376
Vernon-Sayles
1914
Amended
Fourth C. S.
35 L. P. 119

Art. 5377. Patents on homestead claims, to issue when.—The commissioner is directed to issue patents to all homestead claimants, pre-emptors, and other persons who settled upon public lands in good faith and attempted to purchase the same and had the field-notes thereto returned to and actually filed in said land office prior to October 23, 1898, where the law under which said settlement, pre-emption or purchase was made is complied with, and patent could legally issue thereto, had it not been for the decision of the supreme court of the state of Texas in the case of *Hoge vs. Baker*, rendered on October 23, 1898; provided, proof of occupancy shall be filed in the land office and payment of patent fees made. [Amended Acts 1903, p. 228, sec. 9.]

Art. 5378. [4192] Refunding of fee when patent can not issue.—Upon proper proof being made to the comptroller that deposits have been made in any special funds of moneys, for which deposits and payments no patents for lands can be issued for which such payment may have been or may hereafter be made, the comptroller is authorized to issue his warrant in favor of such parties for such amount as may be found to be due; provided, this article shall not apply to surveys, the errors in which may be corrected. [Acts 1883, p. 113.]

Note.—This article was chapter 111 of Laws 1883, and was amended and superseded by chapter 104 of Laws 1895. The chapter was inserted by the codifiers of 1895 as article 4159c. See Art. 5404 herein.

Art. 5379. [4193] When patent may be delivered to agent.—No patent shall be delivered in any case to an agent or legal representative until he shall have filed written authority from the owner.

Art. 5380. [4194] Commissioner required to issue patents on certificates not reported by clerks, when.—The commissioner of the general

land office is authorized and required to issue patents to lands that have been surveyed and returned to the general land office and have been suspended because the clerks of the county courts have failed to make reports as required by law, when said commissioner is satisfied from evidence in his office that such patents should issue. [Acts 1883, p. 82.]

Note.—This article originally read: "The commissioner of the general land office is hereby authorized and required to issue patents to lands that have heretofore been surveyed," etc. See 2 Sayles' Civ. St. 1889, art. 3967a.

Art. 5381. [4195] Penalty for failure to pay fees on patents; venue, etc.—If any patents remain in the land office six months after the owners are notified of the issuance, and to pay the dues on the same, it shall be the duty of the commissioner to add to the amount of said fees a penalty of ten per cent per month for the whole time the fees may remain unpaid, and to collect said penalty and fees from the persons or corporations to whom said patents have been granted; and said commissioner shall have no authority to deliver any patent for land or certified copy of field-notes or certificate thereof until the whole amount of said fees and penalty shall have been paid, and it is made the duty of the attorney general to bring suit for the same in the district court of Travis county. [Acts 1879, p. 62.]

Fees payable.—Fees are payable upon all patents issued from the land office. Taylor v. Hall, 71 T. 213, 9 S. W. 141.

Art. 5382. [4196] State shall have a lien to secure the fees.—The state of Texas has and shall hereafter have a lien upon all the land conveyed by or included in all patents to land granted by the state for the amount of fees and penalties provided for in the preceding article, and said land shall be subject to be sold in satisfaction of the same. [Id.]

Art. 5382a. Surveys validated; when patent to be issued.—That in all cases where parties resurveyed or re-located lands by virtue of any valid land certificates previously surveyed and on file in the general land office, with or without having taken out certified copies thereof, and thereby failed to comply strictly with the law, such last named survey, which in law might be deemed a re-location, shall be valid, and the owner shall hold thereunder, thereby abandoning all other surveys previously made, and the commissioner of the general land office is authorized to issue patents therefor. Provided such re-location shall not be patented if made in conflict with any valid location or survey previously made. [Acts 1889, p. 107, sec. 1. Amended Acts 1913, p. 357, sec. 1.]

CHAPTER SEVEN

LAND RESERVATIONS

Art.	Art.
5383. Locations validated.	5386. One-half of public domain added to permanent fund.
5384. Lands sold for taxes to state, etc.	5387. The asylum lands.
5385. All unappropriated lands declared part of permanent school fund.	

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter. See, also, Appendix for omitted and repealed land laws.]

Article 5383. [4265] Locations validated.—Any and all public lands heretofore surveyed by railroads, or corporations, or any company, or any person in this state, for the benefit of the public free schools of this state, by virtue of any certificate, valid or invalid, void or voidable, be and the same are hereby declared to be lands belonging to the public free schools of this state. [Acts 1883, p. 4.]

Application.—This article was intended to apply to all lands theretofore surveyed for the benefit of the public free schools, and to appropriate such lands to that fund, and it applies to surveys in which there are irregularities in the manner of making the same, or to a failure to comply with the statutory provisions with reference to the entry or

application for survey or in returning the certificate and field notes of such surveys to the general land office. *Eyl v. State*, 37 C. A. 297, 84 S. W. 611.

Art. 5384. [4266] Lands sold for taxes to state, etc.—When lands are sold in unorganized counties and bid in by the comptroller for the state for the taxes due thereon, and are not redeemed by the owner thereof, nor his agent, within two years, by the party redeeming the same paying double the amount for which said land was sold, then the land thus sold and unredeemed shall become vacant and revert to and become a part of the public free school fund, to be sold and disposed of as other lands belonging to the public free school fund are to be sold and disposed of by law. [Acts 1879, p. 140.]

Art. 5385. All unappropriated lands declared part of permanent school fund.—All lands heretofore set apart under the constitution and laws of Texas, and all of the unappropriated public domain remaining in the state of Texas, of whatever character, and wheresoever located, including any lands hereafter recovered by the state, except that included in lakes, bays and islands along the gulf of Mexico within tide-water limits, is set apart and granted to the permanent school fund of the state; and all such lands heretofore or hereafter recovered from railway companies, firms, persons, or other corporations by the state, by suit or otherwise, and constituting a part of said school fund as herein provided, shall be disposed of as other school lands, except as otherwise provided by law. In all cases where said land, or any portion thereof, has been surveyed into tracts of six hundred and forty acres, more or less, and field-notes thereof returned to and filed in the general land office, the same is hereby declared a sufficient designation of said land; and the commissioner of the general land office shall dispose of the same by the survey and block numbers contained in said field-notes. [Acts 1900, p. 29. Acts 1899, p. 123.]

Constitution.—For construction of article 7, section 2, of the constitution, setting apart school lands, see *G., H. & S. A. Ry. Co. v. State*, 77 T. 367, 12 S. W. 988, 13 S. W. 619; *Von Rosenberg v. Cuellar*, 80 T. 249, 16 S. W. 58; *Pulliam v. Runnels County*, 79 T. 363, 15 S. W. 277.

Retroactive operation.—Acts 26th Leg. c. 81, declaring that all lands theretofore or thereafter recovered by the state shall at once become part of the permanent school fund, cannot have a retroactive effect as to land, the patent to which was prior to such act validated by the legislature, after having been declared invalid by a judgment in favor of the state. *State v. Powell* (Civ. App.) 134 S. W. 746.

Lands included in appropriation.—In the case of lands equitably owned by the public free school fund, one whose homestead survey thereof under which he claims not having been made until October, 1898, and the benefit of these laws of 1899 and 1900 being limited to those whose homestead surveys were made prior to such time, it cannot avail him that he became an actual settler and made application for such survey before that time. *Burkhead v. Bush* (Civ. App.) 75 S. W. 68.

Where one has taken all necessary steps in 1896 and subsequently to acquire land under the homestead laws as then existing, before the land had been withdrawn by the act of 1900, he has title superior to one who purchases from the state (land in question) as school land by patent issued to him in October, 1902. *Lane v. Huffman* (Civ. App.) 82 S. W. 1071.

Art. 5386. [4253] One-half of public domain added to permanent fund, etc.—After the payment of the amounts due from the state to the common free school fund out of the proceeds of the sales heretofore made, or hereafter to be made, of that portion of the public lands set aside for the payment of the public debt by an act approved July 14, 1879, and an act amendatory thereof approved March 11, 1881, and the payment directed to be made to the common school and university funds by an act approved February 23, 1883, the remainder of said land, not to exceed two million of acres, contained in the counties and territory specially mentioned in said acts, or the proceeds thereof, set aside by said acts for the payment of the public debt, heretofore or hereafter to be received by the state, shall one-half thereof constitute a permanent endowment fund for the university of Texas and its branches, including the branch for the instruction of colored youths. [Acts 1883, p. 71.]

See Appendix for omitted and repealed land laws.

Art. 5387. [4254] The asylum lands.—The four hundred thousand acres of land set apart for the lunatic asylum, the blind asylum, the asylum for the deaf and dumb, and an orphan asylum, in equal portions of one hundred thousand acres for each of said asylums, by the provisions of an act of the legislature entitled, "An act setting aside and appropriating land for the benefit of asylums," approved August 30, 1856, is hereby recognized and set apart to provide a permanent fund for the support, maintenance and improvement of such asylums. [Const., art. 7, sec. 9. Act Aug. 30, 1856, p. 76.]

See Early Laws, Art. 2595.

DECISIONS RELATING TO SUBJECT IN GENERAL

Islands.—The term "reservation" used in the grant of a certificate, held intended in the sense of lands subject to appropriation which have at different times been reserved temporarily from general and subjected to particular locations, and does not include islands. *Roberts v. Terrell*, 101 T. 577, 110 S. W. 733.

It is the policy of the state of Texas to reserve its islands from location. *Texas Channel & Dock Co. v. State* (Civ. App.) 133 S. W. 318.

A public land certificate issued under a special act, not authorizing its location on an island, held not subject to location on an island belonging to the state. *Id.*

Certain special acts held not to constitute a ratification of the location of certain land certificates by W. on islands belonging to the state. *Id.*

Lands situated on islands in Texas are reserved from location. *Texas Channel & Dock Co. v. State*, 104 T. 168, 135 S. W. 522.

Abandonment of appropriated lands.—Title to a part of public lands appropriated for a particular use held to become a vested right not impaired by abandonment. *Talley v. Lamar County*, 104 T. 295, 137 S. W. 1125.

Lease of reserved lands.—The acts creating the Memphis and El Paso reservation did not operate as an appropriation of the lands, but only as a mere withdrawal from the location by others than those for whose benefit the reservation was created, and do not preclude the lease of unlocated portions thereof by the commissioner of the general land office. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 703.

CHAPTER EIGHT

GENERAL PROVISIONS

Art.	Art.
5388. No officer to be interested in public lands, etc.	5397. Belong to public free school fund.
5389. Abstract to be corrected if necessary.	5398. Excess to be added.
5390. Supplemental abstracts furnished, when.	5399. Shall not affect.
5391. Abstracts to be printed, etc.	5400. Conflict.
5392. Printing of, how paid for.	5401. Even numbered surveys in conflict, etc.
5393. Certain locations validated.	5402. Lands—how sold and proceeds invested.
5394. Failure to alienate no forfeiture, when.	5403. Actual settlers to have preference.
5395. Must alienate within what time.	5404. Land purchase money refunded, when.
5396. Surplus segregated from public domain, when.	

Article 5388. [4211] No officer shall be interested in public land, etc.—No person elected or appointed to any position of trust in the general land office, or employed in such land office, shall, directly or indirectly, be concerned in the purchase of any right, title or interest in any public land, either in his own name, right or interest for any other person, or in the name or right of any other person in trust for himself; nor shall take nor receive any fee or emolument for negotiating or transacting the business of said office, other than those fees allowed by law. [Act Dec. 14, 1837. P. D. 4090.]

See Appendix for omitted and repealed land laws.

Cancellation of patent to surveyor.—By the provisions of Pen. Code, art. 164, no county or district surveyors or their deputies shall be directly or indirectly engaged in the purchase of public land. When patent has been issued to such a purchaser, the state can maintain an action to cancel the patent without returning or offering to return the purchase-money paid by the defendant to the state. *State v. Thompson*, 64 T. 690.

Art. 5389. [4215] Abstract to be corrected when necessary.—The commissioner of the general land office shall make it the special duty of one of his clerks to constantly correct the abstract of patented, titled and

surveyed lands required to be kept in his office according to errors discovered, changes by cancellation of patents, changes of county lines, and creation of new counties, and to add all new patented surveys at the date of the patent. [Id. sec. 4.]

Excerpts admissible in evidence.—Excerpts from the abstract of Texas land titles, published by the land commissioner as required by this article, are admissible in evidence in trespass to try title. *Whitaker v. Browning* (Civ. App.) 155 S. W. 1197.

Art. 5390. [4216] Supplemental abstract furnished, when.—During the month of August of each year hereafter, the commissioner of the general land office shall have made out and furnished to the comptroller of public accounts a supplementary abstract of all patents that have been issued from his office during the year ending on the thirty-first day of August. [Id. sec. 5.]

Art. 5391. [4217] Abstract to be printed, etc.—The comptroller of public accounts is hereby authorized to have one thousand copies of said supplementary abstracts printed and bound for distribution among those officers of the state and counties whose duties require the use of said abstract, the surplus copies to be sold at a reasonable price to parties applying for them; provided, that, if the demand for copies of said abstract shall be greater than the supply provided for by this article, an additional number of five hundred copies may be printed. [Id. sec. 6.]

Art. 5392. [4218] Printing of, how paid for, etc.—The sum necessary to pay for the printing and binding of said supplemental abstracts shall be paid out of the general appropriation made by the legislature for printing; and all moneys received by the comptroller by the sale of said abstracts shall be paid into the treasury to the credit of said appropriation. [Id. sec. 7.]

Art. 5393. [4218a] Certain locations validated.—The titles to all lands located by virtue of certificates issued to railroad companies in whole or in part for sidings, switches or turnouts, and which lands were transferred by any of said companies, or their duly appointed receivers or assigns, prior to the first day of January, A. D. 1891, to purchasers in actual good faith for value, and are now owned by such purchasers, their heirs or assigns, be and the same are hereby validated to such purchasers, their heirs or assigns, and also to all actual settlers on such lands so far as the state may have any claim, and that the titles to all public free school, university, or asylum lands located by virtue of such certificates are also validated, whether the locations were voidable or not by reason of their having been made by the wrong surveyor; provided, that this article shall not apply to lands for the recovery of which suit has already been instituted by the state, nor be construed to validate locations made on lands that were at the time appropriated or reserved from such locations, nor shall it be construed to in any manner apply to or affect the rights of third parties heretofore acquired in good faith; provided, further, this article shall not apply or be held to validate titles in the following other cases:

1. Where said lands were transferred through foreclosure proceedings against such companies to trustees or mortgagees or other persons or corporations interested in mortgages on said lands, or who held said lands for such interested persons or corporations, and where the apparent title to said lands was still in said companies or their receivers or their transferees at such foreclosure sale on January 1, 1891, and have not been subsequently transferred to actual settlers on such land or to bona fide purchasers thereof for value and without notice.

2. Where said lands have been transferred by said companies in evasion and fraud of the laws of alienation applicable thereto and the title is now in the name of the original vendees of said companies. [Acts 1895, p. 36.]

Art. 5394. Failure to alienate, no forfeiture when.—The failure of any railway company or other original grantee of any valid alternate land certificate to alienate their lands or any portion thereof, granted to them within the periods specified in the laws under which said lands were granted, or by any other law of the state of Texas, shall not be deemed a sufficient cause for forfeiting such lands, or any part thereof, by the state of Texas; provided, it shall appear that such lands have in fact, by a bona fide sale, been already alienated to actual purchasers; and provided, further, that all lands now held by such original grantee shall be sold to actual bona fide purchasers on or before the first day of July, 1910, otherwise such lands as are not so alienated shall revert to and become the property of the state of Texas; provided, further, that all lands affected by this article shall be alienated in tracts not to exceed four sections to any one person or persons, and that no person, persons, or corporations shall make more than one purchase of said lands. [Acts 1903, p. 130.]

Art. 5395. Must alienate within what time.—Any railway company which has in any manner whatsoever acquired title to or interest in any land in this state, not required in the construction, operation or repair of its railway, or for yards, stations, or other facilities, shall alienate the same in good faith on or before the first day of July, 1910, otherwise the same shall be forfeited to the state at the suit of the attorney general. [Id.]

Art. 5396. [4274] Surplus segregated from public domain, when.—Surveys and blocks of surveys made by virtue of valid alternate scrip be and the same are hereby declared to segregate from the mass of the public domain all land embraced in said surveys, or blocks of surveys, as evidenced by the corners and lines of same, or by calls for natural or artificial objects, or the calls for the corners and boundaries of other surveys, or by the maps and other records in the general land office. [Acts 1889, p. 104.]

Application.—In order to become the beneficiary under Arts. 5396-5398, the person invoking their protection must show that he is a purchaser of the entire section before he can claim the prior right to purchase the excess and (2) he must exercise that right within the period of six months after the date of the resurvey which discloses the excess. *Willoughby v. Long* (Civ. App.) 69 S. W. 648.

Where the state has received and approved an application to purchase a section of school land, previously surveyed by authority of law in good faith, Arts. 5396-5398 contemplate that the land commissioner may sell the excess to the purchaser of the section or survey affected thereby, without segregating the excess from the body of the section or survey, and does not give the commissioner arbitrary or discretionary authority to segregate the excess from the body of the section and locate it in any portion of the section regardless of improvements or of the quality of the land segregated as compared with other portions of the section, and without regard to equitable rules governing the partition and distribution of lands. *Wright v. Gale*, 104 T. 450, 140 S. W. 91, 143 S. W. 141.

Resurvey.—Where the land commissioner, after discovering an excess of school land in a section or survey sold to a bona fide purchaser, desires to segregate the excess as authorized by Arts. 5396-5398, he must begin the resurvey at the beginning corner of the original survey, and leave the section or survey in a body and as near a square as may be practicable, and, after giving the purchaser his quantum of acreage, lop off the excess. *Wright v. Gale*, 104 T. 450, 140 S. W. 91, 143 S. W. 141.

Rights of purchaser.—A survey of state land containing 685 acres was purchased as containing 640. Defendant, a subsequent purchaser, having sold 200 acres to a third person, sold 485 to plaintiff. Held, under Arts. 5396-5398, that, no segregation having been made, plaintiff cannot assume that the 45-acre excess will be taken from his tract, and hence cannot recover from defendant such deficiency in the acreage purchased by him. *Gale v. Wright* (Civ. App.) 136 S. W. 1163.

Under Arts. 5396-5398, a vendee of a purchaser of a section containing excess lands is entitled to have the original purchaser purchase the excess for the vendee's benefit, or purchase the same in his own name as the purchaser's assignee; and hence, on a shortage in the sale quantity being discovered by reason of the existence of an excess in the survey, the purchaser's vendee was entitled to perfect his title to the excess and to recover from the purchaser under his warranty of title such sum as the vendee was required to expend for that purpose, not to exceed the amount paid to the purchaser in the first instance for the shortage, with legal interest. *Wright v. Gale*, 104 T. 450, 140 S. W. 91, 143 S. W. 141.

Art. 5397. [4275] Belong to public free school fund.—All excess in said surveys are donated and declared to belong to the public free school

fund of the state; and it shall be the duty of the commissioner of the general land office to ascertain, by any and all means practicable, the existence and extent of such excesses, and to provide for and direct such surveys, or corrected surveys, as may be necessary for this purpose; provided, that, where such surveys were made in blocks of two or more surveys, said respective surveys shall remain on the ground consecutively as placed therein, as shown by the maps, sketches and field-notes originally returned to the general land office; provided, that the person who has already purchased, or who may hereafter purchase from the state the particular section to which surplus shall by such resurvey be made contiguous, shall have the prior right for the period of six months after such resurvey shall have been made, in which to purchase such excess on the same terms on which such purchaser has already bought or may buy. [Id. sec. 2.]

Art. 5398. [4276] Excess to be added.—All such surveys which, under the direction of the commissioner of the general land office have been or may be hereafter corrected, so that all excess in the original surveys shall be placed in the surveys belonging to the public free schools, are hereby validated, and the action of the commissioner is hereby ratified; and he is directed and authorized to issue patents to the owners thereof, and to sell such surveys belonging to the public free schools, securing to the state the benefit of such excesses. [Id. sec. 3.]

Application.—See notes under Art. 5396.

Where the draughtsman in the land office, according to custom in such office, adopted the designation and numbering of such surveys made by the surveyor and appearing in the field notes, it was a sufficient compliance with this article. *Eyl v. State*, 37 C. A. 297, 84 S. W. 610.

Art. 5399. [4277] Shall not affect.—The provisions of this law shall not apply to nor affect the rights of the third persons heretofore acquired in good faith. [Id. sec. 4.]

Art. 5400. [4278] Conflicts.—Nothing in the preceding four articles shall apply to any lands for which patents have been issued. [Id. sec. 5.]

Art. 5401. [4279] Even numbered surveys in conflict, etc.—Where the common school or even numbered surveys in conflicting locations, made by virtue of alternate land certificates, are not identical or upon the same land, the commissioner of the general land office may, where he deems it to the interest of the state to do so, change the numbers of the surveys in the conflicting locations so as to make the common school or even numbered surveys in both locations identical; provided, that the commissioner of the general land office shall not change the numbers of surveys without the written consent of the owner of the certificates by virtue of which said surveys are made. [Acts 1889, p. 104.]

Art. 5402. [4271] Land, how sold and proceeds invested.—Each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the commissioners' court of such county; and the proceeds of any such sale shall be invested in bonds of the state of Texas, or of the United States, and held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually. [Id.]

See, also, notes under Arts. 1370, 1373.

Title and rights of counties in general.—The title of a county to school lands, the patent of which it had received from the state before the adoption of the constitution of 1869, was not divested by section 8, article 9, of that instrument, which gave to the legislature control of such lands. That section would only affect such school lands as had not been patented. *Galveston County v. Tankersley*, 39 T. 651. The authority of this decision is recognized in *Worley v. State*, 48 T. 1; but the court says: "We are by no means prepared to assent to what is said in the opinion in that case denying the power of the state over lands granted by her to her own political subdivisions for public purposes."

The state cannot arbitrarily take from a county its school lands. *Milam County v. Bateman*, 54 T. 153.

The state may exercise such supervisory control as may be necessary to enforce the performance of the trust upon which the land is donated, but it cannot by legislation divert its use to other and different parties and purposes than those contemplated when

it was originally granted. *Milam County v. Bateman*, 54 T. 153; *Milam County v. Blake*, 54 T. 169; *Palo Pinto County v. Gano*, 60 T. 249.

The counties may sell or dispose of their lands in such manner as the commissioners' court may direct. *Palo Pinto County v. Gano*, 60 T. 249.

The entire proceeds of the sale of land belong to the permanent school fund of the county. *Pulliam v. Runnels County*, 79 T. 363, 15 S. W. 277; *Tomlinson v. Hopkins County*, 57 T. 572; *Cassin v. La Salle County*, 1 C. A. 127, 21 S. W. 122.

County school lands are exempt from taxation while owned by the county. *Land & Cattle Co. v. Board*, 80 T. 489, 16 S. W. 312.

The intention in granting lands to counties for educational purposes was to impose upon the several counties the duties of trustees as to such lands. *Board of School Trustees v. Webb County (Civ. App.)* 64 S. W. 488.

Construction of grants.—The legislature intended to prescribe one broad general rule to the construction of grants of school lands to counties and that rule is that the land included in the patents shall be held to be that included in the lines returned to the land office without regard to mistakes in surveying. * * * Where lines are given which embrace all of the land between two sets of surveys but the surveyor by a mistake not shown by his return has erroneously stated the distance, the lines given in the land are made to conclusively control whether the distance and quantity are as the surveyor intended or not. *Steward v. Coleman County*, 95 T. 445, 67 S. W. 1017, 1018.

Powers of commissioners' court in general.—See, also, Title 40, Chapter 2.

Purchasers of school land held charged with notice of any want of power of a commissioner appointed to sell such lands by an order of the commissioners' court. *Logan v. Stephens County (Civ. App.)* 81 S. W. 109.

The commissioners' court is authorized to sell the county's school lands in such manner as it may provide. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1057.

Const. art. 7, § 6, as it existed in 1881, provided that lands granted to counties for school purposes might be sold by the counties as provided by the commissioners' court; the proceeds to be held for the benefit of the public schools. Const. 1876, art. 5, § 18, declared that the county commissioners' court should exercise such powers and jurisdiction over all county business as was conferred by the constitution or laws of the state, and this article and Art. 2271, made it the duty of the commissioners' court to provide for the disposition of all county school lands in the manner provided by the commissioners' court. Held that, while such provisions authorized a disposition of such lands, they could only be sold "in the manner" provided by the commissioners' court, which had no power to delegate to the county judge the power to make such sales as agent for the county, and sales so attempted to be made by him were invalid. *Gallup v. Liberty County*, 57 C. A. 175, 122 S. W. 291.

— **Ratification of sale.**—Where a county had full power to sell certain school lands, but the sale was invalid because made by the county judge under an ultra vires delegation of authority by the commissioners' court, the county, having received the purchase money and used it for county purposes, thereby ratified the sale and was not entitled to recover the land. *Gallup v. Liberty County*, 57 C. A. 175, 122 S. W. 291.

Approval of a sale of the timber on school lands by the commissioners' court and the receiving of the purchase money and use thereof by the county for school purposes held a ratification of the sale. *Carter-Kelly Lumber Co. v. Angelina County (Civ. App.)* 126 S. W. 293.

The order of the commissioners' court approving a sale of timber on school lands need not be in writing to constitute a ratification of the sale. *Id.*

Contracts for purchase.—The commissioners' court has the authority to release the original vendees from their liability on a vendor's lien note for the purchase money of the county school land and to accept instead the obligation of the parties to whom such vendees sold secured by a deed of trust on the land. *Waggoner v. Wise County*, 17 C. A. 220, 43 S. W. 836.

A sale of school lands held executory prior to payment of the price authorizing the commissioners' court to reduce the rate of interest on the purchaser's obligation. *Delta County v. Blackburn (Civ. App.)* 90 S. W. 902.

One of defendants held not to have taken a part of land as agreed under a contract between plaintiff and defendants, whereby each was to take a certain amount of land purchased from the county. *Ellerd v. Cox*, 52 C. A. 60, 114 S. W. 410.

Where one of several parties to an agreement for the purchase of county land defaulted in his payments, the county held not entitled to recognize certain persons as entitled to take up his interest as against another party to the agreement though an option to do so had been expressly reserved. *Id.*

The county held not a necessary party to an action by one of several parties to an agreement, under which they bought county lands, to enforce his right to take up the interest of a defaulting party to the agreement. *Id.*

A county held to rescind its contract to sell school land. *Tinney v. Waggoner (Civ. App.)* 138 S. W. 184.

There is no distinction between an express provision and an implied provision in a county's executory contract for the sale of its school lands, as to the county's right to rescind it, in case of a breach by the grantee. *Fullerton v. Scurry County (Civ. App.)* 143 S. W. 971.

Right of purchaser to enforce specific performance of contract for school lands after his own breach, as dependent on the provisions of the contract as to forfeiture of payments made, stated. *Id.*

Existing law as to a county's right to rescind an executory contract of sale of its school lands held to enter into an executory contract of sale, and become a part of it. *Id.*

Acquiescence by county officers in a contract of sale of school lands, ineffectual to pass title, held not to raise a limitation as against the county. *Id.*

Judicial proceedings, by which a county recovered judgment for school lands which it had sold, held not to divest grantees of the purchaser from their right to tender and obtain specific performance of the original contract upon certain conditions. *Id.*

County selling school lands and retaining a vendor's lien held entitled, upon breach of contract, to rescind the contract and retake possession, without notice to the purchaser's grantees or their representatives. *Id.*

County held to have the right to rescind its executory sale of school lands and to resume possession thereof on breach by the purchaser, without notice of rescission to his infant grantees or heirs. *Id.*

On county's rescission of entire executory contract for the sale of its school lands, held, that a minor grantee, although without notice of a rescission by the county, could not acquire an undivided interest in common with the school fund. *Id.*

Sale for consideration other than money.—A county cannot convey a part of its school lands to pay expenses of its location. *Tomlinson v. Hopkins County*, 57 T. 572.

Where a part of the consideration of the sale of county school land is other than money the sale is invalid. *Tomlinson v. Hopkins County*, 57 T. 572; *Cassin v. La Salle County*, 1 C. A. 127, 21 S. W. 122.

The entire consideration must be money. If a part of the consideration is anything other than money the sale is invalid, if the purchaser knew the fact or might have known it, however innocent of any intention to defraud or deceive he may have been. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1057.

Fact that a purchaser of county school lands in addition to paying full value for the land agrees to release a claim against the county held not to invalidate the sale. *Taber v. Dallas County*, 101 T. 241, 106 S. W. 332.

Payment for services in subdividing land.—Where county commissioners convey school lands for services in subdividing the whole tract, in a suit to recover from a subsequent grantee it is not incumbent on the county to pay the defendant the value of such services. *Dallas County v. Club Land & Cattle Co.*, 95 T. 200, 66 S. W. 294.

Employment of agents and payment of commission.—The commissioners' court held to have power to appoint agents to sell county school lands on specified terms, convey the lands, receive the purchase money, deposit it to the credit of the school fund, and make an annual report pursuant to a written contract. *Matagorda County v. Casey*, 49 C. A. 35, 108 S. W. 476.

A stipulation in a contract with agents for the sale of county school lands held not an agreement to pay them out of the proceeds of the sales; and hence on its face an unauthorized diversion thereof. *Id.*

Where county commissioners without authority authorized a sale of school lands by the county judge, the fact that he was allowed a commission out of the purchase price, all of which belonged to the county school fund, did not invalidate the sale. *Gallup v. Liberty County*, 57 C. A. 175, 122 S. W. 291.

Amount for which sold.—Fact that it should be subsequently found that county school land was in fact worth more than it brought held not to avoid the sale fairly made. *Taber v. Dallas County*, 101 T. 241, 106 S. W. 332.

Warranty of title.—A county held not liable on a warranty of title contained in a deed of certain school lands, which deed the commissioner making the same had no authority to execute. *Logan v. Stephens County (Civ. App.)* 81 S. W. 109.

Boundary agreement.—A county may dispose of the fee in its school lands only by sale, and cannot make such disposition by a boundary line agreement. *Atascosa County v. Alderman (Civ. App.)* 91 S. W. 846.

Abandonment of lands purchased.—On facts stated, held, that the grantees of a purchaser of county school lands had abandoned their rights therein. *Fullerton v. Scurry County (Civ. App.)* 143 S. W. 971.

Lease.—A county may lease its school lands. *McInnes v. Wallace (Civ. App.)* 38 S. W. 816.

Liability of sureties on treasurer's bond.—When the school lands are sold on credit, the county taking the purchaser's notes therefor, the interest upon the notes becomes a part of the available school fund, and the sureties on the treasurer's bond are liable for the safe-keeping of such moneys that come into his hands. *Simons v. Jackson County*, 63 T. 428.

Investment of school fund.—This article does not restrict the general power of the court over the investment of the school fund. *Boydston v. Rockwall County*, 24 S. W. 272, 86 T. 234. See *Kentucky Cattle Raising Co. v. Bruce*, 78 T. 269, 14 S. W. 619.

The county has no authority to loan the proceeds of sales on a note secured by deed of trust of lands belonging to the borrower, but he cannot avoid such note and security under the plea of *ultra vires*. *Albright v. Allday (Civ. App.)* 37 S. W. 646.

Diversion of funds.—Where county school land is sold by the trustees in good faith for full market value, the validity of the sale held to depend upon whether they have applied all the proceeds to the school fund, as required by Const. 1876, art. 7, § 6. *Taber v. Dallas County*, 101 T. 241, 106 S. W. 332.

Art. 5403. [4272] Actual settlers to have preference.—In any sale of county school lands, under the provisions of the preceding article, the actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres, at the price fixed by the commissioners' court, which price shall not include the value of existing improvements made thereon by such settlers. [*Id.*]

In general.—A settler's occupancy operates as a notice of his claim against purchasers from the county. *Land Co. v. Earle*, 71 T. 468, 12 S. W. 66.

Actual settlement at the time the county offers the land for sale gives the settler a prior right to purchase, which is assignable. *Best v. Baker*, 3 C. A. 551, 22 S. W. 1067, 24 S. W. 679; *Harris v. Byrd*, 3 C. A. 677, 22 S. W. 659.

A settler on school lands belonging to a county cannot be deprived of his right to pre-emption without an offer to sell made in good faith. *Carrington v. Harris (Civ. App.)* 50 S. W. 197.

That one moved on county land knowing it was for sale, and remained there five years, held not to relieve county from duty of offering land to him before selling it to another. *Id.*

Who are actual settlers.—See notes under Art. 5416.

A settler upon school land belonging to a county cannot be deprived of his pre-emption by a sale to another without an offer to sell first having been made to him in good faith and a rejection on his part. *Carrington v. Harris* (Civ. App.) 50 S. W. 197.

Assignee.—The settler's right to purchase may be lawfully transferred to another. *Baker v. Millman*, 2 C. A. 342, 21 S. W. 297. See *Perkins v. Miller*, 60 T. 61.

Vested right.—The preference right creates no vested right after the period of preference has expired, unless the settler took, before the expiration of the period, such further steps as the law required to bring about a purchase by him. *Wing v. Dunn* (Civ. App.) 127 S. W. 1101.

Price.—To defend against the county, the settler must buy at the price fixed by the court of the county which owned the land. *Clay County Land Co. v. Wood*, 71 T. 460, 9 S. W. 340; *Same v. Earle*, 71 T. 468, 12 S. W. 66; *Baker v. Dunning*, 77 T. 28, 13 S. W. 617; *Baker v. Millman*, 77 T. 46, 13 S. W. 618.

The settler has the prior right to purchase the block occupied by him, on tender of the price fixed by the county on the block. *Ward v. Worsham*, 6 C. A. 22, 24 S. W. 843. See *Patterson v. True* (Sup.) 2 S. W. 860.

Art. 5404. [4159c] Land purchase money refunded, when.—Upon proper proof being made to the comptroller that money has been in good faith paid into the state treasury upon lands for taxes, lease and purchase money, for which, on account of conflicts, erroneous surveys, or illegal sales, patents can not legally issue, or upon lands which patents have issued and have been or may hereafter be legally canceled, the comptroller is hereby authorized to issue his warrant for the amount so paid into the treasury in favor of the parties who have in good faith paid such money, for which they receive no consideration; provided, that this article shall not apply to surveys, the errors in which may be corrected; and provided, further, that whenever the official records of the general land office shall show that patents for such lands can not legally issue upon such surveys, on account of conflicts, erroneous or illegal sales, or that patents issued on such lands have been legally canceled, it shall be the duty of the commissioner to issue his certificate to that effect, which certificate filed with the comptroller shall be sufficient proof to authorize him to act under the provisions hereof. [*Id.* p. 162.]

CHAPTER NINE

SALE AND LEASE OF PUBLIC FREE SCHOOL AND ASYLUM LANDS

[See Appendix for omitted and repealed land laws.]

Art.	Art.
5405. Sale and lease of public lands provided for.	5421b. Certain settlements and attempted purchases validated.
5406. Duties of commissioner of general land office.	5422. Sales without settlement.
5407. Classification and valuation.	5423. Forfeiture of purchase by non-payment of interest, etc.
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Art.	Art.
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5434. Sale of gayule and lechuguilla.	5449b. Certain sales and patents validated.
5435. Transfers.	
5435a. Transfers other than personal; accounts with transferees, etc.	LEASES
5435b. Certified copies to be filed with transfers, etc.	5450. Commissioner may withhold agricultural lands from lease, when.
5435c. Transfer fees.	5451. Commissioner to advertise lands for lease, how.
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5439. Application of railroad to buy, to contain what.	5457. Lessees may remove improvements, when.
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5442. Application for less than 320 acres to particularly describe.	

Article 5405. [4218b] Sale and lease of public lands provided for.—All lands set apart for the benefit of the public free schools, the lunatic asylum, the blind asylum, the deaf and dumb asylum, and the orphan asylum shall be sold and leased under the provisions of this chapter. [Acts 1895, p. 63.]

See *Elliott v. Morris*, 49 C. A. 527, 121 S. W. 209; *Wing v. Dunn* (Civ. App.) 127 S. W. 1101; *Ericksen v. McWhorter*, 143 S. W. 245; *Cox v. Robinson*, 105 T. 426, 150 S. W. 1149.

In general.—Under the laws in force October 2, 1882, the school lands could be withdrawn from the market. *Kentucky Cattle Raising Co. v. Bruce*, 78 T. 269, 14 S. W. 619.

The time within which lands shall be sold is within the discretion of the legislature. *Swenson v. Taylor*, 80 T. 584, 16 S. W. 336; *Canales v. Perez*, 65 T. 291.

Act March 29, 1887, p. 61, considered in *Cox v. Finks* (Civ. App.) 41 S. W. 95; *Id.*, 91 T. 318, 43 S. W. 1.

Constitutional provisions.—The constitution does not inhibit the lease of the school lands. *Smisson v. State*, 71 T. 222, 9 S. W. 112; *Fitzgerald v. State* (Sup.) 9 S. W. 150; *Cunningham v. State* (Sup.) 11 S. W. 871; *Falls County v. Delaney*, 73 T. 463, 11 S. W. 492; *Brown v. Shiner*, 84 T. 505, 19 S. W. 686; *Arnold v. State*, 71 T. 239, 9 S. W. 120; *Coleman v. Lord*, 72 T. 288, 10 S. W. 91; *Swenson v. Taylor*, 80 T. 564, 16 S. W. 336.

Section 4, article 7, of the constitution of 1876, provides: "The lands herein set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms as may be prescribed by law." While this commands that the lands shall be sold, it leaves it entirely to the discretion of the legislature when it shall be done. It fails to direct that the entire body of such lands shall be immediately sold, or that until sold no other disposition shall be made of them. See *Brown v. Shiner*, 84 T. 505, 19 S. W. 686; *Swenson v. Taylor*, 80 T. 584, 16 S. W. 336.

The legislature may deal with the public school lands in any manner not inconsistent with the express provisions of the constitution. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

Art. 5406. [4218c] Duties of commissioner of the general land office.—The commissioner of the general land office is hereby vested with all the power and authority necessary to carry into effect the provisions of this chapter, and shall have full charge and discretion of all matters pertaining to the sale and lease of said lands, and their protection from free use and occupancy and from unlawful enclosure, with such exceptions and under such restrictions as may be imposed by the provisions of this chapter, or by the constitution of the state. He shall, as soon as practicable, adopt such regulations not inconsistent with the constitution or this chapter as may be deemed necessary for carrying into effect the provisions of this chapter, and may from time to time alter or amend

such regulations so as to protect the public interest; but all regulations shall be submitted to the governor for his approval before adoption or promulgation. He shall adopt all necessary forms of applications for sales or leases, and all other forms necessary or proper for the transaction of the business imposed upon him by this chapter, and may, from time to time, call upon the attorney general to prepare such forms; and it shall be the duty of that officer to furnish the commissioner of the general land office with such advice and legal assistance as may be requisite for the due execution of the provisions of this chapter; and it shall be the duty of such commissioner to call upon the attorney general for advice whenever there is any doubt as to the meaning of this chapter, or any provisions thereof. [Id.]

Powers of commissioner.—The authority given the commissioner of the land office to lease public lands, Acts 1895, is not in conflict with article 14, § 6, Const. 1876, authorizing homestead donations. *Bain v. Simpson*, 18 C. A. 429, 45 S. W. 395.

The law both before and after the amendment of 1897 clearly authorized the commissioner of the land office to lease the school, asylum and other lands, and the lessee is entitled to recover as against trespassers. *Sullivan v. Hall*, 22 C. A. 440, 55 S. W. 579.

It would seem that the land commissioner is given the power, when necessary, to cause a transfer (if not theretofore done by the secretary of the land board) of obligations of purchasers of school lands from the treasurer's office to his own, and the land commissioner could not forfeit the land without indorsing a forfeiture on the obligation. *Comanche Co. v. Brightman* (Civ. App.) 62 S. W. 976, 977.

The adoption of rules and regulations by the commissioner held not a condition precedent, essential to the validity of sales and leases of certain public lands. *West v. Terrell*, 96 T. 548, 74 S. W. 903.

Under this article the land commissioner is nominally invested with a very enlarged discretion in reference to the sale and lease of the school and asylum lands. But the restrictions with reference to the sale are so specific as to deprive him practically of all discretion in the matter. This is not so with regard to a lease. He can make a lease for not less than three cents an acre and for not longer than five or ten years as the case may be (Art. 5452). In the one case the state makes the offer the acceptance of which is the contract. In the other the making of the lease is confided to the discretion of the commissioner. When he has made a lease for 10 years, it will be presumed that he has examined the question and found that the quality of the land is such as to permit a lease for that term. *Sanford v. Terrell* (Sup.) 87 S. W. 656.

Art. 5407. Classification and valuation.—The commissioner of the general land office may, from time to time, as the public interest may require, classify or reclassify, value or revalue, any of the lands set apart for the benefit of the public free school, lunatic asylum, the blind asylum, the deaf and dumb asylum and the orphan asylum, designating the same as agricultural, grazing, or timbered land, according to the fact in the particular case; and he may prescribe such regulations in relation thereto as he may deem necessary to secure a correct classification; provided, all agricultural lands shall be sold at not less than one dollar and fifty cents per acre, and all grazing lands shall be sold at not less than one dollar per acre. He may also reclassify any lands heretofore erroneously classified, upon the official certificate of the commissioners' court of the county in which said land is situated, or of the county to which such county is attached for judicial purposes, certifying what the proper classification should be, said certificate to be signed by the entire commissioners' court, including the county judge, or upon such other evidence as may be satisfactory to the commissioner. And it shall be his duty to notify in writing the county clerk of each county the classification and valuation affixed upon each section of land in his county, and each county attached to it for judicial purposes; and he shall forward the same to the county clerk of the county for which said list was made, or to the county clerk of the county to which the said county is attached for judicial purposes. The said commissioner shall also notify said clerk of each and every sale as soon as they are made. Upon receipt of said list, or any notice required to be given under the provisions of this act, the county clerk receiving the same shall forthwith file and record said list or notice in a well bound book to be kept for that purpose. When informed of the sale of any land, the clerk shall enter on his books, opposite the description of the land so sold, the name of the purchaser and the date sold, and the said list and notice of sale so furnished the said

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clerk, and the said books shall be considered public records, and be open to public inspection; and it is hereby made the duty of the county clerk to exhibit the said book and the records to any person who shall apply therefor. When any portion of said land has been classified to the satisfaction of the commissioner of the general land office, under the provisions of this chapter, such land shall be subject to sale, but to actual settlers only, except where otherwise provided by law; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land. [Acts 1905, p. 159, sec. 1. Art. 4218e, Act 1895, amended Acts 1897, p. 184. Art. 4218b, Act 1895. Art. 4218e, Act 1895, amended Acts 1897, p. 184. Act of 1905, p. 159, part of sec. 1. Art. 4218f, Act 1895.]

See Appendix for omitted and repealed land laws.

See *Snyder v. Nunn*, 66 T. 255, 18 S. W. 340; *Perez v. Canales*, 69 T. 674, 7 S. W. 507; *Flannagan v. Nasworthy*, 1 C. A. 470, 20 S. W. 839.

In general.—What is probably meant by "when any portion of the school land has been classified to the satisfaction of the commissioner it shall be subject to sale," is that it is again "subject to sale" as it originally was when classified to the satisfaction of the commissioner—to be put upon the market and sold in the same manner. *O'Keefe v. McPherson*, 25 C. A. 313, 61 S. W. 535.

This law was intended merely to give fuller and more accurate information as to unsold lands in order to help purchasers and facilitate sales. It was not intended to stop sales which were then going on and continued to be made under other provisions. Lands were not taken off the market and sales suspended by this act until the statement provided by section 1 had been made to the county clerks. *Barnes v. Williams*, 102 T. 444, 119 S. W. 90.

Powers and duties of commissioner.—See notes under Art. 5406.

The commissioner has no discretion in regard to sale to an applicant. *Burnett v. Winburn* (Civ. App.) 25 S. W. 969. The act does not apply where, after location, the number of acres is reduced by correcting adjoining surveys. *Thompson v. Langdon*, 87 T. 254, 28 S. W. 931.

Under this article the commissioner is himself empowered to make the classification, and this classification and appraisal are necessary for the sale of the lands. When application is made to lease, the commissioner can determine to what class the land belonged in the first instance without the aid of a previous classification. He is presumed to have done his duty, and having made a lease for 10 years, his action is conclusive as to the rights of the lessee under the lease. *Sanford v. Terrell* (Sup.) 87 S. W. 656.

Necessity of classification and valuation.—An appraisal of the land is a condition precedent to its sale. *Snyder v. Nunn*, 66 T. 255, 18 S. W. 340. See *Perez v. Canales*, 69 T. 674, 7 S. W. 507; *Flannagan v. Nasworthy*, 1 C. A. 470, 20 S. W. 839.

The act of 1887 did not give a preference right to a settler upon land prior to its classification. No right is acquired by actual occupancy before the land is put on the market. *Hovert v. Wilson* (Civ. App.) 31 S. W. 710.

Public school lands cannot be bought until they are classified and put on the market for sale. *Cordill v. Moore*, 17 C. A. 217, 43 S. W. 298.

A purchaser of school lands cannot maintain an action of trespass to try title against one holding under lease from the state without showing that the lands had been classified and appraised by the commissioner of the land office. *Thompson v. Austry* (Civ. App.) 52 S. W. 581.

After judgment declaring forfeiture of land is filed in the land office the commissioner can reject application of former purchaser on the ground that the same had not been listed by the county clerk and put on the market. *Willoughby v. Townsend*, 93 T. 80, 53 S. W. 581.

Classification and appraisal are not necessary in respect to land leased. *Sanford v. Terrell* (Sup.) 87 S. W. 656.

The law for classifying state lands applies only to those belonging to the free school and asylum funds, and not to other public lands, and the latter were not required to be classified before leased. The statute requires the commissioner to lease the lands when not in demand for actual settlement, but it does not expressly declare for a classification before lease; the language of the statute amounts to little more than a vague suggestion that there should be a classification before a lease. It is not agricultural lands which the commissioner is not authorized to lease for more than five years, but lands which have been classed as agricultural. *Id.*

To authorize the purchase of the land it is essential that at the time the application is made the land should be listed with the county clerk in the manner required by this act. Unless this is done the land is not on the market subject to purchase. *Williams v. Barnes* (Civ. App.) 111 S. W. 436.

Reclassification and reappraisal.—An approval of a reappraisal of all school lands "which appeared on the market" held not to constitute a reappraisal of a tract which had previously been awarded to plaintiff. *Bowerman v. Pope*, 25 C. A. 79, 61 S. W. 330, 75 S. W. 1093.

Where an application to purchase school land at \$1 per acre is made while the land is appraised at \$2 per acre, and the appraisal is changed to \$1 per acre and the land thereafter awarded to the applicant at such price on such application, the award is valid and takes the land out of the market. *Steward v. Wagley*, 29 C. A. 105, 68 S. W. 297.

This act did not require a new classification and appraisal of the public lands offered for sale by the state, nor did it suspend the sale thereof, until the land commissioner could make up and send out the revised lists. Where one makes application on May 7, 1901, for land which was classified as dry grazing land and appraised at \$2 an

acre May 27, 1896, and was an actual settler, he was entitled to the land over one who had been awarded the land at \$1 an acre by the commissioner September 3, 1900, but who was not an actual settler. The fact that the commissioner made an award which was void did not take the land off the market. *Briggs v. Key*, 30 C. A. 565, 71 S. W. 43.

A sale of school lands reappraised at \$5 an acre to an applicant applying for the purchase while the appraised value was fixed at \$3 an acre is not a sale in compliance with law. *Erp v. Tillman*, 103 T. 574, 131 S. W. 1057.

Report of commissioners' court.—The settler can purchase at the price fixed by the commissioners' court. *Land Co. v. Wood*, 71 T. 460, 9 S. W. 340.

The commissioner of the land office can approve of the appraisal of school lands by the commissioners' court, although not made strictly in compliance with the statute. *Dooley v. Maywald*, 18 C. A. 386, 45 S. W. 221.

Fifteen years after sale of school lands, purchaser could assume that tabulated report from the commissioner's court had been filed with commissioner of land office, as required by law. *Scott v. Blackburn* (Civ. App.) 47 S. W. 480.

Notice of classification and effect thereof.—The filing of the notification by the commissioner of the classification is not essential, and an application is not insufficient for that reason. *Cordill v. Moore*, 17 C. A. 217, 43 S. W. 298.

School land is not subject to sale on the same day that it is forfeited for non-payment of interest, in the absence of notice to the county clerk by the land commissioner that the land is offered for sale. The fact that the commissioner had previously advertised the land for sale does not dispense with necessity of sending notice to county clerk. *Boswell v. Terrell*, 97 T. 259, 78 S. W. 4.

Under this article and Art. 5409, land is on the market for sale when the clerk of the county court receives notice of the classification and appraisement, and the act of 1905 does not conflict with these articles in this respect. *Estes v. Terrell*, 99 T. 622, 92 S. W. 407.

Effect of classification and valuation.—An actual settler applying to purchase school land under law of 1897, at a price less than its appraised value, held entitled to award, where the commissioner, before acting on application, reduced the price to less than that offered. *Hendrix v. Gracey* (Civ. App.) 50 S. W. 137.

A party has no right to buy at \$1.50 per acre land put on the market at \$2.00, and hence the deposit and his obligation to buy at \$1.50 per acre give him no rights; neither does it make any difference that three days after his deposit and obligation the land was reclassified at \$1.50 per acre. *Gracey v. Hendrix*, 93 T. 26, 51 S. W. 846.

Where school land was appraised at \$2 per acre, the fact that it appeared on the books of the land office without appraisement, and that land so listed was understood to be on sale at \$1.50 per acre, held not to validate an application to purchase it at that price. *Bowerman v. Pope*, 25 C. A. 79, 61 S. W. 330, 75 S. W. 1093.

Where the price of school lands has been fixed by the commissioner, an application for and award of the land to a proposed purchaser at a less price is void. *Nard v. Baker*, 27 C. A. 461, 66 S. W. 306.

Award of school lands to applicant at a reduced price held valid. *Threadgill v. Butler*, 33 C. A. 347, 77 S. W. 43.

The commissioner of the general land office held not required to sell at less than \$2 per acre public school lands, a classification of which valuing it at \$2 per acre was regularly made by him and recorded in his office, though on the same day he forwarded to the county clerk a "corrected and revised list of all unsold school lands," showing it to be valued at \$1 per acre. *Wilson v. Smith* (Civ. App.) 82 S. W. 818.

When notice of the classification and appraisement is sent to the county clerk, and is received by him, the tract is subject to sale and the land commissioner is without authority to postpone the sale to some future date. *Estes v. Terrell*, 99 T. 622, 92 S. W. 407.

Where school lands are classified and prices fixed and placed on the market, it is an offer of sale by the state the acceptance of which by an actual settler completes the sale. *Williams v. Barnes* (Civ. App.) 111 S. W. 432.

Where an application for the purchase of school land appraised at \$3 per acre was not acted on until after the commissioner had reappraised the land at \$5 per acre, a sale to the applicant at \$3 per acre was not a sale in compliance with law. *Erp v. Tillman*, 103 T. 574, 131 S. W. 1057.

An application to purchase school land at a price below that at which it has been appraised and offered for sale secures no right to the applicant, and the application does not constitute an acceptance of an offer to sell subsequently made for a price below that stated in it. *Id.*

A sale of public school lands at a price less than the appraised value is invalid. *Erp v. Robison* (Sup.) 157 S. W. 1160.

Cancellation of sales for errors in classification.—The land commissioner, after he has made a classification and appraisement under the law, and has awarded the land to a purchaser, has no right to cancel a sale to a purchaser on the ground alone that he made a mistake in the classification and appraisement. The conditions precedent to the power to sell having been complied with (by the commissioner) and the purchaser, by his application having accepted the offer to sell thus held out by the statute through such action of the commissioner and having complied with the statutory requirements, there was a complete executory contract of sale. *Harper v. Terrell*, 96 T. 479, 73 S. W. 949.

Evidence.—See, also, notes under Arts. 3687, 3696.

In a contest for school land, evidence considered, and held insufficient to show that the land had not been appraised at the price for which it was awarded to an applicant. *Davis v. McCauley*, 28 C. A. 211, 66 S. W. 1124.

In trespass to try title by the purchaser of school lands, held, that there was nothing to show a classification and appraisement prior to his application. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 68.

Evidence held to show *prima facie* classification and appraisal of home section before the grant. *Stolley v. Lilwall*, 33 C. A. 48, 84 S. W. 689.

Art. 5408
 Vernon Sayles
 1914
 Amended
 L. P. 313

Art. 5408. Advertisement of land.—In cases where lands may be leased and the same shall come on the market by reason of the expiration of such lease, it shall be the duty of the commissioner to notify the county clerk ninety days, when practicable, before the expiration of such lease of the date of such expiration. When a lease is for any cause canceled, he shall notify the county clerk of that fact and fix a date not less than ninety days thereafter on and after which applications to purchase may be filed. All notices of expiration and cancellation of leases shall be forthwith recorded as required for notices of classification and valuation. The commissioner shall adopt such means as may be at his command that will give the widest publicity as to when land will be on the market for sale by reason of expiration of any lease. Such publicity shall, when practicable, be given ninety days in advance of such expiration. When a lease is canceled for any cause, the land shall not be for sale until ninety days thereafter. Immediately after the cancellation of a lease or leases the commissioner shall proceed to give publicity to the fact, the same as is herein required with reference to publicity of expiring leases. If there are no other satisfactory or sufficient means at the command of the commissioner that will give the necessary publicity, he shall have printed at the expense of the state, to be paid out of the appropriation for public printing, a list or lists of the lands, and send them out in the mail and to every person requesting them. Such lists shall also contain a brief statement as to how one shall proceed to purchase the land. [Acts 1905, p. 159, sec. 2.]

See *Sayles v. Robison*, 103 T. 430, 129 S. W. 346.

Effect of outstanding lease.—Invalid sale of lands to lessee cannot be treated as continuation of lease, though payments exceeded amount due under lease. *Burnam v. Terrell*, 97 T. 309, 78 S. W. 500.

A part owner of a lease of state school lands cannot alone waive the lease, so as to authorize purchase of the lands. *Jones v. Wright* (Civ. App.) 81 S. W. 569.

Mere proof that a state lease had been executed for a period sufficient to embrace an award of state school land, without showing that the lease had been forfeited or the rights thereunder duly waived, held insufficient to show the award invalid. *Hood v. Pursley*, 39 C. A. 476, 87 S. W. 870.

A lease of school lands held void and no obstacle to a subsequent award to defendant on which judgment was rendered. *Buchanan v. Barnsley*, 51 C. A. 253, 112 S. W. 118.

Expiration of lease.—Premature application for purchase, see notes under Art. 5410.

A lease of public lands for five years from April 16, 1897, held to have expired midnight April 16, 1902. *Patterson v. Terrell*, 96 T. 509, 74 S. W. 19.

Purchase after cancellation of lease.—The provisions of this article relating to the giving of notice as to land which becomes subject to sale by the termination or cancellation of a lease, were not applicable to land which must be surveyed before it can be sold under section 8 of the act of April 15, 1905; no land being subject to sale upon cancellation of a lease until it is surveyed, so that the fact that the full 90 days' notice was not given to the county clerk upon the cancellation of a lease of unsurveyed land would not affect the validity of the survey and sale of such land under section 8. *Meador v. Robison*, 103 T. 206, 125 S. W. 564.

Art. 5409
 Vernon Sayles
 1914
 Amended
 16 L. P. 313

Art. 5409. [4218g] Sales by commissioner, how made.—The purchaser shall transmit to the land commissioner one-fortieth of the aggregate purchase money for the particular tract of land, together with his application, affidavit and his obligation to the state, duly executed, binding the purchaser to pay to the state on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three or five per cent per annum, according to his purchase, on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and, upon receipt of one-fortieth of the purchase money, and the affidavit and obligation aforesaid, by the commissioner, the sale shall be deemed and held effective from the date the application, affidavit and obligation are filed in the general land office. [Acts 1895.]

Art. 5410
 Vernon Sayles
 1914
 Amended
 16 L. P. 314

Art. 5410. Actual settlers, applications.—All sales shall be made by the commissioner of the general land office, or under his direction. Any person desiring to purchase any of the surveyed land mentioned in this chapter shall make a separate application in writing for each tract applied for and be addressed to the commissioner of the general land office.

It shall sufficiently designate the tract sought to be purchased, and give the price offered therefor, which shall not be less than the appraised value fixed by the commissioner. Each application shall contain the affidavit of the applicant to the effect that he desires to purchase the land for a home, or as additional to the home applied for, or as additional to his own land which has been theretofore purchased from the state, or as additional to his own private land, as the case may be, and that he is or will, as the case may be, in good faith, become in person an actual bona fide settler on some portion of the land he purchases, or upon his other land, as the case may be, within ninety days from the date his application is accepted, also that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase thereof; also every application shall be accompanied by the obligation of the applicant in a sum equal to the amount of the deferred payment offered for the land. Said application, affidavit and obligation shall be filed in the land office through due course of mail and not by any one in person, in an envelope addressed to the commissioner of the general land office at Austin, Texas; and, when the land is to come on the market at some future date, the envelope shall have endorsed thereon as follows: "Application to buy land; Sections, Block, Grantee, County, Date on market," and the blanks shall be properly filled out. When the envelope so endorsed is received in the land office, it shall be safely and securely kept and preserved by the commissioner, or his chief clerk, without being opened until the day following the date endorsed thereon as to when the land comes on the market, and one or both of them shall begin at ten o'clock a. m., on the day following the day the land comes on the market, to open the envelopes for inspection of the applications, and such action as is herein provided for, and in the presence of the applicants, if they desire to be present, or in the presence of such person as they may designate to represent them; and said applications shall immediately be filed, together with all other applications received up to that time for the same land. [Acts 1905, p. 159, sec. 3.]

See *Wing v. Dunn* (Civ. App.) 127 S. W. 1101; *Hanna v. Atchison*, 141 S. W. 190.

Rights of applicants in general.—A petition, in a suit to recover school land by an applicant for the purchase thereof, not alleging that he is either an actual settler on the land or is an owner of and actual settler on other lands, held fatally defective. *Sterling v. Seif*, 30 C. A. 284, 70 S. W. 238.

Under the law in force in 1897, an applicant could not purchase more than two agricultural sections, and an application for three (or four) is improper and forms no basis of title, and should be excluded from evidence, and having been excluded he can offer no evidence of his obligation, or payment and settlement. *Goethal v. Read*, 35 C. A. 461, 81 S. W. 594.

An application for the purchase of school lands is properly rejected, where at the time the application is made the records of the commissioner's office show they are under lease or have been sold to another person. *Bradford v. Brown*, 37 C. A. 323, 84 S. W. 392.

If school land is unsold and is lawfully on the market for sale, the application of one who may be entitled to purchase and who complies with all the terms of the statute and the rules of the land office, cannot be arbitrarily rejected by the land commissioner; and when one who is suing upon his rejected application has brought himself within the terms of the law, he has overcome the presumption that the commissioner has acted lawfully in rejecting his application. *Knapp v. Patterson* (Civ. App.) 87 S. W. 394.

Under the facts, one who made a bid for school lands held not entitled to an award. *Hobbs v. Robison*, 103 T. 89, 124 S. W. 89.

In view of this article the provisions of Art. 5408, relating to the giving of notice as to land which becomes subject to sale by the termination or cancellation of a lease, were not applicable to land which must be surveyed before it can be sold under section 8 of the act of April 15, 1905; no land being subject to sale upon cancellation of a lease until it is surveyed, so that the fact that the full 90 days' notice was not given to the county clerk upon the cancellation of a lease of unsurveyed land would not affect the validity of the survey and sale of such land under said section 8. *Meador v. Robison*, 103 T. 206, 125 S. W. 564.

When land is on the market in general.—Premature application, see post.

When the legislature spoke of land "to come on the market at some future date," they meant merely such lands as were to be subject to sale at a time subsequent to the making of the applications, and that the word "future" was intended to relate to the

time at which the application was made, and not to the time at which the statute was passed or took effect. *Flores v. Terrell*, 99 T. 575, 92 S. W. 32.

Other sales.—A fraudulent purchase and sale does not interpose a legal obstacle to another purchaser. A sale can be contested in the courts at any time before the final proof is made. A subsequent purchaser is not bound to wait for the state to obtain a judicial forfeiture of the prior fraudulent purchase. *Metzler v. Johnson*, 1 C. A. 137, 20 S. W. 1116; *Hitson v. Glasscock*, 21 S. W. 710, 2 C. A. 617.

Where an application to purchase school lands was regular, and the applicant was an actual settler thereon until his assignment to another, the award of the land to such applicant took the land off the market until it was declared forfeited by proper proceedings; and a subsequent applicant, alleging abandonment, could not recover the lands. *Duncan v. State*, 28 C. A. 447, 67 S. W. 903.

An award of school lands by the commissioner of the general land office, void because the applicant was not an actual settler, did not take the land off the market. *Briggs v. Key*, 30 C. A. 565, 71 S. W. 43.

Uncanceled award held sufficient to keep school lands from being subject to a subsequent application. *May v. Hollingsworth*, 35 C. A. 665, 30 S. W. 841.

Evidence held not to show a prior award of state land had been canceled, so as to place it on the market, when plaintiff made application to purchase it. *Smith v. Hughes*, 39 C. A. 113, 86 S. W. 936.

Where school land had been once sold it could not again be put upon the market until the sale had been legally forfeited. *Bumpass v. McLendon*, 45 C. A. 519, 101 S. W. 491.

An applicant to purchase school land, claiming that a prior application by the holder of a lease was invalid, held required to show a termination of the state's rights under the lease. *Patterson v. Knapp* (Sup.) 103 S. W. 489.

The commissioner of the general land office is powerless to sell school land which has been legally sold previously where the prior purchase is kept in good standing. *Zettlemeier v. Shuler*, 52 C. A. 648, 115 S. W. 78.

One claiming school land under a subsequent award must show the invalidity of the previous sale. *Id.*

A sale of school land after it had been sold to another, and while the prior sale was in force, does not affect the title of the prior purchaser or of the state. *Pohle v. Robertson*, 102 T. 274, 115 S. W. 1166.

On abandonment of purchase of school land, substitution of third person for another purchaser held complete, and sufficient to take the land off the market. *Fitzhugh v. Johnson* (Civ. App.) 133 S. W. 913.

Public school lands were not subject to purchase where a prior sale thereof had not been officially canceled when the application to purchase was filed, so that the subsequent sale was unauthorized and conveyed no right. *Erp v. Robison* (Sup.) 155 S. W. 180.

A cancellation of a void award of public lands to a minor is not necessary to a subsequent award of the land to an adult. *Rainer v. Durrill* (Civ. App.) 156 S. W. 589.

Purchase by minors and married women.—As the act authorizing the sale of school lands (July 8, 1879), and declaring that "any" person may become a purchaser, etc., did not expressly authorize minors to become purchasers, a sale to a minor who complies with the law, creates no contract between the state and the minor which could be enforced against the state by one who afterwards bought the minor's interest in the land under an order of a probate court, and then paid the balance of the purchase money to the state treasurer. *State ex rel. Walker v. Rogan*, 93 T. 248, 54 S. W. 1018.

The contention that a married woman had no right to acquire school lands, because she was not a "person" within the contemplation of the statute authorizing the sale of such lands to "any person," held not maintainable. *Anderson v. Neighbors*, 25 C. A. 504, 61 S. W. 145.

A sale to a minor who is old enough to become an actual settler under statutes making that the sole qualification of a purchaser should be upheld, especially in view of the decisions and the action of the land department of the state authorizing such sales. *O'Keefe v. McPherson*, 25 C. A. 313, 61 S. W. 535.

A minor is entitled to purchase land under this article. *Watson v. White*, 26 C. A. 442, 64 S. W. 828.

A minor who is an actual settler is not denied the privilege of buying additional lands by reason of his minority. *White v. Watson*, 34 C. A. 169, 78 S. W. 237.

Sales of public lands are not void because made to a minor. *Taylor v. Lewis*, 38 C. A. 390, 85 S. W. 1011.

In a proceeding to cancel a sale of school land on the ground of the purchaser's minority, the state must allege and maintain it by proof. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

An award of public lands to a minor is invalid. *Rainer v. Durrill* (Civ. App.) 156 S. W. 589.

The removal by the district court of the disability of infancy of one to whom public land had been previously awarded does not avoid an award to an adult made subsequent to the award to the minor and prior to the removal of disability. *Id.*

Necessity and sufficiency of application in general.—An application to purchase public school lands, accompanied by an affidavit of settlement thereon for a home, are conditions precedent to acquiring title. *Cordill v. Moore*, 17 C. A. 217, 43 S. W. 298.

An application to purchase school lands, where in compliance with the act of 1895, is good, under the amendatory act of 1897. *Abilene Live Stock Co. v. Guinn* (Civ. App.) 51 S. W. 885.

When the application complies substantially with the statute and one-fortieth of the aggregate purchase price is tendered, the erroneous recital of the balance of the purchase money due may be treated as surplusage or at most as a clerical error and the right of the applicant—an actual settler and intending purchaser—cannot be thus defeated. *Joyce v. Sisk*, 26 C. A. 68, 62 S. W. 961.

Application to purchase school land held not void for a certain irregularity. *Faucett v. Sheppard*, 33 C. A. 64, 75 S. W. 538.

An application for the purchase of school lands held to sufficiently describe the lands to empower the commissioner to sell the same. *Lindsey v. Terrell*, 100 T. 548, 101 S. W. 1073.

Inclosure of state land does not of itself confer any right in or to the land, but only gives a preference right to purchase. *Underwood v. King*, 102 T. 561, 119 S. W. 298.

An application to purchase state land cannot include several separate tracts. *Giraud v. Robison*, 102 T. 488, 119 S. W. 1145; *Scrivner v. Same* (Sup.) 119 S. W. 1146.

A purchase of school land held not absolutely void because of a mistake in the application. *Samples v. Wever*, 56 C. A. 562, 121 S. W. 1129.

An application by one who has purchased the east 240 acres of 529½ acres surveyed and placed on the market as school land, which describes the land applied for as additional land to his 240 acres, does not sufficiently describe the land, and an award thereof by the commissioner is not a sale in compliance with the law. *Erp v. Tillman*, 103 T. 574, 131 S. W. 1057.

Under the provision of this article requiring the original purchaser of public land to forward his application properly describing the land, and Art. 5436 authorizing him to sell and the substitute purchaser to file his obligation with the commissioner of the general land office, together with the duly authenticated conveyance or transfer from the original purchaser, a proper description in the substitute purchaser's affidavit, if required, was substantially complied with by application of the substitute purchaser, with the attached obligation describing the land correctly and including the county where it was located, so as to authorize the commissioner to recognize him as a purchaser of the land, though the application itself omitted the county. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

Time for making application.—An application and affidavit, made for the purpose of acquiring title to public school lands, which were sworn to before the land was put on sale, but otherwise regular, held insufficient. *Cordill v. Moore*, 17 C. A. 217, 43 S. W. 298.

An application to purchase public school lands is properly made after the lands are classified and placed on the market, but before notification thereof has been filed. *Id.*

An application to purchase school lands, filed before the same have been placed on the market by the commissioner by listing the same with the county clerk, is properly rejected. *Willoughby v. Townsend*, 93 T. 80, 53 S. W. 581.

An application to purchase public school land, which was made the same day, but prior to the receipt of the notice by the county clerk of its classification and appraisal, but reached the general land office afterwards, held not invalid. *Lester v. Elliott*, 26 C. A. 429, 63 S. W. 916.

Where one who applied to purchase school lands before settlement afterwards settles on the land, without making a new application, but relies on the application made, he waives, in a contest with another applicant, any superior right by reason of his settlement. *Nowlin v. Hall* (Civ. App.) 66 S. W. 116.

Where a settler on school land applies for an additional tract before acquiring title to his home tract, but acquires such title before the application is considered, the award held valid. *Id.*

Under the agreed statement of facts in trespass to try title to school lands, held, that the court must assume that the land was regularly on the market at the time of plaintiff's application to purchase the land. *Hardman v. Crawford*, 95 T. 193, 66 S. W. 206.

Where two or more applications for the purchase of leased school lands are filed prior to the expiration of the lease by persons other than the lessee, the first applicant is entitled to the land, if the other applicants do not file a further application after the lease has expired. *Corbin v. McGee* (Civ. App.) 67 S. W. 1068.

Where various applications to purchase leased school lands were all premature, because made before the expiration of the lease, but one of the applicants filed another application after the expiration of the lease, he was entitled to the land, though his first application was not prior to that of the other premature applicants. *Id.*

A lease of school land for a term of two years from August 26, 1899, cannot be regarded as expiring prior to 12 o'clock midnight of August 26, 1901, and an application to purchase made prior thereto is premature. *Id.*

Prematurity of affidavit to accompany application for purchase of school lands held immaterial. *McGee v. Corbin*, 96 T. 35, 70 S. W. 79.

Where, in trespass to try title to school lands, plaintiff fails to show that the land was classified at the time of his application to purchase, he cannot recover. *Anderson v. Walker* (Civ. App.) 70 S. W. 1003.

Application to purchase public school lands leased for two years from August 26, 1899, held not premature, though filed after midnight August 25, 1901. *McChristy v. Jackson* (Civ. App.) 71 S. W. 569.

Application to purchase public lands as an actual settler held not affected by the fact that it was sworn to a few hours before the settlement. *Allen v. Frost*, 31 C. A. 232, 71 S. W. 767.

An applicant for the purchase of certain public lands held entitled to an acceptance of his application, though it was filed with the county clerk prior to the expiration of a lease of the land. *Patterson v. Terrell*, 96 T. 509, 74 S. W. 19.

As against one who applied to purchase the land after the county clerk has received notice of valuation, one who has applied to purchase before the receipt by the clerk of such notice acquires no right or title in the land by his application, because his application was prematurely made. *Ford v. Brown*, 96 T. 537, 74 S. W. 537.

The land is not on the market for sale until the notice of the valuation placed upon it has been received by the county clerk of the county in which it is located. The law itself makes the offer of the sale of the land by the action of the commissioner in giving notice to the clerk. The specific requirement of the statute as to the manner in which the application shall be made necessarily implies that the value of the land should be determined before the application is presented; and considering the provisions of Art. 5409 in connection with such requirements, we think it was the intention of the legislature by

requiring notice to be given to the county clerk of the valuation to afford all persons equal opportunity to purchase. *Id.*

An application by an actual settler to purchase school land, though premature, held to give title against one who made an invalid application to purchase. *Ford v. Brown*, 33 C. A. 198, 75 S. W. 393.

An application for school lands, made after classification and appraisal, but before notice thereof has reached the clerk, is void. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 68.

An outstanding lease of public school lands precludes an application to purchase them, though the lessee is ineligible as a purchaser. *Pruitt v. Scrivner* (Civ. App.) 77 S. W. 976.

In a suit to recover school land awarded to plaintiff, proof that he was an actual settler at the time he applied for the land is unavailing, in the absence of evidence of classification and appraisal. *Smithers v. Lowrance*, 35 C. A. 25, 79 S. W. 1088.

Where a lease of school land had not expired at the time plaintiff applied to purchase the same, but before plaintiff's application was acted on the lease expired, and defendant applied to purchase the same, the land was properly awarded to defendant. *Jones v. Lohman*, 36 C. A. 418, 81 S. W. 1002.

A premature application to purchase public school lands held not to give applicant a right to the land, where, before their award to her, another made proper application. *Perry v. Rutherford*, 39 C. A. 477, 87 S. W. 1054.

Award of school lands based on application made before lands were regularly on the market held valid. *Williams v. Barnes*, 44 C. A. 298, 99 S. W. 127.

When a lease has been canceled and the land placed again on the market, a purchaser has no right to file his application to buy until the date fixed by the commissioner for filing applications and if he files before this time the commissioner has the right to reject it. *Fine v. Robison*, 102 T. 406, 118 S. W. 126.

If public school land is not on the market and subject to sale when application therefor is filed, a subsequent award by the commissioner, after the land comes on the market, upon the premature application, is void. *Tillman v. Erp* (Civ. App.) 121 S. W. 547.

If public school land is not on the market when application therefor is filed, the application confers no rights upon the applicant, and cannot be made effective by the acceptance of the land commissioner. *Id.*

An application for the purchase of school land, filed more than a month before the cancellation of a prior sale to another and acted on after the cancellation of the prior sale and after the commissioner had reappraised the land, raising it from \$3 to \$5 per acre, is insufficient, and a sale to the applicant on his application is ineffectual. *Erp v. Tillman*, 103 T. 574, 131 S. W. 1057.

An application for the purchase of school land, made prior to the cancellation of a previous sale of land to another, is an application to purchase land not open to purchase until the previous sale is canceled, and no right is acquired at the time of the filing of the application nor prior to the cancellation. *Id.*

One, who has filed prematurely an application for the purchase of school land so that he cannot secure a right because the land cannot then be bought, has the right to make application when the proper time has arrived, and under proper circumstances this may consist in the use for that purpose of the papers already prepared and on file and the payment already in the proper hands. *Id.*

Application for the purchase of school land filed more than a month before the cancellation of a prior sale to another, and acted on after the cancellation of the prior sale and a reappraisal of the land by the commissioner, held ineffectual to give the applicant title. *Id.*

Mode of filing or presenting application.—Filing of application to purchase school lands held sufficient. *McGee v. Corbin*, 96 T. 35, 70 S. W. 79.

Under this article an award cannot be set aside, and the land awarded to one who had sent a bid which did not reach the commissioner's office in time because the letter containing it remained in the post office, owing to absence of an employé of the land office whose duty it was to get the mail. *Byrne v. Robison*, 103 T. 20.

— **Application by agent.**—The proposed purchaser of school lands is authorized to employ an agent to present his application. *Sweet v. Slough* (Civ. App.) 51 S. W. 854.

Under law regulating purchase of school lands, requiring purchaser to make affidavit and execute notes for price, one acting as agent of another to present latter's application to commissioner of land office is deemed to be his agent only to extent of lands described in application. *Sweet v. Slough* (Civ. App.) 52 S. W. 1043.

Where application to be made.—Where the land lies in two counties application to purchase may be made in either. It is not required that it be made in both. *Davis v. Burnett*, 35 C. A. 30, 79 S. W. 105.

Successive applications.—Rights under a first application to purchase public school lands held not waived by a second application. *Perry v. Rutherford*, 39 C. A. 477, 87 S. W. 1054.

Withdrawal of application.—A party seeking to claim school land as a purchaser from the state held to have withdrawn his application to purchase and forfeited his right to claim the land as a purchaser. *Hamilton v. Gouddy*, 46 C. A. 506, 103 S. W. 1117.

Collusion.—Purchaser of state school land held entitled to contest the validity of a prior purchaser's title, on the ground that his purchase was made for the benefit of a third party. *Thomson v. Hubbard*, 22 C. A. 101, 53 S. W. 841.

When the purchaser agrees with a third party to allow him the use of so much of the land for grazing purposes as the purchaser did not need for money with which to make payment, this is not acting in collusion with another within the meaning of the law. *Wyatt v. Lyons*, 25 C. A. 88, 60 S. W. 576.

One who is not a bona fide purchaser of a section of agricultural land but who settled upon and attempts to purchase for benefit of others acquires no title as against one who subsequently applies to purchase in good faith. *Logan v. Curry* (Civ. App.) 66 S. W. 83.

The title of a purchaser of school land is not subject to collateral attack on the ground that he purchased in collusion with another, and hence was not a bona fide purchaser. *Logan v. Curry*, 95 T. 664, 69 S. W. 129.

When the affidavit is made this concludes the question of good faith as to the matter of collusion. *Id.*

No one except the state can raise the question of fraud and collusion between applicants for the purchase of state public lands. *Thomson v. Hubbard* (Civ. App.) 69 S. W. 649.

An adverse claimant cannot assail the title of a purchaser of school lands on the ground that, in making his purchase, he acted in collusion with some other person. *Hamilton v. Votaw*, 31 C. A. 684, 73 S. W. 1091.

Right of persons to purchase public lands as detached sections held not prevented by their inducing another to buy other lands, so as to make such sections detached, where he purchased in good faith. *Maney v. Eyres*, 33 C. A. 497, 77 S. W. 428, 969.

Only the state can attack as collusive a purchase of public school lands, made on proper affidavit and compliance with all legal requirements. *Maney v. Eyres*, 33 C. A. 497, 77 S. W. 428, 969.

Only the state can raise the issue of collusion after an award of school lands. *May v. Hollingsworth*, 35 C. A. 665, 80 S. W. 841.

Evidence of collusion, in view of rights of substituted purchasers, held immaterial in an action for public school lands. *Perry v. Rutherford*, 39 C. A. 477, 87 S. W. 1054.

Contracts having for their object the acquisition of public lands in a lawful manner are not void as against public policy. *Williams v. Finley*, 99 T. 468, 90 S. W. 1087.

A contract, binding a purchaser from the state of school lands to execute to another a bond for title and complete the statutory period of occupancy necessary to perfect title, is not void as contrary to public policy. *Johnson & Moran v. Buchanan*, 54 C. A. 328, 116 S. W. 875.

Collusion between persons interested in the purchase of state land held not to strengthen the rights of an adverse claimant. *Underwood v. King*, 102 T. 561, 119 S. W. 298.

Where the applicant for lands makes the affidavit required by a purchaser, and the commissioner accepts it and awards the sale, he is without power to cancel the sale because of collusion. *Mitchell v. Robison*, 103 T. 642, 132 S. W. 465.

A contract relating to the acquisition of an interest in state school land held non-enforceable. *Brown v. Brown* (Civ. App.) 132 S. W. 887.

One purchasing lands under an executory contract to convey held not entitled to compel specific performance of the agreement; the land being state school land, and the agreement being collusive for the purpose of defrauding the state. *Purinton v. Brown* (Civ. App.) 133 S. W. 1080.

The payment of fees for a cancellation of the original award, and the making of a new award of school lands to a purchaser by the original purchaser, was not such collusion as would invalidate a purchase-price mortgage given to the original purchaser. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Right and interest of purchaser.—Purchase-money notes, given to a party who sells unappropriated public land that he has no right to, are without consideration. *Rayner Cattle Co. v. Bedford*, 91 T. 642, 45 S. W. 554.

A purchaser of school lands held to take it incumbered with the public road previously established by a commissioner's court. *Middleton v. Presidio County* (Civ. App.) 138 S. W. 812.

A purchaser of school lands from the state, whose purchase is in good standing, is entitled to possession as an ordinary vendee, and the state cannot, in the absence of special authority, maintain trespass to try title, even though another makes claim adversely to the title of the vendee. *State v. Dayton Lumber Co.* (Sup.) 155 S. W. 1178.

Land included in application or purchase.—A purchase of a section of land held not to include an excess included in the original survey. *Willoughby v. Long* (Civ. App.) 69 S. W. 646.

A purchase from the state held to include a whole survey. *Willoughby v. Long*, 96 T. 194, 71 S. W. 545.

The remedy of the state, where it sells by the acre a whole survey containing more than estimated, stated. *Id.*

An application for 400.8 acres of the south part of a certain section held subject to location anywhere in the south part of such survey. *Morgan v. Armstrong* (Civ. App.) 102 S. W. 1164.

Opening applications.—The word "day" in this section means not the next calendar day, but the next day on which the land office is required to be open, and when the land comes on the market on Friday, the 20th of April (the 21st being a legal holiday, and the 22d Sunday), the next day when applications can be opened and considered is Monday, the 23d. *Fessenden v. Terrell*, 100 T. 273, 98 S. W. 640.

Art. 5411. Cash payments, how remitted.—Such applicants shall transmit with their applications the required first payment in the form of money or remittance collectible on demand in Austin, and convertible at par into money on the order of the state treasurer, without liability; provided, that, should a remittance be made payable to the commissioner of the general land office, such payment shall not be invalid for that reason, but the commissioner shall endorse it to the state treasurer without incurring liability and the same shall be treated as if payable to the treasurer. If the payment is not made as required in this article, the application shall be void. [Acts 1909, p. 429.]

Mistake.—Applicant's right to purchase cannot be defeated by a mistake of the land commissioner or state treasurer in inadvertently returning a part of the purchase money which the applicant has tried to retransmit. *Faucett v. Sheppard*, 24 C. A. 552, 60 S. W. 277.

Art. 5412. Remittances, how accounts kept.—When an envelope enclosing an application to purchase land is opened and the remittance for the first payment is in the general land office, the commissioner shall cause such remittance to be listed in triplicate daily, and in such form as to show the purpose and amount of each remittance, the name and address of the applicant, and transmit the remittance and two of the lists to the treasurer. On receipt thereof, the treasurer shall check the remittances with the lists, and, if found to be correct, he shall receipt one of the lists and return it to the commissioner and retain the other list; and thereupon the commissioner shall deliver the third list retained by him to the comptroller of public accounts. The treasurer shall at once collect all collectible remittances and report to the commissioner and comptroller all remittances not collectible in Austin. The items not collected shall be returned to the commissioner, and the application for which such remittances were made shall be void. All first payments thus collected by the treasurer shall be retained by him until he receives notice from the commissioner of the final disposition of the applications to purchase; and thereupon he shall at once return to each applicant the amount shown to have been paid on his rejected applications. A duplicate of the notice to the treasurer of accepted and rejected applications and the amount of first payment shall be transmitted to the comptroller. On the last working day of each month, the treasurer shall deposit in the treasury to the credit of the proper fund the sum collected by him on accepted applications during that month. [Id.]

Art. 5413. Awards, how made; notice and accounts of.—Notices of awards shall be prepared and issued by the commissioner, and shall be appropriately numbered, and shall be so worded as to constitute a receipt for first payment when signed as such by the commissioner. Books shall be prepared containing two copies of the notice of award and a suitable number of coupons to be used by the applicant in making subsequent payments on the land. The notice of award shall be prepared in duplicate, one to be detached from the book and retained in the land office, the other, with the coupons attached, to be sent to the applicant. The coupons in each book shall be prepared in duplicate, each of which shall be numbered with the same number as that on the notice of award. The form of the coupons shall be so prepared as to be suitable for, and shall be used by the remitter in making all subsequent payments on the land, the original to be so worded as to be used as a receipt for remittances when signed as such by the commissioner. The remitter shall describe each tract of land on which he is making remittance by properly filling in the blanks on both the original and duplicate coupons, and shall enter in the proper blanks the amount remitted as interest, and the amount remitted as principal, and both the original and duplicate shall be mailed to the commissioner with the remittance. The commissioner shall likewise furnish former purchasers with similar coupon books, without notice of award, which coupon shall be used by them in the same manner as herein provided when making remittances for interest or principal, or both. [Id. sec. 3.]

Art. 5414. Remittances, disposition of and accounts of.—All accounts with purchasers and lessees of the lands mentioned in the preceding articles and university land shall be kept in the general land office. A remittance payable to the commissioner of the general land office shall not be invalid for that reason, but he shall endorse it to the treasurer without incurring liability. Immediately on receipt thereof the commissioner shall list in triplicate, separate from first payments, all money and other forms of remittances received for the purposes stated in this article and in such form as to show the amount of each remittance, the name and address of the remitter, and the probable fund to which the remittance should be deposited. The remittances and two of the lists

aforesaid shall be transmitted to the treasurer. On receipt thereof, the treasurer shall check the remittances with the list, and if found to be correct he shall receipt one of the lists and return it to the commissioner and retain the other list, and thereupon the commissioner shall deliver the third list retained by him to the comptroller. The treasurer shall at once collect all collectible remittances and report to the commissioner and comptroller all remittances not collectible in Austin. The items not collected shall be returned to the commissioner. On the last working day of each month, the treasurer shall deposit into the treasury to the credit of the proper fund, as indicated by the lists theretofore furnished him by the commissioner, eighty per cent of all collections which have come into his hands during that month upon such lists, and hold the remaining twenty per cent thereof upon deposit receipts issued therefor by the comptroller; provided, when the commissioner shall have issued receipts to the remitters for remittances, he shall immediately notify the comptroller and treasurer definitely the fund or funds to which the whole of such remittances so receipted for should have been applied; and thereupon the treasurer shall deposit to the credit of the proper fund or funds the remaining twenty per cent of such remittances so receipted for. The commissioner shall furnish all available data to the state board of education when requested to do so by said board. The commissioner, treasurer and comptroller shall each keep an account with each fund mentioned in the preceding articles according to the lists and notices given and received by them. [Id.]

Art. 5415. Purchaser's name to be given; permanent records to be kept.—Persons making payments of interest, principal or lease rentals on land shall give the name of the original purchaser or lessee and sufficiently designate the land. All lists and notices provided in the preceding articles, to be given by the commissioner to the treasurer and comptroller, shall be retained in each of those departments as permanent records thereof. [Id. sec. 5.]

Art. 5416. Award and settlement.—When the applications and obligations aforesaid have been filed in the general land office, and upon inspection they are found correct and the land is found to be classified and valued, and on the market for sale the day the application was filed, or on any prior date and still unsold, and the first payment made as required by law, it shall be the duty of the commissioner to award the land to the one offering the highest price therefor. If two or more applicants offer the same price for the same land, the same being the highest price offered, they shall be advised of that fact and a date fixed not less than thirty days thereafter within which time they may again file applications, and notice shall be sent to the clerk and other publicity shall be given that said lands are still on the market to any one, and the time in which applications to purchase the same may be filed as in the first instance. The applicant offering the highest price shall receive the award. If the second or subsequent applications should be found to offer the same price, the procedure shall be as in the first instance. An application at a less price than the former application contained shall not be considered. An application to purchase land coming on the market at some future date shall not be considered for award prior to the day next following the day the land comes on the market for sale. Land that is or may be on the market, and not filed on as herein provided, may be filed on and sold to any one at any time upon proper applications filed in the land office as herein provided, and in accordance with law, except the envelope enclosing the application shall not be required to have any memorandum thereon, and, if two or more applications should be filed the same day for the same land, the one offering the highest price shall be accepted, but, if two or more such applicants should offer the same price, the commissioner shall proceed as herein provided for in the first filing. All sales

shall date from the day the successful applicant's application was filed in the land office. The applicant shall have ninety days from the date of the acceptance of his application within which to actually settle upon the land so purchased; and he shall within thirty days after the expiration of said ninety days given within which to make settlement, file in the land office his affidavit that he has in good faith actually in person settled upon the land purchased by him. Should the applicant fail to make and file the affidavit and proof of settlement as herein provided within the time specified, the commissioner of the general land office shall indorse that fact upon his application, cancelling the same, and immediately place the same upon the market by notice to the clerk, fixing a date not less than thirty days thereafter when applications may be filed for the purchase thereof; and any sum which may have been paid upon a former application, canceled as aforesaid, shall be forfeited to the fund to which the same belonged. All sums paid in by an unsuccessful applicant shall be returned to him. Provided, if for any cause a designated home tract can not be awarded to an applicant and there be no other obstacle to the award of one or more tracts as additional thereto, such applicant shall be permitted, without prejudice, to designate one of the additional tracts as a home tract, which shall, with such other tracts as he has applied for and are within five miles thereof, be awarded to the applicant. The commissioner shall advise the applicant why he can not award to him the home tract and request a new designation by his affidavit; and, in default of such affidavit being filed in the land office within thirty days after such notice, the commissioner may reject all the applications of such applicant, but, should no rights intervene, such affidavit may be considered at any time prior to a rejection. The affidavit shall be sufficient authority for the change of the home tract, and shall relate back to the date of the filing of the application in the land office. A purchaser may live on any tract designated as a home, or move from any designated home tract to any of his additional land, at any time during the required three years residence on the land. The applicant shall accompany the application aforesaid with his obligation to the state, duly executed, binding the purchaser to pay to the state at the land office at Austin, Texas, on the first day of November of each year thereafter, until the whole purchase price is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and in default of the interest the land shall be forfeited as now provided by law. At the same time the applicant applies to purchase the land, he shall also deposit in the land office one-fortieth of the aggregate price of the same as the first payment thereon. A purchaser shall not transfer his land prior to his actual settlement thereon, and evidence of that fact filed as herein provided; and any attempt to so transfer by deed, bond for title, or other agreement shall operate as a forfeiture of the land to the fund to which the same belonged, together with all the payments made thereon; and when sufficiently informed of the facts which operate as a forfeiture, the commissioner shall note the fact of forfeiture upon the application and proceed to place the land on the market by notice to the proper county clerk and advertisement in the manner provided for canceled leases. [Acts 1905, p. 159, sec. 4.]

See *State v. Snyder*, 66 T. 687, 18 S. W. 106; *Payne v. Cox* (Civ. App.) 143 S. W. 336.

Estoppel against state.—See notes under Art. 3687, Rule 37, § 10.

Acceptance and rejection.—An unsigned indorsement, made on the back of an application to purchase school lands, showing the date of its rejection, is not evidence to show that the application was rejected. *Smith v. Russell*, 23 C. A. 554, 56 S. W. 687.

The acceptance of the offer of the state, and the compliance by the applicant to purchase therewith, held to be what will constitute him a purchaser of school lands, and not the acceptance of his application by the land commissioner. *Tillman v. Erp* (Civ. App.) 121 S. W. 547.

Conflicting claims—Priorities.—The law awards the land to the first applicant who is able to make affidavit to actual settlement and comply with the other requirements of the statute. The fact that some other person may have preceded him in settling thereon, but not in making application to purchase, will not deprive him of his right. *Hobert v. Wilson* (Civ. App.) 31 S. W. 710.

Where an applicant for the purchase of school lands by mistake enters on the wrong land, such mistake will not invalidate his title as against a subsequent applicant, who has not, prior to the correction of the mistake, acquired any right by taking possession. *White v. Hall* (Civ. App.) 59 S. W. 810.

An application to purchase school lands as an actual settler held to convey superior title over a subsequent attempted purchase. *Martin v. Marr*, 26 C. A. 55, 62 S. W. 932.

In trespass to try title, held, that the plaintiff was entitled to recover by reason of a prior application for the purchase of the land. *Clack v. Hart*, 26 C. A. 46, 62 S. W. 935.

Evidence held not to show that the acts of the county clerk in making and mailing an application to purchase public school land gave the applicant an undue preference, so as to render the application invalid. *Lester v. Elliott*, 26 C. A. 429, 63 S. W. 916.

Where public school lands have been awarded to an actual settler as pasture lands, one subsequently discovering oil therein cannot acquire a prospector's rights. *Chappell v. Rogan*, 94 T. 650, 63 S. W. 1006.

Where applications to purchase school lands were both premature, land held properly awarded to party first filing the application. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 80.

In trespass to try title to school land, where plaintiff's application to purchase, dated Friday, was indorsed as filed on Sunday, and defendant's two days later, an instruction that if plaintiff's "was filed on any other day than Sunday, about the time or soon after he made it, the jury should find for him," was error. *Stephens v. Porter*, 29 C. A. 556, 69 S. W. 423.

An applicant who files for the purchase of school land before the expiration of a lease thereof to another held entitled thereto as against applicants filing after the award to him. *Smith v. Zesch*, 30 C. A. 444, 70 S. W. 775.

Acts 1900, 1st called Sess. p. 33, § 7, does not deal with the question as to whom or how the land is to become subject to sale at all. Assuming that a sale is to be made, it determines rights of priority among applicants and fixes the right of a lessee when, the land being on the market, he seeks to become a purchaser. *West v. Terrell*, 96 T. 548, 74 S. W. 905.

On an issue whether the application of plaintiff to purchase school land or that of defendant first reached the hands of the commissioner of the land office, evidence held insufficient to sustain a verdict for defendant. *Coody v. Harris*, 36 C. A. 465, 81 S. W. 1233.

Where plaintiff and defendant filed rival applications to purchase two sections of school land, held immaterial that plaintiff filed his application for the second section before defendant filed his. *Fellers v. McFatter*, 46 C. A. 335, 101 S. W. 1065.

It is the application and not possession that fixes title in the purchaser of public school land. Possession must be shown, but an applicant who files his application to purchase prior in time to any other legal applicant acquires title. *Id.*

Where an applicant to purchase school lands by mistake settled on adjoining land, and on discovering the mistake immediately removed to the land applied for she was entitled to the same as against a subsequent locator and applicant with notice of her claim. *Morgan v. Armstrong* (Civ. App.) 102 S. W. 1164.

Where a prior purchaser of school lands took up her residence a short distance therefrom in good faith, and on discovering her mistake, moved onto the land, she was entitled to it as against a subsequent locator with notice. *Morgan v. Fleming* (Civ. App.) 133 S. W. 736.

A good-faith applicant to purchase school land held entitled to it as against a prior applicant. *Barnes v. Williams' Adm'r* (Civ. App.) 143 S. W. 978.

— **Who may make objections.**—The issue of the good or bad faith of the purchaser, who is an actual settler on the land, cannot be made by a mere trespasser. *Gray v. Thompson*, 5 C. A. 32, 23 S. W. 926; *Swan v. Busby*, 5 C. A. 63, 24 S. W. 303.

The disability of minority can not be urged by a person seeking to purchase school land after the commissioner of the land office had awarded it to such person laboring under the disability of minority. *Weatherford v. McFadden*, 21 C. A. 260, 51 S. W. 548.

One who has abandoned possession of school lands cannot dispute claim of one thereafter in possession under land commissioner. *Chesser v. Baughman*, 22 C. A. 435, 55 S. W. 132.

Where there was no objection on the part of the state to a sale of school land to defendant because she was a married woman, a subsequent lessee from the state cannot question her right to purchase on that ground. *Anderson v. Neighbors*, 25 C. A. 504, 61 S. W. 145.

Attitude of owner of school land lease with regard to the time of expiration thereof held to prevent him from attacking the validity of a sale to another applicant on the ground that his application was prematurely filed. *Corbin v. McGee* (Civ. App.) 67 S. W. 1068.

There is nothing in our law that will prevent an actual settler who has complied with the statute in an effort to purchase school lands from showing that a previous award, made within less than three years from the date of his own application and settlement, was a nullity by reason of the fact that such prior applicant did not comply with the essential requirement of actual settlement at the time of the application under which such prior award had been made, although a certificate of occupancy has been issued by the commissioner to the first applicant. *Lamkin v. Matsler*, 32 C. A. 218, 73 S. W. 971. This case is distinguished from *Logan v. Curry*, 95 T. 664, 69 S. W. 129.

An applicant for the purchase of school land cannot question the sufficiency of the proof of occupancy of a prior purchaser thereof after the commissioner has issued his certificate. *Harper v. Dodd*, 30 C. A. 287, 70 S. W. 223.

Defendants held not entitled to complain of acquisition by plaintiffs from an original defendant filing a cross-action of the latter's title to land involved. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

Where the sale of school lands is permitted to stand by the state, another cannot buy the same land unless the sale was or has become null and void. *Weyert v. Terrell*, 100 T. 409, 100 S. W. 133.

In trespass to try title by a grantee of the purchaser of the land from the state, defendant cannot show that the purchaser perpetrated a fraud on the state, without showing a right in himself to the land other than through the purchaser. *Elliott v. Morris*, 49 C. A. 527, 121 S. W. 209.

Any collusion in securing a second award of school lands after a sale by the purchaser can be taken advantage of only by the state. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Where, by reason of the lapse of a year from the award of public school lands to plaintiff, the sale became valid as between him and a third person, though invalid as against the state, because a prior sale had not been canceled, no one could acquire a valid title by purchase from the state, in the absence of action by the state to forfeit plaintiff's purchase. *Erp v. Robison* (Sup.) 155 S. W. 180.

— **Improvements and other expenditures.**—A settler upon vacant public lands cannot recover from a subsequent purchaser from the state the value of improvements made by him. *Finks v. Cox* (Civ. App.) 30 S. W. 512.

An instruction authorizing the jury to consider defendant's acts and misconduct before and after the date of her application to purchase school lands for the purpose of determining the good faith of her settlement held proper. *Jones v. Wright* (Civ. App.) 92 S. W. 1010.

In an action of trespass to try title to school land between rival applicants, plaintiff could not claim to have made any improvements on the land in good faith after his application was rejected as having been made at the same time defendant's was and after filing the suit, and could not recover from defendant the value of such improvements. *Fellers v. McFatter*, 46 C. A. 335, 101 S. W. 1065.

A grantee of a purchaser of school lands paying one-fortieth of the price in cash is in the attitude of the state, and improvements made in good faith on the land cannot be urged against him. *Hamman v. Presswood* (Civ. App.) 120 S. W. 1052.

— **Right to maintain trespass to try title.**—J. actually settled upon state school land fraudulently purchased by K., and duly made application to purchase the same from the state, tendering the first payment therefor, which was refused because of prior sale to K. Held, that such possession and tender entitled J. to sue K. and M., his assignee, in trespass to try title and to recover judgment for the land. *Metzler v. Johnson*, 1 C. A. 137, 20 S. W. 1116.

Purchaser of school land held to have title sufficient to support an action against a mere trespasser. *Dowding v. Dittmore*, 26 C. A. 606, 65 S. W. 486.

A purchaser of school lands cannot maintain trespass to try title to recover such lands without showing that the lands had been classified and appraised. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 68.

A purchaser of school lands from the state, whose purchase is in good standing, is entitled to possession as an ordinary vendee, and the state cannot, in the absence of special authority, maintain trespass to try title, even though another makes claim adversely to the title of the vendee. *State v. Dayton Lumber Co.* (Sup.) 155 S. W. 1178.

— **Rents and profits.**—One buying of the state public school lands, of which another is in possession under a void lease, held entitled to recover of him rent from the time of his purchase till placed in possession on termination of their litigation over title. *Buchanan v. Wilburn* (Civ. App.) 127 S. W. 1198.

— **Bona fide purchase.**—The defense of innocent purchaser is inapplicable to cases involving conflicting claims as purchasers of school land. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

Settlement on and occupancy of land.—See *Perez v. Canales*, 69 T. 674, 7 S. W. 507; *Snyder v. Nunn*, 66 T. 255, 13 S. W. 340; *Flannagan v. Nasworthy*, 1 C. A. 470, 20 S. W. 839; *State v. Palin* (Civ. App.) 25 S. W. 820; *Wilson v. Hampton*, 2 U. C. 426; *Perego v. White*, 77 T. 196, 13 S. W. 974; *Ward v. Worsham*, 78 T. 180, 14 S. W. 453; *King v. Jones*, 78 T. 288, 14 S. W. 571; *Joyner v. Johnson*, 84 T. 465, 19 S. W. 522.

An actual settler is not required to occupy the land for a period beyond the time necessary to make him an actual settler in good faith. *Perkins v. Miller*, 60 T. 61.

One who claims under another who had resided on the land is not an actual settler. *Perkins v. Miller*, 60 T. 61; *Taylor v. Burke*, 66 T. 643, 1 S. W. 910.

Actual occupancy is necessary and is notice of the claim of the settler. *Clay County Land Co. v. Earle*, 71 T. 468, 12 S. W. 66; *Baker v. Millman*, 77 T. 46, 13 S. W. 618; *Id.*, 2 C. A. 342, 21 S. W. 297; *Metzler v. Johnson*, 1 C. A. 137, 20 S. W. 1116; *Paffrath v. State*, 2 C. A. 137, 21 S. W. 159; *Hitson v. Glascock*, 2 C. A. 617, 21 S. W. 710; *Atkeson v. Bilger*, 4 C. A. 99, 23 S. W. 415. See *Baker v. Burroughs*, 2 C. A. 337, 21 S. W. 295; *Swan v. Busby*, 5 C. A. 63, 24 S. W. 303.

An actual settler is one whose residence is actually established and is living on the land. *Baker v. Millman*, 77 T. 46, 13 S. W. 618; *Joyner v. Johnson*, 84 T. 465, 19 S. W. 522; *Chancey v. State*, 84 T. 529, 19 S. W. 706; *State v. Strain* (Civ. App.) 25 S. W. 1003; *Hume v. Gracy*, 86 T. 671, 27 S. W. 584. He has the right to purchase on complying with the law. *Perego v. White*, 77 T. 196, 13 S. W. 974; *Ward v. Worsham*, 78 T. 180, 14 S. W. 453; *King v. Jones*, 78 T. 285, 14 S. W. 571; *Joyner v. Johnson*, 84 T. 465, 19 S. W. 522. A purchase by one who is not an actual settler confers no title. *Metzler v. Johnson*, 1 C. A. 137, 20 S. W. 1116. The word settlement used in the constitution does not limit the right of purchase to the land actually improved. *Perkins v. Miller*, 60 T. 61.

Actual settlement by the original purchaser or some one holding under him is sufficient. *Chancey v. State*, 84 T. 529, 19 S. W. 706.

K. purchased a section of school land under the act of 1887. His application and affidavits therefor represented him to be an actual settler. He was not in fact an actual settler, nor had he purchased the land in good faith. Held, such purchase conferred no title on him nor his assignee, against one who afterward settled on the land and duly applied to purchase it. *Metzler v. Johnson*, 1 C. A. 137, 20 S. W. 1116.

One who is not in fact an actual settler, or who does not purchase in good faith, acquires no title. *Id.*

The right to purchase is not defeated by the fact that the settler owns an interest in other land. *Baker v. Burroughs*, 2 C. A. 337, 21 S. W. 295; *Best v. Baker*, 3 C. A. 551, 22 S. W. 1067, 24 S. W. 679. See *Harris v. Byrd*, 3 C. A. 677, 22 S. W. 659.

Bona fide actual settler defined. *Atkeson v. Bilger*, 4 C. A. 99, 23 S. W. 415; *Eastin v. Ferguson*, 4 C. A. 643, 23 S. W. 918.

A mere trespasser cannot litigate the issue. *Gray v. Thompson*, 5 C. A. 32, 23 S. W. 926.

The applicant must be an actual settler in good faith on the land. *Busk v. Lowrie*, 86 T. 128, 23 S. W. 983; *Martin v. McCarty*, 74 T. 128, 10 S. W. 221; *Luckie v. Watt*, 77 T. 262, 13 S. W. 1035.

The purchaser is not required to remain on the land any definite length of time after settlement. *State v. Palin* (Civ. App.) 25 S. W. 820. See, also, *State v. Stone Cattle Co.*, 66 T. 363, 17 S. W. 735; *Cameron v. State*, 26 S. W. 869, 7 C. A. 35.

The act of April 1, 1887, and the amendment of April 8, 1889, authorized the sale of detached or isolated school lands to actual settlers only. Persons not actual settlers could not purchase such lands. *Cameron v. State*, 26 S. W. 869, 7 C. A. 35.

One who settles on a section of school land is entitled to purchase all or any portion of it. *Simon v. Stearns*, 17 C. A. 13, 43 S. W. 50.

The plaintiff put a covered wagon bed on the land, placed bedding and provision box in it, set up a stove outside, fenced in a small piece of ground, put some feed in the enclosure, ate dinner and stayed all night. He made application for the land the following day. Held, that the question as to whether he was a settler in good faith should be submitted to the jury together with his after conduct in regard to the land. *Borchers v. Mead*, 17 C. A. 32, 43 S. W. 300.

Evidence held to support finding that plaintiff was actual settler on land. *Borchers v. Mead*, 17 C. A. 32, 43 S. W. 300; *Willoughby v. Townsend* (Civ. App.) 51 S. W. 335; *Singleton v. Wright*, 54 S. W. 249; *Smith v. Russell*, 23 C. A. 554, 56 S. W. 687; *Taylor v. Lewis*, 38 C. A. 390, 85 S. W. 1011.

It is not the law that one may be an actual settler on school lands without residing thereon. *Waggoner v. Daniels*, 18 C. A. 235, 44 S. W. 946.

A person who occupies school land "preparatory to and with the bona fide intention of thereafter removing on and residing on said land as his home" is not an actual settler. *Id.*

A person who goes on a section of vacant school land and sticks up a dozen sticks as evidence of his occupation is not an actual settler, it being shown that he was a farm hand and worked elsewhere, and did not complete his shanty till eight months afterward. *Jordan v. Payne*, 18 C. A. 382, 45 S. W. 189.

Evidence held to show that plaintiff was not "an actual settler," as required in affidavit of application to purchase state lands. *Hart v. Menefee* (Civ. App.) 45 S. W. 854; *Lee v. Green*, 24 C. A. 109, 58 S. W. 196, 847; *Thomson v. Hubbard* (Civ. App.) 69 S. W. 649.

Evidence showing that plaintiff, the day before she made application to purchase as an actual settler on state school land, picked out a place for a house, and that no one was occupying the land, and there were no improvements, is insufficient to show that plaintiff was an actual settler when she made her application. *Renner v. Peterson* (Civ. App.) 51 S. W. 867.

It is no evidence against one's claim as settler in C. county that claimant's husband was compelled to serve on jury in H. county; he having objected, and claimed residence in C. county. *Barnett v. Murray* (Civ. App.) 54 S. W. 784.

The definition of the residence of a married man contained in Art. 2941, as being the place where his wife resides, is not necessarily to be applied in determining whether one be an actual settler on school lands. If there be no separation of husband and wife and the latter's absence is but temporary, and the intention of both is as soon as practicable to reside upon the land as their home, active settlement and occupancy being shown in the husband, the rule does not require the actual pedal presence of the wife. *Chesser v. Baughman*, 22 C. A. 435, 55 S. W. 132.

This article entitles any actual bona fide owner of and resident upon any lands other than free school, asylum or public lands to purchase three additional sections situated within the five-mile radius from the land he so owns and upon which he so resides the same as if he had applied to purchase public school lands from the state in the first instance. The owner or his vendee, who has applied to purchase other lands from the state is required to reside continuously upon such patented land, or on some portion of the land applied for, for three years after the application to purchase the additional land is made, and a failure so to do forfeits the land applied for without any action of the commissioner. *McKnight v. Clark*, 24 C. A. 89, 58 S. W. 147.

See this case for facts which do not make one an actual settler on public land bought for a home. *Jones v. Bourbonnais*, 25 C. A. 94, 60 S. W. 987.

An applicant for the purchase of school land does not lose his right thereto by mistakenly and in good faith settling on adjacent land, believing it to be the tract he applied for. *Hall v. White*, 94 T. 452, 61 S. W. 385.

An applicant to purchase school lands as an actual settler, who builds his house through mistake on an adjoining tract, held an actual settler. *Martin v. Marr*, 26 C. A. 55, 62 S. W. 932; *Moody v. Hahn*, 25 C. A. 474, 62 S. W. 940.

Unless an applicant to purchase state public land is an actual settler thereon, he obtains no right thereto, though he thereafter makes a sufficient settlement. *Thomson v. Hubbard* (Civ. App.) 69 S. W. 649.

The long-continued use of an existing home by one who has applied to purchase school land, as an actual settler, may furnish convincing evidence that he did not intend to make the school land his home. *Anderson v. Walker* (Civ. App.) 70 S. W. 1003.

Wife of applicant for school lands held to have made settlement for both, and not for herself alone. *Willingham v. Floyd*, 32 C. A. 161, 73 S. W. 831.

A purchaser of land which is not detached must comply with conditions of actual settlement. *Witcher v. Wiles*, 33 C. A. 69, 75 S. W. 889.

An award of public free school lands to one as an actual settler thereon, and of other sections as additional thereto, is of no validity, unless such person is an actual settler in good faith. *Lewis v. Scharbauer*, 33 C. A. 220, 76 S. W. 225.

See this case for evidence which was sufficient to show that a purchaser of school land was not an actual settler in good faith as required by this article, though his absence may not have amounted to an abandonment under the homestead exemption law. *Mann v. Greer*, 33 C. A. 517, 77 S. W. 34.

One who actually occupies and settles on land, intending to make it his home, is an actual settler. *May v. Hollingsworth*, 35 C. A. 665, 80 S. W. 841.

Evidence held to sustain a finding against the good faith of plaintiff's settlement on land which he made application to purchase from the state. *Smith v. Hughes*, 39 C. A. 113, 86 S. W. 936.

On an issue as to whether defendant was an actual settler on school lands when he applied to purchase, the evidence held sufficient to show such settlement. *Smith v. Florence*, 43 C. A. 557, 96 S. W. 1096.

School lands can be sold to actual settlers only. *Lufkin Land & Lumber Co. v. Terrell*, 100 T. 406, 100 S. W. 134.

In trespass to try title to certain school lands, evidence held to support a finding that defendant entertained an honest belief that she had located on the land applied for, that she was justified in so believing, and that she continued so to believe until she moved onto the lands, immediately after discovering her mistake. *Morgan v. Armstrong* (Civ. App.) 102 S. W. 1164.

The policy of the state in the disposition of its school lands is to sell only to those who will actually settle upon them and occupy them as homes. *Bourn v. Robinson*, 49 C. A. 157, 107 S. W. 873.

A sale of school lands to one not an actual settler is a nullity. *Williams v. Barnes* (Civ. App.) 111 S. W. 432.

One who makes his home on public lands is an "actual settler" thereon, within the statute permitting such settlers to purchase additional school lands, though his habitation is such that it can hardly be called a house. *Corrigan v. Fitzsimmons*, 51 C. A. 444, 111 S. W. 793.

In trespass to try title, evidence held to support a finding that defendant was an actual settler on a half section of land when he applied to purchase additional school lands. *Id.*

Held, that there was no failure to reside on school land so as to warrant a cancellation of its purchase. *Bustin v. Robison*, 102 T. 526, 119 S. W. 1140.

Evidence held to support a finding that a purchaser of school lands substantially complied with the law as to residence on the lands. *State v. Davidson* (Civ. App.) 132 S. W. 520.

A purchaser of state school lands may not fulfill the conditions of settlement and occupancy by proxy. *Ericksen v. McWhorter* (Civ. App.) 132 S. W. 847.

Where, in a suit involving conflicting claims to state school land, the evidence showed that plaintiff, a married man and the head of a family, purchased the land; that he in person, at or before the purchase, went on the land, and that subsequently he was there one or more times assisting in making improvements; that the wife, excepting temporary absences, continuously occupied the land, making improvements thereon, and that the husband remained away the greater part of the time pursuing his business; that he purchased the land for a home, and that his business was necessary to secure money with which to pay his indebtedness on the land—a charge that if plaintiff did not actually and in person settle on the land he could not recover, and that occupancy by one's wife without his presence was not sufficient, was erroneous as unduly emphasizing the necessity of plaintiff's personal occupancy, and in excluding a consideration of the acts of the wife. *Id.*

An "actual settler" as involving title to school land is one who actually occupies and settles upon the land, intending to make it his home. *Beaty v. Yell* (Civ. App.) 133 S. W. 911.

Conduct of applicant for purchase of school land held to raise issue as to abandonment of purchase. *Fitzhugh v. Johnson* (Civ. App.) 133 S. W. 913.

Evidence held to sustain a finding that plaintiff claiming as a purchaser of school lands did not acquire or settle upon the land in good faith. *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Evidence held to show abandonment of plaintiff's residence in a particular county, warranting vacation of his purchase of school land therein. *Lane v. Samora* (Civ. App.) 136 S. W. 818.

An instruction that settlement on school land for the purpose of purchasing the same might be made in a tent was objectionable, as intimating that settlement in a tent was a compliance with the law. *State v. Haley* (Civ. App.) 142 S. W. 1003.

On the issue of whether there was a sufficient settlement by one who becomes a substitute purchaser of public school lands, emphasis should not be given by instructions to the fact that the settlement and occupancy must be "in person," thus tending to exclude from the jury's consideration the acts of his wife in aid of his settlement and occupancy, to which, as well as all other circumstances, the jury may look; Acts 29th Leg. c. 103, even if adding anything, by the use of the words "in person," to the prior requirements as to settlement, being directed in terms only to an original purchaser of school lands, and not repealing Art. 5436, as to the affidavit a substitute purchaser thereof shall make as to settlement. *Ericksen v. McWhorter* (Civ. App.) 143 S. W. 245.

A purchaser of school lands conveying it shortly after award and then leaving it for more than seven months for more or less unexplained absence abandoned it as a matter of law, though he claimed the conveyance was not absolute, and that he intended to return. *Anthony v. Ball* (Civ. App.) 146 S. W. 612.

Only the original purchaser can make the settlement required by the statute and the affidavit proving such settlement; a settlement by his wife being insufficient. *McWhorter v. Ericksen* (Civ. App.) 151 S. W. 624.

Affidavit.—A sale to one whose application and affidavit stated that he was an actual settler, when in fact he was not, conveys no title. *Hitson v. Glascock*, 2 C. A. 617, 21 S. W. 710; *Metzler v. Johnson*, 1 C. A. 137, 20 S. W. 1116.

An application to purchase state lands made on Sunday is not void. *Willoughby v. Townsend*, 18 C. A. 724, 45 S. W. 861; *Id.* (Civ. App.) 51 S. W. 335.

Affidavit held not to comply with the requirement that an application for the purchase of school lands shall be accompanied by affidavit that applicant desires to purchase the land for a home and has in good faith settled thereon. *Willoughby v. Townsend*, 93 T. 80, 53 S. W. 581, reversing (Civ. App.) 51 S. W. 335.

The failure of an officer taking the affidavit of an applicant for the purchase of additional school lands to affix seal held not to make the application junior to a subsequent application. *Watson v. White*, 26 C. A. 442, 64 S. W. 826.

Under these acts requiring an intending purchaser to swear that he is not purchasing for another, a title bond given by a prospective purchaser while the land is still public domain is void because it seems to require a false affidavit by the purchaser. *Mahoney v. Tubbs*, 34 C. A. 96, 77 S. W. 823.

Where one applies to purchase additional land, but by mistake his application is made to purchase as an actual settler, his affidavit reciting that he is an actual settler (which is untrue), but is in all other respects sufficient, and had made the cash payment and afterwards has paid the annual interest, as against a collateral attack by a subsequent applicant, his title to the land is good. *Weckesser v. Lewis*, 35 C. A. 18, 79 S. W. 355.

This act requires not only a settlement upon the land, but also the filing of an affidavit thereof before the land can be transferred. *Good v. Terrell*, 100 T. 275, 98 S. W. 641.

A sale of school land before the affidavit of settlement is actually on file in the land-office, works a forfeiture of the purchase. *Brown v. Terrell*, 100 T. 309, 99 S. W. 542.

Where one fails to file his affidavit of settlement within 120 days from the date of the acceptance of his application, it will be immediately canceled, and the land again placed on the market. *Jones v. Terrell*, 100 T. 410, 100 S. W. 137.

The date of the deed is not conclusive evidence of the date of the transfer, and where the deed is wrongly dated, as of a date anterior to that of filing of affidavit of settlement, and there is no controversy as to this, the sale having been canceled, mandamus will issue to compel a reinstatement. *Patton v. Terrell*, 101 T. 221, 105 S. W. 1116.

Under this article and Art. 5421, giving preference rights of purchase to original lessees or their assignees, and providing that if one purchasing under the section does not comply with the law as to settlement and residence, the sale shall be canceled, a purchaser under Art. 5421 need not file the affidavit required by this article. *Hanna v. Atchison* (Civ. App.) 141 S. W. 190.

The date of delivery by filing for record, and not the date of the deed purchasing public land, nor of the acknowledgment, would control as to whether the deed conveying state school land was void as being executed before the filing of an affidavit of settlement by the original purchaser. *Payne v. Cox* (Civ. App.) 143 S. W. 336.

Obligation of purchaser.—Variance between application for purchase of school lands and the purchaser's obligation held immaterial. *Hamilton v. Votaw*, 31 C. A. 684, 73 S. W. 1091.

The statute does not require that the obligation for the payment of the purchase money shall describe the land. But having undertaken to describe it, the obligation would be void if it described a different tract of land than that described in the application. *Id.*

Fact that insufficient obligation was given with application to purchase school land held immaterial, where proper obligation was afterwards filed. *Faucett v. Sheppard*, 33 C. A. 64, 75 S. W. 538.

Deposit.—The first payment must be in the treasury at the time the bids are opened to entitle the applicant to the award of the land. *Rawls v. Terrell*, 101 T. 157, 105 S. W. 489.

The provision that, "at the same time the applicant applies to purchase the land he shall also deposit in the state treasury one fortieth of the aggregate price of the same as the first payment thereon," does not apply to a sale of eighty acres which is required to be for cash. *Buckley v. Terrell*, 101 T. 487, 109 S. W. 861.

A deposit in the state treasurer's office of a check on a bank by the highest bidder for school land open to competitive bidding held a payment, entitling the bidder to the land. *Whitis v. Robison*, 102 T. 389, 117 S. W. 429.

Under this article such deposit is a condition precedent to the purchase of the land, and it is improperly awarded to one who, though the highest bidder, has not made his deposit, as against a lower bidder who has made his deposit. *Fitzhugh v. Johnson*, 105 T. 318, 148 S. W. 286.

Forfeiture or cancellation of purchase.—Evidence considered in an action to recover school lands, and held, that an award of the land to plaintiff's grantor was properly canceled. *Spence v. Dawson* (Civ. App.) 67 S. W. 180.

The commissioner of the general land office has a right to cancel an award of public domain not authorized by law. *Moore v. Rogan*, 96 T. 375, 73 S. W. 1.

Commissioner of general land office, or successor, held to have power to rescind sale of public lands made by mistake. *Burnam v. Terrell*, 97 T. 309, 78 S. W. 500.

It is the duty of the land commissioner to forfeit the award when settlement (on the land) has not been made in the 90 days; and this without exception or qualification. *Suares v. Terrell*, 100 T. 315, 99 S. W. 542.

The commissioner of the land office cannot cancel an award to a purchaser of school land; that being a judicial act, authority for which is vested in the courts. *Trimble v. Burroughs*, 52 C. A. 266, 113 S. W. 551.

School lands settled on and sold to another held to be the subject of contract, though the lands were forfeited after the sale was made. *Bynum v. Hobbs*, 56 C. A. 557, 121 S. W. 900.

A commissioner of the general land office is not authorized to forfeit a purchase of land on the ground of the purchaser's minority, nor on the ground of collusion. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

A purchaser of state lands made the necessary payments and settled thereon. A defective affidavit of settlement was made when he executed a conveyance and instructed his agent not to deliver the deed until the affidavit was filed. A new affidavit was filed after the date of the deed, which recited that the payment of the price should be by notes bearing interest from the date of the deed. There was no proof as to when the notes were delivered. Held, that the purchase was subject to forfeiture under the provision of this article that any attempt of a purchaser to transfer his land prior to his actual settlement, and evidence of that fact duly filed, shall operate as a forfeiture. *Payne v. Johnson* (Civ. App.) 147 S. W. 703.

The conveyance of the purchaser to his grantee disclosed that fact; and the grantee, if consulted, would have disclosed that he bought the land from the purchaser. The purchase was forfeited, and thereafter a third person purchased from the state. Held, that the grantee of the original purchaser was not entitled to recover the lands from the subsequent purchaser. *Id.*

Purchase of additional lands.—*Sayles' Civ. St. art. 4218fff*, provided that "any actual bona fide owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the aforesaid lands." The two preceding articles, 4218f and 4218ff, made provisions for persons who purchased from the state, but article 4218fff comprehended any actual bona fide owner of land, who filled the other requirements mentioned therein. *Smith v. Rothe* (Civ. App.) 55 S. W. 755.

A statute authorizing a purchaser of a home section of school lands to purchase additional sections to the exclusion of actual settlers held not unconstitutional as class legislation. *McGrew v. Wilson* (Civ. App.) 57 S. W. 63.

The statute providing that a bona fide owner and resident of lands may purchase additional land does not authorize the purchase of land intended as a home place and additional lands at the same time. *Nowlin v. Hall* (Civ. App.) 66 S. W. 851.

The right to purchase additional lands is expressly conferred by *Rev. St. 1895, art. 4218f*, as amended by the act of 1897, which is not affected by the act of 1901. The amount of land the settler was entitled to purchase was to be determined by the number of surveys and not by the quantity in acres. The words "home section" include within their meaning a survey of less than 640 acres of land. *Hazelwood v. Rogan*, 95 T. 295, 67 S. W. 84.

Where an application for additional school lands is rejected, the applicant acquires no right to the land thereunder, unless it is shown that the land was within five miles of his home tract. *Spence v. Dawson* (Civ. App.) 67 S. W. 180.

Since the statute gives to the owner of the other lands the right to purchase school lands in proximity thereto, when the owner does so purchase he acquires the title, and at any time before the right of a third party has intervened he ought, in case the mistake in the description of the land upon which he bases his right to purchase has been inadvertently made, be permitted to show the fact and to correct his application. *Nesting v. Terrell*, 97 T. 18 75 S. W. 486.

Where, one in his application to buy additional lands, but through mistake alleges in the application that he is an actual settler, but in all other respects he complies with the law, and after discovery of the mistake he files another application in all things correct, he will be awarded the land over one who files application subsequent to the first application of the other party and previous to his second. *Ratliff v. Terrell*, 97 T. 522, 80 S. W. 600.

The legislature did not by the use of the words "owner of other" intend to include the owner of a lot or lots in a town. The law means the owner of agricultural or grazing lands. *Conn v. Terrell*, 97 T. 578, 80 S. W. 608, 609.

Where an application to purchase several sections of school land had written below the description the words, "Settlement is on No. 4," it was not sufficient to indicate that that was the applicant's home section, and that he was residing thereon at the time of application. *Goethal v. Read*, 35 C. A. 461, 81 S. W. 592.

In trespass to try title to additional school land, purchaser held bound to prove that the land was within the prescribed distance of other land owned or settled on by him. *Knippa v. Brown* (Civ. App.) 82 S. W. 658.

Where an application to purchase a home section fails because of the superior rights of a lessee of the land applied for, a claim of the applicant to another section as "additional lands" must also fail. *Sanford v. Terrell* (Sup.) 87 S. W. 655.

Evidence that the land commissioner had rejected plaintiff's application on other grounds held insufficient proof that plaintiff had not purchased all the additional land he was entitled to buy. *Reininger v. Pannell*, 46 C. A. 137, 101 S. W. 816.

However essential it may be that a purchaser of additional lands is an actual resident upon his home section or "other lands," there is nothing in the statutes requiring the applicant for additional lands to state in his sworn application that such is the fact. The only requirement is the matter about collusion. *Pohle v. Robertson*, 54 C. A. 326, 116 S. W. 862.

— Settlement on and title to home tract.—When there has been a bona fide purchase under previous laws, under the act of 1881 and there has been an actual bona fide occupancy and residence upon such section for three years prior to the act of 1897, an additional section within a radius of five miles of the land so occupied may be purchased. The purchaser need not in person reside on the original section nor make his home there. But the original section must either be occupied by himself or some one for him. *Thomson v. Hubbard*, 22 C. A. 101, 53 S. W. 841.

The law does not require that the actual owner and resident, should have purchased the land from the state on which he resides and which is contiguous to or within a radius of five miles of the public land he desires to purchase. If he has been in actual possession of the land under deeds for many years, has made valuable improvements thereon and paid taxes, he is a bona fide owner and resident upon the land on which he resides and is entitled to purchase although there may be a break in his chain of title. The very language seems to demand not a perfect title, but an ownership and residence in good faith situated with reference to the land he wishes to purchase as the statute demands. *Smith v. Rothe* (Civ. App.) 55 S. W. 754.

Sayles' Civ. St. 1897, Art. 4218f, as amended by articles 4218ff and 4218fff therein, re-

quired that both the original purchaser and his vendee must be an actual settler upon the parent section in order to give a right in any case to any additional lands. *Schwarz v. McCall*, 94 T. 10, 57 S. W. 34.

A party cannot recover if there is no proof that the land sued for is within a radius of five miles of the land occupied by him. The burden is on plaintiff to show this. *Faucett v. Sheppard*, 24 C. A. 552, 60 S. W. 277.

Where applicants for the purchase of additional public lands were unmarried men, having an abode elsewhere, and made no substantial improvements, nor remained any considerable length of time on the land, the question of a bona fide settlement was for the jury. *Wyatt v. Lyons*, 25 C. A. 88, 60 S. W. 575.

Settlement on the additional land sought to be purchased within six months from the date of the application is not required. Settlement on the home tract is sufficient. *Dabbs v. Rothe*, 25 C. A. 201, 60 S. W. 312.

One who was not an actual settler on the land which he had bought in good faith for a home under provisions of *Sayles' Civ. St.* 1897, art. 4218f, cannot buy additional land, although he has been prevented from actually settling on the purchased land by sickness. *Jones v. Bourbonnais*, 25 C. A. 94, 60 S. W. 987.

To entitle one to additional land he must not only be a resident—an actual settler—upon school land within the prescribed radius, but he must also have been a purchaser thereof. One who marries the widow of a purchaser and thereafter resides with her on the land is not eligible to buy additional land. *Boyd v. Montgomery*, 27 C. A. 206, 66 S. W. 243.

An actual settler can purchase section or fraction of section upon which settlement is made and at the same time as much as three additional sections provided they are contiguous to or within radius of five miles of home section. *Nowlin v. Hall* (Civ. App.) 67 S. W. 901.

Settlement on leased school land prior to the expiration of the lease does not give right to apply for adjoining land. *Corbin v. McGee* (Civ. App.) 67 S. W. 1068.

Original wrongful entry on home section of applicant for purchase of additional school lands held immaterial. *McGee v. Corbin*, 96 T. 35, 70 S. W. 79.

Instruction in action, by applicant to purchase additional school lands, to recover such lands, held erroneous as submitting immaterial issue as to actual settlement of applicant's predecessor on home section. *Coody v. Harris*, 31 C. A. 169, 71 S. W. 607.

When one has resided on his home section for three years, the additional land purchased by him, though unpatented is subject to sale under execution issued on a judgment against him. *Martin v. Bryson*, 31 C. A. 98, 71 S. W. 615.

Sayles' Civ. St. 1897, art. 4218fff, only applies to those who have bought additional lands as the owners of lands other than school lands. *Roberson v. Sterrett*, 96 T. 180, 71 S. W. 385, 73 S. W. 3.

It contemplates that the purchaser may perfect his title to the additional lands purchased by him by the continued residence for three years upon his original land or upon the land so purchased; and it would seem that he is allowed to tack his occupancy of the purchased land to that of the land originally owned by him in order to make up the designated period, provided there is no lapse between the two. In the event he fails to make such continued residence and occupancy, the law provides that his purchase shall work a forfeiture and this is the only forfeiture prescribed in this article. *Id.*

Plaintiff in trespass to try title held not precluded from questioning defendant's actual settlement on his home section, when he applied to purchase the land in controversy as additional land. *Ford v. Brown*, 33 C. A. 198, 75 S. W. 893.

An actual settler on school land, who claims the right to purchase additional land, must not only have actually occupied and settled upon his land, but must intend to make it his home. *Mahoney v. Tubbs*, 34 C. A. 96, 77 S. W. 822.

The right to purchase additional lands is limited by the statute to "bona fide purchasers." No such right is extended to a mere occupant of other lands. *Trevey v. Lowrie*, 33 C. A. 606, 78 S. W. 19.

In order to constitute one a qualified purchaser of additional lands, he must be the owner of his home or base survey. He need not have vested in him an indefeasible legal title. If he has an equitable title, or such right as entitles him to a specific performance of a verbal contract between him and the legal owner of his home tract, he would be the "owner" within the purview of this statute. *Bone v. Cowan*, 37 C. A. 519, 84 S. W. 386.

Where defendant was not an actual settler on a home section of school lands at the time additional land was awarded to her, such award was ineffective. *Jones v. Wright* (Civ. App.) 92 S. W. 1010.

Where the state land commissioner did not contest relator's right to purchase his home section of school land as such, he could not deny his incidental right to purchase additional land subject to sale. *Murphy v. Terrell*, 100 T. 397, 100 S. W. 130.

Where petitioner's application to purchase his home section was invalid, the land commissioner properly canceled his application for additional tracts until relator had selected a new home section. *Bogel v. Robison*, 102 T. 496, 119 S. W. 1144.

A bona fide purchaser of a home section used by the vendor as a base for the purchase of school land held authorized to make the home section a base for such a purchase. *State v. Ellis*, 49 C. A. 561, 130 S. W. 891.

— **Occupancy of additional land.**—A settler on agricultural land purchasing pasture lands is not required to remove and settle on one of the other tracts. *Watts v. Wheeler*, 10 C. A. 117, 30 S. W. 297.

This article does not provide that in case of sale by original purchaser of additional lands to purchase of a home section that the failure of his vendee to occupy and continue to reside upon the land so purchased by him, shall subject him to forfeiture as does Art. 5426, and the omission indicates that it was not the intention that such rule should apply to a sale of additional lands purchased from the state by one as the owner of lands other than school lands as provided for in Art. 5426. *Roberson v. Sterrett*, 96 T. 180, 71 S. W. 385, 73 S. W. 3.

Under *Sayles' Civ. St.* art. 4218fff, persons who owned and occupied lands other than those purchased from the state could become the owners of additional lands out of the

public domain upon a compliance with the statute regulating such sales. Whether the purchaser occupies the additional lands or not is optional with him. *Roddy v. White*, 32 C. A. 422, 75 S. W. 358.

Conclusiveness of rejection or acceptance of application.—The award of the land commissioner is not conclusive as to the facts. *Eastin v. Ferguson*, 4 C. A. 643, 23 S. W. 918.

Where commissioner determines to which of two rival applicants for the purchase of school lands an award shall be made, it is immaterial whether he assigned a proper reason therefor, if he decided properly. *Willoughby v. Townsend*, 93 T. 80, 53 S. W. 581.

The validity of an award of school lands will not be considered, in an action by the person to whom the land is granted for damages against a mere trespasser, who exhibits no title to the land. *Forst v. Rothe* (Civ. App.) 66 S. W. 575.

Acceptance by the commissioner of the general land office of application to purchase land as an actual settler is not conclusive of such settlement against a subsequent applicant. *Franklin v. Kerlin*, 32 C. A. 380, 74 S. W. 592.

An award of school land to an applicant to purchase same as additional land held not evidence that the same was located within the prescribed distance of other land owned or settled on by him. *Knippa v. Brown* (Civ. App.) 82 S. W. 658.

Proof of an award of land by state land commissioner makes a prima facie case of ownership in the one receiving the award, sufficient to entitle him to recover until by proper evidence the commissioner of the general land office is shown to have exceeded his authority in making the award. *Holt v. Cave*, 38 C. A. 62, 85 S. W. 309.

An award of school land by the commissioner is prima facie evidence that the land was on the market and that all prerequisites to his power to make the sale had been met. *Hood v. Pursley*, 39 C. A. 475, 87 S. W. 870.

In trespass to try title to certain school lands, it was not error for the court to refuse to charge that the act of the commissioner of the general land office in awarding the land to defendant was prima facie evidence that she was an actual settler on her home section. *Jones v. Wright* (Civ. App.) 92 S. W. 1010.

Since an award to a purchaser of school land does not fix title in the purchaser as against one making due application to purchase unless such purchaser has complied with the law authorizing an award, and was legally qualified to purchase, if plaintiff was not an actual settler upon the land when it was awarded to him, it remained open to settlement by defendant, and, if defendant complied with the law, his rights were not affected by a rejection of his application by the commissioner of the general land office. *Barnes v. Williams' Adm'r* (Civ. App.) 143 S. W. 978.

Certificate of sale.—The land commissioner has the power to give a certificate as to any fact appearing of record in his office, but we do not believe that he has the power under the head of "Remarks" to state that the section of school land had been sold, and that the sale was still in good standing. *Knapp v. Patterson* (Civ. App.) 87 S. W. 394.

Mistake in middle initial of person named in certificate of sale of school land held immaterial. *Trimble v. Burroughs*, 41 C. A. 554, 95 S. W. 614.

Release of purchaser.—A transaction releasing the original purchaser of school lands and awarding the same lands to his purchaser held not against public policy. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Art. 5416a. Validating act.—That in all cases where persons have on file in the general land office valid application to purchase school and other public lands and awards to them have been duly made on such application and such persons failed to settle on their lands within the ninety days required by law, but have in fact settled thereon in good faith to make the same their home, and in all cases where the applicant did become an actual settler on the land but failed to file his affidavit of settlement within the time required by law but did file the affidavit and such purchaser or his legal assignee has continued to reside thereon then and in that event such settlement and attempted purchases are hereby declared to be valid. [Acts 1913, S. S., p. 21, sec. 1.]

See Final Title for list of validating acts.

Validating acts.—Effect of an act validating locations under Confederate veteran certificates on action pending, determined. *Cox v. Finks* (Civ. App.) 41 S. W. 95.

Act Feb. 8, 1875, validating a void grant of land in 1835, held to confer no title as against an actual settler under Const. 1869, art. 10. *Williams v. League* (Civ. App.) 44 S. W. 570.

The objection that, on the sale of state land, no tabulated statement was filed in the surveyor's office, cannot be made available where the omission was cured by a healing act. *Garrett v. Findlater*, 21 C. A. 635, 53 S. W. 839.

Under Acts 1899, p. 259, a sale made to a minor is validated. *Strickel v. Turberville*, 28 C. A. 469, 67 S. W. 1059.

Even if sale of public school land made in 1898 be void, because to a minor, it is validated by Acts 1899, p. 259. *Johnson v. Bibb*, 32 C. A. 471, 75 S. W. 73.

Under Rev. St. 1895, art. 4269, providing that vested rights shall not be disturbed by the location of school land in favor of a county, a location of school land for the state under authority of Const. art. 7, § 2, providing that all alternative sections of land reserved to the state or that shall be hereafter made to railroads or other corporations, and one-half of the public domain, etc., shall constitute a public school fund, will prevail over a subsequent location of county school land, although a patent is first issued on the county location. *Ellwood v. Stallcup*, 57 C. A. 343, 122 S. W. 906.

Under Rev. St. 1895, art. 4269, providing that in surveys of school lands the calls for distance must prevail over calls for natural objects, where the calls for distance will give the land intended, otherwise not, the court, in ascertaining the boundaries of a coun-

ty school land grant, will so construe the field notes as to give the county the benefit of those calls that are most favorable to its interests when they can be ascertained with a reasonable degree of certainty, though by so doing some other call may be displaced which may, under ordinary rules of construction of determining the superiority of calls, be given effect and made to control when the lines of county school lands are not involved, and a boundary line which can be ascertained with a reasonable degree of certainty will control the call for distance if in accordance with the conditions prescribed in the statute, but in determining a lost line in a county school land grant the ordinary rule of construction, in recognition of the controlling influence of established corners, controls. *Polk County v. Stevens* (Civ. App.) 143 S. W. 204.

Art. 5417. To whom awarded, when application rejected.—If for any cause an application for land or timber which offers the highest price can not be accepted, those offering the next highest price and filed on same day shall be considered in their order of price until one may be awarded. [Acts 1907, p. 490, sec. 6e.]

Art. 5418. Eight section counties; complement of land.—One who has not purchased any land since April 19, 1901, may purchase, on condition of settlement, in the counties of Brewster, Crockett, Edwards, El Paso, Jeff Davis, Kinney, Pecos, Presidio, Sutton, Terrell and Val Verde, not to exceed eight sections of six hundred and forty acres each, more or less, which are wholly within said counties. One who has heretofore, or who may hereafter, purchase a complement as aforesaid, shall not purchase any more. One who has purchased or may hereafter purchase on condition of settlement four sections of six hundred and forty acres each, more or less, wholly or partly within any county other than those hereinabove named since said date, shall not purchase any more on condition of settlement. One who has purchased less than a complement, as aforesaid, may hereafter purchase in any county such number of sections as his lack of a complement in the county of the former purchase bears to a complement in the county of such former purchase. One who has heretofore purchased land on condition of settlement, which lies partly within an eight-section county and partly within a four-section county, shall be considered for the purpose of future purchase by him as having purchased in a four-section county. Every additional survey applied for shall be situated within five miles of the designated home tract, except the survey on which the lessee, who may apply [to buy] out of his lease, may have placed permanent and immovable improvements of the value of five hundred dollars, need not be within such radius. No survey shall be sold in any county except as a whole, notwithstanding it may be leased in two or more parts. [Acts 1907, 1 S. S., p. 490, sec. 6.]

See *Gaddes v. Terrell*, 101 T. 574, 110 S. W. 429.

Purchase of additional sections.—One who has purchased four sections under a former law (that of 1901) in one of the excepted counties, is authorized under the law of 1905 to buy the whole or any part of four additional sections. "Complement," as used in this section means eight sections. One who has bought less than four sections in an excepted county under a former law can purchase enough under this section (Acts 1905, p. 167, § 6) to fill up the complement of eight sections. *Ross v. Terrell*, 99 T. 502, 90 S. W. 1094.

Art. 5419. Settlement and residence.—All of the surveyed school land wholly or partly within the counties of Andrews, Brewster, Cameron, Crane, Crockett, Dimmit, Duval, Ector, Edwards, El Paso, Gaines, Hidalgo, Jeff Davis, Kimble, Kinney, La Salle, Loving, Maverick, McMullen, Midland, Pecos, Presidio, Reeves, Starr, Sutton, Terrell, Terry, Upton, Uvalde, Val Verde, Ward, Webb, Winkler, Yoakum, Zapata and Zavala shall be sold on condition of settlement as provided by this act and existing statutes, except tracts of one hundred acres or less shall be sold for cash. The land purchased by one, either for cash or on deferred payment without condition of settlement, shall not be computed against him in his purchase on condition of settlement. Every purchaser on condition of settlement shall in person reside continuously on either the designated home tract or on some portion of the land purchased as additional thereto, for three consecutive years next succeeding the date of the award of the home tract, or from the date of the award of

the first tract, as additional to a home already owned, as the case may be, including the ninety days allowed to settle. The proof of such settlement and residence shall be made as now provided by statute. [Id. sec. 6a.]

See *Gaddes v. Terrell*, 101 T. 574, 110 S. W. 429; *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Requirement as to residence.—When a purchaser has proved his occupancy of the home tract, and is in actual occupancy when he applies for and is awarded an additional section, he does not have to occupy either section for three years next after the purchase of the additional section. *Zettlemeyer v. Shuler*, 52 C. A. 648, 115 S. W. 80.

This article added nothing to the former statute requiring purchasers to reside on the land as a home for three consecutive years after their purchase, except that it repealed the permit to reside elsewhere six months in each year for the purposes specified. *State v. Davidson* (Civ. App.) 132 S. W. 520.

Forfeiture for nonoccupancy or abandonment.—See Arts. 5424, 5425, and notes.

Proof and certificate of occupancy.—See notes under Art. 5444.

Art. 5420. Limitations as to purchases.—The commissioner of the general land office is hereby prohibited from selling to the same party more than one complement of four or eight sections of land, according to the county; and all applications to purchase land shall also disclose the prior lands purchased by the applicant from the state, if any, and the residence of the applicant at said time; and, if it appear therefrom, or from the records in the land office, that said applicant has already purchased land aggregating four or eight sections, according to county, since April 19, 1901, his application shall be rejected; provided, this shall not apply to sales made to a purchaser and afterwards canceled as invalid for some reason other than abandonment, and where the purchaser himself was not at fault. [Acts 1901, p. 292, sec. 3.]

See *Wing v. Dunn* (Civ. App.) 127 S. W. 1101.

Not repealed.—Acts 27th Leg. c. 125, § 3 (Art. 5420 herein), was not repealed by Acts 29th Leg. c. 103, § 8 (Art. 5432 herein). *Houston v. Koonce* (Civ. App.) 136 S. W. 1159; *Id.* (Sup.) 156 S. W. 202.

Limitations as to amount of land.—See, also, Arts. 5418, 5419.

The purpose of first part of this section seems to have been mainly to prevent one who had previously purchased four sections from making a new settlement and purchasing again. This inhibition was not contained in the previous laws. The language that the commissioner "is hereby prohibited from selling to the same party more than four sections of land" was probably used out of abundant caution to reaffirm the existing rule on the subject. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 84.

The words "four sections" refer rather to surveys than to quantity of acres, and the sections may contain less than 640 acres each. *Id.*

Acts 27th Leg. c. 125, § 3 (Art. 5420 herein), prohibiting the commissioner of the general land office from selling to the same person more than four sections of land, was not repealed by Acts 29th Leg. c. 103, § 8 (Art. 5432 herein), providing for the survey and sale of public school lands, but the two acts so far as they relate to the same subject, are to be construed together; and hence, where one had purchased four sections under the act of 1901, a further purchase of two sections under the act of 1905 was void. *Houston v. Koonce* (Sup.) 156 S. W. 202.

— **No limitation in certain counties.**—See Art. 5422.

Art. 5421. Right of lessees.—An original lessee of a lease executed prior to April 15, 1905, who has never parted with any interest in his lease, except by purchase, may purchase out of such lease in whole surveys only one complement of sections, or such part thereof as will make his total purchase since April 19, 1901, not to exceed eight or four sections, according to the county; provided, an original lessee who has not heretofore exercised his right to buy one complement of sections out of one or more leases and should not hereafter desire to do so, may assign one or more leases to a qualified purchaser, and his assignee shall have the same right to purchase out of the leases one complement of sections, or such number thereof as the assignor may be qualified to purchase, or such number as the assignee may be qualified to purchase; provided, that in case the assignment should have been made and acknowledged before an officer authorized to take acknowledgments the assignee may exercise that right as provided for under the act of April 15, 1905. Only one complement shall be sold out of any lease, including that heretofore sold out of it. One who desires to buy land out of his lease shall first give written notice to the commissioner of the general land office, and specify the land he wants to buy not less than sixty days prior to ex-

piration of the lease. The commissioner shall make, or cause to be made, an inspection of the land, if he is not already in possession of sufficient information, and appraise same at its reasonable market value, and advise such person and the proper county clerk of the value placed thereon. Thereafter the land shall be subject to sale to the lessee only during the life of the lease. After a lease expires or is canceled, no one shall have any preference to purchase any land contained therein. [Acts 1907, p. 490, sec. 5.]

Constitutionality.—This act, giving a preference to lessees and their assignees to purchase the lands held by them under lease, is not unconstitutional. *Glasgow v. Terrell*, 100 T. 581, 102 S. W. 100.

Leases of public lands in general.—See notes under Art. 5452.

Lessee's preference right of purchasing.—See, also, Arts. 5452, 5453, and notes.

The privilege of a lessee of state lands to purchase the land within 60 days after the expiration of the lease, destroyed by the transfer of the lease, held not revived by the transferee quitclaiming his interest in the lands to lessee. *Adkinson v. Porter* (Civ. App.) 73 S. W. 43 (decided under prior act).

A lessee of state lands is entitled to a preference right to purchase the land provided his right is exercised by completing the purchase before the expiration of his lease. *Welhausen v. Terrell*, 100 T. 150, 97 S. W. 79.

Petitioner by erroneous indorsement on his applications to purchase state lands, held to have lost his preference right to purchase as lessee. *Id.*

The act of 1905 gives to a lessor or to the assignee of an entire lease the right to purchase a complement of land out of the leased premises, but provides in express terms that the provision shall apply only to leases existing at the time of the passage of the act. *Trezevant v. Terrell*, 100 T. 289, 99 S. W. 94.

Time of exercising privilege.—A lessee's right to purchase in preference to others is conditional on his exercising the right before the expiration of his lease. *Welhausen v. Terrell*, 100 T. 150, 97 S. W. 79.

The assignee of a lease which has expired has no preference rights of purchase of land which came on the market September 1, 1905. *Murphy v. Terrell*, 100 T. 397, 100 S. W. 132.

Where the lessee after the expiration of his lease and before September 1, 1905, applied to the land commissioner notifying him of his purpose to buy the premises covered by the lease he had no prior right to purchase the land. *Patterson v. Crenshaw*, 47 C. A. 440, 105 S. W. 998 (decision under Acts 1905, p. 167, § 11).

Land that may be acquired.—The purpose of this article was to define the rights of lessees and their assignees, and the purpose of the limitation was to hedge against any construction that would permit an applicant to acquire by purchase more than four sections, save in the counties excepted in Article 5418. *Ross v. Terrell*, 99 T. 502, 90 S. W. 1094.

By the words "tracts of land," only such lands as were actually surveyed at the time the act was to take effect, and possibly such detached parcels of 640 acres or less, as could be brought under the act without making an additional survey were intended to be included in the word tract. *Raper v. Terrell*, 100 T. 287, 99 S. W. 93 (decision before the amendment of 1907).

The holder of a lease of school lands, who is an actual settler, is entitled to purchase all the land embraced in his lease. *Patterson v. Knapp* (Sup.) 103 S. W. 489.

Rights of assignee.—It would seem from Acts 1900, 1st called Sess., p. 33, § 7, that whenever the legislature desired to confer a right upon the assignees of a lessee, they were expressly mentioned. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 82.

The privilege of a lessee of state lands to purchase the land within 60 days after the expiration of the lease in preference to other purchasers is a personal privilege, destroyed by his transferring the lease to another. *Adkinson v. Porter* (Civ. App.) 73 S. W. 43 (decided under prior act).

Where outstanding lease of school land has been assigned to purchaser and homestead occupant of a neighboring section, it is no obstacle to his purchase of the leased section. *Mitchell v. Johnson*, 32 C. A. 373, 74 S. W. 48.

The assignee of the rights of a lessee of public land may purchase the land during the life of the lease. *Fields v. Davis* (Civ. App.) 74 S. W. 52.

Where a lessee from the state assigns his lease, it is no bar to an application by the assignee, on surrendering the same, to purchase the lands covered thereby. *Walker v. Marchbanks*, 32 C. A. 303, 74 S. W. 929.

When after the lease part of the lands were sold to a third party with the consent of the lessee, and the lessee then assigned the remainder of the lease, the assignee is entitled to purchase, because, while he is not the assignee of the entire original lease, yet he is the assignee of the "entire lease," when the assignment was made, within the meaning of this law. *Garza v. Terrell*, 99 T. 506, 90 S. W. 1093 (decision before the amendment of 1907).

The preference right given under this article to lessees and their assignees to purchase lands held under lease, is not confined to assignees who were such when the act took effect. *Glasgow v. Terrell*, 100 T. 581, 102 S. W. 100.

Where assignment of lease was executed, but not acknowledged when the act of 1907 became effective, the assignee could not purchase under the law of 1905, and as he did not give his notice 60 days before the expiration of the lease, he could not purchase under the act of 1907. *Ross v. Terrell*, 101 T. 224, 105 S. W. 1117.

Effect of application or purchase upon lease.—Where the lessee of public school lands filed with the commissioner of the land office a consent for their sale to a certain person, and her attempted purchase was void, the lease continued in force. *Smith v. McClain*, 96 T. 568, 74 S. W. 754.

Where the holder of a lease of school lands makes a valid purchase of the lands, the lease is terminated. *Patterson v. Knapp*, 100 T. 587, 102 S. W. 97.

Where the holder of a lease of school land applied to purchase on the maturity of an installment of rent, the fact that an award was not made until after notices to state treasurer did not affect the presumption that the lease was not canceled because of the sale. *Patterson v. Knapp* (Sup.) 103 S. W. 489.

Where an entire section of school land was embraced in an unexpired lease when the lessee applied to purchase certain of the leased land, including the east half of such section, and thereafter, during the term of the lease, the purchase was forfeited, the west half of the section remained subject to the lease, and could not be resold. *Ford v. Terrell*, 101 T. 327, 107 S. W. 40.

That a lessee of public school land who makes application to purchase it, and tenders his lease for cancellation, is not entitled to buy, does not subject the land to purchase by another. *Halbert v. Terrell*, 102 T. 29, 112 S. W. 1036.

Art. 5421a. Certain sales and leases validated, etc.—All sales made out of leases of unsurveyed school lands that may have been erroneous by reason of a lack of definiteness of lease-holds and unmarked survey lines, and all sales made on lines of four-section counties and eight-section counties, and such sales of land as may have been [made] in a four-section county, and other sales as may have been made in an eight-section county, as may have been erroneous on account of a lack of clearness in the statute regulating the rights of purchasers in four-section counties and eight-section counties, are hereby validated and declared to be good sales so far as probable errors herein mentioned may affect such sales; provided that nothing in this Act shall validate or affect any land sales or titles for which suits may be now pending in any of the courts of this state on behalf of the state. The commissioner of the general land office may issue his official certificate on all proofs of occupancy now on file in the general land office previous to the taking effect of this Act, whether such proofs were filed within two years' period of grace as provided by law, or not. [Acts 1911, p. 206, sec. 1.]

See Final Title for list of validating acts.

Art. 5421b. Certain settlements and attempted purchases validated.—In all cases where persons have made valid applications to purchase land on the condition of becoming an actual settler thereon within ninety days after the date of acceptance and award under the Act of April 15, 1905 [Arts. 5407, 5408, 5410, 5416], and Acts amendatory thereto, and the land was subject to sale and the application was accepted and award was issued as required by law, and the applicant did become in person an actual bona fide settler on the land within the time required by law, but did not file in the general land office the required affidavit of settlement within the time required by law, but did file the affidavit, and such purchaser, or his legal assignee, has continued to reside thereon, then, and in that event, such settlement and attempted purchases are hereby declared to be valid; provided that this Act shall not validate any land acquired by fraud. [Id. sec. 2.]

Art. 5422. Sales without settlement.—The surveyed school and asylum land and the timber thereon situated wholly within any county other than those named in article 5419 shall be sold in whole tracts only, and without condition of settlement or limit as to quantity, and either for cash with the right to patent at once, or for one-fortieth cash with five per cent interest on the deferred payment, together with all the pains and penalties of forfeiture for non-payment as is now or may hereafter be provided by law. All applications for the purchase of land without settlement, and either for cash or on deferred payment, shall be in writing and accompanied by the affidavit of the applicant that he desires the land for his own benefit and not for any other person or corporation. When any such purchase is fully paid for, the land may be patented. No land on which there is merchantable timber shall be sold until the timber is sold for cash and fully paid for. Should two or more applicants offer the same price for any tract on the same date, the same being the highest price offered, and one should offer full cash payment and another should offer one-fortieth cash payment and balance on

time, the application on deferred payment shall be accepted. Such of the land in the counties included within this section as is now sold, but which may hereafter become subject to sale, shall not be subject to sale until the former sale shall have been canceled and the land and timber, if any thereon, shall be reappraised by the commissioner, and a date fixed not more than sixty days from the date of such cancellation, when it may be subject to sale to the one offering the highest price therefor. Notice of such cancellation and reappraisal shall be mailed to the proper county clerk, together with the date when the land and timber, if any, will be subject to sale. [Acts 1907, p. 490, secs. 6b and 6e.]

Construction of language of statute.—The surveys referred to in this law clearly appear to be the sections, and the purpose is to require each section, no part of which has been sold, to be sold as a whole, and not in subdivisions as heretofore. The fact that part of a section may be under lease and is thereby temporarily kept off the market is not made to take it out of the rule. *Ford v. Terrell*, 101 T. 327, 107 S. W. 40.

“Such land” means under the provision of the act, lands that are subject to sale without the condition of actual settlement. The previous section of the act (Art. 5419 herein) mentions by name the counties in which actual settlement is required. *Hamilton v. Terrell*, 101 T. 330, 107 S. W. 48.

Application to purchase in general.—Whenever the money is deposited an application being on file, it may be considered provided some adverse application has not been filed for the purchase of the land. Respondent had applied for twelve parcels of land and deposited one fortieth of price in the treasury but his applications had been rejected for all except one eighty-acre tract which was required to be sold for cash, the payment on which amounted to \$5.75. He then applied for the purchase of this tract for cash and directed that the money on deposit be applied to the payment. The land was awarded to him but afterwards the award was canceled. This was error. *Buckley v. Terrell*, 101 T. 487, 109 S. W. 861.

Art. 5423. [4218/] Forfeiture of purchase by non-payment of interest, etc.—If upon the first day of November of any year any portion of the interest due on any obligation remains unpaid, the commissioner of the general land office shall endorse on such obligation, “Land Forfeited,” and shall cause an entry to that effect to be made on the account kept with the purchaser; and thereupon said land shall thereby be forfeited to the state without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter, or any future law; provided, the purchaser of land prior to August 20, 1897, shall have the right, at any time within six months after such endorsement of “Lands Forfeited” to institute a suit in district court of Travis county, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but, if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive. In any cases where lands have been forfeited to the state for the non-payment of interest, the purchasers, or their vendees, may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened. In all such cases, the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death, and shall be absolved and exempt from the requirement of settlement and residence thereon; provided, that all necessary and temporary absence from such land of such purchaser, for the time of not more than six months in any one year, for the purpose of earning money with which to pay for the land, or for the purpose of schooling his children, shall not work a forfeiture of his title; provided, further, that nothing in this article contained shall be construed to inhibit the state from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the state at

the time such forfeiture occurred, or to protect any other right to such land; which suits may be instituted by the attorney general, or under his direction, in the proper court of the county in which the land lies, or of the county to which such county is attached for judicial purposes. [Acts 1895. Acts 1897, p. 39, sec. 1. Art. 4218~~l~~, Acts 1895, amended Acts 1897, p. 184. Art. 4218~~l~~, Acts 1895.]

See *Barker v. Torrey*, 69 T. 7, 4 S. W. 646; *Berrendo Stock Co. v. McCarty*, 85 T. 412, 21 S. W. 598; *Schilling v. State*, 2 C. A. 578, 22 S. W. 233; *Patterson v. O'Docherty*, 4 C. A. 462, 23 C. A. 293; *Atkeson v. Bilger*, 4 C. A. 99, 23 S. W. 415; *Anderson v. Waco State Bank*, 86 T. 618, 28 S. W. 344; *Slaughter v. Cooper*, 56 C. A. 169, 121 S. W. 173; *Elliott v. Morris*, 49 C. A. 527, 121 S. W. 209.

Constitutionality of various acts.—Act Feb. 23, 1885, declaring that failure to pay interest on school lands prior to a certain date should not forfeit the purchaser's rights, was constitutional. *Capps v. Garvey* (Civ. App.) 41 S. W. 379.

Legislature may authorize land commissioner to declare forfeiture for nonpayment of interest in sale of school lands, without reference to law under which rights of purchaser accrued. *Waggoner v. Flack*, 21 C. A. 449, 52 S. W. 584.

This act (Rev. St. 1895, art. 4218~~l~~) simply enforces a right which existed in the state from the formation of the contract. It takes away no right of the purchaser, unless it can be said that he had the right to demand that the particular remedy provided by the act of 1879 should be followed. A subsequent statute which simply changes the remedy without impairing rights is not repugnant to any constitutional provision. *Standiver v. Wilson*, 93 T. 232, 54 S. W. 898.

Not repealed.—Act March 25, 1897, did not repeal Acts 1895, p. 67, § 11, so as to prevent a forfeiture for nonpayment of interest. *Waggoner v. Flack*, 92 T. 633, 51 S. W. 330.

The act of 1905 only repeals laws in conflict with it. This article provides that if a purchaser of school lands shall die, his heirs or legal representatives shall have one year in which to make payment after the 1st day of November next, after such death, and shall be exempt from the requirement of settlement and residence thereon. There is nothing in the act of 1905 that conflicts with this provision, and, hence it is not repealed. *Clark v. Terrell*, 100 T. 277, 98 S. W. 642.

Acts 1905, p. 163, § 6 (re-enacted with modifications as Art. 5418 herein), is not in conflict with the provision in article 4218~~l~~, Rev. St. 1895 (Art. 5423 herein), permitting absence from the land not exceeding six months without forfeiture, and therefore the act of 1905 does not repeal said provision. *Gaddes v. Terrell*, 101 T. 574, 110 S. W. 429. But see note under "Temporary absence for six months," post.

Acts 27th Leg. c. 125, § 3 (re-enacted as Art. 5424 herein), and Rev. St. 1895, art. 4218~~l~~ (re-enacted with modifications as Art. 5423 herein), were not repealed by Acts 30th Leg. Ex. Sess. c. 20, §§ 6e, 6a (Arts. 5419, 5425, herein), nor were they repealed by Acts 29th Leg. c. 103 (see Art. 5416 herein). *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Statutes not retrospective.—See, also, note under "Forfeiture for nonpayment of interest in general," post.

Acts 1895, p. 67, § 11, authorizing a forfeiture of school lands, has reference to future sales only. *Capps v. Garvey* (Civ. App.) 41 S. W. 379.

Under Act Feb. 23, 1885, relating to state lands, the land commissioner cannot forfeit a contract made in 1884 for nonpayment of interest for 1882. *Cuba v. Island City Sav. Bank* (Civ. App.) 41 S. W. 532.

Act April, 1895, providing for forfeiture of school lands on default, does not apply to a contract made under act of 1883. *Blum v. Fristoe* (Civ. App.) 42 S. W. 656.

Under Act April, 1895, providing for forfeiture of school lands, no forfeiture can be had prior to November 1, 1895. Id.

Previous law.—Sections 9 and 10 of the act of April 13, 1883, provide for the forfeiture of purchases of public school lands upon nonpayment of interest by March 1st of each year by indorsement upon the purchaser's obligation, without a judicial ascertainment of the facts. The acts of February 16, 1885, and of February 23, 1885, are construed as repealing the provisions of the act of 1883, authorizing a summary forfeiture. There was therefore no law in force between August 1 and November 15, 1887, under which purchases of land under the act of 1883 could be declared forfeited for nonpayment of interest. If such annual installments of interest shall not be paid as they mature, the state may bring suit for their collection and enforce the state's vendor's lien. *Stock Co. v. McCarty*, 85 T. 412, 21 S. W. 598. This ruling was made without the court's attention being called to the act of 1887. The ruling is corrected in the later case of *Anderson v. Waco State Bank*, 86 T. 618, 28 S. W. 344.

Payment of interest or installments in general.—*Sayles' Ann. Civ. St. 1897, art. 4218~~l~~*, did not in terms extend the time of the maturity of the annual installments, but in effect it did so, by withholding from the commissioner the power to forfeit for nonpayment of interest until the time named and when the person whose claim had been forfeited pays interest subsequent to August 1, but previous to November 1, 1897, for the years 1895 and 1896, he paid all the interest that was due within the meaning of the article at the date of reinstatement. *Pardue v. White*, 21 C. A. 121, 50 S. W. 591.

It is not necessary to tender subsequent installments where the commissioner of the land office has refused the first installment, and rejected the application in favor of a rival applicant. *Willoughby v. Townsend* (Civ. App.) 51 S. W. 335.

Forfeitures disfavored.—Forfeitures of public free school lands by the commissioner of the general land office are disfavored, and will not be sustained upon doubtful authority. *Salgado v. Baldwin*, 105 T. 508, 152 S. W. 165.

Forfeiture for nonpayment of interest in general.—The commissioner of the land office can declare a forfeiture of school lands bought under the act of April 1, 1887, for the failure to pay interest. *Fristoe v. Blum*, 92 T. 76, 45 S. W. 993.

The commissioner of the land office is authorized to declare forfeiture of land for failure to pay interest accrued prior to this act. *Waggoner v. Flack*, 92 T. 633, 51 S. W. 330 (decided under Act March 25, 1897).

The right of a vendor to rescind a contract of sale for the nonpayment of purchase money does not depend upon the life of the vendee and the commissioner can declare the land forfeited for nonpayment of interest though the vendee is dead, and he is not required to take action on the 1st day of November, but can act after that date if the interest is unpaid on said date. *McKinley v. Keath*, 24 C. A. 570, 59 S. W. 813.

The commissioner can only forfeit the land when the fact exists which authorizes him to forfeit. Hence he can set aside an inadvertent, unauthorized attempt to forfeit. *Johnson v. Bibb*, 32 C. A. 471, 75 S. W. 73.

The state has power, through a declaration of the land commissioner, to forfeit a sale of its lands for the nonpayment by the vendee of the interest on price. *Lawless v. Wright*, 39 C. A. 26, 86 S. W. 1039.

Statement of land commissioner. that a purchaser of public lands was in good standing held not to estop the state to declare a forfeiture for a prior nonpayment of interest. *Mound Oil Co. v. Terrell*, 99 T. 625, 92 S. W. 451.

— **Notice to purchaser.**—In absence of statute, failure of commissioner of land office to give notice that claim for land is subject to forfeiture for nonpayment of interest held not to estop the state to declare forfeiture. *Mound Oil Co. v. Terrell*, 99 T. 625, 92 S. W. 451.

— **Indorsement of forfeiture.**—The rescission of the contract does not depend upon the act of the commissioner in indorsing the words "lands forfeited" thereon and causing entry to that effect to be made. Default in payment and subsequent payment are ipso facto a rescission. *Island City Savings Bank v. Dowlearn* (Civ. App.) 59 S. W. 308. (This decision construes act of 1891.)

So important is it that the land shall be indorsed "forfeited" that the time allowed the purchaser in this article in which to contest the forfeiture by suit is fixed by the date of the indorsement: "Lands forfeited." *O'Keefe v. McPherson*, 25 C. A. 313, 61 S. W. 535; *Comanche Co. v. Brightman* (Civ. App.) 62 S. W. 976.

Under this article a land commissioner indorsed upon the contract with the original purchaser, and also upon the file wrapper which contained all the papers, and upon the account kept in the land office, the words "Land Forfeited." Held, such indorsement was sufficient, without placing it upon the obligation of the second substitute purchaser. *Hoefler v. Robison*, 104 T. 159, 135 S. W. 371.

— **Death of purchaser.**—See, also, note under "Not repealed," ante.

Where the husband applied to purchase school lands, the fact that the wife died did not entitle the children to a further time in which to make payment, under the provision for the heirs when the purchaser dies. *Simon v. Stearns*, 17 C. A. 13, 43 S. W. 50.

After the death of a purchaser (who dies owing interest on his purchase) the land commissioner cannot declare a forfeiture of the land, until the expiration of one year from the 1st day of November next after the death of the purchaser. *Potter v. Robison*, 102 T. 448, 119 S. W. 92.

The contract of a husband to buy public land is a community obligation and the wife acquires a half interest in the land by virtue of the contract even though she does not sign the contract. She thus becomes a "purchaser" and her heirs have the right to pay the overdue interest within one year after 1st of November next after her death, the husband having died before the wife died. *Leaverton v. Robison*, 102 T. 516, 120 S. W. 169.

— **Reinstatement.**—See, also, Art. 5428, and notes.

The commissioner of the land office is only authorized to make a reinstatement of the account where no rights of third persons have intervened. *Waggoner v. Flack*, 21 C. A. 449, 52 S. W. 584.

The statute in a case in which the right of a former purchaser to be reinstated is involved places no time limit on the applicant. The limit there is to cases where after forfeiture "no rights of third persons may have intervened." *Cobb v. Webb*, 26 C. A. 467, 64 S. W. 793.

See this case for facts held sufficient to show that one had actually settled on land that had been forfeited to the state for nonpayment of interest, and application for reinstatement, after such actual settlement, was properly refused. *Price v. Bates*, 32 C. A. 374, 74 S. W. 608.

The provision in this article for the forfeiture of land for the nonpayment of rent, in no way weakens or affects the proposition that a forfeiture restores the land to the public domain and reinvests the title in the state. Where one has bought land from the state and forfeiture was declared for nonpayment of rent, and land put on sale again, and another has bought and after holding a while has relinquished his title to the state, and the former has been reinstated, the reinstatement did not have the effect of continuing the title, whether legal or equitable in him after the forfeiture, and the 10-year statute of limitation was interrupted by the time that elapsed from the forfeiture to the reinstatement. *Lawless v. Wright*, 39 C. A. 26, 86 S. W. 1040.

Where purchase of land has been forfeited for nonpayment of interest, the purchaser cannot be reinstated if rights of other persons have intervened. *Mound Oil Co. v. Terrell*, 99 T. 625, 92 S. W. 453.

Where the west quarter of a section was the only part of the section on the market, an application to purchase complying with the law in all respects save that it designated the land applied for as 160 acres of the named section without other description, was sufficient to give the applicant standing with the right to comply with the requirement of the commissioner to perfect his description, and when the letter perfecting the description was filed in the landoffice the same day that a former purchaser applied for reinstatement, reinstatement was properly refused. *Lindsay v. Terrell*, 100 T. 548, 101 S. W. 1073.

Under this article the right to reinstatement is absolute, and is not defeated by the act of the commissioner in erroneously awarding the land to a third person. *Davis v. Yates* (Civ. App.) 133 S. W. 281.

The right of a purchaser of school land forfeited for nonpayment of interest to reinstatement held to become fixed as of the date of his compliance with the statute authorizing reinstatement. *Id.*

A purchaser of school land who had been reinstated as purchaser after forfeiture held entitled to claim the land as against one claiming under an erroneous award of the lands after the forfeiture. *Id.*

Under this article an application for a reinstatement made after a subsequent purchaser had completed his purchase came too late. *Jones v. Robison*, 104 T. 70, 133 S. W. 879.

A misrepresentation of facts by the treasurer of the land office as to condition of accounts in his office does not entitle one to reinstatement of a forfeited purchase after the rights of legal purchasers have intervened. *Id.*

Forfeiture for nonoccupancy.—See Arts. 5424, 5425, and notes.

Temporary absence for six months.—A settler does not forfeit his rights by being absent not exceeding six months for the purpose of educating his children and making money to pay for the land. Under the laws of 1895 the settlement must be for the bona fide purpose of making a home. *Willoughby v. Townsend*, 18 C. A. 724, 45 S. W. 861.

The provision in this article for temporary absence from the land not exceeding six months is not repealed by section 6 of the act of 1905 (Art. 5419 herein) requiring a residence of three successive years next succeeding the date of the purchase of the home tract. *Gaddes v. Terrell*, 101 T. 574, 110 S. W. 429.

The act of 1907 (Art. 5419 herein), requiring purchasers to reside in person continuously on the land, repealed the permit of the former law to reside elsewhere six months in the year for the purposes specified. *State v. Davidson* (Civ. App.) 132 S. W. 520.

Under this article, where a purchaser, after remaining in actual possession thereon for 10 days, went to an agricultural college to take a course in veterinary surgery under contract with other persons who paid his expenses and agreed to pay him more than double what he had been receiving when he returned with his certificate from the college, his purpose being to earn an increased salary to pay for the land, and his intent being to return to the land, which he did, in good faith, being absent less than 2½ months, his absence was within the article, and did not work a forfeiture of his purchase. *Ramsey v. Patterson* (Civ. App.) 133 S. W. 930.

A purchaser left his land to take a course in veterinary surgery under a contract for his services when he returned, with the proceeds which he intended to pay what he owed on the land. Held, that this article contemplates only an absence when actually earning the money, and the absence for the purpose of schooling is not within its terms and would work a forfeiture. *Ramsey v. Patterson*, 105 T. 378, 150 S. W. 889.

Suits to enforce forfeitures.—As to attorney's fees in school land litigation, see Arts. 3925, 3926.

A county attorney has no right to appear and represent the state to enforce forfeiture of school lands. *Duncan v. State*, 28 C. A. 447, 67 S. W. 904, 905.

Art. 5423a. Purchasers after January 1, 1907, and before January 1, 1913, who have forfeited for non-payment of interest, may repurchase, when.—In case any of the public free school lands that has been purchased from the state after January 1st, 1907 and prior to January 1st, 1913, on condition of settlement and residence may hereafter be forfeited for the non-payment of interest in the manner now provided by law the owner of such land at the date of forfeiture, provided the forfeiture was made by reason of interest accrued or accruing prior to the passage of this Act, shall have the right for a period of ninety days after notice of classification and appraisal of his land, as herein provided, to repurchase any of such tracts, not to exceed one complement of sections upon the terms and conditions prescribed in this Act. [Acts 1913, p. 336, sec. 1.]

Art. 5423b. Owner to advise commissioner of wish to repurchase; duties of commissioner.—When any of the land included within the preceding section has been forfeited for the non-payment of interest, the commissioner of the general land office shall forward such a list of land to the proper county clerk, and within thirty days after the receipt of said list by the clerk, the owner mentioned in the preceding section, who may wish to repurchase any or all of the land, not to exceed one complement of sections, as now provided by law, that he may have permitted to be forfeited, shall advise the commissioner of the general land office of such wish. As soon as practicable after the receipt of such advise by the commissioner, he shall furnish the board of appraisers hereinafter provided for, a complete list of all such lands, together with the names of all persons who have advised him of this desire to repurchase their said lands, or a part of their complements of sections, giving the post-office address of each person, as well as such other information he may have in his possession as will enable said board to properly appraise said lands as hereinafter provided. [Id. sec. 2.]

Art. 5423c. Board of appraisers, how constituted, etc.; duties; forfeited owner to file application to repurchase, etc.; provisions applicable.—There is hereby created a board of appraisers, consisting of three members, to be composed of the commissioner of the general land office, and two members to be appointed by the governor of the state. Said board shall organize, take the constitutional oath of office and elect one of its members chairman and one secretary thereof, which board and each member thereof shall have the power to administer oaths and take testimony by depositions or otherwise, and said board when organized shall notify the commissioner of the general land office of the facts of its organization and that it is ready to receive from him the list of lands, names of forfeiting purchasers, and other information and data, as provided for in section 2 [Art. 5423b] of this Act. Upon receipt of such data and information, said board shall ascertain the reasonable values of said land and appraise accordingly, and shall prepare triplicate notices of the appraisal and classification, sending one to each of the forfeiting owners and to the commissioner of the general land office, and retaining one in its possession until the completion of its duties under this Act; when same, together with all the papers and data in the possession of said board, shall be deposited by the secretary thereof with the commissioner of the general land office, who shall keep same on file in his office as an archive thereof. If such forfeiting owner desires to repurchase the land at the appraised value placed thereon by said board, he shall file his application therefore [therefor] in the general land office within ninety days after the date of notice of appraisal, together with one-fortieth of the appraised value and his obligation for the remaining portion of the purchase price, bearing 3 per cent. interest per annum. The said one-fortieth cash payment shall conform to the requirements now prescribed for the first payments on applications for the purchase of other public free school lands. Before any application shall be accepted and the award issued thereon under the right herein given, the applicant shall deposit in the general land office for the use of the general fund a sum of money equal to seven and one-half dollars for each section of land awarded herein, for the purpose of reimbursing said fund for the moneys drawn therefrom under the provisions of this Act. The land commissioner shall pay into the state treasury all money paid into his office under this section of this Act, and the treasurer shall place same to the credit of the general fund. All terms, conditions and penalties now provided for the sale of public free school lands shall apply, govern and control all sales made under this Act, except as may be otherwise provided herein. If the land purchased under the right given herein shall have been resided upon, for three years as required by law prior to the date of purchase, and sufficient proof of that fact shall be in the general land office, the purchaser shall not be required again to reside on it; but, if such residence shall not have been completed prior to the date of repurchase, then the purchaser shall purchase the land upon condition of settlement and residence and continue to reside upon the land in person until he shall have completed the required three years of continuous residence next succeeding the date that the original residence was begun. [Id. sec. 3.]

Art. 5423d. Commissioner to sell if right to repurchase not exercised, etc.—If the owner at the date of forfeiture shall not exercise his right to repurchase, the commissioner of the general land office shall again place the land on the market for sale as is now provided by law for the sale of leased land. In all such sales the same terms, conditions, limitations, pains and penalties and regulations now prescribed by law for the sale of other public free school land in the same county and the payments therefor, shall govern such sales. [Id. sec. 4.]

Art. 5423e. Liens on repurchased land unimpaired.—Provided, that whenever any land, affected by this Act, is forfeited and afterwards repurchased under the rights of repurchase given by this Act, to the owner at the time of forfeiture, any lien legal or equitable, and any valid contractual right in favor of any person, firm or corporation, existing against, in and to, said land, or any part of same at the time of forfeiture, shall remain unimpaired and in full force and effect as if no such forfeiture had occurred. [Id. sec. 5.]

Art. 5423f. Compensation of board of appraisers, etc.—Each member of the board of appraisers provided for by this Act except the commissioner of the general land office shall receive as compensation for his services the sum of ten dollars per day for each day actually employed in the performance of his duties as a member of said board, not to exceed ninety days, together with all necessary expenses, including the necessary expenses of the commissioner of the general land office; provided, however, that number of days of actual service for which said member shall have received compensation, as well as expenses incurred by said board in the performance of its duties, shall be stated under oath in writing by said board, or some member thereof, and which, when approved by the governor, shall be filed with the comptroller, who shall thereupon issue a warrant upon the state treasurer for the same. There is hereby appropriated out of any moneys not otherwise appropriated the sum of ten thousand dollars or so much thereof, as may be necessary to carry out the provisions of this Act. [Id. sec. 6.]

Art. 5424. Permanent improvements to be erected by purchaser; forfeiture.—Every purchaser shall be required within three years after his purchase to erect permanent and valuable improvements on the land purchased by him, which improvements shall be of the reasonable market value of three hundred dollars. If any purchaser shall fail to reside upon and improve in good faith the land purchased by him as required by law, he shall forfeit said land and all payments made thereon to the state, to the same extent as for the non-payment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred; and all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the commissioner of the general land office; and, if any purchaser shall be forced to yield possession of the land purchased by him from the state on account of any writ or other judicial process issued from a court of competent jurisdiction, or be compelled to temporarily yield his possession from a well-grounded fear of death or serious bodily injury, such absence shall not work the forfeiture provided by law for non-occupancy; but no writ of injunction shall issue in any case involving the title or possession of lands herein referred to where the applicant has an adequate remedy at law by sequestration or otherwise. [Acts 1901, p. 292, sec. 3.]

Not repealed.—This article and article 42181, Rev. St. 1895 (re-enacted with modifications as Art. 5423 hereof), held not repealed by Acts 30th Leg. Ext. Sess. c. 20, §§ 6a, 6c (Arts. 5419, 5425, herein) nor by Acts 29th Leg. c. 103 (see Art. 5416 herein). *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Not retrospective.—Where one contesting an award of school land made his application before this statute took effect, the question whether the owner to whom the land was awarded continued to reside on the land after the award is immaterial. *Davis v. McCauley*, 28 C. A. 211, 66 S. W. 1124.

It was not the intention of the legislature in passing this law to affect in any manner the rights of those who had purchased under the previous law and whose account was in good standing in the general land office. It did apply to lands, which had been previously sold, but which had been forfeited, or might thereafter be forfeited, in accordance with the provisions of laws under which they had been bought. *Bates v. Bratton*, 96 T. 279, 72 S. W. 158.

A sale of school land prior to the adoption of this article is governed by the law of 1895 (Acts 1895, p. 63, c. 47), requiring forfeitures of sales of school land for nonresidence to be declared by the commissioner. *Samples v. Wever*, 56 C. A. 562, 121 S. W. 1129.

Forfeiture for nonoccupancy or abandonment.—Art. 5423 permits temporary absence from the land for not more than six months when such absence is necessary for certain purposes. See, also, notes under Art. 5444, which requires the commissioner to prescribe

regulations respecting occupancy by purchasers for three years after purchase. And see Art. 5425 and notes.

See this case for facts which show that the plaintiff was entitled to the land as an actual settler which had applied for, and obtained from the land commissioner the right to purchase. *Singleton v. Wright* (Civ. App.) 54 S. W. 249.

A purchaser executed a bond reciting a sale of the land and obligating himself to make title after acceptance of proof of three years' occupancy. Prior thereto the purchaser leased the land to the obligee, reserving the use of it and continuing in possession of part of the land. This was not an abandonment of the land, subjecting it to another sale. *Witcher v. Wiles*, 33 C. A. 69, 75 S. W. 890.

Absence from the land for eight months while attending a normal school in a distant county, is a failure to reside upon the land purchased as required by law, and works a forfeiture of the land. *Andrus v. Davis*, 99 T. 303, 89 S. W. 773.

If one moves off the land and abandons the same, he forfeits all rights acquired by virtue of his application to purchase. *Edwards v. Terrell*, 100 T. 26, 93 S. W. 426.

Where school land sold by the state was not abandoned, the land commissioner had no authority to forfeit the sale on the ground, and his action could not affect plaintiff's lien on the land created prior thereto. *Bumpass v. McLendon*, 45 C. A. 519, 101 S. W. 491.

If a person leaves the land for six months without a well-grounded fear of death or serious bodily harm, he forfeits his purchase. *Overfelt v. Vinson*, 46 C. A. 381, 103 S. W. 1190.

Where a purchaser actually settled on the land within 90 days, his absence from the land prior to this actual settlement was not such a failure to reside on the land as forfeited the purchase. *Ramsey v. Patterson* (Civ. App.) 133 S. W. 930.

In an action to disaffirm a conveyance of public school lands made by plaintiff when an infant, allegations in the petition of plaintiff's purchase from an individual and plaintiff's occupancy thereafter for a couple of months, but not showing whether plaintiff's grantor had purchased from the state, or the length of his occupancy of the land, are insufficient to show plaintiff's abandonment of such lands within three years, so as to forfeit her title. *Salser v. Barron* (Civ. App.) 146 S. W. 1039.

Does not ipso facto work forfeiture.—Land purchased and abandoned will not be treated as forfeited until so declared by the land commissioner. *Adams v. Terrell*, 101 T. 331, 107 S. W. 538.

This section should not be construed to mean that non-occupancy results ipso facto in a forfeiture of the land and placing the same on the market for sale without any action on the part of the land commissioner. *Williams v. Keith* (Civ. App.) 111 S. W. 1058.

Under this article abandonment by an actual settler purchaser will not ipso facto place the land at once upon the market, but it can only be done by the declaration of forfeiture by the commissioner as prescribed by statute. *Tillman v. Erp* (Civ. App.) 121 S. W. 547.

A nonoccupation of school lands purchased from the state alone does not work a forfeiture ipso facto. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Under this article nonoccupancy does not ipso facto constitute such a forfeiture as will place the land upon the market, subject to resale, without cancellation of the prior sale. *Erp v. Robison* (Sup.) 155 S. W. 180.

Further action by commissioner unnecessary.—If the purchaser or his vendee failed to reside upon the land as the law requires, it became forfeited and the land again on the market without any action of the commissioner. The rule has been held to be different when after three years' occupation, proof thereof has been made and the commissioner has issued his certificate of that fact. *Bates v. Bratton* (Civ. App.) 71 S. W. 39.

Under this article no action by the commissioner is necessary to work a forfeiture; and hence an indorsement by the commissioner on the purchaser's application that it was forfeited for failure to reside on the land was not evidence of forfeiture as against the purchaser. *Slaughter v. Cooper*, 56 C. A. 169, 121 S. W. 173.

Under this article a cancellation by the land commissioner of the sale of school lands on the ground that the purchaser did not settle thereon in good faith, and a resale to another party, fixes the status of the first party's claim, without any further action by the commissioner. *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Fear of death or bodily harm.—The fear of death or serious bodily injury, which will excuse a purchaser of state school lands for abandoning the same within three years after the purchase, need not be such as would be given way to only by a man of ordinary prudence and courage. *Jones v. Wright* (Civ. App.) 81 S. W. 569.

If such fear as in law justified plaintiff in temporarily yielding his possession continued since the abandonment, he would not while under such fear, be required to resume such possession in order to prevent a forfeiture of his rights. *Jones v. Wright* (Civ. App.) 92 S. W. 1013.

Removal in obedience to judgment.—Where an applicant for the purchase of state lands obeyed a judgment of ouster, and moved off without waiting to be put off by an officer, such relinquishment of possession did not constitute an abandonment of the application. *Clack v. Hart*, 26 C. A. 46, 62 S. W. 935.

Good faith of settler.—Under this article a citizen, as well as the state by a direct proceeding, may attack the bona fides of a settlement on public lands even after a certificate of three years' occupancy has been granted by the land commissioner, since the certificate is not conclusive as to the purchaser's bona fides in settling upon the land. *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Under this article, which is similar to Rev. St. 1895, art. 4218½ where the commissioner declares a forfeiture of land in actual occupancy, because the purchaser did not reside thereon as required by law, this necessarily involves an inquiry into and a finding adverse to the purchaser's good faith. *Id.*

Effect of forfeiture.—This section does not forbid a purchase merely because the applicant has suffered a forfeiture of a previous purchase on the ground of abandonment and there is no provision in the statutes which does so. The only penalty attached to

abandonment, is forfeiture of the purchase and of the payments made. *Cameron v. Terrell*, 101 T. 330, 107 S. W. 47.

Where the purchaser of school land, after cancellation for abandonment, voluntarily made a second application and was awarded a second allotment, he acquiesced in the cancellation of his first purchase. *Williams v. Robison*, 103 T. 90, 124 S. W. 85.

Decisions under article 4218I, Rev. St. 1895.—Rev. St. 1895, art. 4218I, provided for forfeiture for non-occupancy as well as for non-payment of interest, but when re-enacted as Rev. Civ. St. 1911, art. 5423, the provision as to forfeiture for non-occupancy was omitted.

This article makes the failure to reside upon the land purchased and not upon the "other land" the ground of forfeiture. *O'Keefe v. McPherson*, 25 C. A. 313, 61 S. W. 535.

It is only after the land commissioner has marked the land "forfeited" that the land can be resold. *Id.*

The statute declares that forfeiture shall result from the failure to reside upon and improve the land, and does not require any action of the land commissioner or other officer as a prerequisite to the forfeiture. *Hardman v. Crawford* (Civ. App.) 63 S. W. 662; *Comanche Co. v. Brightman* (Civ. App.) 62 S. W. 976.

The term "occupancy" as used in the statutes regulating the sale of school lands means actual settlement and residence upon the land. *Hardman v. Crawford* (Civ. App.) 63 S. W. 662.

On a contest between applicants to purchase school lands, award held void and to leave the land subject to sale, without a forfeiture being declared, as prescribed by Art. 5423. *Nowlin v. Hall* (Civ. App.) 66 S. W. 116.

Under this article lands which had become subject to forfeiture by reason of the failure of the purchaser to continue his residence upon the same as required by the act were not subject to be sold again until the commissioner had declared the forfeiture. *Bates v. Bratton*, 96 T. 279, 72 S. W. 157, 158.

The phrase "improvements in good faith," as used in Rev. Stat. 1895, art. 4218I, only meant such improvements as are necessarily incidental to the required settlement. It was not required that the improvements should be to any specified amount. *McLendon v. Bumpass*, 51 C. A. 586, 114 S. W. 464.

Under Acts 1895, p. 67, c. 47, § 11 (Rev. St. 1895, art. 4218I), regulating the sale of public free school lands, land sold to an actual settler, subject to forfeiture for failure to comply with the condition of three years' occupancy, is not forfeited to the state, with the effect of being again upon the market for sale, by the mere fact of abandonment of the purchaser, but to have that effect the land commissioner must make formal declaration of such forfeiture by the indorsement "Land forfeited" on the purchaser's obligation. *Tillman v. Erp* (Civ. App.) 121 S. W. 547.

Where a purchaser of school land while the law of 1895 (Acts 1895, p. 63, c. 47), requiring forfeitures of sales of school land for nonresidence to be declared by the commissioner, was in force, conveyed land to a grantee, who received possession before a forfeiture for the purchaser's abandonment had been declared, the grantee took such title as would support an action against a mere trespasser. *Samples v. Wever*, 56 C. A. 562, 121 S. W. 1129.

Parol sale of improvements.—A parol sale of improvements made by a settler on public land and not attached to the land held valid. *McCullers v. Johnson* (Civ. App.) 104 S. W. 502.

Lien on improvements.—A lien acquired by plaintiff on school land sold by the state before the purchaser had completed the three years' occupancy required by statute was valid, and could be enforced after the requisite occupancy had been completed. *Bumpass v. McLendon*, 45 C. A. 519, 101 S. W. 491.

Art. 5425. Forfeiture for failure to settle on land, etc.—One who has heretofore, or who may hereafter, purchase land out of a lease or otherwise on condition of settlement in the counties named in article 5419 and fails to settle thereon within the required time, or fails to file in the land office his affidavit of settlement within the required time, or fails to comply with the law as to residence on the land, or executes a transfer contrary to the provisions hereof, except those stated in this chapter as not being void, he shall forfeit the land and all payments made thereon to the fund to which the land belongs; and, when the commissioner shall be sufficiently informed of the facts which operate as a forfeiture, he shall cancel the award or sale by noting the act of forfeiture on the obligation, and mail notice of that fact to the proper county clerk. Such land shall not be subject to sale again at a less price than the former sale price, unless the commissioner shall have re-appraised the land at a less price after noting the act of forfeiture. [Acts 1907, p. 490, sec. 6e.]

See *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

Forfeitures disfavored.—Forfeitures of public free school lands by the commissioner of the general land office are disfavored, and will not be sustained upon doubtful authority. *Salgado v. Baldwin*, 105 T. 508, 152 S. W. 165.

Forfeiture—in general.—The land commissioner is authorized to forfeit for the specified causes and the attorney general is authorized to bring suit for the protection of any other right. The contract not being void, the purchaser is entitled to have the evidence which the statute prescribes of its existence and of his compliance with its terms preserved and kept up in the land office by the action of the commissioner until his rights under it have been terminated by the state. The commissioner himself cannot cancel

a sale on the ground alone that he made a mistake in the classification and appraisal. He is not in all matters pertaining to public school lands the representative of the state. *Harper v. Terrell*, 96 T. 479, 73 S. W. 949, 950.

Where the action of the land commissioner in canceling a sale of school lands is proper, it is immaterial whether he assigns the proper reason for his action. *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

The commissioner of the general land office cannot declare a forfeiture of a purchase of school land for collusion. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

A commissioner of the general land office is not authorized to forfeit a purchase of school land on the ground of the purchaser's minority, though the state could cancel a sale on that ground in a proceeding for that purpose. *Id.*

Under this article a forfeiture for "collusion and failure to settle upon and occupy and improve the land in good faith as a home, as required by law," is unauthorized. *Salgado v. Baldwin*, 105 T. 508, 152 S. W. 165.

— For nonpayment of interest.—See Art. 5423 and notes.

— For nonoccupancy or abandonment.—See notes under Art. 5424.

— Failure to settle in good faith.—Acts 30th Leg. c. 20, § 6e (re-enacted with modifications as Art. 5425 herein), wherein grounds for declaring a forfeiture of a purchase of school land are specified without mention of a failure to settle in good faith, does not change the law as to a settlement in good faith, and authority to declare a forfeiture for failure to so settle, as section 6a (Art. 5419 herein) expressly provides that the land shall be sold on condition of settlement as provided by this act and existing statutes. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.

— Forfeiture for unauthorized transfer.—Under Arts. 5435, 5436, and this article, where a holder of a right to a title in school lands transferred his interest within less than 12 months after the sale to him by the state, the award to him became ipso facto forfeited and the land reverted to the state free of any incumbrance which the purchaser may have placed thereon. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

— Conclusiveness of records as to forfeiture.—In an action of forcible entry and detainer of school land, it is not proper to go outside the records of the land office to show a state of facts which would impeach such records and show a forfeiture not declared by the office. *Renfro v. Harris*, 28 C. A. 58, 66 S. W. 460.

— Conclusiveness and effect of forfeiture.—In an action to try title to land, the fact that the land commissioner had forfeited the sale to the party under whom plaintiff claims was not conclusive against him, but he could show that the attempted forfeiture was unauthorized and of no effect. *Bumpass v. McLendon*, 45 C. A. 519, 101 S. W. 491.

The forfeiture by the commissioner of the general land office of a school land purchase is not conclusive as to the purchaser's rights. *Zettlemeyer v. Shuler*, 52 C. A. 648, 115 S. W. 78.

Art. 5426. [4218ff] Forfeiture of home tract works forfeiture of other land, when.—When any purchaser buys and settles upon a section, or part of a section, of school lands, and buys, either at the same time or subsequently, other lands in addition thereto, a forfeiture for any legal cause of the part on which he resides, at any time before the three years residence thereon has been completed, shall work a forfeiture of the entire purchase, except such part thereof as he may have previously sold to another. But, after the three years residence has been completed, a forfeiture of the home tract shall not of itself work a forfeiture of the other tract or tracts. [Acts 1895, amended 1897, p. 184.]

— Application.—This article applies to those who have purchased a section or a part of a section of school lands, and who have subsequently or at the same time bought an additional section. *Roberson v. Sterrett*, 96 T. 180, 71 S. W. 385, 73 S. W. 3.

— Extent of forfeiture.—Forfeiture of the part on which the settler resides works a forfeiture of title to the additional land bought. *Dabbs v. Rothe*, 25 C. A. 201, 60 S. W. 813.

Art. 5427. [4218h] Terms of repurchase of forfeited agricultural lands.—The owner of land which is in fact agricultural, purchased prior to August 20, 1897, and which land is not subject to forfeiture at said date, shall not be permitted, in case said land is forfeited, to purchase said forfeited land from the state for a less price per acre than the contract price under the former sale. [Acts 1895, amended 1897, p. 184.]

Art. 5428. [4218f] Purchasers prior to July 30, 1895; rights of under forfeiture.—Where any of the lands referred to have been sold prior to July 30, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. Any owner of land purchased prior to said date, and which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right, after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but, if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, that, when any

forfeiture has been made, the commissioner of the general land office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. [Acts 1895, amended 1897, p. 184. Art. 4218j, Acts 1895.]

Right to preference.—Where school lands had been sold by the settler after application to purchase, but before securing the patent, he has no prior right to purchase them as owner after forfeiture for failure of the grantee to pay the interest due state as agreed. *Settle v. Stephens*, 18 C. A. 695, 45 S. W. 969.

The person who is the owner at the time the forfeiture is declared has 90 days' prior right to purchase the land after it is placed upon the market. Unless he complies with the statute in the particulars named (regarding the purchase) during the 90 days grace given him, the commissioner has no power to award him the land over other legal applications made during that time, nor can the commissioner extend the time beyond the 90 days. *Cobb v. Webb*, 26 C. A. 467, 64 S. W. 794.

A corporation is not entitled to the preference right of 90 days, where it is the vendee of the original purchaser, to buy detached land situated in a county organized prior to January 1, 1875. The prior right for 90 days to purchase such lands did not change the legal qualification of the purchaser prescribed in article 4218z, Rev. St. 1895. *Mound Oil Co. v. Terrell*, 99 T. 630, 92 S. W. 454.

Art. 5429. Timber lands defined; regulations for sale of.—The commissioner of the general land office shall adopt such regulations for the sale of timber on timbered lands as may be deemed necessary and judicious, subject to the provisions of this chapter. By timbered lands is meant lands valued chiefly for the timber thereon. [Acts 1901, p. 296, sec. 8.]

See *Hooks v. Kirby* (Civ. App.) 124 S. W. 156.

Rule regarding application.—This section authorizes the land commissioner to adopt a rule requiring the purchaser as a prerequisite to purchase the timber on the timbered lands referred to, to make and file in the land office a written application therefor of a certain prescribed form in substance. *Hornbeck v. Terrell*, 38 C. A. 70, 85 S. W. 486.

Art. 5430. Same.—One who applies to purchase the timber shall file his application in writing in the general land office in the manner now provided for the filing of applications for the purchase of land, and pay to the land office the full cash payment according to the price offered therefor, but not at a less price than that fixed by the commissioner. Should two or more persons each apply to purchase the timber and land on the same day, and one should offer more for the timber but less for the land than a competitor, then the one offering the highest price for the timber shall have an option for thirty days, as now provided by law for designating home tracts, to take the land at the highest price offered by such competitor. Should the one offering the highest price for the timber not want the land at such highest price, but should want the timber, it shall be awarded to him. Should one who applies for both timber and land offer the highest price for the land, but a lower price for the timber, he shall have an option of thirty days as aforesaid to purchase the land, if it should not be purchased by the one who offers the highest price for the timber; but, should the one who offers the highest price for the timber and the lesser price for the land not want the land at such high price, nor should he exercise his option by purchasing the timber alone, then the land and timber shall be awarded to the one offering the highest price for the land, and next highest price for the timber. The commissioner shall appraise all timber at its reasonable market value, and it shall not be sold at a price less than that so fixed by him. Should two or more applications for timber alone be filed on the same day, the one offering the most therefor shall be accepted. All timber shall be sold in full tracts. The purchaser of timber without the land shall have the right of ingress and egress upon the land for a period of five years after date of award for the purpose of removing or protecting the timber thereon, and the purchaser shall be entitled to all the timber thereon for that period and no longer. After that time the title to the timber shall revert to the fund to which the land belonged and be again subject to sale by the state, unless the land

shall sooner be sold and fully paid for and patent issued thereon; and in that even the timber shall revert to the owner of the land. The owners of timber heretofore purchased, which has not been removed and the five years in which to remove same or to purchase the land have not expired, but may expire on or before November 1, 1907, may purchase the land on that date at the price fixed by the commissioner and without condition of settlement, either for cash or on deferred payment, with five per cent interest as provided in this chapter for other purchasers without settlement. In case the five years do not expire before said date, only the owner of the timber shall have the right to purchase the land as herein provided at any time prior to the removal of the timber and within the five years allowed in which to remove same. Land on which timber has heretofore been sold, and the timber has been or may be removed, or the five years shall have expired and the land not purchased by the owner of the timber, shall not be sold until it is re-classified and re-appraised by the commissioner, and a date fixed not more than sixty days after such action for the sale thereof. Notice of such action and date fixed for sale shall be mailed to the proper county clerk. [Acts 1907, p. 490, sec. 6c.]

Purchase of timber withdraws land from sale.—Under Sayles' Ann. Civ. St. 1897, art. 4218q (re-enacted with additions and modifications as Art. 5430 herein), no one may purchase land on which the timber has been sold and stands until the expiration of five years from the sale, except the purchaser of the timber, or his vendee, so that a sale of the timber withdraws the land from sale to an actual settler during the five years, and for this period it can be sold only to the purchaser of the timber, or his vendee thereof. *Wing v. Dunn* (Civ. App.) 127 S. W. 1101.

Rights of purchaser of timber cannot be impaired.—Where by Acts 1895, p. 68, c. 47, § 16, a purchaser of timber on public lands has the right to purchase the land itself within five years without being an actual settler thereon, this right could not be affected by Acts 1901, p. 296, c. 125, § 8 (Art. 5431 herein) passed thereafter, containing the same provisions as section 16, except that purchasers of timber must settle on the land, since the right was a part of the consideration for the sale of the timber and was a vested right which could not be impaired by subsequent legislation. *Hooks v. Kirby* (Civ. App.) 124 S. W. 156.

The rights of a purchaser of timber on public lands, under Sayles' Ann. Civ. St. 1897, art. 4218q (re-enacted with additions and modifications as Art. 5430 herein), are contractual and vested, and may not be impaired or taken away by future legislation; and, where a purchaser of timber has the right under the statute to purchase the land on the terms fixed in the statute, his rights are not affected by the subsequent laws of 1901, though so intended by the legislature. *Wing v. Dunn* (Civ. App.) 127 S. W. 1101.

The state could not grant to a patentee land that it had previously contracted to sell to the purchaser of timber, and any patent impairing such purchaser's right to acquire title by compliance with the terms of his contract was void, and passed no title. *Kirby v. Conn* (Civ. App.) 156 S. W. 232.

Rights acquired by purchaser of timber.—Failure of a purchaser of standing timber to be cut and removed from land to pay a sum as rental for an extension of his right to the exercise of privileges granted held not to forfeit his title to the uncut timber on the land. *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* (Civ. App.) 139 S. W. 1015.

An instrument construed as a conveyance of standing timber as personalty, to be severed and removed from the land. *Id.*

Corporation may purchase land.—See, also, Art. 5432.

Under Sayles' Ann. Civ. St. 1897, art. 4218q (re-enacted with additions and modifications as Art. 5430 herein), the fact that a corporation is the real purchaser of the timber on public lands does not prevent it from purchasing the land within the time prescribed. *Wing v. Dunn* (Civ. App.) 127 S. W. 1101.

When purchaser's right to land accrues.—Where a purchaser of the timber on school land filed prior to the removal of the timber an application to purchase the land, and paid the price at the same time, he became entitled under the statute to the land, and his cause of action against an adverse claimant accrued at that time and not at the time of a subsequent award of the land to him; that being mere evidence of his existing right to the land. *Houston Oil Co. of Texas v. McGrew* (Civ. App.) 143 S. W. 191.

Purchaser need not be actual settler.—Acts 1895, p. 63, c. 47, § 3, relating to the sale of public school lands, provides, in section 3, for a classification thereof and when classified to be subject to sale but to actual settlers only, with a limitation of quantity in certain cases, and provides, in sections 8 and 9 (pages 64 and 65), the time for settlement of the land and proof thereof. Section 16 (page 68) of the act provides that the Commissioner of the general land office shall adopt regulations for the sale of the timber on timber lands, and that purchasers of timber shall have five years to remove the timber, and that when all the timber is taken off the lands may be classified and sold as grazing land, and that a purchaser of timber within the five years may purchase the land on which the timber is purchased "under the provisions of the act." Held, that the statute evidently contemplated two classes of purchasers, actual settlers on the land and purchasers of timber, and the quoted words at the end of section 16 did not refer to preceding sections, and hence a purchaser of timber buying the land was not obliged to settle thereon to get good title. *Hooks v. Kirby* (Civ. App.) 124 S. W. 156.

A purchaser of timber on public lands, under Sayles' Ann. Civ. St. 1897, art. 4218q (re-enacted with modifications as Art. 5430 herein), authorizing the sale of timber on public lands, need not be an actual settler. *Wing v. Dunn* (Civ. App.) 127 S. W. 1101.

Effect of issuance of patent in disregard of preference.—In pursuance of Acts 1895, p. 68, c. 47, § 16, a purchaser of timber on public land exercised the right given by the section to purchase the land itself, but did not comply with all the terms of the section in making his application to purchase. Before he made application the land had been erroneously classified as "grazing land" and so sold and patent issued to the purchaser, the title of whom was void as against the purchaser of the timber, if he had complied with the terms of the section. Held, in trespass to try title by the purchaser of the timber against the vendee of the purchaser of grazing land, that the court, on adjudging that plaintiff was entitled to the land on his compliance with the provisions of the act granting him the right of purchase, would not cancel the patent to defendant's vendor, since such patent conveyed a good title until plaintiff established a better title by compliance with the statute. *Hooks v. Kirby* (Civ. App.) 124 S. W. 156.

Art. 5431. Timber and lands sold prior to August 12, 1907.—The purchaser of timber prior to August 12, 1907, shall have five years from that date within which to remove the timber therefrom, and, in case of failure to do so, such timber shall thereby be forfeited to the state without judicial ascertainment; provided, that all timbered lands sold prior to such date, from which the timber has been cut and taken off, may be placed on the market and sold as agricultural or grazing lands, according to classifications to be made by the land commissioner; provided, that upon application of the purchaser or his vendees of any such timber made within five years from the purchase of such timber, the commissioner of the general land office shall have said land classified at the expense of the owner of said timber as agricultural or grazing land, and the owner of said timber shall have the right to purchase said land at the valuation fixed by said commissioner on the same terms and conditions as other lands of like classification are sold under the provisions of this chapter. [Acts 1901, p. 296, sec. 8.]

Vested rights cannot be impaired.—See, also, note under Art. 5430.

Where by Acts 1895, p. 68, c. 47, § 16, a purchaser of timber on public lands has the right to purchase the land itself within five years without being an actual settler thereon, this right could not be affected by this article passed thereafter, containing the same provisions, except that purchasers of timber must settle on the land, since the right was a part of the consideration for the sale of the timber and was a vested right which could not be impaired by subsequent legislation. *Hooks v. Kirby* (Civ. App.) 124 S. W. 156.

Under Acts 27th Leg. c. 125, a purchaser of timber with the right to purchase the land at any time before five years, but before the timber has been removed a part of the consideration for which he paid the state, has a vested right when the state accepts his application to purchase the timber, and he complies with the terms of such purchase, which could not be impaired by a sale of any part of the land and the issuance of patents thereto from the state to another, during the time in which the purchaser had the statutory right to buy the land; and the fact that the act of 1907 relieved those holding such purchase rights from complying with the requirement of actual settlement did not change the date of his purchase of the timber as the date upon which his right to purchase the land became vested. *Kirby v. Conn* (Civ. App.) 156 S. W. 232.

Who may exercise right to purchase.—Under this article the commissioner need not inquire into equities between a remote vendee of the purchaser of the timber and a third person, growing out of the fact that the latter furnished the price for the conveyance to the remote vendee, and, where the legal title to the timber is in a vendee of the purchaser, a third person has not the right to purchase the land. *Ragley v. Robison*, 103 T. 240, 126 S. W. 1.

Settlement on land necessary.—Acts 1895, p. 68, c. 47, § 16, gave a purchaser of timber on public school lands the right to buy the land itself within five years without settling on the land. Acts 1901, p. 296, c. 125, § 8 (Art. 5431 herein), contained the identical terms as section 16, except that, after providing that the owner of the timber shall have the right to purchase the land, it further provides "at the valuation fixed by the commissioner on the same terms and conditions as other lands of like classification are sold under the provisions of this chapter," and the sections other than section 8 provided for sale to actual settlers only. Held, that section 8 would be construed to change the rule in section 16 that a timber owner could purchase the land itself without settling on the land. *Hooks v. Kirby* (Civ. App.) 124 S. W. 156.

Art. 5432. Unsurveyed or scrap lands.—Any person desiring to purchase any portion of the unsurveyed school lands shall first make a written application to the surveyor of the proper county or district in which the land, or a portion thereof, is situated, signed and sworn to by the applicant, giving his postoffice address, and designating the land he desires by metes and bounds, as nearly as practicable, and stating that he desires to have the land surveyed with the intention of buying it, and that he is not acting in collusion with or attempting to acquire land for another person or corporation. It shall be the duty of the surveyor

to file and record such application, and to survey the land and file the application and field-notes in the land office within ninety days from the date of the filing of the application, together with a properly prepared and certified sketch of the survey, with the variations at which all lines were run. The land shall be surveyed under the instructions of the commissioner of the general land office. The applicant shall pay to the surveyor one dollar as a filing fee, and his further lawful fees for surveying the land. When the surveyor returns the application and field-notes to the land office, he shall report under oath the classification and market value of the land, and also the timber thereon and its value, which may be considered in connection with such other evidence as may be required in determining the class and price to be given the land or timber. If, upon inspection of the papers, the commissioner is satisfied, from the report of the surveyor and the records of the land office, that the land is vacant and belongs to the school fund, and the survey has been made according to law, he shall approve same and notify the applicant that the land is subject to sale to him, stating the classification, price and terms, which shall be the same as that for surveyed lands, except as herein provided; provided, all unsurveyed vacant tracts not disclosed by the official maps in use in the land office at the time an application for the survey is filed, may be sold for cash, or for one-fortieth cash with five per cent interest on the deferred principal, and without condition of settlement and improvement, and with the right to pay the same out at any time and obtain patent; all unsurveyed vacant tracts which are subject to overflow, or situated in bottoms or swamps or otherwise so as to be unsuitable for settlement, may be sold for cash or for one-fortieth cash, with five per cent interest on deferred principal, and without condition of settlement and improvement, and with the right to pay the same out at any time and obtain patent; all unsurveyed vacant tracts not exceeding six hundred and forty acres, and not less than one hundred acres, which are disclosed by the official maps in use in the land office at the time an application for a survey is filed, and which are now or may be entirely surrounded by valid surveys or sold school surveys, shall be sold as a whole, and may be sold for cash, or for one-fortieth cash with five per cent interest on deferred principal, and without the condition of settlement and improvement, and with the right to pay same out at any time and obtain patent; all unsurveyed vacant tracts of one hundred acres or less shall be sold for cash only; all other unsurveyed vacant tracts disclosed by the official maps in use in the land office when an application for survey is filed, shall be sold on condition of settlement and improvement as provided by law for the sale of surveyed land; provided, that land heretofore or hereafter recovered by the state from claimants holding or claiming same under Spanish or Mexican titles shall be considered as vacancies disclosed by the official maps, and the person who in good faith so held or claimed such land under the claim aforesaid shall have a prior right for ninety days after the date of the final recovery of such land hereafter, to file on and purchase four sections of six hundred and forty acres each for cash, or for one-fortieth cash with five per cent interest on the deferred principal, and without the condition of settlement, and with the right to pay same out at any time and obtain patent. When the land is applied for and purchased under this article, without condition of settlement and improvement, the application to purchase shall otherwise conform to the requirements of applications for surveyed land, except as to settlement and designation of home tract. In all cases of the sale of any land on deferred payments and without the condition of settlement and improvement, as provided for in this article, the merchantable timber thereon, if any, shall first be paid for in cash. All land appropriated to the public school fund by the act of February 23, 1900, and which has heretofore been surveyed at private expense, may be sold

under the provisions of this article relating to undisclosed vacancies and swamp lands. If within sixty days from the date of the notice of approval of any survey as herein provided, the applicant shall not have filed in the land office his purchase application at the appraised value fixed on the land, and in compliance with this article, such land shall be placed on the market for sale, upon the same terms and conditions as other surveyed school land. When any land, lying between older surveys, is held by the commissioner of the general land office to be unsurveyed or vacant land appropriated to the public school fund by the act of February 23, 1900, and is sold as such under the provisions of this chapter, and thereafter any suit arises between the owner or owners of such older surveys, and the purchaser from the state or his vendees, any final judgment rendered in such suit shall be deemed and held conclusive as to the existence or non-existence of such vacancy; provided, if in any suit judgment is obtained through collusion or fraud against the state, the same may be set aside and vacated at the suit of the state any time within five years thereafter. All unsurveyed tracts of six hundred and forty acres or less shall be sold as a whole, and all tracts of more than six hundred and forty acres shall be sold in such tracts as may be required or approved by the commissioner. No one shall hereafter have any preference to purchase any unsurveyed land, except as provided in this chapter for original lessees out of leases. All tracts containing one hundred acres or less, wheresoever situated, shall be sold for cash and without condition of settlement. All applications to purchase land under any preference right, which were filed in the land office prior to August 12, 1907, shall be accepted. No corporation shall purchase any land under the provisions of this chapter. [Acts 1907, p. 490, sec. 8.]

See *Houston v. Koonce* (Sup.) 156 S. W. 202.

Right to cause survey and purchase in general.—Defendant held entitled to apply to have surveyed, classified, and to purchase unsurveyed state land within plaintiff's inclosure, subject to plaintiff's prior right, without settling on the land. *King v. Underwood* (Civ. App.) 112 S. W. 334.

The right given by Acts 1905, p. 164, § 8, to an applicant who has caused public land previously unsurveyed, to be surveyed for the purpose of buying it within sixty days after the approval of the survey, is not taken away by the provisions of section 6e of the act of 1907 (provision quoted re-enacted in Art. 6432 herein), that "no one shall hereafter have any preference to purchase any unsurveyed land, except as provided in this act for original lessees out of leases." The right given in the law of 1905 is not a preference right in the sense of the above question from the law of 1907. *Pence v. Robison*, 102 T. 489, 119 S. W. 1145.

— **Where title is in dispute.**—Where there is a dispute as between the state and another party as to the title of a tract of land the commissioner cannot be compelled to make a sale. Act Feb. 23, 1900, p. 29, c. 11, § 6, as amended by Act April 15, 1901, p. 253, c. 88, applies only to such lands as appeared upon the maps and records of the general land office not to be claimed by other parties, and to such as had been adjudged to the state, if ever so claimed. *Juencke v. Terrell*, 98 T. 237, 82 S. W. 1026.

Land held under lease.—Where the land is held under a lease, and the lease is in good standing, the fact that the legislative act appropriated the lands to the public school funds, and provided for their sale cannot be considered as ipso facto abrogating the lease. The lease is valid and conferred upon the lessee the sole right to the use of the land covered thereby until such right was legally divested in the manner provided by law. *Adair v. Hays*, 31 C. A. 446, 72 S. W. 257.

The provisions of Art. 5408 relating to the giving of notice as to land which becomes subject to sale by the termination or cancellation of a lease were not applicable to land which must be surveyed before it can be sold under this article; no land being subject to sale upon cancellation of a lease until it is surveyed, so that the fact that the full 90 days' notice was not given to the county clerk upon the cancellation of a lease of unsurveyed land would not affect the validity of the survey and sale of such land under this article. *Meador v. Robison*, 103 T. 206, 125 S. W. 564.

— **Time of application.**—The fact that an application to purchase school land was dated prior to the approval of the survey thereof is insufficient to warrant a conclusion that the application was entertained by the surveyor before the land was on the market. *Dooley v. Maywald*, 18 C. A. 386, 45 S. W. 221.

The action of the surveyor in entertaining an application to purchase school land before the commissioner of the land office approved the appraisal report of the commissioners' court will not render void the sale of the land to the applicant, in the absence of the rights of third parties intervening. *Id.*

Effect of application for survey.—The application merely secures the right to have the survey made and in 60 days after the approval of the field notes by the commissioner of

the general land office and notification that it was on the market to become the purchaser as required in cases of sales of other school lands. *Adair v. Hays*, 31 C. A. 446, 72 S. W. 257.

An application for survey of public lands by metes and bounds held not to furnish notice precluding the subsequent location and survey of lands outside the tract so described. *Texas Mexican Ry. Co. v. Scott* (Civ. App.) 129 S. W. 1170.

Tender of cost of survey.—Evidence held to establish a valid tender of the cost of surveying certain state land so as to protect plaintiff's prior right to purchase. *King v. Underwood* (Civ. App.) 112 S. W. 334.

Application under act of 1900.—A petition for mandamus to compel the land commissioner to rescind his action in canceling a purchase, and to reinstate the contract of purchase, is fatally defective under Acts 1900, p. 29, § 6, when it fails to show that the land sought to be purchased is a part of a tract embracing 2,560 acres or less, and fails to allege that the land was embraced in the terms of the section because it shows no right in the applicant to purchase and no right in the commissioner to sell the land. *Moore v. Rogan*, 96 T. 375, 73 S. W. 1.

When sale must be for cash.—Under Acts 1905, p. 164, § 8, only unsurveyed vacant tracts of eighty acres or less shall be sold for cash only, so that where a tract of 80 acres was surveyed under the act of 1900 as amended by the act of 1901, the commissioner of the land office could sell upon the payment of one-fortieth of the purchase money and the balance on time with interest. *Hamman v. Presswood* (Civ. App.) 120 S. W. 1053.

Field notes must be filed within 90 days.—In October, 1906, an application was filed by C. and the land surveyed in November, 1906, and the application and field notes filed in the land office in December, 1906. The field notes conflicted with other surveys, and the surveyor who had surveyed the land was notified in February, 1907. M.'s application for the same land was filed December 24, 1908, and surveyed February 11, 1909, which application and field notes were filed in the land office March 3, 1909, and found correct. February 16, 1909, corrected field notes were filed by C. The commissioner refused to value the land on C.'s application, as M.'s application was filed prior to the return of the corrected field notes made for C. Held, that under this article it was necessary that the surveyor for C. should within 90 days return correct field notes, and, M. having filed his application and a survey having been made before the corrected field notes of C. were returned to the land office, after the 90 days, M. acquired a superior right to purchases and the land was properly awarded. *Cox v. Robison*, 103 T. 354, 127 S. W. 806.

Preference given party who has improved or inclosed land.—Acts 1905, p. 167, § 8, gave the person whose inclosure embraced any unsurveyed school lands, or who had improved the same, the right to purchase the same in preference to others at any time within 90 days after notice given as provided therein. The following cases were decided under that or similar acts:

Under acts 1889, c. 54, p. 48, a person having a preference right must be a settler within his inclosure. *Hume v. Gracy*, 27 S. W. 584, 86 T. 671.

That defendant settled on and improved vacant state land within plaintiff's inclosure did not deprive plaintiff of the prior right to purchase within 90 days after the land had been surveyed, classified, and appraised. *King v. Underwood* (Civ. App.) 112 S. W. 334.

When land is situated in one's inclosure he has the preference right to purchase at any time within 90 days after it was surveyed, classified and appraised and he has received notice thereof. *Id.*

Where one person has the land inclosed and another has improvements on it, the statute does not prefer the owner of the land to the owner of the improvements. The latter has the same right as the former to buy 160 acres, and where the owner of the improvements has secured a patent to the land the owner of the inclosure must show a better title in order to recover the land. *Underwood v. King*, 102 T. 561, 119 S. W. 300.

Equities of adverse claimant.—Where B. abandoned certain land in controversy in 1896 and made no claim thereto until 1905 prior to which plaintiff had acquired a right to purchase, no equities survived B.'s abandonment which he could transfer to defendant. *King v. Underwood* (Civ. App.) 112 S. W. 334.

B., having voluntarily made certain payments on state lands to which plaintiff had a prior right to purchase with knowledge of such right, held not entitled to reimbursement as a condition to plaintiff's right to a decree vesting title in her. *Id.*

Isolated or detached lands.—Article 4218y, Rev. St. 1895, provided for the sale, without necessity of settlement, of isolated and detached public lands in certain counties. The statute was re-enacted in Rev. Civ. St. 1911, art. 5450, without the provision referred to above.

The statute authorizing the sale of detached and isolated sections of school land, without requiring settlement, applies to sections which were not isolated when the act was passed, but which subsequently became so. *Thomas v. Wolfe*, 16 C. A. 22, 40 S. W. 182.

The question whether or not a section is subject to sale thereunder is to be determined from its situation, as shown by the state maps at the time of sale. *Id.*

If the purchaser acts in good faith a sale will not be held unlawful because it may subsequently be discovered that a mistake was made in the mapping and location. *Id.*

Evidence held insufficient to show that a sale of school land as isolated land was invalid. *Id.*

The statute is mandatory; and it is the duty of the commissioner of the general land office to accept all bids for isolated sections and parts of sections of the school lands at a dollar an acre upon the purchasers tendering the part of the purchase money, and the obligation for the balance, as was required by the general law, whether the lands are classified as agricultural, timbered or grazing. *State ex rel. Weber v. Rogan*, 94 T. 62, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 940.

After the commissioner of the general land office has declared a forfeiture in the case of a detached and isolated section it is not necessary for him to report the forfeiture to

the county clerk of the county in which the land is situated before it is again subject to purchase. All that is necessary to acquire an inchoate title is to make application to the commissioner, and to tender the amount of cash required together with a statutory obligation for the balance. *Id.*

This article (Rev. St. 1895, art. 4218y) applies to a county that had been organized prior to January 1, 1875, but whose organization had lapsed and was not organized at said date, but was again organized thereafter. *Tompkins v. McKinney*, 93 T. 629, 57 S. W. 804.

The word "may" in this article (Sayles' Ann. Civ. St. 1897, art. 4218y) ought to be construed in its literal sense—that is to say, as a word merely conferring a power upon the commissioner to sell the lands therein specified at one dollar per acre and not as making it obligatory upon him to do so, and therefore mandamus will not lie to compel him to do so. *Weber v. Rogan*, 94 T. 62, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 941, 942.

A person buying under the law applying to detached land can not have his title attacked because he may desire to let some one else have the benefit of his purchase. The sale of such land is inhibited to none but a corporation. *Wurzbach v. Burkett* (Civ. App.) 60 S. W. 590.

Certain state lands held detached lands at the time of their sale. *Hamilton v. Votaw*, 31 C. A. 684, 73 S. W. 1091.

That one was entitled to purchase public lands as actual settler held not to render valid his purchase of sections as isolated, when in fact connected. *Burnam v. Terrell*, 97 T. 309, 78 S. W. 500.

Sale of connected sections as isolated held not rendered valid by subsequent invalid sale of the connecting section. *Id.*

The act of the land commissioner in determining whether lands are isolated and detached from other public land is ministerial and not judicial. And where he acts under a mistake in believing that the lands are detached and makes a sale, when he discovers his mistake he can rescind his previous action and cancel the award, or his successor can do this. *Id.*

There is no conflict between the proviso of Gen. Laws 27th Leg. p. 253, c. 88, providing that actual settlement of unsurveyed and detached lands containing less than 640 acres shall not be necessary, and section 7 of Act April 19, 1901, which provided that all lands which are or may become detached shall be sold to actual settlers only, the latter only applying to surveyed lands, and the proviso was not repealed by said act. The two laws having been passed by same legislature, and not being in conflict, should be construed as one act. *McGrady v. Terrell*, 98 T. 427, 84 S. W. 641.

In forbidding sale of school lands to any but actual settlers, an exception is made in case of "isolated and detached" lands lying in certain counties, but by the terms of this article (Rev. St. 1895, art. 4218y) a sale to a corporation is not permitted. *Lufkin Land & Lumber Co. v. Terrell*, 100 T. 406, 100 S. W. 134.

By the express terms of Acts 1901, p. 296, § 7, the exception in Rev. St. 1895, art. 4218y, as to "isolated and detached" lands, is eliminated in express terms, and such lands are made subject to sale to actual settlers only. One must become an actual settler upon school lands within 90 days after the land is awarded to him. *Id.*

Vacancies between surveys.—Claimant to vacant public domain, in action of trespass to try title, held entitled to show that the land claimed as vacant was outside the corrected boundaries of original surveys under which plaintiff claimed. *Austin v. Espuela Land & Cattle Co.*, 34 C. A. 39, 77 S. W. 830.

One who has not acquired any right to land held not entitled to litigate the question of a vacancy between surveys under which another claims the land. *Hickey v. Collins*, 40 C. A. 565, 90 S. W. 716.

State cannot intervene in suit between adverse claimants.—The provision that, when any suit arises between the owners of the older survey and the purchaser, any final judgment shall be conclusive as to the existence of such vacancy, but, if the judgment be obtained through collusion against the state, it may be vacated at any time within five years, does not authorize the state to intervene in such an action. *State v. Dayton Lumber Co.* (Sup.) 155 S. W. 1178.

Corporation cannot purchase.—See, also, notes under Arts. 5428, 5430.

Land subject to classification as agricultural or grazing land cannot be sold to a corporation. *Lufkin Land & Lumber Co. v. Terrell*, 100 T. 406, 100 S. W. 135.

Art. 5433. Minerals, gayule and lechuguilla reserved.—The land which is now or may hereafter be classed as mineral may be sold for agricultural or grazing purposes, but all sales of such land shall be upon the express condition that the minerals shall be and are reserved to the fund to which the land belongs, and such reservation shall be stated in all applications to purchase; provided, should any person who has no authority or right to do so cut or remove any mineral, gayule or lechuguilla from the land belonging to the public free school fund, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished as provided in the Penal Code, and in addition thereto judgment shall be rendered against the defendant in behalf of the state in a sum of money equal to the value of the substance so cut or removed, which shall be collected as under execution; and when collected, the money shall be remitted to the state treasurer and by him credited to the fund to which the land belongs. The commissioner shall adopt all

the necessary rules and regulations for the execution of the several provisions of this chapter. [Acts 1907, p. 490, sec. 6f.]

See *Cox v. Robinson*, 105 T. 426, 150 S. W. 1149.

Applies only to land designated as mineral land.—Provision, in statute for sale of public school and asylum lands, for affidavit by applicant as to knowledge of minerals, and that as to reservation of minerals, apply only to lands designated as mineral lands. *Schendell v. Rogan*, 94 T. 585, 63 S. W. 1001.

Mines and mining.—See Title 93.

Art. 5434. Sale of gayule and lechuguilla.—The commissioner of the general land office may, with the consent and approval of the governor and attorney general, sell the gayule, lechuguilla, growing or found upon the public free school land, exclusive of timber. The sales may be upon such terms, conditions and limitations as they may deem most advantageous, having in view the protection of the interest of the school fund and the state. They may also enter into such contracts as they may deem wise for the purpose of having determined the commercial properties and value of any and all such material, and for such purpose they may enter into executory contracts of sale; provided, they shall not in such contracts cause the expenditure of public money nor incur any liability on the state. [Acts 1907, p. 251.]

Art. 5435. Transfers.—One who hereafter buys land on condition of settlement shall not sell any part of such purchase prior to one year after date of award of the home tract, nor prior to one year after date of the award of the first additional tract purchased to a formerly acquired home, unless the required residence has sooner been completed. After the lapse of the time aforesaid, the purchaser may sell all of his land, or any part thereof, in whole tracts, according to his purchase, to another qualified purchaser, who will become an actual bona fide settler on some part thereof at date of his transfer, if the residence is not complete, and such assignee shall complete the residence on the land by continuous residence thereon as required of his vendor; and if the vendor does not sell all of his purchase he shall continue to reside upon his home tract, or on some part of that retained, until the completion of the residence required of him. A purchaser on condition of settlement under this chapter, or any former law, who may have the right to sell his land, or a part of it, may sell his whole home tract, or one or more of his additional tracts, as a whole, according to his purchase, to another purchaser who owns a designated home tract within five miles of each of such tracts as he may purchase as assignee, and the assignee may take each of the tracts as additional to his own designated home tract; provided, the total tracts so purchased by an assignee prior to the completion of the residence of the vendor, together with the former purchase of the assignee, shall not exceed one complement of sections. In such cases, the assignee shall continue to reside in person upon either his formerly designated home tract, or on one of his formerly acquired additional tracts, or on one of his additional tracts purchased as assignee, continuously until the completion of the residence required of him under his former purchase and that of his vendor. No tract hereafter purchased shall be transferred, except as a whole, prior to the issuance of patent thereon; but, should a transfer of less than a whole tract be made after the purchaser has the right to sell in whole tracts under the provisions of this chapter, such transfer shall not be void, but the owner shall not be substituted as assignee on the records of the land office. The failure to pay the interest on the whole of such tract shall operate as a forfeiture of every part thereof. [Acts 1907, p. 490, sec. 6d.]

See *Ericksen v. McWhorter* (Civ. App.) 143 S. W. 245.

Explanatory.—It has been the purpose to group the decisions since this law took effect here, while decisions relative to transfers prior thereto will be found under Art. 5436, as also all decisions having express reference to that article. Cases relative to transfers of land as additional to the transferee's home tract will also be found under this article.

Right to transfer in general.—A contract agreeing to convey school land, when an action involving the title thereto should have terminated favorably to the contracting party, held not invalid. *Hudman v. Henderson* (Civ. App.) 124 S. W. 186.

Art. 5435
Vernon Sayles
1914
Amended
36 L. P. 316

Art. 5435
Vernon Sayles
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Amended
37 L. P. 118

The law does not favor restrictions on the alienation of a title acquired in public land, whether complete or inchoate. *Breen v. Morehead* (Civ. App.) 126 S. W. 650.

A sale of school lands awarded by the state before the three years' occupancy prescribed as a prerequisite to the issuance of final title by the state is not against public policy. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Judicial sale.—The rights of a purchaser of school lands prior to the completion of the three-year occupancy held to be only a chattel interest, and not subject to sale in judicial proceedings. *Bourn v. Robinson*, 49 C. A. 157, 107 S. W. 873.

Time of transfer.—Under this article and Arts. 5425, 5436, where a holder of a right to a title in school lands transferred his interest within less than 12 months after the sale to him by the state, the award to him became ipso facto forfeited and the land reverted to the state free of any incumbrance which the purchaser may have placed thereon, and, where his vendee later secured an award from the state, he took the land free from the incumbrance of a trust deed executed by the vendor. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Transfers of tracts additional to home tract in general.—A charge that a grantee of state school lands from the original purchaser must have occupied the original tract as a condition precedent to his right to purchase additional land was error. *Thomson v. Hubbard*, 22 C. A. 101, 53 S. W. 841.

Under Sayles' Ann. Civ. St. 1897, art. 4218ff, a sale by a purchaser before the completion of the three years' occupancy, to one not an actual settler on the land sold, did not forfeit title thereto, because the purchaser has the right to sell to one not an actual settler. *Nesting v. Terrell*, 97 T. 18, 75 S. W. 486.

A purchase of additional school land by owner of other lands, is not forfeited but his rights pass to vendee, before occupation, not an actual settler, where he continues to own and occupy the land made the basis of the purchase. It was not necessary that the purchaser nor any of his vendees should occupy the land. *Miller v. Hallford*, 34 C. A. 243, 73 S. W. 239.

Limitation on amount of land.—Before this law went into effect a father had purchased four sections and his son two and part of another. After this law became effective the son conveyed one of his sections to his father and the father conveyed one of his to the son. The land commissioner had no right to cancel the son's conveyance because the father obtained no more than he was entitled, for by the transaction he gave up one of his sections when he obtained the one from his son. *Cunningham v. Terrell*, 101 T. 613, 111 S. W. 652.

Location of land.—Under this article, held, that it was not necessary that the land purchased be wholly within a radius of five miles of the home tract; it being sufficient that the land to be purchased be not more than five miles from the home section at the nearest point of the home section to that sought to be purchased. *Bradford v. Robison* (Sup.) 141 S. W. 769.

Title or rights acquired by transferee.—Though a purchaser of school land might mortgage his interest before he had completed the three years of occupancy, his subsequent sale thereof before the termination of the occupancy and therefore before his interest was subject to a judgment lien would prevent the mortgage lien from attaching to the land in the hands of the purchaser. *Bourn v. Robinson*, 49 C. A. 157, 107 S. W. 873.

Though the state may wholly ignore a subsequent purchaser of school land and recognize only the contract of the original purchaser, it does not follow that, as between the original purchaser and the vendee of an interest in the former's inchoate title the conveyance is void. *Breen v. Morehead* (Civ. App.) 126 S. W. 650.

The grantee of a substituted purchaser of school land, having been also duly substituted as a purchaser in the General Land Office and complied in all things with the law governing occupancy as an actual settler, irregularities or even invalidity of previous sales to his grantor or the original purchaser from the state become immaterial as affecting his title. *Goodwin v. Koonce* (Civ. App.) 130 S. W. 620.

A purchaser of the rights of one to whom school land has been awarded occupies by substitution on the commissioner accepting him the position of an original purchaser, but he takes subject to any right to the land intervening between the award and his purchase. *Davis v. Yates* (Civ. App.) 133 S. W. 281.

One to whom a deed was made by one having contract with the state for purchase of public land held not in privity with the state, and so not entitled to attack the forfeiture of such sale by the state, and through it a patent of the land to another on a subsequent sale. *Breen v. Morehead*, 104 T. 254, 136 S. W. 1047.

Evidence in trespass to try title brought by one purchasing from a purchaser of state land, held to show that the intention of plaintiff and his grantor was that the land should not be conveyed prior to the grantor's filing his notice of settlement in the land office. *Payne v. Cox* (Civ. App.) 143 S. W. 336.

Art. 5436 was not repealed by this act, and a substituted purchaser under this article becomes an original purchaser from the state. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

A subsequent purchaser of school lands from the original purchaser, who held a recorded mortgage from an intermediate purchaser, was not an innocent purchaser. *Id.*

A grantee of one to whom school lands have been awarded by the commissioner of the general land office acquires, prior to issuance of patent, an equitable title, and he may enforce rights which his grantor could enforce against third persons claiming under an obligee in a bond for title, though annual interest installments due to the state have not been paid. *Spotts v. Whitaker* (Civ. App.) 157 S. W. 422.

Liens for and collection of purchase price.—Where the state through its regular authorized officer makes an award of public lands to one authorized to purchase, the land so far passes out of the state as to authorize its sale by the purchaser, thereby creating between himself and his purchaser the relation of vendor and vendee, and, where possession accompanies such transfer, the second purchaser may not thereafter successfully plead a total failure of consideration upon the forfeiture of his vendor's title. *Slaughter v. Cooper*, 56 C. A. 169, 121 S. W. 173.

That the land office, after forfeiting school land, which was sold by the settler to another, reinstated the sale and awarded the land to such other, held good defense to the

plea of failure of consideration of the notes given for the lands, which were secured by a vendor's lien. *Bynum v. Hobbs*, 56 C. A. 557, 121 S. W. 900.

A substituted purchaser of school lands legally awarded by the state had a vendible title, though the three years' occupancy, prerequisite to issue of final title, had not been completed, which was sufficient to support a purchase-money mortgage and notes therefor. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Where a subsequent purchaser of school lands acquiesces in the acts of his vendor in procuring the cancellation of the original award, and the making of a new award to the purchaser, he is estopped to object to the validity of his mortgage to the original purchaser. *Id.*

A pre-existing debt for a balance due on the purchase price of school lands, though the vendor had no title thereto, held a good consideration for a mortgage thereon, executed on the cancellation of the vendor's rights and an award to the purchaser. *Id.*

— **Recovery back after payment.**—In an action to recover money paid for land, to actual settler under contract with state, judgment in another action held inadmissible to show eviction under the rule that the law by which the rights of vendor and vendee are adjusted as to private lands is inapplicable where the attempted conveyance is of public domain. *Slaughter v. Cooper* (Civ. App.) 107 S. W. 897.

Registration of conveyance.—A conveyance of the equitable ownership of a homestead settler in the public domain acquired by the completion of three years of continuous occupancy held subject to registration with the county court, so as to be constructive notice to subsequent purchasers. *Phillips v. Campbell* (Civ. App.) 146 S. W. 319.

Art. 5435a. Transfers other than personal; accounts with transferees, etc.—Upon presenting to the commissioner of the general land office of a regular chain of transfer to any of the sold public free school, university or asylum lands of this state, where same have been or may hereafter become matured under occupancy as required by law, in cases where occupancy is required, and where the terms and conditions of sale by the state to the original purchaser thereof have been otherwise complied with in cases where occupancy is not required, from the heir or heirs, executor, administrator or survivor in community of any deceased owner thereof, or from the guardian of any minor or person of unsound mind, who are the owners thereof, or from any trustee under deed of trust, or mortgagee in any mortgage with power of sale, or transfer executed by the sheriff or other officer of any court of this state having competent jurisdiction, by virtue of any execution or order of sale issued out of such court, and in all cases where title emanates from and is authorized by any court proceedings of the courts of this state, it shall be the duty of said commissioner to cause such chain of transfer to be filed together with the proper and necessary obligations and other instruments of verification hereinafter provided for, and thereupon the commissioner shall separate the account of the land so transferred from the account of the original or parent tract, and shall open a new account for the land so transferred in the name of the person filing such transfer, in the same manner as accounts are now opened with persons filing personal transfers. [Acts 1911, p. 32, sec. 1.]

Art. 5435b. Certified copies to be filed with transfers, etc.—When the transfer of any executor, administrator, or guardian is so filed it shall be accompanied by a copy of the order of the probate court appointing such executor, administrator or guardian of such estate and approving and confirming the sale of which such transfer is the evidence, duly certified to by the clerk of the county court of the county in which such order of confirmation was made. When the transfer of any survivor in community is so filed it shall be accompanied by a copy of the order of the probate court appointing such survivor in community, and also by a copy of the oath and bond, and the order approving same, of such survivor in community, all duly certified to under the hand and seal of the county clerk of the county where such orders were made and such oath and bond are filed. When the transfer of any trustee in any deed of trust, or any mortgagee under a mortgage with power of sale is filed as provided in this Act, it shall be accompanied by a copy of the deed of trust or mortgage, as the case may be, under which such transfer was made, duly certified to under the hand and seal of the county clerk of the county in which such land may be situated. When any transfer of a sheriff or other officer of a court is filed as provided in this

Act, it shall be accompanied by a copy of the execution, order of sale or other process authorizing the execution of such transfer, together with the sheriff's return thereon, which copy shall be duly certified to under the hand and seal of the clerk of the court from which such execution or order of sale issued. When the judgment or decree of any court of this state is filed wherein the title to any of such lands is decreed out of the owner, such judgment shall be duly certified to by the clerk of the court in which judgment was rendered. [Id. sec. 2.]

Art. 5435c. Transfer fees.—The commissioner shall charge and collect such fees for filing the transfers provided for in this Act as are now charged for filing personal transfers, and in addition thereto he shall charge and collect a fee of fifty cents for the certified copies which accompany each transfer, the same to be paid into the state treasury as other fees are now paid. [Id. sec. 3.]

Art. 5435d. Provisions applicable to transfers other than personal.—The lands described in section 1 [Art. 5435a] of this Act shall be subject to patent in like manner as lands that are transferred by chain of personal transfer, and shall be subject to the same conditions and penalties as are prescribed by law for other free school, university and asylum lands of this state; provided that patent when issued shall issue in the name of the person to whom said land was last transferred by personal transfer as shown by such transfers on file in the land office; provided, that the commissioner of the general land office shall deliver said patent to the party entitled thereto as shown by the mesne conveyances on file in his office; provided, that no account shall be opened and no patent issued as provided for in this Act, except in such quantities as are now provided by law in cases of personal transfer. [Id. sec. 4.]

Art. 5435e. Purchasers of land in certain counties may sell within year, etc.—One who has heretofore bought or who may hereafter buy public free school land on condition of settlement and occupancy in the counties of Andrews and Bailey, Cameron, Cochran, Crane, Dimmit, Duval, Ector, Gaines, Hidalgo, La Salle, Loving, McMullen, Midland, Starr, Terry, Upton, Winkler, Yoakum and Zavala, may sell after one year from date of award any portion of said land to another in the manner provided in article 4218k, Revised Civil Statutes of 1895, but such assignees shall complete the residence thereon as provided in section 6 [Art. 5435] of the land sales act of 1907, approved May 16th, 1907. [Acts 1911, p. 154, sec. 1.]

Art. 5436. [4218k] Lands patented, when.—Purchasers shall have the option of paying the purchase money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land for three consecutive years, they shall receive patents for the same upon payment of the patent fee prescribed by law. Purchasers prior to August 12, 1907, may also sell their lands, or a part of the same, in quantities of forty acres, or multiples thereof, at any time after the sale; and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the commissioner of the general land office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies, or to which said county may be attached for judicial purposes, together with his affidavit, in case three years residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other

person or corporation, and that no other person or corporation is interested in the purchase, save himself; and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the state, and be subject to all the obligations and penalties prescribed by law, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon; and, if he or his vendor has already resided on his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time. [Acts 1895.]

Explanatory.—It has been the purpose to group the decisions having express reference to this article and all those decided prior to the time that Art. 5435 went into effect here, while all other cases relative to transfers will be found under that article. All cases relative to transfers of land as additional to the transferee's home tract will also be found under Art. 5435.

Not repealed.—This article was not repealed by Acts 30th Leg. 1st Ex. Sess. c. 20, which provides in section 6d (Art. 5435 herein) that "one who hereafter buys land on condition of settlement shall not sell any part of such purchase prior to one year after date of award of the home tract," and a substituted purchaser under that section will become an original purchaser from the state. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

Right to transfer in general.—An actual settler who tenders the purchase money has an interest which he can transfer. *Wood v. Wesson* (Civ. App.) 22 S. W. 1069.

Land can only be sold under this article to the person selected by the original purchaser. *O'Keefe v. McPherson*, 25 C. A. 313, 61 S. W. 536.

The original purchaser of state lands, having an interest which will ripen into title by the payment of the purchase price, may make a valid contract for the sale of his interest therein. *Gunnels v. Cartledge*, 26 C. A. 623, 64 S. W. 806.

The statute authorizes the actual settler to convey to another, but requires of the vendee to make the same character of settlement upon the land as was required of the original purchaser. The state allows an actual settler to be substituted by another of the same qualifications, but an actual settler can not transfer the land before the expiration of three years' occupancy unless the state at the time gets another actual settler in the place of the one that is released. *Hardman v. Crawford*, 95 T. 193, 66 S. W. 208.

One who purchases lands from the state under a contract which provides for certain payments upon the making of which he will become entitled to a patent and in default of any of which he forfeits all rights under his contract has a vendible interest in such lands prior to their forfeiture, and one which is subject to execution. *Martin v. Bryson*, 31 C. A. 98, 71 S. W. 615.

Land awarded by commissioner of general land office, occupied for three years, proofs having been made, held subject of sale and mortgage. *Logue v. Atkeson*, 35 C. A. 303, 80 S. W. 137.

The state allows an actual settler to be substituted by another with the same qualification and performing the same duties, but there is no provision by which land once sold to and occupied by an actual settler can be transferred before the expiration of three years' occupancy, to another person, unless the state at the same time acquires another actual settler in the place of the one that is released. *Dugat v. Means* (Civ. App.) 91 S. W. 364.

— **Mortgages.**—Land duly awarded and occupied for three years, proof of which has been made, may be mortgaged. *Logue v. Atkeson*, 35 C. A. 303, 80 S. W. 137.

A mortgage executed by the purchaser of school lands before he had completed the three years occupancy created a lien on the land, enforceable against the succeeding purchaser, after he had completed and made proof of the requisite occupancy. *Harwell v. Harbison*, 43 C. A. 343, 95 S. W. 30.

Form of transfer.—Transfer of land certificate with name of vendee in blank held good as against one making the transfer. *Walker v. Peterson* (Civ. App.) 42 S. W. 1045.

Title, rights and liabilities of substitute purchaser.—A transferee of a contract for the purchase of school land, who takes all the statutory steps to have himself substituted as purchaser, and is so substituted, is entitled to all the rights he would have had if he had been an original purchaser. *Thomas v. Wolfe*, 16 C. A. 22, 40 S. W. 182.

Under the laws relating to the sale of state school land, a failure of the vendee to substitute his obligation to the state for unpaid purchase price for that of the original purchaser held not to work a forfeiture of vendee's title. *Lee v. Green*, 24 C. A. 109, 58 S. W. 196, 347.

A valid sale of an unconditional land certificate by the administrator of the owner thereof is sufficient to pass title thereto to the purchaser. *Harvey v. Petty* (Civ. App.) 63 S. W. 893.

One who purchases lands from the state under a contract which provides for certain payments upon the making of which he will become entitled to a patent, has an interest therein which is subject to execution. *Martin v. Bryson*, 31 C. A. 98, 71 S. W. 615.

A sale to a substitute purchaser of public lands held valid, without regard to validity of original and prior substitute sales, though the first payment was made only by the original purchaser. *Johnson v. Bibb*, 32 C. A. 471, 75 S. W. 71.

When the terms of the statute have been complied with the sale to a substitute vendee is to all intents and purposes a new sale upon substantially the same terms and conditions as if the sale was an original one, save that actual settlement seems not to be required where three years' occupancy has already been had, and proof of that fact made and save that the substitute applicant is not by said article required to make the first payment as in case of the original purchaser. *Id.*

Bona fide purchasers of county school lands held to acquire a good title against the county, notwithstanding invalidity of original conveyance from the county. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1056.

Where defendant obtained the rights of K. in the purchase of certain state lands, and was substituted as the purchaser, he was entitled to the benefit of K.'s cash payment required of original purchasers. *Reininger v. Pannell*, 46 C. A. 137, 101 S. W. 816.

A purchaser of the rights of one to whom school land has been awarded occupies by substitution, on the commissioner accepting him, the position of an original purchaser, but he takes subject to any right to the land that intervened between the award and his purchase. *Davis v. Yates* (Civ. App.) 133 S. W. 281 (2nd case).

Where a purchaser of school land abandoned his purchase, the substitution of a third person for another purchaser was complete and took the land off the market, though the attempted sale to the second purchaser was void for his failure to deposit the first payment with the state treasurer. *Fitzhugh v. Johnson* (Civ. App.) 133 S. W. 913.

Under this article, held, that the claim of one purchasing from the original purchaser after the settlement was complete, and an affidavit of settlement was filed and who continued his settlement and paid all dues and made valuable improvements thereon, would not be forfeited because he did not file the application to become a substituted purchaser. *Payne v. Cox* (Civ. App.) 143 S. W. 336.

Under *Sayles' Ann. Civ. St. 1897*, art. 4291 (Art. 5410 herein), requiring the original purchaser of public land to forward his application properly describing the land, and article 4292 (Art. 5436 herein), a proper description in the substitute purchaser's affidavit, if required, was substantially complied with by application of the substitute purchaser, with the attached obligation describing the land correctly and including the county where it was located, so as to authorize the commissioner to recognize him as a purchaser of the land, though the application itself omitted the county. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

Settlement upon land.—The purchaser, in the event of his vendor not having resided on the land for three years must file his affidavit stating that he has in good faith settled upon the land, and he must show that his and his vendor's occupancy together has covered the period of three years. *Hardman v. Crawford* (Civ. App.) 63 S. W. 662.

Actual settlement by a substitute purchaser is not required, where three years' occupancy has already been had and proof thereof offered. *Johnson v. Bibb*, 32 C. A. 471, 75 S. W. 73.

Land sold to an actual settler cannot be transferred until it has been occupied for three years, unless the state at the same time acquires another actual settler in the place of the first one. *Dugat v. Means* (Civ. App.) 91 S. W. 364.

Title to state school land can only be secured by an original or substituted purchaser from the state, accompanied with actual settlement and continued occupancy, and while one may accept a transfer from another and make settlement and occupancy of the land, his only right is that of a substituted purchaser, and as such, he must make the affidavit of settlement and occupancy required by this article, and aver that he is purchasing the land for his home, and that he is not acting in collusion with others. *Brown v. Brown* (Civ. App.) 132 S. W. 887.

On the issue of whether there was a sufficient settlement by one who becomes a substitute purchaser of public school lands, emphasis should not be given by instructions to the fact that the settlement and occupancy must be "in person," thus tending to exclude from the jury's consideration the acts of his wife in aid of his settlement and occupancy, to which, as well as all other circumstances, the jury may look; Acts 29th Leg. c. 103 (Art. 5410 herein), even if adding anything, by the use of the words "in person," to the prior requirements as to settlement, being directed in terms only to an original purchaser of school lands, and not repealing this article. *Ericksen v. McWhorter* (Civ. App.) 143 S. W. 245.

Plaintiff in an action involving conflicting claims to public school lands, of which he became substitute purchaser, and which were thereafter forfeited by the land commissioner, on the ground of plaintiff's failure to reside thereon, and then sold to defendant, may prove that, before his purchase, he and his wife had a home of considerable value in the state, which constituted part of the consideration given by them for the lands involved, and that they thereafter acquired no other property for a home till the purchase in question; plaintiff in becoming a substitute purchaser being required by this article to make affidavit, etc.; his purpose and good faith being therefore in issue, and the fact of his old home having been surrendered and having been of considerable value being circumstances relevant and material on the issue of his good faith and illustrative of the purpose and acts on which he relied as constituting settlement, there being evidence that at and before his purchase his wife in person went on the land for the purpose of making a home thereon, and that he, with the same purpose, was thereafter there a number of times and assisted in making improvements. *Id.*

Plaintiff purchased school lands from a purchaser from the state before the expiration of the three years' occupancy by such purchaser. Plaintiff's wife immediately went on the land, made her home thereon, but plaintiff did not personally go thereon for over two months, and was not there continuously after that time. Held, that there was not a sufficient settlement on the land by plaintiff under this article. *McWhorter v. Ericksen* (Civ. App.) 151 S. W. 624.

Lien for and collection of purchase money.—The purchaser of school land may sell on credit and foreclose his lien while the title is in the state. *Wilson v. Hampton*, 2 U. C. 426.

A purchaser sold to another with the understanding that the latter could forfeit and buy back from the government, and he reserved a vendor's lien to secure the contract price. Held, that the vendor's lien attached after the land had been rebought by such vendee from the state. *Garrett v. Findlater*, 21 C. A. 635, 53 S. W. 839.

Where a purchase of state lands is forfeited, after their sale by the original grantee, for the nonpayment of interest, the vendee of the latter cannot resist payment of his purchase money notes on the ground that the original application to purchase contained a misdescription of the land. *Gunnels v. Cartledge*, 26 C. A. 623, 64 S. W. 806.

Proof and certificate of occupancy.—See art. 5444 and notes.

Right to attack sale or patent.—When patent has been issued no one claiming under an after-acquired right can attack patentee's title. That only the state can do by direct proceeding. *Logan v. Curry*, 95 T. 664, 69 S. W. 129; *Id.* (Civ. App.) 66 S. W. 82.

Until the grant is made (by issuance of patent) the sale or transaction is in fieri and subject to collateral attack for want of actual settlement. After patent has been issued the title is not subject to collateral attack by subsequent applicants. *Id.*

The validity of a patent to land cannot be attacked by one in possession as a trespasser of land covered by the patent. *Yarbrough v. De Martin*, 28 C. A. 276, 67 S. W. 177.

Error in patent regarding grantee's name held, on the evidence, not to vitiate title. *New York & Texas Land Co. v. Dooley*, 33 C. A. 636, 77 S. W. 1030.

Art. 5437. Same.—Land which has been sold by the state prior to August 12, 1907, and which has been or may be subsequently transferred in tracts other than in legal multiples, may, in the discretion of the commissioner, be so patented. [Acts 1905, p. 159, sec. 9.]

Art. 5438. [4218k] Payments and patents for town sites.—Whenever a town shall be located and established upon any lands sold under this or any former law, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the state upon such land and obtain a patent therefor at any time; but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the general land office a certified plat of such town, made by a surveyor, which shall be accompanied by the affidavit of the owner of such land, corroborated by the affidavit of five disinterested and credible citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and is being occupied by bona fide citizens, twenty business and residence houses, or either, or both. [Acts 1895.]

Art. 5439. Application of railroad to buy, to contain what.—Any railroad company owning, operating or constructing a line of railway in this state, desiring to purchase any portion of the public free school, university or asylum lands in this state, under the provisions of this law and the succeeding articles, for the location and establishment thereon of town sites, depots, stations, yards, divisional terminals, shops, round houses or water stations, shall file with the commissioner of the general land office, if the land desired be public free school or asylum lands, and with the board of regents of the state university, if the land desired is university land, an application to purchase each tract so desired, supported by the affidavit of its president, vice-president or chief engineer, which application shall:

First. Describe by metes and bounds or otherwise sufficient to satisfy the commissioner of the general land office, or the board of regents of the state university, as the case may be, of the particular tract or tracts of land that it desires to purchase under the provisions of this law.

Second. Said application shall show that said land so applied for is desired and needed by said railway company for some one or more of the purposes for which the sale of such lands are authorized by this article, and that it is the intention of said railway company to speedily use said land for such purpose or purposes.

Third. That said application is not made for the use or benefit of any other person or corporation than the applicant, nor in collusion with, or in the interest of any other person or corporation whatsoever; and

Fourth. That said railway company applying for said land shall furnish the commissioner of the general land office, or board of regents of the state university, as the case may be, with a plat and map, together with the field-notes of each tract of land so applied for, if required by such commissioner, or board of regents, which plat and map shall accompany said application and affidavit. [Acts 1905, p. 58.]

Right of way over public lands.—See Art. 6482 and notes.

Art. 5440. Land, how sold and patent issued.—When any such application or applications shall be filed with the commissioner of the

general land office for the purchase of public school land, or with the board of regents for the purchase of university land, under the provisions hereof, said commissioner, or said board of regents, as the case may be, shall investigate the matter therein set forth; and, if after such investigation, he or they shall be satisfied that the statements made in such application are true, he or they shall then determine and fix the fair and reasonable value of such tract or tracts of land, regardless of any lease thereon, unless the lessee should have two hundred dollars worth of improvements thereon, in which event the consent of the lessee shall be first obtained, and he or they shall advise the applicant of the price so fixed; and, if said railway company desires said land at the price so fixed, it shall pay therefor in cash to the state treasurer the price so fixed by the commissioner of the general land office, or said board of regents, as the case may be; and the treasurer shall give his receipt showing such payment, whereupon there shall be issued and delivered to the said railway company a patent for said tract or tracts of land, to be properly executed by the governor and the commissioner of the general land office upon payment of the patent fee therefor; provided, that no mineral land shall be sold under this law. [Acts 1903, p. 127.]

Art. 5441. Limitations as to purchase.—The amount of land that may be purchased by any one railway company, or for any one railway company, under the provisions of this law, for the several purposes named in these articles, and the conditions and limitations imposed thereon, shall be as follows: If such land is desired for the purpose of the location and establishment thereon of depots, stations, yards, divisional terminals, shops or round houses, said railway company shall be permitted to purchase only such an amount of land as may be necessary for the proper operation and maintenance of said railway, which fact shall be determined by said commissioner of the general land office, or said board of regents, as the case may be; and, if desired by them, they may, for that purpose, have the advice and assistance of the engineer of the railroad commission of Texas; and, if said land applied for be desired for water stations at points on or near said line of railway where it is necessary to construct and maintain a dam and reservoir for the impounding of rain water, for the operation and use of said railway, sufficient land may be sold for such purpose as may be necessary for the proper construction, preservation and maintenance of such water station, not to exceed six hundred and forty acres for each water station. And, if said land be desired for the location and establishment thereon of a town site, not exceeding three hundred and twenty acres shall be sold for each town site. Provided, that, if any railway company shall fail to use said land so purchased by it under any of the provisions of these articles, for the purpose for which same was sold, within five years from the date of the patent for each tract of land sold, said land, and all improvements thereon belonging to said railway company shall revert to the fund to which it formerly belonged. And provided, further, that, if said land is sold for town site purposes, such tract must be at least eight miles distant from any other tract of land sold for the same purpose to said railway company, and, after such sale, no other tract or tracts of land shall ever be sold to said railway company, or its assigns, for town site purposes, adjoining said tract sold for such purpose. And provided, further, that if the land applied for be for the purpose of depots, stations, yards, divisional terminals, shops or round houses, the land applied for for such purposes must adjoin the line of road, railroad tracks or right of way of said railway company; and all lands sold for town sites must either adjoin said railway tracks, line of road or right of way, or adjoin land sold under the provisions hereof to said railway company for depots, stations, yards, divisional terminals, shops or round houses. And provided, further, that all lands

acquired for town site purposes under these articles shall be in good faith placed upon the market for sale, and said railway company shall alienate the title to said land so sold to said railway company within the term of ten years after acquiring title to same. And provided, further, that, if said land be desired for a water station and reservoir for the impounding of rain water for the use and operation of said railway, each tract sold for such purpose must be within three miles of the line of road of said railway company, and must be at least eight miles distant from any other tract sold to the same railway company for same purpose; and, when said tract of land sold for water stations does not adjoin said line of road of said railway company, said railway shall have the right of way over any lands belonging to either of the funds mentioned in this act for its water mains from its said water station to its line of railway. [Acts 1905, p. 58.]

Art. 5442. Applications for less than 320 acres to particularly describe.—If any railway company desires to purchase any public free school land under the conditions and provisions of the foregoing articles out of any tract of such public free school land containing less than three hundred and twenty acres, it shall, in its application therefor, describe by metes and bounds, or otherwise, to the satisfaction of the commissioner of the general land office, the particular portion of any existing survey which it may so desire to purchase, and such commissioner shall be and is hereby authorized to sell such number of acres so applied for, though less than the whole survey, under the provisions and conditions of the foregoing articles, but all sales of less than the entire tract shall be in eighty acre tracts, or multiples thereof. [Id. sec. 4.]

Art. 5443. No actual settlement required.—This law shall not be construed to require any character of actual settlement to be made upon the land sold under its provisions previous to the sale and patent thereof, nor shall it be construed as in any way changing or modifying the present laws in relation to the sale of public free school, university and asylum lands of this state, except as provided for in the preceding articles. Whenever any land is sold to railway companies for the purposes mentioned in this chapter and shall be used for any other purposes than those mentioned in this chapter, then such land shall revert back to the state. All laws and parts of laws in conflict herewith are hereby repealed. [Acts 1903, p. 127.]

Art. 5444. [4218j] Regulations as to occupancy.—The commissioner of the general land office shall prescribe suitable regulations whereby all purchasers shall be required to reside upon, as a home, the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the commissioner of the general land office within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths; and on making such proof the commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If any person has sold the whole, or any part of, his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein.

See *Pulliam v. Runnels County*, 79 T. 363, 15 S. W. 277; *Cassin v. La Salle County*, 1 C. A. 127, 21 S. W. 122; *Dunn v. Wing*, 103 T. 393, 128 S. W. 108.

Occupancy in general.—On a purchase of state school land, an actual settlement for three years from the date of the original purchase held essential to the acquisition of title. *Redwine v. Hudman*, 104 T. 21, 133 S. W. 426.

Of tracts additional to home tracts.—See notes under Art. 5410, and see, also, Arts. 5426, 5435.

- **Unsurveyed or scrap lands.**—See Art. 5432 and notes.
- **By purchasers owning timber on land.**—See Arts. 5430, 5431, and notes.
- **By substituted purchasers.**—See Arts. 6435, 6436, and notes.
- **In certain counties.**—See Arts. 5418, 5419, and 5422.

Proof of occupancy.—Proof of occupancy of lands purchased from state may be made by copy of original affidavit of purchaser in land office. *McGrew v. Wilson* (Civ. App.) 57 S. W. 63.

Under Act 1905, § 4 (Gen. Laws 1905, c. 103), requiring purchasers of school land to settle thereon within 90 days after acceptance of their applications, and to file an affidavit of settlement in good faith within 30 days after the 90 days, and under section 5, giving preference rights of purchase to original lessees or their assignees, and providing that if one purchasing under the section does not comply with the law as to settlement and residence, the sale shall be canceled, a purchaser under section 5 need not file the affidavit required by section 4. *Hanna v. Atchison* (Civ. App.) 141 S. W. 190.

Certificate of occupancy—In general.—While the land commissioner can act upon the statutory proof and certificates, yet if doubt is thrown upon the disinterestedness and credibility of the witnesses, he should enquire into the matter and refuse the certificate if he is satisfied that the land had not been resided upon for the period required by law. *Logan v. Curry*, 95 T. 664, 69 S. W. 131.

The defense of innocent purchaser of land under a certificate of occupancy is good against an attack of the state upon the sale on the ground of nonoccupancy. *State v. Hughes*, 97 T. 520, 80 S. W. 524.

Neither this article nor Art. 5445 require the commissioner of the land office to give more than one certificate, which is as to the occupancy of the tract on which the purchaser or those under whom he claims have resided and actually maintained a home; therefore mandamus will not lie to compel him to give another certificate as to the sufficiency of the same occupation as a compliance with the statute as to other lands purchased from the state. *Conger v. Robison*, 104 T. 141, 135 S. W. 110.

— **Conclusiveness.**—The certificate issued by the commissioner can be attacked collaterally and if the proof shows that the applicant was not an actual settler, the sale to him will be declared void. *Logan v. Curry* (Civ. App.) 66 S. W. 82.

A certificate of occupancy is conclusive, except perhaps as to the state. *Logan v. Sperry*, 95 T. 664, 69 S. W. 131.

As against one claiming public land under settlement and application to purchase, a certificate of occupancy issued by the commissioner of the general land office to others after his rights accrued, and after he commenced action against them for the land, is not conclusive. *May v. Hollingsworth*, 32 C. A. 245, 74 S. W. 592.

Applicant to purchase public lands, held entitled to litigate question of prior applicant's actual occupancy, notwithstanding commissioner's acceptance of latter's proofs. *Forester v. Berry*, 35 C. A. 175, 79 S. W. 591.

One applying for land, after the commissioner of the general land office has accepted another's proof of occupancy and issued his certificate, cannot controvert the fact of occupancy. *Smith v. McClain*, 39 C. A. 152, 87 S. W. 212.

The issuance of a certificate of settlement and occupancy is conclusive, not only as to rights accruing thereafter but also against claims of an actual settler on the land before the issuance of the certificate, who did not seek to assert any right to the land at law until after the issuance of the certificate. *Williams v. Barnes* (Civ. App.) 111 S. W. 433-435.

A certificate of occupancy issued by the commissioner of the general land office covering a home section of school land concludes the question of occupancy as affecting the settler's right to an additional section. *Zettlemeyer v. Shuler*, 62 C. A. 648, 115 S. W. 78.

A certificate of occupancy of school lands held not conclusive as against a prior claimant to the land. *Barnes v. Williams*, 102 T. 444, 119 S. W. 89.

A certificate of three years' occupancy of school lands is not conclusive as against a claimant whose rights accrued before the issuance of the certificate. *Gilmore v. Lockwood*, 57 C. A. 616, 124 S. W. 111.

A certificate of three years' occupancy is not conclusive as to the good faith required of the settler by Art. 5424. *Lefevre v. Jackson* (Civ. App.) 135 S. W. 212.

— **Revocation of certificate.**—Commissioner of land office held to have no authority to reverse his determination as to occupancy to the prejudice of holder of a certificate thereof. *Smith v. McClain*, 39 C. A. 152, 87 S. W. 212.

Where a certificate is issued by the commissioner, showing that the purchaser has occupied the land as required by statute, it cannot be revoked for failure to so occupy. *Mitchell v. Robison*, 103 T. 642, 132 S. W. 465.

— **Effect of absence of certificate.**—Court properly disregarded title in trespass to try title, depending on purchase from land commissioner by one not a settler, and concerning whose occupancy no certificate had issued. *Nowlin v. Hall* (Civ. App.) 77 S. W. 419.

Appellee owned a home within five miles of lands in controversy and on May 5, 1899, applied to purchase 640 acres and on July 15, 1899, applied to purchase 320 additional acres. The lands were awarded to him. On June 16, 1902, appellant applied to purchase the 640-acre tract as a home and the 320 as additional, but his application was rejected. He moved on the lands June 9, 1902, for purpose of making a home there and still resides on the land. On August 2, 1902, appellee made his proofs of occupancy of the land for three years and the same was filed in the land office August 4, 1902, and the same were accepted by the commissioner, but it is not made to appear that the commissioner issued a certificate showing the fact. Before the proofs had been filed affidavits setting up appellee's abandonment of the land had been filed by appellant with the land commissioner. The trial court erred in refusing to allow appellant to show that appellee had abandoned his home land before the expiration of three years from the date of his application. *Forester v. Berry*, 35 C. A. 175, 79 S. W. 591, 592.

Prior to the issuance of a certificate of three years' occupancy, an actual settler on school land whose application had been rejected might contest the right of the

person to whom the land was awarded on the ground that the latter was not or had not remained an actual settler. *Williams v. Barnes* (Civ. App.) 111 S. W. 432.

Forfeiture for nonoccupancy.—See Arts. 5424–5426, and notes.

Affidavit of nonoccupancy.—Commissioner of general land office held not entitled to require the making of an affidavit of nonoccupancy of certain public lands as a condition precedent to selling the same. *Haney v. Atwood*, 42 C. A. 270, 93 S. W. 1093.

Art. 5445. Certificates of occupancy to be recorded, etc.—If a proof of occupancy has heretofore been, or should hereafter be, filed in the general land office, in accordance with the statute under which the purchase was made, or may be made, and it should be approved by the commissioner by the issuance of the certificate of its sufficiency, the said certificate may be recorded in the office of the clerk of the county or counties in which the land is situated, and shall thereafter be a muniment of title of the home tract and additional land purchased to such home tract. [Acts 1907, p. 490.]

See *Conger v. Robison*, 104 T. 141, 135 S. W. 110.

Certificate of occupancy.—See Art. 5444 and notes.

— **Admissibility in evidence.**—See notes under Arts. 3696, 3707.

Under Art. 3700, making a certified copy of any instrument affecting title to land admissible in evidence when a proper predicate is laid, and this article, a certified copy of such a certificate is admissible in evidence on a proper predicate being laid. *Whitaker v. Browning* (Civ. App.) 155 S. W. 1197.

Art. 5446. [4218m] Coupling occupancy under second purchase to cure defects of first.—In all cases where persons have purchased, or may hereafter purchase, state, school or asylum lands under any act of the legislature authorizing the sale thereof and requiring a residence of three years thereon, and said persons have so resided upon said land, or may hereafter reside thereon, for the period of three years as required by law, and their files have been, or may hereafter be, canceled and purchases annulled by the commissioner of the general land office on account of conflict with other surveys, said persons shall have the right to purchase other lands of the classes mentioned in this article without being required to reside thereon. Persons desiring to avail themselves of the benefits of this provision shall make satisfactory proof to the commissioner of the three years' residence under their first purchase. [Acts 1895, p. 163.]

Art. 5447. [4218n] Vendees of original purchasers protected.—In all cases where any of the lands mentioned in this chapter have been sold prior to July 30, 1895, under any law authorizing the sale thereof, and the original purchaser shall have sold, or may hereafter sell, any part of his purchase in quantities of forty acres or multiples thereof, and the conveyance to his vendee or vendees is filed in the general land office after having been duly recorded in the proper county, the commissioner shall credit his account with the value of the land sold, and shall open up new accounts with the original purchaser and such vendee or vendees, and the commissioner shall patent said land to the owners thereof in quantities of forty acres or multiples thereof; provided, that when any of such land is situated within three miles of a county seat it may be patented in twenty acre tracts. [Id.]

Transfers by original purchaser in general.—See Arts. 5435, 5436, and notes.

Art. 5448. [4218o] Cemetery, church and school house sites.—The commissioner of the general land office is hereby authorized to patent in quantities of not less than one nor more than five acres any of the vacant and unappropriated public domain of Texas, or any of the lands mentioned in this chapter, as sites for cemeteries, churches or school houses. When the land is desired as a location for a school house, the patent shall issue to the county judge of the proper county and his successors in office in trust for that purpose; and, when desired for a church house or a cemetery, it shall be issued to trustees designated by those requesting the patent. If the land has been previously sold by the state and not patented, the owner thereof shall execute a deed therefor to the county judge, or trustees, as the case may be, and cause the same to be

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recorded in the office of the county clerk of the proper county, and to be filed in the general land office, and shall be entitled to credit on his account with the state for the value therefor. The value of the land and patent fee shall be paid to the commissioner of the general land office before patent issues. Such land shall be taken from the margin of a tract or section, or of a subdivision thereof, as the case may be. [Id.]

Art. 5449. [4218p] **Accounts, etc., with purchasers to be kept.**—The commissioner of the general land office shall retain in his custody as records of his office all applications, affidavits, obligations and all other papers relating to sales of said lands, and shall cause to be kept accurate accounts with each purchaser. All purchase money due upon lands, as well as accrued interest, and all other moneys arising from the sales or leases of said lands shall be paid by the purchaser or lessee direct to the land commissioner, who shall cause an accurate account to be kept with each purchaser. [Id.]

Art. 5449a. **Relief to certain persons compelled to defend suit because of erroneous award, etc.**—That any person who has filed on any of the public school lands of this state, subsequent to January 1st, 1907, and prior to January 1st, 1913, and to whom an award was made, and afterwards canceled, or withdrawn before the expiration of the time required by law, to make settlement on said land; and to whom said land was again awarded by the commissioner of the general land office, after the cancellation by him of a prior erroneous award, to third parties; and who has been compelled to defend a lawsuit to obtain title to, or possession of said land because of such erroneous award, or awards of said land, made by the commissioner of the general land office, to an adverse party or parties; shall in making proof of occupancy of said land, be entitled to credit for the full time said land was in litigation, and from the date of the applications to purchase were filed as a result of said erroneous award or awards; and, be it further provided, that the party to whom the land should have been awarded, in the first instance, in estimating the cost of the improvements required by law to be put upon said land; shall be entitled to credit for the value of all improvements placed on said land subsequent to January 1st, 1907, and prior to January 1st, 1913. [Acts 1913, p. 66, sec. 1.]

Art. 5449b. **Certain sales and patents validated.**—All public school lands sold by the State of Texas, and patented prior to the first day of October, 1883, applied for and sold by virtue of the Act of 1879, approved July 18th [8th], 1879, relating to the sale of public free school lands in organized counties, and the Act approved April 6, 1881, relating to the sale of such lands in unorganized counties sold and patented prior to said October 1, 1883, wherein the original patentee has paid the state school fund for said land, and has sold and parted with the title thereto, prior to the first day of June, 1895, and wherein said lands are now owned and in the possession of subsequent purchasers for value the title to same in the present owners is hereby quieted, and the said sales and patents validated. [Acts 1913, p. 351, sec. 1.]

LEASES

Art. 5450. [4218y] **Commissioner may withhold agricultural lands from lease, when.**—The commissioner of the general land office may withhold from lease any agricultural lands necessary for the purpose of settlement; and no agricultural lands shall be leased, if, in the judgment of the commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter. [Amended 1897, p. 184.]

Former law—Isolated and detached lands.—See notes under Art. 5432.

Art. 5451. [4218r] Commissioner to advertise lands for lease, how.—All leases under the provisions of this chapter may be advertised by the commissioner in such manner as he may think best, and let to the highest responsible bidder in such quantities and under such regulations as he may think to the best interest of the state not inconsistent with the equities of the occupant. All bids and offers to lease may be rejected by him prior to signing the lease contract, for fraud or collusion, or other good and sufficient cause.

See *Sayles v. Robiston*, 103 T. 430, 129 S. W. 346.

Discretion of commissioner.—Under this article as amended by act of 1897, it was discretionary with the commissioner to advertise or not as he deemed best and this discretion the courts have no power to control. *West v. Terrell*, 96 T. 548, 74 S. W. 905.

Art. 5452. Leases, how and when made.—Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this chapter shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease; and thereupon the commissioner, if the lands applied for are subject to lease, and not in immediate demand for actual settlement, shall notify the applicant in writing who offers the highest price, that his proposition to lease is accepted; and thereupon he shall execute to the lessee in the name and by the authority of the state of Texas a lease of said lands for such time as may be agreed upon, not to exceed five years; and, when satisfied that the lessee has paid to the state the rent for one year in advance, he shall deliver said lease to the clerk of the county court of the county in which the land is situated, or of the county to which said county is attached for judicial purposes; and it shall be the duty of the clerk to record in a well-bound book kept in his office, open to public inspection, a memorandum or abstract of said lease, showing the number of the survey or surveys leased, the name of the original grantee, the amount leased, the name of the lessee, the date of the lease and the number of years it has to run; and for entering said memorandum the clerk shall be entitled to a fee of twenty-five cents. Upon payment of said fee, the clerk shall deliver the lease to the lessee, and no other record of leases hereafter made shall be required, except said memorandum. When any of such leases are filed for record, the clerk shall make the memorandum or abstract above provided for. All lands which may be leased shall be subject to sale at any time, except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made as well as to those hereafter to be made. Any section, or part of a section, which may be leased shall not be sold except to the lessee, nor shall the lessee be disturbed in his possession thereof during the term of his lease, when he has placed on such section, or part of a section, improvements to the value of two hundred dollars. [Acts 1901, p. 292, sec. 4.]

Authority to lease in general.—See, also, note under Art. 5455.

The commissioner of the general land office has authority to lease unsurveyed lands. *Harrington v. Blankenship* (Civ. App.) 52 S. W. 585.

The land commissioner both before and after the amendment of 1897 was authorized to lease the school, asylum and other lands. *Sullivan v. Hall*, 22 C. A. 440, 55 S. W. 579.

Where lands are a part of the void surveys made by the Houston & Texas Central Railway Company within the Memphis & El Paso reservation, and being otherwise unappropriated, had become a part of the public free school fund the land commissioner has power to lease them. The above-mentioned reservations did not constitute an appropriation of the public lands situated therein. The lands were merely withdrawn from location and survey by others than those for whose benefit the reservations were created. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 704.

Conflicting applications.—Where one makes application and it is erroneously rejected by the land commissioner and he fails to take steps to compel acceptance of his application, and another makes application which is granted and the lease made, the former cannot by making application subsequently have the lease to second applicant canceled and thus recover the land, because by his action he acquired no such right to the land as entitled him to recover from the second applicant to whom the land was leased. *Watts v. Cotton*, 26 C. A. 73, 62 S. W. 931.

Construction and validity of lease.—A lease of public lands is not invalid because they are designated as school lands when not yet allotted to any fund. *Harrington v. Blankenship* (Civ. App.) 52 S. W. 585.

Construction impliedly given by commissioner of the land office as to duration of lease of school lands sustained. *McGee v. Corbin*, 96 T. 35, 70 S. W. 79.

A lease of school lands held invalid. *Fish Cattle Co. v. Terrell*, 97 T. 490, 80 S. W. 73.

Validating by ratification.—Action of commissioner in recognizing an invalid lease of school lands, and of treasurer in accepting rent thereunder, held not a ratification by the state. *Ketner v. Rogan*, 95 T. 559, 68 S. W. 774.

Acts of land commissioner and state treasurer held to be a ratification of act of deputy district clerk in adding to a lease of public lands. *McGill v. Sites* (Civ. App.) 103 S. W. 695.

Recording lease.—*Sayles' Ann. Civ. St. 1897*, art. 4218s, provided that all leases theretofore made and not recorded should be filed for record as therein provided within three months after the taking effect of the act.

This article (*Sayles' Ann. Civ. St. 1897*, art. 4218s) was evidently remedial in so far as it afforded relief to persons who held lease contracts formerly made and not recorded. By it the state not only waives the condition up to the time of the passage of the act but recognizes the leases as valid, and extends the time within which they might be recorded for three months after the time this act took effect. *Irwin & Sanders v. Mayes*, 33 C. A. 517, 73 S. W. 35.

Clerk's certificate.—A lease is invalid if there is no evidence that the application was accompanied with the clerk's certificate that no lease of said land is of record in his office. Without this certificate the land commissioner has no right to make the lease. *Irwin & Sanders v. Mayes*, 31 C. A. 517, 73 S. W. 35 (decision under *Sayles' Ann. Civ. St. 1897*, art. 4218s).

Payment of rent.—Where a lease of school lands is of the sections by name and for a sum in gross, it may be doubted whether a small deficiency of acreage in one of the sections would entitle the lessee to any abatement of the rent. *People v. Terrell*, 97 T. 74, 76 S. W. 432.

The commissioner of the general land office has no authority to receive less than a year's rent on the lease of school lands. *Sherrod v. Terrell*, 97 T. 165, 76 S. W. 916.

Constituent leases of school lands being in good standing, and consolidated lease of same lands reserving the same rentals being void, payments on consolidated lease should be applied to constituent leases, thereby keeping them in force. *Scott v. Slaughter*, 35 C. A. 524, 80 S. W. 643.

Year's rental, deposited with an application for the lease of school lands, held to be properly applied to an existing lease, which applicant held covering the same lands, so that a new lease was void. *Thomson Bros. v. Lynn*, 36 C. A. 79, 81 S. W. 330.

Extension or renewal of lease.—See Art. 5453, and notes.

Assignment of lease.—Transfer of lease of school lands void in part held to amount to a consideration for money paid therefor. *Scott v. Slaughter*, 35 C. A. 524, 80 S. W. 643.

Want of consent by commissioner of general land office to transfer of lease of school lands would not be presumed, in order to base a forfeiture thereon. *Id.*

Where the commissioner of the general land office did not claim a forfeiture of a lease of school lands on the ground of want of consent to a transfer thereof, the transferee could not set up such want of consent in order to defeat his contract. *Id.*

In an action on a note given for the conveyance of a leasehold estate in state lands, the fact that the commissioner of the land office did not consent to the conveyance was no defense. *Wilkinson v. Sweet* (Civ. App.) 93 S. W. 702.

A transfer of a lease of public lands is authorized to be filed in the land office, without being acknowledged by the grantor or recorded in the county where the land is. *McKee v. West*, 55 C. A. 460, 118 S. W. 1135.

Leased land subject to sale.—See, also, Art. 5453.

The provision that all leased lands shall be subject to sale except as otherwise provided applies to the ordinary lease, and not to leases acquired under Art. 5455, and hence did not repeal the latter section. *Sayles v. Robison*, 103 T. 430, 129 S. W. 346.

Improvements exempting from sale.—The burden is on the applicant to purchase leased land to show that at the date of his application the lessee did not have improvements on the land of the value of \$200. *White v. Pyron*, 23 C. A. 105, 57 S. W. 56.

Evidence held to support a verdict that improvements on public lands were not worth \$200. *Shelton v. Willis*, 23 C. A. 547, 58 S. W. 176.

All public free school lands are subject to sale, including those that have been leased, but a lessee shall not be disturbed during term of his lease when he has made improvements of value of \$200. The burden is on him claiming benefit of exception that there are improvements exceeding in value \$200. *Id.*

If one wishes to bring himself within the second clause of the exceptions contained in this article (*Sayles' Ann. Civ. St. 1897*, art. 4218s) the burden is on him to show that the improvements are of permanent character. *Clark v. McKnight*, 25 C. A. 60, 61 S. W. 350.

Where one makes application to purchase school land within a five-mile radius duly classified, appraised and placed on the market for sale, and makes the first payment, he is entitled to recover although the land is under lease if the purchaser in the lease has not acquired or put on the land improvements worth \$200. *Id.*

The lessee had the right, when his lease was made subject to sale to actual settler before the expiration of the term by making improvements upon a section of value of \$200, to take it out of the rule and make his lease absolute as to such section. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 82, 83.

Making of valuable improvements on school lands by lessee, claiming under a void lease substituted for a valid one, before the expiration of the term, held not to prevent the purchase of the land by another on expiration of the valid lease. *Ketner v. Rogan*, 95 T. 559, 68 S. W. 774.

Does not validate unauthorized leases.—The provisions concerning leases theretofore made refer to valid leases and the purpose is to make clear what leased lands shall be subject and what ones not subject to sale. There is nothing whatever to indicate a purpose to validate unauthorized leases. *Ketner v. Rogan*, 95 T. 559, 68 S. W. 777.

Art. 5453. Regulations as to leases in absolute lease districts.—The following counties shall constitute the absolute lease district, to wit: El Paso, Jeff Davis, Presidio, Brewster, Reeves, Pecos, Loving, Winkler, Ward, Yoakum, Terry, Gaines, Andrews, Ector, Midland, Upton, Crane, Crockett, Sutton, Val Verde, Edwards, Kinney, Maverick, Zavala, Dimmit, La Salle, McMullen, Webb, Duval, Nueces, Kimble, Zapata, Starr, Hidalgo and Cameron. All tracts of land lying partly inside and partly outside of the absolute lease district shall be considered, for the purpose of sale and lease, as being wholly without said district. And lands situated in the absolute lease district which may be leased shall not be sold during the term of the lease, except as provided herein. X On the expiration of any lease in the absolute lease district, the lands shall remain subject to sale for a period of ninety days, and, if it has been previously classified and valued by the commissioner of the general land office, and notice given to the county clerk, it shall not be necessary to give the clerk any further notice in order to put the land on the market, but it shall be considered as already on the market and subject to sale. During said period of ninety days, the commissioner of the general land office shall suspend action upon any application to lease said land, and shall award it upon any legal application to purchase made during said time. X The party purchasing any of said lands, whether inside or outside of the absolute lease district, within the inclosure of another, shall not turn loose any stock within the inclosure until he shall have provided sufficient water for the stock so turned loose, and any violation of this provision shall be an offense, and, upon conviction, the party so offending shall be punished as provided in the Penal Code. If no application to purchase has been filed within ninety days after the expiration of the lease, then the former lessee shall have a preference right over any one else for thirty days thereafter to re-lease such lands, or any part thereof, but his lease shall run from the expiration of his old lease. In all cases where the lease is terminated under any of the provisions of this chapter before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent or the money refunded to him by the treasurer, as he may elect. On the expiration of his lease or its termination under the provisions of law, or by a final judgment of any court of competent jurisdiction, the lessee shall have the right for the period of sixty days to remove any or all improvements he shall have placed upon the leased premises. No purchaser or other person than the lessee shall be permitted to turn loose within such lessee's inclosure more than one head of horses, mules or cattle or in lieu thereof, four head of sheep or goats, for every ten acres of land so purchased, owned or controlled by him and uninclosed. Each violation of the provisions of this chapter which restrict the number of stock which may be turned loose in such inclosure shall be an offense, and the offender, on conviction, shall be punished as provided in the Penal Code. The commissioner of the general land office is hereby prohibited from renewing any lease before its expiration, as shown on the face of the original lease contract; and no lease contract shall be canceled, except in cases where the land has been, or may be, sold as provided by law, or where the lessee fails to pay the annual rental due the state within sixty days from the date it becomes due. And when the lessee shall fail to pay his annual rental within sixty days after it becomes due, the commissioner of the general land office shall cancel said lease, and immediately notify the county clerk of the county in which the land, or a part thereof, is situated, of the cancellation and the date when canceled, and the clerk shall note the date of cancellation on his lease record. [Acts 1901, p. 292, sec. 5.]

Constitutionality of prior law.—Acts 1897, pp. 186, 187, providing that in a certain section of the state leased land shall not be subject to sale during the term of the lease, is not a local law and is not violative of the constitution. A law is not local that operates upon subject in which the people at large are interested. *Reed v. Rogan*, 94 T. 177, 59 S. W. 257.

Sale of leased lands in general.—See, also, note under "Preference rights of lessee," post; and see Art. 5421 and notes.

All lands which may be leased are made subject to sale unless they fall within some of the exceptions named in the statute and where the only exception is that part of the land lies south and west of the line designated in the statute, the exception is not available and the whole section can be sold. It cannot be said that half of the section is west and south of the line, when only a part of it is. *Joyce v. Sisk*, 26 C. A. 68, 62 S. W. 961 (decision under prior act).

A denial by the commissioner of the general land office of an application to purchase certain land in the absolute lease district held justified by the circumstances. *Carothers v. Rogan*, 96 T. 113, 70 S. W. 18.

Where a lessee assigns his lease, it is no bar to an application by the assignee to purchase the land. *Mitchell v. Johnson*, 32 C. A. 373, 74 S. W. 48; *Walker v. Marchbanks*, 32 C. A. 303, 74 S. W. 929.

The commissioner of the general land office had no authority to sell sections of school land in the absolute lease district which were under lease, except by the consent of the lessee. *Smith v. McClain*, 96 T. 568, 74 S. W. 754.

Under this act lands situated in the territory defined as the absolute lease district and under lease were not subject to sale without regard to the lease. *West v. Terrell*, 96 T. 548, 74 S. W. 904.

Proof of issuance of prior lease held not to overcome presumption that land commissioner did his duty in awarding land covered by lease to a purchaser, no proof being offered that the lease was still in force. *Davis v. Tillar*, 32 C. A. 383, 74 S. W. 921.

After the 30 days have expired the land is again on the market. *Valentine v. Sweatt*, 34 C. A. 135, 78 S. W. 387.

The land could be classified and appraised while the lease was in existence and the moment the lease expired by time or cancellation the land was at once on the market. *Id.*

A lease of school lands for five years from November 15, 1897, did not expire until midnight of November 15, 1902, rendering an application to purchase the same premature. *Jones v. Lohman*, 36 C. A. 418, 81 S. W. 1002.

A third person held to possess no absolute right to purchase school lands formerly leased to another. *Patterson v. Knapp*, 100 T. 587, 102 S. W. 97.

Preference rights of lessee.—See, also, Arts. 5421, 5452, and 5454; and see "Sale of leased land in general," ante.

Where a section had improvements of the value of \$200 upon it, the lessee was not required to wait 60 days before leasing it again, as was the case of a section without improvements of that value but could apply at once for a lease of such section. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 83 (decision under a provision of Acts 1901, p. 292, § 5, permitting the re-leasing of lands, without their becoming subject to sale, provided they have been improved to the extent of \$200, which provision was not carried into Rev. Civ. St. 1911, Art. 5453).

The act of 1897 (chapter 129, p. 184, Acts of 1897), prohibited the sale of leased land in the absolute lease district to any one except the lessee or his assignee. If the transferee of the rights of the lessee was ineligible to purchase, the land commissioner could not sell to any one else. *Treary v. Lowrie*, 40 C. A. 321, 89 S. W. 982, 983.

Waiver of rights.—Where a lessee of public school lands within the absolute lease district filed with the commissioner of the general land office consent that the same might be sold to a certain person, the commissioner could not sell during the lease to any other than the one designated. *Smith v. McClain*, 96 T. 568, 74 S. W. 754.

Rights of assignee of lessee.—See, also, note under "Preference rights of lessee," ante; and see Arts. 5421, 5452, and notes.

The intention of the legislature was to confer the 60-day prior right to purchase upon the lessees only, and not upon those to whom the lease might be assigned. Although an assignment of the lease is not expressly prohibited, such assignment was in contemplation of the legislature when it passed the act, and the privilege was intended to be conferred upon the original lessees only. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 82.

Since the exception is made by reason of the improvements the privilege (to release) is intended to be granted to him only by whom the improvements are made (and not to an assignee of the lease). It is, therefore, the duty of the land commissioner not only to suspend action for sixty days upon an application (of assignee) of lessee to lease, but also to award the land to a purchaser upon his application to purchase the land, where the application to purchase and the application to re-lease are filed contemporaneously. But even if the applicant to lease was entitled to the benefit of the exception (by reason of the improvements) and his application to lease was contemporaneous with the application to purchase and both are made as soon as they can be after the expiration of the original lease the commissioner should award the land to the applicant to purchase. Any other construction would place it in the power of a lessee having improvements of a value of \$200, or over, on a section of school land in the absolute lease district by making application to re-lease before or immediately upon the expiration of the former lease, to prevent its sale forever, notwithstanding the undoubted purpose of the framers of our constitution and laws to give the actual settler not only the right to purchase but also the preference over an applicant to lease. This act (of 1901) only authorizes the commissioner to accept a lease where the land is "not in immediate demand for actual settlement," thus differing, at least in the language employed, from previous acts which authorized him to lease "if satisfied" that the lands applied for were not in immediate demand for actual settlement. *Taylor v. Rose*, 30 C. A. 471, 70 S. W. 1023.

Renewal or extension before expiration of term.—Lease of school land, invalid because substituted for another lease before the expiration of the term, held not to have become valid as a new contract, though recognized by the commissioner after he had power to lease the land. *Ketner v. Rogan*, 95 T. 559, 68 S. W. 774.

A lease cannot be extended by a second lease. But a second lease is valid if made to take effect at the expiration of the first lease and the first annual rental is paid. *McDowell v. Terrell*, 99 T. 107, 87 S. W. 668.

Removal of Improvements.—See, also, Art. 5457.

Defendant took a lease from the land commissioner of public school lands, and, in reliance thereon, placed movable improvements thereon. Afterwards, and during the term of the lease, plaintiff bought the land of the state, and in trespass to try title recovered judgment, which was affirmed by the court of civil appeals; the lease being held void. Writ of error was denied by the supreme court, which afterwards overruled a motion for rehearing. Held that though there be no law permitting a rehearing in the supreme court when an application for writ of error is denied by it, and the judgment became final when such application was denied, which was more than 60 days prior to issuance of mandate by the court of civil appeals which was delayed because of the pendency of such motion for rehearing, and defendant did not within such 60 days demand of plaintiff the right to remove such improvements, he may recover their value, defendant having denied such subsequent demand by him; this article not prohibiting the removal after such period, and claims for improvements in good faith being allowed on principles of equity, so that defendant, having brought himself within that rule, and shown a reasonable excuse for not sooner demanding right to remove, did not forfeit his claim. *Buchanan v. Wilburn* (Civ. App.) 127 S. W. 1198.

Cancellation of lease.—See, also, Art. 5456 and notes.

Acts 1901, p. 296, c. 125, was supplemental to and amendatory of the previous laws, and repealed the existing statutes only in so far as they were in conflict therewith. The only change in reference to the canceling of the lease is that the new law clearly makes it the duty of the commissioner to cancel the lease and immediately give notice of the fact to the county clerk, of the county in which the land lies. *Willoughby v. Terrell*, 99 T. 488, 90 S. W. 1092.

The provision in this section clearly implies that upon the failure of the lessee to pay within 60 days, it was the duty of the commissioner by some official action to declare the lease forfeited, and that until this was done the land was not on the market for sale. *Id.*

— **Clerk's record as evidence.**—The record of the county clerk of the cancellation of a lease is admissible in evidence to show such cancellation. *Valentine v. Sweatt*, 34 C. A. 135, 78 S. W. 387.

Damages for violation of statute.—Where defendant acquired title to land previously inclosed in plaintiff's pasture, plaintiff was entitled to recover for grass and water consumed by defendant's cattle placed in the pasture in excess of the number defendant's land was capable of sustaining. *Lyons v. Slaughter* (Civ. App.) 87 S. W. 182.

Where defendant turned more cattle in plaintiff's pasture than defendant's land inclosed therein was capable of supporting, plaintiff was not precluded from recovering damages by the fact that there was other land in the pasture owned and used by third persons. *Id.*

Plaintiff, having inclosed certain land, held not required to fence off a portion thereof subsequently sold by the state to defendant, in order to protect himself against defendant's stock. *Id.*

The provision regarding the number of head of stock that may be pastured by a purchaser within a lessee's inclosure has effect only upon lands bought under its provisions. At time act was passed the defendant's two sections had been sold by the state. *Id.*

Art. 5454. Expired leases; regulations as to.—When a lease expires or is canceled for any cause, the commissioner shall not consider an application to lease the land prior to ninety days from such expiration or cancellation, and no lease on any land shall be made if it is in demand by purchasers. An original lessee, or the assignee of an entire leasehold, who was such owner at the date of the termination thereof, shall have a preference to another lease of the land at the expiration of the ninety days over another applicant to lease, provided he is willing to pay and will pay as much therefor as another, after due publicity; provided, no lease shall be made at less than three cents per acre. [Acts 1905, p. 159, sec. 7.]

Preference to re-lease.—See Art. 5453 and notes.

Cancellation of lease.—See Arts. 5453, 5456, and notes.

Art. 5455. [4218t] Where lessees secure permanent water, rights of.—Any person desiring to lease any portion of the lands aforesaid on which no permanent water supply exists, shall notify the commissioner of the general land office in writing that he desires to lease lands, specifying and describing them, provided he can obtain the necessary supply of water by boring or otherwise, and that he will within ninety days lease said lands, provided such water supply can be obtained; he shall also make and file with the commissioner of the general land office his bond, with good and sufficient personal security, in a sum equal to one year's rental of the quantity of land applied for, payable to the state of Texas, conditioned that he will diligently and in good faith try to secure water on such land during such ninety days, and if secured will lease the designated lands for the term prescribed herein; and thereupon

the commissioner shall for such ninety days withhold the lands thus designated from lease to any other person; within or at the expiration of said ninety days and annually thereafter such applicant to lease shall pay to the state of Texas, in advance, one year's rental of the land applied for by him; on satisfactory proof of which payment the commissioner shall execute and deliver to the lessee a lease of the said lands, signed by himself officially and attested by the seal of the land office, together with which he shall deliver up the bond of said lessee, marked, "Satisfied." If the said lessee shall fail to apply for his lease and make the payment aforesaid within said ninety days, and shall also within said ninety days fail to make proof to the satisfaction of the commissioner of the general land office within that time that he has in good faith and diligently used proper means and expended proper efforts to secure a water supply on such land and failed, then and in that case the commissioner shall mark said bond, "Forfeited," and shall deliver the same to the attorney general of the state, who shall at once cause the said bond to be sued upon and collected; and such collection shall become a part of the available school fund. The penalty stated in such bond is hereby declared to be liquidated damages, and judgment for that sum shall in all cases be recovered by the state. Proof satisfactory to the commissioner of the general land office that proper, suitable and diligent effort had been made by such applicant to secure water, and that sufficient water could not be secured, shall relieve the principal and sureties on said bond from all responsibility therein, and it shall be marked, "Satisfied," by said commissioner and delivered to the principal therein. No lease of less than four sections of unwatered pasture lands shall be made, unless such less number includes all unleased land in that vicinity belonging to the several funds mentioned in this chapter. Lessees or their vendees who shall have at their own expense secured water on their leaseholds in accordance with the provisions of this article shall, at the expiration of their lease contract, have the right to a renewal of their leases for another term of five years at the price then provided by law, by giving sixty days' written notice to the commissioner, as provided in the preceding article. [Acts 1895, p. 63.]

Not repealed.—The provision of Art. 5452 that all leased lands shall be subject to sale except as otherwise provided applies to the ordinary lease, and not to leases acquired under this article, and hence did not repeal this article. *Sayles v. Robison*, 103 T. 430, 129 S. W. 346.

There is no repugnancy between Acts 1895, c. 47, § 17 (Rev. St. 1895, art. 4218r [Art. 5451 herein]), section 18 (Rev. St. 1895, Art. 4218s [see Art. 5452 herein]), and section 19 (Rev. St. 1895, Art. 4218t [Art. 5455 herein]); the first two making rules for lands generally, and the last section applying specially to lands having no permanent water supply, and such sections having been re-enacted without change, as part of the Revised Statutes, section 19 (Rev. St. 1895, art. 4218t [Art. 5455 herein]) was not repealed by implication by the former sections of the statute. *Id.*

Power of commissioner.—The power of the land commissioner to lease the public lands and under given circumstances to cancel such leases and thereafter again to re-lease the same, seems to be expressly given. From such express powers it seems the power to consent to an assignment of the lease may be fairly implied especially in view of the legislative recognition of "vendees of lessees" in the latter part of this article, relating to certain leases of school lands there authorized, and the further apparent, if not real, recognition of such assignments by the supreme court in the case of *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 80. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 706.

Condition of renewal.—This article means that the lessees shall pay the price provided by law at the time of the renewal. *Sayles v. Robison*, 103 T. 430, 129 S. W. 346.

Art. 5456. [4218v] Lease, how forfeited; lien on improvements for rents.—If any lessee shall fail to pay the annual rent due, in advance, for any year, within sixty days after such rent shall become due, the commissioner shall cancel said lease by writing under his hand and seal of office, which writing shall be filed with the other papers relating to such lease, and thereupon such lease shall immediately terminate. During the continuance of all leases, and after forfeiture, the state shall have a lien upon all property owned by the lessee upon the leased premises to secure the payment of all rents due, which lien shall be superior to all other liens whatsoever; and it shall not be essential to the preservation

or validity of such lien that it shall be reserved in the instrument of lease. [Acts 1901, p. 29, sec. 5.]

Nonpayment does not work forfeiture ipso facto.—A lessee has the right to make payment at any time before formal cancellation, failure to pay as required not working a forfeiture ipso facto. *People v. Terrell*, 97 T. 74, 76 S. W. 433.

Cancellation of lease in general.—See, also, Art. 5453 and note.

Where a certain lease is shown to have been canceled, and there is evidence that it should not have been, the said evidence will not affect the fact that it was canceled. *Borchers v. Mead*, 17 C. A. 32, 43 S. W. 300.

Upon production of lease of territory within the absolute lease district, prima facie title at least was shown in the lessee and the burden was on the one attacking the title to show that not only cause for forfeiture existed but that in fact the commissioner had declared the lease canceled in the manner prescribed by the statute, that in writing under his hand and seal of office, and the writing filed with the other papers relating to such lease. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 705.

A land commissioner held to have no power to cancel an existing lease of school lands and execute another lease to the holder of the lease so canceled. *Blevins v. Terrell*, 96 T. 411, 73 S. W. 515.

Where a valid lease of school lands was illegally canceled and an intervening lease executed, and after the expiration of the first lease the intervening lease was canceled and a third lease executed, the latter lease held valid. *Id.*

Rights of a lessee of public lands held terminable by an informal cancellation under the facts. *West v. Terrell*, 96 T. 548, 74 S. W. 903.

The fact that application for new lease of public lands was made by lessee before expiration of his old lease held not to affect power of commissioner to cancel and relet. *Id.*

Conceding that such formal declaration of cancellation was essential in order to terminate the rights of a lessee by the mere action of the commissioner, such rights might also be terminated by an informal cancellation, when the right to cancel existed and all parties concerned agreed to or acquiesced in it. *Id.*

This article requires a declaration canceling a lease to be in writing under the commissioner's hand and seal and to be filed with the other papers relating to the lease. Such paper is essential to cancellation of a lease. *Bradford v. Brown*, 37 C. A. 323, 84 S. W. 392.

A letter from the land commissioner to the state treasurer and the county clerk of the county in which the land lay, and the award of the land to an assignee of the lessees to note a cancellation of the lease on their records, do not show such a formal cancellation of the lease as this article requires before an applicant is entitled to purchase. *Patterson v. Knapp* (Civ. App.) 99 S. W. 126.

A land commissioner had no power to cancel a lease before its termination where there had been no failure to pay the rentals due, and issue a new lease of the same land to the same lessee for a longer period. *McGill v. Sites* (Civ. App.) 103 S. W. 695.

— **Reinstatement after cancellation.**—An attempted reinstatement by the commissioner of the general land office of a lease of public school lands canceled by him for nonpayment of rent held void. *Wilson v. Smith* (Civ. App.) 82 S. W. 818.

Payment of arrears as condition to new lease.—Lands were leased in 1890 for 10 years under the law of 1887, but were forfeited by the commissioner in 1894 for the nonpayment of rent. In 1897 a second lease was made to the lessee in the first lease without his having paid the arrearages, and therefore it is urged that the second lease is invalid. This law (*Sayles' Ann. Civ. St. 1897, art. 4218v*, providing that a new lease shall not be entered into until all arrears under the original lease are paid) relied on to show the invalidity was not passed until 1895, and does not apply to forfeitures that had already occurred when the act took effect. The language of the law is clearly prospective, and applies to future events only. The words (in this law) "such lease shall not be made to original lessees until all arrears are fully paid" mean the leases mentioned in the provision which immediately precedes; that is, leases authorized upon forfeitures thereafter to be incurred. The legislature had in mind only future forfeitures, and did not intend that the law should apply to those which had occurred before the act took effect. *Angle v. Terrell*, 97 T. 509, 80 S. W. 232.

This article only applies to the original lease, so that where, after forfeiture of a lease of school lands, for failure to pay rent, the lease was canceled, subsequent leases made to the original lessee and his assignee as tenants in common, were not void under this article. *Rhae v. Terrell*, 100 T. 626, 103 S. W. 481.

Art. 5457. [4218w] Lessees may remove improvements, when.—All improvements made by lessees on lands leased by them are hereby declared to be personal property, which may be removed by such lessees on the expiration of their lease contracts; and they shall have sixty days after such expiration in which to remove the same.

Removal of improvements.—See, also, Art. 5453 and note.

Improvements placed on school lands by a purchaser of such character so as to become fixtures will pass to the state on legal forfeiture of the contract of purchase, together with the land of which they constitute a part. *Clark v. McKnight*, 25 C. A. 60, 61 S. W. 350.

Improvements constituting fixtures placed in good faith on land by an intending settler under the state pre-emption laws cannot be removed by him where he fails to have the survey recorded in the general land office, and application to purchase the land is made by another. *McCullers v. Johnson* (Civ. App.) 104 S. W. 502.

Recovery of value from subsequent purchaser.—One taking a void lease of public school land and in good faith making improvements held entitled to recover thereof of the subsequent purchaser from the state. *Buchanan v. Wilburn* (Civ. App.) 127 S. W. 1198.

Art. 5458. One year to assert right to leased or sold land.—All persons claiming the right to purchase or lease any public free school lands, or any lands belonging to the state university, or either of the state asylums, which have been heretofore, or which may be hereafter, sold or leased to any other person under any provision of the law authorizing the sale or lease of any of said lands, shall bring his suit therefor within one year after the date of the award of such sale or lease, and not thereafter. [Acts 1905, p. 35.]

See *Erp v. Robison* (Sup.) 155 S. W. 180.

Constitutionality of prior law.—Act May 27, 1899, requiring suits against the purchaser of public school lands to be begun within six months after the act took effect, was not retroactive, and does not deprive any one of vested rights, and is constitutional. *Dabbs v. Rothe*, 25 C. A. 201, 60 S. W. 813.

Limitation of actions in general.—See, also, notes under Art. 5459.

Under this article and Art. 5459, one claiming no interest in the home section of an original settler, cannot attack the validity of his claim thereto merely to resist his right to purchase additional lands as an incident to his settlement on and occupancy of the home section. *Murphy v. Terrell*, 100 T. 397, 100 S. W. 131.

After more than a year has elapsed after a sale of school land has been reinstated without any suit being brought to vacate same, such sale cannot thereafter be vacated at instance of a subsequent applicant to purchase. *Weyert v. Terrell*, 100 T. 409, 100 S. W. 133.

This article was intended to bar after one year an action to set aside an award of school land by the commissioner because of insufficient application. *Tillman v. Erp* (Civ. App.) 121 S. W. 547.

A lease of school land for 10 years from March 22, 1898, was kept in force by regular payments of rent until June, 1900, when it was superseded by another lease including the same and other land for 10 years from that date. Held, that mandamus to compel the commissioner to award the land to another, begun November 1, 1909, was barred by limitations under this act. *King v. Robison*, 103 T. 390, 128 S. W. 368.

This article applies to an award of lands made before passage of the act. *Barnes v. Williams' Adm'r* (Civ. App.) 143 S. W. 978.

Under this article, where a purchaser's right to purchase school land is forfeited by the commissioner, his right to reinstatement, if any, is a claim of right to purchase, to which the statute applies; and, unless suit to enforce such right is instituted within a year after the award, it is barred. *Nations v. Miller* (Civ. App.) 146 S. W. 261.

This article and Art. 5459 were intended to limit to one year the time in which an award or sale of land by the state might be attacked on the ground of irregularity by one claiming a right to purchase, and did not affect one whose right in the land sought to be recovered had vested prior to an award or sale by the state to the adverse claimant. *Kirby v. Conn* (Civ. App.) 156 S. W. 232.

— **When statute does not apply.**—The provision of this act requiring suit to be brought within 12 months from the date of the award when a purchaser desires to set aside a sale theretofore made, applies only to cases where the state recognizes the validity of the purchase being attacked, and does not apply to a case where there has been a forfeiture of the former purchase, and the land again put upon the market. *Slaughter v. Terrell*, 100 T. 600, 102 S. W. 402.

This law does not apply in a case where the validity of the purchase is not attacked, but the purchaser's right to the land is assailed on the ground that he has forfeited it by nonoccupancy, and that such forfeiture had the effect of placing the land upon the market without any action of the land commissioner. *Campbell v. Enochs* (Civ. App.) 107 S. W. 880.

This article applies only in cases in which persons claim the right to purchase land which has been sold to others, and it does not apply to an action by a purchaser of school land reinstated after a forfeiture brought against one claiming under an erroneous award subsequent to the forfeiture when such award was canceled. *Davis v. Yates* (Civ. App.) 133 S. W. 281.

Where a purchaser of school land was reinstated after a forfeiture of his right for nonpayment of interest before any third person acquired any rights, subsequent to the forfeiture and prior to the application for reinstatement, an action of trespass to try title brought against one claiming the land under an award to one not entitled to purchase within a year after the reinstatement was not barred by this article. *Id.*

This article does not apply to a void sale, but to a sale voidable for some irregularity, and no length of time can legalize a void award. *Rainer v. Durrill* (Civ. App.) 156 S. W. 589.

— **What constitutes bringing suit.**—An action, within this article, is begun by filing of a motion for leave to file a petition for mandamus against the commissioner to compel him to award the land, accompanied by the petition therefor. *King v. Robison*, 103 T. 390, 128 S. W. 368.

Under this article the filing of an answer in trespass to try title within one year after the passage of the act, setting up such a right, is a sufficient compliance with the terms of the statute; the act simply requiring that the adverse claim be asserted within one year, and not that any particular form of action be brought. *Barnes v. Patrick*, 105 T. 146, 146 S. W. 154.

Pleading the statute.—This act being an act of limitations, it is necessary to plead it, in order to gain any right under it. *Williams v. Keith* (Civ. App.) 111 S. W. 1058.

The title of a purchaser of school land resulting from the operation of this article comes from the operation of the act, and need not be pleaded as constituting a new cause of action arising from transactions during the pendency of a suit involving the right to purchase, but is a matter of law to be noticed and applied by the court, and when a year has passed without an attack on an award, it stands as if valid from

the beginning, and the production of it at the trial is evidence to sustain an action for the land. *Erp v. Tillman*, 103 T. 574, 131 S. W. 1057.

This article is not merely a statute of limitations for the benefit of a party to a suit to be pleaded or waived, but is a rule of substantive law and a rule of evidence which the courts must take notice of, and after the expiration of the time fixed in the act the state only may interfere with purchases of school land, and in a contest as to the right to purchase school land, an award constituting the title of a purchaser may be produced in evidence without specially pleading it, and when it is produced and shown to have stood for a year, the statute makes it conclusive evidence of a valid sale against every one but the state. *Id.*

Jurisdiction and parties.—This act does not give the supreme court exclusive original jurisdiction of a proceeding to adjudge the validity of an award to a purchaser, and trespass to try title or a proceeding to quiet title in the district court is a proper remedy. *Barnes v. Williams' Adm'r* (Civ. App.) 143 S. W. 978.

The validity of an award of Texas school lands to a purchaser may be adjudicated without making the commissioner of the general land office a party. *Id.*

Art. 5459. Same.—If no suit has been instituted by any person claiming the right to purchase or lease any of said land within the period of time limited in the foregoing article, it shall be conclusive evidence that all the requirements of the law with reference to the sale or lease of such lands have been complied with; provided, that nothing in this and the preceding article shall be construed to affect the state of Texas in any action or proceeding that may be brought by it in respect to any of said lands. [*Id.*]

See *Nations v. Miller* (Civ. App.) 146 S. W. 261.

Effect of act—As to state.—The statute of limitations of 1905 held not intended to deny to the state rights previously exercised as to public lands by its agents, so that the rights of one holding an invalid lease were cut off by the action of the commissioner in making a subsequent award of the land without bringing suit. *Buchanan v. Barnsley*, 51 C. A. 253, 112 S. W. 118.

Under this article the commissioner of the general land office could not be required to recognize an invalid sale, though the state did not repudiate it. *Erp v. Robison* (Sup.) 155 S. W. 180.

— **As to others.**—Where, by reason of the lapse of a year from the award of public school lands to plaintiff, the sale became valid as between him and a third person, though invalid as against the state because a prior sale had not been canceled, no one else could acquire a valid title by purchase. *Erp v. Robison* (Sup.) 155 S. W. 180.

CHAPTER TEN

SUITS TO RECOVER PUBLIC LANDS, RENTS AND DAMAGES

Art. 5460. State land agents, appointment and salary.	Art. 5468. The attorney general to bring suits for lands.
5461. Duties of such agents.	5469. Suits for mineral and timber depre- dations.
5462. Agents to make monthly reports.	5470. Venue.
5463. May administer oaths; traveling ex- penses paid.	5471. To report offenders to attorney gen- eral.
5464. Suits to be brought.	5472. Attorney general may compromise.
5465. Damages recoverable.	5473. Money to be turned over to school fund.
5466. Sums recovered, how appropriated.	5474. Attorney's fees in such cases.
5467. Suits to recover lands illegally oc- cupied.	

Article 5460. State land agents, appointment and salary.—The commissioner of the general land office, with the consent and approval of the governor, shall appoint two state land agents, who shall hold their office at the pleasure of the governor and commissioner, and receive a salary of thirteen hundred dollars each per annum. [Acts 1899, p. 176, sec. 1.]

Art. 5461. Duties of such agents.—Such agents shall have the power, and it is made their duty, to investigate and make inquiries into and concerning the location, valuation and condition of any and all lands controlled or owned by the state; also concerning the free use, occupancy or inclosure of any of said lands without authority of law, and all depredations upon timber of said lands. They shall also procure and furnish information as to location and quality of such lands to all persons desiring to purchase or lease same. [*Id.*]

Art. 5462. Agents to make monthly reports.—Such agents shall make monthly reports to the commissioner or governor touching any and all matters investigated by them, and make such other reports and perform such other duties relating to such lands as may be required of them by the commissioner and governor. [Id.]

Art. 5463. May administer oaths; traveling expenses paid.—For the purpose of this law, such agents shall have authority to administer oaths. In addition to the salary of such agents, they shall be allowed their actual traveling expenses, not to exceed the sum of one thousand and five hundred dollars per annum, for the expenses incurred by both of such agents, the same to be allowed only upon the duly sworn itemized statement that said sum was actually paid and necessary to the discharge of their duties. [Id.]

Art. 5464. Suits to be brought.—When said agents shall have reported that any public free school, asylum, or other public lands is or has been used or occupied or inclosed without authority of law, or that any timbered land belonging to any of said fund has been or is being destroyed, or depredated upon to the injury of such land, or the detriment of such fund, the governor shall investigate same, and in his discretion direct that suit be instituted for the recovery of such sums as may appear to be proper under this law and article 5467, or he may transmit such documents as he may deem proper to the proper officer or court for the purpose of criminal proceeding, as provided for in articles 850, 851, 852, 853, 859, 860 of the Penal Code and neither of said remedies shall be exclusive of the other, but the one shall be cumulative of the other, and the state may use either or both remedies; provided, that this shall not repeal any pre-existing criminal law. [Id. sec. 2.]

Art. 5465. Damages recoverable.—In civil suits, the amount of damage for use or occupancy, or unlawful inclosure, shall be not less than five cents per acre per annum. [Id.]

Art. 5466. Sums recovered, how appropriated.—All recoveries under the preceding articles shall be paid into the state treasury for the benefit of the available school fund, or to the fund to which such land, upon which such recovery is had, may belong. For the purpose of recovery herein, the state shall not be required to prove a continuous daily use or occupancy or herding or line riding by the defendant, or any one for him; provided, that, if any person who is so unlawfully using any of said lands will either buy or lease same, and pay the arrears due thereon, no action shall be begun or continued against him. This action shall apply to individuals or corporations. [Id.]

Art. 5467. [4218x] Suits to recover lands illegally occupied.—If the governor shall at any time be credibly informed that any portion of the public lands, or the lands belonging to any of the several funds named in this chapter, have been inclosed or that fences have been erected thereon without authority of law, he is authorized in his discretion to direct the attorney general to institute suit in the name of the state for the recovery of such lands and damages, and a fee of not less than ten dollars for the attorney when the sum recovered is less than one hundred dollars, and, when it is over that sum, the fee shall be ten per cent, to be paid by the defendant for the use and occupancy of the same, and the removal of such inclosures and fences; and such damages shall not be for a less sum than five cents per acre per annum during such occupancy. For the recovery by the state of all lands sold under the provisions of this or former laws which have been, or may hereafter be, forfeited to the state for any reason, and for the recovery of any money due the state on leases made under this or former laws, and for the recovery of damages for the unlawful use and occupancy of such

lands, as provided in this article, or any former laws, jurisdiction is expressly conferred on the courts of Travis county having jurisdiction thereof under the constitution concurrently with courts of the districts in which the land is situated; and all such suits shall be instituted by the attorney general, or under his direction. In suits provided for in this article, the court shall issue a writ of sequestration directed to any sheriff of the state, commanding and requiring such officer to take such land and all property thereon belonging to the person or persons so unlawfully occupying said lands into his actual custody, and hold the same subject to further orders of the court; and the state shall not be required to give bond. Such writ of sequestration may be executed by any sheriff of the state into whose hands it may be delivered, and it shall be the duty of any sheriff into whose hands it may come to proceed and execute such writ. The defendant in such suit may replevy as in ordinary cases by giving bond as prescribed by law; and such cases shall have precedence on the docket and stand for trial before all other cases; and, in case judgment is recovered by the state in such suit, the court shall order such inclosure or fences to be removed, and shall tax the costs of the suit against the defendant; and all property found upon the land belonging to the defendant, not exempt from execution, shall be liable to the payment of such costs and damages in addition to the personal liability of the defendant. Appeals may be prosecuted from all judgments in such cases as in ordinary cases, except that the state shall not be required to give bond to perfect its appeal, and such cases on appeal shall have precedence over all other cases. If any person shall make a lease contract, and after the same is inclosed by fence shall for any cause decide not to continue payment of his lease, either in whole or in part, he shall give public notice by publication in any local paper having the largest circulation, for at least sixty days before the time in which his next annual payment shall become due, that he will not continue his lease after the year for which payment is made, and shall also state the number and block of the land which he will not lease inside his inclosure if he only intends to surrender a part of his lease, and shall post and shall keep posted for said sixty days notice on all gates of his pasture of such intention; then, and then only, he shall not be subject to the suit nor liable for the damages provided for in this article. [Acts 1895, p. 63, amended p. 75. Acts 1899, p. 176.]

See *Sayles v. Robison*, 103 T. 430, 129 S. W. 346.

Recovery of public lands in general.—Greer county having been decided by the United States supreme court not to be a part of Texas, the state of Texas held entitled to recover land granted to it for school purposes. *Greer County v. State*, 31 C. A. 223, 72 S. W. 104.

A judgment by an applicant for purchase of public lands against one holding it as tenant of the state held not to estop the state to deny that he has not acquired the right to purchase. *Willoughby v. Terrell*, 99 T. 488, 90 S. W. 1091.

In ejectment by the state to recover certain islands, a plea of defendant railroad company tendering an issue as to its legal right to build a railroad across an island held to raise a mere moot question, on which it was not entitled to judgment. *Texas Channel & Dock Co. v. State* (Civ. App.) 133 S. W. 318.

In action by the state to recover land, claim by a railroad company of right of way held not to present academic question, since judgment without reservation would be conclusive against the railway. *Texas Channel & Dock Co. v. State*, 104 T. 168, 135 S. W. 522.

In action by state to recover land, claim by defendant railroad company of right of way held not a suit against the state. *Id.*

Grant of land located only by reference to a jacal and ranch held not available as a defense to the state's suit for public free school land, where there was no proof of the location of such jacal and ranch. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

Evidence, in an action by the state for public free school land and rents, held not to show that the land in controversy was included in the land relinquished by act of the legislature passed February 10, 1852. *Id.*

— **Authority of county attorney.**—A county attorney has no authority to bring suit in behalf of state to compel forfeiture to state of school lands. *Duncan v. State*, 23 C. A. 447, 67 S. W. 904, 905.

— **From innocent purchasers.**—There is no such thing as an innocent purchaser as against the state, claiming under a patent issued without authority of and contrary to law. *Kempner v. State*, 31 C. A. 363, 72 S. W. 888.

State, in action to recover school lands in the hands of innocent purchaser, on the ground of fraud in procuring the certificate of purchase, held not entitled to prevail, on

showing that commissioner of the land office committed error as to questions of fact. *State v. Hughes* (Civ. App.) 79 S. W. 608.

Complaint by state to recover school lands in the hands of an innocent purchaser, on the ground of fraud in procuring certificate of occupancy, held insufficient. *Id.*

— **Establishing title.**—In an action for public free school land and rents, the state need not prove title, but can recover unless the defendants show title either from the government of Spain or the state of Texas. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

The recitals of a judgment in another action against the state that the land in controversy in the present suit was titled under the Spanish government was incompetent to show that it did not belong to the state of Texas, where such recitals were immaterial to the issues of the former case. *Id.*

— **Who may take advantage of purchaser's fraud.**—The title of a purchaser of public lands acquired by fraud on the state is not open to attack, except by the state, or by one having a prior equitable or legal right. *Wing v. Dunn* (Civ. App.) 127 S. W. 1101; *Same v. Morgan*, *Id.* 1109; *Same v. Simms*, *Id.*

The state alone may take advantage of fraud in transactions for the acquisition of its lands, where the rights of an individual do not antedate such fraud. *Campbell v. Elliott* (Civ. App.) 151 S. W. 1180.

Disposition of recovered lands.—See Art. 5385.

Action for rent or damages for detention.—In the state's action for rents and public free school land detained by defendants, evidence held to support a finding for \$6,000 rents. *Hamilton v. State* (Civ. App.) 152 S. W. 1117.

While the measure of the damages which the state may recover for the unlawful detention of public free school land is the reasonable rental value of such lands for the period detained, evidence of the amount for which such lands were rented by defendants to a third person was admissible to show such value. *Id.*

Trespass on public lands.—The state may prevent the unauthorized inclosure of the school lands. *State v. Goodnight*, 70 T. 682, 11 S. W. 119. A county may recover possession against an intruder upon the county school land. *Falls County v. Delaney*, 73 T. 463, 11 S. W. 492.

Art. 5468. The attorney general to bring suits for lands.—When any of the lands described in this title, or any of the other public lands of the state held or owned by any fund, or any lands in which this state, or any such funds, have an interest, are held, occupied or claimed by any person or association or corporation adversely to the state, or to such fund, it shall be the duty of the attorney general to institute suit therefor, together for rent thereon, for any damages thereto; and for the purpose of any such suits for such lands, or affecting the title thereto, or right growing out of the same, the venue thereof is fixed in Travis county, Texas, concurrently with the county of defendant's residence, and the county where the land is situated; and the courts of said county shall have the same jurisdiction over the defendant and the subject matter of the same as if such defendant resided, and such property was situated, in said county. [Acts 1900, p. 29, sec. 8.]

Recovery of public lands in general.—See notes under Art. 5467.

— **Suits authorized to be brought.**—Acts 1901, 1st. Sp. Sess., c. 4, § 11, authorizes suits in two instances. In one for the recovery from the person or persons in possession thereof, or claiming title thereto, of all lands which are held or claimed under titles emanating from the Spanish or Mexican governments when no valid evidence of such grants are to be found in the records or among the files of the general landoffice; and in the other when it is necessary to determine the exact location and boundaries of such lands where the evidence on file in the general landoffice does not sufficiently identify the land claimed. When the allegations in the petition show that one object of the suit is to determine the true location and boundaries of the land emanating from the Spanish or Mexican government, the suit was authorized by last provision quoted above. And when the petition shows that the defendant is claiming more land than he is entitled to by virtue of said grant, and that no legal survey of said grant has been made and field notes thereof returned to the general landoffice, as required by law, and that such excess belongs to the school fund and its recovery is sought by the suit, it is sufficient to authorize suit for said excess under the first clause of the above quoted provision of law and also under this article, and the petition was not subject to a general demurrer. *Sullivan v. State*, 41 C. A. 89, 95 S. W. 646.

Under this article the state is not authorized to maintain trespass to try title to school land which has been sold to a vendee who has not made default in his contract and is in good standing, even though other persons make adverse claims against the land, for lands validly sold become segregated from the mass of lands held in the several funds and cannot be said to thereafter belong to such funds. *State v. Dayton Lumber Co.* (Sup.) 155 S. W. 1178.

Disposition of recovered lands.—See Art. 5385.

Art. 5469. Suit for mineral and timber depredations.—It shall be the duty of the attorney general of the state of Texas to bring suit against every person, firm, association of persons, or corporations, for the value of all minerals or other property of value taken from school, university, asylum and other public lands and for all timber which has

been, or may hereafter be, cut, destroyed, sold, used or otherwise appropriated by them off of any such public lands. [Acts 1905, p. 38.]

Art. 5470. Venue.—The venue of said suits shall be in any county in Texas, or in the county where the injury occurs, or a part thereof, or in the county of the residence of the defendant, at the discretion of the attorney general. [Id.]

Art. 5471. To report offenders to attorney general.—It shall be the duty of the commissioner of the general land office and the county attorneys of the state to report to the attorney general semi-annually, or oftener if they desire, the names and residence of every person, firm, association of persons or corporations, who have cut, used, destroyed, sold or otherwise appropriated any timber on the aforesaid lands or taken any minerals or other property of value therefrom, and such other data and evidence as shall come to their knowledge. [Id.]

Art. 5472. Attorney general may compromise.—The attorney general shall have power by and with the consent of the governor to compromise and settle with or without suit any of the aforesaid liabilities. [Id.]

Art. 5473. Money to be turned over to school fund.—Whatever sums are collected or received by the attorney general shall be turned over by him to the permanent funds to which they belong. [Id.]

Art. 5474. Attorneys' fees in such cases.—As compensation for said services, the attorney general and county attorneys shall receive the following compensation, respectively, to be paid by the defendant as part of the costs to be taxed against the defendant, to wit: The attorney general, ten per cent; the county attorney, five per cent of the amount recovered if recovered by suit, and if recovered by compromise, then said officers shall receive one-half of the above amounts, respectively; provided, that the county attorneys shall receive compensation only from cases reported by them to the attorney general. It shall be the duty of county attorneys to assist the attorney general in whatever way they may be requested in relation to such cases. [Id.]